

## **ATTORNEY FEE RETAINERS CLOSING DOCUMENTS FEE APPLICATIONS**

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When an employment case is successfully litigated, there is at least the prospect of a separate award of attorneys' fees and litigation expenses. Such separate awards, which are based by law on hourly fees, can sometimes vastly exceed the damage recovery for the client. This circumstance and all the rules which have grown up to govern the computation of attorneys' fee awards, create a unique set of special challenges for the employment law litigator. These difficulties can arise at any stage from early settlement negotiations through final prosecution of an attorneys' fee application after a successful trial. A special retainer agreement for such cases can help attorneys to solve many of these problems.

A retainer agreement in employment law cases should guarantee that the attorney who wins the case will get paid at least as much as if they had taken it under a standard personal-injury contingent fee arrangement and more if their time investment justifies it.

Certainly, a sound and comprehensive retainer agreement can assist in insuring the economic viability of an employment practice only if its lawyers select their cases judiciously, litigate them excellently, and settle them wisely.

The Retainer Agreement should:

- Identify the parties to the Agreement.
- Limit the duration of the attorneys' obligation to represent the client by setting forth an end point, such as the successful negotiation of reinstatement to client's former position, or, the entry of judgment by the court.
- Set forth the client's duties and warn about the prospect of sanctions for frivolous actions.
- Address the attorney and client's right to withdraw from the case and terms for withdrawal before the end point, including the attorneys' right to be paid.
- Set forth the payment obligations of the client before the case is finished and regardless of the outcome.
- Contain an optional "win-or-lose" retainer fee.
- Set forth clearly the terms of the attorneys' fees upon settlement or successful adjudication of the client's claims and acknowledge the attorneys' willingness to represent the client at the attorneys' regular hourly rates if the client were willing and able to proceed under such an arrangement, memorialize the client's financial inability and decision to proceed under a contingent fee agreement.

- Contain a provision which requires the attorney and client to disregard any division in a settlement offer between attorneys fees and damages and to treat such an offer as a single sum of money to be divided, if accepted, according to the agreement.
- Provide for the computation of the attorney fee entitling the attorney to the greater of an hourly fee in a contingent case or a standard personal injury type contingent fee.
- Provide for a contingency enhancement.
- Contain an assignment of the client's right to recover attorney's fees from the defendants. (This right belongs to the client).
- Create an attorneys' lien.
- Set forth the attorney's right to veto a settlement which does not insure receipt of a reasonable hourly fee unless client makes reasonable alternative arrangements to pay the attorneys' fees and expenses.
- Conclude the agreement with a signature line for attorney and client.

**RETAINER AGREEMENT OF [ CLIENT'S NAME ]  
AND  
[ LAW FIRM'S NAME ]**

**I. INTRODUCTION.**

[Client's name] ("the client"), by signing this agreement, retains [law firm's name] ("the attorneys"), to advise and represent the client in the client's case ("the case") against [prospective defendants' names] and any other persons who may be liable for the client's injuries ("the defendants"). By signing this agreement the client and the attorneys agree to be bound by the following terms:

**II. THE ATTORNEYS' DUTIES**

The attorneys are obligated to advise and represent the client in the case. The obligation only extends through [settlement negotiations] [the issuance of an initial determination by the New Jersey Division on Civil Rights] [the United States Equal Opportunity Commission] [the entry of judgment by a court]. After this point it shall not be necessary for the attorneys to perform any further services for the client in the absence of a new retainer agreement. If, in the absence of a new retainer agreement, the attorneys provide further services, with the client's express or implied consent, the terms of this agreement will continue in effect.

The attorneys agree to work in good faith and to deal fairly with the client in this joint endeavor. The attorneys promise to put forth their best professional effort for the client, but cannot guarantee any particular results.

**III. THE CLIENT'S DUTIES**

The client agrees to provide all information and papers requested by the attorneys. In order to prove your case, you will do so by completing the initial **EVIDENCE PACKAGE**. You will have to supplement that evidence as your case progresses. You will have to keep records of your personal hardships and your damages. You promise to diligently seek work and to document your search efforts. Fulfilling this promise is crucial to the success of your claim for damages.

The client also agrees to cooperate fully in any proceedings in connection with the case, including but not limited to attending scheduled meetings and hearings, answering interrogatories, appearing for depositions, and participating cooperatively in judicial or other proceedings as may arise from time to time in the case. The client agrees not to communicate with the court or administrative tribunal or with other parties to the case without the attorneys' consent. The client also agrees not to misrepresent or conceal any facts when communicating with the attorney.

The client agrees that the attorneys shall conduct all negotiations with the defendants. The client also agrees that we will make joint decisions with respect to contacting the media, the defendants [for reasons other than negotiating], or third parties to influence the outcome of your case. The client understands that defendants usually want to keep secret any agreement made and that our bargaining leverage with the defendants depends in part on keeping that secret. Accordingly, the client agrees to make a joint decision with this office before disclosing any details of negotiations with anyone other than your immediate family. This is not a bar to discussing your situation and case with friends and co-workers; **it bars you from discussing our settlement negotiations**. You agree that while discussing your case with co-workers or witnesses, you will not disclose any information about our negotiations.

The client understands that if the defendants prevail in the case, defendants will recover certain costs from the client. If the defendants also demonstrate that the action was frivolous, unreasonable, groundless, or litigated in bad faith in order to harass or oppress the defendants they may also recover their attorneys' fees from the client. The attorneys and the client hereby agree that in our best judgment the case is meritorious; it is not frivolous, unreasonable, groundless, nor is it the purpose of the client or the attorneys to vex, harass, or oppress the defendants. In the event that any fees, costs, or expenses are assessed against the client, the client agrees that he or she is legally responsible for the payment of those fees, costs or expenses.

#### **IV. THE TERMINATION OF REPRESENTATION**

##### **A. The Attorneys' Right to Withdraw**

The attorneys may withdraw from representing the client if:

1. The client violates any of the duties in Section III;
2. The client indicates an intention to give false testimony or is found to have misrepresented or concealed facts which affect the value of the case;
3. The client directs the attorneys to file or insists on advancing any claim or defense which the attorneys reasonably believe might subject them to sanctions;

4. The client makes a fiscally unreasonable decision as to settlement of the case;
5. The client fails to honor the financial obligations set forth in this agreement; or
6. The attorneys are required or authorized by law to withdraw from the client's case.

If the attorneys withdraw for any of these reasons, they will give the client reasonable advance notice in writing of their intentions.

#### **B. The Client's Right to Discharge the Attorneys**

The client may discharge the attorneys, or direct the attorneys to discontinue the case, at any time. If the attorneys have appeared as counsel of record for the client in any court they will promptly move for an order in accordance with the client's decision to discharge them or discontinue the case.

#### **C. Payments Required Upon Termination**

If the attorneys withdraw or the client discharges the attorneys, or discontinues the case against the attorneys' advice, the client will pay the attorneys any unpaid out-of-pocket expenses immediately, and upon termination of the case the client will pay the attorneys their fees computed at their then-current regular hourly rates, unless additional lawyers have represented the client, in which case the client will pay the attorneys a pro rata share of all attorneys' fees paid out at the termination of the case (such that each lawyer will receive an equal percentage of the product of his or her actual hours and then-current regular hourly billing rate).

### **V. PAYMENTS REQUIRED BEFORE THE CASE IS FINISHED**

#### **A. Litigation Expenses**

The attorneys will have complete discretion to incur litigation and other out-of-pocket expenses in the prosecution of the case, and will ordinarily advance these sums on the client's behalf. The attorneys will bill the client for these expenses on a monthly basis. The client is ultimately responsible for such expenses and agrees to pay them regardless of the outcome of the case by making regular monthly payment against these bills. Unpaid bills will accrue interest at the rate of 1 ½ % per month. These expenses include (but are not limited to) such items as the fees paid to the courts, court reporters, lay and expert witnesses, investigators and process servers; the attorneys' travel expenses, long distance telephone, facsimile transmission, and photocopying charges; courier or messenger service, and computer database access charges; and the cost of special exhibits and supplies purchased for the case. The client agrees to advance the sum of [ amount ] against expected out-of-pocket expenses [ at the time this agreement is signed ] [ description of payment plan ]

## **B. “Win or Lose” Retainer Fee**

The client agrees to pay the attorneys a retainer fee of [ amount ] [ at the time this agreement is signed ] [description of payment plan ]. Because this agreement creates a duty of loyalty on the part of the attorneys which may require them to decline other work, and because it associates the attorneys’ reputation with the client’s cause, the client shall not be entitled to a refund of this retainer fee in whole or in part under any circumstances except as provided below. If representation is not terminated and no recovery is secured for the client, this payment will be the attorneys’ only fee for all their services. If a recovery is secured, this payment will be credited dollar-for-dollar against any attorneys’ fees due at that time under this agreement, and refunded to the client to the extent that the sum of this payment and any separate recovery of attorneys’ fees from the defendants exceeds the attorneys’ fees due under this agreement.

## **VI. PAYMENTS REQUIRED WHEN THE CASE IS FINISHED (MONETARY RECOVERY ONLY)**

The client understands that the client could retain the attorneys to represent the client by compensating the attorneys on a monthly basis at the attorneys’ regular hourly rates. The client expressly declines to do so, believing that such terms are beyond his or her means, and chooses the terms of this agreement instead.

Any settlement offer of a fixed sum which includes a division proposed by the offering defendant or defendants between damages and attorneys’ fees shall be treated by the client and the attorneys as the offer of a single sum of money, and the division of the offer by the offeror into damages and attorneys’ fees shall be completely disregarded by the client and the attorneys. If such an offer is accepted, it shall be treated as the recovery of a single sum of money to be apportioned between the client and the attorneys according to this section.

In the event that the attorneys recover for the client a sum of money, the attorneys’ fees for their services shall be paid immediately out of this sum, even if a separate recovery of attorneys’ fees is contemplated and shall be the greater of “a reasonable hourly fee in a contingent case” or “a standard personal-injury contingent fee,” as those terms are defined in this section [except that where a separate recovery of attorneys’ fees is contemplated at the time a recovery of damages is secured, the client’s payment of attorneys’ fees out of the damage recovery will not exceed (one-third) (one-half) of the damage recovery].

A “reasonable hourly fee in a contingent case” shall be defined as the attorneys’ fees computed at their regular hourly rates (at the attorneys’ discretion, either using those rates which were current when the services were performed and adding interest at the attorneys’ regular rate for paying clients or using those rates current at the time the payment is made) plus a contingency enhancement factor of 100% of the contingency portion of these fees, subject to these limitations:

- (1) The attorneys' fees may in no event exceed the total recovery, and
- (2) The contingency enhancement factor shall not exceed one-third of the remaining recovery after the regular hourly attorneys' fees, computed in whichever of the above ways is chosen by the attorneys, are paid.

A "standard personal-injury contingent fee" shall be defined as one-third of the recovery if the case is concluded before any appeal is taken. Should the attorney represent the client in any appeal, the standard personal-injury contingency fee shall be 50% of any recovery after an appeal is taken by any party. Where a separate recovery of attorneys' fees or costs or both is secured after an initial recovery of damages for the client, "the recovery" for purposes of the computation of a standard personal-injury contingent fee, shall exclude such later recovery of fees or costs or both.

If, after recovery of damages, the attorneys secure a separate recovery of attorneys' fees, this separate recovery shall be refunded to the client only to the extent that the sum of the separate recovery and any attorneys' fees previously paid exceed the greater of a reasonable hourly fee in a contingent case or a standard personal-injury contingent fee.

Any litigation expenses or costs recovered in the case will first be applied to litigation expenses and attorneys' fee owed by the client to the attorney and then any overage will be paid to the client.

## VII. REINSTATEMENT ONLY

The client has been advised that the employer may offer reinstatement of his or her previous position or a comparable position. The employer charged with discrimination or a violation of an employment practice can stop the accrual of liability for their career injury by unconditionally offering reinstatement. You have stated that you will/will not (**circle one**) consider an offer of reinstatement.

In the event the client accepts an offer of reinstatement with no recovery of damages, the client agrees to pay the attorneys fifteen (15) % of the total pay you receive from your employer upon reinstatement for a one (1) year pay period. You agree to pay us the fifteen (15)% of one year's compensation in six (6) months equal monthly installments. You have stated that you will not consider an offer of reinstatement unless you are re-employed with a guaranteed term of six (6) months/one (1) year (**circle one**) compensation [total pay and benefits] equal to your last compensation. You agree to execute the attached AUTHORIZATION FOR PAYROLL DEDUCTION and agree to allow the attorneys to forward same to your employer (or, any subsequent employer) so as to enable the attorneys to recover the 15% value of your reinstatement. The AUTHORIZATION FOR PAYROLL DEDUCTION shall be forwarded to your employer within five (5) days of the date you settle your claim with defendants. Upon

satisfaction of your fee and cost obligations to attorneys, the attorneys will notify your employer of same.

### **VIII. REINSTATEMENT AND MONETARY RECOVERY**

In the event the client accepts an offer of reinstatement and recovery of damages, the client agrees to pay the attorneys fifteen (15)% of one year's compensation in six (6) months equal monthly installments. Also, the client agrees to the provisions at Paragraph VI regarding the payment of any monetary recovery; should the defendants offer reinstatement and a monetary recovery. You agree, however, to satisfy all your financial obligations including the fifteen (15) % value of your reinstatement and expenses directly and immediately from any and all monetary recovery; any overage will be paid to the client.

### **IX. ASSIGNMENT AND LIEN**

The client hereby assigns to the attorneys all rights and interests the client may have in any claims against the defendants for costs, expenses and attorneys' fees based on the attorneys' work.

The client hereby gives the attorneys a continuing lien on the client's claim and the proceeds thereof for the amount of the attorneys' fees out-of-pocket expenses and costs for which the client is obligated under this agreement. The attorneys' lien is given by the client pursuant to New Jersey Statutes Annotated, Title 2A:13-5.

### **X. CONFIDENTIALITY**

The client understands that the attorneys may consult with other attorneys, experts in other fields, investigators and others concerning the case. The client authorizes the attorneys to consult with such persons and to divulge to them such privileged information as is necessary for them to assist the attorneys in connection with the case.

This office agrees not to identify any witness who you say is a confidential witness. You understand, however, that our inability to identify confidential sources may weaken our presentation of your case.

### **XI. SETTLEMENT OF THE CASE**

The attorneys will not settle the action on the client's behalf without the client's prior authorization. If the client settles the case, even after the termination of representation, the client will inform the attorneys at the earliest possible moment. The client, by law, has the right to make all decisions regarding the settlement of the case. [ In exchange for the attorneys' promises in this agreement, the client hereby gives up a portion of that right and agrees not to

accept any settlement which does not include a monetary component sufficient to insure receipt by the attorneys of a reasonable hourly fee in a contingent case as defined in Paragraph VI above, unless the attorneys consent to the settlement or the client makes reasonable alternative arrangement for the payment of the attorneys' fees and expenses ] Reasonable people can differ about the settlement value of a case. If you disagree about whether to accept a bona fide settlement offer, the client agrees to the following plan: If you continue the case against our advice and ultimately recover less than the bona fide settlement offer, you will pay us a reasonable hourly fee as defined in Paragraph VI plus expenses from the dates the bona fide settlement offer is made by the attorneys forward, but the client will not owe the attorneys immediately for the pre-payment. At the end of the case, the client will also pay the attorneys what they would have paid the attorneys had they followed the attorneys' advice. This plan allows you to continue with our firm as counsel without compromising your claim, avoiding the problems of switching counsel mid-case.

## **XII. TAX CONSEQUENCES**

Effective August 20, 1996, any payments made for purposes of settlement or by way of judgment to a claimant or plaintiff in an employment discrimination litigation case are subject to the Small Business Job Protection Act, Pub. L. 104-188. Section 1605 of this act narrows the Internal Revenue Code Section 104(a) exclusions and provides that:

- a) Damages for emotional distress claims are excludable from income only where the emotional distress is directly attributable to an actual physical injury. Physical manifestations of emotional distress do not in and of themselves justify exclusions from income of a payment for money damages.
- b) Payment for punitive damages are excluded from income only in a wrongful death case.

In accordance with the provisions of this Act, it appears that virtually all the proceeds from an employment discrimination settlement or judgment must be reported as income and are taxable under the Internal Revenue Code.

## **CONCLUSION**

By signing this agreement, the client and the attorneys signify that they have read and understand its terms, and that they agree to be bound by it.

ATTORNEYS:

[ATTY NAME, ADDRESS, PHONE NOS.]

CLIENT:

[CLIENT'S NAME AND ADDRESS]



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[ATTORNEY'S SIGNATURE]

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[CLIENT'S SIGNATURE]

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Date

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Date

## QUESTIONS AND ANSWERS ABOUT OUR RETAINER AGREEMENT

*Question:* Do we really need such a complicated written agreement?

*Answer:* The law requires that all contingent fee agreements be in writing. As a matter of law firm policy, we will not represent any client on a contingent fee basis without a written agreement. We have tried to make this agreement as simple as we can, but it is still more complicated than we would prefer because it has to cover a large number of different possible scenarios.

*Question:* Are the terms of this agreement relatively standard in employment law and civil rights cases?

*Answer:* The basic form of this agreement comes from a book written for lawyers who handle such cases and it has been widely adopted across the country. Other lawyers in this area may vary the basic form somewhat, such as by using higher or lower percentage figures at various points, while still other lawyers use very different retainer agreements.

*Question:* This agreement expires at a certain point (paragraph II). What happens then if the case isn't finished?

*Answer:* The attorneys and the client can either negotiate a new agreement, agree to continue the case under this agreement, or agree to go their separate ways. If no new agreement can be reached at this point, the attorneys are free to stop work on the case and withdraw as counsel for the client.

*Question:* Why does the client get billed for expenses?

*Answer:* The law prohibits lawyers from agreeing to be ultimately responsible for litigation expenses. A law firm can advance and incur such expenses but must pass them on to the client, win or lose.

*Question:* How do the attorneys bill their paying clients?

*Answer:* The attorneys ordinarily bill their clients for their work, including the work of paralegal staff, at hourly billing rates. The rates at which the attorneys bill for their time vary from attorney to attorney depending upon such factors as experience, reputation, and degree of

specialization. These rates may also be increased from time to time to reflect changes in these factors and inflation. The attorneys' bills for their fees accrue interest at the rate of 1½% per month until paid. The hourly billing rates are set at such levels that, assuming that the attorneys work full time and are compensated for all their services at their hourly rates, they will be able to pay their office expenses and pay fair salaries to themselves and their employees. Accordingly the attorneys' continued practice and their livelihoods depend upon being compensated at their hourly billing rates, plus interest, for substantially all services rendered.

*Question:* What is a contingent fee?

*Answer:* A contingent fee is a fee which must be paid only if a recovery is secured for the client, by settlement or litigation. It is called a contingent fee because its payment is contingent upon success in the case.

*Question:* Why should a client prefer a contingent-fee arrangement?

*Answer:* A contingent fee arrangement has distinct advantages for clients, who are able to obtain the services of specialists in the employment and civil rights field to litigate their cases. These services would very often be beyond the clients' means if they were required to pay for them on an on-going basis at the attorneys' regular hourly rates. Also, because the attorneys' compensation is dependent on victory in the case and may be proportionate to the size of the recovery, a client has an added assurance that the attorneys will exert their best efforts in the case.

On the other hand, a contingent fee arrangement has a number of disadvantages for the attorneys. First, although the attorneys attempt to exercise their best judgment in selecting cases to accept contingent fee arrangements, the outcome of legal proceedings is always uncertain. A portion of the cases which the attorneys accept under contingent fee arrangements will be lost and generate no fees at all. Second, because a contingent-fee case, even if won, generates a fee only at its conclusion, it provides no income to help defray the attorneys' office expenses and salaries, which is being litigated.

*Question:* Why do the attorneys charge a win-or-lose retainer fee? Does it indicate lack of confidence in the case?

*Answer:* The win-or-lose retainer fee is never more than a small portion of the total fees the attorneys expect to generate in a case, so the attorneys are still assuming great risk in any case taken on a contingent-fee basis. The win-or-lose retainer fee is charged for three reasons. First, since it requires the client to share some of the financial risk inherent in the case, it deters clients who are not serious about their cases from pursuing them. Second, since it requires the client to pay something for the attorneys' services, it deters clients who are not prepared to repose complete trust and confidence in the attorneys' skill and judgment. Third, it assures the attorneys of some measure of compensation even if the agreement is canceled or the case is lost.

*Question:* Why does the agreement say we will disregard a defendant's division of a settlement offer into damages and attorneys' fees?

*Answer:* Some employment and civil rights laws provide for the separate recovery of “a reasonable attorneys’ fee”, in addition to damages, from the defendant. In cases brought under such laws defendants may make settlement offers which include a division of the total amount offered into one amount for damages and one amount for attorneys’ fees. If such an offer is made, and if the proposed division between damages and attorneys’ fees is respected by the client and the attorneys, it might create a financial conflict of interest between the client and the attorneys. For example, if a defendant offers a settlement package which includes a generous amount for damages but a small amount for attorneys’ fees, it might be in the client’s interest to accept the offer but in the attorneys’ interest to decline it. On the other hand, if an offer provides for generous attorneys’ fees but only meager damages, the attorneys might wish to accept the offer while the client would not.

Because of these potential conflicts, some courts have suggested that plaintiffs’ attorneys attempt to settle or litigate the damages questions first, and only when these questions are resolved, to settle or litigate the amount of attorneys’ fees to be paid by the defendant. Because of these court rulings, the attorneys may attempt to settle or litigate any damages question in the case before settling or litigating the attorneys’ fees issue. However, since these court rulings are not binding upon defendants, they may still make package settlement offers with special components for attorneys’ fees and damages. In any sort of case, circumstances may arise where a defendant can separately dictate the levels of damages and attorneys’ fees, it can manipulate the intensity and nature of these conflicts. The only way that the attorneys and the client can be sure to avoid this is to agree, prior to the commencement of representation, that any division of a settlement offer into attorneys’ fees and damages proposed by any defendant will be disregarded by the attorneys and the client, and that they will treat the total offer as one amount to be apportioned between the client and the attorneys according to previously agreed terms.

*Question:* Why does the agreement not set the attorneys’ fees simply as a percentage of the damages?

*Answer:* In most employment and civil rights cases the prospective damage recovery is not large enough that a percentage fee would adequately compensate the attorneys, compared to their hourly fees. For this reason most attorneys will not take most employment and civil rights cases under straight percentage-fee arrangements. A person whose rights are violated should not have to abandon a case because he or she cannot engage a lawyer. For this reason, the law permits separate recovery of attorneys’ fees from the defendants on an hourly basis when a case is won, in order to attract lawyers to these cases. The retainer agreement provides that the attorneys will also be paid on an hourly basis if the case is settled, if the hourly fees exceed the applicable percentage fee.

*Question:* Why is an hourly fee paid at the end of the case increased by adding interest (or by using current as opposed to historical hourly rates)?

*Answer:* The attorneys’ hourly fees are set with paying clients in mind. Such clients pay their fees in advance or at least monthly. When payment is delayed, the attorneys are denied use of the money they have earned, including the opportunity to invest it at interest. Also, when the money is finally received, it will purchase less than it would when it was earned, because of inflation. For these reasons the attorneys charge interest even to their paying clients. Using

current as opposed to historical rates is, since the attorneys' rates go up over time, a recognized alternative method of compensating the attorneys for delay in receipt of payment, and the attorneys sometimes use it to simplify computations.

*Question:* Why are the hourly fees subject to a "contingency enhancement" of 100%?

*Answer:* The attorneys' regular hourly rates are set with paying clients in mind. These clients pay full value for legal services rendered regardless of the outcome of the case. Under the retainer agreement the attorneys receive no compensation (beyond any win-or-lose retainer fee) unless they recover money for the client. Because their fees are contingent on success, they are assuming a substantial risk that they will not be paid at all and the agreement provides for a "contingency enhancement" as extra compensation for assuming this risk. In a sense, it is like hazardous duty pay or combat pay, extra compensation for taking on a risky mission. Under certain circumstances, contingency enhancements are included in attorneys' fees awards made by courts against losing defendants. Such courts frequently fix a contingency enhancement at 100% of the contingent portion of the hourly fees. The agreement provides for a contingency enhancement of 100% because it is at the low end of the range of contingency enhancements paid in private-market contingent-fee cases and because it is the minimum enhancement which, in an agreement like this, will induce the attorneys to take the case.

*Question:* If the court awards an attorneys' fee, and it is supposed to be reasonable, why does the agreement say the client may have to supplement this fee award out of the damages?

*Answer:* When signed, this agreement fixes a manner of computing the fees the attorneys will receive in this case which will result in fair compensation for their services in most circumstances. The fees arrived at under this agreement may not coincide with the fees the court decides it is fair to award against a defendant. While there are general guidelines for the computation of attorneys' fees awards, there are no fixed rules by which the courts may compute an exact figure in any individual case. The amount of attorneys' fees to be awarded against any defendant is in the discretion of the trial judge and is often less than the fees of the attorneys involved computed in the manner set forth in this agreement. Because the court may award an inadequate fee in such a case, the client may be required to supplement such an award.

*Question:* What is a lien (paragraph IX)?

*Answer:* The attorneys' lien created by paragraph IX means that no money recovered in the case can be disbursed without the approval of the attorneys or an order of the court.

*Question:* How might this agreement work in practice?

*Answer:* Suppose the cases were settled for \$36,000.00. The standard personal injury contingent fee, one-third, would be \$12,000.00. If the attorneys' hourly fees with interest and the contingency enhancement factor were \$10,000.00, the total fee would be \$22,000.00 since this is greater than the hourly fees with the contingency enhancement factor and interest. If the attorneys' hourly fees with interest and the contingency enhancement factor were \$22,000.00, this would be the fee since it is greater than the personal injury contingent fee of \$12,000.00.

*Question:* How does the limit on the contingency enhancement factor work?

*Answer:* Using the same settlement figure as an example, if the attorneys' hourly fees and interest (without the contingency enhancement factor) were \$9,000.00, the total attorneys' fees with the full 100% contingency enhancement factor would be \$18,000.00. The full contingency enhancement factor of 100% takes just a third and no more (\$9,000.00) of the remaining settlement proceeds after hourly fees and interest are deducted (\$36,000.00 settlement proceeds minus \$9,000.00 equals \$27,000.00. \$27,000.00 divided by 3 = \$9,000.00). Therefore, the full contingency enhancement factor would be charged. If the hourly fees with interest were \$15,000.00, this leaves remaining proceeds of only \$21,000.00 and the agreement limits the contingency enhancement factor to one-third of this sum, or \$7,000.00. Total fees in this case: \$15,000.00 hourly fees and interest plus the \$7,000.00 contingency enhancement factor equals \$22,000.00 total fees.]

*Question:* So the attorneys' fees can be larger than the client's share of the damages?

*Answer:* Yes. The employment and civil rights laws are intended to work even in some situations where a great deal of legal work is required to establish a victim's right to the recovery of only modest damages, or to other kinds of judicial relief altogether.

*Question:* Can the attorneys ever get all the money?

*Answer:* In a case, such as a voting rights case, where no damages are sought, the only source of monetary recovery is the attorneys' fees award and the attorneys receive this award. In a case in which damages are sought, however, no rational client would agree to a settlement under which the attorneys got all the money.

*Question:* So the attorneys can agree to accept a smaller fee than the agreement provides for in order to leave some money for the client so that the client will accept a settlement offer?

*Answer:* Yes, and this happens frequently. If a case is risky both the client and the attorneys will find it in their interests to take less than 100 cents on the dollar of what they claim to be entitled to in order to achieve a settlement agreement.

*Question:* What if there is a court-awarded fee or a win-or-lose retainer paid in advance?

*Answer:* Take the last example: settlement (or judgment) of \$36,000.00 and total attorneys' fees of \$22,000.00. Suppose the client has paid a win-or-lose retainer fee of \$5,000.00 and the court later awards fees against the defendants of \$15,000.00. The client would get full dollar-for-dollar credit for both these sums (\$5,000.00 win-or-lose retainer plus \$15,000.00 fee award equals \$20,000.00 total credit) and would owe the attorneys only an additional \$2,000.00 out of the \$36,000.00 damage proceeds (\$20,000.00 total credit plus \$2,000.00 client payment equals \$22,000.00 total fee). If the court awarded the full \$22,000.00 attorneys' fees against the defendants, the client would keep the entire \$36,000.00 damages and his or her \$5,000.00 win-or-lose retainer fee would be refunded.

## CLOSING DOCUMENTS

### A. Settlements, Consent Orders, and other Non-Judicial Relief

- Favorable settlements qualify the plaintiffs to a fee award. Maier v. Gagne, 448 U.S. 122 (1980).
- Entitlement to fees can be obtained and settlement proceeds can be obtained without having achieved formal judicial relief. E.P. by P.A. v. Union County Reg. H.S., 741 F.Supp. 1114, 1150 (D.N.J. 1989) (holding that, following a settlement agreement in a case where statutory fees have been sought in the complaint because fees have not been addressed in the settlement agreement, they are still awardable.); Warrington v. Village Supermarket, Inc., 328 N.J.Super. 410, 418-419 (App. Div. 2000) (holding that, although the consent judgment did not refer to the fee-shifting statutes such as the LAD or the ADA plaintiff did not waive the right to apply for an award of attorneys' fees. Also, there was no waiver of plaintiff's right to apply for an award of attorneys' fees even though consent judgment did not address attorneys' fees at all.); Field v. Haddonfield Brd. of Educ., 769 F.Supp. 1313, 1321 (D.N.J. 1991) (holding that, notwithstanding the resolution of the case by settlement, plaintiff was still entitled to file a fee petition.).
- The fee award belongs to the client, not the lawyer, so settlements contingent on a waiver of fees are valid and enforceable. Cf. Evans v. Jeff D., 475 U.S. 717 (1986).

### B. Taxability

- In U.S. v. Burke, 504 U.S. 229, 239 (1992), the Court held that an award of back pay under Title VII I subject to taxation. The Court reasoned that back pay is intended to remedy economic harm and that back pay is not applicable to any personal injury, which is excluded from the taxable amount of an award. Id. Similarly, back pay awards under the ADEA also are taxable. See, Commissioner Internal Revenue v. Schleir, 515 U.S. 323 (1995).
- Small Business Protection Act of 1996:

In August 1996, President Clinton signed into law the Small Business Job Protection Act (the "Act"). P.L. 104-188 Section 1605 of the Act. The Act amends Section 104 of the Internal Revenue Code to provide that punitive damages for most personal injuries and damages from non-physical personal injuries are taxable.

- Taxable v. Non-Taxable Recoveries:

With respect to the drafting of a Settlement Agreement and General Release, there are two primary taxation issues. The first issue is whether or not settlement payments are taxable. The law has made this issue much easier.

1. Taxable Recoveries: Damages will be taxable if they are:

- (i) *Punitive* in nature; or

(ii) On account of *non-physical* personal injuries. [Examples of such *non-physical* personal injuries include claims of employment discrimination or injury to reputation which are accompanied by claims of emotional distress.] It is important to note that *physical* symptoms e.g., insomnia, headaches, stomach disorders, which result from the emotional distress claims will be considered *non-physical* injuries for tax purposes.

2. Non-Taxable Recovery: Conversely, damages will not be taxable if they:

(i) Are on account of a *physical* injury or illness (including damages for emotional distress attributable to such physical injury or physical sickness); or

(ii) Represent *medical expenses* for treatment of emotional distress even if the expenses are unrelated to a physical injury.

- Wages v. Non-Wages:

The second issue is whether or not the employer should treat settlement payments as wages on account of loss pay or as non-wages/additional income on account of emotional distress, punitive damages, medical expenses.

1. Wages: Employers treat settlement payments as wages whenever there is some basis that the amounts relate to income, i.e., back pay, front pay, severance payments, benefits. Remember, however, that accrued wage losses are “wages” for FICA and Medicare tax purposes, but recoveries on prospective losses are not necessarily “wages”. Thus, FIT is paid but FICA and Medicare are not taken out.

2. Non-Wages: Conversely, employers can treat settlement payments as additional income to the extent that emotional distress damages, punitive damages, medical expenses, etc. are substantiated. If such non-wages are not substantiated, employers take a risk that the IRS would determine that such settlement payment should have been wages and that the employer should have withheld the appropriate amounts and paid employment taxes. If the IRS makes such a determination, the employer will be required to pay certain amounts plus penalties and interest. There is no formal guidance conclusively determining that employers do not have to withhold or pay employment taxes on non-wages.

- Form W-2 vs. 1099:

W-2:

When an employer makes settlement payments on account of wages, the employer should make appropriate state and federal withholdings and pay applicable employment taxes (social security, FICA, federal unemployment tax (FUTA), federal and state income tax withholding, state unemployment insurance and disability insurance) and forward an IRS Form W-2 to the plaintiff. Recoveries of prospective losses are not necessarily “wages”.

1099:

When an employer makes payment which are non-wages, the employer can submit payment to the plaintiff without holding or paying employment taxes and thereafter forwarding an IRS Form 1099 to the plaintiff. Even when a settlement payment is characterized as non-wages, there is no formal guidance from the IRS whether or not such payment is subject to withholding and employment taxes.

- Attorneys' Fees:

The full amount of the non-wages payment (with the exclusion of medical expenses) to Plaintiff (including the portion on account of attorneys' fees) should be included in the IRS Form 1099 which the employer forwards to the plaintiff. It does not make a difference whether Defendant makes a payment to Plaintiff for Attorneys' fees or whether Defendants make the check directly payable to the Plaintiff's attorney. The amount is still included in Plaintiff's taxable income and on the Form 1099.

The Plaintiff can deduct as an itemized deduction (IRC, § 212(1)), the amount of attorneys' fees and costs that are allocable to the taxable portion of the recovery. While there is no law in the Third Circuit on the subject, it is likely that the fee should be treated as a miscellaneous expense on the 1040 Form subject to the two percent floor on this erroneous deductions plus Alt Min Tax. The employer too can deduct payments made pursuant to a settlement.

- Indemnification Provision:

Employers may classify settlement payment as non-wages and attempt to protect themselves from any subsequent determination by the IRS that withholdings should have been made by including an indemnification provision in the settlement agreement. Thus, if there is objective support for emotional distress or damages to reputation or other non-wage proofs there should be no withholdings and payment of employment taxes. Objective support for non-wage allocation includes: documented evidence of the basis of a particular claim, itemization of claims in a complaint, medical records or correspondence, and perhaps, reference to similar matters determined by the court.

## **RELEASE**

This Release is made to confirm the settlement on \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and is given by [ Plaintiff ], the Releasor (referred to as "I"), to the [ Employer ], and each and every employee of the [ Employer ] presently and or previously employed by the [ Employer ],



and all of their agents, servants, and/or their employees and/or their insurance carriers, jointly, severally and/or in the alternative, hereinafter referred to as the Releasee(s) and/or (referred to as "you").

1. **Release.** I release and give up any and all claims, demands, actions, and causes of action that I now or may hereafter have for any and all personal injury and/or any and all loss of income and/or any and all harm of any other nature, type and/or quantity, of any type of damage whatsoever, arising out of or as a result of any incident and/or event complained of or which may have been complained of in an action in the Superior Court of New Jersey under Docket No. [ ].

(a) I release and give up any and all claims and rights, including any and all claims for litigation expenses, attorneys' fees and/or court fees or other fees related to litigation which I may have against you. This releases all claims, including those of which I am now aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now in regard to the Releasees.

(b) More particularly and expressly included within the operative force of this Release are any and all causes of action which have arisen or which may have arisen out of my employment, at any time during my employment with [ Employer ], including any and all claims for Workers Compensation benefits and any and all other claims for compensatory or equitable damages, harm and/or expense.

(c) I specifically agree that I will take all necessary action and cooperate with my attorney (or attorneys) to effectuate the dismissal and the withdrawal of any charge and/or any complaint and/or any cause of action against any Releasee named herein for any matter described in any Workers Compensation action against the [ Employer ] in the Superior Court of New Jersey under Docket No. [ ].

(d) It is further understood and agreed that the acceptance of the money I am being paid is in full accord and satisfaction and in compromise of any and all disputed claims as to the

Releasees and that the payment described herein is not to be construed as an admission of liability on the part of any Releasee but is for the sole purpose of terminating the litigation between the parties. It is specifically understood that in executing this Release, I am releasing the Releasees from all expenses incurred to date as the result of any event which occurred during the course of my employment with the [ Employer ].

(e) I have had the opportunity to consult with my attorney and I understand that in accepting the sum to be paid as described in this Release I am compensated for any claims which I had, have, or may have against the Releasees for anything that has happened up until now. I specifically understand and acknowledge that the payment described herein is in full and complete satisfaction of *any and all attorneys fees and costs related to any claims that I have, had or may have against the Releasees for any thing that has happened up until now.*

(f) It is expressly understood and agreed that in addition to the sum specified in this Release, I have already received during my employment and for a period of time following my resignation, salary payments and certain benefits, including but not limited to health insurance benefits and I expressly understand and agree that the sums received in this release and by way of salary and/or benefits paid to date are sums paid in settlement of any and all employment claims and any and all tort claims and any and all contractual claims and any and all causes of action of any kind, type and or nature inclusive of attorneys fees, costs of suit, litigation expense of any type, pre-judgement interest and/or post-judgement interest.

(g) For good, valuable and other consideration, the receipt and adequacy of which is hereby acknowledged, I do hereby for myself, my family, my dependents, executors, administrators, heirs and assigns, release, demise, acquit and forever discharge the Releasees and their attorneys, agents, servants and/or employees, benefit trustees, officers, parent corporations, subsidiaries, affiliates, successors and assigns from any and all liabilities and/or injuries and/or harm *including but not limited to* emotional distress, hospital bills, medical bills, vacation time, salary, benefit plans, benefits, bonuses, compensatory damages, compensatory time, sick time, vacation time, pension benefits, health benefits, insurance coverage, and any and all other sums of money and/or damage of any kind or nature whatsoever in law or in equity now existing or which may hereafter accrue in my favor and against Releasees for any reasons based on facts existing up until this time, whether known or unknown, fixed or contingent, for any reason except for any claim I may have for accrued pension benefit(s).

2. **Agreement to Satisfy Liens.** I agree to satisfy any and all liens. I further agree to indemnify and defend you, your attorney, your liability insurance carrier from and against any and all claims made or actions filed against you, your attorneys or your liability insurance carrier for payment of any liens related to this case. I further acknowledge that I have specifically discussed this provision of this Release with my attorneys.

3. **Covenant Not to Sue.** In consideration of the payment described in this Release, I agree not to file any claim and/or lawsuit of any kind against any Releasee named herein for anything which may have occurred during the course of my employment with [ Employer ]. I warrant that I have not filed any claims or lawsuits based on anything that took place during the course of my employment with [ Employer ], except for the action in the Superior Court of New Jersey under Docket No. [ ]. I agree that if I have filed any other claim and/or action against any one of the named Releasees, I will take all the necessary action to effectuate the dismissal and withdrawal of any such charge and/or complaint and/or cause of action.

4. **Covenant Not to Sue for Future Rights to Employment.** I specifically agree not to file any claims and/or lawsuit of any kind arising out of my potential application for employment with the [ Employer ]. I specifically agree not to file any claim or action in the future for employment with the [ Employer ] or assert any claim arising out of a denial of employment to be by the [ Employer ].

5. **Covenant to Indemnify Re: Tax Liability.** I specifically agree to indemnify and hold harmless Releasees for any and all claims that may be assessed, levied or otherwise charged against Releasees by any taxing and/or government or authority, including any charge, assessment and/or levy for additional taxes, fees, penalties on account of any obligation which I may have for State or Federal income taxes, withholding taxes, and/or employee FICA taxes pursuant to this settlement agreement for [ Sum ] or on account of the failure of the Releasees to withhold any taxes or make contributions or other deductions from the settlement payment described herein.

6. **Breach of Agreement.** Should I violate the terms of this Agreement in any manner, as for example, should I file or further prosecute any charge, claim, cause of action or lawsuit of any nature whatsoever based on Federal, State and/or Local laws regarding any matter which has

been raised or could have been raised by way of claim, petition, suit or otherwise as a result of my application, employment and/or separation from employment with the Releasees or the circumstances giving rise to and/or surrounding my application, employment and/or separation from employment with Releasees, such violation will constitute a breach of this Agreement. If a breach of this Agreement occurs or is alleged to have occurred by the Releasees, then I hereby consent to personal jurisdiction in the Superior Court of New Jersey. If a breach is found to have occurred, then I agree to pay for counsel fees for all opposing counsel to enforce this agreement and I agree to pay all costs associated with the enforcement of the Agreement. I expressly agree that the damage amount to be paid under this provision is fair, reasonable and enforceable, given the damage to the Releasees which would be caused by breach of this Agreement.

7. **Consultation with Counsel.** I acknowledge that I have read and that I understand this Agreement. I represent and acknowledge that I have fully discussed or I have had the opportunity to discuss this Agreement with an attorney of my choosing and that I have been fully advised of the legal consequences of this Agreement. I accept the money received pursuant to this Agreement and I acknowledge that I receive the payment herein in exchange for a full and complete release of all Federal, State and Workers Compensation claims which I may have had against the Releasee(s). I intend to be bound by this Release. The terms and conditions of this Release were the result of full disclosure and negotiations between the parties. I acknowledge that the Releasee(s) have not made any representation to me which has not been specifically stated in this Agreement.

8. **Payment.** In consideration for making this Release, you have agreed to pay me within thirty (30) days from the date of execution of Release Documents a settlement of [ Sum ] which sum includes attorneys fees and costs. The settlement draft will be made payable to [ Plaintiff ] and her attorney, [ Name, Esquire ]. I understand and agree that I will not seek anything further, including any other payments, from you.

9. **Dismissal of Actions.** The entire action *against Releasees* filed in the Superior Court of New Jersey under Docket No. [ ] and any actions filed in the Worker's Compensation Court in New Jersey shall be dismissed with prejudice as a condition of payment. I agree to take any and all steps necessary to effectuate the foregoing, including but not limited to the filing of a Stipulation of Dismissal with Prejudice, the executing of an Affidavit, the execution of a Consent Order and/or making an appearance before a Judge of the Worker's Compensation Court.

10. **Enforceability.** In the event that any provision of this Agreement is found to be illegal or unenforceable, such provision shall be severed or modified to the extent necessary to make it enforceable, and as so severed or modified, the remainder of this Agreement shall remain in full force and effect.

11. **No Admission of Liability.** *I acknowledge and understand that you do not make any admissions of any liability by making payment pursuant to this Release. I agree that the parties have entered into this Settlement Agreement and General Release solely to avoid the time, expense and continuing distraction of further litigation.*

12. **Parties Bound.** I am bound by this Release and anyone who succeeds to my rights and responsibilities, is also bound to this Release. This Release is made for your benefit (Releasees) and shall inure to the benefit of all who succeed to your rights and your responsibilities. By signing this Release, I agree to its terms and I have had the opportunity to consult with my own attorney.

13. **Entire Agreement.** This Settlement Agreement and General Release contains the entire Agreement between the Releasor and the Releasees with regard to the matter set forth herein. There are no other understandings and/or agreements, verbal or otherwise, by, between and/or among the parties, except those set forth herein.

14. **Full Cooperation.** The Releasor and the Releasees agree to cooperate fully and execute any and all supplemental documents and to take any additional action that may be necessary or appropriate to give full force and effect to the terms of this Settlement Agreement and General Release, including, but not limited to, the dismissal with prejudice any action pending in the Workers Compensation Court with the State of New Jersey and the matter in the Superior Court of New Jersey under Docket No. [ ].

15. **Controlling Law.** This Settlement Agreement and release shall be construed and interpreted in accord with the laws of the State of New Jersey.

**Execution.** Executed by the Releasor on the \_\_\_\_\_ day of \_\_\_\_\_, 2000.

WITNESSED BY:

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[ Plaintiff ], RELEASOR

Prepared by:

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[ Name ], Esquire

STATE OF NEW JERSEY :  
SS.  
COUNTY OF ATLANTIC :

I CERTIFY that on \_\_\_\_\_, 2000, \_\_\_\_\_ personally  
came before me and these person acknowledged under oath, to my satisfaction, that she is the  
person named in and personally signed this document; and signed, sealed and delivered this  
document to be their act and deed.

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## ATTORNEY FEE PETITION

### A. Lack of a Fee-Shifting Statute

The existence of a fee-shifting statute is a necessary predicate to an award of attorneys' fees. Without authorizing legislation, there can be no recovery of attorneys' fees.

### B. When Has a Plaintiff Prevailed?

1. *The Necessity to Obtain Some Relief Sought on the Merits of a Claim*

The prevailing plaintiff must have received some relief on the merits of her claim that affects the legal relationship of the parties in a way that Congress sought to promote in the fee statute. Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (*per curiam*); Hewitt v. Helms, 482 U.S. 755, 760, 763 (1987); Rhodes v. Stewart, 109 S.Ct. 202 (1988) (*per curiam*). Qualifying relief may not be judicially decreed; it may come in the form of a settlement. Maher v. Gagne, 748 U.S. 122, 129 (1980); Girandolo v. Boro of Allentown, 208 N.J.Super. 437 (App. Div. 1986); Throckmorton v. Twp. of Egg Harbor, 267 N.J.Super. 14 (App. Div. 1993).

The New Jersey State Court case addressed what constitutes “prevailing parties” status:

“To be a prevailing party, a plaintiff must have succeeded on any significant claim affording it some of the relief sought”. Robb v. Ridgewood Brd. of Educ., 269 N.J.Super. 394, 400 (Ch. Div. 1993)

In Texas State Teacher’s Ass. v. Garland Indep. School Dist., 489 U.S. 782, 791-92 (1989), the Supreme Court held that plaintiff was a “prevailing party” and had entitlement to a fee award of some kind where the plaintiff had succeeded on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit.

### C. The Lodestar Calculation

In 1973, the Third Circuit developed a method of calculating reasonable attorneys’ fees which has come to be known as the “Lodestar” method. Lindy Bros. Builders, Inc. v. American Radiators & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973). “Lodestar” is determined by multiplying the “number of hours reasonably expended on the litigation by a reasonable hourly rate”. Hensley v. Eckerhardt, 461 U.S. 424 (1983).

(i) *Reasonable hourly rates.* To be found reasonable, rates must be fair, realistic, accurate and based on current rates (not rates contemporaneous to the rendering of each service in order to take into account delay in payment) and which are in keeping with the “relevant market”. (The entire State of New Jersey constitutes the “relevant market” for purposes of calculating the prevailing hourly rate, Public Interest Research Group of NJ v. Windall, 51 F.3d 1179 1186-88 (3d Cir. 1995)).

(ii) *Reasonably expended hours.* In Szczepanski v. Newcomb Medical Centers, Inc., 131 N.J. 346 (1995) the Court held that the use of contemporaneously-recorded time records is a preferred practice so as to verify hours expended by counsel with respect to attorneys’ fee applications, but awards of fees based on reconstructed time records are not completely precluded although such calculation must be carefully scrutinized to verify the reasonableness of the hours claimed to have been expended.

The Lodestar calculation may be reduced by the number of hours that a court finds were not “reasonably” expended. City of Riverside v. Rivera, 477 U.S. 561 (1986). Hours not reasonably expended include those that exceed hours “that competent counsel reasonably would have expended to achieve a comparable result, in the context of the damages prospectively

recoverable, the interest to be vindicated and the underlying statutory objective.” Rendine v. Pantzer, 141 N.J. 292, 336 (1995). In Rode v. Dellarciprete, 892 F.2d 1177 (3d Cir. 1990) the court found as permissible the reduction of hours claimed by the number of hours spent litigating claims on which the party did not succeed and that were distinct in all respects from claims on which the party did succeed.

#### **D. Contingency Enhancement**

In New Jersey, multipliers are valuable and should be awarded where the fee agreement is wholly or substantially contingent, should range from five-fifty percent of the Lodestar and should typically average between twenty - thirty-five percent. The Supreme Court admonishes that a multiplier should never exceed one hundred percent of the Lodestar amount and should reach one hundred percent only in the rare and exceptional situation where none of the risk-mitigating factors cited by the Court exist. Rendine, supra, 141 N.J. at 343-44; Cf. Coleman v. Kaye, 71 FEP Cases 236 (3d Cir. 1996).

To assess whether to award a multiplier, as well as its magnitude, courts must consider the following factors:

- (1) Whether the case has been taken on a wholly or substantially contingent basis; and,
- (2) Whether the attorney is able to mitigate the risk of non-payment in any way, e.g., “whether other economic risks were aggravated by the contingency of payment”. Rendine, at 339. Examples of mitigating factors for such things as receipt of a portion of that attorneys’ normal hourly fee, irrespective of the result, a suit in which substantial damages are sought, and, the inherent strength of the party’s claim. The difficulty in obtaining counsel in the local market without the prospect of fee enhancement is not a factor in New Jersey State statutory fee shifting. Rendine, at 341.

#### **E. Procedural Matters Regarding the Fee Application**

##### *1. Federal Court Fee Petitions*

A fee petition filed in an action venued in Federal District Court must comply with the standards of Fed. R. Civ. P. 54(d) and the Local Rule for the District. Fed. R. Civ. P. 54(d) merely requires that an application be filed no later than 14 days after the entry of judgment; permits a Magistrate to decide the issues; allows the appointment of a special master on the value of the services; and refers the party to the Local Rules for petition details.

New Jersey General Rule 46 requires the affidavit for fees to address:

- (1) The nature of services rendered, the results obtained, any particular novelty or difficulty about the matter;



- (2) The record of the dates services were rendered;
- (3) The description of (a) services rendered on each date, by (b) the person rendering the service, together with a (c) brief description of each timekeeper's qualifications and general experience;
- (4) The time spent in rendering each service for performing each activity. The use of computerized time sheets are specifically authorized by New Jersey General Rule 46(a)(5);
- (5) The normal billing rate of each timekeeper;
- (6) A description of all fee agreements with the client; and
- (7) The amount billed to the client for fees and disbursements as well as the amounts paid by the client.

## 2. *State Court Fee Petitions*

New Jersey Court Rule 4:42-9(b) sets forth the points that must be enumerated in the affidavit of services submitted in support of a fee petition, and specifically requires the affidavit to address the factors enumerated in the New Jersey Rules of Professional Conduct, R.P.C.1.5(a), as follows:

- (1) Amount of fees sought, statement of fees paid, and what provisions, if any, has been made for payment of fees in the future;
- (2) Time and labor required;
- (3) Likelihood that acceptance of the case will preclude other employment by the lawyer;
- (4) Fee customarily charged in the locality for similar legal services;
- (5) Results obtained;
- (6) Time limitations imposed by the client or circumstances;
- (7) Nature and length of professional relationship with the client;
- (8) Experience, reputation, and ability of the lawyers performing of services;
- (9) Whether the fee is fixed or contingent; and,
- (10) An itemization of disbursement.

## **F. Time for Submitting Fee Applications**

- Fed. R. Civ. P. 54(d) specifies that a fee petition must be submitted “no later than” 14 days after entry of judgment, local rules, however, may modify the time period. For example, under General Rule 46 for the District of New Jersey, an affidavit in support of a motion for fees must be submitted within 30 days of the entry of the judgment or order. Failure to meet this deadline can be fatal to the fee petition. Oberti v. Brd. of Educ. of Clementon School Dist., 1995 U.S. Dist. Lexis 1023a (D.N.J. 1995).
- In New Jersey, State Courts, R. 1:4-8(b)(2) provides that a motion for attorneys' fees as a sanction for frivolous litigation “shall be filed with the court prior to the entry of final judgment.”
- When an award of fees and costs is sought for services rendered in the Appellate Division or Supreme Court, the motion must be made within ten days after the determination of the appeal. R. 2:11-4.

## **G. Costs and Expenses**

Only actual, not estimated, expenses are reimbursable. An analysis of recoverable expenses is set forth in Abrams v. Lightolier, 50 F.3d 1204 (3d Cir. 1995). See also, In Re: Continental Illinois Sec. Litig., 962 F.2d 566, 570 (7<sup>th</sup> Cir. 1992); and Allen v. Freeman, 122 F.R.D. 589 (S.D. Fla. 1988); Davis v. City and County of San Francisco, 976 F.2d 1536 (9<sup>th</sup> Cir. 1992); Student Public Interest Research Group of NJ v. Anchor Thread Co., 1988 U.S. Dist. LEXIS 434a (D.N.J. 1988); Mennor v. Fort Hood Nat'l Bank, 829 F.2d 553 (5<sup>th</sup> Cir. 1987); Ramos v. Lamm, 713 F.2d 546 (10<sup>th</sup> Cir. 1983); Haol v. Savings of America, 4 A.D.D. Cases 455 (S.D. Tx 1994); Ryther v. KARE, 11, 70 FEP Cases 1701 (D.Minn. 1996); Dawdell v. City of Apopka, 698 F.2d 1181 (11<sup>th</sup> Cir. 1983); Dones v. Volkswagen of America, Inc., 41 F.3d 1143 (7<sup>th</sup> Cir. 1994).

## **H. Fees in Connection with an Appeal**

The Supreme Court has long sanctioned fee awards for appellate work. See e.g., Perkins v. Standard Oil Co. of Cal., 399 U.S. 222 (1970) (authorizing award of attorneys' fees for services in connection with appellate proceedings in a Clayton Act case); Hutto v. Finney, 437 U.S. 678 (1978) (affirming an award of appellate fees made by the Eighth Circuit in a civil rights case).

Where attorneys' fees attributable to services rendered at the trial and appellate court levels are sought by its prevailing party, separate fee petitions must be submitted to each court, and each court is responsible for determining the fees for its own proceedings. Dotsko v. Dotsko, 244 N.J.Super. 668 (App. Div. 1990).

## **I. Fees Incurred in Bringing the Fee Application**

The fees incurred for legal services rendered in litigating the fee petition are compensable. H.I.P. v. K. Hovnanian, 291 N.J.Super. 141 (Law Div. 1996); Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1<sup>st</sup> Cir. 1984). In New Jersey, fees incurred in the preparation of a fee petition are recoverable, however, some courts say at a lower hourly rates than fees for litigating the case on the merits. Robb v. Ridgewood Brd. of Educ., 269 N.J.Super. 394 (Ch. Div. 1993).

## **J. Plenary Hearing**

A plenary proof hearing regarding attorneys' fees may be required, but is not mandatory. Cohen v. Fairlawn Dairies, Inc., 86 N.J.Super. 206 (App. Div.) *aff'd* 44 N.J. 450 (1965).