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# Engagement Letters in Transactional Practice: A Reporter's Reflections

by D. Christopher Wells\*

## INTRODUCTION

In recent years, lawyers have turned increasingly to written contracts, usually called "engagement letters," to memorialize their professional representations.<sup>1</sup> This practice grows absent specific directives requiring such writings,<sup>2</sup> apparently deriving from professional preference rather than mandatory rule. It grows also despite scant attention paid by law reviews and bar publications. Only infrequently do publications appear noting this practice or offering advice on drafting

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The author of this Article served as the Reporter for the ad hoc Professionalism Committee of the State Bar of Georgia's Corporate and Banking Law Section and was the principal author of its 1997 *Report on Engagement Letters in Transactional Practice*. The views and opinions expressed in this Article are those of the author only and do not necessarily represent the views and opinions of the State Bar of Georgia, its Corporate and Banking Law Section, or its ad hoc Professionalism Committee.

1. This assertion is supported only by anecdotal evidence gathered from members of the Georgia corporate bar. Research reveals no scientific study that supports it.

2. There are some exceptions, such as those involving contingent fees. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c); RULES & REGS. FOR THE ORG. & GOV'T OF THE ST. BAR OF GA. [hereinafter GA. BAR RULES] Rule 4-102(d), Standard 31(d)(1).

engagement letters.<sup>3</sup> Even continuing legal education programs give them only occasional attention.<sup>4</sup>

One of the most ambitious treatments of engagement letters came in 1997 from the State Bar of Georgia in the form of a report from its Corporate and Banking Law Section entitled *Report on Engagement Letters in Transactional Practice* ("Report").<sup>5</sup> The Report encourages regular use of engagement letters, suggests an appropriate scope and format, offers an extensive menu of sample provisions, and discusses the ethical and legal principles that underlie its suggestions. Although the Report originated with and was directed toward Georgia transactional lawyers, most of its suggestions may be generalized to other jurisdictions and practices. Indeed, its general nature and content should be useful to lawyers in all types of private practice. One purpose of this Article is to bring the Report's suggestions to the attention of this broader audience.

Lawyers unfamiliar with engagement letters may wonder about the Report's strong support for increased use of engagement letters and may

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3. See, e.g., James L. Cunningham, *Engagement Letter*, in DRAFTING DOCUMENTS FOR CONDOMINIUMS, PUDS, AND GOLF COURSE COMMUNITIES, SB50 ALI-ABA 1281 (1997) (including sample engagement letter); Michael E. Flowers, *Sample Engagement Letter*, in TAX, BUSINESS, AND SUCCESSION PLANNING FOR THE GROWING COMPANY, SB71 ALI-ABA 79 (1997) (including sample engagement letter); Roy L. Reardon, *Outside Counsel's View: A Guide That Will Be Kept at Your Elbow and Not on the Bookshelf*, 22 J. CORP. L. 337, 337-39 (1997) (reviewing CORPORATE COUNSEL SECTION, NEW YORK STATE BAR ASS'N, CORPORATE COUNSEL'S GUIDE (1996) (discussing the benefits of engagement letters)); Louis A. Mezzullo, *Who Is Your Client? Identifying the Client: Ethical Considerations*, in QUALIFIED PLANS, PROFESSIONAL ORGANIZATIONS, AND WELFARE BENEFITS, CA43 ALI-ABA 307, 327-34 (1996) (including sample engagement letters for avoiding conflicts of interest, as when representing multiple clients in joint venture); Lisa Fremer-Tenner, *Artist Pacts With Business Managers*, ENT. L. & FIN., Dec. 1996, at 3 (including sample engagement letter for use in the entertainment industry); Harry J. Haynsworth, *Engagement Letters*, in BUSINESS LAWYERS UNDER FIRE: LIABILITY AND ETHICAL RISKS FACING IN-HOUSE AND OUTSIDE COUNSEL, Q246 ALI-ABA 165 (1996) (including sample engagement letter language for representation of partnerships and corporations); CORPORATE COUNSEL SECTION, NEW YORK STATE BAR ASS'N, CORPORATE COUNSEL'S GUIDE (1996), partially reprinted in CORP. COUNS., June 1996, at 4 (including sample engagement letter); AMERICAN LAWYER MEDIA, MODEL TERMS OF ENGAGEMENT 1996/97 (1995).

4. The Section of Business Law of the ABA recently published a book that addresses issues and policies relating to initiating, terminating, and declining legal representation and provides sample forms. See SECTION OF BUSINESS LAW, AMERICAN BAR ASS'N, DOCUMENTING THE ATTORNEY-CLIENT RELATIONSHIP (1999).

5. See PROFESSIONALISM COMMITTEE, STATE BAR OF GA., REPORT ON ENGAGEMENT LETTERS IN TRANSACTIONAL PRACTICE (1997). The Report is available electronically at the State Bar of Georgia internet site, under the Corporate and Banking Law Section listing: <[http://www.gabar.org/ga\\_bar/52518.htm](http://www.gabar.org/ga_bar/52518.htm)>. Unfortunately, because the electronic version of the Report is not paginated, references to it in this Article will be by section.

question how engagement letters weave into the traditional fabric of legal practice,<sup>6</sup> what ends are to be achieved with such letters, and whether such letters are justified by sufficient legal, economic, and professional rationales. This Article targets that audience especially and, as the Report itself does, addresses those questions.

This Article offers insight into the Professionalism Project's design and drafting process. As with legislation and sausage-making, one might wish to avoid attention to this creative process. Here, though, a review of the creative process might help lawyers understand and accept the Report's advice. Knowing how the Committee wrestled with some of the demons might help lawyers do the same. Not all lawyers may agree with the Committee's specific suggestions or even with its general support of engagements letters, but understanding the Committee's purposes, motivations, and concerns should make their choices better informed.

In bringing the Report to the attention of a larger audience, this Article is designed not only to propagate the Committee's suggestions unashamedly but also to cause lawyers to reflect more generally on the rationale, application, and form of engagement letters. Perhaps such reflection will benefit future bar committees when they elicit suggestions for improving engagement letters and lawyer-client relationships.

Part I of this Article has the substance of an "apology," as the Greeks might have used that word, directed particularly to those readers who are interested in the history and the rationale of the Committee's engagement letter project, especially its suggestions for format and specific provisions.<sup>7</sup>

Part II is directed to readers who wonder how engagement letters fit within the laws of contract and fiduciary relationships and whether engagement letters make practical sense for the lawyer and the client. For many lawyers, entering into a written contract with a client raises serious questions about the nature of the professional relationship and the purposes to be served by a writing. At bottom, the question becomes whether this added formality presents a salutary development in that relationship.

Finally, the Appendix sets out brief excerpts from the Report and includes limited commentary on the purpose of the suggested engage-

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6. In the more than two years that have passed since the Report was published, its authors and their colleagues have had a chance to reflect on the Report's relevance to their own and their colleagues' practices. This Article incorporates much of the substance of those comments, especially in the Appendix, without specific attribution.

7. Some of this Article appeared in earlier drafts of the Report and the author's oral presentations to the Corporate and Banking Law Section of the State Bar of Georgia.

ment letter provisions. To preserve trees and readers' patience, the Report does not appear in its entirety. Those who wish to know more will find the complete Report accessible in electronic form from the State Bar of Georgia.<sup>8</sup>

## I. BACKGROUND AND PURPOSES OF THE ENGAGEMENT LETTER PROJECT

### A. *Background*

In 1995 the Corporate and Banking Law Section of the State Bar of Georgia formed an ad hoc Professionalism Committee and charged it with addressing professionalism issues of special importance to corporate practitioners. The Committee's work proceeded under the leadership of several experienced transactional lawyers, including Elliott Goldstein, considered by many to be the dean of Georgia's corporate and banking bar. Other corporate practitioners from across the state comprised the Committee.<sup>9</sup> Serving as co-chair was one corporate general counsel who provided some client perspective on the nature and use of engagement letters.

In essence the Committee's charge from the State Bar required it to determine which "professionalism" issues appeared both ripe for study and amenable to committee action. Preliminary discussions about the intersections of professional ethics, tradition, and practice led the Committee rather quickly to the subject of engagement letters. Two observations seemed to inspire this focus.<sup>10</sup> First, in their practices, Committee members had noted increasing use of engagement letters in representing corporate clients in transactional matters, a trend supported by substantive concerns and not mere fashion. In some cases,

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8. See *supra* note 5.

9. The other members of the Committee were Robert W. Beynart, Susan Cahoon, George L. Cohen, John J. Dalton, F.T. Davis, Jr., Steven E. Fox, Walter M. Grant, Thomas R. McNeill, Jonathan D. Sprague, J. Edward Sprouse, Jeffrey B. Stewart, M. Robert Thornton, John K. Train, III, and the author, D. Christopher Wells, who served as Reporter. In August 1995 Walter Grant assumed the cochairmanship in place of Lawrence Klamon, who had resigned following his appointment as President and CEO of Fuqua Enterprises, Inc. The author owes a debt of gratitude to all members of the Committee for their dedication and hard work on the Report.

10. It should go without saying that comments such as these, which suggest special insight into the thought processes or subjective motivations of Committee members, whether individually or collegial, are no more than the author's inferences, on occasion supported by the recollections of other former Committee members. It is said that in juries of twelve there are thirteen opinions. If the Report itself expresses the Committee's "thirteenth" opinion, this Article occasionally offers a fourteenth.

the members had noted that engagement letters (or the impetus to create one) had originated with the client rather than the law firm. Second, Committee members' experiences suggested that the potential benefits of engagement letters could exceed their costs and that the benefit/cost ratio would increase proportionally with the size and complexity of business transactions.

From these two observations, the Committee saw great promise for engagement letters to assist transactional lawyers in establishing more sound and successful relationships with clients. They saw improvements to be derived both from the process of engagement letter discussion and from the improved precision and thoroughness of the agreement itself. The joint lawyer-client process of developing the engagement letter established better lines of communication, which, communication, in turn, better clarified client needs and party expectations. Even skeptical Committee members agreed that the idea deserved study: whatever would assist lawyers and clients to develop a clear understanding of their relationship and goals—whether the ultimate product became a writing or not—had promise for improving professionalism. Some members also wondered whether there might be a darker side to engagement letters, resulting in negative but unintended consequences for clients.<sup>11</sup> So far as possible, any end product should protect the client's interests and avoid lawyer overreaching.

Once the Committee had decided to pursue the engagement letter project, it considered the form its recommendations should take. Some understood that the Bar expected the Committee to propose amendments to the rules of professional ethics. Whether or not that was correct, the Committee consciously sought to avoid a course of action that could be too easily delayed or derailed by political, judicial, or legislative processes. It recognized that proposing mandatory rules or even precatory ethical considerations could raise the stakes so high as to engender opposition, if only on fine points of drafting.<sup>12</sup>

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11. Committee members, bar members, and others have wondered aloud whether this Report, the provisions it suggests, and engagement letters in general might be, or be seen as, lawyer-oriented devices susceptible to overreaching and other inappropriate lawyer behavior. See *infra* Appendix.

12. Appendix A of the Report recommends two changes to Georgia's ethical rules. First, it recommends two amendments to Standard 69 of Georgia's Ethical Standard and Considerations. The changes suggested would eliminate the irrebuttable presumption of a lawyer's knowledge of former client confidences and defines the disclosure required as a predicate for "former client" consent to adverse representation. Second, it recommends adoption of new Ethical Consideration 2-34, which would encourage lawyers to use engagement letters and clarify that lawyers have no ethical obligation to recommend that their clients seek other counsel prior to entering into an engagement letter agreement.

The Committee also eschewed creating a long, abstract list of rules. It worried that such a list would be difficult to draft, much less to read and understand. Such rules, as with all rules, would likely tend toward interpretation and application quandaries. Undoubtedly, each rule would have innumerable corollaries and exceptions that the Committee would feel obligated to identify and explain. If success for the drafting endeavor was even possible, the entire work might just collapse of its own weight. Neither situation would advance the Committee's, the profession's, or the prospective clients' interests. Ultimately, the Committee concluded that a sufficient number of transactional lawyers were employing engagement letters that a rule would be unnecessary. What lawyers needed, if anything, was help to improve the quality of their letters and to increase their ease of use.

To increase the chances of professional understanding and acceptance and to avoid the time commitments attendant to a more politicized process, the Committee consciously chose the lightest precatory approach for its bar colleagues.<sup>13</sup> The Committee decided to promote the use of engagement letters by offering lawyers something of practical use in the form of a bank of suggested engagement letter provisions especially appropriate for corporate practice.<sup>14</sup> In that way, lawyers would be free to use, adapt, or reject the Committee's suggestions. An alternative "statute of frauds" approach of requiring a written lawyer-client agreement, however qualified, would have not only been impractical but also contrary to the general development of contract law.

#### *B. The Project: Focus on Engagement Letters*

Engagement letters may have been in use for a long time, but it goes without saying that not all lawyers use engagement letters. Even those who do might not use them for all representations. Very probably, many

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13. The author, as Reporter, presented to the Committee at least two other factors that militated against a regulatory, rule-making approach to the professionalism problems at issue. A tight rule would potentially require lawyer behavior that would ill-fit the client's and society's best interests. A loose one could be so easily ignored or avoided that it would call into question the effort expended in drafting it.

14. To the extent that the Committee pontificated, it did so only presenting a series of preliminary drafts at the 1995 and 1996 annual meetings of the Corporate and Banking Law Section, which elicited critiques and suggestions of bar colleagues. At the conclusion of its research and drafting work in Spring 1997, it forwarded the Report to the Executive Committee of the Section. On June 1, 1997, following its formal approval and endorsement, the Executive Committee published the Report to the Section and the broader bar membership.

lawyers seldom use them, and some never do.<sup>15</sup> No ethical rule requires their use in typical transactional practice, and no strong professional tradition encourages their use. If anything, the tradition has tended in the opposite direction because of the notion that a healthy professional relationship should proceed on trust, bound by little more than a handshake. Those who choose to employ engagement letters do so because of a sense of propriety based on a personal understanding of ethics and professionalism, not because of professional and ethical imperatives.

The jury of professional peers is still out on when, even whether, engagement letters *should* be used.<sup>16</sup> Opinions about engagement letters range from an increasingly common belief that they are essential components of good practice; to acceptance of them as salutary developments for special, but only occasional, application; to concern that they suggest distrust between client and lawyer; and to genuine antipathy because they impose an unnecessary burden on client and lawyer resources and can provide an opportunity for lawyer overreaching. Additionally, any one lawyer's opinions may vary depending upon the nature of the representation, the specific matter, or the client involved.<sup>17</sup>

Given the spectrum of professional opinion about engagement letters, the Committee expected that its decision to pursue the project would be met with some surprise and skepticism, if not hostility. It was correct. When the Committee made preliminary reports at the 1995 and 1996 annual meetings of the Corporate and Banking Law Section, several lawyers sharply questioned why a committee charged with focusing on "professionalism" would devote itself to engagement letters. They suggested that although engagement letters may address practical or ethical issues, they have little to do with professionalism. Others

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15. Although apparent to most practitioners, this assertion is confirmed by responses to a test version of a questionnaire developed by the author to learn how and when practitioners employ engagement letters.

16. If these contracts are to avoid the epithet of "adhesion" and are to be judged objectively, this jury should include a client cohort as well.

17. Committee members tended to involve themselves in fairly complex commercial and banking matters, and a majority regularly represented corporate clients that employed inside counsel. This practice context and associated experience undoubtedly affected the Committee's views about the nature and efficacy of engagement letters. Nonetheless, the author's preliminary questionnaire data from practitioners in solo or small practices who represent small-business clients also suggests significant use of engagements letters and a generally favorable attitude toward them. To the extent that small-business clients are less sophisticated, the use of engagement letters that spell out all the essential provisions of the representation may be even more advisable.



expressed suspicion that engagement letters might be used as lawyer protection devices to the disadvantage of clients.

Indeed, these and other mildly hostile reactions echoed similar questions and concerns raised by Committee members at the outset of the project. Most Committee members initially would not have predicted that their work would take them in that direction. So how did the Committee members justify to themselves this project's direction?

In its early discussions of potential target problems, Committee members found common ground on the observation that lawyer ethical and professional lapses (for example, failure to recognize or account for conflicts of interest and failure to account for the possible need to associate specialist co-counsel) and lawyer-client misunderstandings (for example, the fees to be charged and services to be rendered) often resulted from insufficient attention to detail by both the lawyer and the client at the outset of a representation. The Committee believed that to avoid such problems the lawyer and the client must invest some effort at the outset to clarify their expectations and understandings. That, in turn, seemed to suggest developing and improving a mechanism that encouraged, even required, discussion of the scope and nature of the representation, potential conflicts, and termination before potential problems ripened into actual problems. Representations involving complex business transactions require more than average effort to establish a sound working relationship and a clear understanding of client interests, which are essential not only to avoiding legal and ethical disputes but also to promoting professionalism itself. Given the primacy of a healthy relationship in an effective representation and the centrality of such issues to the health of the relationship, the Committee concluded that this was a professionalism issue and that it should be the focus of its work. After all, should not lawyers attend to the beginning of the representation with the same care and thought that they would devote to any other important business matter of their clients? Lack of attention and communication at the start of representation may engender inaccurate assumptions and misconstrued goals and may ultimately lead to failed relationships. If these problems frustrate the goals and success of the representation, then they negate the very rationale of the professional relationship. Unless the lawyer and the client begin and continue the representation with a sound professional relationship, all other issues that fall under the rubric of professionalism, such as the professionalism among lawyers or between the lawyer and the court, will lose importance.

To increase the likelihood that lawyer-client relationships will begin and proceed with a clear understanding of the responsibilities and expectations of both the lawyer and the client, the Committee chose the

mechanism of the engagement letter. Engagement letters are, after all, just a variation on the familiar and time-honored tool for fostering communication and understanding between parties—the written contract. Of course, this was not an original idea. All members had noticed the growing use of engagement letters. Some members and their firms already were using engagement letters regularly. Many also noted the growing popularity of client-drafted engagement letters, especially corporate clients represented by in-house counsel.

As noted above, after deciding that broader use of engagement letters would enhance professionalism, the Committee faced the question of how best to encourage their use. It decided that the least intrusive methods—suggestion and exhortation—would likely be inadequate without more. At the other extreme, the most intrusive method—a mandatory rule—would take much more time and would raise the political stakes greatly. It would also risk adoption of a one-size-fits-all approach that could reduce, not increase, professionalism and client service.<sup>18</sup> The golden mean would suggest something more effective than exhortation and less constraining than rule changes. One answer, consistent with the traditions of transactional practice, would be to provide forms—concrete examples of engagement letters for practitioners to adapt to their clients' needs.

That led to the next obvious question—just what sort of form letters ought to be recommend? Engagement letters can vary greatly in length and complexity. The simplest do little more than identify the firm and client and memorialize the fee arrangement. More thorough engagement letters define the scope and purpose of the representation, describe the obligations of the client and the lawyer, establish the bases for future withdrawal or termination of representation, and inform the client of actual or potential conflicts of interest.<sup>19</sup> Clearly, no one example

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18. The Committee discussed at some length whether engagement letters ought to be made mandatory by a new Georgia directory rule. There was no Committee support for this approach for several reasons. Rule changes not only take time but also invoke the legislative processes of the Bar and the Supreme Court of Georgia. Legislative processes, in turn, often entail political divisions, posturing, and zero-sum games, none of which the Committee had the time or the stomach for. Further, the Committee viewed the issue of engagement letters as one of professionalism, not ethics. The Committee concluded that a precatory or hortatory approach was not only more suitable but also more likely to find early support and acceptance within the Bar.

19. The Report disproportionately addresses conflicts of interest for several reasons. First, conflicts of interest raise very knotty problems, some of which can preclude or terminate the representation. Second, actual and potential conflicts must be disclosed to clients under the rules of professional ethics. Finally, by disclosing these conflicts, an engagement letter can become a predicate for informed client waivers of such conflicts.

would do. The Committee therefore decided to present an example of a comprehensive engagement letter, augmented by a menu of alternative examples that together comprised a modest bank of form engagement letter provisions.<sup>20</sup> Drawing from the work product from its members' firms, from that of other Georgia firms, and, in part, from (the very few) published sources, the Committee created a suggested outline, a sample letter, and alternative provisions grouped by topic.<sup>21</sup> These three elements form the core of the Report. The Report also devotes a lengthy final section to practical, ethical, and legal considerations for deciding whether and how to use the suggested provisions. Finally, it attaches appendices for an abbreviated reference list and for suggested rule changes respecting conflicts of interest.

As the Report indicates, the Committee's work followed a nascent trend toward increased use of engagement letters. For example, the American Bar Association's Section of Business Law reported that in recent years engagement letters have been used with greater frequency in establishing lawyer-client relationships.<sup>22</sup> In addition, several national projects and commercial publications recently recommended the use of engagement letters, or at least agreements in principle, as vehicles for avoiding common misunderstandings between lawyers and their clients and between lawyers and their Bars.<sup>23</sup> The Committee's suggestions and commentary drew some strength from the ideas and analyses articulated in those endeavors.

Some practitioners, thinking selfishly, may believe that engagement letters can be a bad idea. They may worry about the imposition of additional, perhaps unnecessary, formality and possible unintended consequences on the lawyer-client relationship.<sup>24</sup> Such practitioners

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20. The Appendix lists the alternative provisions included in the Report.

21. The Appendix includes the Report's suggested outline of an engagement letter and a list of the alternative provisions.

22. See SECTION OF BUSINESS LAW, AMERICAN BAR ASS'N, ENGAGEMENT, DISENGAGEMENT AND DECLINATION: LAW FIRM POLICIES ON DOCUMENTING THE ATTORNEY-CLIENT RELATIONSHIP 2-3 (draft Mar. 25, 1994). For the citation to the final version of this book, see *supra* note 4.

23. See, e.g., Task Force on Conflicts of Interest, American Bar Ass'n, *Conflicts of Interest Issues*, 50 BUS. LAW. 1381 (1995); AMERICAN LAWYER MEDIA, MODEL TERMS OF ENGAGEMENT 1996/97 (1995); *A Model Engagement Letter*, ACCA DOCKET, Spring 1994, at 52. For a discussion of law firms' participation in "beauty contests" and suggested procedures for clarifying the understanding of the lawyer and the prospective client in those situations, see *Conflicts of Interest Issues, supra*, at 1396-401.

24. As an example of unintended consequences, in some jurisdictions integrating the agreement in a writing affects the applicable statute of limitations. In Georgia, for example, an action arising from breach of a duty imposed by an oral contract or one only partly reduced to a writing must ordinarily be brought within four years of the breach.

may choose to use engagement letters only when required, such as to meet an ethical or statutory requirement for a written fee arrangement. Nonetheless, the Committee observed that most transactional lawyers, while acknowledging the real risks and costs of drafting and negotiating<sup>25</sup> engagement letters, will take a longer look when assessing their benefits. Transactional lawyers see engagement letters as an opportunity to clarify the terms of the professional representation, with concomitant advantages for both the client and the lawyer as the representation begins, proceeds, and eventually concludes. Taking the time to draft and discuss an engagement letter provides an opportunity to identify and anticipate less-apparent potential problems in the representation. Approached with sensitivity to client concerns, such letters have the potential for not only documenting but also solidifying the professional relationship. Engagement letters also provide counsel with an opportunity to delimit the representation and to avoid conflicts with other clients, whether former, current, or future.

## II. THE PROFESSIONAL RELATIONSHIP AND THE RATIONAL DECISION TO USE ENGAGEMENT LETTERS

In deciding whether (or when) to use engagement letters, clients and lawyers will likely consider three threshold questions: (1) Will using an engagement letter alter my legal rights?; (2) Will the added effort of reducing an oral agreement to writing yield benefits that justify its costs?; and (3) Will the added formality of a writing have a negative effect on the personal and professional relationship? The answers to these questions, especially to the last, will vary with the nature of the representation and the personalities involved. Nonetheless, the following general observations ought to hold true in most situations.

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O.C.G.A. § 9-3-25 (1982); *Plumlee v. Davis*, 221 Ga. App. 848, 851-53, 473 S.E.2d 510, 513-14 (1996). In contrast, in such an action arising from a written contract, including written contracts for legal services, the statute of limitations may extend to six years. O.C.G.A. § 9-3-24 (Supp. 1999); *Buchanan v. Huson*, 39 Ga. App. 734, 736-37, 148 S.E. 345, 347 (1929). These limitations can be shortened within reason by the contract itself. *Rabey Elec. Co. v. Housing Auth.*, 190 Ga. App. 89, 90, 378 S.E.2d 169, 170 (1989).

25. This Article often uses the term "negotiate" when referring to the process leading to the execution of an engagement letter. That term suggests that each party has several powers, including exercising some control of the process, making some contribution to it, and having the freedom to accept or reject suggested terms and provisions as well as the engagement itself. Although the extent to which the parties exercise these powers will vary, the tenor of the Report is that the less the engagement letter "negotiation" process resembles that associated with contracts of adhesion, the more it is consistent with principles of professionalism.

A. *The Legal Nature of the Lawyer-Client Relationship*

The engagement letter, simply because it is a writing, represents a departure from traditional lawyer-client agreements, which have tended to be oral and sealed with little more than a handshake. To the extent that the recommended engagement letter introduces a writing or does substantially more than acknowledge the engagement and discuss fee arrangements, its length and detail will probably render its appearance more formal and contractual than a conversation, a short acknowledgment or fee-agreement letter. However, this departure from a largely informal, oral tradition does not create a new legal relationship between lawyers and their clients. That relationship has always had one foot in contract and the other in fiduciary obligation, neither of which should be significantly affected by memorializing an oral agreement or by executing a comprehensive writing.

With respect to contract law, the typical legal representation begins with an exchange of promises. The lawyer promises to handle the client's matter competently and the client promises to compensate the lawyer for services rendered.<sup>26</sup> This exchange of promises ordinarily creates an enforceable contract.<sup>27</sup> Memorializing this exchange with a writing adds an element of formality to the agreement, which includes corresponding benefits, but it does not transform the fundamental contractual character of the exchange of promises. In that respect, engagement letters are no different than other personal services contracts.

Unlike contracts bargained for at arm's length, engagement letters arise in a fiduciary context in which lawyers must protect their clients' interests above their own.<sup>28</sup> Fiduciary principles, usually embodied in ethical regulations, constrain both the formation and the substance of the contract.<sup>29</sup> For example, although many lawyers may negotiate their fees with clients and may seek to charge what the market will bear, they may not charge fees that would be considered unreasonable

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26. The client's promise may, of course, be conditional, as in a contingent fee arrangement in a civil matter.

27. See, e.g., *J. Lewis Madorsky Co. v. Nolan*, 992 F. Supp. 945, 949 (N.D. Ohio 1998); *Guerrero v. Bluebeard's Castle Hotel, Inc.*, 982 F. Supp. 343, 346 (D.V.I. 1997); *Gallagher, Langlas & Gallagher v. Burco*, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). It is true, of course, that some agreements are unenforceable unless they are reduced to writing, most notably those that fall within the various statutes of frauds.

28. Of course, this does not exhaust the lawyer's fiduciary duties. For a thorough discussion of fiduciary duties of professionals, see *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 28 (Proposed Final Draft No. 1, 1996).

29. *Id.*

or excessive.<sup>30</sup> Nor may lawyers extract secret, personal benefits from the representation to the disadvantage of the client or, in many cases, even enter into business arrangements with the client beyond the representation.<sup>31</sup>

As with other contract problems, courts and other tribunals may be called upon to interpret provisions and fill gaps of engagement letters. With engagement letters, the tribunals will use the lawyer's underlying fiduciary duty as an interpretive aid, which often benefits the client. These and other constraints deriving from fiduciary responsibility apply whether or not the understanding is reduced to a writing. Although they may be rendered more precisely in an engagement letter, neither fiduciary duties nor other contractual obligations can be expanded or restricted by one party. In the end, the use of an engagement letter principally suggests a formal change, not a substantive change, in the legal relationship.<sup>32</sup>

This conclusion leads to the next question: If reducing the agreement to writing works no fundamental change in the parties' legal rights, why bother? The answer for engagement letters mirrors that for most other contracts.

#### *B. Economic Considerations in the Use of Engagement Letters*

Especially because engagement letters remain largely optional, both lawyers and clients will desire that the engagement letter decision be rational in both the business (microeconomic) and professional senses.<sup>33</sup> A standard method for making the judgment about economic rationality requires what the dismal scientists call marginal return (utility or benefit) analysis and what the rest of us call common sense. Simply put, an engagement letter should yield benefits that justify making the extra effort required to produce it. The effort to draft a more, rather than less,

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30. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a); GA. BAR RULES Rule 4-102(d), Standard 31(a)-(b).

31. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a)-(b); GA. BAR RULES Rule 3-104; GA. BAR RULES DR 5-104.

32. As shown below, however, this added formality will often have a beneficial effect on the substance of the contract. Indeed, one of the rationales for encouraging a writing is that it will improve the clarity and content of the agreement. See *infra* Part II.B.3.

33. This may be more true for transactional and other business-related representations, in which the client may be expected to practice microeconomic rationality as a matter of course. Whatever the case, it is important for the society in which both lawyers and clients operate that transactional engagement letters make economic sense. In a free enterprise system in which costs are internalized—accounted for by the firm and not left as external costs imposed on society—a rational firm (microeconomic) decision will translate into societal benefit.

comprehensive agreement should return still greater benefits. Under this principle, the thoroughness of the engagement letter will increase until the cost of the next increment of effort exceeds its return.

This analysis would seem to require lawyers and clients to evaluate the use of engagement letters not as a whole but rather as an aggregation of provisions, each of which addresses a discrete issue confronting the client and the lawyer. To do that, the parties would first agree that some writing is worthwhile, even if it does little more than, say, acknowledge the matter and the fee. Next, they would determine how much more detail to include in the letter, one issue at a time, until the cost of addressing the next issue exceeds the value of the benefit expected. That approach would require redesigning the contractual wheel with each new matter, an expensive and usually unjustifiable proposition for both lawyer and client.

The Report takes a different tack. It concludes that transactional matters will ordinarily require even basic agreements to comprehend seven core issues. Increasing the level of complexity within or beyond those seven core issues may then require the parties to consider marginal costs and benefits of each additional elaboration. This extra effort should be undertaken when it appears that it will bring sufficient benefit.<sup>34</sup> In the usual engagement letter, addressing the seven core issues is essential to its function, and the letter will ordinarily return benefits that justify the costs.<sup>35</sup> Lawyers and clients should always begin with these issues, focusing their efforts on precise substance.<sup>36</sup> Once they have met the precision and clarity goals for the seven core issues, then they may consider augmentation with special provisions that will usually be unnecessary. This approach should increase time and resource efficiency, including reducing drafting costs.

This benefit/cost calculus may already be embodied to a degree in ethical rules imposed by governing bodies and by individual practitio-

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34. Consider the prosaic metaphor of the automobile purchase. When buying a functioning automobile, one needs to be sure it includes all essential components: an engine, a transmission, four wheels, etc. Without these components the automobile will function poorly, if at all. Because each of the components comes in a multitude of versions that can affect performance, the buyer should always choose each carefully. The buyer may desire to add special components tailored to the needs of those who will use the car, perhaps a CD player and a moonroof. At that point, the buyer should assess the marginal utility each would provide and compare that to its additional (marginal) cost. The buyer should purchase only those components whose benefits exceed their costs.

35. For a discussion of the specific benefits and costs of engagement letters, see *infra* Part II.B.1-2.

36. It is possible that one of the seven core issues will be a nullity. Even so, it should probably be addressed. For example, if the parties see no current or potential conflicts of interest, that conclusion should be stated.

ners. For example, some ethical rules require or suggest written agreements regarding fees, especially if the fees are contingent.<sup>37</sup> One explanation for this special attention is that fee disputes are relatively common and costly. Assuming such rules to be rational, bar associations and courts have apparently determined that the potential benefit to the parties of avoiding these costs justifies the marginal cost of memorializing the fee agreement in a writing. The writing therefore offers the potential of avoiding a possibly costly dispute. Even when a dispute arises, a writing offers the possibility of resolving it in a more efficient and less costly manner. Similarly, when canvassed informally, lawyers usually cite fee agreements as the one area of the lawyer-client relationship that they put in writing, even when not required to do so. They explain that the fee is the issue most likely to be misunderstood by the client and to be a problem at the conclusion of the matter. Simply put, lawyers and clients seem willing to reduce the fee agreement to writing because they see that the marginal return from the writing—understanding, peace of mind, prevention of disputes, resolution of disputes—exceeds the marginal cost, in the form of added time and resources expended in making the writing.

**1. Costs of Using an Engagement Letter.** It seems intuitively obvious that the additional formality of a writing will add cost at the formation stage of the professional relationship. Although this may often be correct, as discussed below, it is not necessarily so. Because the cost is more immediate and obvious than the often speculative problems the engagement letter seeks to avoid, just the perception of added cost may deter parties from the endeavor. Absent a rule requiring a writing or some personal experience demonstrating its value, lawyers and clients may proceed on a conversation and a handshake or with an inadequate letter. They might have been well advised to think again because they may have found the costs lower and the benefits greater than they believed.

*a. Direct Costs.* The most obvious, but usually the most trivial, costs are those directly incurred in creating a writing. Direct costs include the paper, ink, computer disks, postage, and staff necessary to conduct the negotiation and drafting. For a single engagement letter, these costs will usually be minimal. Most law firms probably track such costs in general ways but do not bother to charge them separately in client billing. Similarly, clients who incur such costs may account for them by project but would not usually find them significant.

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37. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b)-(c).



Far greater costs will likely come in devotion of lawyer and client time to the negotiation of the engagement letter's terms. Clients must explain the nature of their legal problem, and lawyers must explain the terms and the limits of their representation. If these negotiations match those preceding an oral agreement, there is no added negotiation cost. Given the Report's suggested engagement letter format, however, it is likely that negotiations will be more thorough and that consequent costs will increase when a comprehensive engagement letter is contemplated.<sup>38</sup>

Lawyers may measure the extra time in hourly fees. If they bill those hours to the client expressly or otherwise, the prospective benefit matches their cost, and it is a wash.<sup>39</sup> If they do not, they could measure the time-cost lost in terms of the loss of an alternative use or opportunity, assuming they have one. In any case, the efficiencies of negotiation, and therefore the reduction in costs, ought to grow with experience for both the lawyer and the client.

Drafting costs deserve additional comment. As with negotiation costs, lawyers may measure drafting costs as time and hourly fees and may charge them or not. A principal goal of the Report is to reduce the drafting costs to a reasonable minimum. As noted above, by following the Report's format of seven core issues, lawyers and clients should not spend much time deciding upon issues to address. They will likely spend more time drafting the core provisions, but again, the Report's suggestions should reduce this effort significantly. As lawyers increase their experience with the process and develop their own form bank, the efficiencies should increase even more.

Clients may see the costs of the engagement letter as extra fees charged for the legal representation and extra internal business resources devoted to the negotiation, such as principal, executive, and staff time. Business clients may also seek to pass these costs to their customers. If their competitors are doing the same for similar matters, this added increment of cost should not impair the client's competitive position. If their competitors are not, there is at least a theoretical disadvantage.

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38. Indeed, one rationale for a writing is that it should foster a more structured and careful discussion phase. To some extent, time costs may diminish as lawyers and clients gain experience with engagement letters.

39. In the usual case, the additional charge for the lawyer's time will find its way into the hourly fee or the hours charged to the client. In this way, the lawyer's direct costs at least are translated into client direct costs. This fact may be camouflaged, however, when the lawyer increases the hourly charge or flat fee rather than simply charging for the extra time at a lower rate.

*b. Opportunity Costs.* Economic justification requires that the engagement letter's aggregate benefit exceed (or at least equal) the potential return from alternative uses of the lawyer's and the client's resources. After all, time and money are finite; devoting more of them to negotiating and drafting an engagement letter will mean less of them for alternative activities. Other profitable activities will have to be ignored or postponed. Economists call this "opportunity cost." As noted above, lawyers may measure this as the forgone opportunity to charge other clients for the time. Lawyers may easily overstate the value of that opportunity if they fail to consider the possibility that the alternative opportunity may also deserve an engagement letter. This observation suggests that the lawyer who decides as a matter of policy to use engagement letters will not likely incur an opportunity cost if the alternative activity is another new matter. Only when the alternative is an existing matter would the time likely be billed differently and provide a genuine opportunity.<sup>40</sup>

Clients must also account for alternative possibilities. Staff and executive time devoted to engagement letter negotiation usually reduces the time available for other productive activity.<sup>41</sup> If the alternative activity requires legal assistance, it may also deserve an engagement letter, and the opportunity cost may be negligible. If it does not, then the comparison with the alternative opportunity's return should take into account the value of the original project, not just the cost of the engagement letter.

*c. Other Costs.* Other potential costs include possible damage to the professional or personal relationship between the lawyer and the client during the negotiation process, and, for lawyers, possible lengthened exposure to liability for breach of the agreement. The former concern, given the purpose of the negotiation and the potential benefits that flow from clarification of the engagement, ought to be minimal, as explained

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40. If the alternative new matter is itself more attractive, then the lawyer may see that the opportunity cost is sufficiently significant to forgo the first opportunity. However, that is a judgment about the opportunity cost of the entire matter, not the engagement letter that would precede its acceptance.

41. This is true when client time is fully occupied. Another argument is that salaried employees work extra hours at no marginal firm cost. That may be true if those employees do not become less productive or achieve alternative compensation, such as enhanced bargaining position for their next salary discussion. To the extent that the client employs in-house lawyers, they can be seen simply as salaried employees.

below. The latter is actually a benefit to the client, whose interests ought to be paramount.<sup>42</sup>

**2. Benefits of Using an Engagement Letter.** The benefits derived from engagement letters can take the following two forms: (1) return (income or other benefit) produced directly, and (2) transactional efficiency coupled with costs or losses avoided.

The direct returns to the lawyer are straightforward. If lawyers charge specifically for the time involved in negotiating and drafting the engagement letter, they will have that portion of their fee as a direct return. However, because the client sees that as a cost, the net effect, and the benefit, of the lawyer's fees for the transaction is zero. If this were the only benefit, as an economic matter, the parties should give it a pass. Other benefits must justify the letter's costs.

Two other often-related benefits control—transactional efficiency and loss avoidance. In an ordinary business transaction, the client's dominant goal is to make a profit. Ultimately, a law firm has a similar goal with respect to the representation. The client hopes that legal representation will increase resource productivity by creating efficiencies and reducing "legal friction"<sup>43</sup> to the extent possible. For example, imagine a representation undertaken without proper consideration of potential conflicts of interest. If a law firm undertakes the matter only to discover that it must terminate its representation and hand the matter to a second firm that provides redundant services (for example, legal research and fact investigation), the client may be subjected to double fees. Time invested at the outset might disclose such conflicts, thereby allowing the client to avoid them. Such friction and losses take many forms, including costs that come from having to associate special counsel when the legal scope outstrips the firm's expertise; litigation costs deriving from a dispute over fee calculations; delay costs deriving from stopping midstream to negotiate whether the firm will or can represent a business affiliate; and any other costs avoidable by careful contract negotiation and drafting.

One difficulty in ascribing benefits to engagement letters arises from the fact that professional representation, especially the more complex corporate variety, may stretch out over time and require frequent

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42. For the effect of a writing on the statute of limitations, see *supra* note 24.

43. "Legal friction" is my phrase for any source of productive inefficiency that could have been prevented by good lawyering. Legal friction occurs whenever extra and unnecessary resources must be expended to comply with law, to negotiate contracts, to defend avoidable lawsuits, or to redo products or services that were created in violation of public or private law. Spending resources unnecessarily is a cost to one or more parties and to society.

adjustment. Longer-lasting relational exchanges can make it more difficult for the parties to define performance obligations and to allocate risks and costs properly. In such cases, the cost of negotiation may soon outrun its benefits and become counterproductive. The answer is for such parties to fall back on professional or institutional norms that require at least cooperation and compromise, if not more.

The engagement letter, as the Report suggests, implicitly recognizes this dilemma and solution. By suggesting a format and form approach, it attempts to reduce the costs of identifying issues and their common resolutions. It also recognizes both the limits of contract and the fiduciary duties that place such letters squarely in a world in which professional and legal norms will assist the continuing relationship.

**3. General Benefits from Putting Agreements in Writing.** In general, a writing serves several beneficial functions in the creation, interpretation, and performance of contracts. The current inquiry is whether those general benefits inhere in the special case of an engagement letter. There is no better reference for that inquiry than Professor Lon Fuller's classic article, *Consideration and Form*.<sup>44</sup> In that article, Professor Fuller identified the following three functions of legal formalities, which include the formality of reducing an agreement to writing: the cautionary function, the evidentiary function, and the channeling function.<sup>45</sup> Each has beneficial application to the engagement letter.

The cautionary function,<sup>46</sup> as its name implies, holds that imposing formality on an obligation tends to cause those contemplating (or participating in) the undertaking to act more cautiously. This idea explains a great deal of ritual, from a wedding ceremony to a judge's donning of a black robe. Its principal premise is that within boundaries, the seriousness with which persons take an event varies directly with the level of formality attached to the event. In turn, the more serious they recognize the event to be, the more likely it is that they will exercise caution—by investigation, discussion, and analysis—before participating in it. As Professor Fuller points out, such formalities in a contract can take any of several forms—a seal, an attestation, a notarization, or a writing.<sup>47</sup> Several benefits accrue to both parties

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44. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). This article is often cited as seminal in the uses of contract formalities. Its principal focus was the role of consideration as a formality. *See id.* at 799-800, 814-24.

45. *See id.* at 800-04.

46. *See id.* at 800.

47. *See id.*

from this function. When they contemplate or confront a writing, the parties are not as likely to come to treaty thoughtlessly. To the extent that the parties must acknowledge the writing by signatures, their caution will likely increase. Just knowing that a writing is contemplated causes parties to take greater care in identifying and negotiating the component parts of the agreement and in ensuring that its language accurately reflects the agreement.

The second function of the writing formality is evidentiary.<sup>48</sup> The writing provides reliable information about the agreement at a later point. Most important, written contracts provide reliable information to the parties themselves. When memory fails one party about its or the other's obligations, or when the parties disagree about the substance of their agreement, the writing supplies a ready, objective referent. The availability of the writing increases the chances of amicable resolution of the dispute without resort to expensive resolution mechanisms. When such mechanisms, such as mediation or litigation, become necessary, the engagement letter provides third parties with reliable information about the agreement.

Another benefit flowing from the evidentiary nature of the writing enures principally to the client's benefit. Critics of engagement letters may worry that it provides an opportunity for lawyer overreaching. That is, the lawyer may include provisions in the engagement letter that are inconsistent with professional obligations in that the provisions may stray into territory inconsistent with law or ethical regulation, omit provisions required by such rules, or support excessive fees. The provisions ought to have just the opposite effect. The writing brings sunshine into an otherwise dark and private place and makes the lawyer's defalcation more obvious to all. Recognizing this, perhaps the lawyer will attend more carefully to propriety.

The third function of the writing is the channeling function.<sup>49</sup> The formality provides an obvious means or mechanism—a channel—to accomplish the parties' goals. Once accepted, the formality becomes the usual way that the parties (and others) know what has happened between them. Properly followed, the formality will leave little room for ambiguity of purpose. In this way, engagement letters, like all written contracts, assure that the parties are legally bound to one another and understand that to be so.

A fourth function, not described by Professor Fuller but related to both the channeling function and the evidentiary function, might be called the "precurative" function. Written contracts, including engagement letters,

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48. *See id.*

49. *See id.* at 801-03.

indicate the beginning of the new relationship. This may be especially important in lawyer-client interaction, when rather informal consultation can invoke professional duties and when clients are occasionally uncertain about whether they have actually engaged a lawyer. An engagement letter can provide that obvious threshold. As engagement letters become more common, more clients will come to view them as the normal precursor to active representation.

### *C. The Lawyer-Client Relationship*

Some clients and lawyers worry that either the process of negotiating an engagement letter or the fact of its existence will change the personal and professional relationship. A similar worry may attend engaged couples who contemplate a prenuptial agreement. After all, is not the relationship much deeper and more important than buying a new freezer? Of course it is. This part of the problem has several component issues.

First, both lawyers and clients may see suggesting a writing as questioning their integrity. If a lawyer's or a client's word was good in the past, why should it not be good for all time? One harshly realistic response to this concern is that we no longer live (if we ever did) in an ideal world. If the matter is important, and if neither the humans involved nor their trust for one another is perfect, then getting it in writing helps both parties sleep at night. Another response is that the writing just reflects what was agreed to orally—it simply memorializes the understanding. It affords both parties an important opportunity to reflect upon their agreement carefully before proceeding. Practically, this concern should evaporate with the increased use of engagement letters. The more commonplace engagement letters become, the more the parties become inured to them. Lawyers already report that clients, especially more sophisticated ones, expect an engagement letter.

Second, the client may see a proposal for an engagement letter as an opportunity for lawyer overreaching. That concern should be addressed directly by the lawyer explaining the benefits of an engagement letter. It ought to be possible for the lawyer to explain just how the letter will protect the client against lawyer predation.

Finally, when a party is not familiar with the concept of engagement letters, there exists a natural sensitivity—call it suspicion—that makes issues one and two seem like real possibilities. This aspect of the problem is cured by desensitization. The more that engagement letters become the norm, the less anyone will notice their existence or react negatively. In fact, this concern holds the seeds of demise. The more commonplace engagement letters become and the more boilerplate their language, the less effectiveness they maintain.

## CONCLUSION

Although there may be a trend toward the greater use of engagement letters in legal practice, not all lawyers may understand or welcome it. In 1997 the Georgia Bar's Corporate and Banking Law Section undertook a Professionalism Project that determined to make engagement letters a matter of professionalism. It decided that lawyer professionalism would improve with increased acceptance and thoroughness of engagement letters. Engagement letters offer benefits and protections for the lawyer and the client alike. They entail some costs, but their benefits will ordinarily outweigh their costs so significantly as to make the decision to use them economically and professionally rational. The Report's suggested engagement letter format, examples, and alternative provisions should assist all practicing lawyers to develop engagement letter forms and efficient practices that are beneficial in their practices. As lawyers and clients increase their familiarity with engagement letters, even greater efficiencies may attend their negotiation and drafting.

## APPENDIX

### OUTLINE OF THE BASIC ENGAGEMENT LETTER

As the Report noted, engagement letters vary from the simple and straightforward to the extremely detailed and complex. The Report suggests that all comprehensive engagement letters should seek to clarify the following seven categories of information:

1. Acceptance of Engagement
2. Identification of the Client
  - a. Corporation, partnership, individual, etc.
  - b. Disclaimer of representation of affiliated parties
3. Identification of the Matter
  - a. Description of work to be done
  - b. Limitations on engagement (e.g., duration)
4. Scope of the Engagement
  - a. Legal services to be provided by lawyer
  - b. Legal services to be provided by others
  - c. Responsibility of lawyer for review of opinions and work product of other providers of legal services
5. Fees and Billing
  - a. Basis for billing fees (e.g., hourly rate; blended rate; contingent fee; reduced hourly rate and contingent fee; fixed fee based upon task; premium billing based upon results)
  - b. Retainer and refreshers
  - c. Expenses (which charged to client; time of payment; mark-ups)
6. Conflicts of Interest
  - a. In general
  - b. With former client
  - c. Representing an organization; multiple clients
  - d. Imputed conflicts
7. Termination of Engagement

### OVERVIEW OF THE FORM AND CONTENT OF THE ENGAGEMENT LETTER

After providing a brief introduction and suggested engagement letter outline, Section I of the Report provides a sample engagement letter following the organization of the outline. The Committee's purpose in beginning with a sample engagement letter was to demonstrate how the core elements of a transactional engagement letter could be fleshed out



in a coherent whole. The letter derived from a hypothetical set of facts describing a real-estate developer in need of legal assistance.

Section II of the Report follows by giving attention to each of the outlined elements of an engagement letter. It suggests specific language and content for each element, usually with one or more alternative provisions. Brief commentary on practical application accompanies the Report's suggestions, which by no means exhaust the possibilities. In essence, Section II of the Report serves as the form bank contemplated by the Committee, offered with the hope that it will assist lawyers to begin or expand their form files.

The Report concludes, in Section III, by exploring more deeply the legal and ethical issues pertinent to each of the elements of the letter, with a more detailed discussion of the problems each provision is designed to address. This third section also follows the seven-elements organization of the engagement letter outline offered at the outset of the Report.<sup>50</sup>

#### **REPORT SECTIONS I AND II: FORMAT AND PROVISIONS FOR THE ENGAGEMENT LETTER<sup>51</sup>**

Engagement letters can vary from simple to extremely detailed. The Report suggests that most engagement letters for transactional representations should seek to clarify at least seven specific categories of information.<sup>52</sup> There may, of course, be reasons why some provisions are unnecessary. For example, when the parties see no current or potential conflicts of interest, that category may be omitted.

Nonetheless, even when the parties agree that one of these categories need not be included, working from such an outline will remind them to raise the question. In that way, the outline serves as a checklist. Many lawyers already work from similar checklists, perhaps much more detailed ones. In any case, a good checklist translates easily into an engagement letter draft.

Because the Report is directed to lawyers and their engagement letters, the comments that follow each of the category headings usually suggest the lawyer's viewpoint. However, the comments apply equally

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50. The Committee hoped that organizing each of the three sections under a consistent menu—the topics indicated by the outline—would enable readers to locate pertinent provisions and commentary with relative ease and without having to wade through material not useful for their specific drafting question.

51. As noted above, this Article does not reproduce the Report in full. Rather, it includes only the following excerpts to suggest the Report's organization and content and to inspire the reader to seek out the full Report. The electronic form of the Report contains no page numbers.

52. *See supra* p. 63.

to clients who propose their own engagement letters. In other words, clarity with respect to all the suggested provisions enures to the benefit of both parties.

Most of these major categories will require amplification and perhaps discussion in the letter. As an example of how the outline above may be fleshed out, Section I of the Report sets out a sample engagement letter concerning legal representation for a real-estate development project. Section II of the Report follows with numerous alternative provisions that would be appropriate for the categories of information recommended by the outline.

To give some flavor of the Report's suggestions, I have set out several examples of a few categories from the Section I sample engagement letter. The bold-faced headings found underneath the category heading refer to alternative or additional provisions that the Report suggests in Section II.

#### *A. Acceptance of Engagement*

This is usually a brief introduction to the letter establishing that the lawyer wishes to represent the client under the terms that the parties earlier discussed and agreed upon.

The Report suggests, by way of example, the following language:

[I, We] appreciate your selection of [firm name] to perform legal services for you in connection with the proposed SeaPoplar project (the "Project"), as set out below. This letter will confirm the terms of our engagement as orally agreed upon at our conference on [date].

An important consideration for both parties is how the lawyer will know that the client accepted the terms set out in the letter. The acceptance provision may also include a passive or active (execution requirement) provision. Some lawyers will wish to place such a provision at the end of the letter. The Report's sample engagement letter includes the following request for acknowledgment and execution at the end:

If you agree with these terms of our engagement, we would appreciate your signing and dating the enclosed copy of this letter in the space below and returning it to us. We will need a signed engagement letter before we can commit the substantial resources this matter will require. Of course, if you have any questions or comments whatsoever, we would welcome an opportunity to discuss your concerns with you.

Paul, we are flattered and delighted that you have selected the Firm to represent you in this exciting venture, and we look forward to its ultimate successful conclusion.

The Report also includes the following two additional examples.<sup>53</sup>

**Opening Paragraph Stating Execution Requirement  
Passive Acknowledgment of Engagement Terms**

*B. Identification of the Client*

Transactional matters may involve one or more affiliate organizations, such as a subsidiary or a parent company, or one or more principals, such as an individual and a wholly-owned corporation or general partners and a partnership. In such cases, the parties need to identify which entity (or entities) is the client. It may also be advisable to identify which entities or persons are *not* to be represented by the lawyer. The Report's sample engagement letter includes the following provision:

Our clients in this transaction will be you, Paul P. Promoter, individually, and your wholly-owned corporation, Development, Inc. ("Development"). It is anticipated that one or more limited partnerships will be formed in connection with the purchase, development and/or operation of the Project, and that Development will act as general partner in those partnerships. In that event, the Firm will act as counsel to the limited partnerships.<sup>54</sup> The Firm has not been engaged to, and expressly does not agree to, represent any other person or party in connection with the Project. Specifically, the Firm will not represent the limited partners of any partnerships formed as anticipated. You have agreed that the Firm may confirm in writing to any other participant in the Project that the Firm does not represent that participant.

The Report also contains the following alternative suggestions:

**Single Client - Corporation**  
**Single Client - Association**  
**Multiple Clients**

*C. Identification of the Matter*

This provision briefly names and describes the purpose of the representation. This may be especially important when the lawyer or

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53. As the Report emphasizes, its sample provisions are suggestions only and are not intended as either prescriptive or proscriptive.

54. [From the Report:] In including this provision in the engagement letter, counsel must consider the potential conflicts of interest that exist between the corporate general partner and the limited partners and limited partnership. At the point the limited partnerships come into existence, counsel should inform the entities of the potential conflicts and seek their consent to the representation. REPORT ON ENGAGEMENT LETTERS IN TRANSACTIONAL PRACTICE, *supra* note 5, at Part I.2 n.8.

firm is representing the client in other, distinct matters and when there is a history of past representations. The following sample engagement letter provision describes precisely the scope of the matter:

The matter on which we have been engaged involves the assembly, development, and ultimate sale of what you have termed the SeaPoplar Project. You have advised us that you hold options on several contiguous parcels of land on the Savannah River some miles downstream from the city, and that you intend to assemble those parcels as a single unit and build a multi-use development, including hotel, retail, and residential space. You intend to use Development as your business vehicle in this Project and expect Development to be general partner of any limited partnerships which are formed with respect to the Project. You anticipate that build-out of the hotel and retail space will be accomplished by December 31, 1997, and that completion of the residential infrastructure will be accomplished by June 30, 1998. It is your intention ultimately to sell all portions of the Project to third parties not connected with you.

The Report includes the following alternative:

**Generic Development Project**

*D. Scope of the Engagement*

Here the parties should take care to describe as precisely as possible what professional services the client expects from the lawyer. Many transactional matters require representation by more than one lawyer or firm, as when special tax, environmental, or criminal law issues arise related to the main project. Each firm will want to know which pieces of the representation come within its duties.

The Report includes the following sample:

We will provide all legal services directly relating to the purchase, development, and operation of the Project. Without limitation, we expect those services to include the drafting of appropriate legal documents to create the limited partnerships you expect to form; the drafting of legal documents, examinations of title, closing of real estate purchase transactions, and obtaining appropriate land use approvals from involved regulatory agencies with respect to development and operation of the property; drafting construction and related documents with respect to development of the property; drafting appropriate documents with respect to financing of the purchase and development of the property; drafting appropriate documents with respect to the operation of the property upon completion; drafting appropriate documents with respect to the ultimate sale of the Project, or portions of it; negotiations with other parties with respect to all of the above functions; and advising with you and Development with respect to these matters. Notwithstanding the above the Firm has not been

engaged to provide any services with respect to environmental matters which may impact upon any phase of the Project. We understand that you will obtain other counsel to advise you and to take such action as is necessary with respect to any environmental matters, including negotiating with the appropriate regulatory agencies and obtaining environmental permits necessary for the Project. Of course, we will cooperate with such counsel towards furtherance of the overall development of the Project, but we will not be responsible for any legal matters relating to environmental concerns.

Other suggestions include the following:

**Single Client - Transactional Representation**

**Single Client - Regular Representation**

*E. Fees and Billing*

Lawyers have many fee structures and billing practices to choose from and explain to their clients. The sample engagement letter's fees and billing provision is lengthy.

The Firm will charge fees for its services based upon the regular hourly rates of the lawyers and support personnel working on this matter. It is anticipated that the undersigned will be the partner in charge of the matter; my current hourly rate is \$200 per hour. It is expected that John Jones and May Smith, partners in the Firm, will spend considerable time on this matter; their hourly rates are \$175 per hour. It is also anticipated that Ann Page, a younger partner, will be involved in the Project, and her rate is \$150 per hour. We anticipate that at least three associate attorneys will work on this matter frequently, but we have not yet identified those associate attorneys. The hourly rates for our associates range from \$80 per hour to \$125 per hour. We will utilize our paralegal assistants in the matter, and expect at least one such assistant to be regularly engaged on this file. Our paralegal time is charged at \$65 per hour. These hourly rates may change during the life of this Project, and your billings will reflect such changes. Finally, we reserve the right to add or substitute personnel on this matter as we see fit. The hourly rates of our other partners who may work on the Project currently range from \$140 to \$225 per hour.

We will also bill you for out-of-pocket expenses advanced to your account. We routinely make disbursements on client accounts for telephone bills, copying expenses, courier charges, travel expenses, overnight express deliveries, facsimile transmissions, local travel mileage and the like. All of these expenses will be charged to your file at our cost, with the exception of copying expenses. We assess a 20% surcharge on our in-house copying services to cover otherwise unrecoverable overhead costs. Out-of-office copying expenses are billed to you at our cost. We will obtain your permission before incurring any

expense item in excess of \$500. Further, we will obtain your permission before retaining outside experts, consultants, or other support personnel or facilities whose fees are expected to exceed \$1,000. You agree that you and/or Development are directly responsible for the fees of any outside experts, consultants, or other support personnel or facilities and will pay those fees directly to the outside party upon our request.

Our statements for fees and expenses will be rendered to you monthly and will be due upon receipt. Any statement which is not paid within 45 days of its date will be considered past due. Past due billings will accrue interest at the rate of 1/2% per month until paid. As you know, we expect this engagement to be quite intensive on our part, and you can expect substantial periodic legal bills from us. It is important that you budget for the payment of these bills. Nonpayment of our statements could give rise to the Firm's withdrawal from your representation.

The Report includes the following alternative samples:

- Hourly Rate - sample 1**
- Hourly Rate - sample 2**
- Variation from Hourly Rate**
- Result Factor - sample 1**
- Result Factor - sample 2**
- Fixed Fee**
- Estimated Fees Within a Range**
- Retainer - sample 1**
- Retainer - sample 2**
- Retainer - sample 3**
- Retainer - sample 4**
- Retainer - nonrefundable**

#### *F. Conflicts of Interest*

Conflicts of interest present some of the most difficult problems to identify and address. The potential for conflicts grows almost exponentially as the size of the firm increases. The possibility of conflicts also increases with the complexity of the organization represented.

The sample engagement letter includes the following provision:

We understand that Megabank is a potential lender on the SeaPoplar project. We have advised you that we represent Megabank from time to time in connection with loans for other construction and development projects, and we have discussed with you the possible conflict that may arise during our representation of you in connection with loans from Megabank as contemplated by this engagement letter. You have consented to both representations. This letter, therefore, confirms our disclosure and discussions with you of our existing

representation of Megabank and your consent to our continuing that representation while assuming our representation of you in connection with loans from Megabank as outlined in this letter. For your information, we are asking Megabank to execute a letter confirming its consent to our representation of you as described in this letter. Megabank is represented by separate counsel, who will advise Megabank on the issue of its consent.

In addition, we have advised you that this firm formerly represented a party in litigation concerning one of the real estate parcels involved in your current development plans. That representation has concluded, but under some circumstances we may have to seek the consent of that former client to continue our current representation of you. We judge that eventuality to be remote, and this letter confirms our disclosure and discussions with you of that potential conflict of interest and your consent to our representation of you as outlined in this letter.

Finally, if you are successful in involving local investors in the project, it is likely that some of the limited partners in the proposed limited partnerships will be current or former clients of the firm. Because such cases can create conflicts of interest and because there may exist potential conflicts between the general partner and limited partners, we shall seek consent of all parties to our continued representation as outlined in this letter.

The Report includes many alternative provisions dealing with one or more aspects of currently or potentially conflicting representations, including the following:

**Current Conflicts - sample 1**

**Current Conflicts - sample 2**

**Current Conflicts - sample 3**

**Prospective Conflict Admonition**

**Disclosure of Multiple Representation**

**Association**

**Simultaneous Representation of Partnership and of Individual Partner**

**Preparation of Shareholder Agreement**

**Possible Future Conflict with Client of Firm**

**Law Firms as Co-counsel**

**Double Imputation**

**Assurances Regarding Protection and Non-transmittal of Confidential Information**

### G. Termination of Engagement

Lawyers, clients, and even courts may terminate legal representation in transactional matters in many ways.<sup>55</sup> Without attempting to describe all the possibilities, the Report urges lawyers to remember as they draft engagement letters that they should include a clear understanding of the intended termination event. The Report's sample engagement letter provides:

It is anticipated that our engagement will remain in effect until the Project is substantially completed. We understand that the Project will be substantially completed when the hotel phase has in place an operating hotel, when the retail space is physically complete, and at least one major tenant is physically on-site, and when the streets, utilities and other infrastructure of the residential development are in place and the last building lot is ready for construction. It is anticipated that all of this activity will be accomplished by June 30, 1998. Our engagement will terminate on that date, or on such earlier date on which the Project has been substantially completed. Further, in the event the Project becomes inactive, or for any reason the Firm performs no substantive legal services for you for a period of one year, our engagement shall be deemed terminated.

Of course, you have the right to discharge the Firm at any time and for any reason. In the event we are discharged before the Project is substantially completed, we would expect you to retain other counsel to provide legal services through its completion. In that event, we will cooperate with you and your other counsel to effect as smooth a transition of legal services as possible. You will, however, be responsible for whatever out-of-pocket expenses the Firm incurs in making that transition, specifically including the costs related to the duplication of files and file materials and the physical transfer of the same to your new counsel, as well as for the time expended by the Firm to effect that transfer. In the event of premature termination at your request, all of our outstanding statements for fees and services will be immediately due and payable, and any subsequent statement we render for services related to the transfer of your representation will be due and payable upon your receipt of the same.

There are circumstances in which the Firm may feel compelled to resign your representation prior to the substantial completion of the Project, such as the development of an irreconcilable conflict of interest between you and some other client of the Firm, or your failure to pay our fee and expense statements when due, to name two possibilities.

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55. With respect to termination issues, especially as they relate to engagement letters, see DOCUMENTING THE ATTORNEY-CLIENT RELATIONSHIP, *supra* note 4, at 21-23, and *Conflicts of Interest Issues*, *supra* note 23, at 1385-87.



In the event the Firm withdraws from the representation prior to the substantial completion of the Project, the Firm again will make every effort to make transition of your legal business to a successor law firm as smooth as possible. In that circumstance, the Firm will assume responsibility for its out-of-pocket costs relating to the duplication and physical transfer of your files and outstanding materials, and the Firm will waive its time charges relating to that transfer. Again, the Firm's outstanding statements for fees and disbursements will be immediately due and payable upon the Firm's withdrawal from your representation, or the rendering of a final statement.

The alternative termination provisions also suggest that the engagement letter can attempt to account for potential termination events that may occur instead of the one predicted at the outset, such as when the client wishes to replace counsel or proceed without counsel, discovers a conflict, or terminates the deal. Alternatively, the lawyer may have to withdraw because of conflict, lack of needed expertise, lack of client cooperation, or failure to be compensated. The engagement letter provides the best opportunity for agreeing upon the mechanisms for accomplishing such terminations reasonably, amicably, and efficiently.<sup>56</sup>

The provision can also address ambiguity arising from lack of activity in a current or ongoing representation. The Report suggests adopting the presumption proposed by the Task Force on Conflicts of Interest of the ABA Section of Business Law that one year of inactivity or "lack of meaningful contact" terminates the lawyer client relationship.<sup>57</sup>

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56. [From the Report:] Two Georgia Standards specifically address withdrawal as it may apply to transactional representations:

**Standard 22.**

Withdrawal in general:

(a) if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(b) in any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.

A violation of this standard may be punished by a public reprimand.

**Standard 23.**

A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. A violation of this standard may be punished by a public reprimand.

In addition, Ethical Consideration 2-32 and Directory Rule 2-110 elaborate on withdrawal procedures and constraints.

REPORT ON ENGAGEMENT LETTERS IN TRANSACTIONAL PRACTICE, *supra* note 5, at Part III.7.

57. *Conflicts of Interest Issues*, *supra* note 23, at 1386.