

CHECKLIST FOR PREPARATION OF CLIENT ENGAGEMENT LETTERS¹

The KBA Ethics Committee has developed this generic Checklist for preparing Client Engagement Letters and is intended to serve as a guide when developing your client engagement letters. This checklist is not intended to be applicable to all situations and is not a substitute for an attorney's careful review and compliance with Kentucky's Rules of Professional Conduct which are found at SCR 3.130. If you have any suggestions or comments about this Checklist address them to the Chair of the KBA Ethics Committee, Bill Fortune, fortunew@uky.edu, as it is intended that from time-to-time this Checklist will be updated.

Before Accepting Employment

- 1) Are you able to and do you want to represent the person in the matter? Within time constraints of your initial meeting (discussion) learn as much as you can about the prospective client – personal situation, employment, etc. A good resource is www.investopedia.com. Consider the following issues in making your decision as to your willingness to accept the prospective person as your client.
 - a. identify your client – will you meet alone with the prospective client or in the presence of a non-client and what steps will you take to preserve the attorney client privilege;
 - b. are you competent to handle the matter;
 - c. are you able to devote the time and effort necessary to adequately represent the prospective client;
 - d. based on your initial interview does the prospective client's claim have merit;
 - e. does the prospective client give an appearance of being difficult to work with – how many lawyers have previously handled the client's matter and will prospective client consent to your contact of previous lawyer(s); and
 - f. does the prospective client appear to be competent – is the client suffering from diminished capacity; do you sense any substance abuse issues, cognizance concerns or issues of persons imposing undue influence on the prospective client.
- 2) Conflicts – present or past
 - a. do you or your firm represent someone who is or might be adverse to the prospective client – this includes your former representations of potentially adverse persons;
 - b. do you or your firm have a “material limitation conflict” based on responsibilities to another client, a former client, or a third person, and will you be able to obtain your client's informed consent; see Comments 8 and 9 to Rule 1.7 and KBA “Checklist to Obtain Client Informed Consent Under SCR 3.130(1.7);” and
 - c. do you or a member of your firm have a “personal interest conflict?” e.g. knowing an adverse party, a relationship to a lawyer in a firm on the other side of the matter, a business interest, etc. See Comments 10 and 11 to Rule 1.7 for examples.
- 3) Know your client – consider performing an internet search about your prospective client before accepting the engagement.
- 4) Multiple Clients – recognize your duties of competency, loyalty, and confidentiality to each client. Consider Rule 1.7 and the KBA's “Checklist to Obtain Client Informed Consent Under SCR 3.130(1.7),” and, most importantly:

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- a. Anticipate possible conflicts among multiple clients and determine and then explain how such conflicts will be resolved; and
 - b. If representing an entity and its constituents (directors, officers, employees, members, shareholders) consider necessity to obtain informed consent of entity and constituents. See Rule 1.13(g) and Comment 12.
- 5) Refusal of Engagement – if you decide not to accept the person as your client will you:
- a. confirm non-engagement in writing;
 - b. do you need to explain, if applicable, any statutes of limitations;
 - c. will you retain or return client papers.

Drafting Engagement Letter

- 1) Usually prepared after the initial interview –
 - a. Is prospective client required to sign engagement letter – even if not required it is good practice to have the client sign or otherwise acknowledge your engagement letter;
 - b. Are you required to sign the engagement letter;
- 2) Define scope of your representation – be as precise as possible to avoid misunderstandings
 - a. If representing a fiduciary identify your duties to fiduciary, your duties to beneficiaries, obligations to the ward of an estate;
 - b. Advise the client as to who within your firm will perform services and explain whether a portion of the client’s matters will be outsourced to others;
 - c. If client’s matter is subject to statute of limitations, advise client of the expected expiration date and consider asking client to notify you within a stated date prior to statute’s expiration date;
 - d. Advise if whether a new engagement letter be required for services beyond the scope of initial representation; and
 - e. Explain the scope of the accepted assignment and whether it may affect your engagement of any future or related or unrelated matters.
- 3) Confirm basis for determining & payment of lawyer fees and expenses -
 - a. If a contingent fee, comply with Rule 1.5(c) – in writing, whether expenses are deducted before or after the lawyer’s share is calculated, the expenses (costs) for which the client is responsible;
 - b. Will proposed fee and expenses (costs) be “reasonable” as determined both at the beginning and end of the representation;
 - c. If on an hourly basis, explain hourly rates for attorneys and staff and whether standard charges are assessed (e.g. minimum of 15 minutes for a phone call);
 - d. If on a flat fee basis, whether an advance fee is obtained, whether the fee is deposited in the office account or the escrow account, and assure compliance with Rule 1.5(f), whether the fee is a retainer to be drawn against as work is done, etc.;
 - e. If joint clients, specify how responsibility for payment will be allocated among the clients;
 - f. If all or part of the fee will be paid by a non-client third party, comply with Rule 1.8(f); and

- g. If any portion of your fee is to be paid in property other than money then such arrangement is subject to the requirements of Rule 1.8(a) because the arrangement has the essential qualities of a business transaction with your client.
- 4) Define what expenses are to be paid by the client and when payment will be due.
 - 5) Billing practices – Explain when your billing statements will be submitted for payment, the expected time for payment and whether you (or your firm) will accept payment by means other than check;
 - 6) Means of communication – will email and/or text messaging be used; explain issues of cyber security and whether client will accept proposed methods of communication;
 - 7) Define Lawyer’s responsibilities -
 - a. What is the time frame in which the client’s matters will be performed;
 - b. Obtain the client’s consent to any extraordinary expenses;
 - c. Describe how you will keep your client informed and expected regularity of client consultations;
 - d. Confirm your client’s objectives and the means by which those objectives will be achieved; and
 - e. Your policy on the timing of responding to client phone calls and emails and if you are unavailable alternate means for client to convey important information to you or staff associates.
 - 8) Client’s Responsibilities -
 - a. pay legal fees and expenses promptly
 - b. respond promptly to counsel’s phone calls and emails
 - c. provide requested information promptly and truthfully
 - d. cooperate with counsel
 - e. consider in good faith reasonable offers of settlement
 - f. keep counsel informed of changes in address, phone number, etc.
 - 9) Define conditions in which representation will be terminated before completion of matter -
 - a. Explain client’s right to terminate representation and if client does so without “due cause” the client’s responsibility to pay your fees, based on quantum meruit, and expenses
 - b. Explain your right to withdraw for good cause, and explain typical reasons for withdrawal; such as, failure to pay your fee or expenses; receipt of information that client’s case is without merit; client’s decision to reject recommended settlement; client fraud. See Rule 1.16(b)(2)(3)(4)(5) for other examples of good cause;
 - c. Explain to client that if you decide to withdraw whether the client will have a responsibility to pay lawyer fees, based on quantum meruit, and case expenses. See Lofton v Fairmont Specialty Insurance Managers, Inc., 367 SW3d 593 (Ky. 2012).
 - 10) At conclusion of the representation:
 - a. Explain when and how you will make a distribution of funds pursuant to the contract between lawyer and client, subject to obligation to pay to third persons with valid liens or assignments to a portion of client’s recovery. In personal injury cases counsel and client obligations to determine potential of third-party claims, and how they will be paid. Define expenses that must be paid as a matter of law, e.g. Medicare and others, on a recovery. Determine potential ERISA liability for clients whose bills have been paid by employer-based health insurance.

- b. Provide client with an accounting of money received and paid
- c. Obtain client agreement on disposition of the file. Client has a right to the file (except for counsel's work product) on payment of copying expenses – may copy of file be provided by means other than paper, e.g. CD, flash drive, sent by email, and the like;
- d. Describe your file retention policy - how long and in what form.