SUFFOLK ACADEMY OF LAW
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BETTER BILLING SERIES: Engagement Agreement Basics

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Getting Paid & Retaining Engagement Agreements

SUFFOLK COUNTY BAR ASSOCIATION: JULY 13, 2016

LEGALease CONSULTING INC

Engagement Agreement Basics

Allison C. Shields, Legal Ease Consulting, Inc.
Suffolk County Bar Association, July 13, 2016 – 1.5 Credits

The Initial Consultation - *15 minutes*

- Define the Scope of the Engagement
- Identify the Desired Result
- Establish Value
- Dispel objections
- Explain the fee and how it is calculated

When You Need a Written Engagement Agreement – *10 minutes*

Rules for written agreements, and consequences for failing to prepare one

Retainer/Engagement Agreement Essentials – *35 minutes*

What should be included in your agreement, including scope of work, calculating and setting the fee, payment terms, costs, payment acceptance methods, consequences for late or non-payment and more

Special Engagement Agreement Rules – *5 minutes*

- Divorce and Domestic Relations matters
- Personal injury and wrongful death
- Medical Malpractice Actions

The Non-Engagement Letter

Billing Alternatives – *10 minutes*

Q&A - *5 minutes*

Engagement Agreement Basics

By Allison C. Shields, Legal Ease Consulting, Inc.

The attorney-client relationship relies on trust. Clients must not only trust in your legal skills, but they also must trust in your everyday interactions with them—especially when it comes to billing and fees. That relationship of trust starts at the initial consultation with a frank discussion which can set the tone for the entire relationship. Under-informing clients about costs and fees or over-stating the likelihood or amount of anticipated recovery risks damaging the client's trust.

The Initial Consultation

No matter how you price your services, you must review with the client:

- Your rates and how they will be calculated (hourly, flat, contingent);
- Whether there is a maximum or upper limit to your fees;
- Whether the fee is tied to results;
- The frequency of bills and when payment is due (upon receipt, within 15 days, etc.);
- The format of bills and what they will contain;
- The scope of services to be provided;
- The circumstances and variables that may affect the fee;
- Additional costs and expenses that may be incurred, such as expert witness fees, filing fees, and appraisal fees; and
- Information about withdrawal for nonpayment or other consequences, including interest and fees to be charged for late payment.

Each of these points should be covered in writing in your engagement agreement. As you explain the fee agreement, have the client initial the fee provisions in the agreement.

The initial consultation should define the scope of the engagement, identify the results the client wants to accomplish, establish the value of the engagement to the client, and eliminate any objections or misconceptions. During this meeting, asking questions and listening to the client's answers are crucial.

ⓘ Should you charge for your initial consultation? What about charging for cancellations? *See,* NYSBA Committee on Professional Ethics Opinion 1087 (March 23, 2016):

"A lawyer may ethically charge a nominal amount to a person who cancels an appointment for an initial consultation without reasonable notice, provided the lawyer informs the person (orally or in writing) what will trigger the cancellation charge and the charge either represents the cost incurred by the lawyer as a result of the late cancellation or the client has given advance consent to the amount of the charge."

Define the scope of the engagement.

No matter how eager you are to get started or jump in to help a new client, you must be clear with the client about the scope of the work you are going to perform. Is the client retaining you for purposes of attempting a settlement only, or does she expect you to commence a lawsuit on her behalf if settlement discussions fail? What about an appeal? Does the engagement to prepare a will include preparation of a trust document, living will, and power of attorney as well? Are there other services included in the engagement, such as a review of current documents or policies, or will such services require an additional fee?

The client may not know what a typical engagement of this type usually involves. Therefore, it is important to clearly state the scope of the engagement during the first meeting.

Identify the desired result.

What is the client's ideal outcome? Does the client require a specific selling price in order to afford the new house he intends to purchase? Will the failure to take action on a breach of contract require the client to default on other obligations?

If possible, have clients quantify their desired outcome. If the desired outcome can't be easily quantified in a "hard" number or dollar figure, ask questions to establish what the engagement means to the client. Perhaps the monetary outcome is secondary or even unimportant. Maybe the client wants to protect his reputation or to make a point in his industry. Perhaps the client wants to take advantage of a business opportunity.

After the desired result has been identified, discuss the likelihood of reaching that result with the client. This is the time to explore alternatives and define the ideal versus the acceptable outcome—as well as those results that will be entirely unacceptable to the client.

If a client's desired result is unlikely or unrealistic, it is imperative that you explain why. It is always easier to deal with these issues at the beginning of the engagement than to explain them to a client after work has commenced.

Establish value.

Once you know what the client wants to accomplish, you must determine the value of the representation to the client. Establishing value takes the client's desired result one step further. It requires you to explore the far-reaching implications of the outcome of the matter and of the process itself.

Establishing value also requires that you differentiate yourself and your service using the client's values and priorities. Make yourself irreplaceable and create loyal clients by taking the time to ascertain the key elements

that are important to them and focus your services around those key elements to set you apart from others. Articulate the benefits your clients will receive as a result of working with you. Keep in mind that what you're really selling is your expertise and your ability to help clients reach their goal or eliminate or reduce their problems—you aren't selling the time it takes to reach those goals. The more valuable the client considers the representation and the outcome to be, the less price-sensitive the client will be.

Dispel the client's objections and misconceptions.

Clients come with preconceived notions about their case and the legal process, and objections or misconceptions about lawyers, their services, and particularly their fees. Explore these ideas with clients at the outset to correct any misconceptions and address any underlying objections or fears that the client may have.

Sometimes discussing the client's expectations in depth leads to a determination that these expectations are unrealistic or don't align with your way of practicing law. Don't be afraid to let clients voice their objections. It is better to lose a potential client who is not willing to pay for the work required than it is to take on a client who fails to pay after the work has already been performed.

Explaining the fee and how it is calculated.

Some resistance to fees is normal. But if the client understands the scope of the engagement and the necessary steps involved, and if the fees are based on the value of the engagement as articulated by the client, that resistance should dissipate. But if clients are pushing back too much—if they don't value your services or the anticipated outcome - it may signal a problem. Keep in mind, however, that if you never perceive any resistance whatsoever to your fees from any of your clients, your fees may be too low.

No matter how you calculate your fees, provide an estimate or budget based on the client's desired outcome and realistic expectations of what will occur during the engagement. Explain how your fees are calculated and give the client an opportunity to ask questions.

When you need a Written Engagement Letter

Effective in 2002, the Appellate Divisions of the Supreme Court of the State of New York modified the Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York regarding written engagement letters, setting forth particular requirements for New York Lawyers. You can also find rules about engagement agreements in the New York Code of Professional Responsibility, Rule 1.5, *Fees and Division of Fees*.

The rules require that an attorney provide the client with a written engagement letter or signed engagement agreement before beginning the representation (or within a 'reasonable time' thereafter if it is otherwise impracticable or if the scope of services cannot be determined at the beginning of the engagement) in any matter in which the attorney would be charging or collecting a fee.

The engagement letter must: 1) explain the scope of the legal services to be provided; 2) explain the attorney's fees to be charged, expenses and billing practices; and 3) where applicable, provide that the client may have a right to arbitrate fee disputes under Part 137 of the Judiciary Rules.

Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

There are some exceptions to the requirement for a written engagement letter: If the fee charged is expected to be less than $3000, or of the attorney's services are of the same general kind as previously rendered to and paid for by the client, no engagement letter is required.

ⓘRegardless of these exceptions, attorneys would be advised to supply an engagement agreement (or at least a letter confirming that terms will be the same as previous matters, etc.) in writing for ***all*** matters, regardless of the amount or type of work provided. This makes the relationship clear to the client, helps the client to take your work seriously and value your work, and it memorializes the agreement and the scope of work to be performed in the event that any dispute should arise later.

Note: For purposes of the rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney.

If someone other than the client will pay the lawyer's fees, the client's consent is required before the lawyer can accept such compensation.

Consequences for Failure to Prepare an Engagement Letter or Agreement

While the rule does not contain a specific penalty for failure to enter into a written engagement as outlined in the rule, and attorneys who have failed to do so may still be entitled to payment of legal fees pursuant to *quantum meruit* (*See, Seth Rubenstein, PC v. Ganea,* 41 AD 3d 54 (2nd Dept. 2007); *Nabi v. Sells,* 70 AD3d 252(1st Dept. 2009), there may be disciplinary consequences for such failure.

See, Matter of Polow, 117 A.D.3d 19 (2nd Dept. 2014):

> "failure to enter into a written letter of engagement, as required, reflects adversely on his fitness as a lawyer, in violation of former Code of Professional Responsibility DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]) and Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4 (h)."

Retainer/Engagement Agreement Essentials

An engagement letter is written by the attorney and outlines the terms under which the attorney will represent the client, and offers the client a better understanding of the attorney's path of representation. A retainer agreement is a letter of engagement that has been signed by the client. Let's cover some of the elements to consider including in your retainer or engagement agreement.

Who Is the Client?

Your engagement agreement should specifically state who the client is. While this may seem basic, it can become important later, particularly when working with businesses: do you represent the corporation or its shareholders or Officers and Directors? What about affiliated companies?

Some examples of clauses you might include in your engagement agreement to clarify these items include:

(a) "[Name of Firm] will represent [Client] in [description of scope of legal services]. In this engagement, we will not represent any directors, members, officers, partners, shareholders, subsidiaries or affiliates of, or other persons or entities associated with, [Client]."

(b) "Unless specifically stated in our letter, our representation of you does not extend to any of your affiliates and we do not assume any duties with respect to your affiliates. For example, if you are a corporation, we do not represent your parents, subsidiaries, sister corporations, employees, officers, directors, shareholders, or partners, or any entities in which you own an interest. If you are a partnership..."

Occasionally, you'll represent a client but your fee will be paid by a third party. This is another instance in which your engagement agreement should be clear who the client is.

When Does the Agreement Take Effect?

Don't leave yourself open for problems with clients that fail to return your retainer agreement. Your agreement should state specifically that the provisions contained within it (including the fee) are only valid if the agreement is signed within a specific period of time (i.e. 2 weeks. one month, etc.) Make it clear that if the agreement (and retainer fee) are not received within that period of time, *you are not obligated to represent the client*. Consider sending a non-engagement letter to clients that fail to return your agreement in a timely manner. *(See the non-engagement letter, below).*

What is the Scope of Work to Be Performed?

Your retainer agreement or engagement letter should accurately and specifically reflect the work you will perform for the client. These days, even a retainer agreement for a 'simple' real estate matter may not be that simple – are you charging one fee for the closing? What happens if the first deal falls through? How many contracts are you willing to review (or prepare) for your flat fee?

Scope creep can become a problem, especially if you are working on a limited scope project, through a flat or fixed fee, or on a task-based arrangement. Since the scope will directly affect the fee, you must be clear about the scope of your representation and what the fee does and does not cover in those instances. You do not need to anticipate every possible scenario, but you should articulate the kinds of problems or contingencies that may arise, such as failure of opposing counsel to provide documents, addition of new parties to the action, etc. that might affect both the scope and the fee.

The rules specifically contemplate circumstances under which there might be a change in the scope of services as originally contemplated by the attorney and the client. Rule1.5 states, "Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the

NYSBA Committee on Professional Ethics Opinion 856, March 17, 2011 (A lawyer may limit the scope of the representation of a client provided that the client gives informed consent to the limitation, the scope of the representation is reasonable under the circumstances, and the limitation is not prejudicial to the administration of justice. However, even if the original limitation is permissible, the ethical obligation to represent the client may extend beyond the initial limitation contemplated by the lawyer and client if withdrawal from the representation requires court permission and the court withholds or denies that permission.)

client." As such, it is perfectly proper for you to execute a new agreement with a client when the scope and fee change.

Giving the client options or levels of service helps define the scope of the engagement and helps the client to be involved in setting the fee.

Examples of options include:

- Packaging or bundling some services together at a different fee than the services would be priced separately; or
- Providing additional services to the client at a premium fee.

Options provide the client with some control over the amount of services provided and the level of the fee.

The American Bar Association Standing Committee on Ethics and Professional Responsibility released Formal Opinion 11-458, Changing Fee Agreements During Representation in August 2011, specifically addressing the issue of a change in a lawyer's fee during the course of a representation. That opinion noted that not only are lawyers required to communicate to the client any modification of an existing fee agreement, especially a modification sought by the lawyer, but the lawyer is also required to *explain the reason* for the modification to the client. The change must be reasonable under the circumstances at the time of the modification, and the modification must also be *accepted by the client*.

The opinion was based on ABA Model Rules Rule 1.5(a), 1.5(b), and Rule 1.4, all of which are similar to the New York rules. The opinion is just one more reason lawyers need to have explicit conversations with clients at the outset of the engagement about their fees, and especially about the scope of the representation that will be provided for those fees.

Lawyers who bill on an hourly basis must also anticipate regular rate increases and advise clients in the original engagement that regular fee increases may be anticipated. Clients may agree to these increases as part of the original fee agreement, without the necessity for the firm to return to each and every client for every regular fee increase.

In addition to having the client sign the engagement agreement, it is always a good idea to have clients initial certain portions of the agreement, such as those describing scope and fees. If the time comes when the fee needs to be changed during the representation or if any questions arise later, it will be easier to point the client (and potentially the court) back to those provisions and the client's explicit written agreement to the terms.

At the first sign that a change in the scope and/or a change in the fee is necessary, the lawyer should contact the client and reiterate those provisions, gaining the client's explicit agreement once again to proceed. If the client refuses to agree to the change in fee and no compromise can be reached at that time, the lawyer may

wish to advise the client that they may seek other representation and/or consider withdrawing from the representation. (These conditions should also be enumerated within the engagement agreement).

The ABA opinion emphasizes the necessity that any change in fee be reasonable under the circumstances, and notes that any change in a fee agreement made a significant period of time after the initial retention of the lawyer will be regarded with suspicion, even if the client agrees. Thus, the better (and earlier) the lawyer can articulate the need for an increase in fees, and the more specifically the lawyer can describe the change in circumstances and reasonableness of the requested change, the more likely that the change will be seen as acceptable.

Are there any Exclusions?

In addition to telling your client what you *will* do for them and what is included in the representation, you must also advise the client what is *not* included in the representation. For example, if you're retained for a litigation matter, does your retainer agreement include working on an appeal, or is that excluded?

Example:

> In an engagement wherein the attorney agrees to represent a client at an arbitration, the exclusion might read, "This Agreement **does not** cover representation of Client in any court action, litigation or trial which may be filed if the mediation or arbitration is unsuccessful. "

What is the Fee? Will there be a Budget?

Your agreement should include the amount of the fee (in fixed or flat fee arrangements), the method of calculating the fee, responsibility for expenses, frequency of bills and timing and method of payment.

What is a reasonable fee?

An attorney is required to charge a "reasonable" fee but how is that determined? The New York Rules of Professional Conduct, Rule 1.5 provides that the following factors are to be considered when determining whether a fee is 'reasonable':

- The time and labor required;
- The novelty and difficulty of the procedures involved;
- The skill requisite to complete the engagement;
- The likelihood that taking on the engagement preclude the lawyer from taking on other matters;
- The fee customarily charged in the locality for that service;
- The amount of money involved and the results obtained;
- The time limitations imposed by you or by the circumstances;
- The nature and length of the relationship between the lawyer and client;
- The experience, reputation and ability of the lawyer or law firm; and
- Whether the fee is fixed or contingent

Payment Terms

Make sure your client knows when you expect to receive payment, in addition to when they should expect to receive the bill. When are fees considered earned? Are any fees nonrefundable? Will you be billing in stages?

Will the client be paying a retainer? Will it be a 'replenishing' or 'evergreen' retainer? What is the fee structure? Will payments need to be made in advance (i.e. 30 days before trial, etc.)?

If you are billing by the hour or under any method by which the fee will not be known until the work is completed, give the client an estimate or budget. Also note whether the fee quoted is good for the entire engagement or whether it is subject to change subject to a change order or supplemental services agreement.

Non-Refundable Retainers

NYSBA Committee on Professional Ethics, Opinion 599, March 16, 1989 (It is improper for a lawyer's fee agreement to include a provision for a nonrefundable minimum, subject to narrow exceptions):

> We do not consider improper a fee agreement that calls for a specified minimum not thereafter refundable in the event of discharge, providing the following standards are met: (1) The specified minimum must not be excessive or unconscionable under the circumstances of the particular matter; (2) non-refundability must be expressly conditioned on the absence of lawyer default; and (3) the agreement must clearly and unambiguously explain in language that is "fully known and understood by the client" the grounds that would entitle the client to a refund of the otherwise nonrefundable fee. Cf. Jacobson v. Sassower, 66 N. Y. 2d at 993. We also call attention to the court adopted standard that in cases of doubt or ambiguity, fee contracts will be construed most strongly against the lawyer and favorably to the client.

Costs

In addition to your fees, will there be costs incurred during the course of the engagement that the client will be responsible for paying? Will the client pay those costs up front or will the law firm pay them and seek reimbursement from the client? What kinds of costs will be incurred (filing fees, expert witness fees, court reporter's bills, etc.), and when will the client be expected to pay these costs?

Payment acceptance methods and policies

Your agreement must detail the ways in which your firm accepts payments (i.e. credit cards, check only, electronic payments, etc.), as well as the terms and conditions of using these payment methods.

Example:

> Attorney will send Client monthly Billing Statements for fees and costs incurred. Each statement will be payable within 30 days of its mailing date. The Billing Statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.
>
> Both parties accept the Billing Statement as accurate and complete for the time period noted if neither party objects within 10 days of the date reflected on the Billing Statement.
>
> Payments may be made by check, by credit card or via electronic payment through Attorney's website.
>
> If a Billing Statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of 3% per month. The unpaid balance will bear interest until paid.
>
> Past due bills will incur a late payment fee of $____ per month.

> Both parties accept the Billing Statement as accurate and complete for the time period noted if neither party objects within 10 days of the date reflected on the Billing Statement.

Accepting Credit Cards

Lawyers may accept credit card payments of their fees as long as (i) the amount of the fees is reasonable, (ii) the lawyer complies with the duty to protect the confidentiality of client information, (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client, (iv) the lawyer notifies the client before charges are billed to the credit card and offers the client the opportunity to question any billing errors, and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R., Part 137. *See, New York City Bar Association Formal Opinion 2014-3; Bar Association of Nassau County Committee on Professional Ethics Opinion 2013-5* (2013); *NYSBA Committee on Professional Ethics, Opinion 763* (2003).

An attorney may even charge a client an amount over and above the amount charged by the credit card companies to cover processing fees. *See, New York State Bar Association Committee on Professional Ethics Opinion 1050 (3/25/15):*

> A lawyer may, as an administrative convenience, charge a client a nominal amount over the actual processing fees imposed on the lawyer by a credit card company in connection with the client's payment by credit card of the lawyer's advance payment retainer, as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the upcharge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged, including the upcharge) are reasonable under the circumstances.

Confidentiality

Your engagement agreement should set forth the rules of confidentiality and explain attorney-client privilege.

Your Team

Your engagement agreement may spell out who will be working on the client's matter – who is on their 'team' and what their roles will be in the matter, including attorneys, paralegals and others. If all of the legal work on a client's matter will not be produced directly by your office, for example, if you are outsourcing some work or using contract attorneys, virtual assistants and others, you may want to include that information in your engagement agreement or provide clients with a separate document that covers your policies and practices.

If you intend to charge different rates for different people who work on a client's matter, this should be enumerated within the engagement agreement. Lawyers in New York are permitted to charge for time expended by paralegals. *See, NYSBA Committee on Professional Ethics Opinion 1079.*

Technology and other 21st Century Issues

Today's engagement or retainer agreements need to keep up with today's times, which means that you may need to consider more than just the basics. For example, if you're using cloud-based practice management software or storage, it may be prudent to provide clients with information about these services and obtain their consent for you to use them or to store their personal data in the cloud.

Similarly, if you plan to communicate with clients using electronic means such as email or text messaging, you may want to provide your client with information about email privacy and protecting the attorney-client privilege.

File Retention Policies

Whether in your retainer agreement or in a separate policy document, you should advise your clients of your file retention policies. How long will you maintain the client's file? What will happen to any originals the client has furnished? Will you maintain hard copies of files or only electronic copies?

Conflicts of Interest

How will conflicts be handled? Is the lawyer or firm representing a corporation? Its shareholders? More than one party to a transaction? If any of these issues exist, they shold be enumerated in the agreement.

Disclaimer of guarantee

It is prudent to advise the client in the engagement agreement itself that you cannot and do not guarantee the client any specific outcome to their matter.

Duties and Responsibilities of the Parties

Your agreement should set forth not only your obligations to your client, but also your client's obligations to you - in cooperating with you, responding to your requests, providing you with necessary documents and information in a timely manner, etc.

The attorney-client relationship is a two-way street. Clients have responsibilities in the same way that lawyers do. Lawyers should discuss these responsibilities with clients at the initial consultation, and these responsibilities should be distributed to clients in writing along with the Statement of Client's Rights (covered in Section 1210.1 of the Joint Rules of the Appellate Division [22NYCRR§1210.1]), either within the engagement agreement itself or as a separate handout.

Some lawyers have begun the practice of charging for initial consultations. The question then arises whether, since they are collecting a fee for that initial conference, the Statement of Client's Rights must be given to the client prior to the consultation. This question was addressed in NYSBA Committee on Professional Ethics Opinion 685 (1997) (Prospective clients need not be asked to sign retainer agreement as a condition to charging for consultations, but must be given the Statement of Client's Rights and Responsibilities at consultations).

Consequences for late or non-payment

The retainer agreement or retainer letter should also address the consequences for the client's late payment or failure to pay and the grounds for withdrawal from the representation, as well as the procedure for notifying the client of your intention to withdraw. You should advise the client if your custom and practice will be to stop work until the account is current, or if the client will be charged interest.

See, NYSBA Committee on Professional Ethics, Opinion 805, January 10, 2007 (A retainer agreement may not ethically provide for a client's advance assent to a lawyer's withdrawal from employment based on the client's failure to pay agreed legal fees and expenses, but the agreement may advise the client of the lawyer's right to withdraw, subject to court approval where applicable, if the client "deliberately disregards" a payment obligation.)

The New York State Code of Professional Responsibility addresses turning down or ending the representation of a client in ***Rule 1.16: Declining or Terminating Representation***, enumerating reasons why lawyers should

not accept representation of a client, where a lawyer *should withdraw* from the representation, and when a lawyer *may withdraw* from the representation.

Reasons a lawyer may withdraw are set form in Rule 1.16(c), and include:

- The client has used the lawyer's services to perpetrate a crime or fraud;
- The client insists upon taking action with which the lawyer has a fundamental disagreement;
- The client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
- The client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
- The client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

On occasion, lawyers will be required to seek the court's permission before they are able to withdraw. In those cases, Rule 1.16(d) requires that lawyers continue the representation until the court permits withdrawal, and if a court orders the lawyer to continue representation, the lawyer must do so notwithstanding good cause for terminating the representation.

Rule 1.16 (e) advises lawyers that they should give reasonable notice to the client, allow time for employment of other counsel, deliver to the client all papers and property to which the client is entitled, and promptly refund any part of a fee paid in advance that has not been earned.

It is always advisable for lawyers to have good client selection criteria in place and to continually evaluate the attorney-client relationship throughout the engagement to avoid withdrawal whenever possible. But if withdrawal is inevitable, attorneys should identify the problem and endeavor to withdraw as early as possible so as not to prejudice the client.

See also, NYSBA Committee on Professional Ethics Opinion 719, July 2, 1999 (It is improper for lawyer to utilize a retainer agreement in a domestic relations matter which misleads the client regarding the circumstances under which the lawyer may withdraw for nonpayment or other reasons.)

Client's ability to discharge lawyer

In the same way that you should advise the client of the protocols governing your ability to withdraw from the representation, you should also advise the client of their right to discharge you – and the method for doing so.

Arbitration/Mediation/Dispute Resolution

Many jurisdictions have mandatory arbitration or mediation of fee disputes. Or you may be permitted to mandate through your engagement agreement that the client must go through arbitration or mediation prior to filing suit with respect to fees. There may be statutory provisions which govern dispute resolution in your practice area. These should also be covered in your agreement.

Special Engagement Agreement Rules

Divorce or Domestic Relations Matters

Domestic relations matters in New York are governed by 22 NYCRR 1400, which sets forth special provisions that must be included in the retainer agreement and special rules that must be followed. 22 NYCRR 1400.3 provides for a written retainer agreement in these matters.

1400.3. Written Retainer Agreement.

This section requires that an attorney who represents a client in a domestic relations matter in which a fee will be charged ***must*** prepare a written engagement agreement which includes the services to be provided as well as the terms of compensation. This agreement must be signed by both the attorney and the client, and, if the matter is in Supreme Court, a copy of the signed agreement must be filed with the court with the statement of net worth. Within 15 days (10 if there is a substitution of attorney). A copy must also be provided to the client.

The rule provides that the agreement must contain:

1. Names and addresses of the parties entering into the agreement;

2. Nature of the services to be rendered;

3. Amount of the advance retainer, if any, and what it is intended to cover;

4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer, the written retainer agreement shall provide how the attorney's fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client;

5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;

6. How the attorney will be paid through the conclusion of the case after the retainer is depleted; whether the client may be asked to pay another lump sum;

7. Hourly rate of each person whose time may be charged to the client; any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect;

8. Any clause providing for a fee in addition to the agreed- upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.

9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received;

10. Client's right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case;

11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary;

12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court.

13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

Personal Injury and Wrongful Death Matters

A new mandatory rule governing contingent fees in claims and actions for personal injury and wrongful death (but not for medical malpractice cases – see below) was recently adopted by each of the Appellate Divisions. This rule changes how fees may be charged in personal injury and wrongful death matters. The language of the rules in each of the departments is slightly different. The rules for different departments can be found at:

First Department (22 N.Y.C.R.R. Section 603.7[e])
Second Department (22 N.Y.C.R.R. Section 691.20[e])
Third Department (22 N.Y.C.R.R. Section 806.13[c])
Fourth Judicial Department (22 N.Y.C.R.R. Section 1022.31[c]).

The Second Department Rule provides that in any claim or action for personal injury or wrongful death other than medical, dental or podiatric malpractice, if the plaintiff's attorney is charging a contingency fee, there are two methods by which the fee can be calculated, and that if the attorney's fee is equal to or less than the fees contained in the two schedules of fees, it is deemed to be fair and reasonable, while any fee in excess of the fee schedule will be considered excessive and a violation of the ethical rules, unless authorized by a written order of the court.

The schedule of fees is either:

SCHEDULE A

(i) 50 percent on the first $1000 of the sum recovered;

(ii) 40 percent on the next $2000 of the sum recovered;

(iii) 35 percent on the next $22,000 of the sum recovered; or

(iv) 25 percent on any amount over $25,000 of the sum recovered; or

SCHEDULE B

(v) A percentage not exceeding 33 1/3 percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

There are two methods for computing the percentages, and the method must be selected by the client in the retainer agreement or letter of engagement:
1. on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or

2. If the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements.

The retainer agreement or letter of engagement must describe the two methods, explain the financial consequences of each, and clearly indicate the client's selection.

In computing the fee, the costs as taxed, including interest upon a judgment, are deemed part of the amount recovered.

If the attorney believes that extraordinary circumstances exist and that the fees in the above schedules will not provide sufficient fees, the attorney may apply to the court with an affidavit. If the court finds that there are extraordinary circumstances the court may fix fees above the fees in Schedule A, but they may not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorney.

In personal injury and wrongful death actions, signed retainer statements must be filed with the Office of Court Administration and contain the following information:

1. Date of agreement as to retainer
2. Terms of compensation
3. Name and home address of client
4. If engaged by an attorney, name and office address of retaining attorney
5. If claim for personal injuries, wrongful death or property damage, date and place of occurrence
6. if a condemnation or change of grade proceeding:
    a. Title and description
    b. Date proceeding was commenced
    c. Number or other designation of the parcels affected
7. Name, address, occupation and relationship of person referring the client

And include the date and signature of the attorney.

Attorneys must also file closing statements in these matters

Medical Malpractice Actions

Medical malpractice actions must be handled in accordance with NYS Judiciary law 474-a, which provides that in any claim or action for medical, dental or podiatric malpractice in which the attorney will be charging a contingency fee, the fee may not exceed this schedule:

30 percent of the first $250,000 of the sum recovered;

25 percent of the next $250,000 of the sum recovered;

20 percent of the next $500,000 of the sum recovered;

15 percent of the next $250,000 of the sum recovered;

10 percent of any amount over $1,250,000 of the sum recovered.

Percentages are computed on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the

enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered.

Similar to the rule above for personal injury and wrongful death matters, in medical malpractice actions, an attorney may apply for additional compensation under extraordinary circumstance.

Contingent fees in medical, dental or podiatric malpractice actions brought on behalf of an infant are governed by NYS Judiciary law 474.

The Non-Engagement Letter

In addition to an engagement letter, every attorney should have a **non-engagement** letter as part of their forms. These letters are used any time you have contact with a potential client but you (or the client) has determined that you are not going to move forward with the representation. A non-engagement letter is also advisable when a client has not responded to your requests to return the signed engagement agreement. It is a formal 'termination' of a relationship that was never officially started, and it clarifies that you are NOT that person's attorney.

The non-engagement letter comes in handy when:

- You have decided that you do not want to work with a particular client with whom you have spoken or consulted in person
- The client chooses another lawyer
- The client has your engagement agreement but has not yet signed, because they want to 'think about it'

The non-engagement letter should explicitly inform the prospective client that the law firm will not accept retention. It is highly advisable to send such letters via certified mail, return receipt requested, such that evidence exists in the event a statute of limitations issue later arises.

Disengagement Letters

Similarly, at the conclusion of a client's matter send a disengagement letter. This will provide a concrete date for purposes of statute of limitations defenses if a legal malpractice claim is brought. Once again, disengagement letters are best delivered via certified mail.

Billing Alternatives

General Retainer

A general retainer is a sum paid to the lawyer for being available to the client. A general retainer is earned upon receipt. *See Agusta & Ross v. Trancamp Contracting Corp.*, 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) (general retainer compensates a lawyer for "agree[ing] implicitly to turn down other work opportunities that might interfere with his ability to perform the retainer-client's needs" and "giv[ing] up the right to be retained by a host of clients whose interests might conflict with those of the retainer-client"); *see also Kelly v. MD Buyline, Inc.*, 2 F. Supp. 2d 420, 426 (S.D.N.Y. 1998).

A non-refundable general retainer is permissible provided the arrangement is clearly explained to the client. *See, The Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2015-2: Nonrefundable Monthly Fee In A Retainer Agreement.*

Advanced Payment Retainer

See, NYSBA Committee on Professional Ethics Opinion 816 (October 26, 2007)

An advance payment retainer is a sum provided by the client to the lawyer to cover payment of legal fees expected to be earned during the representation. To the extent the fees advanced are not earned during the representation, the lawyer agrees to return them to the client.

ⓘFees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in a client trust account. Therefore, any interest earned on these fee advances may be retained by the lawyer.

Contingency

The lawyer gets paid a percentage of the client's recovery at the end of the case. The fee can be a fixed percentage or a sliding scale.

Flat Fee

The lawyer charges one fee for the entire engagement – usually in predictable or repetitive matters. The fee is the same for every engagement, regardless of the client, the circumstances, etc.

Fixed Fee

The fee is fixed on a case by case basis, depending on the client, the anticipated outcome, the anticipated difficulty of the matter, the client's values and priorities, and other factors.

Set a fixed fee based on your experience and the information available at the beginning of the engagement and then use "change orders" when circumstances change or unforeseen issues arise. It is not always possible to anticipate all of the costs or fees in a particular matter. There may be factors outside your control that will affect the fee. Although you may not be able to predict the actual cost of these items, be sure to advise the client of potential factors that would change the outcome, the fee, or the time it will take to conclude the matter.

Even if you can't quote a fee up front for the entire matter, you may be able to offer the client a fixed fee in stages. At the beginning of each stage, quote a fee for that stage based on what has already occurred and what you anticipate for the next stage. When the scope of the work and the fee are agreed on before the work is performed, the client won't be surprised by the bill later.

Staged Billing

The fee is set in stages. Can be used to set the fee based upon the level of difficulty or complexity as the matter evolves. The fee for all of the stages can be set in advance, or the fees can be set at the beginning of each individual stage.

Staged billing can be done in one of two ways.

1. Provide an *estimate* of the total fee. Bill the client at the beginning of each stage, revising your estimate as needed.

2. Ascertain the fee for the entire engagement at the outset, and then bill the client a specific percentage of the fee as the matter reaches each subsequent phase.

Blended or Hybrid Fees

A combination of different billing methods. (Ex: fixed fee for litigation up to the time of trial, and hourly billing for the trial itself; or a flat fee with a performance bonus based upon achieving the client's stated goals).

Success Fees or Bonuses

Although you cannot guarantee a specific outcome, you be compensation with a bonus based on the outcome

Task or Activity Based Billing

Task or activity-based billing is a form of either flat or fixed fee billing in which the attorney provides the client for a price for the particular task, and charges that fee for that task. For example, a per diem attorney may charge a flat fee to other law firms for appearing in court. Rather than billing by the hour for the time it takes to review the file, make the court appearance, and report back to the handling attorney, the per diem attorney may choose to set a single fee for each time that attorney appears in a particular court.

Another method of task-based billing is to take on the engagement as a whole and then bill per task or activity based upon an agreed-upon schedule of fees for each task. There can be pitfalls to undertaking this type of representation. You should, at a minimum, advise clients of the types of tasks to be undertaken, and then communicate with the client about tasks to be performed as they arise or come to an agreement in advance about when the lawyer may proceed with a task even though the client has not given specific consent for that individual task.

In order to avoid short deadlines and uncertainty about whether a client has agreed to a particular task, your engagement agreement should include a timeline within which clients must respond. Failure to respond within that time period will be defined in the engagement as the client's consent to the lawyer's chosen course of action and related tasks to be undertaken in furtherance of that course of action *and* consent to incur the fee for that task pursuant to the fee schedule.

Advantages of Alternative Billing

- More fees collected;
- Fees are more likely to be paid up front;
- Little (or no) concern about writing down, writing off, or otherwise negotiating fees after the service has been rendered;
- Administrative work for billing and collections is reduced or eliminated;
- Timesheets become obsolete (with few exceptions);
- Reduced staff costs and/or more time for revenue-generating work;
- More consistent cash flow.

SAMPLE LETTER OF ENGAGEMENT

(From NYSBA website: http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/SampleLetterofEngagement.pdf)

To: [Name of Client]

This Letter of Engagement is furnished to you in accordance with Part 1215 of the Joint Rules of the Appellate Division.

Having reviewed with you the Statement of Client's Rights and the Statement of Client's Responsibilities, we have undertaken your representation in connection with the matter[s] described below:

SCOPE OF REPRESENTATION

A claim, dispute or dealings with relating to _____

All of our services in this matter will end, unless otherwise agreed upon in a writing signed by us, when there is a final agreement, settlement, decision or judgment by the court. Not included within the scope of our representation are appeals from any judgments or orders of the court.

Appeals are subject to separate discussion and negotiation between our firm and you. Also not included in the scope of this agreement are services you may request of us in connection with any other matter, action or proceeding.

FEES, EXPENSES AND BILLING PRACTICE

We intend to submit a bill to you no less frequently than every 60 days. Expenses will be separately stated on the bill and our fees will be charged as indicated below [check appropriate box]:

[ ] If on contingency, the fee will be charged in accordance with the following percent or scaled percentages _____. The stated percentage or percentages will be applied to the net sum recovered after the deduction of expenses. You will be liable for reimbursement of expenses whether or not there is a recovery.

[ ] On the basis of our time charges as follows:

$ _____per hour for the services of [name];

$ _____per hour for the services of [name];

[ ] A flat fee of $ for all services within the scope of our representation as set forth above.

In consideration of our services, in matters in which the fee is based on time charges, we shall In consideration of our services, in matters in which the fee is based on time charges, we shall require a retainer of $_____, of which the first $ _____shall constitute our minimum fee for the services to be rendered. The retainer is to be applied to our time charges.

Our minimum fee is intended to operate as follows:

a. The time initially expended on your matter will be charged against the minimum fee.

However, if your matter is concluded, whether by settlement or by judicial action, in less time than would be required to expend the minimum fee on the basis of time alone, we shall retain the minimum fee and there would be no refund of any part of the minimum fee. An additional retainer may be required as time charges warrant.

b. If our relationship is terminated in less time than would be required to expend the minimum fee on the basis of time alone, without your matter having been concluded by settlement or judicial action, then we shall not retain the entire minimum fee. Rather, in that event a fair and reasonable fee will be determined in accordance with legally accepted standards and only such portion of the minimum fee as represents such fair and reasonable fee would be retained. The

elements of a reasonable fee are set forth in DR 2-106 of the Lawyer's Code of Professional Responsibility, a copy of which provision will be furnished to you upon request.

ARBITRATION

In the event that a dispute arises between us relating to our fees, you may have the right to arbitration of the dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts, a copy of which will be provided to you upon request.

[Name of Law Firm]

By:

Dated:

Allison C. Shields

LEGALease CONSULTING INC

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Allison C. Shields, Esq., President of Legal Ease Consulting, Inc., provides productivity, practice management, marketing, business development, copywriting and social media coaching and consulting services for lawyers and law firms.

After leaving her position as Administrative Partner at Lewis Johs Avallone Aviles, LLP in 2005, Allison started Legal Ease Consulting, Inc. to help lawyers build better law practices. A former practicing lawyer and law firm manager, Allison understands the law firm environment and the daily pressures faced by lawyers trying to manage and build their business while practicing law and successfully serving their clients.

Allison helps her clients create efficient, effective systems and operations to maximize productivity. Her clients learn how to identify and attract their ideal clients, improve their client intake and selection, increase client loyalty, develop client-friendly fee structures, and increase profits. Recognizing that lawyers must capture attention and demonstrate their expertise online, Allison provides online marketing and social media services and training for lawyers to help them maximize these important opportunities.

Allison is the author of the Legal Ease Blog at www.LegalEaseConsulting.com, writes the *Simple Steps* column for *Law Practice Magazine* and is a regular columnist for the ABA Legal Technology Resource Center (LTRC) blog, Law Technology Today and has written regularly for the Canadian blog, Slaw, and for Lawyerist. Allison's latest book, written with Daniel J. Siegel, is *How to Do More in Less Time: The Complete Guide to Increasing Your Productivity and Improving Your Bottom Line*. She is also the co-author, with Dennis Kennedy, of the books, *LinkedIn in One Hour for Lawyers* (now in its second edition) and *Facebook in One Hour for Lawyers*. All of these books are published by the American Bar Association's Law Practice Division.

Allison serves on the Council of the American Bar Association's Law Practice Division and is the Chair of the Division's Book Publishing Board. She also serves on the Board of the LTRC and has been a member of the editorial boards of both *Law Practice Magazine* and *Law Practice Today*. She is the former Executive Director of the Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, and also served as Associate Dean of the Academy, and is a past member of the Board of Directors of the Suffolk County Bar Association. She is on the editorial board of *The Nassau Lawyer* and is a past Chair of the Membership Committee at the Nassau County Bar Association.

In addition to her articles published by numerous legal publications, Allison lectures on marketing, social media, business development, productivity and practice management for bar associations, law schools and other legal associations, and has been a presenter at the ABA TECHSHOW, the leading legal technology conference and expo. Her website, Lawyer Meltdown, provides resources and information for lawyers about managing and building their practices.