



GUIDEBOOK TO PRACTICE FORMS AND LETTERS

Non-Engagement

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INTRODUCTION

It is a proven fact that attorneys who correspond with their clients regularly, and make sure their services and fees are reduced to writing have fewer complaints filed against them, fewer problems with their clients, and provide better legal services. Letters set the stage for the relationship and responsibilities between the parties. They protect both the lawyer and the client by providing a clear written description of the client's relationship with counsel. Many legal malpractice claims are successfully defended because the lawyer can produce a letter which establishes that he or she did not have responsibilities to the client. As such, it is wise to delineate these relationships in writing.

Using practice letters and letters does not have to be time consuming, difficult or offensive to the client. On the contrary, most clients welcome (and expect) a clear written description of their association with their lawyer. Providing these letters to potential clients will clarify and formalize your own relationship to the client, or potential client. This practice will also increase the likelihood that the legal matter is entered into your conflict of interest and calendaring systems.

This guidebook is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and practices. Individual cases require individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.

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IMPORTANCE OF NON-ENGAGEMENT LETTERS

Most of the malpractice claims in situations where a case hasn't been formally declined arise out of a missed statute of limitations or similar deadline. Minnesota Lawyers Mutual recommends you send a non-engagement letter whenever you decline representation. Be careful in drafting the letter so that it's understandable to a non-lawyer and make it clear in your letter that your rejection decision does not imply any judgment by you about their chances of winning or losing the case.

CLAIMS AVOIDANCE

Sending a non-engagement letter is equally important when the lawyer does not wish to accept the case as to when a case is accepted. In many instances lawyers are sued by non-clients, or by those who are considered by the lawyer to be non-clients. An example of this occurrence is as follows:

A woman who had extensive health problems consulted with her "family" lawyer about a potential medical malpractice case. The lawyer listened empathetically to the woman's story, commented that he felt she had a good case, and advised her that he did not handle medical malpractice cases. The woman left the office believing that she had established a rapport with the lawyer, and expecting that the lawyer would be handling her medical malpractice case. When the woman later sued the lawyer for missing the statute of limitations, the lawyer could only offer his verbal testimony that he did not accept the case. He had not written the client a non-engagement letter, and could not offer any additional proof. The jury entered a verdict in favor of the woman.

In the example above, the lawyer could have avoided the legal malpractice claim by writing a three line non-engagement letter. The letter could have protected him, and also served as a reminder to the client that she needed to obtain another lawyer.

Motivation for sending a non-engagement letter can be generated by considering how the jury will view the situation. If you have rejected a case and have not sent a follow-up letter, your verbal testimony will be pitted against the client's. The plaintiff's lawyer in the legal malpractice case against you is likely to bring out that you interview over two hundred clients or potential clients a year. The jury is likely to believe that the client's recollection is better than yours since the client only has one case.

Guidelines

Consider these guidelines when drafting a non-engagement letter:

- Specifically state in the letter that you are not able to accept the case. It is not necessary to give a reason for declining the case, but you may do so if you wish.
- Avoid commenting on the merits of the case. If you are not taking the time to research and investigate the case, you should not offer an opinion as to its worth. This is particularly true if you are not skilled in the area of law.
- If time limits apply to the case, generally advise the client that time limitations apply. Do not specifically state your calculations for the time limitations. Emphasize that it is imperative to consult with another lawyer immediately.
- If you decline representation of a client, you should consider sending the non-engagement letter by certified mail, return receipt requested. Keep a file copy of all non-engagement letters in a miscellaneous file, and be sure to enter information concerning the declined potential client in your conflict system.

AVOIDING INADVERTENT REPRESENTATION

An attorney-client relationship is formed when the parties enter into an express or implied contract, or when the individual seeks and receives legal advice under circumstances which would lead a reasonable person to rely on the advice. If there is any question as to whether the client reasonably thought an attorney-client relationship was created, the issue is for the jury. If you fail to document, in writing, that you are declining representation, it is your word against the potential client's word. One need not exercise a great deal of imagination to foresee, between a lawyer failing to document and an aggrieved lay person, with whom the jury's sympathies will lie.

Considerations for Avoiding Inadvertent Representation

Some practical suggestions to help avoid an inadvertent representation:

- Never agree in an informal setting to undertake representation.
- Never promise you will contact a person involved to complete the formalities of representation - have that person initiate the next contact (to come to your office or telephone you).
- If you do promise to contact someone, make sure you have their full name, telephone numbers, and address from the start.
- When you take calls from prospects, have a telephone log, which requires you to obtain vital information such as name, address, telephone numbers, and an explanation of the purpose of the call.

- Be sure, whether you ultimately accept the case or not, that you inform any prospect of the existence of statutes of limitation and their time barring effect and note that you have done so in the telephone log or a non-engagement letter.
- Whenever possible, use non-engagement letters and keep a special non-engagement letter file for copies (do not open a separate file unless you are actually accepting representation).
- Many jurisdictions now have Rule 1.18 regarding prospective clients, which includes the important concept of not receiving confidential client information until after the conflicts check has been completed.

Non-engagement letters will be your best evidence that you have declined representation. A non-engagement letter should include:

- A clear and unambiguous statement that you are declining representation.
- A statement indicating that while you are declining representation, that does not necessarily mean that the person does not have a claim or that other lawyers might not differ with your analysis.
- A statement indicating that if the person intends to pursue the claim, he or she should act quickly to seek other legal counsel.
- A statement indicating that acting quickly is necessary because statutes of limitation can bar the person's claim if he or she does not pursue the claim in a timely fashion.

Non-engagement letters are easy to set up as a word processing form. They should automatically be sent every time you decline to represent someone. Non-engagement letters should be preserved for at least ten years.

There can be situations where a non-engagement letter must be handled with some delicacy or might, in rare instances, be inappropriate.

SAMPLE FORMS & LETTERS

Following are samples of:

- Non-Engagement Letter - Basic (Form NE01)
- Conflict of Interest Letter (Form NE02)
- Lost Client Letter (Form NE03)
- Default Judgment Option Clause Letter (Form NE04)

Non-Engagement Letter – Basic
(Form NE01)

[Date]

[Name and Address of Client]

RE: Consultation of [Date of Consult]

Certified Mail No.

Return Receipt Requested

Dear _____:

Thank you for your visit today. As we discussed, although I have not investigated the merits of your matter, I do not feel it would be appropriate for [Name of Firm] to represent you in your possible action against [Name of Company] for [legal matter]. In declining to undertake this matter, the firm is not expressing an opinion on whether you will prevail if a complaint is filed.

Please be aware that whatever claim, if any, that you have may be barred by the passage of time. Since deadlines may be critical to your case, I recommend that you immediately contact another firm for assistance regarding your matter.

Thank you again for your interest in [Name of Firm].

[Name of Firm]

By _____

[Name of Attorney]

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Non-Engagement Letter – Conflict of Interest
(Form NE02)

[Date]

[Name and Address of Client]

RE: Potential Claim Against [_____]

Certified Mail No.

Return Receipt Requested

Dear [Client]:

Thank you for your visit yesterday. As we discussed during our meeting, before [Name of Firm] could accept representation of your matter, we must investigate whether this representation will adversely affect existing or former clients' interests or there is some other element that would undermine our ability to adequately represent your interests.

After you left our offices yesterday, we performed a formal conflict of interest check and found that our firm does indeed have a conflict of interest involving your intended adversary in this case, [Company that there is a potential claim against]. Unfortunately, this conflict cannot be resolved in a manner that would allow us to represent you in this matter. Consequently, [Law Firm] is formally declining representation of you in your potential action against [Company that there is a potential claim against].

Please be aware that whatever claim, if any, that you have may be barred by the passage of time. Since deadlines may be critical to your case, I recommend that you immediately contact another firm for assistance regarding your matter.

Although we were not able to assist you in this matter, I hope that you will consider [Law Firm] in the event you require legal services in the future. Thank you again for your consideration.

[Name of Firm]

By _____

[Name of Attorney]

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Non-Engagement Letter – Lost Client
(Form NE03)

[Date]

[Name and Address of Client]

Re: [LEGAL MATTER]

Dear [Client]:

We have been pleased to have represented you for the past [TIME FRAME] in [LEGAL MATTER]. We have not heard from you, however, for the past [TIME FRAME]. We have attempted to communicate with you by letter and telephone, but we have not been successful. Our letters [ARE RETURNED], and [OUR TELEPHONE CALLS GO UNANSWERED] [YOUR TELEPHONE HAS BEEN DISCONNECTED].

Because we are unable to communicate with you, we must assume that you no longer wish us to represent you in this matter.

Because your case is pending before the court, we may only withdraw with the court's permission. Enclosed is a copy of the motion we intend to file within [number] days from the date of this letter. We believe the court will grant our request for leave to withdraw. You should begin looking for another attorney immediately so that the transition may be as smooth as possible and to insure that no time deadlines are missed. Your failure to take some action regarding this matter may result in [your claim being forever barred] [a default judgment being entered against you].

Of course, we will cooperate with the attorney you choose. If your new lawyer wishes to discuss this case with us, we will do so only if you agree to pay us for the additional time and expense involved in such a consultation. We will also turn over our file to your new lawyer if we have a reasonable assurance that you will pay the outstanding fees and costs for the services we have provided through this date. Without such an assurance, the law allows us to assert a retaining lien on your file until you have either paid the fees owed or posted security for payment unless our retention of the documents would cause prejudice to your case.

If you desire that we continue to represent you, we will do so if you contact us immediately upon receipt of this letter. If you do not contact us within [number] days, we will file the motion to withdraw. I look forward to hearing from you and hope that we can continue representing you in this matter.

[Name of Firm]

By _____

[Name of Attorney]

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Non-Engagement Letter – Default Judgment Option Clause
(Form NE04)

[Date]

[Name and Address of Client]

Re: Consultation of [date of consult]

Dear _____:

Thank you for [meeting with me] / [speaking with me by telephone] on _____ to discuss _____ . I greatly appreciate the confidence you have expressed in our firm, but we are not in a position to represent you on this particular matter.

OPTION 1 [Please be advised that your claim may become barred by the passage of time as a result of the applicable statute of limitations. Therefore, you should consult another attorney immediately about your claim.]

OPTION 2 [Please be advised a default judgment may be entered against you if an answer or other action is not taken in a timely manner. Therefore, you should consult another attorney immediately about responding to this claim.]

I would also like to emphasize that in declining to represent you, the firm is not expressing an opinion on the merits of your case. We neither had an opportunity to investigate the facts in this matter nor to research the applicable law.

[Since we did not undertake to provide you with any legal advice regarding this matter, no charge is being made for any legal fees or expenses.]

[I am enclosing all the original documents and materials you left with me following our meeting.]¹ In the future should you require legal assistance regarding some other matter, I hope you will contact me. Sincerely yours,

[Name of Firm]

By _____

[Name of Attorney]

¹ Keep a copy of any documents which establish basic information on the case including the statute of limitations.

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