

PROFESSIONAL PRACTICES FOR INSURANCE EXPERTS:
Business Practices for Expert Witness Engagements

Presented by

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A. Engagement Letters

1. Reasons for using an engagement letter:

- To avoid misunderstandings about whether you were engaged as an expert.
- To clarify your role in the case.
- To have a reference document for opposing counsel about the rates they must pay when they take your deposition.
- To provide documentation about when you were engaged to begin working on the case.
- To clarify billing and collection arrangements for your client.
- To project a more professional business image.

2. Key contents of engagement letters:

- Name of the law firm engaging you as a consultant/expert (addressee of the letter).
- Identification of the case (caption, court, case no.).
- Identification of the party the client law firm represents (i.e., the "ultimate" client).
- Statement that the law firm is authorized to engage you on behalf of the ultimate client.

- A very general statement of the services you will perform. (This material should be generic, so that it can be used in virtually identical form in all of your engagement letters.) DO NOT state that your work will result in any stated outcome or show bias toward your client; it could then be used to discredit you at trial.
- Assent to any standing confidentiality orders by the courts that may apply to the case, on behalf of yourself and anyone working with you under your direction.
- Basis of billing for services (time plus expenses or flat fee plus expenses).
- The billing rates that will be charged for your time and anyone working with you.
- Statement of how much the retainer will be, and how the retainer will be credited for actual time and expenses incurred.
- Name of the party to whom periodic invoices will be submitted for payment.
- Payment terms for invoices.
- Whether interest will be charged on unpaid balances.
- Space for signatures of the attorney and the client representative.
- Retain the original, signed engagement letter in your billing file.

C. Retainers

1. Professional retainers are customarily charged by the legal profession, so both lawyers and their clients are familiar with them.
2. You can credit the retainer against the first bill, or against the final bill. Recommendation: Credit the retainer against the final bill, after all work is finished, to be sure you have some funds in hand for your time and out-of-pocket expenses.
3. Retainers are optional. If you can afford to work for free and to front out-of-pocket expenses for the client, why bother with a retainer? However, if you are uncomfortable playing banker for your client, then at least charge enough to cover your estimated expenses (e.g., travel costs), plus one day's time.

D. Fee Practices

1. Your hourly rate is a reflection of your skill, experience and value to the engagement. Like insurance rates, consulting rates should be adequate to

provide for your projected annual income from consulting, but neither too low nor too high. If the rate is too low, it cheapens your image, since many semi-skilled and semi-professional workers today charge as much as \$75 per hour. If the rate is too high, it makes you appear greedy (which is also sometimes understood to mean unscrupulous), and it may send a negative message to a jury if it is disclosed.

2. Hourly rates vary around the United States. In the major cities, a range of \$200 to \$500 per hour (or more – much more!) is common for major law firms and other professionals (e.g., partners in accounting firms). In smaller cities and outlying areas, clients may object to rates greater than \$200 (or less) per hour. Among professional consultants (any others don't matter), \$200 per hour is virtually the minimum rate for expert witness services.
3. Some consultants charge a multiple of their standard hourly rate for testimony, e.g. 150% of the standard rate for depositions or trial testimony. Although sometimes described as "combat pay," such surcharges on the rate are optional. Relatively little time is spent testifying during the course of most engagements. The extra bookkeeping for this time may be more trouble than the value of the bill.
4. If you can estimate the amount of time you need for preparation and testimony, you could use a fixed flat fee for the engagement. However, it would be prudent to place limits on the amount of work you will perform for such a fee arrangement. If reading voluminous documents is required to prepare to testify, the flexibility of hourly billing is fairer to the consultant. A little pile of documents, just "this high," often turns into a banker's box, plus several depositions and exhibits!
5. Most professional consulting firms charge separately for staff time (assistants or secretarial time), working under the direction of the expert, as explained in the engagement letter. Experts may use staff to assist in performing some tasks connected with the engagement, such as document organization, research, preparing exhibits, summarizing depositions or other document review.
6. Out-of-pocket expenses include all expenses specifically incurred because of the engagement, including travel, meals, automobile, computer, photocopying, telephone or outside service costs. Expenses are either charged at cost or surcharged 5-10% as a service and billing charge. Sometimes a per diem is used for miscellaneous travel expenses and travel meals.
7. Some clients will request a budget for your charges. If you cannot estimate how much time the entire engagement will require at the outset, try to agree on an amount for a specific task or portion of the work, and then see if you can estimate the remaining work when the initial budget has been reached and you are more familiar with the case documents.
8. Maintain a case file time log to record and properly document the date and duration of all work, research, telephone calls, reading, or any other task (including collection followup). Such logs usually will be required as support for your billing. However, when recording the work performed, remember that these records are discoverable by opposing counsel.

E. Collection of Engagement Billings

1. Slow-paying clients may require much additional time and follow up.
2. Be persistent and businesslike. If you are careless about your billing and collection practices, clients will tailor their payment practices to match.
3. Clearly establish at the outset of the engagement the procedure for submitting your billings to the party with responsibility for approving payment. You then will know whom to contact about payment if you do not receive it on time
4. Have a contingency plan for difficult collections. If your engagement letter terms are well written, you should have fewer problems when clients question your invoices.
5. Discounts for early or prompt payment of invoices often are effective levers to speed up collections. You may need to adjust your billing rates in anticipation of the discount, to be sure you earn enough for your work to support your business.
6. Settlement of the case should not impair your ability to collect for the work you did at the attorney's direction under the terms of your engagement letter.
7. In some cases you may want to prepare a bill for all estimated time and expenses and have it paid before trial. For example, if the client has consistently questioned or shorted payments on your interim bills or been very slow to pay, they may not bother to pay your final bill after the trial is concluded. You then have no further leverage to collect and might have to resort to suing for collection (this is costly). It is best to tell the attorney at the outset that if your interim invoices are not paid prior to trial, you will not appear to testify and will perform no further work on the engagement. Although this step may appear is drastic, it usually results in prompt payment.

F. Consulting Practices

1. Maintain a good business relationship throughout the engagement, especially about timely payment for services.
2. Disclose and explain any potential business conflicts to the attorney; if necessary, obtain a waiver from other clients. Relationships with parties with an interest in the outcome give the appearance of bias.
3. Clarify time commitments early. Disclose all of your potential time conflicts with other client commitments/deadlines, or days when you are unwilling or unable to appear because of other personal or professional conflicts.
4. Be flexible about delays and being on call for trial. Expect postponements and uncertainty when dealing with a trial schedule.

5. Listen more than you talk, except when you need to educate your attorney about insurance or industry practices. Don't withhold any contribution you can make that would benefit your client, but listen carefully to be sure you understand the issues and the attorney's expectations.
6. Use appropriate work practices. Unless asked, do not make careless notes or written judgments that will be discoverable. Written notes open up new areas of inquiry for the opposition and seldom help maintain the focus of the litigation on the issues. Unlike normal practices in consulting, brokerage and insurance companies, during expert witness engagements less documentation is preferable.
7. What should you document?
 - All documents and records connected with a case may be maintained electronically, in your computer system. You do not need to keep paper copies of case documents, regardless how you received them originally.
 - All time spent working on the engagement, with a general description of the reason for the work.
 - Keep a file for all correspondence with the attorney, your engagement letter, billing records, and related documents.
 - Create a list of all documents received for review.
 - Create a list of key persons whose names appear frequently in the documents, so that you can refer to it to accurately recall names.
 - If there are many depositions, factual summaries of key parts of the testimony may be helpful to you. However, be careful not to include editorial or judgmental comments in your deposition summaries. Keep summaries objective and factual. Such summaries of depositions may be prepared by staff working under your direction.
 - List or create exhibits of insurance policies, claims reviewed, or other important factual information that you may need to recall or to which you will refer during testimony.
 - Reference material or other research required as support for your opinions or any other written reports, declarations or affidavits you may prepare.
8. What should you keep?
 - You must have a record of all cases in which you testified during the last four years (minimum) to comply with FRE 26(b) disclosure requirements.

- If retaining records electronically, you can move all of the files to an archive until you are sure they will not be needed again (N.B. If the case in which you testified is appealed, or if an MSJ is reversed, it can come back for retrial years after your original engagement). You may be required to destroy records by the terms of a confidentiality order of the court. Comply!
- All billing records for the case should be kept for the normal period you keep all accounting, billing and other records related to taxable income.
- It is advisable to retain copies of all depositions you have given, and all expert reports you write, forever. Even if they are confidential, they are your work product and you are entitled to keep them. You probably will be unable to obtain your trial testimony, but I was recently (in 2013) questioned about my testimony from a trial in 1998, by a lawyer who had obtained a copy of the old trial transcript.
- Transfer all outside research and non-production material you provide for the case from outside (non-party) sources to your personal reference library (or electronic reference files). You may need to research the same issue(s) again for future cases.
- A good high-speed, duplex scanner is a very good accessory you should have in your office to transfer paper records to electronic files (usually PDF files), as well as multiple backups of the hard drive on which all case and reference materials are maintained.