

**New York State Bar Association
Labor & Employment Section – Fall Meeting – September 24, 2011**

**CONTINGENCY RETAINERS AND MULTIPLE PARTIES:
PROBLEMS AND PITFALLS**

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I. Contingency Retainers

a. Relevant Rules and Statutes

i. Rule 1.5

1. 1.5(a)

A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

2. 1.5(c)

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d)¹ or other law.

¹ (d) provides: A lawyer shall not enter into an arrangement for, charge or collect:

Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

ii. Rule 1.8(e) – Advancing costs in a contingency case

While representing a client in connection with a contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
- (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds

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- (1) a contingent fee for representing a defendant in a criminal matter;
 - (2) a fee prohibited by law or rule of court;
 - (3) a fee based on fraudulent billing;
 - (4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or (hidden)
 - (5) any fee in a domestic relations matter if:
 - (i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;
 - (ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or
 - (iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

of the action may include an amount equal to such costs and expenses incurred.

- iii. Fee-shifting statutes and their purpose/congressional intent of ensuring that even victims of civil rights violations of smaller damages receive competent representation, so that civil rights are vindicated.
- iv. N.Y. Comp. Codes R. & Regs. tit. 22. § 603.7 (2011) (1st Dep't) (any claim for damages for personal injuries or for property damages or for death or loss of services resulting from personal injuries requires prompt filing with OCA).
- v. N.Y. Comp. Codes R. & Regs. tit. 22. § 691.20(e) (2011)(2d Department)(any claim for damages for personal injury or for property damages or for death or loss of services resulting from personal injuries, due to negligence or any type of malpractice or in connection with any claim in condemnation or change of grade proceedings)
 - 1. 33.3% is reasonable if and only if “the initial contractual arrangement between the client and the attorney so provides.” Otherwise, 50% of first \$1,000, 40% of next \$2,000, 35% o next \$22,000, and 25% of anything over \$25,000.

b. Issues

- i. What percentage is excessive?
- ii. Percentage of result in fee shifting cases:
 - 1. Sample language: Our fee with regard to this representation is to be one-third of the total of: (i) the gross amount of any award, judgment or settlement resolving the matter (including the monetary value of any and all benefits) and (ii) any attorneys’ fees which may be awarded and paid pursuant to statute, court order or settlement. Should this firm’s accrued time charges (measured by number of hours times hourly rates²) exceed our one-third share as described above, this firm will be paid the full amount of its accrued time charges, and you will receive the remainder, subject to paragraph 3 below. In the event of settlement, this firm will first make a good faith effort to settle the fees separately.

² The firm’s current hourly rates are as follows: [names of attorneys and respective rates]. The firm reserves the right to change its hourly rates at any time.

- iii. Assignment language?
- iv. Shifting percentages: e.g., increased percentage 30 days before trial?
- v. Costs – clearly state what they might be and when they will be deducted.

II. Multiple Clients

a. Relevant Rules and Statutes

- i. Rule 1.0 “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.
- ii. Rule 1.6
“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
- iii. Rule 1.7
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
 - (1) the representation will involve the lawyer in representing differing interests; or
 - (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

iv. Rule 1.9 (duties to former clients)

b. Common Issues

i. Sharing Confidences

1. Sample language: You understand that a client has the right to have all the information she provides to her attorney or other information she considers secret to be kept by that attorney in confidence from any other person. You agree, however, to allow us to share any and all confidences you share with us with Client 2 in order to advance this negotiation.

a. Sufficient? Does this inform the individual of the material risks and reasonably available alternatives to waiving confidentiality?

ii. Advance Concurrent Conflict Waivers

1. Concurrent conflict of interest is one in which the attorney's responsibilities to one client will materially limit the attorney's ability to advise the other client
2. Effective only if detailed (informed consent) and in writing; the more specific the waiver the more likely it will be upheld
3. Common issue for co-plaintiffs: settlement discussions – how to ensure informed consent in advance

III. Sundry Items

a. Multiple Plaintiff Firms

i. Rule 1.5(g):

A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

- (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share

each lawyer will receive, and the client's agreement is confirmed in writing; and
(3) the total fee is not excessive.

ii. Sample language: Our fee with regard to this representation is to be 40% of the total of the gross amount of settlement resolving the matter. You understand that Firm 1 and Firm 2 are jointly representing you and that they will together be paid 40% of any recovery in this matter, and that as between Firm 1 and Firm 2, they will split the fee equally.

- b. No retainer does not mean no attorney-client relationship: remember to send non-engagement letters to prospectives advising them of SOL *Togstad v. Vesely, Otto, Miller & Keef* 291 N.W.2d 686 (Min. 1980)
- c. Document destruction/retention at the end of a representation: consider agreeing on the method/means at the outset with the client in the retainer. Rule 1.16(e).