

ATTORNEY-CLIENT ENGAGEMENT AGREEMENTS AND IT – WHAT NEEDS TO BE ADDRESSED?

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Electronic correspondence with clients and the management of electronic files raise several issues that need to be addressed. The following contribution develops a model for an engagement agreement that covers these topics. To provide our readers with a corresponding sample of the engagement agreement in Italian and English as well, this article is exceptionally published in four languages (see *Anwaltsrevue* [AWR] 3/2013).

I. Introduction

1. Objective of the proposed text

In my last contribution¹, I proposed that various issues related to the use of IT (e.g. e-mail correspondence) should be addressed in agreements with clients. What would an engagement agreement covering these topics actually look like?

Individual cantonal bar associations have developed model engagement agreements.² These focus primarily on issues related to fees³. By contrast, the following proposed text focuses primarily on issues related to information technology (particularly e-mail correspondence, electronic file management, and archiving). To present them in context, however, a complete model agreement is reproduced below.⁴

2. Engagement agreement and power of attorney

As a rule, the attorney-client relationship is based upon an agency agreement or agreement for the provision of services (*Auftrag* pursuant to Art. 394 et seqq. OR)⁵ that can be established without any specific legal form, i.e. also orally (Art. 11 OR). Clients sometimes maintain the view that the content of the agreement is defined in the power of attorney. Powers of attorney are actually designed to address the relationship with third parties (courts or counterparties). The description of the subject matter in the power of attorney can help to determine the scope of the engagement, however.

The power of attorney forms provided by the cantonal bar associations also frequently include provisions relating to the internal relationship between attorney and client (e.g. advances on costs are mentioned in the form supplied by the Bar Association of the Canton of Bern). Nevertheless, at best they only touch upon rudimentary ele-

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- 1 WOLFGANG STRAUB, Was bringt IT in der Anwaltskanzlei?, *Anwaltsrevue* 11-12/2012, p. 521-525 and 1/2013, p. 21-26.
- 2 The Lucerne Bar Association has made such a model agreement available on the Internet (<http://www.lav.ch/dateien/Auftrag.doc>). The Zurich Bar Association's model engagement agreement can be requested from the association.
- 3 The text being proposed here presumes a time-based fee. The principle of the admissibility of contingency fees was controversial for a long time. The model agreement created by the Zürich Bar Association and that of the Lucerne Bar Association both stipulate hourly fees and contingency fees. In my view, the considerations with respect to contingency fees also apply analogously for the (rare) case in which compensation awarded by the court is greater than the time expenditure in accordance with the agreed rate. At first glance, a model in which the attorney receives the higher amount of the two appears to be unbalanced. Nevertheless, a *pactum de palmario* can ultimately also lead to a reduction of the basic rate and thus serve the interests of the clientele. For the relationship between base rate and success-based component, see also http://www.bgfa.ch/de/02_rechtsprechung/05_standesregeln.htm?eintrag_id=722.
- 4 The text of the model agreement is also available as a Word document at <http://www.advobern.ch>. The online version is subject to subsequent amendment, and may therefore differ from the print version.
- 5 The model text published here makes reference to the statutory provisions on agency agreements and agreements for provision of services (*Auftragsrecht* pursuant to Art. 394 et seqq. OR). The statutory provisions on agreements for the provision of works or other concrete results (*Werkvertragsrecht* pursuant to Art. 363 et seqq. OR) may, however, also apply to certain engagements, such as the drafting of general terms and conditions of business based upon a client's requirements. Cf. also in this regard FRANÇOIS BOHNET/VINCENT MARTENET, *Droit de la profession d'avocat*, Bern 2009, Margin no. 2535 et seqq.

ments of an engagement agreements' content. Even the default statutory provisions (particularly the OR, BGFA, and DSG) address the content of a specific engagement only incompletely. A description of the most important rights, duties, and procedures in a written engagement agreement is therefore practical from a general perspective, to maintain transparency in the collaboration.

3. General need for adaptation

The proposed text supplied here is based upon a model agreement from our own law firm. It is tailored to the processes and procedures within our firm (electronic file management, archiving, etc.) and must therefore be adapted to the requirements of other law firms and to the circumstances of each individual case.

In formulating this text, we have generally made an attempt to maintain transparency and balance (for example, the agreement deliberately includes no limitations of liability⁶). The text makes no claim to completeness or perfection, however, and may also be too detailed for many cases.

Because the scope of attorney-client engagements ranges from court cases and expert opinions to property management or board of director engagements, it is hardly possible to create a single contractual text that properly addresses all possible circumstances. The model presented here is tailored to the needs of court representation and advisory engagements. It presumes an agreement formed between the client and an individual attorney practicing together with other attorneys, e.g. as an unincorporated

association sharing general costs (*Unkostengemeinschaft* – as opposed to a partnership sharing costs as well as profits). If a legal entity (e.g. a law firm organized as a stock corporation [*Aktiengesellschaft*]) is being engaged, then the text must be amended accordingly.

4. International relationships

The model text includes a choice of law and venue clause. In international engagements, however, this clause could collide with the mandatory provisions of a national legal system that considers itself as having jurisdiction (e.g. in the case of consumer protection law⁷ or data protection law). This problem cannot be fundamentally solved by a model agreement, since its range of use cannot be predicted in terms of either time or geographic location. The question of the validity of a choice of law and venue clause must therefore be reviewed on a case-by-case basis.

⁶ Limitations of liability in attorney-client engagement agreements are questionable in light of Art. 12(a) of the Federal Act on the Freedom of Movement for Lawyers (BGFA). For a nuanced analysis, cf. the resolution of the Supervisory Committee on Attorneys of the Canton of Zurich dated 5 July 2007, ZR 106/2007, p. 309–312.

⁷ Based upon our interpretation, domestic attorney-client engagements do not fall under the definition of a consumer agreement within the meaning of Art. 32 (2) ZPO because they are not intended for the purpose of consumption (*Konsum*) in the sense of «regular consumption» (*üblicher Verbrauch*). Cf. the decisions of the Court of Appeal of the Canton of Bern of 2 August 2009, APH 09 30, E. 3, and the Cantonal Court of St. Gallen of 1 February 2008, BZ.2007.68, E. III.

II. Sample Text

Attorney-Client Engagement Agreement

between

[Company or first name, last name, and address of client], hereinafter referred to as the **Client**

and

[First and last name of the attorney, name and address of law firm], hereinafter referred to as the **Attorney**

concerning _____

1. Basis

1.1 Legal basis

The contractual relationship shall be subject to the **regulations on agency agreements or agreements for the provision of services** (*Auftrag*) within the meaning of Art. 394 et seqq. of the Swiss Code of Obligations (OR).

The Attorney must also comply with regulations under the professional code of conduct for attorneys. He/she shall be subject to **supervision by the cantonal supervisory authorities** [exact name and address of the supervisory authority]

1.2 Contractual document

The Client and the Attorney shall **each** receive **one copy** of the present agreement.

The **emphasized passages** in the text of the agreement are intended only for easier legibility.

2. Scope of the engagement

[Brief description of the content of the engagement, engagement objectives, and any restrictions in the scope of the engagement (e.g. restricted to the role of local representative of foreign attorney)]

Unless otherwise stipulated, the provisions of the present agreement shall also apply for any expansions of the engagement or **additional engagements**.

The Attorney shall undertake a careful performance of the agreement in the interests of the Client. Nevertheless, the Attorney shall be in no way obligated to ensure a specific **success** (e.g. victory in litigation).

Unless otherwise stipulated, the engagement also includes the **collection** of all amounts in dispute and attorney's fees.

3. Representation vis-à-vis authorities, counterparties, etc.

If the Attorney engages in external representation of the Client, he/she shall require a corresponding **power of attorney**. He/she shall use *[the official form text of the cantonal bar association/the attached power of attorney text]* for this purpose.

The Attorney shall undertake to use this power of attorney **only to the extent necessary**, even if he/she has been granted more extensive external rights pursuant to the text of the power of attorney. Except for cases of emergency (in particular when the Client him/herself cannot act in a timely manner), the Attorney shall not issue any statements that could be binding for the Client without prior consultation.

4. Termination of the engagement

The engagement is based upon mutual trust. The contractual relationship, and thus the power of attorney as well, may be **terminated** by the Client at any time with effect for the future.

The Attorney is also entitled to a corresponding **right of termination** (cf. also para. 9.1 regarding compensation for work performed in such a case). He/she shall not discontinue the engagement in an ill-timed manner (Art. 404 OR). If the Client fails to pay on time any advance payments demanded by the Attorney (cf. para. 9.2 in connection with para. 9.3), then a termination of the engagement shall not be deemed ill-timed.

5. Mutual provision of information

5.1 Provision of information by the Attorney

The Client has the right to receive comprehensive **information** at any time **regarding the status of the case**. The Attorney shall discuss with the Client in advance the content of legal briefs or other important correspondence. He/she shall voluntarily report to the Client regarding the significant content of negotiations, and shall document such correspondence for the Client by sending a copy via e-mail (cf. in this regard para. 6), telefax, or the postal service.

The Attorney shall inform the Client regarding **legal aspects** that are material to the case. Following the conclusion of the engagement, however, the Attorney shall no longer have any obligation to inform the Client regarding further legal developments.

In order to ensure an open exchange of information, the Client him-/herself should **actively inquire** if something is unclear, or if he/she is not satisfied with the performance of the engagement.

Unless the Client has issued instructions to the contrary in an individual case, or circumstances clearly dictate otherwise, the Attorney may exchange **information** related to the engagement **with staff members or external consultants of the Client**, as well as with other involved third parties (para. 8).

5.2 Provision of information by the Client

A **complete and accurate provision of information** by the Client regarding all relevant circumstances, including those that occur only during the course of the engagement, is a prerequisite for the Attorney's activity. The Attorney also relies upon the timely provision of all required documents by the Client. In principle, the Attorney may presume that the information obtained from the Client is correct.

If the Client has given **information** to the Attorney's colleagues at the firm **in other cases** that could be relevant to the case in the present engagement, the Client must inform the Attorney of this fact.

6. Electronic communication

6.1 Risks

The transmission of information by electronic means (e.g. via e-mail, telefax, or Internet applications) is generally associated with risks, particularly the **risk that third parties may gain knowledge of and manipulate** such information, or that the information may be delivered to the wrong recipient. Such risks can be reduced through the use of encrypted transmission, e.g. by the encryption of e-mail attachments or the use of a delivery platform.

6.2 Communication within the scope of the present engagement

If information may be transmitted electronically only in encrypted form within the scope of the present engagement, the following **encryption procedure** should be used:

[The initial password is as follows: _____.]

The Client him-/herself is responsible for the secure handling of passwords and access data.

If no requirements for communication have been stipulated in this paragraph, the Client authorizes the Attorney to engage in unencrypted electronic communication, despite awareness of the associated risks.

These instructions may be changed by the Client at any time. To avoid ambiguity, such instructions must be sent to the Attorney in writing.

6.3 Billing for additional expenditures

Any individual **third-party costs** incurred in connection with an encrypted transmission of information (particularly fees for delivery platforms) may be billed to the Client in addition to a flat fee for expenses pursuant to para. 9.4.

Any **additional time expenditure** by the Attorney related to encryption shall be billed in accordance with the agreed hourly rate (para. 9.1).

7. File management

The Attorney him-/herself shall make a decision regarding file management for fulfilling the engagement. He/she shall have the right to manage an **electronic file** in addition to or in place of paper files. This may include in particular address data and data on billing for services, e-mail correspondence, and copies of all received and sent documents. All staff members of the law firm shall have access to such electronic file.

Original documents (e.g. court rulings, contracts, incoming correspondence) are generally forwarded directly to the Client. The Attorney shall also make copies of the correspondence available to the Client in electronic format (and as hard copy upon request – cf. in this regard also para. 5.2). The Client shall be solely responsible for storage of the documents sent to him/her. The Client shall have no right to management or archiving of files above and beyond the complete handover of these documents.

In order to fulfill his/her **own obligations for bookkeeping and storage of records** (particularly for the tax authorities), the Attorney generally stores certain documents (e.g. fee invoices) for a period of 10 years beyond the conclusion of an engagement. The Attorney also has the right to store files, in whole or in part, for longer periods in order to allow the handling of possible follow-up questions. Should the Attorney cease his/her professional activity, he/she may hand over all existing files (paper and electronic files) to the remaining colleagues at his/her firm or to the cantonal bar association in order to fulfill any continuing statutory requirements for the storage of records.

The Attorney may **outsource** the maintenance or the **operation of its IT system to third parties. The Client agrees in principle to such a procedure.** The Attorney must ensure, however, that all requirements of Swiss laws governing attorneys and data protection are fulfilled. If involved third parties could obtain access to client data within the course of their work, they must sign a non-disclosure agreement in advance.

8. Involvement of other staff members of the law firm

The Attorney works together with the other attorneys of the law firm in an unincorporated association sharing facilities. The individual attorneys share a common corporate identity, but are solely responsible to their respective clients for performance of the engagement. The other attorneys are **liable** to the Client **only** if they are responsible as a result of their own actions in a specific case.

The Attorney may **involve other staff members of the law firm** within the context of the engagement (particularly other attorneys, legal staff members, or secretaries). He/she is responsible for their actions, however, as for his/her own actions. Unless otherwise explicitly agreed in an individual case, invoicing shall always be in the name of the Attorney.

Following consultation with the Client, the Attorney shall also have the right to involve **external specialists** (particularly domestic and foreign correspondent attorneys or other experts). Unless otherwise explicitly agreed, the associated agreements shall be formed on behalf of and for the account of the Client.

During periods of absence, the Attorney may be represented by his/her own staff members as well as his/her partners at the firm and their staff members. **These persons are hereby also authorized to sign any documents** (e.g. time-sensitive submissions to authorities) **on behalf of the Attorney.** Their representational authority, however, shall not extend beyond that of the Attorney.

9. Fee and reimbursement of expenses

9.1 Fee agreement

The Attorney shall bill the Client for the actual time expenditure. The following **hourly rates** (plus VAT) are hereby agreed: _____

Should an engagement continue over multiple years, the Attorney reserves the right to **adjust the hourly rates.** The new hourly rates shall be established by mutual consent.

As a rule, **secretarial work** is not billed. If particularly time-intensive clerical work is required in an individual case, however, then separate compensation may be agreed upon for such work.

In the event that the **engagement is discontinued**, the Attorney shall have the right to compensation for services provided until the effective date of the discontinuation. Moreover, all services required for an orderly conclusion of the engagement must be compensated in accordance with the rates pursuant to para. 9.1 (e.g. notification of courts and parties to the proceedings regarding the termination of the engagement, compilation of a dossier for a new attorney).

9.2 Payments on account

At any time, the Attorney may demand **payments on account** (advance payments for services yet to be provided or payments for partial services already provided). These payments shall not bear interest.

The Attorney may submit a detailed **statement**, either periodically or only after the conclusion of the engagement, regarding billable hours and payments received (payments on account as well as any third-party payments pursuant to para. 9.7). The Client, however, may demand an interim statement at any time.

9.3 Billing

Time expenditure shall be **recorded** in detail in units of 0.1 hours. The Client may demand at any time an excerpt of the record for past time expenditure.

The Attorney has the right to present a statement each month for services provided, and to deliver corresponding **interim invoices** to the Client. Unless otherwise explicitly agreed in an individual case, invoices (interim and final statements) shall be due and payable **within 30 days** of the invoice date, and **advance payment invoices for within 10 days.** In order to properly assign payments, the ESR reference number must be used when making payments.

In addition to the fee and reimbursement of expenses, the appropriate **value-added tax** must be paid in accordance with the requirements of VAT law.

9.4 Reimbursement of expenses

In addition to the hourly rate, expenses in connection with the performance of the engagement must be reimbursed. In general, the reimbursement of expenses is **billed as a flat fee and is specified as ____ % of the total fee**. This includes telecommunication costs, photocopies, and postage. If mandatory law (particularly provisions on free legal representation) prevents billing on a flat fee basis, all expenses must be reimbursed based upon **actual expenditure**. Unless other rates are stipulated for the Client by mandatory law, these shall be billed as follows: _____

Unless used for other purposes, **travel time** shall be deemed as working hours. **Travel expenses** shall be reimbursed at the following rates: _____

The Attorney need not pay in advance any **fees** and costs that third parties, authorities, or courts charge to the Client, even if the invoice is issued to the Attorney. If he/she nevertheless pays such expenses, however, then he/she shall be entitled to full reimbursement.

9.5 Relationship to a possible reimbursement of attorney's fees

The reimbursement of attorney fees in the case of victory in court proceedings is regulated by law. In the relationship with the Client, the contractual fee agreement is generally determinative (para. 9.1). If the awarded **reimbursement of attorney's fees is less than the amount pursuant to the present engagement agreement** (e. g. in the event of significant time expenditure despite a low amount in dispute), then the Attorney shall have the right to compensation of the differential amount. This shall be subject to mandatory provisions, however (particularly those regarding free legal representation).

Should the awarded **reimbursement of attorney's fees** be **greater** than the contractually agreed remuneration, the Attorney shall have the right to the full amount ordered by the court.

9.6 Legal expense insurance

The Client shall inform the Attorney regarding the existence and content of any legal expense insurance. **The Client hereby explicitly authorizes the Attorney to provide the insurance company with oral or written information regarding the case.** The Attorney shall inform the Client regarding relevant correspondence with the insurance company as well as payments made by the insurance company.

If there is an associated assumption of costs by the insurance company, the Attorney shall have the right to **bill the insurance company** directly for any claims for fees and reimbursement of expenses. In the event that the insurance company's assumption of costs is less or greater than the fee pursuant to the present engagement agreement, para. 9.6 shall apply accordingly.

9.7 Client funds

Funds that the Attorney collects for the Client shall be held in a **client fund account**. This is a pool account for funds from all clients. This account shall be administered separately from the other funds of the Attorney, however. The Attorney shall inform the Client voluntarily regarding any corresponding incoming payments.

Unless explicitly agreed in an individual case, client funds shall not bear interest. The Attorney shall be obligated to surrender the funds on first demand. He/she may **offset** them with claims for fees and reimbursement of expenses, however.

10. Venue and governing law

The contractual relationship shall be governed exclusively by **Swiss law**.

By signing this agreement, **the Client acknowledges** the Attorney's principal place of business in ... **as the exclusive venue**, unless mandatory law prescribes a different venue.

Signatures

If the Client is a legal entity, the undersigned hereby warrant that they are authorized signatories. They shall notify the Attorney without undue delay regarding any cancellation of their signatory authority.

Place and Date: _____

The Attorney: _____

Place and Date: _____

The Client: _____

[Name and position of any authorized representatives]