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Non-Engagement Letters: What They Are and Why They Are Important

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"Non-engagement" letters (sometimes also called "non-representation" letters) occupy a unique—but uniquely important—place in a law firm's risk management toolbox. By definition, they are a communication—ideally in writing to provide a contemporaneous record—to someone we have encountered telling them that we are not going to be representing them. Circumstances vary, but a common example is a situation where a lawyer meets with three people about starting a business but will only be representing one of them going forward. Although a lawyer will prudently send an engagement agreement to the client, non-engagement letters tell the other two in my example that the lawyer will not be representing them. If a dispute among the three arises later, the non-engagement letters will make it clear that the lawyer is free to represent the client against the other two.

In this column, we'll first look at what non-engagements are and then turn to why they are important.

Before we do, however, two qualifiers are in order.

First, although we will use the term "letter" as a shorthand, a non-engagement letter can just as easily be an email or other electronic

communication. The key is a contemporaneous record that the non-clients have been told that the lawyer will not be representing them.

Second, as noted, a lawyer will ideally pair non-engagement letters with a written engagement letter to the lawyer's client clearly identifying the client being represented, the scope of the work being undertaken, and the fee arrangements. In many respects, non-engagement letters can be thought of as risk management supplements to a lawyer's engagement agreement with the client.

What They Are

We owe a wide variety of duties to clients, including competence, confidentiality and loyalty. In many instances, who the client is will be clear: the person sitting physically or electronically across our desk. In others, however, it may not be so clear. As noted earlier, the lawyer may have met with three budding entrepreneurs about a new business but will only be representing one. In those kinds of scenarios, it can be critical to clarify with all who the lawyer is—and is not—representing going forward so that the unrepresented parties will not claim later that they thought the lawyer was representing them, too, and didn't do right by them.

Analytically, a non-engagement letter relies on the central test for an attorney-client relationship in Oregon. In *In re Weidner*, 310 Or. 757, 770, 801

P.2d 828 (1990), the Oregon Supreme Court articulated a two-part test for an attorney-client relationship: (1) does the putative client subjectively believe the lawyer is representing them? and (2) is that subjective belief objectively reasonable under the circumstances? Although the subjective prong is a low bar, the objective prong is not and both elements of the test must be met for there to be an attorney-client relationship. A non-engagement letter speaks to the objective prong. It will be difficult for a person to meet the objective prong if they have received a contemporaneous written communication from the lawyer to the effect that the lawyer is not representing them (and the lawyer's subsequent actions are consistent with the non-engagement letter).

A non-engagement letter doesn't need to be long or detailed. Rather, it can be as simple as: "I enjoyed meeting with you and your colleagues earlier today about your plans for Goliath Software. As we discussed at the meeting, I will only be representing Moneybags concerning your new venture." Both the Professional Liability Fund (in the practice aids section) and the Oregon State Bar (in the Fee Agreement Compendium) have sample non-engagement letters available on their respective websites.

Why They Are Important

Whether an attorney-client relationship exists can certainly arise in the context of a regulatory complaint. *Weidner*, for example, was a disciplinary case that, in relevant part, turned on whether a lawyer had a conflict with a person who claimed to be the lawyer's client.

Whether an attorney-client relationship exists, however, can also play out in a variety of other contexts, including legal malpractice (*Lord v. Parisi*, 172 Or. App. 271, 19 P.3d 358 (2001)), breach of fiduciary duty (*Larmanger v. Kaiser Foundation Health Plan of the Northwest*, 805 F. Supp.2d 1050 (D. Or. 2011)), disqualification (*Tinn v. EMM Labs, Inc.*, 556 F. Supp.2d 1191 (D. Or. 2008)), and privilege (*Dorman v. County Mutual Insurance Company*, 2025 WL 2962470 (D. Or. Oct. 20, 2025) (unpublished)).

In all of these settings, non-engagement letters play a central role when a party asserts that it was a client of the law firm involved. In *Evraz, Inc., N.A. v. Continental Ins. Co.*, 2013 WL 6174839 (D. Or. Nov. 21, 2013) (unpublished), for example, the defendant insurer in a coverage case moved to disqualify the plaintiff's law firm for an asserted conflict. The carrier argued that it thought the law firm also represented the carrier because it had defended the insured in the underlying matter—albeit as corporate counsel, not insurance defense counsel.

The court denied the motion, noting pointedly that the law firm had sent the carrier three separate non-engagement letters.

Although there are other ways to prove the absence of an attorney-client relationship, a non-engagement letter—together with conduct consistent with the letter—can offer the key evidence to rebut that argument.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and was a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also taught legal ethics for over a decade as an adjunct at the University of Oregon School of Law. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.