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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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obtain legal representation without them.

Courts do remain concerned, however, with the obvious ethical issues that arise whenever an attorney acquires a financial interest in a client property. If you decide that securing payment is necessary to ensure compensation, there are important rules you need to know and follow if you plan on avoiding client disputes and/or discipline from the State Bar.

Until recently, it was unclear what standard should apply to determine what interests were "adverse" within the meaning of rule 3-300 of the Rules of Professional Conduct. Rule 3-300 sets forth certain requirements that an attorney must satisfy before entering into any transaction in which the attorney obtains an interest adverse to the client.

Rule 3-300 provides:

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client;

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Just recently, in *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58], a case of first impression, the California Supreme Court clarified whether an attorney's lien against the proceedings of a judgment or settlement as a means of securing payment constituted an "adverse" interest, such that application of Rule 3-300 was triggered.

In *Fletcher*, the client, Master Washer, orally agreed to pay attorney Fletcher's hourly rate and costs to defend it in a breach-of-lease action. Master Washer also sought to file a counterclaim against the lessor for conversion because the lessor refused to release the company's equipment. Because the company's equipment was the only source of income, Master Washer did not have cash to pay Fletcher's fees and expenses up front. Instead, Master Washer orally agreed to grant Fletcher a lien on any judgment or settlement obtained in the litigation. Although the client received a written retainer agreement from Fletcher reflecting the terms of the fee contract, including the lien agreement, the contract was never executed by the client. Pursuant to the oral agreement, Fletcher prepared and filed a complaint for the client and also assisted the client in additional personal legal matters.

Sometime thereafter, Master Washer discharged Fletcher and obtained other counsel to take over the litigation. After subsequent counsel obtained a favorable judgment for the company in the conversion action, Master Washer entered into a stipulated disbursement of the judgment. Despite the lien agreement agreed to with Fletcher, Master Washer did not include Fletcher among the parties in the stipulated disbursement.

When Fletcher filed suit to collect his share of the judgment, the question raised was whether a charging lien against a judgment or settlement was enforceable in the absence of written consent from the client. (*Fletcher v. Davis, supra*, 33 Cal.4th at p. 67.) More specifically, the issue was whether a lien agreement constituted an "adverse" interest, thereby triggering rule 3-300 of the California Rules of Professional Conduct.

In determining what constitutes adversity, the Court reaffirmed the standard that "an attorney who has obtained an interest in the property of a client where it is reasonably foreseeable that his acquisition may be detrimental to the client, even though his intention is to aid the client, has acquired an interest adverse to a client," a standard promulgated earlier by the Court. (*Fletcher v. Davis, supra*, 33 Cal.4th at p. 68.) Circumstances that already have been held to trigger the standard are "when an attorney's 'personal financial interest was in conflict with [his client's] interest in obtaining full repayment of is loan,' . . . when counsel had 'acquired an interest in the subject matter of the litigation for which they had been retained,' . . . and when a secured note 'can be used to summarily extinguish the client's interest in the property.'" *Id.*

The Court found a charging lien could significantly impair the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien could be resolved. Because it was reasonably foreseeable that a charging lien might become detrimental and thereby adverse to the client's interest, the Court held that Rule 3-300 applied.

Because Fletcher did not obtain Master Washer's informed consent to the retainer agreement in writing, the Court found he failed to comply with Rule 3-300. Consequently, the Court held that the oral retainer agreement was unenforceable.

The Court's decision in *Fletcher* does not prohibit an attorney's charging lien as a means to securing payment. Nor does the decision forbid attorneys from entering transactions that are reasonably foreseeable to impair a client's interest. Rather, the Court's decision tells us that when adversity is reasonably foreseeable, the requirements of rule 3-300 must be satisfied. Thus, to be safe, an attorney should comply with rule 3-300 whenever reasonable minds could differ about whether the interests the client might be impaired by the attorney's acquisition of a pecuniary interest in a fee arrangement.

Class actions and Business & Professions Code section 17200 claims

There are additional considerations for retainers when dealing with class actions and/or Business & Professions Code section 17200 claims. Section 17200, also known as the Consumers' Rights Law, provides consumers with an action for equitable relief against businesses engaging in unlawful, unfair or fraudulent business practices. (Bus. & Prof. Code, § 17200, et seq.) In enacting the law, legislators sought to protect all California consumers by permitting actions to be brought on behalf of the general public and by giving courts the authority to enjoin businesses from further engaging in unfair competition.

In addition, lawmakers authorized courts to order restitutionary relief in instances where money was unlawfully, unfairly or fraudulently obtained from consumers in violation of section 17200. Lawmakers did not, however, intend for violations of the code to provide monetary damages to a prevailing party.

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Indeed, courts have clarified that money is recoverable under section 17200 only when necessary to achieve restitutionary relief and when prior ownership of a pecuniary interest is established. Furthermore, the statute does not give the courts authority to award attorney's fees to a prevailing party. Therefore, the remedies available to an injured party under section 17200 are limited to injunctive and restitutionary relief and do not include compensation for attorney costs and fees.

However, compensation for attorney's fees and costs can be awarded pursuant to Code of Civil Procedure section 1021.5, which grants courts authority to award attorney's fees when each of the following three conditions are met: "(a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . make(s) the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." Code of Civil Procedure, section 1021.5 (hereinafter, "section 1021.5").

Because prevailing on a section 17200 claim often involves vindicating the rights of numerous consumers, yet provides for limited relief to each consumer, it is often the case that compensation for attorney's fees under section 1021.5 is appropriate. Similarly, because a judgment in a class action suit is likely to confer important benefits to the public at large but is not likely to account for attorney fees and costs, an attorney may request compensation under section 1021.5 under this scenario as well.

Unless you describe the effect of a statutory award of attorneys' fees in the retainer agreement, the award will automatically be credited toward the total amount owed by the client under the contract. (Vapnek, et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2003) ¶ 5:240.) For this reason, an attorney should make clear in a retainer agreement for a 17200 claim or a class action suit what effect a judgment obtained on behalf of the general public will have on his or her costs and fees. For example, you may want to disclose that any statutory recovery of attorney's fees does not relieve a client of his or her own obligation to pay. You may also want to include a provision explaining that your client is not entitled to receive an award of attorneys' fees granted under section 1021.5.

Consider using the following language:

> Attorney has advised Client that the issues involved in Client's claim may be a matter of public interest. Client recognizes that Client's individual claim is being represented, and Client may receive both contractual and extra-contractual compensation related to the individual claim. Client is aware that Client will not be entitled to compensation for any recovery obtained by attorneys on behalf of the General Public, and Client is aware that attorneys will be entitled to fees pursuant to California Code of Civil Procedure section 1021.5, for any recovery obtained on behalf of the General Public.

Conclusion

Always remember to get your client's informed consent to a retainer agreement in writing. Do not wait to obtain a signed retainer thinking that it can be worked out later. Also, if you think there is a chance your retainer agreement grants you an "adverse" interest, make the necessary disclosures – it is better to be safe than sorry. There are appropriate times to gamble and take risks; the time you take to draft a retainer agreement is not one of them.

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