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Dos and don'ts for retainer agreements: You can't do it on a handshake

After spending hours, months, sometimes even years working on a case, the last thing you want to worry about is not being compensated. Even more daunting is the prospect of being disciplined for violating ethical rules in making inappropriate financial arrangements with clients. A carefully drafted retainer agreement will help avoid these problems.

The purpose of this article is to provide you with some "how to" tips on drafting retainer agreements to ensure that the fee contract you use is not only legally effective but also in compliance with statutory requirements and ethical standards. This article will first discuss the statutory rules governing fee contracts. Then it will shed some light on the pitfalls of making alternative fee arrangements with a client. Finally, it will address the disclosures an attorney should include in a retainer agreement when taking on a 17200 claim or a class action suit.

General rules governing fee contracts

As with all contractual agreements, you should always get a retainer agreement in writing. Pursuant to Business and Professions Code section 6148, a fee contract must be in writing whenever it is reasonably foreseeable that the cost to a client, including attorney fees, will exceed $1,000. (Bus. & Prof. Code, § 6148, subd. (a).) Fee contracts that do not contemplate such costs and are not on a contingent basis are not statutorily required to be in writing, with the exception of the presence of an adverse interest, which will be discussed below. (See Bus. & Prof. Code, §§ 6147-6148.) Although the Code does not mandate that all fee contracts be in writing, it is always a good practice to get a retainer agreement in writing to avoid conflict.

Business & Professions Code section 6148 states that a retainer agreement must clearly explain the basis of compensation. Be sure to indicate the fee percentages and whether the agreement includes an hourly rate component, statutory fees or any other expenses that a client will be responsible to pay. (Bus. & Prof. Code, § 6148, subd. (a)(1).)

Section 6148 of the Business and Professions Code also requires that attorneys disclose the nature of legal services that will be provided as well as the responsibilities of both parties to perform the contract. (Bus. & Prof. Code, § 6148, subd. (a)(2), (3).) It is good practice to spell out in detail the nature of the dispute for which you are being retained to represent the client. This becomes increasingly important should another dispute arise that requires separate representation for the client. Also, keep in mind that should a dispute arise, any ambiguity in a fee contract will be interpreted in favor of the client, not the attorney. (Flahavan, et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2004) ¶ 1:105.)

Because section 6148 expressly allows a client to void a fee contract if the statutory requirements of the retainer are not satisfied, it is crucial to comply with the rules. (Bus. & Prof. Code, § 6148, subd. (c).) Should a fee contract be voided for this reason, you would be left with the right to collect "reasonable fees" under a quantum meruit theory of recovery.

As stated above, there are a few circumstances when retainer agreements need not be in writing. Such exceptions include emergencies, impracticability to avoid prejudice to the client, prior dealings with a client such that an implied contract is established, a client's waiver to obtain a written retainer agreement after full disclosure of section 6148, or when the client is a corporation. (Bus. & Prof. Code, § 6148, subd. (d)(1)-(4).)

Despite these exceptions, the best practice is always to get a retainer agreement in writing. Taking these precautions will work in your favor should a dispute arise, and will help prevent disputes from surfacing in the first place.

Rules governing contingency fee contracts

Most plaintiff's lawyers use contingency fee contracts with their clients. Business & Professions Code section 6147 sets forth the rules applicable to contingent fee contracts. The section requires that all contingency fee retainer agreements be in writing and that the client be provided with a copy of the signed contract. In addition, section 6147 requires that a contingency fee contract include: (1) the contingency fee rate that the client and attorney have agreed upon; (2) an explanation of how disbursements and fees incurred related to the litigation or settlement will affect the contingency fee and the client's ultimate recovery; (3) an explanation of any additional expenses for which the client might have to compensate the attorney; (4) a statement that the fee arrangement is negotiable between the attorney and client and not fixed by law (provided the claim is not subject to section 6146); and (5) a statement that the fee rates are the maximum limits for the contingency fee rate and that the attorney and client have the option to negotiate a lower rate if the claim is subject to section 6146. It is well worth the time it takes to ensure that a contingency fee contract complies with section 6147, because failure to do so renders a fee contract voidable at the client's option. (Bus. & Prof. Code, § 6147, subd. (b).)

Percentages that can be collected in a contingency fee contract are not fixed under the Code, unless you are representing a client with a claim for professional negligence against a health care provider. (Bus. & Prof. Code, § 6146.) Under that circumstance, percentages are fixed pursuant to the Medical Injury Compensation Reform Act ("MICRA"), codified at Section 6146.

Alternative means of securing payment

Sometimes, an attorney will find it necessary to obtain a lien against a client's interest as a means of securing payment of fees. This necessity might arise when a client does not have cash to pay attorney fees up front but promises to pay the attorney at a later time. Often, an attorney will request some type of security, such as a lien against the client's cause of action or a promissory note to real property as a guarantee on the client's promise to pay.

Generally, lien agreements are an accepted type of fee arrangement between an attorney and a client because courts acknowledge that an injured party without cash reserves might not be able to

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