



Engagement letters

BACKGROUND

All members of the Institute are expected to maintain high standards in their professional lives. To help them the Institute produces guidance in the Members Handbook. However, that guide cannot cover all situations or deal with all the specific issues faced by members specialising in particular areas of practice. Members must therefore be prepared to apply not only the letter but also the spirit of the guidance and should, in particular, refer back to the fundamental principles that outline the minimum standards of behaviour expected of all members.

This practical perspective considers the principles concerning engagement letters in relation to members engaged in litigation support and forensic accountancy assignments.

Reason for engagement letters and basis of this advice

There are many reasons for having an engagement letter in all areas of work that you may undertake as an accountant. Litigation support is, however, one area where it may be even more important. The Members Handbook refers to engagement letters in the context of both fees and managing liability and these are important reasons for putting an engagement letter in place. You should also note that in litigation support you are dealing with legal professionals who will themselves always have a letter of engagement, and with parties who have already shown their willingness to fight a dispute. There is therefore a greater risk of dispute arising if you do not follow appropriate practice.

There may be occasions on which it is necessary to start work on an assignment before the engagement letter is in place. This can expose you and your firm to significant risk, and should be avoided wherever possible. Members should keep a record of the reasons why the countersigned letter could not be in place before work commences, but should not be persuaded by the solicitor who says he is 'too busy' to consider the letter. Members may have some limited protection if they have issued an engagement letter which, although not returned, has not been contradicted, but that is not to be relied on.

The last point of persuasion is to make clear to those issuing instructions that the required expert report will not be issued until the engagement letter is in place; but that still leaves members exposed to not being paid for their work, or to claims for not having carried out instructions correctly, if the terms of engagement have not been acknowledged by a countersigned engagement letter.

Fees

As outlined in the Members Handbook at 240.2A, 'The basis on which fees will be calculated should be discussed and explained at the earliest opportunity together with, where practicable, the estimated initial fee'. Also at 240.2B, 'The Institute is of the view that the arrangements agreed

should be confirmed in writing prior to the commencement of any engagement, normally in an engagement letter...’.

Managing liability

The importance of considering such matters as responsibility accepted to the client, responsibility accepted to third parties, and defining the scope of professional involvement is discussed in the Members Handbook at Section 9.1: ‘Managing the Professional Liability of Accountants’. It deals at length with the matters which should be included in the engagement letter, and why. Study of the whole of this section is strongly recommended. The headnote draws attention to the fact that developments since this was first issued, including of incorporation as limited partnerships, may impact on the particular circumstances.

Limiting or excluding liability

You should consider whether and to what extent to limit your liability for any loss arising from your involvement in the case. This is discussed in Section 9.1 at paragraphs 26 to 34. The British Venture Capital Association guidance used in corporate finance assignments is as follows:

- where the potential loss is £10m or below, liability is capped at £10m;
- where the potential loss is between £10m and £55m, liability is capped at £10m plus a third of the amount over £10m; or
- where the potential loss is over £55m, liability is capped at £25m.

Although this may be a guide you will bear in mind the extent of cover provided by your own professional indemnity insurance arrangements.

Who is contracting to engage you?

This question is important because the engagement letter sets out the relationship between you and those instructing you. In practice the custom of many firms is to address the letter to the instructing solicitor, and specify at the head of the letter the full names of all known parties. If the solicitor will sign the letter, either as the contracting client or as the agent for the contracting client/litigant, then that should be sufficient. Where the solicitor arranges for the party to the action to sign the letter that is also normally acceptable, though you should be aware that it is the solicitor’s responsibility to meet many of the requirements of the relationship, such as the duty to provide all relevant evidence for the expert’s consideration, and the duty to inform the expert of the date of any hearing. So where the litigant signs the engagement letter, it should also be signed by the solicitor.

Matters to include specific to litigation support and forensic work

This will vary depending on the area of work, however the following have been found to be worthwhile to include:

- your duty to the court rather than the instructing party, restating the guideline in the CPR;
- the right in extremis to approach the court for directions;
- the people you expect to involve in the engagement;
- payment terms, including liability for your fees even if they exceed those assessed by the Court;
- data protection, retention, and destruction policies; or

- a complaints procedure.

Compiling an engagement letter

Most firms will have their own specifically designed engagement letter. The following checklist is provided to assist a firm new to this area of work.

DO

Ensure the terms of the engagement letter are specific to the type of engagement, as appropriate

For example:

- expert witness under CPR Part 35;
- single joint expert under CPR Part 35;
- expert witness under CrimPR Part 33;
- single joint expert under CrimPR Part 33;
- expert witness in arbitration proceedings;
- expert determination (either as the independent expert or as advisor to one of the parties involved). If as expert, whether 'speaking' or not;
- advisor (or shadow expert) in connection with litigation or a dispute; or
- forensic investigation (civil or criminal).

Supplement your firm's standard terms of business with specific terms for particular types of engagement

- Generally, state that the engagement to provide the expert services is from the firm which makes available the individual expert, even in the case of appointment to determine as expert. Accordingly, engagement terms should be agreed between the contracting client and the expert's firm whether or not an LLP.
- State the limitations to the scope of the engagement.
- Explain the expert's overriding duty to the court or other tribunal to give an independent expert opinion.
- State that the expert is engaged as an expert witness, not as a witness of fact; be aware of your need to show expertise if you are to be heard.
- Make clear that, if it was necessary to start work before the engagement letter is signed and returned, all work done before is subject to the same terms and conditions as future work.
- Explain the nature and purpose of the final report.
- Note any restrictions upon reliance to be placed on the final report (and any draft reports).
- Note any restrictions which may be necessary on distribution of draft report(s).
- State that the report is produced in connection with proceedings and should be kept confidential to the parties in the proceedings for the purposes of the proceedings only. You should note that there is no property in an expert witness, and therefore that as soon as an expert report is disclosed it may be used by any party to the action – whether or not the expert continues to be retained under the original instructions – and is accessible by the general public.

- Require reasonable advance notice of the timetable of the case, particularly exchange of expert reports, joint discussions between experts and court hearing dates.
- Require the opportunity to consider and comment on the report(s) served by experts retained by your own and other parties to the case which deal with the issues upon which you are instructed.
- Make clear that if circumstances change or new information emerges then you require the opportunity to update your report; if this is after a report has been served, this will require court permission.
- State that often fees cannot be determined in advance; be sure the contracting client understands their responsibility to pay for any additional work arising from your role as expert, e.g. conferences, trials, etc.
- Require that the parties are jointly and severally liable for your fees, unless the court directs otherwise, where the expert is being engaged by multiple parties as a single expert.
- Where the party to whom the engagement letter is addressed is not the litigant (eg it is the litigant's lawyers), confirm that they act on their own behalf.

Consider general risk management issues

- Be aware of the requirements of the particular court/ tribunal/jurisdiction relevant to the engagement.
- Be certain of the identity of the client.
- Agree to whom the engagement letter should be addressed; the instructing solicitor or the end client.
- Consider which parties should sign.
- Consider the inclusion of a liability cap bearing in mind the limitations of an expert's immunity, for example in respect of advisory work.
- Consider the inclusion of a proportionality clause
- to limit your firm's liability to that proportion of the total loss or damage, after taking into account the contributory negligence (if any) of the client and any other beneficiaries, having regard to the extent of your responsibilities for the loss and the extent of responsibility of any other party also responsible
- or potentially responsible. Be aware of the provisions of the Unfair Contract Terms Act 1977.
- Refer to further guidance from bodies such as the Academy of Experts, the Expert Witness Institute and the ICAEW.

DON'T

Include terms which may compromise independence

- Do not allow payment of fees to be dependent on the outcome of the case.
- Do not grant extended credit; instead, include a period within which the fee must be paid, whether or not the instructing solicitor is in funds to do so.
- Do not permit the final content of the report to be determined by anyone other than the expert.
- Do not impact your independence by giving expert evidence on a matter which has been investigated by your own firm in another context.
- Do not accept an engagement before ensuring that no conflict of interest exists.

Allow undocumented changes to scope

- Do not permit possible undocumented changes in scope; rule these out and consider setting out a phased approach in the engagement letter.
- Do not ignore the need to document changes in scope once an engagement has started, but do issue supplemental engagement letters.
- Do not fail to anticipate the impact of changes of scope on the level of evidence required, for example if an engagement starts as civil and becomes criminal, or if the required expertise changes.
- Do not omit to agree revised engagement terms where an assignment in which you have initially acted in an advisory capacity turns into an expert witness assignment.

Compromise your professionalism

- Do not issue deliverables before the engagement letter is signed and before the scope of your instructions has been formalised.
- Do not accept an appointment as an expert witness where you don't have the appropriate expertise.

ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

ICAEW members, affiliates, ICAEW students and staff in eligible firms with member firm access can discuss their specific situation confidentially with the Ethics Advisory Service on +44 (0)1908 248 250, via webchat or via e-mail ethics@icaew.com.

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