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Lawyers' Toolkit 3.0: A Guide to Managing the Attorney-Client Relationship

*Entire Lawyers' Toolkit 3.0
available at www.lawyersinsurance.com,
under the Risk Control tab.*

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Entire Lawyers' Toolkit 3.0 available at www.lawyersinsurance.com, under the Risk Control tab.

Introduction

Documentation of the attorney-client relationship represents a critical risk control technique. CNA has developed the following *Lawyers' Toolkit 3.0: A Guide to Managing the Attorney-Client Relationship* to assist attorneys in creating documents that will enable them to better manage their interactions with potential and actual clients. Documentation of the scope of the representation and the mutual responsibilities of the attorneys and their clients can often be a deciding factor in determining the responsibilities of both parties. These sample documents are designed to establish client expectations, reduce client misunderstandings, improve client communications, and provide opportunities for additional services. The use of these documents may not prevent legal malpractice claims, but can support a stronger defense in the event a claim arises.

This Guide includes the following sample documents:

- 15 engagement agreements
- 2 awaiting further action letters
- 1 non-engagement/declination letter
- 4 conflict of interest waivers
- 1 closing matter/disengagement letter

Several of the sample documents include language addressing joint or dual representations and discuss prospective and actual conflicts of interest. Sample conflict of interest waivers are included for reference. Attorneys also should consider applicable legal ethics rules as well as the relevant risks associated with joint or dual representations prior to accepting such engagements. Joint or dual representations should be undertaken only with full disclosure to clients regarding the relevant risks, and only when such representation is in the best interests of the clients. From a professional liability perspective, engagements undertaken where a conflict of interest exists are inherently risky, irrespective of obtaining signed conflict of interest waivers.

In addition, the first three sample engagement agreements include draft language for contingent fee, hourly fee, and flat fee arrangements. Attorneys should incorporate the appropriate fee agreement language from one of these first three sample engagement agreements when using one of the twelve other engagement agreements included herein.

These sample documents are provided as a convenience for use in the practice of law and include illustrative language that attorneys may wish to consider using in their own agreements, letters, and waivers. Additionally, each sample document should be customized for every engagement and prepared in accordance with applicable professional and regulatory requirements. CNA used the ABA Model Rules of Professional Conduct as a guide in creating these sample documents. However, attorneys must consult their applicable rules of professional conduct, as well as the case law and ethics opinions of the relevant jurisdiction, when drafting their own agreements, letters and waivers.

Sample Engagement Agreement – Contingent Fee

We are pleased that you have engaged our law firm to serve as your legal counsel. Our representation is limited to the matter as described below. To the extent you wish to engage our firm to represent you regarding other matters, you will be required to sign a separate engagement agreement describing the scope of that representation prior to our initiation of services. It is our policy to confirm in writing the nature of the engagement and the terms of our legal representation. If you do not understand all of the terms or language in this engagement agreement, please contact [name of attorney handling the matter] prior to signing this engagement agreement.

Scope of Representation: We have been engaged to represent [name of client or clients] for the purpose of _____

[describe matter or case with specificity]. [Consider disclaiming by name representation of other individuals or entities and/or other matters related to your representation to avoid confusion regarding whom you represent.] You represent that you do not know of any related legal matters that would require our legal services under this agreement. If such matters arise later, you agree that this agreement does not apply to any related legal matter. Therefore, a separate engagement agreement for provision of services and payment for those services will be required if you wish to engage our law firm to perform legal services pertaining to such matters.

Limited Scope of Representation: The scope of our representation does not include advice or services regarding accounting, tax, personal financial matters or business management, and related non-legal matters and advice. If you wish for us to consult with other professionals retained by you regarding this matter, we will communicate with you in writing to confirm the scope of such consultations prior to initiating same.

(For representations involving real estate, consider including the following language: The scope of our representation does not include title searches, surveys, inspections, and other non-legal work relating to real estate. You may wish to engage a title insurance company, abstractor, surveyor, or other licensed professional to provide you with these services.)

Fees and Billing Statements: We will submit a bill to you every ____ days. Expenses will be separately stated on the bill and our fees will be charged as indicated below. Our billing statements are due and payable upon presentation, and are overdue if not paid by the due date set forth on the statements.

You are responsible for payment of all legal fees, expenses, and disbursements, regardless of whether or not any money is recovered on your behalf through a settlement or judgment. Please see the "Expenses" and "Late Payment and Failure to Pay" provisions of this agreement for further information. To the extent we are successful in recovering a settlement or judgment on your behalf, all legal fees, costs and expenses not previously paid by you will be deducted from the gross amount recovered in the settlement or judgment, and the remaining amount will be subject to our contingency fee, as described below.

We will provide you with a summary statement listing these deductions at the time of any payment to you from a settlement or judgment.

The fee arrangement, as agreed, will be based on a contingency fee to be charged as follows:

____% of the gross amount recovered in a settlement before we have instituted a lawsuit;

____% of the gross amount recovered in a settlement after we have instituted a lawsuit;

____% of the gross amount recovered after trial has begun;

____% of the gross amount recovered if any judgment is appealed, either on your behalf or by an adverse party, or if garnishment or any proceeding after judgment is necessary to collect the judgment or any portion of it; and

____% of the gross amount recovered if the matter is the subject of a retrial as ordered by a trial or appellate court.

Expenses: In the course of rendering services to you, it may be necessary for us to incur expenses for items such as filing and recording fees, deposition transcripts, computerized legal research, notary service, overnight or special delivery service, postage, photocopying, facsimile transmissions, telephone calls, travel, lodging, meals, and overtime for firm secretarial and other staff services. The actual expenses incurred will vary depending on the services that we provide to you. Certain expenses may include an adjustment, above cost, to cover our expenses in providing the billed service. However, expenses paid entirely to third parties, such as travel and lodging expenses, will be billed to you as our out-of-pocket costs.

Expense items incurred on your behalf will be itemized separately and listed on our billing statements as "disbursements." Third-party expenses may be forwarded directly to you for payment. As is customary, expense disbursements may not be current at the time of final billing. Remaining disbursements, if any, will be billed at a later date.

Late Payment and Failure to Pay: If you fail to pay our statements in full on or before the due date set forth on the statements, we reserve the right to assess you with a monthly service charge equal to 1% of all fees, expenses and disbursements that are past due. This monthly service charge will be billed to you at the end of each month in which a late payment occurs. In no event will the service charge be greater than that permitted by any applicable law.

In the event that we are required to file an action or proceeding to collect any late payment or assessed monthly service charge, you will be required to pay for all costs of collection, including without limitation all filing fees, third-party expenses and attorney fees incurred for our efforts in collecting such amounts. If we use our own attorneys or legal assistants to pursue such an action or proceeding, the fees charged shall be calculated on an hourly basis using the applicable hourly rates for the attorneys and legal assistants who perform such work.

We will maintain a lien on all files in our possession and their content until we have received payment in full on all amounts due. In litigation matters in which a money judgment or settlement is rendered in your favor, we will maintain a lien on all proceeds thereof to the extent of any unpaid fees, expenses or disbursements.

Responsibilities of Law Firm and Client: We will provide only legal services, as previously described in the “Scope of Representation” and “Limited Scope of Representation” sections of this engagement agreement. We will keep you apprised of developments and will consult with you as necessary to ensure the timely, effective, and efficient completion of our work. You acknowledge that we cannot guarantee either the outcome or the timing to complete legal services on your behalf.

You agree to be truthful and cooperative with us, to respond to our inquiries and communications promptly and to provide promptly all information known or available that may be relevant to our engagement. You will provide us with factual information and materials as we require in order to perform the foregoing services. You acknowledge and agree that you remain responsible for making all business or technical decisions and that you are not relying on us for accounting, tax, personal financial matters or business management, and related non-legal matters and advice. You also acknowledge that we are not responsible for investigating the character or credit of persons with whom you may be dealing.

As a matter of our professional responsibility and as long as in our judgment it will not substantively injure your position in this matter, we retain control over decisions affecting our reputation and professionalism. This discretion includes, among other decisions, whether to extend deadlines for opposing counsel; whether to cooperate with opposing counsel in scheduling or similar matters; and whether and how matters should be argued in correspondence, pleadings, or to a court or administrative body.

We may provide to you newsletters or similar materials regarding general legal developments or matters of current interest. Similarly, we may invite you to attend seminars or symposia where legal topics are discussed. In our experience, such information or events are educational, because a well-informed client will be better able to make decisions about the need for future legal representation. However, it is understood that such communications do not constitute legal advice, and do not create an attorney-client relationship beyond the scope of the representation described herein.

It is your duty to keep us informed of your mailing address and other contact information. If, at any time during the course of this representation, your address becomes unknown or we are otherwise unable to contact you, we shall be permitted to withdraw from this representation by sending you a certified letter to your last known address and by depositing with the Clerk of the Court for the county of your last known residence any property owned by you in our possession, including but not limited to items of personal property, funds, and any portions of the actual client file that belong to you.

Termination: You may terminate this representation at any time with or without cause by notifying us in writing of your desire to do so. Upon receipt of the notice to terminate representation, we will cease all legal work on your behalf immediately. You will be responsible for paying all legal fees, expenses and disbursements incurred on your behalf in this matter until written notice of termination is received by our firm.

If you terminate the representation before the conclusion of the matter, we will be entitled to receive from the proceeds of any recovery a reasonable fee for the work we have performed based upon the amount of time required, the complexity of the matter, the time frame within which the work was performed, the responsibility involved, as well as our experience, ability, reputation, and the results obtained. This fee is in addition to any legal fees, expenses and disbursements incurred on your behalf that have not previously been paid by you.

To the extent permitted by rules of professional responsibility and the court, we may terminate our representation at any time if you breach any material term of this agreement, fail to cooperate or follow our advice on a material matter, if a conflict of interest develops or is discovered, or if there exists, at any time, any fact or circumstance that would, in our opinion, render our continuing representation unlawful, unethical, or otherwise inappropriate.

If we elect to terminate our representation, you will timely take all steps reasonably necessary and will cooperate as reasonably required to relieve us of any further obligation to perform legal services, including the execution of any documents necessary to complete our withdrawal from representation. In such case, you agree to pay for all legal services performed and any legal fees, expenses or disbursements incurred on your behalf before the termination of our representation in accordance with the provisions of this agreement.

Electronic Data Communication and Storage: In the interest of facilitating our services to you, we may communicate with you or others by email, facsimile transmission, send data over the Internet, store electronic data via computer software applications hosted remotely on the Internet, or allow access to data through third-party vendors' secured portals or clouds. Electronic data that is confidential to your case may be transmitted or stored using these methods. In using these data communication and storage methods, our firm makes reasonable efforts to keep such communications and data access secure in accordance with our obligations under applicable laws and professional standards. You recognize and accept that we have no control over the unauthorized interception or breach of any communications or data once it has been sent or has been subject to unauthorized access, notwithstanding all reasonable security measures employed by us or our third-party vendors. You consent to our use of these electronic devices and applications and submission of confidential client information to third-party service providers during this engagement.

We advise you to refrain from communicating with us on any device provided by your employer or any computer, smart phone, tablet computer or other device shared with someone else. In addition, when communicating with us, please do not use your work email address or a shared email account. You should utilize only a private email account that is password protected and accessed solely by you.

File Retention and Destruction: At the conclusion of this matter, we will retain your legal files for a period of ____ years after we close our file. At the expiration of the ____-year period, we will destroy these files unless you notify us in writing that you wish to take possession of them. We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files.

No Guarantee of Success: It is expressly acknowledged by you that this law firm has not made any warranties or representations to you, nor have we given you any assurances as to the favorable or successful resolution of your claim or defense of the action referred to above; nor as to the favorable outcome of any legal action that may be filed; nor as to the nature or amount of any awards or distributions of property, attorney fees, costs, or any other aspects of this matter. All of this law firm's expressions relative to your case are limited only to estimates based upon our experience and judgment and are only our opinion. Such expressions should not be considered as representations, promises, or guarantees of results, which might be obtainable, either by way of a negotiated settlement or in a contested trial.

Professional Liability Insurance: *[Do not include unless required by jurisdiction; research applicable disclosure requirements and adapt the statement accordingly.]* Our law firm maintains errors and omissions insurance coverage applicable to the services to be rendered.

Client Review of this Agreement: You have a right to have this engagement agreement reviewed by another law firm prior to signing it. Likewise, you have the right to review this engagement agreement outside the presence of this law firm and away from the law firm's office prior to signing it. You understand that this law firm is not retained until the signed original engagement agreement is returned to the law firm, including the corresponding retainer.

If you have any questions or concerns about the terms of this engagement agreement, please contact us immediately. On behalf of the law firm, we appreciate the opportunity to represent you in this matter.

By signing this agreement, I confirm that I have read this engagement agreement, understand its provisions, and agree to abide by it.

ACKNOWLEDGED AND AGREED TO:

[Client Name]

[Date]

[Client Signature]

This sample engagement agreement is for illustrative purposes only. Your risks may be different than those described. We encourage you to modify the sample engagement agreement to suit your individual practice needs. As each practice presents unique situations and statutes may vary by state, we recommend that you review governing requirements prior to use of this or similar agreements in your practice. Use of this sample language is not intended to constitute a binding contract or legal advice. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2014 CNA. All rights reserved.

Sample Awaiting Further Action Letter – Document Review

DATE

ADDRESS OF POTENTIAL CLIENT

Re: Potential engagement of law firm

Dear Mr./Ms. Potential Client:

This letter is being sent to confirm that this firm has consulted with you about representing you regarding [insert subject] matter on [insert date].

At this time, you have not engaged our firm and we are not representing you in this matter. We will not be representing you unless and until you advise us that you wish to proceed, you send us [insert documents needed to begin representation], and you provide us with time to review those documents and decide whether or not to accept the representation. In addition, you must provide us with \$_____ as a retainer fee before we will agree to represent you and begin to work on your matter.

If and when we receive the retainer fee, we will hold the funds in a lawyer's trust account and provide you with an engagement agreement, which will further specify the scope and circumstances of our representation. If the above conditions are met, you will also be responsible for paying fees, expenses and disbursements in excess of the funds that we hold.

Please note that time limits may apply to any claim you may have against third parties. If you wish to proceed with your claim, it is important to act *immediately*. Failure to do so may bar your claim based upon time limits established by statutory law, court rules or case law. If your claim is barred based upon time limits, you will not be able to pursue any action to recover damages or other relief. Because we are not representing you, we have not researched and have not advised you regarding the application of time limits to any claims you may have.

If we do not receive your request to represent you along with the above requested documents and retainer fee within 30 days of the date of this letter, we will assume that you do not wish to proceed and we will close our file.

If you have any questions, please feel free to contact me.

Sincerely,

[Lawyer's Name]

[Law Firm's Name]

Certified Mail

Return Receipt Requested

This sample awaiting further action letter is for illustrative purposes only. Your risks may be different than those described. We encourage you to modify the sample awaiting further action letter to suit your individual practice needs. As each practice presents unique situations and statutes may vary by state, we recommend that you review governing requirements prior to use of this or similar letters in your practice. Use of this sample language is not intended to constitute a binding contract or legal advice. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2014 CNA. All rights reserved.

Sample Non-Engagement/Declination Letter

DATE

ADDRESS OF NONCLIENT

Re: Non-engagement of law firm

Dear Mr./Ms. Non-client:

This letter is being sent to confirm that this firm will not represent you in the [insert subject] matter. We have not investigated your case and are expressing no opinion as to its merits or the likelihood of whether you would prevail. Rather, we have decided to decline the representation. Enclosed with this letter are the documents that you provided to us. [List Documents.] [Alternatively, *you did not provide us with any documents when we met with you to discuss your case.*]

We strongly recommend that you consult with another attorney about this matter without delay to ensure that your rights will not be lost or jeopardized. Please note that time limits may apply to any claim you may have against third parties. If you wish to proceed with your claim, it is important to act **immediately**. Failure to do so may bar your claim based upon time limits established by statutory law, court rules or case law. If your claim is barred based upon time limits, you will not be able to pursue any action to recover damages or other relief. Because we are not representing you, we have not researched and have not advised you regarding the application of time limits to any claims you may have.

Again, we will not be representing you in this matter and will not be taking action on your behalf. Thank you for your consideration of our firm.

Sincerely,

[Lawyer's Name]

[Law Firm's Name]

Certified Mail

Return Receipt Requested

This sample declination letter is for illustrative purposes only. Your risks may be different than those described. We encourage you to modify the sample declination letter to suit your individual practice needs. As each practice presents unique situations and statutes may vary by state, we recommend that you review governing requirements prior to use of this or similar letters in your practice. Use of this sample language is not intended to constitute a binding contract or legal advice. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2014 CNA. All rights reserved.

Sample Conflict of Interest Waiver – Unrelated Matters, Waiver Letter to Current Client Being Represented

Dear Client ABC:

This waiver letter confirms that you have asked us to represent you with respect to [describe matter] adverse to [XYZ]. As you are aware from our previous discussion, our law firm currently represents [XYZ] with respect to [describe matter(s)]. The factual and legal issues likely to arise in the work that you have asked us to perform appear to be unrelated to the work we are presently performing or appear likely to perform for [XYZ]. However, since [XYZ] is a current client of ours, any work that we perform for you that is adverse to [XYZ] will create a conflict of interest. You acknowledge that we have informed you of our representation of [XYZ] and you have agreed to waive this conflict of interest. It is also our understanding that [XYZ] has agreed to waive this conflict of interest.

In deciding whether or not to consent, you should consider how our representation of [XYZ] as described above could or may affect you. For example, clients that are asked to waive or consent to conflicts should consider whether there is any material risk that their attorney will be less diligent on their behalf due to the conflict. Similarly, clients should consider whether there is any material risk that their confidential information or other proprietary matters will be used adversely to them due to the conflict.

Please be aware that the Rules of Professional Conduct require that we represent all of our clients with diligence and that we protect and maintain their confidences. Accordingly, we will not disclose or use any information that we may have acquired about [XYZ] in our representation of [XYZ] to you. Similarly, we will not disclose to [XYZ] any confidential information that we acquire about you as a result of our representation of you. The conflict waiver merely allows us to represent you in this matter. We do not believe that our obligations of loyalty and confidentiality to [XYZ] will impair our ability to represent you in this matter.

Although we are asking you to waive this conflict of interest so that we can represent you in this matter, you are not obligated to do so. We are pleased to answer any further questions that you may have about this matter. Although you are not required to do so, we recommend that you seek the advice of a lawyer outside of our firm if you have any questions or concerns about whether you should sign this conflict waiver.

Please respond to this request by either signing and returning this waiver letter or informing us that you decline to waive this conflict of interest. As we cannot continue to represent you unless you agree to waive the conflict, if we do not receive your response by [date] we will contact you regarding our withdrawal from this representation.

ACKNOWLEDGED AND AGREED TO:

[Client Name]

[Date]

[Client Signature]

This sample waiver letter is for illustrative purposes only. Your risks may be different than those described. We encourage you to modify the sample waiver letter to suit your individual practice needs. As each practice presents unique situations and statutes may vary by state, we recommend that you review governing requirements prior to use of this or similar waiver letters in your practice. Use of this sample language is not intended to constitute a binding contract or legal advice. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2014 CNA. All rights reserved.

Sample Closing Matter/Disengagement Letter

DATE

ADDRESS OF CLIENT

Re: End of Representation in Case/Matter #_____

Via Certified Mail

Return Receipt Requested

Dear Mr./Ms. Client:

Thank you again for selecting our firm to represent you with respect to case/matter #_____.

This letter is being sent to confirm that case/matter #_____ is now concluded and we will be closing our file, as our representation of you has terminated. Enclosed with this letter are our final invoice and any original documents related to your case/matter that we have not previously returned to you, as listed in the appendix. [Alternatively, we have previously returned to you all original documents related to your case/matter.] In accordance with our firm's document retention policy, we will retain your legal file for ____ years from this date. At the expiration of this period, we will destroy these files unless you notify us in writing that you wish to take possession of them. We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files.

In the event that you need legal representation in the future, I hope that you will consider engaging our law firm again. Thank you for allowing us to represent you in this matter.

Sincerely,

[Lawyer's Name]

[Law Firm's Name]

Enclosures

This sample closing matter/disengagement letter is for illustrative purposes only. Your risks may be different than those described. We encourage you to modify the sample closing matter/disengagement letter to suit your individual practice needs. As each practice presents unique situations and statutes may vary by state, we recommend that you review governing requirements prior to use of this or similar letters in your practice. Use of this sample language is not intended to constitute a binding contract or legal advice. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2014 CNA. All rights reserved.



For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com.

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