What Parts to Add to a Litigation Engagement Agreement?

I am redoing my standard engagement agreement for hourly litigation cases. In CA, the state bar puts out a template engagement agreement that is not bad, but it is highly generic.

What components have you added to your engagement agreement over the years because you have found it is practically-useful, but very few template engagement agreements address? I am trying to compile a list of practical things to add/change to my current engagement agreement.

One big thing I added last year was a clause that says that the client is responsible for keeping copies of all emails that they send to or receive from me. That way, in the event I am fired or quit, I only have to provide copies of emails between myself and opposing counsel. Shockingly, some clients want me to help them without paying for it and try to use the "You have to provide me copies of all emails I've ever sent or received from you" thing as a way of making it onerous for me to quit.

One thing I include in retainer agreements is a statement that "the rule of contra proferentem, i.e., that ambiguous contracts are construed against the drafter, does not apply to this retainer agreement."

L. Maxwell Taylor, Vermont

That may not fly and could have the opposite effect from the one you intend.

Courts often strictly construe lawyer-client agreements in the client's favor. This results from the nature of the lawyer-client relationship, not primarily from the fact that the lawyer drafted the agreement. Of the many species of fiduciary relationships, lawyers are held to the highest and strictest standards relative to their clients. NY has a strong body of case law on this point, with many decisions by the New York Court of Appeals (NY's highest appellate

court). In a jurisdiction with legal doctrine to this effect, the clause you propose could constitute a misrepresentation of the law.

In addition, the last thing you want in your lawyer-client agreement is Latin (or Norman French) legalese. Strive for ultra-plain language.

Steven Finell, California

I think what you say is sound, Steven. Let me add that I write my retainer agreements in plain and simple language and I probably don't need that "the rule shall not apply" stuff. Complicated retainer agreements wouldn't fly where I practice, which is in Vermont.

Max Taylor

Your “emails only with opposing counsel but not with you” probably is inconsistent with Rule 3-700(D) as interpreted by several bar association opinions.

I recommend a paragraph explaining your policy re file retention client requests for file and document destruction.

Though a “fees are negotiable” disclaimer is required only for contingent fee agreements it is prudent to include such in all agreements and have the client initial it.

Make sure your agreements comport with the rules regarding disclosures about legal malpractice insurance.

If you have an attorney’s lien provision be sure it imports with Rule 3-300 written disclosure and client informed written consent requirements. I include an explanation in simple terms how my lien could stop or disrupt the client’s receipt of payment and I have clients separately initial it AFTER the client genuinely has had time to consult independent attorney.

Many fee agreements I see are conclusory and vague in describing the scope of engagement and work to be performed. At your risk.

Michael Boli, California

You will charge interest at 10 per cent per annum on unpaid amounts billed.

Arbitration and mediation.

Address for notices to client.

No texting.

File retention and destruction policy.

Litigation is uncertain, no predictions or guarantees.

No social media posting by client about the facts, parties, witnesses, etc.

Roger M. Rosen, California

California Members:

I offer to exchange fee agreements, one on one, deleting client names, off list, if you care to do so. Litigation, hourly. Let me know at my other email address. rrosen@rmrlaw.com

Roger M. Rosen
