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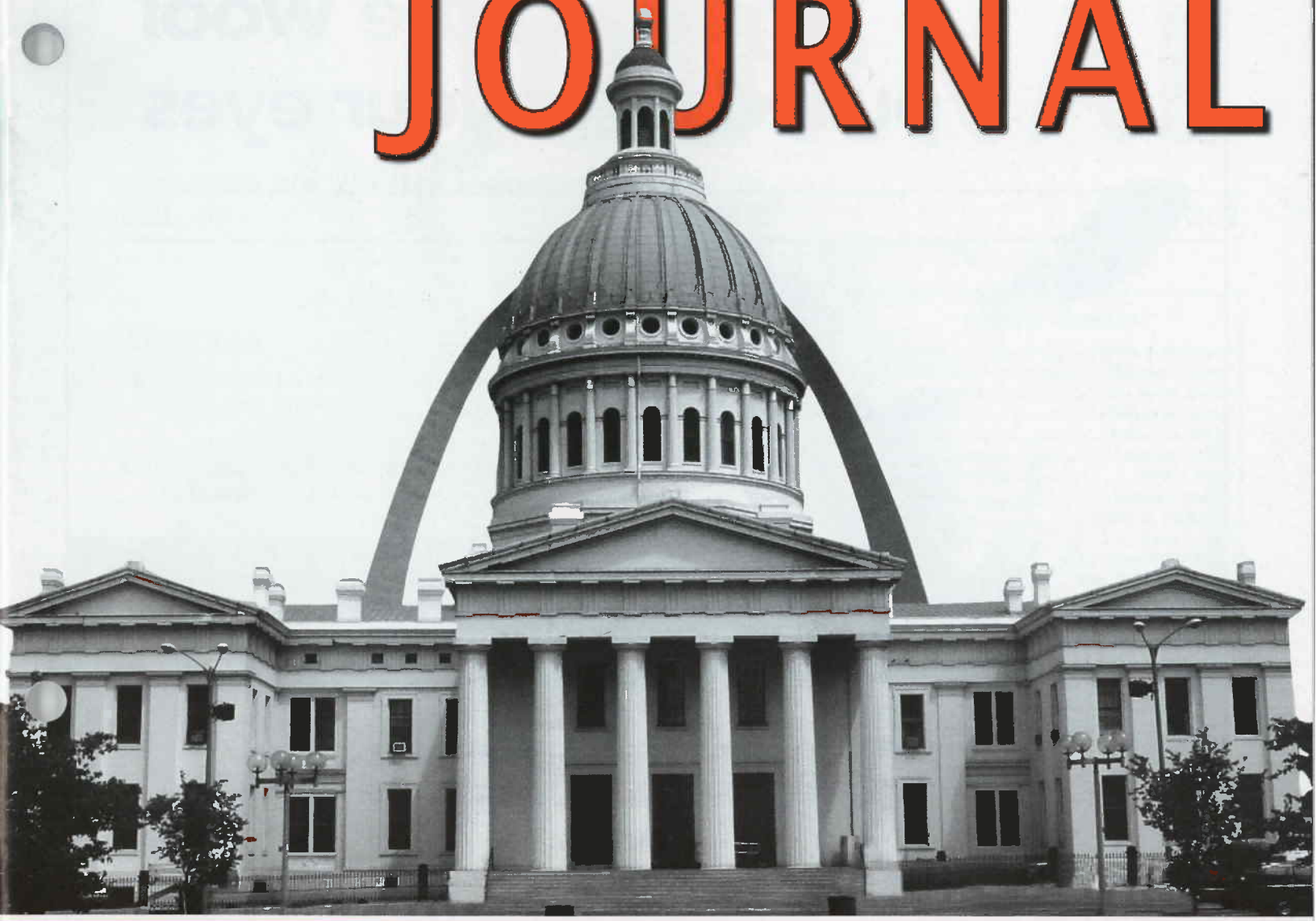

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Using Engagement Letters to Protect from Liability and Market to Clients

By Thomas G. Glick

In many respects "get it in writing" is the watch phrase of the legal profession and probably the most frequent advice given by attorneys. However, it is startling how infrequently we follow our own advice. The attorney-client relationship is a complicated one, fraught with many obligations, duties, privileges and potential liabilities for the attorney. Nevertheless, there are a large number of attorneys who do not follow their own advice and fail to define matters in writing before entering into this relationship.

The Missouri rules of legal professional responsibility make clear that the attorney is a fiduciary for the client, and in almost all respects, the protections of the professionalism code is for the benefit of clients and not their attorney.[1] Managing this relationship is far more complicated than many other relationships most attorneys would not imagine entering into without a written agreement.

Ethical considerations are not the only reasons to adopt a policy of universal engagement letters for all attorney-client relationships or possible attorney-client relationships. In additional to ethical considerations, a well written engagement letter can also provide marketing advantages unrelated to ethics.

The engagement letter forms the basis for a well informed attorney-client relationship.[2] It should include many points; however, many authors on this subject focus exclusively on appropriate management of fiduciary relationships while overlooking other key elements of the engagement letter. For example, in most cases the engagement letter is presented to the client at the very moment when they must decide whether or not to retain counsel and which counsel to retain. Therefore, it is crucial to also consider the engagement letter as a marketing tool that clients read as they decide whether or not to select you as their legal counsel. Indeed, the engagement letter may be the most effective marketing tool you have available, based upon the timing in which the client sees this document. An extremely detailed and lengthy engagement letter can certainly manage the ethical considerations, but an attorney with an engagement letter or contract for services that is so austere that no client ever signs, is of little practical value. However, the professional skill of attorneys to carefully craft language must be used with care in order to accomplish the ethical goals while still presenting a palatable document such that clients will agree to sign it.

My engagement letter is always filled with substantial pleasantries as opposed to more utilitarian letters such as a contract for legal services. These documents can be used effectively to address the ethical considerations but overlook the marketing and business considerations which must also be managed at the time of engagement. This article is not necessarily presented in the order that issues should be addressed in the engagement letter. I do not believe that the order of topics addressed in the engagement letter has any legal or ethical significance, but is among the tools that a lawyer may use to present the most palatable version of their engagement letter.

Despite the topic of this article, the majority of clients do not read the engagement letter carefully. This consideration often impacts my choices in structuring the engagement letter, in that there is a better possibility of the initial and final paragraphs being read by the client. Practical experience teaches me to write the document with the assumption that every word will be considered carefully, however, subsequent actions typically prove that many clients do not in reality read it carefully. In order to address these concerns, I prefer to prepare and mail the engagement letter following the initial visit so that they may consider it at their leisure without me looking over their shoulder. I always offer to summarize each paragraph of the engagement letter. In addition, I suggest that the client retain a copy of the engagement letter.

1. Mo. Sup. Ct. R. 4 preamble.

2. Stephen M. Terrell, *Rules of Engagement: Taking the Offense when it Comes to Defense*, GP Solo Magazine (Oct./Nov. 2002).

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Non-Engagement and Disengagement Letters

The fundamental purpose of an attorney-client engagement letter is to define, with clarity, who the attorney-client rights and privileges benefit.[3] In order to accomplish this goal, the engagement letter is one of a battery of letters used to define and redefine this relationship. The letter purports to establish with whom you have an attorney-client relationship.[4] In order for this method to be persuasively used, it is imperative that the practitioner not only send engagement letters but non-engagement and disengagement letters.

I regularly send out two varieties of non-engagement letters. The first I send to prospective clients with whom I have met, but will not be representing. These letters are sent out immediately following the interview with the client and I state that I do not consider myself to be representing the person, that I will not be taking further action and, in some cases, highlight the statute of limitations. The other non-engagement letter I send out is sent to prospective clients who have been sent an engagement letter which they have failed to return. This letter includes the same elements, making certain to note that I do not represent them, but I often make an effort to point out that if they are merely slow to act in returning the letter, I would still welcome their representation but it will require further discussion. I typically send this sort of letter approximately 90 days after I have sent the engagement letter. This practice is not only an effort to extinguish any possible liability from having met with the prospective client, but also frequently functions as a means of increasing the response rate from clients who intend to act but have failed to do so yet. This practice is not only effective as a protection from liability but also as an effective marketing tool for securing clients whom I have already determined would be financially beneficial to my practice.

Any attempts to limit liability through the use of engagement letters and non-engagement letters must also be integrated into a disengagement letter, or "closing letter".[5] The closing letter indicates that that attorney believes no further action is necessary and that you are taking no additional action, instructs the client as to any remaining deadlines, and other potential ongoing aspects of the attorney-client relationship that may have survived,[6] including eventual disposal of the client's records or the return of them to the client.[7]

Define The Client

If the principal purpose of an engagement letter system is seen as attempting to define the client, then perhaps the one most crucial elements of the engagement letter often comes before the text of the letter. When addressing the letter, the attorney should carefully consider who the client is and who is not the client, particularly in cases where you have spoken with more than one individual. Highlight the actual identity of the client, not only by listing them as addressee but by labeling the signature lines at the conclusion of the letter with their names instead of just a general signature line labeled "client". If multiple clients are engaged, a line for each individual is added to the form so that the clients recognize there are multiple clients.

When there are multiple clients it is important to discuss the possibility of conflicts of interest between them in the text of the letter.[8] This includes not only multiple plaintiffs or defendants but multiple parties in transactional matters including in drafting scenarios the potential of conflict between two spouses that perceive no possible conflict between them at the time of the representation. Multiple clients raise significant questions as to confidentiality.[9] As lawyers we have an obligation to inform our clients of any information that might be relevant to their representation.[10] However, we also have an obligation to keep confidential information that they tell us.[11] This raises the potential of a conflict if ever one party tells the attorney information they wish to be kept secret from the other party.[12] When that information significantly impacts your representation of the other party, a conflict has arisen.[13] To avoid this potential conflict the engagement letter states that, although I will strictly keep matters confidential from others, I need to inform any and all clients of relevant material and their signature on the engagement letter is a waiver of privilege amongst the parties.

Defining the scope of representation is another key element of the engagement letter. It is unusual for a single lawyer to represent an individual in all their legal needs. Even attorneys that maintain a true retainer system, whereby a client pays a regu-

3. *Id.*
4. *Id.*
5. *Id.*
6. P.A. Henrichsen, *Sample Engagement Letters and Fee Agreements*, GP Solo Magazine (Jan/Feb 2002).
7. Mo. Sup. Ct. R. 4-1.15(m).
8. Mo. Sup. Ct. R. 4-1.7 cmt. 18.
9. Mo. Sup. Ct. R. 4-1.7 cmt. 30.
10. Mo. Sup. Ct. R. 4-1.7 cmt. 31.
11. Mo. Sup. Ct. R. 4-1.7 cmt. 18.
12. Mo. Sup. Ct. R. 4-1.7 cmt. 31.
13. Mo. Sup. Ct. R. 4-1.4 cmt. 2.

lar retainer for the attorney to represent them in a variety of matters do not really wish to take on any and all cases for that client. For example, an engagement letter in which an attorney was agreeing to represent to serve as general counsel for a corporation, a fairly broad representation, must still limit the scope of representation. This can be done by highlighting the distinction between representation of the corporation and individuals associated with it as well potentially excluding some matters such as representation for a major litigation case or representing a corporate officer in a traffic matter. This example highlights nicely the use of the engagement letter as both a marketing device and an effort to limit attorney liability. The marketing aspect of these sections acts to manage client expectations so a client is not disappointed or dissatisfied if they approach their attorney on a matter beyond the scope of the initial representation and are then informed of possible conflicts or complications as well as additional charges. This approach enhances efforts to limit liability through limitation of the scope of representation without curtailing completely the possibility of additional business for the attorney with statements that any additional actions will require an additional or amended engagement letter. This also requires that the engagement letter contains a provision that it can only be modified in writing.

Limitations on the scope of representation are best accomplished by a definition of the goals of representation.[14] Discussion of the client's goals presents another excellent opportunity to manage client expectations. Many attorneys, upon completing an initial interview with their client, while drafting an engagement letter are enthusiastic about their ability to help that client. The more contemplative process of engagement letter drafting is an opportunity for the eager attorney to reconsider the facts of the case and explore pitfalls that may not have been immediately obvious. The process of "curbing your enthusiasm" is useful to most attorneys because of the inevitability of the discovery of additional information from opposing parties. The engagement letter is a good opportunity to discuss inherent weaknesses in the legal system that are almost universally frustrating to clients, such as the speed at which the case will move and the collectability of a monetary judgment. It is also good to point out the various protections that the legal system provides to opposing parties. This can help the client see that what appears to them to be an obvious injustice that should be immediately corrected by the legal system, may be a very complicated matter that takes substantially longer and more effort than they initially anticipate.

Counsel should not confuse their efforts at defining the scope of their attorney-client relationship with the similar activity of "issue spotting" that we learned in law school and practice frequently during initial interviews with clients. The sophistication of the legal issues is often very intellectually attractive and interesting to us but is rarely interesting to the client. A hyper technical discussion of legal issues you have spotted in the initial interview is not helpful to the client in managing expectations and limiting the scope of representation. Rather than an issue spotting approach in defining the scope of representation it is often more understandable to clients if you focus on the goals to be achieved rather than the means to those goals.

To the extent that additional unrelated issues are discussed, even briefly during the interview, they are best explicitly addressed and excluded from the attorney-client relationship to avoid misunderstanding. This should be done with a gentle touch to assure the client that you may be willing to assist them with other legal matters discussed but that they are not covered in the current engagement letter.

Fee Arrangements

Missouri ethical rules require engagement letters for contingency fee arrangements, including explicit requirements as to the terms of the contingency fee arrangement that must be included.[15] Although the obvious perspective of this article is that engagement letters are always advisable, they are not required in most cases. As such, there are no specific requirement as to the financial terms which are required in the way that Rule 4-1.5(c) requires for contingency fee agreements.[16] However, it is certainly in the best interest of the attorney, when entering into the attorney-client relationship, to be clear about the cost of services, the manner of calculations of those costs and the expectations of regular payments, if appropriate. When discussing fees, an engagement letter should list hourly rates for matters billed by time or other methods such as flat fees. Clients should be informed about your billing policies, particularly if time is accrued and billed for telephone conversations. In representations that involve either flat fee or hourly billing, it is important to manage expectations by listing the ways in which the case can take unexpected turns which would generate attorney fees that were not originally anticipated. Carefully addressing the possibility of unknown contingencies prepares the client for additional charges that they are not expecting. It is important in the fee section to clarify the difference between a deposit or retainer and actual charges; particularly if the retainer or fee deposit is not a limit on the total amount of fees.

For contingency fee agreements, ethical obligations require a distinction and explicit agreement regarding fees and costs and a discussion of the payment of both.[17] However, the distinction between fees and costs are not intuitive to most clients. Even in letters where explicit distinction is not ethically required, it is a good practice to distinguishing fees and costs for the client. If it is your practice to take no action on behalf of a client until they have paid a retainer or fee deposit, this should be explicitly mentioned in the

14. Mo. Sup. Ct. R. 4-1.2(c).

15. Mo. Sup. Ct. R. 4-1.5(c).

16. Mo. Sup. Ct. R. 4-1.5(c).

engagement letter and all the components of the non-engagement letter as discussed above should be included in this portion of the engagement letter. That is to say, if your practice is to take no action unless and until the engagement letter is returned with payment, then it is important to highlight any statute of limitation or other time deadlines that are relevant in the interim, as well as state that you will be taking no additional action until the engagement letter and retainer or deposit is returned. Basic financial expectations of all clients require the explicit listing of hourly rates for clients including minimum increments for each occasion the client will be billed. In particular, if the client is being billed by multiple professionals at more than one rate for different activities, it is helpful to identify any and all hourly rates which the client might anticipate seeing.

This discussion of fees and billing procedures should not be interpreted as a basis for failing to complete an engagement letter in cases which counsel has opted to take on a reduced fee or *pro bono* basis. When, and if, counsel opts to work on a *pro bono* basis, other aspects of the engagement letter still apply and are a least as valuable, if not more so, for the *pro bono* client. Even discussion of *pro bono* arrangements, if appropriate, should be included in the engagement letter. Personally, I do not maintain a version of my engagement letter to *pro bono* clients. Although I frequently accept *pro bono* representation through Legal Services of Eastern Missouri volunteer lawyer program, my participation in this program provides the added benefit of an agreement executed by Legal Services of Eastern Missouri even before I have been contacted by the client. I take large number of *pro bono* cases each year to comply with ethical requirement that all lawyers must, but I have affirmatively determined that I will only take *pro bono* cases through Legal Services.[18] Most clients do not budget for the expenses for attorney fee actions, with limited exceptions for large corporations. As such, most clients perceive themselves as unable to stretch their budget to pay legal fees because they have not planned for them in advance. If you rely on the perceptions of prospective clients to define their need for your sympathy and *pro bono* action, you will discover that there are large numbers of sympathetic people. If you carefully inspected their finances, many more might be able to pay for legal fees than you initially ascertain from their general representations. Because I do not wish to take on the task of careful financial review, I delegate this task to Legal Services of Eastern Missouri. Then I know if I take *pro bono* cases only through the Volunteer Lawyer Program that the prospective client meets the income and asset guidelines to qualify.[19] I am able to both meet my ethical obligations for *pro bono* work and assure that my *pro bono* clients are, in fact, those clients most desperately in need for free or reduced fee services.[20]

Threshold Client Obligations

Many prospective clients find a tremendous sense of relief in merely telling the narrative of their legal difficulties to an attorney. It creates a sense of relief and releases them of stress and urgency that they are feeling. It is important to consider this effect when drafting your engagement letter. You must highlight to the client that despite the relief they feel, unless and until they execute and return the engagement letter you will not be taking any actions. Other conditions that I like to highlight are the need to return any financial or payment requirements and the need for ongoing cooperation and participation. I also include the fact that there are many deadlines in any legal matter and I will be unable to meet the deadlines on their behalf without significant continued cooperation from them. A client that perceives to have turned the matter over to their attorney, without additional need for interaction on their part is gravely mistaken. I must make it clear that I will be unable to effectively represent them without substantial ongoing cooperation on their part.

I also attempt to keep a list of preliminary information that I will need in order to initiate any action on their behalf and include it with the engagement letter, this includes such items as social security numbers and birth dates. Noting that without this information I cannot proceed even if the engagement letter has been returned is also key. Highlighting the need for ongoing interaction between the attorney and client also provides the opportunity to explain to the client the need for total candor and honesty with their attorney. I make it clear that I expect them to present me with a complete and unvarnished truth about their case. My ability to effectively represent them and achieve the goals which we have discussed is based upon their honesty. Any failures in this honesty, including omissions, will detrimentally affect their representation in ways that I cannot anticipate or control. I will remind them of the nature of attorney-client privilege and absent their permission, in most cases, there will be no negative repercussions to admitting to me matters of which they are not proud or deem detrimental to their case.[21]

This is also an opportunity to highlight the inherent uncertainty in all legal matters. While you are confident in your ability as a lawyer to provide the necessary services, there are inevitability unpredictable factors that may change the course of their case that are beyond your control including irrational responses from opposing parties and opposing attorneys or unpredictable decisions from judges. These factors may radically change the outlook for their case. All cases present some element of risk due to uncertainty. The most predictable representations can change dramatically. Consider a simple case to draft an estate plan; even such a predictable representation could be dramatically effected by the health of the client or changes

17. Mo. Sup. Ct. R. 4-1.5(c).

18. Mo. Sup. Ct. R. 4-6.1.

19. 42 U.S.C. § 2996f (a).

20. Mo. Sup. Ct. R. 4-6.1.

21. Mo. Sup. Ct. R. 4-1.6.

in law effecting wills, trusts and estate taxes. As a result, it is my philosophy that there is never a representation so predictable that the engagement letter should not include some warning about the inherent uncertainty of the law and the uncertainty of judges and juries and the possibility that they will perceive the matters differently than you and your client. This helps the client understand that there are no guarantees for any particular outcome.

The discussion of uncertainty segues into an excellent opportunity to outline the exact ramifications of successfully achieving the goals of representation. For example, discussing expenses and difficulties in collection on a judgment even after it has been issued by the court, including discussing "judgment proof" party such that even if you accomplish the goals the final results may not be satisfactory to the client. All of these are important to add for threshold client obligations.

Mechanics of the Relationship

There is also much objective information that it is appropriate or required to be included in the engagement letter. This includes a discussion of the concept of lawyer trust account, including the escheatment of interest on lawyer trust account (IOLTA) funds.[22] Attorneys in private practice should also include the possibility that other attorneys and staff will be enlisted to help the attorney and the charges due in that instance.[23] Even a sole practitioner with no staff should highlight the possibility of additional help if the case becomes complex or if the attorney becomes unable to handle the matter. It is important to alert the client that attorney-client privilege may be expanded to include other people under certain circumstances.

Current ethical opinions in the State of Missouri view e-mail as a non-confidential form of communication.[24] In addition to a warning as prescribed by the ethical authorities, it is important to highlight to the client that there are evidentiary ramifications to the use of e-mail because it is considered non-confidential. For example, confidential information, under certain circumstances, may be deemed to be discoverable because it was communicated through e-mail.[25] As a practical matter, because of the common practice of people using e-mail and forwarding e-mails to other people, including a complete thread of the message that came before, I make it my practice to inform clients to be weary of forwarding e-mail threads as they may inadvertently cause a breach of confidentiality by forwarding e-mails to a third party that includes a lengthy thread of prior discussion. The ramification of this action is not limited to revealing information to the forwarding recipient but may include a breach that makes the matter discoverable by adverse parties.

When I may be negotiating on behalf of my client I also discuss the concept of negotiation authority, including intermediate authority and ultimate authority and explain the need to provide a range of authority for me in appropriate circumstances so that I can proceed more expeditiously without the need to contact the client many times throughout the negotiations. If the matter is suitably ripe for negotiations such that actual levels of authority can be spelled out at the time of engagement letter, I do so. By including information, I am able to effectively manage the mechanics of the relationship.

Customer Service Considerations

Almost all attorneys have been informed that the single most common basis for ethical complaints against lawyers comes from failures of communications.[26] I believe that this occurs because any given client knows only about their matter being handled by the attorney. Their matter alone is a source of significant stress and focus for them. Conversely, most attorneys handle matters for a number of clients in order to have enough cases to pay their expenses and salary. As a result, any and all lawyers must prioritize their caseload and tasks. It is therefore ethically important not only to maintain good communication with the client, but the engagement letter is a perfect opportunity to begin to manage client expectations regarding your availability and that there will be occasions when they cannot immediately contact you. Clients should be presented with expectations about how quickly you can respond to communications so that they gain an understanding of the time constraints on their attorneys practice in advance of engagement in order to best manage their expectations.

Conclusion

Creation of an engagement letter policy and adherence to it can be your most effective means of limiting ethical and malpractice liability.[27] The effective use of an engagement letter policy is almost as good a hedge against professional liability as malpractice insurance. If you have chosen to carry malpractice insurance, your insurer would agree with my statements about the importance of creating and maintaining an engagement letter policy. Engagement letters, when property prepared can protect you and your client; while at the same time provide marketing opportunities. I use these letters with every client, and I recom-

22. Mo. Sup. Ct. R. 4-1.15.

23. *In the Matter of Cupples*, 952 S.W.2d 226, 234 (Mo. *en banc* 1997).

24. Sara Rittman, Legal Ethics Counsel, Email Communication with Clients and Email Disclaimers, <hppt://www.mo-legal-ethics.org/E-mail%20Communications%20with%20Clients%20and%20E-mail%20Disclaimers-body.php>, last visited Aug. 11, 2011.

25. *Id.*

26. Sam Phillips, *Communication, Communication, Communication: How to Market a Law Practice, Satisfy Clients and Avoid Complaints*, The Missouri Bar Bulletin at p. 15 (Nov. 2005).

27. Francis M. Hanna and William C. Ruggiero, *Legal Malpractice Litigation in Missouri*, Journal of the Missouri Bar at p. 15 (Mar. 1992).