

## CNA's Engagement Letter Questions

CNA asks several specific questions about engagement letters and we are continuing to ask for a current sample engagement letter with each renewal. While there are certainly other important aspects of such a document, CNA has singled out five elements of the engagement letter that they ask about specifically on the application. We address here those specific elements. In the event of a claim, having a signed engagement letter in the underlying file that includes these elements will result in a 50% reduction in the firm's deductible for that claim.

### *Does the engagement letter include the following:*

#### ■ *Identity of the Client?*

This may be as simple as addressing the letter to the right person and referring to them as the client. However, it can be very significant when someone else is paying your fees on behalf of the client, when there is more than one person involved, or when you are representing a business entity or one or more people involved in a business entity or "deal." In those cases clearly identify who is your client and, if appropriate, who is not your client. You may need to address what that means about the need for individual representation, who controls the case, who has access to confidential information, and your duties to the client as opposed to the payer or the person with whom you generally communicate. And if you are representing multiple parties, address what happens if you receive confidential information from one individual or a conflict develops down the road. If these issues come up in some of your representations, we recommend that you put the language for all the contingencies you regularly encounter in your template letter and strike any language that does not apply, rather than risk missing it when it does.

#### ■ *Scope of Representation that includes key terms of legal representation?*

Claims from clients who thought (or think later with 20/20 hindsight) that you were handling something you never intended to touch are very common and can often be avoided altogether or dismissed on a motion on the basis of a good engagement agreement. You can limit your liability and help your client understand the engagement by describing the scope of the engagement very specifically including, when appropriate, stating what you are **not** handling, such as appeals, administrative hearings, updating wills, accounting, tax, personal financial matters, business management, or anything that might help clarify. And while you may want to invite additional legal work from the client, make it clear that this is all you are handling unless another agreement or addendum to this agreement is negotiated and signed.

#### ■ *Fee structures and billing agreements?*

Generally the letters we have seen do a good job of explaining the billing arrangements. We know this does not work for everyone, but for those of you that bill hourly we would just like to put in a good word here for considering an evergreen retainer. Instead of billing against the retainer and later having to ask for a big chunk of money to replenish it or having it run out and then providing your services as an unsecured loan with no guarantee that your client can pay your next bill, just keep the retainer and return it at the end of the engagement. What better time to get some extra money up front from the client than during the honeymoon of the legal relationship? And what better time than the end of the relationship to be sending money back to the client instead of another dreaded legal bill?

#### ■ *Termination agreement that includes file retention and destruction terms?*

Generally, termination language addresses the fact that either party can terminate the agreement, subject to any applicable ethics rules in the lawyer's case. It often states that any fees earned prior to the termination remain the responsibility of the client. In a contingency fee case, it may address how the attorney would be compensated for prior work in the event a recovery is subsequently made.

**File retention and destruction terms are the items most frequently missing from the engagement letters we have reviewed.** maybe because many firms address this only in a termination or close of engagement letter.

While it is also important to have in the closing letter, by including this in the engagement letter, your client understands your policy up front and you are protected in the event the client disappears or for whatever reason a closing letter is never sent. And the closing letter is not signed and returned to you. By including this in the

engagement letter that is signed by the client, you have written confirmation in your file that the client understood your policy. The Rules of Professional Conduct may also require notice of file retention up front if you ever want to destroy the file without contacting the client prior to the destruction. (This is required in Arizona and suggested in New Mexico based on rule 16-104, Duty to Communicate with Clients.)

How long you should keep the file depends on the nature of the representation, applicable statutes of limitation, and the Rules of Professional Conduct regarding file retention and the retention of trust account documentation. Most state bars, including New Mexico and Arizona, suggest that the file be retained a minimum of five years, depending on the nature of the case, and that all trust account information (in many cases this includes the file) be retained a minimum of five years. However, the rules also indicate that some cases, including probate or estate matters, homicide cases, life sentence cases, and lifetime probation cases, be retained indefinitely. In view of the ease of scanning and retaining electronic files, the New Mexico ODC is encouraging indefinite file retention for all cases.

You may be able to meet your ethical requirements regarding file retention by turning the file over to the client at the end of the representation. Don't do that unless you keep a complete copy. Electronic or paper does not matter, but retain a copy of the file for at least as long as you might need it to defend a claim or a trust account investigation. If a dispute or malpractice claim should arise, having the file in your possession will be very, very important.

In both Arizona and New Mexico, the ethics rules establish that the client owns the file and it is the attorney that will have to pay for a copy of the file not the client. In Arizona there is an exception if copies of all documents were previously provided to the client and the client was told to retain them. You may be able to establish a contractual right to charge in your agreement, but we would recommend caution. When a client asks for their file, do you really want to add fuel to that potential fire by charging for it.

Based on the sample engagement letters we have received from CNA insureds, and our understanding of the ethical requirements in Arizona and New Mexico, we would recommend considering the following language.

File Retention and Destruction: It is our policy to copy and return to you any original documents you provide to us during the course of our representation. If any original documents you provided remain in the file at the close of the representation, those will be returned to you at that time. We will retain your legal files for a minimum of five years after we close our file. Files may be retained longer depending on the nature of the representation and our firm's retention policy. At the expiration of the applicable retention period, we will destroy the file unless you notify us in writing now or by the close of the representation that you wish to take possession of the file when the retention period ends.

■ *Does the firm ensure that a countersigned engagement letter is received from the client before work begins on a new begins on a new matter?*

Many of you have told us that, while this may be the goal, in the real world you can't always get the agreement signed before the work begins. We certainly understand that, but we also understand that often the engagement letter then gets forgotten. CNA reports that 97% of all the applications they receive indicate that the firm regularly uses engagement letters, but when claims come in only 12% of all those files have a signed engagement letter. We would like to pass along how one of our firms handles this issue. They simply have a hard and fast rule that the firm can't bill a client or deposit a retainer until they have a signed engagement letter. That allows you to jump in when you need to before the letter is signed, but it also gives you a deadline that will really get your attention.

Any of the recommendations we or CNA make are meant to be a starting place for your own engagement agreements. We understand the language that is perfect for one situation may be all wrong for what you are facing. But the issues are fairly universal; they just need to be addressed in a way that makes sense for your practice and your clients.

**For CNA's latest sample letters just Google "CNA Lawyers' Toolkit 3.0."** They now have sample engagement letters for Contingent Fees, Hourly Fees, Flat Fees, Forming and Representing an LLC, Representing an Administrator/Executor, Joint Representation, Family Law, Workers' Compensation (Plaintiff), Copyright, Patent, Trademark, and Insurance Defense Counsel in a Tripartite Relationships (Letter to Insured), among others.