

## Retainer Agreement Prohibiting Settlement Without Attorney Consent Violates Public Policy

July 27, 2011 by David J. McMahon

In Lemmer v. Charney, 2011 DJDAR 6494 (2011), the California Court of Appeal for the Second District invalidated a retainer agreement entered into between a client and his attorney on the ground that the contract violated fundamental notions of public policy.

The dispute between the attorney and the client was based on the lawyer's assertion that the attorney was fraudulently induced to change the terms of his compensation from the payment of an hourly fee to a contingency fee arrangement based on the client's false promise that he intended to take the case to trial or through settlement.

The lawyer ("Lawyer") represented the client ("Client") in an employment lawsuit. Before filing suit, Client signed a retainer agreement, stating he would pay Lawyer an hourly rate for services.

Several months after filing suit, the parties entered into a new arrangement, with Lawyer being compensated on a contingency fee basis. The new agreement was allegedly based on Client's promise to take the case to trial or settlement. Less than a month before trial, Client called Lawyer, stating he did not wish to pursue the case further. He instructed Lawyer to settle the matter immediately. Lawyer objected, and told Client he had a strong case, but initiated settlement discussions at Client's insistence.

After some negotiations, the employer offered a walk away settlement where both sides received nothing. Client instructed Lawyer to accept the settlement and Lawyer followed those instructions. After Client failed to pay Lawyer any attorney fees, Lawyer filed suit against Client, alleging conspiracy to defraud. The trial court dismissed the complaint for failure to state a cause of action.

The Lawyer appealed and the Court of Appeal affirmed. The Court of Appeal stated that a provision in a lawyer's retainer agreement prohibiting the client from settling his lawsuit, without counsel's consent, is void as against public policy. This court found that there was no difference between a promise not to settle without an attorney's consent and a promise **"to proceed with the case to either settlement or trial."**