

# Letters of Engagement and the Defense Bar

BY ROY SIMON

The new rule on letters of engagement that took effect on March 4, 2002, 22 NYCRR Part 1215, is not a long or complex rule, but it puzzles many lawyers in the defense bar. This article explores a few questions that defense lawyers have been asking.

Consider a lawyer who handles personal injury cases and other insurance defense matters for a number of different insurance carriers and corporate clients. The lawyer has longstanding relationships with most of the insurance carriers who send him cases, but occasionally the lawyer handles a case for a carrier or for an insured corporate client who has never retained him before. Some of the defendants are "repeat players" (such as a manufacturer who is one of the largest employers in town), but other defendants are individuals - typically drivers who had an auto accident, or an individual homeowner whose guest fell on the homeowner's property. Most of the cases are run-of-the-mill litigation defense, but occasionally the lawyer is asked to represent a carrier in a coverage dispute, or to file a fraud suit against an insured, or to supervise an investigation into possible fraud, or to undertake other atypical representations. Usually the lawyer is paid directly by the insurance company, but occasionally the named defendant pays the legal fees directly and seeks reimbursement from the insurance carrier.

Does the letter of engagement rule apply to this lawyer? If so, does the lawyer need to write a letter to each nominal defendant, or only to the particular carrier, or to both? If a letter is necessary, what should the letter cover?

## Start with the exceptions

It's helpful to start with the exceptions to the rule, because if any exception applies then we need not go any further. Section 1215.2 of the new rule states three exceptions to the engagement letter requirement: (1) the attorney expects the fee to be under \$3000; (2) the attorney will be rendering legal services of the same general kind as previously rendered to and paid for by the client; or (3) the matter is a domestic relations matter. We can rule out exception (1) in most cases, because - let's face it - most defense lawyers can't make a living handling matters where the fees are expected to be \$3,000 or less. (The \$3,000 exception was put in mainly to exempt flat-rate or low-rate, high-volume matters like residential house closings, name-changes, and wills.) We can also immediately rule out exception (3) because the matters we have described are not domestic relations matters.

That leaves exception (2), the exception for legal services "of the same general kind" that the client has previously received from the same lawyer, and has paid for. This exception deserves more attention. Obviously, most of the insurance carriers are often receiving legal services of the "same general kind" that they have received and paid for in the past. But before continuing our discussion about whether the legal services fit within an exception, we need to answer a more fundamental question: Who is the "client"

requiring a letter? Is an insurance carrier a "client"? And if the insurance carrier is a client, is it the lawyer's only client?

### **Is an insurance carrier a "client"?**

Identifying the "client" is crucial in answering letter of engagement questions because §1215.1(a), when it applies, requires a lawyer to provide a written letter of engagement to the "client." Is an insurance carrier a client?

In most cases, the answer will be "yes," the insurance carrier is a client. Section §1215.1(a) addresses this point in the following sentence:

"Client" shall include any person or entity that is responsible for the payment of the attorney's fees.

Therefore, an insurance carrier that is "responsible for" paying the attorney's fees is a "client" for purposes of the letter of engagement rule.

However, the carrier is not the insurance defense lawyer's only client; on the contrary, the lawyer's first duty is still to the insured. The definition in Part 1214.1(a) above says that the term "client" shall "include" an entity responsible for paying the fees. This definition was not intended to supplant the traditional notion that the insured is the primary "client." Courts have consistently and repeatedly said that an insured is a "client" and that an insurance defense lawyer owes total devotion and loyalty to the insured even though the insurance carrier is footing the bill. For example, in *Hartford Fire Ins. Co. v. Masternak*, 55 A.D.2d 472, 390 N.Y.S.2d 949, 953 (4th Dep't 1977), the court noted that when the insurer retained counsel on behalf of its insureds, the insureds "became the clients of those attorneys" and deserved "total fidelity, despite the fact that [the insurer] pays the attorneys' fees." More recently, in *Feliberty v. Damon*, 72 N.Y.2d 112 (1988), Chief Judge Kaye (then Judge Kaye) wrote that "the paramount interest independent counsel represents is that of the insured, not the insurer."

Federal courts in New York are of the same mind. In *Schneider v. Canal Insurance Co.*, 1999 WL 689476 (E.D.N.Y 1999), Judge Gleeson said it was "well-settled that the counsel retained by an insurance company to represent an insured has an attorney-client relationship only with the insured, and owes its entire allegiance only to the insured." Thus, the insured surely remains a "client" for purposes of the letter of engagement rule even though the insurance carrier also fits within the rule's definition of a "client."

Realistically, the defense lawyer inevitably feels loyalty both to the carrier which may continue to hire him in other matters, and to the individual insured whose defense he must pursue with maximum diligence. In most cases, both loyalties coincide; the skillful lawyer learns when to avoid a divergence in loyalties. For purposes of the letter of engagement rule, it's advisable to recognize that both insurer and insured come within the definition of "client."

However, not every insurance carrier will be a "client" for purposes of Part 1215. Many commercial insurance policies - especially those covering corporations rather than individuals - allow the insured to choose its own attorney, and obligate the insurance carrier to reimburse the insured for "reasonable" attorney fees, or for attorney fees up to a certain dollar amount. In my view, an insurance carrier whose

contractual duty runs directly to the insured and not to the attorney is not "responsible for the payment of the attorney's fees" as that phrase is used in §1215.1(a), and is therefore not a "client" for purposes of the letter of engagement rule.

### **Legal services "of the same general kind"?**

Now we can explore the meaning of the exception for a representation "where the attorney's services are of the same general kind as previously rendered to and paid for by the client."

First, let's focus on the easy half of this exception - "previously rendered to and paid for by the client." An individual insured will rarely satisfy this branch of the exception. Individual insureds are not "repeat players" in the legal system, so the defense lawyer probably has never rendered legal services of any kind to the individual insured. Thus, the attorney must send a letter of engagement to the individual insured even if the attorney has defended many similar cases on behalf of other insureds.

The same will be true when the defense lawyer is retained by an insurance carrier that has not hired the lawyer before. Thus, the attorney must send a letter of engagement to each new carrier that retains him to defend an insured. As the responsible bill payer, the carrier fits the definition of a "client" in §1215.1(a), and since we are hypothesizing that the carrier has not retained the attorney before, it will not have received or paid for any legal services from this attorney before.

The largest manufacturer in town, however, is almost certainly a "repeat player," and the attorney or his law firm will have "previously rendered" legal services to this client. Moreover, although the insurance carrier wrote the check to cover the legal fees billed by the defense lawyer while representing the manufacturer, I would consider those fees to have been "paid for by the client." To insist that the insured client itself write the check would unduly narrow the "paid for" exception.

Our hypothetical also posits, moreover, that the insurance defense lawyer has "longstanding relationships" with most of the insurance carriers. Accordingly, most of the insurance carriers have previously received and paid for legal services from the defense lawyer. Since the carriers with longstanding relationships satisfy the second half of the exception, we must turn our attention to the front half of the exception - are the legal services "of the same general kind" that the carrier has received and paid for in the past?

As the hypothetical notes, most of the cases are "run-of-the- mill litigation defense matters" such as personal injury defense. In my view, those cases plainly fall within the meaning of the phrase "same general kind." Every case has different facts, of course, but routine cases typically pose similar legal issues (e.g., the standard of care and the scope of recoverable damages). Most personal injury cases also require the same set of legal services - drafting pleadings and motions, taking and defending depositions, requesting and producing documents, drafting and responding to interrogatories, interviewing witnesses, hiring experts, negotiating settlement terms, etc.

On the other hand, filing a declaratory judgment action or investigating possible insurance fraud seems quite different from defending a routine accident case. One could argue that litigation is litigation, and that representing an insurance carrier directly in any type of litigation or possible litigation is the same general kind of service as defending the carrier's insured against litigation. In my view, however, that

argument is mistaken. In my opinion, if the attorney has not previously handled such a matter for a given carrier, then the services are not of the "same general kind" as defending a routine accident case. Therefore, the attorney must provide the carrier with an engagement letter the first time he handles a new type of matter for a given carrier.

The more difficult question is whether defending an unusually complex or difficult matter constitutes a service of the "same general kind" previously rendered to the carrier. This strikes me as a close question. However, I come down in favor of reading the phrase "same general kind" broadly. I think it covers all insurance defense litigation, whether simple or complex. At the same time, though, I would urge defense lawyers to provide the carrier with a letter of engagement whenever a matter is likely to be unusually complicated. Sending a letter of engagement is a sound business practice that is likely to improve attorney-client relationships and ward off disputes over legal fees or over the scope of the services the carrier expects the lawyer to deliver.

### **What should the letter say?**

We have now concluded that the attorney is obligated to provide a letter of engagement to every new insurance carrier-client and virtually every individual client, no matter how elementary or routine the matter may be to the lawyer. Moreover, we have concluded that the attorney must provide a letter of engagement even to longstanding carrier-clients when the legal services required for a particular matter are not of the "same general kind" that the attorney has furnished to the insurance carrier in the past. Now we get to the heart of the matter: what must the letter of engagement say?

Fortunately, this is a relatively simple question. A letter of engagement is not a complicated instrument. Section 1215.1(b) expressly requires that the letter cover only three subjects:

- (1) Explanation of the scope of the legal services to be provided;
- (2) Explanation of attorney's fees to be charged, expenses and billing practices; and
- (3) Where applicable, notice of the client's right to arbitration of fee disputes under Part 137 of the Rules of the Chief Administrator.

Setting forth these three subjects is easy. The New York State Bar Association's web site, [www.nysba.org](http://www.nysba.org), has posted a "Sample Letter of Engagement," and I have modified this sample letter so that it is suitable for insurance defense purposes in personal injury cases. (The letter can easily be changed to cover other types of insurance defense matters instead.) My modified letter, which should be addressed to the insured and copied to the insurance carrier, reads as follows:

To: [NAME OF INSURED]

This Letter of Engagement is furnished to you in accordance with Part 1215 of the Joint Rules of the Appellate Division.

### **SCOPE OF REPRESENTATION**

Our law firm has been designated by your insurance carrier [NAME OF INSURANCE CARRIER], to represent you in defense of a claim that has been made by [NAME OF CLAIMANT] regarding an injury that the claimant alleges was suffered on [DATE] at [PLACE OF ACCIDENT].

All of our services in this matter will end, unless we agree otherwise in writing, when the parties to the dispute reach a final agreement or settlement or when the court renders a final decision or judgment. The scope of our representation does not include appeals from any judgment or order of the court. Appeals are subject to separate discussion and negotiation between our law firm and your insurance carrier.

The scope of our representation also does not include any services you or your insurance carrier may request from us in connection with any other claim, dispute, matter, action or proceeding.

### **FEES, EXPENSES AND BILLING PRACTICE**

We intend to submit a bill to your insurance carrier for legal fees and litigation expenses no less frequently than every sixty (60) days. Your insurance carrier will pay this bill directly. Expenses will be separately stated on the bill and may include such expenses as court costs, expenses of investigation, medical examinations, costs of obtaining and presenting evidence (such as depositions and photocopying), the fees of expert consultants and witnesses, and other costs and expenses associated with litigation.

Our legal fees will be calculated based on the following hourly rates for attorneys and nonlawyers in our firm who are expected to work on your case:

\$ \_\_\_ per hour for the services of [ATTORNEY # 1];

\$ \_\_\_ per hour for the services of [ATTORNEY # 2];

\$ \_\_\_ per hour for the services of [PARALEGALS/INVESTIGATORS/ETC.]. Before we begin working on this matter, our law firm will require an advance retainer of \$\_\_\_, which will be paid directly by the insurance carrier.

### **ARBITRATION**

In the event that a dispute arises between our law firm and you or your insurance carrier relating to our fees, you or your insurance carrier may have the right to arbitration of the dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts, a copy of which will be provided to you upon request.

cc: [REPRESENTATIVE OF THE INSURANCE CARRIER]

The identical letter may be furnished to both the insured and the insurance carrier. Thus, a defense attorney may either address the letter to the insured and send a copy to the carrier, or jointly address the letter to both the insurer and the insured.

### **The signed retainer agreement exception**

Section 1215.1(c) sets out one more exception, but it is only a partial exception. Section 1215.1(c) provides as follows:

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

In other words, whenever an attorney is required to provide a client with a letter of engagement, the attorney may substitute a signed written retainer letter that covers the same subjects.

### **Conclusion**

The new letter of engagement rule is designed mainly to ensure that clients who have not dealt with an attorney before on a particular type of matter understand, at the time the attorney begins work, both the legal services the attorney is agreeing to provide and how the attorney will charge for those services. The rule applies to insurance defense lawyers, who will ordinarily have two clients in every matter - the insured, and the insurance carrier. However, complying with the letter of engagement rule should not be very burdensome, and can essentially be accomplished by either a form letter or a signed written retainer agreement covering the required subjects. In the end, letters of engagement are likely to increase client satisfaction and decrease claims against attorneys.

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