It all starts with your retainer agreement – get it right!

A review of the rules for contingency-fee retainer agreements

BY THOMAS C. ZARET

In California, retainer agreements in personal-injury or wrongful-death matters must comply with Business and Professions Code section 6147.

All Medical Injury Compensation Reform Act ("MICRA") contingency-fee agreements must comply with Business and Professions Code section 6146.

A lawyer's failure to comply with the statute renders the retainer agreement voidable at the client's election. If the retainer agreement is voided for failure to follow the applicable statute, the attorney is only entitled to recover quantum meruit ("reasonable fee") for the attorney's services and costs incurred in successfully prosecuting the matter. (*Guiterrez v. Girardi* (2011) 194 Cal.App.4th 925, 932-933.) All attorney fee agreements are strictly construed against the attorney. (*Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572.)

Business and Professions Code Section 6147 sets forth the rules applicable to contingent-fee contracts. The section mandates that all contingency-fee retainer agreements be in writing and that the client be provided with a copy of the signed contract.

Section 6147 requires that a contingency-fee contract include:

(1) A statement of the contingency-fee rate that the client and attorney have agreed upon;

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RETAINER AGREEMENT

THIS AGREEMENT made this _____ day of _____ 20_____ by and between _____ "Client", and the LAW OFFICES OF CONSUMER ATTORNEY, hereinafter designated as "Attorney".

Client, in consideration of services rendered or to be rendered by Attorney to Client, retains Attorney to represent him/her as his/her attorney at law in a cause of action against _____ and/or whomsoever may be liable, arising out of _____.

Client empowers Attorney to take all steps in said matter deemed by Attorney to be advisable to effect a compromise, to institute appropriate legal proceedings, and to take all other appropriate steps.

In any contingency fee arrangement, the contingency fee is not set by law but is negotiable between Attorney and Client.

STRAIGHT CONTINGENCY: Client agrees to pay for the services herein described the fee of _____% of any and all amounts recovered by way of a settlement or otherwise (including but not limited to recovery from the responsible party, responsible party's insurance company, the client's own insurance company, or any medical pay) if the matter is settled before suit is filed or arbitration is demanded, and _____% after suit is filed, arbitration is demanded or the case is mediated. If there is no recovery, there is NO FEE charged. As to a minor client and during the time he/she is a minor (up to age 18), any award of attorney's fees will have to be determined and approved by the court.

DISBURSEMENTS AFTER RECOVERY: For any contingency agreement, the fee shall be taken from the total amount recovered, then costs shall be deducted. If there are outstanding liens agreed to by Client and Attorney, or statutory by nature, they will be paid. The balance is Client's net recovery. Costs and necessary disbursements will be advanced by Client. However, Attorney may, at its sole discretion, advance money for costs and whatever else Attorney feels will advance the Client's case; these disbursements to be reimbursed to Attorney from Client's portion of any recovery. There may be a reasonable fee for services and investigation by the non-lawyers working for the LAW OFFICES OF CONSUMER ATTORNEY which reasonable fee will be taken from Client's portion of recovery.

MONETARY SANCTIONS: Client agrees that in addition to the contingency fee percentage set forth in this Agreement, Attorney shall be entitled to receive all monetary sanctions awarded by a court in the prosecution of Client's case.

LIEN: The Client hereby grants Attorney a lien upon the cause of action, and upon any document, records, or papers in connection therewith, and upon any sum received to the extent of the foregoing fees and costs incurred or advanced. Said lien is based upon reasonable value of Attorney's services valued at $450.00 per hour for all services rendered OR, in personal injury action, Attorney may elect compensation based upon the agreed contingency for any offer to Client to settle the matter prior to Attorney's discharge. A lien acts as security for payment due Attorney by client. Client may seek the advice of an independent lawyer of Client's choice about this lien and this matter. Client acknowledges

_____

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(2) A statement of how disbursements and fees incurred related to the litigation or settlement will affect the contingency fee and the client's ultimate recovery;

(3) A statement of any additional expenses the client might have to compensate the attorney for;

(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 — MICRA); 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 — MICRA.

Percentages that can be collected in a contingency-fee contract are not fixed under the code, unless governed by the MICRA codified at Section 6146.

Clarity in the agreement

Business and Professions Code Section 6148 states that a retainer agreement must clearly explain the basis of compensation: Indicate what the fee percentage(s) are, whether the agreement includes an hourly rate component, statutory fees, or any other expenses that a client will be liable to pay. (Bus. & Prof. C. Section 6148, subdivision (a)(1).)

Section 6148 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. C. Section 6148, subdivision (a)(2), (3).) One should 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. It is important to note that should a dispute arise, any ambiguity in a fee contract will be interpreted in favor of the client, not the attorney. (*Mayhem v. Beninghoff* (1997) 53 Cal.App.4th 1365, 1370.)

Are attorneys' fees capped?

Attorneys' fees obtained through actions on behalf of minors or incompetent adults require court approval. (Family Code § 6602; Probate

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that Client has been so advised and given a reasonable opportunity to seek that advice. If the Client discharges Attorney, the Attorney shall retain a copy of the file and cost of duplicating the file will be assessed the client.

LOSS OF CONSORTIUM: Attorney has advised client that in the event Client is married, Client's spouse may have a potential claim for "loss of consortium." If a Client's spouse desires to make such a claim, Attorney will accept such a claim only upon consultation with said spouse and upon execution of a separate written Retainer Agreement by both said spouse and Attorney. Absent such agreement, Attorney shall have no responsibility whatsoever for handling such a claim, and Client shall hold Attorney harmless from failing to make such a claim.

POLICY LIMITS: That Attorney's responsibility for representation hereunder is limited by the ability of any Defendant and/or his insurer to pay damages as a result of the incident which is the subject of this Agreement. Should an insurance carrier offer a policy limits settlement, and if, in the opinion of the Attorney, there is no further prospect for recovery, Client agrees to accept the proposed settlement. Should an insurer offer said policy limits settlement, Attorney shall be granted a first priority lien for the full percentage of his Attorney's fees per the terms and conditions of this Agreement.

[Note: The following arbitration clause is OPTIONAL. It was written by the author of the article which it accompanies, and its inclusion here does not constitute endorsement of arbitration clauses in retainer agreements.]

ARBITRATION: That in the event Client asserts any claim against Attorney on any basis whatsoever, including but not limited to a claim for errors and omissions, the parties agree to submit such claim to and resolve said claim by binding arbitration pursuant to the California arbitration statutes, waiving the right to bring suit and the right to a jury trial, with each party to bear his own costs and Attorney's fees, regardless of the outcome.

WITHDRAWAL: It is understood by the Client that if the Attorney is unable to maintain mail and telephone contact with the client, at home and/or at work, it may interfere with the Attorney's ability to perform in the Client's best interest and may possibly have an adverse effect to the case. The Client agrees to keep the Attorney informed, at all times, of Client's current address and telephone number.

SCOPE OF SERVICES: That this contingency fee arrangement covers all legal services to be rendered by Attorney through the original trial of any legal action instituted on the claims aforesaid. Upon completion of said services, Attorney shall be entitled to the said contingency fee, with no obligation to file motion for new trial or appeal. Any fees for legal services required upon the completion of trial shall be agreed upon at that time and shall be in addition to the fees specified herein. Client shall not be required to pay any compensation to Attorney, nor is Attorney retained, responsible or required to perform any services, for related matters that arise out of said accident not covered by this Agreement, unless such compensation and Attorney's responsibilities are described in writing and agreed to by the parties. Attorney shall not be liable for any costs awarded the prevailing party by court or statute, should such costs be awarded against Client in any proceeding relative to this matter. Client agrees to indemnify and hold Attorney free and harmless from any lien claimant(s) who may claim an interest in the proceeds recovered on behalf of Client.

REFERRAL/NO GUARANTEE: Client acknowledges that Attorney has made no guarantee regarding the successful termination of Client's claim or causes of action, nor any guarantee regarding the

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Code § 2644(a).) Many, but not all, courts cap such fees at 25 percent of net recovery. However, Local Rules capping these fees, such as former LASC Local Rule 10.79(c)(3), have now been preempted by California Rules of Court, rule 7.955(d). Thus, if the contingency-fee agreement calls for a fee in excess of 25 percent, a court has discretion to approve it after evaluation of the factors set forth in rule 7.955(b).

• The contingency-fee contract must set forth how costs will affect the calculation of the fee, i.e. whether costs are to be taken from the client's gross or net recovery.

• The contingency-fee contract must set forth the circumstances under which the client could be required to pay the attorney for work which is related to the matter covered by the retainer agreement at issue, but not covered by the retainer itself. That is, appeals, motions for new trial, the defense of cross-complaints against the client, etc.

• An attorney is subject to discipline in the event the attorney enters into an agreement for (or charges or collects) an illegal or unconscionable fee. (Rules of Professional Conduct, rule 4-200.) An example of an "unconscionable" fee is seen in *In re Silverton* (2005) 36 Cal.4th 81, 93-94. There, an attorney was disbarred for a variety of reasons, including entering into a fee agreement with personal-injury clients which gave the attorney the right to negotiate down any medical liens charged against the client's recovery and keep the amount of the reduction for himself.

• If the attorney does not have malpractice insurance, this must be disclosed in writing at the time the lawyer is initially engaged unless the total amount of time the attorney reasonably expects to expend in representing the client is under four hours. (Rules of Professional Conduct, rule 3-410(A).) Thus, while not required to be contained in the retainer agreement itself, it is prudent to make this disclosure in the Retainer if the attorney does not have professional liability insurance.

• An attorney may not contract with a client to prospectively limit the attorney's exposure for professional malpractice. (Rules of Professional Conduct, rule 3-400(A).)

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amount of recovery or the type of relief, if any, which Client seeks to obtain therefrom. Client authorizes Attorney to share any portion of Attorney's fees with any other lawyer for any purpose, including as a referral fee.

NON-COVERED MATTERS: Client acknowledges that the LAW OFFICES OF CONSUMER ATTORNEY will not be handling any workers' compensation action in connection with this case. Should the client so desire, the LAW OFFICES OF CONSUMER ATTORNEY will provide a referral for a workers' compensation attorney. Client acknowledges that this agreement does not cover medical malpractice claims, disputes with the client's own insurance company regarding coverage, disputes with health care providers, determination of tax consequences of any sums recovered, preparation of special needs trusts relating to any sums recovered, or collection of any award, settlement or judgment. Client acknowledges that Attorney maintains errors and omissions insurance coverage applicable to the services to be rendered.

SIGNING OF CHECKS: The undersigned client does hereby authorize any lawyer member of the firm of LAW OFFICES OF CONSUMER ATTORNEY to endorse and sign the undersigned's name to any document, paper, draft or check relating to the case for which this retainer is given, providing that the undersigned will be notified of said signature or endorsement as soon as practical. This right will only be used to expedite the undersigned Client's case and the case has been settled with the Client's express approval.

RETENTION OF FILE: Client Files at Conclusion: Client is advised that and consents that, at the conclusion of this matter, Attorneys will either return the client's original file materials (or any portion thereof) to the Client or shred them within 30 days of Client not advising Attorneys that he/she wishes to keep them. While Attorneys will maintain an electronic copy of all portions of the file that Attorneys feel are important, Client is advised that the file materials may be unavailable in the event of shredding.

This agreement is binding upon the heirs, executors, administrators and assigns of the respective parties hereto. Each term herein is consideration for every other term, and should any portion of the Agreement be deemed unenforceable, the remaining terms shall be valid and enforceable.

The undersigned does acknowledge and agree to the foregoing terms and conditions of said Retainer Agreement. Client acknowledges receipt of a duplicate copy of this agreement.

DATED:_____

BY: _____ _____
LAW OFFICES OF CONSUMER ATTORNEY Client Signature

_____
Client Signature

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Referral fees among attorneys

Referral fees are governed by Rule of Professional Conduct Section 2-200, "Financial Arrangements Among Lawyers."

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300 [sale of law practice], a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Compliance with Rule 2-200 is nondelegable and is required even where the attorney being referred to in the matter promises to obtain the informed written consent of the client for the referring attorney. (*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891.) Failure to comply with Rule 2-200 will prohibit any referral or fee splitting arrangement. (*Compagna v. City of Sanger* 42 Cal.App.4th 533 (1996).

As noted, the client must consent to fee splitting in writing; however, the agreement between the two attorneys need not be in writing or signed by both attorneys. (*Cohen v. Brown* (2009) 173 Cal.App.4th 302.) The client consent may

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come at any time before the division is made, including after the services are fully performed. (*Id.*) However, the best practice is to do so as soon as possible, and preferably in the retainer agreement itself.

Potential liability issues

Might there be any possible liability for making a bad referral? There may be liability to the client for a "negligent referral," referral to an incompetent or disbarred attorney, or failure to make a referral until after the running of the statute of limitations. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31.)

[Note: This is part of an article originally presented at the 2016 Consumer Attorneys of Los Angeles Las Vegas convention for consumer attorneys.]

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