Fee Agreement Compendium

2007 Revision

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The Oregon State Bar provides the *Fee Agreement Compendium* as a starting point to aid lawyers in drafting their own written fee agreements.

The Oregon State Bar makes no representations or warranties of any kind, express or implied, concerning the legal accuracy, ethical considerations, or enforceability of any of the accompanying forms. Each lawyer who uses this compendium is expected to exercise his or her own independent legal and business judgment.

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This handbook completely revises all previous editions.

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Editor's Preface

According to a recent survey, six out of 10 Oregon lawyers frequently use written fee agreements with their clients. The other Oregon lawyers should do so. Why? Because most lawyer-client disputes involve fees; a clear, written agreement between lawyer and client can help preclude such problems.

This 2007 edition of *Fee Agreement Compendium* is the fourth edition of this very useful collection. Initiated in 1993 by the Oregon State Bar Law Practice Management Section, *Fee Agreement Compendium* covers information that Oregon lawyers need regarding ethics issues, billing costs, credit issues, retainer letters, and IOLTA. The book also includes nine general sample agreements and specific agreements for nine discrete practice areas. Each agreement is preceded by notes and comments regarding usage.

This fourth edition includes these useful features:

- Agreements and letters written in plain language so a client can understand the document;
- All forms and agreements available on CD-ROM in both Word and WordPerfect formats so the lawyer can tailor the language to the client;
- A handy table of forms for easy reference;
- A Spanish language fee agreement for criminal cases;
- Essential bankruptcy disclosure statements;
- Updated ethics rules and ethics opinions references; and
- Section headings and outlines in every chapter to help the lawyer find specific discussions quickly and easily.

Many Oregon lawyers contributed their time and expertise—and their fee agreements—to this useful book. I am grateful to each of them. Moreover, all members of our bar owe them thanks for their effort and generosity. I urge you to take full advantage of the authors' practical experience and expertise by using the information and forms presented here.

BRADLEY F. TELLAM
Editorial Review Board

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Retained or Not Retained—
You May Need to Prove It

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Introduction

Does the lawyer have a client? The answer would seem simple—to a nonlawyer. But to a lawyer, the question needs more careful consideration to answer. A prospective client is a person who discusses the possibility of forming a lawyer-client relationship with a lawyer. Oregon RPC 1.18. Even if the parties do not form a lawyer-client relationship, the lawyer owes duties of confidentiality to the prospective client similar to those owed to a former client and is subject to conflict-of-interest rules. Oregon RPC 1.18(b)–(d). The duties owed to a prospective client can become the basis for a current and former client conflict-of-interest allegation resulting in discipline sanctions. *See generally In re Knappenberger,* 338 Or 341, 108 P3d 1161 (2005). OEC 503 (ORS 40.225(1)(a)) identifies the persons who may claim the lawyer-client privilege to include those who consult a lawyer "with a view to obtaining professional legal services from the lawyer."

The test for the existence of a lawyer-client relationship is the two-element "reasonable expectations" test, sometimes referred to as the *Weidner* test. The subjective part of the test asks whether the client believes that the lawyer is representing the client. The objective part of the test asks if the

client's subjective belief is objectively reasonable under the circumstances. *In re Weidner,* 310 Or 757, 770, 801 P2d 828 (1990). *See* THE ETHICAL OREGON LAWYER §5.2 (Oregon CLE 2006). For this reason it is wise to delineate these relationships in writing.

Fee agreements and letters of engagement, nonengagement, and disengagement are crucial to effectively avoid malpractice complaints. These agreements and letters set the stage for the relationship and responsibilities between the lawyer and the client. They protect both parties by providing a clear, written description of what the lawyer is or is not going to do, how much it will cost, and when the lawyer expects to be paid. Many legal malpractice claims are successfully defended because the lawyer can produce a letter or signed agreement establishing that he or she did not have certain responsibilities to the client.

Using fee agreements and engagement, nonengagement, and disengagement letters need not be time-consuming, difficult, or offensive to the client. Most clients welcome and expect a clear, written description of the arrangement they have with their lawyer.

Engagement Letters

In an engagement letter, the lawyer explains to the client what the lawyer will do on the client's behalf. In the letter, the lawyer generally summarizes the initial lawyer-client interview, confirms representation, delineates the scope of representation, states when representation will begin, may discuss relevant conflict-of-interest disclosures, explains procedures for file storage and destruction, and explains arrangements for practice closure if the lawyer dies or becomes disabled. An engagement letter often is the lawyer's first letter to the client, and it documents the agreement between the lawyer and the client.

An engagement letter provides the parties with a clear explanation of what the lawyer is expected to do and what the client is expected to do. Lawyers and clients benefit from this clear delineation of responsibility and issues. In addition, formalizing the lawyer-client relationship increases the likelihood that the lawyer will enter the legal matter and the parties in the lawyer's conflict-of-interest and calendaring systems. This reduces the risk that the lawyer will miss deadlines or engage in unethical conduct.

> EXAMPLE: The mother of a child who was in a serious automobile accident telephoned a lawyer. The lawyer advised the mother, over the telephone, that he would obtain a copy of the police report and would get back to her. However, the lawyer forgot to obtain a copy of the police report, forgot to write back to the client,

and forgot that he had made promises to the client. After the statute of limitations had run, the mother sued the lawyer for legal malpractice. If the lawyer had sent an engagement letter to the client, a file would have been opened and the case would have been entered into the lawyer's calendaring system.

An engagement letter can incorporate and serve as a fee agreement, or it can be a separate letter to the client. *See* chapter 5. Whether a fee agreement is used in addition to or as part of an engagement letter depends on the lawyer's preference and area of practice. Some lawyers prefer to provide their clients with a standard fee agreement at the initial client interview. The client signs the fee agreement at the client interview, and the lawyer sends a follow-up engagement letter to the client. Other lawyers prefer to combine the engagement letter and fee agreement. *See* Forms 6-1 through 6-4.

Whenever possible, a lawyer should conduct client interviews in person. A lawyer should not use telephone calls to screen clients, except for the limited purpose of determining if the person needs legal services in the lawyer's area of expertise. Each person seeking legal services should be required to complete an intake form. The pertinent information on the form, such as name and address, can be used when sending the engagement letter and fee agreement.

PRACTICE TIP: Send a copy of the intake form along with the engagement letter and fee agreement for the client's review.

Nonengagement Letters

If a lawyer decides to decline representation after research or investigation, the lawyer should protect himself or herself and the prospective client by (1) promptly advising the prospective client in writing of the decision not to take the case or matter, (2) informing the client of his or her right to contact another lawyer for a second opinion, and (3) informing the client that time limits may bar a claim and that his or her prompt attention is required. Disengagement and nonengagement letters are especially critical when a lawyer decides not to continue past a specific stage in the case. In some instances the lawyer may want the prospective client to sign an acknowledgment of nonengagement.

In a nonengagement letter, a lawyer documents that the lawyer has not accepted the case and clarifies for the prospective client that the lawyer will not be representing him or her. Under the "reasonable expectations" test for lawyer-client relationships it is very easy for a lawyer-client relationship to be formed. A lawyer who wishes to avoid malpractice claims and ethical

complaints should send a clear and concise nonengagement letter to all prospective clients. *See* Forms 6-5 through 6-10.

The lawyer does not need to state a reason for declining the case in the nonengagement letter. If a reason is stated, however, the lawyer should be very careful. For example, it is generally advisable not to give opinions about the value of the case unless the lawyer has investigated and researched the legal matter, or unless the lawyer specifies in the letter that the opinion is based on facts provided by the prospective client. If the lawyer does give an opinion, the lawyer should also advise the prospective client that he or she may wish to seek a second opinion. A lawyer who refers the prospective client to another lawyer should give the prospective client a list of names to choose from and the telephone number for the Oregon State Bar Lawyer Referral Service.

> PRACTICE TIP: The Lawyer Referral Service telephone number is 503-684-3763 or, toll-free in Oregon, 1-800-452-7636.

If time limits apply to the case, the lawyer should state that time limitations may apply and warn the prospective client that failure to act quickly may result in a loss of the prospective client's rights. The lawyer can give this warning without specifically stating the applicable time periods.

With a nonengagement letter, the lawyer documents that the lawyer did not agree to provide legal services to the prospective client. However, in some cases the lawyer may find it is prudent to have proof that the letter was sent and received.

> PRACTICE TIP: Send the nonengagement letter by certified mail, return receipt requested, and by regular mail if the facts of the case or the nature of the prospective client suggests that proof of mailing and receipt may be needed. Attach the returned receipt card to the notes of the office conference and to the office copy of the nonengagement letter. These letters, notes, proof of mailing, and proof of receipt provide an effective defense to the lawyer whose declined client incorrectly believes or argues that the lawyer has represented or will represent the person.

> EXAMPLE: A woman who had extensive health problems consulted with her "family" lawyer about a potential medical malpractice case. The lawyer listened empathetically to the woman's story, commented that he felt she had a good case, and advised her (orally) that he did not handle medical malpractice cases. The woman left the office believing that she had established a rapport with the lawyer, and expecting that the lawyer would handle her medical

malpractice case. When the woman later sued the lawyer for missing the statute of limitations, the lawyer could offer only his verbal testimony that he did not accept the case. He had not written the client a nonengagement letter and could not offer any additional proof. The jury entered a verdict in favor of the woman. The lawyer could have avoided the legal malpractice claim by writing a three-line nonengagement letter. The letter could have protected him, served as a reminder to the client that she needed to retain another lawyer, and reminded the lawyer to enter the declined client's name into the lawyer's conflict system.

PRACTICE TIP: A lawyer who decides to decline representation should protect himself or herself and the declined client by doing the following in writing immediately after the initial consultation: (1) advise the declined client of the decision not to take the case or matter, (2) inform the declined client of the right to contact another lawyer for a second opinion, (3) inform the declined client that statutory time limits may bar a claim and that his or her prompt attention is required, (4) enter the appropriate information in the lawyer's conflict system, and (5) have the declined client sign an acknowledgment of nonengagement whenever the facts of the case or the nature of the prospective client gives the lawyer reason to believe that this step would be prudent.

Disengagement Letters

The suggestions for engagement letters and nonengagement letters also apply when the lawyer or client terminates the lawyer-client relationship before the legal work is completed. A disengagement letter is especially critical when a lawyer decides not to continue past a specific stage in a case. The lawyer should send a disengagement letter to establish that the relationship is no longer continuing, and to refer the client to another lawyer. In the disengagement letter, the lawyer should warn the client of applicable time limitations, deadlines, and uncompleted investigation or case work. The lawyer should address other topics as applicable, such as whether and under what conditions the lawyer will consult with successor counsel, and whether the client owes fees or expenses.

Using a disengagement letter allows the lawyer to clarify that the lawyer-client relationship has ended and that the client is now a former client. This status is important for conflict-of-interest purposes. *See* OSB Formal Ethics Op. No. 2005-146.

Table of Forms