

Engagement Agreements, Non-Engagement Letters and Termination Letters

by John J. Brandt

There are frequent misunderstandings about attorney-client engagement agreements, as well as nonengagement letters and termination letters.

Engagement Letters

When an attorney agrees to represent a client, he or she enters into a contract—frequently misnamed a “retainer agreement.”¹ With rare exceptions, the contract between attorney and client is an “attorney-client engagement agreement.” Agreements should be reduced to writing so there will be no misunderstandings after the representation.

Although there is no standard form, the engagement agreement should include the following:

- **A description of the work covered by the fee**—“The firm agrees to represent you in all matters relating to your claim against John Smith for bodily injuries sustained in an automobile accident in Arlington, Virginia, on January 1, 2005.” By specifying the matter, the attorney will not be responsible for other matters the client may subsequently claim were also included.
- **The amount of the fee**—This describes the amount of compensation to the attorney, including a payment schedule and whether the fee is fixed or contingent.² It is recommended that the fee schedule include the lawyer’s hourly fee—even in case of a contingency fee—because if the client later discharges the attorney, his fee must be determined via *quantum merit*.) The same logic encourages all lawyers to keep accurate time records (in tenths of hours).
- **Out-of-pocket costs**—“The fee quoted does not include any out-of-

pocket costs incurred by the law firm in pursuit of the client’s claim and which shall be in addition to other fees.”

- **Agreement to cooperate and be truthful**—The attorney is entitled to the individual loyalty, truthfulness and cooperation of the client, and any failure in this regard is the basis for disengagement.
- **Right to terminate services**—Either party may terminate the contract. The attorney is bound by Disciplinary Rule 1.16 as it relates to ethical obligations; i.e., he may not withdraw from a matter in court without the leave of court. Also, he must return the client’s file, whether or not any outstanding fees are paid. Also important is how fees already paid should be treated. If the engagement agreement recites the payment of advanced legal fees, they must be returned unless earned. Of course, advanced legal fees must be deposited in the attorney’s trust account until earned.
- **No guarantees**—The client should be informed in writing that the firm does not guarantee any particular outcome of the representation.
- **Signature**—The agreement should be signed and dated by the firm or attorney and the client.

Nonengagement Letters

Where an attorney decides not to represent a potential client, it is a good practice to state so in writing. Failure to do so could lead to misunderstanding, or a claim by the potential client that there was an oral agreement to represent. Attorneys should write, “It was nice to meet you on [date] to discuss our possible representation of you

in your property-line dispute with your neighbor. However, as I informed you at the end of our meeting, I will not be representing you in this regard. I wish you well with your case and recommend you contact another attorney promptly or contact the county/city lawyer referral service. I have returned to you all of the documents you showed me and I have not kept a copy of any of your papers. If I can be of assistance to you in another matter, feel free to call me.”



Termination Letters

Termination letters make it clear to the client that the attorney’s services are completed and there is no continuing duty to assist the client. Such a letter not only gives the lawyer an opportunity to summarize his successful efforts (hopefully), it also starts the statute of limitations running for any alleged errors.

Exit interviews with jurors in legal malpractice cases reflect that if a case demonstrates an “oral disagreement” between a client and an attorney, the lawyer loses. If a lawyer has documented his side of a dispute, he/she typically prevails.

Endnotes:

- 1 A true “retainer agreement” is an agreement by a client to pay an attorney’s fee now to guarantee the attorney’s availability in the future. “[R]etainers are earned when paid” and are immediately placed in the attorney’s operating account, not trust account. *Virginia LEO #1606 Fees*.
- 2 The Virginia State Bar Professional Guidelines prohibit contingent fees in a domestic relations case (except in rare circumstances), and in defending an accused in a criminal case. DR 1.5(d)(1)(2).