The Elements of Engagement Agreements and Letters in the District of Columbia[1]

The essential elements to a bullet proof engagement agreement between a lawyer and a client are the following:

First, have a conversation with the potential client about fees, how you work, your ground rules, the client's expectations, what you expect of each other, and how you will communicate. Do not rush this exchange. Allow for the free flow of information. Arrive at an understanding and say it out loud.

Second, assuming you have an understanding and intend to proceed into a lawyer/client relationship, prepare a written engagement letter that does the following:

A. Define in detail the scope of the work. Explain what you are going to do and if appropriate, tell what you are not going to do. For example, if you are going to undertake the defense of someone charged with a crime, but you are not going to sue the police over the search and arrest, state that in the agreement;

B. State the fee to be charged. Explain the rate or basis of the fee in detail and give examples where appropriate;

C. Describe the expenses that the client is to pay. In a contingency fee case, detail the client expenses and state whether the client must pay the expenses regardless of the outcome of the case.

When you have not regularly represented the client, the above three elements are required in a written engagement letter by the **District of Columbia Rules of Professional Conduct**.**[1]** If the case involves a contingency fee, a written agreement is required.**[2]**

It is of course the best practice to use a written fee agreement in every case that the lawyer and client sign and to address in clear, simple language other issues such as the following:

D. Fee arbitration: In D.C., a lawyer may have a provision in a fee agreement that any fee dispute be submitted to the **D.C. Bar Attorney/Client Arbitration Board** provided the written agreement

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1 **http://www.dcbar.org/for_lawyers/bar_services/practice_management_advisory_service/engagement_agreements.cfm**

informs the client that counseling and a copy of the ACAB's rules are available from the ACAB staff and provided the client consents in writing to the mandatory arbitration.[3] When the client requests arbitration of a fee dispute, the lawyer must arbitrate.[4] If the lawyer requests arbitration, the client may elect to participate.

E. Detail what is expected of the client: Explain what cooperation is needed and expected. Explain how you will communicate and what the client can expect regarding phone calls, email, letters and meetings.

F. Address your right to withdraw and the client's right to terminate the relationship.

G. Describe your intention to use an associate, paralegal, or contract lawyer and how you will charge for this assistance.

H. Make clear that you are not guaranteeing a result, and receive an acknowledgement from the client that no result is promised.

I. Address how, when the representation ends, you will deal with the client's property and the file. The file belongs to the client with one exception.[5] If the client does not request the file, the lawyer must retain it for at least five years.[6] Consider copying or scanning the file if the client requests the file, and if the lawyer retains the file for five years, allow in the agreement for the right to destroy the file. Depending on the case and nature of your practice, it may be wise to keep a file longer than five years, or to routinely scan the file and return original documents to the client.

J. Put a limit on the time period for the client to sign and return the agreement. Especially when time is of the essence, insist that in order for an attorney/client relationship to proceed, a signed copy of the agreement must be returned by a specific date. Calendar that date and if the individual continues to be nonresponsive, confirm in writing that no agreement has been reached.

As with any well drafted agreement, clear, simple language that details the terms and gives examples will go a long way to avoiding disputes. For example, consider the following:

K. If the representation involves litigation, does the scope of the work cover an appeal? If you are excluding an appeal from the scope of the representation, make it clear that negotiating a new agreement will be necessary for an appeal.

L. How will the selection and payment of an expert witness or investigator be addressed?

M. If it is a flat fee case, state precisely what will be done for the flat fee and whether the start of work is contingent on the fee being paid. If it is an advance fee, explain how you will be charging against the advance fee and what happens or is expected of the client when the advance fee is exhausted. Explain that any unearned fee will be returned. Fee advances and costs are the property of the client until they are earned or incurred unless the client gives informed consent to a different arrangement.**[7]**

N. If it is a contingent fee, explain how the fee will be calculated in the event of a settlement or collected verdict. Is the fee calculated against the gross settlement or verdict, or are expenses paid or reimbursed before the fee is determined?

O. It is best to explain that unearned fees and unincurred costs will be placed in your trust account and withdrawn as earned and incurred.

P. If you are billing on an hourly basis, it is best to explain how your time on all aspects of the case will be billed by giving examples, such as preparation for a hearing, research and investigation, drafting a motion, taking a deposition, and examining records. Explaining in detail in the bill itself what you are doing and the result you are obtaining can help the client understand the process and be less likely to question the bill. If you intend to charge a minimum billing increment for phone calls and letters, it must be stated in the agreement.**[8]**

Q. Detail how you will cover both inside and outside costs. Inside cost examples are postage, copying, and long distance charges. Outside cost examples are filing fees, messenger expenses, process fees, and court reporter charges. If you intend to pay all costs and pass them onto your client in the bill, explain this in detail. If you elect to have the client pay all outside costs directly, this must be setout in the agreement.

R. If the lawyer pays the costs and disbursements related to prosecuting a case with a line of credit, the lawyer may pass the cost of the line of credit on to the client provided the client has been informed in advance and agrees, and provided the expense is reasonable and the lawyer has maintained a separate accounting. The

costs must be directly attributable to the client and not simply overhead expense.[9]

S. It is advisable to explain your billing practices and state when the client can expect to receive the bill, who to call with questions, and when payment is due.

T. The agreement should have space for both the lawyer and client to sign and date the agreement and each should have a signed original.

Disengagement or termination with the client should be memorialized in most circumstances by a letter stating that the legal representation has ended. When the matter is complete, send a letter that:

A. Thank the client for the opportunity to have been of service and state that the case is over and no further work will be performed. Explain why;

B. Addresses the return of client property and how the file will be handled. See paragraph I above;

C. Acknowledges any other terms or conditions of the ending of the relationship, such as a confirmation that the client elected not to appeal a final order;

D. Address the status of fees and payment.

Non-engagement letters are also important. If a potential client does not hire the lawyer and does not sign the engagement agreement, or, if the lawyer declines the representation without preparing an engagement agreement, it is advisable to confirm this fact in a letter with the following elements:

A. Using simple, clear language, state that you are not accepting the case and will not be the lawyer for the individual;

B. You may or may not want to explain why, but if you state a reason, it is best to be straight forward;

C. Resist the urge to comment on the merits of the case. In fact, you may want to state that the fact that you are declining the case is not a reflection on the merits of the case;

D. Where appropriate, encourage the person to seek other counsel, but unless it is obvious, avoid giving advice on any time limitation that may be applicable;

E. It may be appropriate to send the non-engagement letter by certified mail, return receipt, or in a manner to guarantee and document delivery. Retain the letter in a filing system so that you can find it if necessary years later.

1. **[Return to text]** Rule 1.5(b)
2. **[Return to text]** Rule 1.5(c)
3. **[Return to text]** D.C. Bar Legal Ethics Opinion 218, which should be read before drafting an arbitration provision.
4. **[Return to text]** D.C. Bar Rule XIII(a)
5. **[Return to text]** Rule 1.8 (i) – under certain circumstances, unpaid for work product may be retained by the lawyer.
6. **[Return to text]** D.C. Bar Legal Ethics Opinion 283.
7. **[Return to text]** Rule 1.15(d)
8. **[Return to text]** D.C. Bar Legal Ethics Opinion 103.
9. **[Return to text]** D.C. Bar Legal Ethics Opinion 345.

This article is found at:

http://www.dcbar.org/for_lawyers/bar_services/practice_management_advisory_service/engagement_agreements.cfm