



## CBA Member Survey on Engagement Letters/Retainers

On April 28, 2010, the CBA sent out an e-update from the Task Force on Conflicts of Interest which asked recipients to reply to a consultation survey about engagement letters / retainers.

The purpose of the consultation survey was to gather information on the current use of engagement letters / retainers by lawyers in Canada and to gain a better understanding of the views of practitioners.

The responses cannot be considered definitive statistical data on the use of engagement letters / retainers by lawyers in Canada. Nevertheless, the feedback is extremely useful in informing the Task Force's next steps.

### Who answered the consultation survey?

The CBA received a very strong response – 679 respondents representing every jurisdiction in Canada. The responses are not statistically reliable in the way polling data would be but, as can be seen in Table 1, they generally reflect the distribution of lawyers across the country, albeit with British Columbia and Alberta slightly over-represented and Québec under-represented.

**Table 1 – Respondents by province / territory**

	<b>% survey responses</b>	<b>Actual distribution of lawyers</b>
Ontario	36.31 %	38.9 %
BC	22.32 %	11.8 %
Alberta	17.41 %	11.7 %
Quebec	5.06 %	23.1 %
Manitoba	3.87 %	2.1 %
Nova Scotia	3.72 %	3.0 %
Saskatchewan	3.42 %	2.1 %
NB	3.27 %	1.6 %
NL	2.53 %	0.9 %
PEI	1.19 %	0.3 %
NWT	0.45 %	0.9 %

Yukon	0.30 %	0.3 %
Nunavut	0.15 %	0.2 %

Almost 83 % of respondents are in private practice, with almost a third (32%) in solo practice or solo practice with one or more associates. More than a third of respondents (36 %) are equity partners. The other 17 % of practitioner respondents are in-house counsel (8.5 %), government lawyers (3 %), with legal aid lawyers, articling students, and lawyers working in the “other” category making up the rest (6 %). Table 2 shows the representation by type of private practice situation among the 83 % of survey respondents.

**Table 2 – Respondents: type of private practice**

Equity partner	36 %
Solo practitioner	24 %
Associate	22 %
Solo practitioner with associate(s)	8 %
Non-equity partner	6 %
Of counsel	4 %

Almost half the respondents have been in practice for more than 20 years.

**Table 3 – Respondents: years of practice**

Less than 3 years	13 %
4 to 10 years	17 %
11 to 20 years	22 %
More than 20 years	47 %

### **Does the firm require the use of an engagement letter or retainers?**

The firms of 38 % of respondents require the use of engagement letters or retainers in all cases, with 31 % of firms requiring them for some matters.

Respondents from the other 31 % of firms replied that they are not required to use engagement letters or retainers.

The mandatory use of engagement letters / retainers is highest among large firms with more than 250 lawyers (almost 70%) and lowest among the mid-sized firms of between 5 and 50 lawyers (fewer than 30%). Sole practitioners and in-house counsel were the next (50%) after large firms to report using engagement letters on all matters.

For firms requiring engagement letters or retainers the consequences for not following through range from no consequences to a "stern warning" to an inability to open the file. Other answers included:

- automatic retainer letter sent when file opened
- invoices cannot be processed without an agreement in place
- lawyer must confirm engagement letter sent
- approval of partner or Risk Management Committee for work to proceed on an urgent basis without a letter
- file review and follow-up by staff lawyer or staff member
- lawyer must explain why letter not sent
- self-policing/lawyer responsibility

Some respondents noted that work cannot begin on a file until a retainer is paid.

"No substantive work performed until retainer and deposit received."

"Require a retainer if the matter involves a fee more than \$1000."

### **When are engagement letters and retainers used?**

Some respondents (201) provided more details about the type of matters for which they use engagement letters and retainers.

They report using engagement letters and retainers for these matters, in descending order of frequency of response:

- litigation
- family law
- new clients
- estates
- contingency fees/class actions
- transactional client
- personal injury
- criminal matter
- complex/significant matter

They report not using engagement letters and retainers for these matters:

- not for residential real estate
- not for wills
- not for one-time consultation/reporting letter only
- not always for new matter for existing client

However, this last list is not definitive as some respondents report using engagement letters in these situations.

« En général, la lettre mandat est utilisée pour l'ouverture du premier dossier pour un nouveau client. Dans certain cas mineurs tel que notariation de document, il n'y a pas de lettre mandat. »

“Case by case - used upwards of 85 - 90% of clients.”

“All clients other than 2 or 3 large liability insurers.”

“Family, civil. We don't use them on corporate, real estate, wills.”

“I think technically we are supposed to send them out on all matters but the policy is loosely enforced. They generally go out on everything in the litigation department. In the other departments I think this is, in practice, more flexible.”

“We are in the process of developing a policy. Right now it is a bit ad hoc.”

“All matters except residential real estate conveyancing / mortgage transactions, in which case clients sign Directions to Pay when attending to sign Conveyancing / mortgage documents.”

### **Why are engagement letters and retainers used?**

Across all practices types and areas, the number one reason (90 %) respondents cite as the benefit of using engagement letters and retainers is to control or manage lawyer / client expectations about fees and the work to be done.

“It is a professional way to establish the relationship with the client, to make them feel secure that you are going to work on their behalf and to set ground rules.”

“Makes the client actually realize they are the client and they have hired a lawyer. It eliminates grey areas.”

Respondents also indicate that they use engagement letters and retainers for these reasons:

- avoid billing disputes (80 %)
- improve lawyer / client relations (65 %)
- avoid conflicts of interest (51 %)
- avoid a law society complaint (49 %)
- avoid a malpractice claim (39 % )

“Specify who will work on a file. Document discounts. Document any alternative billing arrangement. Set timelines and expectations. Address costs for copying, travel and the like.”

“Encourage clients to take full advantage of staff for non-legal matters.”

“Limit the retainer to matters outlined.”

“The retainer letter is used to set out the identity of the clients, the scope of work, the team to be engaged, and from whom instructions are to be sought and received. The negotiation of a retainer agreement is always a tricky hurdle to overcome at the outset of a relationship -- particularly when conflicts and conflict waivers have to be discussed. I overcome them by involving a senior member of our risk management committee who stresses the importance of the retainer agreement to the client.”

“Define our respective roles.”

“Best way to avoid disputes later and cover yourself.”

“Mainly to permit acting on conflicts ...”

“This is VITAL! Should be mandatory for all legal work.”

### **Why are engagement letters and retainers not used with all clients?**

When deciding on the need for an engagement letter / retainer, respondents are not as influenced by what other law firms are doing as they are by their clients' situation. They may be reluctant to write a letter when it may hurt client relations or be a burden for their client. New clients are more likely to receive a letter than existing clients with whom there is an on-going working relationship. Time and the administrative hassle are sometimes factors that prevent a letter from being sent to a client at the start of a mandate.

Only 13 % of respondents report not using an engagement letter / retainer because they don't see the need.

A few respondents do not use an engagement letter because of language issues – not in plain language, low literacy level of client, English or French is not the client's first language.

“J'ai un modèle en dossier mais je ne l'ai jamais utilisé car je le trouve compliqué pour des non-juristes. »

"The problem is that individuals are sometimes put off by the necessary detail of a fully protective letter."

"I should increase its use but must be careful not to damage client relations."

"I sometimes just forget to do one and then I get busy with the file. Then it's awkward to have the client sign one later on."

"My firm does not provide adequate training on how to discuss retainers with clients."

"We do not use retainer/engagement letters for our 'A' clients, those select clients which have established credit and for whom we act as counsel on numerous matters."

"I am a junior at an established office, so I follow procedure, which is a bit looser than I would prefer. I think the use of engagement / retainer letters would be extremely useful for most files."

It was noted that Alberta's Code of Conduct requires lawyers to send written confirmation of fee information to their clients.

### **Are practitioners using the CBA Task Force Report's model engagement letter?**

Over 70 % of respondents have not looked at the model engagement letters prepared as part of the Task Force on Conflicts of Interest Final Report and Toolkit (August 2008).

Only 15 % of respondents noted that their firm was using the precedent or had adapted it.

However, almost 80 % of respondents said that having an engagement letter precedent would be helpful.

"I do not have good precedents to use."

"Perhaps if there is a model that will make it easier to do."

## Conclusion

The responses suggest significant use of engagement letters and retainers among every size law firms, with 57 % of respondents reporting that 60 % or more of their current open files have engagement letters or retainers.

For some lawyers, the main purpose of correspondence at the beginning of a client matter is to establish fees and clarify billing practices.

"I mainly use an engagement letter to set out the agreed upon rate and invoicing/payment expectations."

"I feel really uncomfortable giving advice or doing work for which I am not retained. It's my security blanket."

For many, this early communication is primarily intended to define the terms of the mandate and clarify both lawyer and client expectations.

"We want to make sure that outside lawyers know what their mandate is and what we expect from them, particularly in terms of reporting obligations and fees."

"I like using retainer letters for new clients to set expectations and understanding of the lawyer / client relationship. I also think it is professional and creates an understanding that this is a business relationship."

Engagement letters and retainers also have other purposes.

"Essential for a joint retainer."

"If a potential client is not willing sign a retainer letter setting out the terms of the engagement, likely that person will end up being a "problem" client down the road – it's a good screening device."

A few respondents noted that their firm is currently working on a engagement letter / retainer policy, or should be.

"Policy is new so still in transition phase."

"We are implementing a mandatory retainer letter regime."

"Actually it has not been my practice to use a retainer letter and I am in the middle of a dispute with a client that has made me realize I must use one in the future."

Finally, the survey makes it clear that the CBA Task Force on Conflicts of Interest's Toolkit which includes a long and short-form model engagement letter has not yet reached all members of the profession. More work needs to be done to alert practitioners to these resources.