

Provision in Retainer Agreement for Using Emails, Text Messages, and Cloud Computing

Does anyone on the list address the use of emails, text messages, and storing data in the cloud in their retainer agreements? I am not talking about billing, but rather security and agreed upon methods of communication. If so, I would love to see what other people are doing.

I have the following language in my engagement agreement:

Communications. There are numerous forms of communications that are undoubtedly more convenient than traditional methods, but may be somewhat riskier than those traditional methods. For example, cellular telephone conversations can more easily be intercepted than traditional “landline” telephone calls, and in some circumstances, e-mail can be intercepted and read, disclosed, or otherwise used or communicated by an unintended third party (especially if Client has an e-mail account that is shared with others). Although various laws make interception of other people’s communications illegal, Attorney cannot guarantee that cellular telephone conversations, e-mail, or other new forms of communications will be properly delivered and heard or read only by the addressee. This creates some risk of adverse consequences, including the loss of attorney-client privilege and attorney work product confidentiality and other protections against the disclosure of confidential information.

Unless otherwise directed by Client, Attorney and Client may communicate in connection with this engagement (both to one another and with others) via the use of such communications and services, including cellular telephones, e-mail transmission, text messaging, and fax transmissions, because of their efficiency and convenience. If Client directs, Attorney will limit all communications to landline telephone, postal service, or similar traditional forms of communication.

Brian Cole, California

Yes. In a separate numbered paragraph, I inform the client that he/she is responsible for ensuring that their online communications are secure.

Flann Lippincott, New Jersey

I have a little of this in my Fee Agreement, but I've been thinking that I want to shorten the situation-specific Agreement and incorporate certain generic things like this, and only provide them and get them signed off at the first engagement. Either that, or incorporate them by reference, and include them in a packet that includes things like 1) information about the IOLTA account, 2) directions to the office, 3) "expectation setting" guidance, 3) billing information, etc.

Does anybody do that? Is it well-received? I think people can find it overwhelming when the Fee Agreement for each new matter is 8 pages long, and it makes it tempting (though I've rarely succumbed) to use a "short form" or letter of engagement in lieu of executing the full Fee Agreement.

Richard J. Rutledge, Jr., North Carolina

I will incorporate by reference in writing, provided the task is the same as that in the retainer. e.g. prepare a contract, file a trademark, etc.

Flann Lippincott

I had a reference to the attorney's duty to maintain secrecy and then having the client agree that nevertheless email and other methods of communication were acceptable.

But I like Brian Cole's language better.

Roger Rosen, California

If I were a client and found out that my lawyer thought that cell phones and email were "new forms of communications," it would worry me somewhat.

I'm curious whether people here advise clients that landline phones are easier to intercept than cell phones, or that postal mail isn't at all secure.

David Nieporent, New York

Here is a cut and paste from the relevant portion of my "Standard Terms and Conditions" which is attached to the engagement letter which contains the details of the client, matter, etc. I don't include texts in my means of communications, because my practice doesn't lend itself to that type of communication for privileged matters, and quite frankly I don't want to encourage its use by clients, but of course that could be added. Also, I can't remember the last time I communicated with anyone by fax, but I leave it in just in case.

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#### COMMUNICATIONS

Communications between us can be by telephone, email, file sharing service, USPS mail, fax and, where needed, overnight delivery. If you have a preference or an objection to my using one or more of these means of communication with you, please let me know in writing so that I can accommodate you.

#### TRANSMITTAL AND OWNERSHIP OF DOCUMENTS

For documents sent in electronic form, firm policy is to provide documents in PDF (Portable Document Format) only.

All documents prepared by The Law Offices of Caroline Achey Edwards are and shall remain the intellectual property of The Law Offices of Caroline Achey Edwards, and are to be used only for the particular purpose for which the documents were provided. The Law Offices of Caroline Achey Edwards is not responsible for any changes to the documents made by the client or others. You agree that all documents prepared by The Law Offices of Caroline Achey Edwards and furnished to you or your agents, which have not been paid for, will be returned upon demand, and will not be used by you for any purpose whatsoever.

**FILE MAINTENANCE, FILE DESTRUCTION NOTICE AND ACCESS TO FILE** The firm maintains its files primarily in electronic format. The firm may store electronic files on a variety of platforms including third-party cloud-based servers. You agree to our use of these services for document storage and management.

Firm policy is to retain copies of client files for seven (7) years after the matter is no longer active. It is your responsibility to request any records from the file prior to the expiration of the seven (7) year period. During the period prior to destruction, the file will be made available to you upon reasonable prior notice and at reasonable times.

Caroline A. Edwards, Pennsylvania

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I added this recently after a client decided to text me constantly and with very long messages and complex demands:

M. Method of Communication

Communication between us will be by phone, mail or e-mail. Your matter will be handled during the course of a regular work week. Please do not text or e-mail me and expect my immediate response. Texting is not appropriate for communicating anything more than a quick message on timing of meetings. It is not an agreed upon method of communication for your matter.

Eliz. C. A. Johnson, California

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I was talking to a couple of attorneys the other day about phone calls.

I'm a plaintiff-lawyer/crimdef, but the largest part of my cases are PI and thus contingency-based. The last couple of months, I have had the luck of having some SERIOUSLY annoying clients who are just absolutely relentless on time-wasting phone calls. Normally I have a decent threshold for this kind of thing as it's the nature of the beast when doing plaintiff PI, but it's just been so egregious here lately that I have genuinely considered putting in my contracts a provision along the lines of: "YOU GET <X> # OF FREE PHONE CALLS TO MY OFFICE. AFTER <X>, THERE WILL BE A \$5.00/CALL CHARGE TO BE DEDUCTED FROM SETTLEMENT FOR EVERY SUCH CALL RECEIVED FROM YOU, REGARDLESS OF THE LENGTH OF THE CALL. YOU WILL NOT BE BILLED FOR THE FREE <X> CALLS AND YOU WILL NOT BE BILLED FOR ANY CALL MADE BY US TO YOU."

Seth Combs, Kentucky

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You guys might have to tweak your language periodically as the state of (in)security of technology is changing all the time. I'm not sure if it's really a good idea to recount all the risks of technology (and there are a lot) in a fee agreement and shift all that risk to the client.

As for me, my fee agreements are almost verbatim the model fee agreements published by the California State Bar. I figure that has the best chance of keeping me out of trouble.

Eugene Lee, California

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