

Professional Correspondence Cont.

As in the text of Chapter 13, the term letter refers to both electronic and paper communications. The text introduced advice letters. Here, the additional most common types of letters lawyers write are introduced.¹ For each, we will explore the three most important considerations in letter writing: the reader, the purpose, and the content.

I. LETTERS TO CLIENTS

The bulk of correspondence occurs between attorneys or paralegals and clients. This section discusses some general considerations and the types of correspondence that attorneys have with clients.

A. General Considerations

Letters to clients are used for all three substantive purposes. Lawyers write client letters to communicate legal and procedural information and advice. For example, they write status letters to update clients on developments in their cases. They write formal and informal opinion letters to explain the results of legal and factual research the firm has conducted. And they write to convey the lawyer's professional judgments and to advise clients about decisions the clients must make. These letters often cover both legal and nonlegal matters.

Lawyers also write to clients to document information in case an issue about that information should arise in the future. For example, a lawyer should write a letter confirming the oral transmission to a client of any important information, such as a settlement offer, a deposition date, a trial date, or the fee agreement. The letter will help the client remember the information and help the lawyer demonstrate that she met her professional duty to inform her client of that information.

Finally, lawyers write to persuade their clients to do something or to refrain from doing something. Although the lawyer's primary persuasive role occurs outside the client/lawyer relationship, the lawyer sometimes must persuade her client as well. The lawyer might advocate for particular decisions regarding legal and extralegal matters, and sometimes the lawyer must persuade the client to act within the law or within moral boundaries.

Client letters are also used for all three relational purposes. Almost always the lawyer intends that a client letter will help establish and maintain a good relationship. Letters can be extraordinarily effective for this purpose because letters effectively carry relationship messages and because clients typically reread their lawyers' letters many times. Carefully written letters also effectively communicate the writer's competence. Nearly all clients can distinguish a sloppy letter from a careful letter. The letter itself is powerful proof of the lawyer's ability and diligence.

1. The advice letter was covered in Chapter 13.

Finally, lawyers sometimes must write to establish professional boundaries with clients. A client might disregard a fee agreement or other policies of the firm; might be overdependent on the lawyer in inappropriate ways, or might desire an unprofessional relationship. In any of these situations, the lawyer's letters would include a boundary-setting purpose.

B. Retainer Letters

Retainer letters, sometimes called "engagement letters," are written to document the beginning or a representation. A good retainer letter achieves a delicate balance between establishing a positive relationship and setting boundaries. The lawyer hopes the letter will leave the client glad to have selected the lawyer. The client should feel confident that the lawyer's loyalties are grounded in the client's needs, not the lawyer's profit-making purposes. The client should sense that she and her lawyer will function well, as a team working toward the same goal.

The letter must also inform the client about uncomfortable but necessary subjects such as fees, costs, allocation of decision-making authority, and conditions under which the firm can withdraw. Achieving this balance can be a daunting task requiring wise selection of coverage and careful attention to tone. A sample retainer letter is below.

[date]

Ms. Elizabeth S. Bradenton
Pinnellas Landscaping, Inc.
8537 South Washington St.
Newton, TX 65432

RE: Retainer Agreement, breach of contract action

Dear Ms. Bradenton:

It was a pleasure meeting with you in our office this week. We appreciate your selection of Harris, Felton, and Cox to represent Pinnellas Landscaping, Inc. in a breach of contract action against Charles and Dorothy Cott. This letter confirms my understanding of the legal matter and the terms on which we agreed.

I understand that the Cotts contracted with Pinnellas Landscaping to landscape their commercial properties. After the work was completed, the Cotts refused to pay for the work, claiming that both the plants and the labor were inferior. You have attempted to resolve the matter informally, but the Cotts continue to refuse any payment. You would like our firm to represent Pinnellas Landscaping and, if necessary, to file a complaint against the Cotts to collect the contract price as well as any other damages to which Pinnellas may be entitled.

Our fee will be based on the amount of time we devote to the case. An hourly fee arrangement insures that Pinnellas Landscaping will not be required to pay for any more services than are actually required for its case. My hourly rate is \$200, and the hourly rate for my paralegal is \$80.

It is impossible to determine in advance how much time will be needed, but we will do our best to minimize the time required while still providing Pinnellas Landscaping with diligent and competent representation. In addition, Pinnellas Landscaping will be responsible for costs our firm incurs on its behalf. These costs may include such charges as filing fees, service-of-process fees, telephone and travel costs, and costs for depositions. By this agreement, you are appointing us as agents for Pinnellas Landscaping and authorizing us to make expenditures on its behalf. I will obtain your advance specific authorization for any expenditures in excess of \$1,000.

As I explained, it is our custom to charge a retainer in commercial litigation. For this case, a retainer of \$3,000 will be sufficient to commence the representation. We will apply the retainer to fees and costs as they accrue, and we will ask Pinnellas Landscaping to renew the retainer when its balance falls below \$500. Each month, I will send a statement itemizing the fees and costs incurred that month so you can monitor both the expenses of the litigation and the substantive developments on the case. Any credit balance remaining at the conclusion of the matter will be refunded promptly.

I am enclosing a copy of this retainer letter and a pre-addressed envelope. If these arrangements are satisfactory, please sign the copy in the space provided and return the signed copy along with the retainer. Upon receipt of the signed retainer letter and the retainer fee, the representation will commence. We will first attempt to settle the claim without the need for litigation, and we will relay any settlement offers to you for your consideration. Sometimes parties who have been unwilling to settle a dispute previously will change their minds once an attorney is retained. However, if the Cotts remain unwilling to settle the matter fairly, we will file suit on Pinnellas Landscaping's behalf and seek all remedies allowed by law.

I look forward to working with you to resolve this matter as quickly and favorably as possible. Should you at any time have questions about these arrangements, please feel free to call me.

Very truly yours,
Keith Salter
Attorney at Law

C. Status Letters

Not only do ethical rules require lawyers to keep clients informed,² but good relations with clients demand frequent communication. This need is even greater if the fee arrangement requires monthly billing. Clients hate to receive nothing but bills from their lawyers. If you are billing your client monthly, include with the bill a status letter explaining what has happened on the case that month. Knowing that you will have to report to your client also provides a good discipline for you to attend to the case appropriately.

2. A lawyer shall "keep the client reasonably informed about the status of the matter." Model R. Pro. Conduct r. 1.4(a)(3) (Am. Bar Ass'n 2013).

If you are not billing the client monthly, report to your client at the intervals your client prefers, within reason. If the case is in litigation and your client is the plaintiff, monthly reports are appropriate. Your goal is to keep the client informed and reassured of your attention to the matter, but not to cause the client to think that you are billing him for too many unnecessary letters.

Report the developments in the case at a level of detail appropriate for your client. You need not explain the intricacies of a discovery dispute to a lay client unless the client will need to know the precise legal grounds for the dispute. To the extent that you explain procedural developments to lay clients, try to use clear, simple language. Here is an example of a status e-mail:

RE: Pinnellas Landscaping, Inc. v. Charles and Dorothy Cott

KSalter@SalterLoo.com
Mon 5/10/2021
To: Elizabeth S. Bradenton

Beth:

As you know, we have filed a set of interrogatories and scheduled the Defendants' depositions for June 12. Yesterday we received word that the Cotts' attorney plans to set your deposition for June 12 immediately following the Defendants' depositions. Since you had already planned to attend the Cotts' depositions on that day, I presume you are available for your own deposition that day as well. Let me know right away if that is not the case.

We should meet prior to the 12th to discuss all three depositions. Your help will be important in preparing me to depose the Cotts, and I will help you prepare for your own deposition as well. In case you have not ever been deposed, let me tell you that you need not worry about the experience. I will be with you throughout the process, and I will handle any objections to the questions you are asked. In our meeting, I'll explain what to expect and help you anticipate the questions and think through your answers. Please call my secretary in the next several days to schedule a time for us to prepare for the depositions, and don't hesitate to call me if you have questions or concerns we should address before that meeting.

Very truly yours,

Keith
Salter & Loo
120 Main Street
Newton, TX 65432
409.565.3222

Confidentiality Notice: This e-mail transmission may contain information that is privileged, confidential, and protected by the attorney-client or work-product privileges. If you are not the addressee, note that any disclosure, copying, distribution, or use of the contents of this message is strictly prohibited. If you have received this transmission in error, please destroy it and notify me immediately at KSalter@SalterLoo.com.

One final word about status letters: Do not avoid telling your client bad news. Many a lawyer has gotten into disciplinary trouble for pretending that a case was proceeding well instead of disclosing unfavorable results. Ultimately, your client will learn the truth, and the consequences will be worse if you appear to have tried to hide the situation.

II. LETTERS TO OTHER LAWYERS

In addition to corresponding with clients, lawyers often send letters to other lawyers and judges. General considerations are discussed first followed by the types of letters that lawyers write other attorneys and judges.

A. General Considerations

Lawyers also write many letters to other lawyers. These letters may convey straightforward procedural information, like the time and place of a deposition, or substantive material, like a demand letter or a settlement offer. Two important considerations apply to all of these letters: the importance of careful writing and the importance of tone.

Careful writing (including careful legal analysis) is important primarily because lawyers have a professional obligation to do good work on behalf of a client. Also, a lawyer's reputation among other lawyers and judges is critical to a successful career. A reputation is formed largely by the quality of the work other lawyers observe. Among the most visible work products are the letters lawyers write to each other. For both of these reasons, then, take care with your letters to other lawyers. Be sure your analysis is complete and your writing is free of errors.

Tone is important because your ability to both represent your client well and simultaneously enjoy your job depend on establishing good relationships with other lawyers. If your working relationships are good, you will offer professional courtesies to other lawyers and receive them in return. These courtesies will benefit you and your client alike. Other lawyers with whom you are on good terms will be willing to accommodate your scheduling conflicts and will hesitate to treat you as they do not wish to be treated in return. The tone of your letters will be instrumental in establishing and maintaining these relationships.

Always maintain a polite professional tone, even if you are very frustrated with the recipient of your letter. Do not descend into sarcasm or angry rhetoric. It will not advance your client's cause, and it does not wear well in the long term. Generally, acting out of anger is a sign of weakness rather than strength. Before you write, wait until you regain your emotional equilibrium.

Use a customary business letter format such as that described in Chapter 13. One added piece of information might be helpful when writing to other lawyers. Often it is appropriate to provide other people with copies of your letters to counsel. Copying your client with your correspondence is an excellent way to keep your client informed. When you send copies to other people, note the fact in one of two ways: If you want your primary recipient to know that you sent the copies and to whom, use the standard "cc" notation (for "courtesy copy") along the lower left

margin and include the names of your secondary recipients. If you do not want your primary recipient to know of the copies, use “bcc” (for “blind courtesy copy”) *on the copies themselves and on your file copy, but not on the original*. This way your file will reflect the fact that you sent the copies. Here is an example of the end of a letter in which the lawyer has sent copies both ways:

[date, recipient’s name and address, and “re” line]

Dear Mr. James:

..... [the body of the letter].

Very truly yours,
Karen Kelly
Attorney at Law

cc: Benjamin Ahmad, Home Care, Inc.

bcc: Sarah Lancaster

B. Demand Letters

Before proceeding to litigation or other enforcement mechanisms on behalf of a client, a lawyer usually sends a demand letter setting out the claims and the damages the client incurred. A demand letter can have three purposes. First, it allows the client to attempt to resolve the matter early and inexpensively. If the parties can settle the matter without resort to litigation, they usually will be best served to do so. Second, in some cases, a prevailing party can recover additional fees and costs if the prevailing party apprised the losing party of the claims prior to filing suit and thus gave that party a chance to settle the case. Third, in a few kinds of cases, sending a demand letter is a legal prerequisite for filing suit.³

If the opposing party is represented, the demand letter goes to the lawyer, not the party. It can be a one-to two-paragraph statement of the client’s claim, the damages he has sustained, and the amount he seeks. An example of a relatively simple demand letter is found below. If the lawyer believes that early settlement is unlikely, she may send such a conclusory demand letter. However, the lawyer may have two reasons for choosing to send a more thorough demand letter. The lawyer might believe that early settlement is possible, so she will want the demand letter to present her client’s claim as effectively and thoroughly as possible. Or she might simply want to send a message to the opposing lawyer—the message that she is a diligent and skilled lawyer who intends to take this case seriously. For either reason, the lawyer might choose to send a detailed letter setting out the results of her legal and factual research. She might even include exhibits such as photographs or documents relevant to the claim or the damages suffered. Demand letters of this second kind can be as long as five or six pages with additional enclosures.

3. When a demand letter is required by law, check the authorities to learn any additional requirements with which the letter must comply.

In the case of a more detailed demand letter, it is customary to begin by identifying your client, summarizing the claim against the other party, and asserting that party's liability. Then set out the facts of the case, truthfully but phrased favorably for your client. Emphasize the culpable conduct of the other party and minimize any culpable conduct of your client. Include a description of your client's damages in sufficient detail to justify the claim. Next, explain the results of your legal research, again framing it in the light most favorable for your client's claim. Part V of the text addresses how to write persuasively.

Finally, make demand for a certain sum and for any nonmonetary relief your client claims, and express your hope that the matter can be settled short of litigation. Invite a response from the lawyer to whom you are writing, set a deadline by which the matter must be resolved, and indicate what action you will take if the deadline is not met.

March 20, 2022

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Harold M. Lawler
Susan S. Lawler
9754 West 14th St.
Newton, TX 65432

RE: State Bank Loan Account 12345

Dear Mr. and Mrs. Lawler:

Your loan with State Bank, account number 12345, is delinquent in the amount of \$1,489.78. As this delinquency represents four months of missed payments, State Bank is exercising its right under the contract to declare the entire balance of the loan due. Our firm has been retained to collect the balance of your loan plus all late fees and accrued interest. As of today, that amount is \$17,225.51.

State Bank has authorized us to file suit against you and to seek all lawful remedies for your breach as well as your payment of our attorneys' fees for collecting the loan balance. If you wish to avoid a lawsuit and liability for our fees, you must pay the sum of \$17,225.51 to this office on or before April 2, 2022. You must pay this amount by certified check or money order made out to State Bank. If you do not pay this amount on or before April 2, we will have no recourse other than to file suit against you. You are hereby instructed to direct all further communication about this matter to our firm and not to State Bank or any of its employees.

Very truly yours,
Keith Salter
Attorney at Law

cc: Charles A. Miller
State Bank Credit Dept.

C. Confirming Letters

Often in law practice lawyers reach agreements orally. In litigation, these agreements may range from relatively unimportant procedural aspects of a case to a complete settlement agreement. In transactional matters, oral agreements may range from setting meeting times to major terms of a transaction. The more important the topic, the more likely it eventually will be reduced to writing in some formal way, but the process of drafting and signing a formal document will take time.

Therefore, whether the topic of the oral agreement is a detail or a major matter, make it the subject of a prompt confirming letter. The process of writing out the agreement will help you clarify your understanding of its terms, and your recipient will go through a similar process upon reading the letter. Then, any misunderstandings can be resolved before the parties rely on the agreement. Also, if memories fade, the confirming letter will be there in both files to clear up the confusion.

In a confirming letter, recite the terms of the agreement. Take care to get the details right. If the other lawyer has extended you a courtesy, do not forget to thank her. Here is an example of a simple confirming letter:

[date, recipient's name and address, and "re" line]

Dear Ms. Keller:

This letter confirms the rescheduling of Mr. Burston's deposition until April 12, 2019, at 10:00. I understand that the location has been moved to your office. Mr. Burston will make every effort to bring with him the documents you requested. Thank you for agreeing to the later date.

Very truly yours,
Keith Salter
Attorney at Law

cc: David Burston

III. LETTERS TO CLIENTS, OTHER ATTORNEYS, AND THE COURT: TRANSMITTAL LETTERS

Transmittal letters (also called "cover letters") accompany documents or other enclosures provided to clients, other lawyers, or the court. Sometimes the letters include an explanation of the enclosures or instructions about what to do with them. The letters provide a tangible record of the transmission for your file, and they allow you to provide explanation or instruction in a form the recipient can keep and review as necessary.

Transmittal documents are notorious for stilted, obtuse language. Some lawyers still write "Enclosed please find . . ." followed by a parade of "herewiths" and "saids," strung together in

long, nearly indecipherable sentences. Instead, use normal twenty-first-century English words and syntax, for example:

[date, recipient's name and address, and "re" line]

Dear Ms. Cantrell,

I have enclosed drafts of your will and the trust agreement for your son. Please read these drafts, and let me know if you have any questions or concerns. You can sign the final versions of both documents in my office when we meet on Monday. By law, you will need two witnesses not related to you. Members of our staff can serve as your witnesses, or you can bring witnesses of your own choosing.

I look forward to seeing you next week.

Very truly yours,

Keith Salter
Attorney at Law

Clearly set out any explanations or instructions your reader will need. If there are more than two enclosures, tabulate the list or format the list in a way that will help your reader tell at a glance what is enclosed. Here is a sample letter to a lay person familiar with the litigation process:

[date, recipient's name and address, and "re" line]

Dear Ms. Gomez,

I am enclosing for your review the following discovery documents received today from Air Mart, Inc.:

- First Set of Interrogatories
- Requests for Production of Documents
- Requests for Admission
- Notice of Deposition (Francis Hawley)
- Notice of Deposition (James Bainley)

Please calendar the dates of the depositions, and let me know if any schedule conflicts arise.

Our response to the written discovery is due on May 5. We can discuss those responses when we meet next week.

Very truly yours,

Keith Salter
Attorney at Law

If the transmittal letter accompanies documents mailed to the court, do not forget to send a copy to all other parties (through their lawyers). Indicate that you have done so by using a “cc” as explained earlier. Ethical rules prohibit any ex parte (private) communication with a judge about a pending matter,⁴ so you will need to demonstrate to the judge that you have included all parties in this communication. The “cc” format shows the judge that you have complied with your ethical duty.

4. Model R. Pro. Conduct r. 3.5 (Am. Bar Ass’n 2002),