**SUFFOLK ACADEMY OF LAW**
***The Educational Arm of the Suffolk County Bar Association***
**560 Wheeler Road, Hauppauge, NY 11788**
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# SUMMER BETTER BILLING SERIES
## Retainer Letters

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**Moderator:**
**Hon. John J. Leo**

**July 18, 2022**
**Suffolk County Bar Association, New York**

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## Christopher Glass, Esq. - Rappaport, Glass, Levine & Zullo, LLP

Christopher Glass is a third generation lawyer who specializes in representing clients who have been injured as a result of medical malpractice, nursing home negligence, car accidents, construction accidents, defective or unsafe products, and trips/slips and falls.

Since joining Rappaport, Glass, Levine and Zullo in 2013, Christopher has secured multiple six and seven figure resolutions. He has been named a “Rising Star” by Super Lawyers and been awarded “Top 40 Under 40” in the category of Civil Plaintiff Lawyers by The National Trial Lawyers. Christopher has published articles and lectured in the field of personal injury and trial practice. He is currently a member of the New York State Trial Lawyers Association, Suffolk County Bar Association, New York State Bar Association, and American Association for Justice.

# NEWS ADVISORY

**New York State**
**Unified Court System**

**Hon. Lawrence K. Marks**
**Chief Administrative Judge**

**Contact:**
**Lucian Chalfen**
**Public Information Director**
**Arlene Hackel, Deputy Director**
**(212) 428-2500**

**www.nycourts.gov/press**

**Date: June 12, 2020**

## Electronic Filing of Retainer and Closing Statements in the First and Second Departments

The First and Second Departments of the New York State Supreme Court, Appellate Division, recently approved an amendment to court rules (22 NYCRR 603.25 & 691.20) to require the electronic filing (rather than paper filing) of retainer and closing statements with the Office of Court Administration (OCA) in contingency fee matters, effective June 8, 2020. Copies of the amended rules can be found here: https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fww2.nycourts.gov%2Frules%2Fjointappellate%2Fretainer.shtml&data=02%7C01%7Cahackel%40nycourts.gov%7C834b0ee205f14672bbe308d80e1e908c%7C3456fe92cbd1406db5a35364bec0a833%7C0%7C0%7C637274871737646452&sdata=tbS8hVvyEiPKotAhDGHUb5n4jrBdS%2FStKJ2G48EvbPU%3D&reserved=0

Concurrent with these rule amendments, OCA has instituted a new online retainer and closing statement e-filing system for use by attorneys with UCS Online Service Accounts. The system allows the secure paperless filing of individual retainer/closing forms and provides proof of filing. Effective immediately, this new system will replace the previous paper mailing system.

Access to the new system, including instructions and FAQs can be found here: https://gcc01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fiapps.courts.state.ny.us%2Fretainerandclosing&data=02%7C01%7Cahackel%40nycourts.gov%7C834b0ee205f14672bbe308d80e1e908c%7C3456fe92cbd1406db5a35364bec0a833%7C0%7C0%7C637274871737646452&sdata=oxqQFap7Q5EoVakK%2Bu0LVGSvzKge5Ae%2FbtYbCNAcmQs%3D&reserved=0

# # #

22 CRR-NY 691.20
NY-CRR

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 22. JUDICIARY
SUBTITLE B. COURTS
CHAPTER IV. SUPREME COURT
SUBCHAPTER B. SECOND JUDICIAL DEPARTMENT
ARTICLE 1. APPELLATE DIVISION
SUBARTICLE B. SPECIAL RULES
PART 691. CONDUCT OF ATTORNEYS

22 CRR-NY 691.20
22 CRR-NY 691.20

# 691.20 Claims or actions for personal injury, property damage, wrongful death, loss of services resulting from personal injuries, due to negligence or any type of malpractice, and claims in connection with condemnation or change of grade proceedings.

**(a) Statements as to retainers; blank retainers.**

(1) Every attorney who, in connection with any action or 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, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby the attorney's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within 30 days from the date of any such retainer or agreement of compensation, sign personally and file with the Office of Court Administration of the State of New York a written statement of such retainer or agreement of compensation, containing the information hereinafter set forth. Such statement must be filed by electronic transmission in a manner directed by the chief administrative judge and approved by the presiding justice of the Appellate Division.

(2) A statement of retainer must be filed in connection with each action, claim or proceeding for which the attorney has been retained. Such statement shall contain the following information:

Retainer Statement

For office use:

TO THE OFFICE OF COURT ADMINISTRATION

OF THE STATE OF NEW YORK

1. Date of agreement as to retainer

2. Terms of compensation

3. Name and home address of client

4. If engaged by an attorney, name and office address of retaining attorney

5. If claim for personal injuries, wrongful death or property damage, date and place of occurrence

6. If a condemnation or change of grade proceeding:

(a) Title and description.

(b) Date proceeding was commenced

(c) Number or other designation of the parcels affected.

7. Name, address, occupation and relationship of person referring the client

Dated:_____, NY,_____day of_____, 20_____

Yours, etc.

_____

Signature of Attorney

_____

Print

Attorney's Name

or

_____

Type

Office and P.O. Address

___ Dist. ___ Dept. ___County

NOTE: CPLR 2104 and 3217 REQUIRE THAT THE ATTORNEY FOR THE DEFENDANT FILE A STIPULATION OR STATEMENT OF DISCONTINUANCE WITH THE COURT UPON DISCONTINUANCE OF AN ACTION.

(3) An attorney retained by another attorney, on a contingent fee basis, as trial or appeal counsel or to assist in the preparation, investigation, adjustment or settlement of any such action, claim or proceeding shall, within 15 days from the date of such retainer, sign personally and file electronically with the Office of Court Administration a written statement of such retainer in the manner and form as above set forth, which statement shall also contain particulars as to the fee arrangement, the type of services to be rendered in the matter, the code number assigned to the statement of retainer filed by the retaining attorney and the date when said statement of retainer was filed.

(4) No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney was left blank at the time of its execution by the client.

**(b) Closing statement; statement where no recovery.**

(1) A closing statement shall be filed in connection with every claim, action or proceeding in which a retainer statement is required, as follows: Every attorney upon receiving, retaining or sharing any sum in connection with a claim, action or proceeding subject to this section shall, within 15 days after such receipt, retention or sharing, sign personally file with the Office of Court Administration by electronic transmission in a manner directed by the chief administrative judge and approved by the presiding justice of the Appellate Division and serve upon the client a closing statement as hereinafter provided. Where there has been a disposition of any claim, action or proceeding, or a retainer agreement is terminated, without recovery, a closing statement showing such fact shall be signed personally by the attorney and filed electronically with the Office of Court Administration within 30 days after such disposition or termination.

(2) Each closing statement shall be on one side of paper 8½ inches by 11 inches and be in the following form and contain the following information:

Closing Statement

For office use:

TO THE OFFICE OF COURT ADMINISTRATION

OF THE STATE OF NEW YORK

1. Code number appearing on Attorney's receipt for filing of retainer statement.

2. Name and present address of client

3. Plaintiff(s) 4. Defendant(s)

5 (a) If an action was commenced, state the date: _____, 20__, _____ Court, _____ County.

5 (b) Was the action disposed of in open court? _____.

If not, and a request for judicial intervention was filed, state the date the stipulation or statement of discontinuance was filed with the clerk of the part to which the action was assigned. _____.

If not, and an index number was assigned but no request for judicial intervention was filed, state the date the stipulation or statement of discontinuance was filed with the County Clerk. _____.

6. Check items applicable: Settled ( ); Claim abandoned by client ( ); Judgment ( )

Date of payment by carrier or defendant _____ day of _____, 20_

Date of payment to client_____day of_____, 20_

7. Gross amount of recovery (if judgment entered, include any interest, costs and disbursements allowed) $_____ (of which $ _____ was taxable costs and disbursements).

8. Name and address of insurance carrier or person paying judgment or claim and carrier's file number, if any.

9. Net amounts: to client $ ___ ; compensation to undersigned $ ___ ; names, addresses and amounts paid to attorneys participating in the contingent compensation.

10. Compensation fixed by: retainer agreement ( ); under schedule ( ); or by court ( ).

11. If compensation fixed by court: Name of Judge . Court_____, Index No._____, Date of Order _____

12. Itemized statement of payments made for hospital, medical care or treatment, liens, assignments, claims and expenses on behalf of the client which have been charged against the client's share of the recovery, together with the name, address, amount and reasons for each payment

13. Itemized statement of the amounts of expenses and disbursements paid or agreed to be paid to others for expert testimony, investigative or other services properly chargeable to the recovery of damages together with the name, address and reason for each payment

14. Date on which a copy of this closing statement has been forwarded to the client

_____, 20__

NOTE: CRPLR 2104 and 3217 REQUIRE THAT THE ATTORNEY FOR THE DEFENDANT FILE A STIPULATION OR STATEMENT OF DISCONTINUANCE WITH THE COURT UPON DISCONTINUANCE OF AN ACTION.

Dated: _____, NY,_____day of _____, 20_____

Yours, etc.

_____

Signature of Attorney

_____

Print

Attorney

or

_____

Type

Office and P.O. Address

___ Dist.___ Dept. ___County

(If space provided is insufficient, riders on sheets 8½ inches by 11 inches and signed by the attorney may be attached.)

(3) A joint closing statement may be served and filed in the event that more than one attorney receives, retains or shares in the contingent compensation in any claim, action or proceeding, in which event the statement shall be signed by each such attorney.

**(c) Confidential nature of statements.**

(1) All statements of retainer or closing statements filed shall be deemed to be confidential and the information therein contained shall not be divulged or made available for inspection or examination except upon written order of the presiding justice of the Appellate Division. (See subdivision [g] of this section.)

(2) When a retainer or closing statement has been filed electronically pursuant to this section, the official record shall be the electronic recording of the document stored by the Office of Court Administration.

**(d) Deposit of collections; notice.**

(1) Whenever an attorney, who has accepted a retainer or entered into an agreement as above referred to, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a special account in accordance with the provisions of Rule 1.15 of the Rules of Professional Conduct. Within 15 days after the receipt of any such sums he shall cause to be delivered personally to such client or sent by registered or certified mail, addressed to such client at the client's last known address, a copy of the closing statement required by this section. At the same time the attorney shall pay or remit to the client the amount shown by such statement to be due the client, and he may then withdraw for himself the amount so claimed to be due him for compensation and disbursements. For the purpose of calculating the 15-day period, the attorney shall be deemed to have collected or received or been paid a sum of money on the date that he receives the draft endorsed by the client, or if the client's endorsement is not required, on the date the attorney receives the sum. The acceptance by a client of such amount shall be without prejudice to the latter's right in an appropriate action or proceeding, to petition the court to have the question of the attorney's compensation or reimbursement for expenses investigated and determined by it.

(2) Whenever any sum of money is payable upon any such claim, action or proceeding, either by way of settlement or after trial or hearing, and the attorney is unable to locate a client, the attorney shall apply pursuant to Rule 1.15 of the Rules of Professional Conduct to the court in which such action or proceeding was pending, or if no action had been commenced, then to the Supreme Court in the county in which the attorney maintains an office, for an order directing payment to be made to the attorney of the fees and reimbursable disbursements determined by the court to be due said attorney and to the Lawyers' Fund for Client Protection of the balance due to the client, for the account of the client, subject to the charge of any lien found by the court to be payable therefrom.

**(e) Contingent fees in claims and actions for personal injury and wrongful death.**

(1) In any claim or action for personal injury or wrongful death, or loss of services resulting from personal injury or for property or money damages resulting from negligence or any type of malpractice, other than one alleging medical, dental or podiatric

malpractice, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of recovery, the receipt, retention or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than that contained in any schedule of fees adopted by this department is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of any provisions of the Rules of Professional Conduct as set forth in Part 1200 of this Title, unless authorized by a written order of the court as hereinafter provided.

(2) The following is the schedule of reasonable fees referred to in paragraph (1) of this subdivision: either

**SCHEDULE A**

(i) 50 percent on the first $1000 of the sum recovered;

(ii) 40 percent on the next $2000 of the sum recovered;

(iii) 35 percent on the next $22,000 of the sum recovered; or

(iv) 25 percent on any amount over $25,000 of the sum recovered; or

**SCHEDULE B**

(v) A percentage not exceeding 33⅓ percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

(3) Such percentage shall be computed by one of the following two methods, to be selected by the client in the retainer agreement or letter of engagement:

(i) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert medical testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or

(ii) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements.

The retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self-insurers or insurance carriers.

(4) In the event that claimant's or plaintiff's attorney believes in good faith that Schedule A above because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney who filed the statement of retainer, pursuant to this section, has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in Schedule A of paragraph (2) of this subdivision; provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorney. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(5) The provisions of subdivision (e) of this section shall not apply to an attorney retained as counsel in a claim or action for personal injury or wrongful death by another attorney, if such other attorney is not subject to the provisions of this section in such claim or action, but all other subdivisions of this section shall apply.

(6) Nothing contained in subdivision (e) of this section shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

(7) Nothing contained in subdivision (e) of this section shall be deemed applicable to the fixing of compensation for attorneys for services rendered in connection with the collection of first party benefits as defined by article 51 of the Insurance Law.

(8) The provisions of paragraph (2) of this subdivision shall not apply to claims alleging medical, dental or podiatric malpractice. Compensation of claimant's or plaintiff's attorney for services rendered in claims or actions for personal injury alleging medical, dental or podiatric malpractice shall be computed pursuant to the fee schedule in section 474-a of the Judiciary Law.

**(f) Preservation of records of claims and actions.**

Attorneys for both plaintiff and defendant in the case of any such claim or cause of action shall preserve, for a period of seven years after any settlement or satisfaction of the claim or cause of action or any judgment thereon or after the dismissal or discontinuance of any action, the pleadings and other papers pertaining to such claim or cause of action, including, but not limited to, letters or other date relating to the claim of loss of time from employment or loss of income; medical reports, medical bills, X-ray reports, X- ray bills; repair bills, estimates of repairs; all correspondence concerning the claim or cause of action; and memoranda of the disposition thereof as well as canceled vouchers, receipts and memoranda evidencing the amounts disbursed by the attorney to the client and others in connection with the aforesaid claim or cause of action and such other records as are required to be maintained under Rule 1.15 of Part 1200 of this Title.

**(g) Special authorization to divulge retainer and closing statements filed by attorneys.**

Pursuant to paragraph (c)(1) of this section, the presiding justice of the Appellate Division of the Supreme Court in the second judicial department does hereby order that, without his further specific order, the clerk of the said Appellate Division and the Office of Court Administration of the State of New York, jointly and severally, are authorized to permit any agent or representative of the Treasury Department or of the district director of internal revenue of the United States, upon the presentation of written authorization from a supervising official or head in the office of said department or district director, to examine and copy any retainer or closing statement heretofore or hereafter filed by any attorney in the office of the said clerk or the Office of Court Administration of the State of New York, in accordance with said rules regulating the conduct of attorneys and counselors at law.

**(h) Omnibus filings in property damage actions or claims.**

Attorneys prosecuting actions or claims for property damage may make semi-annual omnibus filings of retainer statements and closing statements.

22 CRR-NY 691.20
Current through March 15, 2021

END OF DOCUMENT

# New York Consolidated Laws,

# Judiciary Law - JUD § 474-a.

## Contingent fees for attorneys in claims or actions for medical, dental or podiatric malpractice

1. For the purpose of this section, the term "contingent fee" shall mean any attorney's fee in any claim or action for medical, dental or podiatric malpractice, whether determined by judgment or settlement, which is dependent in whole or in part upon the success of the prosecution by the attorney of such claim or action, or which is to consist of a percentage of any recovery, or a sum equal to a percentage of any recovery, in such claim or action.

2. Notwithstanding any inconsistent judicial rule, a contingent fee in a medical, dental or podiatric malpractice action shall not exceed the amount of compensation provided for in the following schedule:

30 percent of the first $250,000 of the sum recovered;

25 percent of the next $250,000 of the sum recovered;

20 percent of the next $500,000 of the sum recovered;

15 percent of the next $250,000 of the sum recovered;

10 percent of any amount over $1,250,000 of the sum recovered.

3. Such percentages shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care, dental care, podiatric care and treatment by doctors and nurses, or of self-insurers or insurance carriers.

4. In the event that claimant's or plaintiff's attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the

action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two of this section, provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. If the application is granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

5. Any contingent fee in a claim or action for medical, dental or podiatric malpractice brought on behalf of an infant shall continue to be subject to the provisions of section four hundred seventy-four of this chapter.

**NYCLA Professional Ethics Committee**
Ethics Opinion 739
July 10, 2008

Topic: Fees for specialized counsel retained to negotiate a plaintiff's complex Medicare, Medicaid or private health insurance lien may be charged to the settlement as a disbursement under certain conditions.

Code: DR 6-101, 2-106, 5-104

**Digest:**

It is ethically permissible for a plaintiff's personal injury attorney to retain a specialty firm to handle the resolution of a Medicare, Medicaid or private healthcare lien on a settled lawsuit. Under the following conditions, the fee for said outside service may be charged as a disbursement against the total proceeds of the settlement: (a) at the outset of the representation, the Retainer Agreement with the client provides that the attorney may do so, and the client has given informed consent thereto; (b) the actual charges are passed on to the client at cost (without any overage or surcharge) and must be reasonable; (c) the transaction results in a net benefit to the client on each lien negotiated; (d) the transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules; and (e) the referring attorney remains responsible for the overall work product.

**Discussion:**

A cottage industry of specialty law firms has evolved in the last few years that specialize in negotiating Medicare, Medicaid and private healthcare liens on behalf of personal injury plaintiffs. Said services are marketed to attorneys representing personal injury clients. Resolving liens is a complex area of law with many traps for the inexperienced and unwary. These specialty law firms charge fees for their work and describe their services as being akin to other legal areas that often effect personal injury settlements. Often, ancillary legal services involved with personal injury settlement such as bankruptcy, probate and disability planning do result in a separate fee chargeable to the client. However, negotiating liens has frequently been done by the plaintiff's attorney at no extra charge (and included in the contingency fee). By posturing Medicare, Medicaid and private healthcare lien resolution as an ancillary area, the specialty law firms are suggesting that fees for their service may be considered a legal disbursement chargeable to the total proceeds of the settlement. The alternative would be for the personal injury attorney to pay such fees out of the attorney's contingency fee, as may be done with legal services provided by trial counsel or appellate counsel.

Increasingly Complicated Lien Resolution

In every personal injury case, plaintiff's counsel has to address possible liens charged to the client's claim. This is a developing area of law, where the policies governing recovery of Medicare, Medicaid and private insurance liens have become much more aggressive over the past few years. The attorney must ferret out and track the liens that are asserted against the claim, and under the new federal rules, has to actively investigate any possible lien held by Medicare (42 CFR 411.25). When there is a recovery, before any funds are disbursed, a determination has to be made as to whether the asserted liens have merit, and if so, which portions of those liens are valid. Repeated contact with the lienholder may be needed, often through a third party collection agency, and extensive negotiations, or even litigation, may ensue before an agreement can be reached.

Lien issues are made more difficult to handle because of constantly changing regulations and protocols. There are four major entities likely to have a lien on a personal injury claim: Medicare, Medicaid, employee health plans, and private health insurance. Each is governed by a different body of law (federal Medicare code, state Medicaid code, ERISA, and state insurance law, respectively). The rules governing each, and the opinions interpreting them, are often subject to change.

Further complicating matters, some clients may have multiple healthcare liens associated with their recovery. A client, for instance, who is initially covered under her employer's healthcare plan may, due to a permanent disability, cycle off of the private plan and onto Medicare during the time between the date of injury and the date of settlement. Furthermore, many clients who are entitled to Medicare are actually 'dual beneficiaries,' having Medicaid pay the coinsurance and deductible applicable to their Medicare coverage. Finally, a client who is only a Medicare beneficiary may have to deal with three separate healthcare reimbursement claims in the end (a Medicare plan outsourcing to multiple administrators -- Medicare Part A, Part B, Part D & MCO's -- all with unique rights of recovery, tort recovery departments and associated protocols to develop, offset, compromise and perfect claims).

Traditional Handling of Liens in Personal Injury Cases

Historically, the resolution of liens on recoveries was considered a routine part of case management. The increasingly complex development of the law, rules, and regulations of lien resolution, however, has made proper lien resolution far more difficult and involved than it was in the past. Many plaintiffs' attorneys view themselves as skilled in proving tort liability and damages, and plaintiffs' personal injury lawyers often develop expertise in the substantive litigation and tort law relevant to establishing the plaintiff's personal injury claim, but have no special skills in the field of lien law and lien resolution. The law and legal processes associated with personal injury claims are distinct from the law and legal processes associated with resolving reimbursement claims and health insurance liens. Therefore, it is increasingly more

difficult for a personal injury lawyer also to be expert in the law of Medicaid liens, ERISA subrogation, and the like. While personal injury lawyers could develop further expertise through study, experience, and consultation, there are advantages to retaining specialized professionals who perform this work on a constant basis, whose work enables them to be up to date on changes in the law and procedures, and who can take advantage of established and ongoing relationships with various carriers and of economies of scale. The complexity of these lien-related issues may make the retention of such outside assistance desirable.

The plaintiff's attorney faces the risks of liability associated with lien resolution. When an attorney undertakes a personal injury lawsuit, she impliedly represents that she has the legal knowledge, skill, and preparation necessary to represent the client's interests competently in that area of the law. See, DR 6-101. If the attorney unwittingly declines to pay a valid lien, she may expose his client to future litigation and possible loss of healthcare coverage. If an attorney overpays the lien, or pays an invalid lien, she may be liable for legal malpractice; if the attorney fails to discover or pay an outstanding Medicare lien, she can be held personally liable for twice the amount of the original lien, plus interest. (See, 42 U.S.C. §1395y (b) (2) (A) (ii-iii)).

Lien resolution may take months or even years after a case is resolved and can delay disbursement of the case proceeds to the client and payment of the attorney's fee. From the plaintiffs' attorney's perspective, lien resolution is often viewed as a troublesome distraction that saps resources from the prosecution of the case and diminishes the recovery to the client. From the client's perspective, said liens delay distribution of proceeds, may affect the continuing entitlement to certain benefits and can even make obtaining representation more difficult.

In the last several years, the option to "outsource" lien resolution has become available to the plaintiffs' bar through the emergence of specialized law firms that focus on lien resolution and settlement disbursement. Typically, such firms hire case workers who do nothing but handle liens on a large scale. Faced with the stark realities outlined above, plaintiffs' attorneys have begun to take advantage of these new services. This option alleviates the time consumption and frustration of handling lien resolution in-house and may generate a better outcome for the client (i.e. a net benefit) than could be obtained through in-house lien resolution.

Fees for Lien Resolution

Addressed below are some of the factors to be considered in determining whether the fees for such lien resolution attorneys are a disbursement to be shared by the client and the attorney, rather than included in the contingency fee, *i.e.* absorbed solely by the attorney. Assessing the costs of outsourced lien resolution as a disbursement apportions those costs to the client and the attorney in the same manner and proportion that the client and attorney share in the net recovery; *i.e.* neither one is saddled with the entire cost or burden to the exclusion of the other.* The client

* When any disbursement (such as the cost of lien resolution) is charged to a case, the net recovery is reduced by the amount of the disbursement. Because the attorney's fee is based on the net recovery, the attorney's fee is likewise

benefits from the lien resolution, while the plaintiff's attorney benefits by being relieved of having to represent the client in an area of law with which she may be unskilled or unfamiliar. The end result benefits both the attorney and the client. The attorney is not burdened with the difficulties of lien resolution and can focus on the areas in which she has true expertise, and the client's lien-related interests are represented by those with specialized knowledge and expertise in such claims, thereby optimizing recovery.

A common practice in personal injury matters when the client's case requires ancillary legal services related to other specialized fields of law, such as bankruptcy, the calculation of Medicare Set Aside accounts, and disability planning (e.g., special needs trusts), is to charge the fee for said services as a disbursement against the entire proceeds of the settlement. Fees incurred in the resolution of complex Medicare, Medicaid, and private healthcare liens may be charged in the same manner provided certain conditions and safeguards are met:

(A) At the outset of the representation, the retainer agreement with the client provides that the attorney may engage an outside law firm for lien resolution and that the fee for said service will be charged as a disbursement.

Counsel seeking to charge a lien resolution fee as a disbursement must consider the timing and notification given to the client. A client will likely object to bearing a cost that has only been brought to her attention late in the course of her case. As a result, courts, ethics boards, and committees have taken a dim view of costs or fees that are sprung upon the client after the parties have signed a fee agreement. Epstein Reiss & Goodman v. Greenfield, 102 A.D.2d 749, 476 N.Y.S.2d 885 (1st Dept.1984); Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 798 N.Y.S.2d 379 (1st Dept. 2005); ABA Opinion No. 93-379; Maryland State Bar Assoc., Committee on Ethics, Op. No. 2001-1. The burden of establishing the existence of a retainer contract, with full knowledge by the client of all material circumstances, is on the attorney. (Matter of Howell, 215 N.Y. 466, 109 N.E. 572 (1915); Kiser v. Bailey, 92 Misc.2d 435, 400 N.Y.S.2d 312 (1977); see also Whitehead v. Kennedy, 69 N.Y. 462 (1877)). For this reason, it is necessary that the original fee agreement provide that the attorney may, at her discretion, obtain outside expertise on the matter of lien resolution and that the cost may be charged as a disbursement.

Specialized lien counsel often insures their services against future lien claims for which the attorney may be held liable. Relieving counsel of responsibility for future lien claims is a benefit to the attorney and not an assurance to the client, and should be disclosed in the retainer agreement as well.

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reduced by the added amount of the disbursement. Thus, the additional disbursement is shared by the client and the attorney in the same proportion that the fee is taken. For example, if a $1000.00 disbursement is charged to a file on a 33.3 percent contingency fee case, the net recovery is reduced by $1000.00, and the attorney's fee is reduced by $333.33. Thus, the attorney absorbs $333.33 of the disbursement in the form of reduction of the fee and the client's net share is reduced by $666.67.

(B) The actual charges are passed on to the client at cost and said charges must be reasonable.

In assigning these costs to the client as a disbursement, the arrangement must comply with substantive law, as well as the Code. First and foremost, the cost of outsourcing lien resolution on any claim must be "reasonable" under DR 2-106, which proscribes "excessive" fees. Some may question whether any such assignment of this cost could be ethical, as lien resolution has traditionally been included as a part of the overall contingency fee. ABA Op. No. 00-420 offers some concise guidance: the client may only be assigned the actual cost of the disbursements, without any surcharge added by the attorney. ABA 93-379 provides that no surcharge can be added by the lawyers absent informed consent by the client. The court has inherent authority to review such a fee for reasonableness, Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491 (1959), cert. denied, 361 U.S. 374, 80 S. Ct. 401 (1960).

(C) The transaction results in a net benefit to the client on each lien negotiated.

The reasonableness of the fee depends on the net benefit to the client. A lawyer who outsources a complex lien problem to another attorney who, in turn, resolves it for a fraction of the lien amount, gains a net benefit to her client. As such the additional fee is justified. The overall outsourcing of lien resolution must benefit the client. It would not be reasonable for a client to be asked to pay an additional fee for lien resolution in excess of the benefit to the client. For example, it would not be reasonable for a lawyer to post a disbursement in an additional amount of, say, $10,000, in order to negotiate a lien of $5,000. Any risk of miscalculation should fall upon the lawyer, as fiduciary, and not the client.

It should be noted that some of these law firms require prepayment for their services. If the result of the lien resolution is less than the entire fee, the attorney may not charge this fee as a disbursement. Before initiating use of such a service, the referring counsel is expected to evaluate the size and complexity of the lien to determine if said service will be of real value to the client. Ultimately, the attorney who outsources negotiation of a lien for a pre-determined fee should be solely responsible for said fee. If the service fails to reduce the lien by an amount that exceeds its fee the attorney bears the risk. (This restriction serves to prevent the automatic reflexive referral of liens issues to outside counsel, where the case does not merit it.)

(D) The transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules.

Whether Medicare, Medicaid and Healthcare lien resolution is included in the scope of the usual personal injury contingency fee retainer agreement is a mixed question of law and of

ethics. This Committee only has jurisdiction to interpret the Lawyer's Code of Professional Responsibility. To the extent that fees charged for lien resolution present a question of law, this committee does not have jurisdiction to resolve legal issues. The New York Judiciary Law (principally, Secs. 474 and 474-a) and the rules of the Appellate Divisions set maximum fees in contingency fee cases for personal injury plaintiffs. (See, 22 N.Y.C.R.R. §603.7; 22 N.Y.C.R.R. §691.20; 22 N.Y.C.R.R. §806.13;22 N.Y.C.R.R §1022.31; and 22 NYCRR §1200.11 et seq.). Federal law and rules impose limits on contingency fees in claims against the United States and its subdivisions. This Committee does not have jurisdiction to interpret the Judiciary Law, Appellate Division rules, or federal law and rules, but does note that a lawyer who charges a fee in excess of the fees permitted, will have acted both unethically and illegally.

(E) The referring attorney remains responsible for the overall work product.

DR 6-101 of the Lawyers Code of Professional Responsibility requires an attorney to act competently. If a lawyer "knows or should know that he or she is not competent to handle [a matter, he or she should...] associate with a lawyer who is competent to handle it." This Rule encourages attorneys to associate with more knowledgeable peers when confronted with issues beyond their abilities, and appears to facially encourage bringing in lien resolution specialists if the attorney thinks it would be necessary or beneficial to the client's interests.

As a matter of common sense, if an outside lien resolution firm is utilized, the attorney should properly investigate the firm he chooses. It is important that the lien resolution firm be familiar with the various aspects of the relevant law, with the professionals being employed of particular importance. Lien resolution outsourcing may be more appropriately classified as an expense if the firm employs experts who are familiar with the lien resolution process, such as former case workers from the Medicare and Medicaid system, healthcare data processing professionals, and billing and coding experts. The firm retained must be capable of complying with the appropriate standard of care. Failure to secure the services of a competent firm will not relieve an attorney of any liability for lien resolution, and may actually increase it.

NYSBA Opinion 769

Our research suggests that this is an inquiry of first impression in New York. However, some guidance is furnished by New York State Bar Association Ethics Opinion 769 (Nov. 4, 2003), in which the New York State Bar Association opined that an attorney may represent a personal injury contingency fee client in securing financing for the costs of their case. Based on the assumption that the original contingency fee agreement only contemplated representation in the underlying personal injury matter, and did not contemplate the proposed transaction with the financing company, the attorney's work in connection with the financing transaction "would be a new and different matter for which the attorney may appropriately charge a separate fee," provided that the fee is not excessive and does not exceed the maximum contingency fee under the appellate division rules (22 NYCRR 603.7(e)). Thus, the State Bar opined that while the

attorney could charge an additional fee, the fees must not exceed the maximum fees set by the Appellate Division. Moreover, the lawyer must guard against conflicts between the interests of the client and the attorney herself.

Here, some of the logic of NY State 769 is instructive. The client's lien can often be distinct from the subject matter of the tort which the plaintiffs' attorney is retained to prosecute. The client's obligation to satisfy any existing liens does not directly arise out of the client's claim against a tortfeasor. Rather, these obligations arise out of a pre-existing contract (private health insurance) between the client and the health plan, or by a statutory 'assignment of rights' that occurs when a recipient of government-paid (Medicaid or Medicare) healthcare receives medical services. Thus, the two representations are different.

Conclusion:

The fee for a specialty firm to handle the resolution of a complex Medicare, Medicaid or private healthcare lien on a settled lawsuit may be charged as a client disbursement provided: (a) that at the outset of the representation, the Retainer Agreement with the client provides that the attorney may do so, and that the client has given informed consent thereto; (b) the actual charges are passed on to the client at cost (without any overage or surcharge) and the actual charges are reasonable; (c) the transaction results is a net benefit to the client; (d) the transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules; and (e) the referring attorney remains responsible for the overall work product.

## DANIELLE COYSH, ESQ.

Danielle Coysh is a Director of the Suffolk County Bar Association and the Immediate Past President of the Suffolk County Criminal Bar Association. Ms. Coysh is also the principle and founder of The Law Office of Danielle Coysh, PLLC. Prior to opening her own law practice, Ms. Coysh was a staff attorney with The Legal Aid Society of Suffolk County, Criminal Division, where she was later hired as a Supervising Attorney for its District Court Bureau. Ms. Coysh began her legal career in Boston, Massachusetts after graduating from Suffolk University Law School. Ms. Coysh is admitted to practice in the State of New York, the Commonwealth of Massachusetts, the United States District Court for the Eastern District of New York and the United States District Court for the District of Massachusetts.

# Fee Agreement for your Criminal Client

# Clearly Define the Nature of Your Services

- Criminal Cases often give rise to collateral matters. Be sure to specify the nature of the legal services to be provided.

- Collateral Considerations:
  - Chemical Test Refusal Hearings (New York State VTL 1194)
  - Civil Forfeiture
  - Future violations of probation, parole, or conditional discharge
  - Family Court matters (i.e. neglect filings)
  - Civil law suits
  - Immigration Proceedings

# Clearly Define the Scope of Your Services

- Does your fee include the cost of pre-trial hearings?
- Does your fee include the cost of a trial?
- Does your fee include the cost of an appeal?
- If not, clearly delineate pre-trial hearing fees and/or trial fees.

# Sample Language to Define the Nature and Scope of Your Services

The Client hereby retains the Attorney to represent the Client in connection with his/her arrest and prosecution for XXXX under Docket No. XXXX in XXXX County, New York.

*Be specific, list each docket separately.*

The Retainer Agreement includes representation of the Client through plea disposition, but also delineates pre-trial hearing fees and trial fees if the matter proceeds in that regard.

The Client has been informed that this retainer shall not include any services to be rendered in connection with any future violation of probation, parole, or conditional discharge or any appellate proceeding that may arise upon the disposition of the matter listed herein.

# Costs, Expenses and Court Imposed Fees

- Be sure to clarify whether or not costs are covered by the fee charged.

- <u>Expenses can include</u>:
  - Court reporter's fee
  - Witness fees
  - Investigation Expenses
  - Consultant / Expert Witness

<u>Fees can include</u>:

Court imposed fines, surcharges

Civil Penalties

Probation Fees

DMV fees

# Attorney Fees

**Rules of Professional Conduct: Rule 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.
- Factors to consider: Time/labor required; whether case precludes attorney from accepting other work; the fee customarily charged, the amount involved and the results obtained; time limitations imposed by client or by the circumstance; the nature and length or the professional relationship with client; the experience, reputation and ability of the lawyer performing the services.

# No Contingent Fee in Criminal Cases

**Rules of Professional Conduct:  Rule 1.5 (d)**

A lawyer shall not enter into an arrangement for, charge or collect a contingent fee for representing a defendant in a criminal matter.

# A Reasonable Minimum Fee is Permitted

**Rules of Professional Conduct: Rule 1.5 (d)(4)**

A non-refundable fee, is a fee that the lawyer claims s/he is entitled to keep whether or not she completes the contemplated work. A non – refundable fee is not permitted. *In re Cooperman,* 83 N.Y.2d 465 (1994)

However, a minimum fee *is* permitted. A minimum fee is the least a lawyer will charge for completing a specified task (i.e. the nature and scope of the representation). A minimum fee is ethical as long as it is reasonable.

# Reasonable Minimum Fee Clause

- Must be specified as such in the written fee agreement. Rule 1.5(d) (4)

A reasonable minimum fee clause must:

1) Define in plain language and set forth the circumstances under which such fee may be incurred (i.e. the nature and scope of the representation); and
2) Define how such fee will be calculated.

Keeping record of your time and the legal services performed will help determine the reasonableness of a minimum fee.

- If no legal work was done, minimum fee must be refunded. *Timofeyev v. Palant & Shapiro, P.C.*, 2010 NY Slip Op 20484, 30 Misc. 3d 546, 916 N.Y.S.2d 482 (Civ. Ct.)

# Disclaimer of Guarantee

An outcome in a criminal case cannot be guaranteed.

“The Attorney has specifically refrained from making any promises or guarantees to the client about the outcome or success of the Client’s matter and nothing in this Agreement shall be construed as such a promise or guarantee.”

**Patrick McCormick, Esq. - Campolo, Middleton & McCormick, LLP**

Patrick McCormick heads the firm's **Litigation & Appeals** practice, which is known for taking on the most difficult cases. He litigates all types of complex commercial and real estate matters and counsels clients on issues including contract disputes, disputes over employment agreements and restrictive and non-compete covenants, corporate and partnership dissolutions, trade secrets, insurance claims, real estate title claims, mortgage foreclosure, and lease disputes. His successes include the representation of a victim of a $70 million fraud in a federal RICO action and of a prominent East End property developer in claims against partners related to ownership and interest in a large-scale development project.

Patrick also handles civil and criminal appeals. Additionally, Patrick maintains a busy landlord-tenant practice, representing both landlords and tenants in commercial and residential matters.

Patrick's diverse legal career includes serving four years as an Assistant District Attorney in the Bronx, where he prosecuted felony matters and appeals and conducted preliminary felony and homicide investigations at crime scenes. He is past Dean of the Academy of Law and the current Treasurer of the SCBA.

Patrick attended Fordham University, B.A. and received his J.D. from St. John's University School of Law

## I. Retainer Agreements

### A. Introduction; New York Ethics Take on Retainer Agreements

The purpose of the retainer agreement is to outline the relationship between the attorney and the client. A provision of the New York Code Rules and Regulations (NYCRR), provides an overview of what should be included in a retainer agreement. *See* 22 NYCRR 1215.1(b).

Pursuant to 22 NYCRR 1215.1(b), attorneys are required to provide all clients with a written letter of engagement explaining (1) the scope of legal services, (2) the fees to be charged, (3) billing practices to be followed, and (4) the right to arbitrate a dispute under Part 137 of the Rules of the Chief Administrator of the New York State Supreme Court, Appellate Division.

These rules permit arbitration where the amount of disputed fees range from $1,000 to $50,000. The required disclosure regarding the state-sponsored fee arbitration program does not preclude an agreed-upon arbitration provision that is applicable to all disputes that arise between the client and the lawyer; such an arbitration provision may specify the arbitration rules and location of the arbitration proceeding.

Furthermore, a retainer does not have to be provided by an attorney when fees for the representation are expected to be less than $3,000, or when the legal services are of the same general kind as previously provided to and paid for by the client. *See* 22 NYCRR 1215.2.

### B. General Provisions for Retainer Agreements

Generally, a retainer agreement for professional legal employment may be made between the attorney and client on such terms as they may agree to and is enforceable as long as it is fair and reasonable. *See Lawrence v. Miller*, 11 N.Y.3d 588, 595 (2008). To accomplish this the attorney should make the clients feel comfortable with the representation process by using a simple

retainer agreement whenever possible. *See Ethics in Estate Planning: Managing the Attorney-Client Relationship (NY), Practical Law Practice Note* w-017-2662; *see also Shaw v. Manufacturers Hanover Trust Co.*, 68 N.Y.2d 172, 176 (1986) ("The importance of an attorney's clear agreement with a client as to the essential terms of representation cannot be overstated.").

*i.* *Fee Agreements*:

Regarding attorney fee agreements, "[t]he client should be fully informed of all relevant facts and the basis of the fee charges, especially in contingent fee arrangements." *Shaw,* 68 N.Y.2d at 176. As a matter of public policy, courts "give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients." *Id.*

Additionally, "it is well settled that 'the client may terminate [the contingent fee agreement] at any time, leaving the lawyer no cause of action for breach of contract' only quantum meruit" *King v. Fox*, 7 N.Y.3d 181, 192 (2006) (citations omitted).

As to the unconscionability of a contingent fee agreement, it is typically difficult to determine if a contingent fee is unconscionable. However, "the Legislature has enacted a statute, and the Appellate Divisions of the Supreme Court have promulgated joint rules for establishing the reasonableness of contingent fee agreements." *Id.* (citing Judiciary Law §§ 474, 474-a; Code of Professional Responsibility DR 2-106 [b] [22 NYCRR 1200.11[b]]). Further, an important factor that the courts will consider when determining if a contingent fee is unconscionable is "whether the client was fully informed upon entering into the agreement with the attorney." *Id.* The New York Court of Appeals has found that "it is not necessarily the agreed-upon percentage

of the recovery due [to] the attorney or the duration of the recovery that makes the contingent fee agreement unconscionable . . . but rather the facts and circumstances surrounding the agreement, including the parties' intent and the value of the attorney's services in proportion to the fees charged in hindsight." *Id.* (citations omitted).

Finally, a client may ratify an attorney fee agreement at any time so long as the client has full knowledge of the relevant terms of the agreement and has acquiesced. For example, in *King v. Fox*, the client, a musician, retained the attorney to determine his rights to artist royalties. The attorney stated that he would represent the client on a 1/3 contingency basis because the client had no money for a retainer. The retainer stated, "our fee for representing you will be 1/3 of the recovery, whether by way of settlement, trial, judgment, or other method." The client signed the agreement and when the attorney reached a settlement for the client, the attorney advised the client that he was entitled to 1/3 of all past *and future royalties*. The client was "shocked and surprised" but did not pursue the issue since obtaining the settlement funds was more important to him. The client continued to pay the attorney past and future royalties for 17 years and then filed a complaint stating that the fee agreement was unconscionable. The attorney argued that the client ratified the fee agreement since he had accepted payment of royalties pursuant to the agreement for 17 years.

The Second Circuit held that a client may ratify an attorney-client fee agreement during a period of continuous representation even if the attorney commits misconduct during that period, so long as the "client has full knowledge of the relevant facts including the terms of the agreement and the choice to disavow it" and the "client's acquiescence is not procured as a result of the misconduct." *King*, 7 N.Y.3d at 191. However, a ratification induced by misconduct would be considered invalid. *Id.*

*ii.* *Legal Services*:

Some legal services to be included in the retainer are "the review, preparation, and/or negotiation of specific documents . . . and the investigation and analysis of issues." *See Keld v. Giddins Claman, LLP*, 170 A.D.3d 589, 589 (1st Dep't 2019)*; see also Commencing a New York Lawsuit: The Parties, Practical Law Practice Note* 2-547-1225.

*iii.* *Appeals*:

A retainer agreement should include a provision that states that the agreement representation persists through conclusion of the matter, including appeal or that the agreement is terminated upon entry of an adverse judgment. *See e.g.*, *Shaw*, 68 N.Y.2d at 177; *Ellis v. Mitchell*, 193 Misc. 956, 957-58 (N.Y. Sup. Ct. 1948).

*iv.* *New Matters*:

It is not necessary to create multiple retainers regarding different matters for one client if "the fee to be charged is expected to be less than $3,000" or "the attorney's services are of the same general kind as previously rendered to and paid for by the client." *Vandenburg & Feliu, LLP v. Interboro Packaging Corp.*, 70 A.D.3d 931, 931 (2d Dep't 2010). If the plaintiff is an existing client, the lawyer should confirm that the retainer agreement on file covers the *new matter* and that the amount currently on retainer is sufficient.

In *Vandenburg & Feliu, LLP v. Interboro Packaging Corp.*, defendants hired the plaintiff, the law firm, to represent them in multiple matters. The parties only executed one retainer agreement which referenced the initial matter that the law firm was retained for. The Appellate Division, Second Department held that contrary to the clients' arguments, an additional retainer agreement for each matter that the law firm rendered services for was not required because pursuant to 22 NYCRR 1215.2(a),(b) additional retainers are unnecessary when "the fee to be charged is expected to be less than $3,000" or "the attorney's services are of the same general kind as previously rendered to and paid for by the client." *Vandenburg,* 70 A.D.3d at 931.

*v.* *Avoid Ambiguous Language:*

If a retainer agreement contains ambiguous language, then the retainer agreement will be construed against an attorney unless the attorney establishes that the client understood the ambiguous terms of the agreement.

For example, in *Jacobson v. Sassower*, the Appellate court held the Civil Court properly construed the retainer agreement against the attorney because the agreement was ambiguous since it did not clearly state that the "non-refundable retainer of $2,500 was intended to be a minimum fee and that the entire sum would be forfeited notwithstanding *any* event that terminated the attorney-client relationship" and the attorney did not explain the nature and consequences of the nonrefundable retainer clause to the client. *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985)

Additionally, in *Bizar & Martin v. U.S. Ice Cream Corp.*, the Court held that the language in the retainer concerning "gross recovery" was ambiguous because it did not provide clear language that this terminology was intended to involve "all cash and non-cash benefits" and the client was never made aware the meaning of "gross recovery" before executing the agreement. *Bizar & Martin v. U.S. Ice Cream Corp.*, 228 A.D.2d 588 (2d Dep't 1996)

*vi.* *Additional Provisions*:

The obligations of the firm and the client; the retainer fee (if any); the grounds on which either party may dissolve the relationship; and details such as:

a. the attorney represents,
b. the nature of the attorney-client relationship,
c. the attorney's duty to maintain the client's confidential information,
d. consent to joint representation, if applicable
e. the services the attorney will provide

*See Commencing a New York Lawsuit: The Parties, Practical Law Practice Note* 2-547-1225; *See Ethics in Estate Planning: Managing the Attorney-Client Relationship (NY), Practical Law Practice Note* w-017-2662.

## C. Cautionary Tales

*i.* *Scope of Representation*:

"It is well settled that '[an] attorney may not be held liable for failing to act outside the scope of the retainer'" *Ressler v. Farrell Fritz, P.C.*, 2022 N.Y. Slip Op 31706(U) (N.Y. Sup. Ct. 2022).

"Where a written retainer agreement plainly indicates the specific purpose of the representation, an attorney will generally not be held liable in malpractice for failing to explore legal issues outside the scope of the agreement."*180 E. 88th St. Apartment Corp. v. Law Office of Robert Jay Gumenick, P.C.*, No. 600039/09, 2010 WL 5799420, at *6 (N.Y. Sup. Ct. Dec. 21, 2010) (citing *Ambase Corp. v. Davis Polk & Wardell*, 8 N.Y.3d 428 (2007)).

The retainer agreement should specifically outline the scope of the representation. For example, in *Ressler v. Farrell Fritz, P.C.*, the New York Department of Environmental Conservation (the "DEC") issued 4 tidal wetlands permits to Village People to develop the parcels. Plaintiffs claimed that the proposed development would harm their property; thus, they hired Farrell Fritz to represent them in an action against Village People LLC asserting a possible adverse possession claim among others. After being retained, Farrell Fritz, wrote four letters to the DEC objecting to the tidal wetlands permits. In 2019, Farrell Fritz learned that the Village People applied to the DEC to modify the permits and DEC issued a permit modification on May 3, 2019. Farrell Fritz commenced an Article 78 proceeding on July 12, 2019, but DEC moved to dismiss the petition for failing to seek judicial review within 30 days of the decision and argued that the information was made available on the DEC Permit Applications (DART) Search portal. Subsequently in 2020, the Village People filed an application to modify another permit and the DEC issued the second modification. Farrell Fritz allegedly never told their clients of the application and never challenged the modification.

Plaintiffs commenced a legal malpractice action against Farrell Fritz for failing to timely file Article 78 proceedings challenging the DEC's issuing of tidal wetland permits. According to Plaintiffs, Farrell Fritz should have known about DART and if they had monitored DART for information about the Village People's permit modification applications, they could have moved for judicial review within the 30-day period.

The Supreme Court of New York County denied plaintiffs' branch of the motion seeking partial summary judgment on the issue of Farrell Fritz's negligence because according to the executed retainer agreement, Farrell Fritz was to provide legal services "in connection with potential litigation involving title to real property located in Saltaire." The plaintiffs did not show whether the retainer was ever modified to expand the scope of Farrell Fritz's obligation to monitor the permits issued to the Village and authorize defendants to commence legal proceedings against the DEC.

*ii.* *Obligation to Refund Unearned Fees and Client's Right to Discharge*:

Retainer agreements are against public policy and ethics rules if they do not include a provision stating a lawyer's obligation, if discharged, to refund any part of a fee paid in advance, which has not been earned or a provision stating the client's right to discharge the attorney with or without cause. *Matter of Cooperman*, 83 N.Y.2d 465, 471 (1994).

*iii.* *Litigation Expenses*:

Retainer agreements must contain a provision spelling out the interim responsibility for advance of litigation expenses. *Shaw*, 68 N.Y.2d at 178.

*iv.* *Disclaimer of Guarantee*:

Attorneys should consider including a disclaimer in the retainer agreement stating that the client understands that the law firm will use its best professional judgment in handling their matter but DOES NOT guarantee any particular outcome or result. *Adam Leitman Bailey, P.C. v. Pollack*, 63 Misc.3d 1229(A) at *1 (N.Y. Sup Ct. 2019).

*v.* *Express Promises and Instructions*:

Lawyers should be cautious about putting an express promise in the agreement because if they fail to uphold that promise, the client may succeed on a breach of contract claim against the attorney. *See Pacesetter Communications Corp. v. Solin & Breindel, P.C.*, 150 A.D.2d 232, 235 (1st Dep't 1989) (finding that a "breach of contract claim against an attorney based on a retainer agreement may be sustained only where the attorney makes an express promise in the agreement to obtain a specific result and fails to do so").

Recently, in *Bison Capital Corp. v. Hunton & Williams LLP*, the Appellate Division First Department, allowed a breach of contract claim to proceed where the retainer did not preclude language regarding express instructions. *Bison Capital Corp. v. Hunton & Williams LLP*, 2021 NY Slip Op 00082 (1st Dep't 2021).

*vi.* *Disclaimer that an Attorney is Not Admitted in NY*:

If an attorney takes on representing clients in New York but is not admitted in New York, they should disclose that they are not admitted in New York in the retainer agreement. *People v. Codina*, 110 A.D.3d 401 (1st Dep't 2013) (noting that the fact that the attorney's retainer agreement failed to disclose that she was not admitted in New York when representing clients in New York for immigration matters contributed to a proper finding that the attorney was engaged in the unauthorized practice of law).

*vii.* *Tax Disclaimer*:

An attorney should make it explicitly clear in the retainer agreement that his or her legal services does not include giving any tax advice if that is the case.

For example, *180 E. 88th St. Apartment Corp. v. Law Office of Robert Jay Gumenick, P.C.*, plaintiffs (shareholders of a corporation) hired an attorney to represent them with respect to the sale of a building. The corporation executed a retainer agreement engaging the attorney to "negotiate and consummate the sale of the . . . premises." The retainer agreement stated that the attorney "[would] not render tax advice in [the] matter." Shortly before the closing, the co-op's accountant notified the attorney that the corporate income taxes of approximate $1.8 million would be due on sale and that if the sale had been structed as a sale of shares, instead of a building, plaintiff would have saved $1.3 million. Plaintiffs were forced to consummate the sale as contracted and brought an action against the attorney for malpractice seeking the $1.3 million in tax liability. The New York Supreme Court granted summary judgment in favor of the attorney because "the retainer agreement plainly states that [the attorney] would not provide plaintiffs *any* tax advice"; thus, he was not required to take any initiative to discuss the tax consequences of the building sale with plaintiffs' accountant. *180 E. 88th St. Apartment Corp. v. Law Office of Robert Jay Gumenick, P.C.*, No. 600039/09, 2010 WL 5799420, at *6 (N.Y. Sup. Ct. Dec. 21, 2010).

**D. Provisions that SHOULD NOT be Included in a Retainer Agreement**:

*i.* *Hourly Rate Compensation if the Attorney is Discharged Without Cause*:

A provision specifying hourly rate compensation if the attorney is discharged without cause should not be included in the retainer agreement because an attorney discharged without cause is entitled to compensation measured by the fair and reasonable value of the services rendered. *See Saw Hwan Kim v. M & Y Gourmet Grocers*, 239 A.D.2d 170, 170 (1st Dep't 1997) (holding that the retainer agreement providing for a specified hourly rate of compensation in the event of the lawyer's discharge without cause was unenforceable).

*ii.* *Nonrefundable fee clauses*:

A nonrefundable retainer agreement is one in which the client pays a fee in advance of any services being performed and it is declared by the attorney nonrefundable whether the client discontinues the representation or whether the attorney does any work. *Agusta & Ross v. Trancamp Contracting Corp*., 193 Misc. 2d 781, 786 (N.Y. City Civ. Ct. 2002).

A lawyer shall not include in the retainer agreement a nonrefundable fee clause because attorney fees are considered refundable as a matter of public policy until they are earned. *See* 7 N.Y. Jur. 2d Attorneys at Law § 236 (citing *Matter of Cooperman*, 83 N.Y.2d 465 (1994); *Rimberg & Associates, P.C. v. Jamaica Chamber of Commerce, Inc.*, 40 A.D.3d 1066 (2d Dep't 2007)).

"While a nonrefundable retainer agreement is unenforceable and may subject the attorney to professional discipline, quantum meruit payment for services actually rendered will still be available to the attorney." *Matter of Cooperman*, 83 N.Y.2d at 475.

Nonrefundable retainer agreements are different than a "minimum-fee clause." Minimum-fee clauses are permitted in retainer agreements as long as it defines in plain language the circumstances under which the fee may be incurred and how it will be calculated. *See* 7 N.Y. Jur. 2d Attorneys at Law § 236. Minimum fees must be "reasonable." *Id.*

*iii.* *Arbitration Clauses*:

As a matter of public policy, a retainer agreement should not contain an arbitration clause that fails to inform the client of his or her rights under Part 137 of the Rules of the Chief Administrator.

For example, in *Larrison v. Scarola Reavis & Parent LLP*, the court held that the arbitration clause in the law firm's retainer agreement violated public policy by failing to inform the client that she had a right to

> "(a) elect non-binding arbitration of any claims by SRP against her for legal fees; (b) assert in such an arbitration any of her own claims or counterclaims against SRP, relating to fees charged by SRP; (c) seek de novo judicial review of any such arbitration award; and (d) do all of the same without the threat of being responsible for any attorney's fees incurred by SRP in attempting to collect its alleged legal fees."

*Larrison v. Scarola Reavis & Parent LLP*, 812 N.Y.S.2d 243 (N.Y. Sup. Ct. 2005).

An attorney cannot require a client to arbitrate any disputes that might arise between the two, if the client rejects the arbitration clause included in the retainer "because the authority to require arbitration arises from agreement of the parties to submit disputes relating to the contract to the arbitral forum." *Arjent Services, LLC v Gentile*, 2008 N.Y. Misc. LEXIS 9864, *2 (N.Y. Sup. Ct. 2008). Therefore, if the party against whom arbitration is sought has not committed itself to arbitration, it cannot be compelled to arbitrate. *Id*.

**E. <u>Corporation President's Authority to Sign Retainer Agreement</u>**:

A corporation's president has the ability to bind the corporation to a retainer agreement because the retention of counsel by the corporation's president is an act within "the powers which, of necessity, inhere in the position of chief executive." *Goldston v. Bandwidth Tech. Corp*., 52 A.D.3d 360 (1st Dep't 2008).

The corporation's president had authority to employ general counsel even though it was not written within the general retainer because part of the corporation president's job responsibilities included making sales and purchases and signing contracts. *Twyeffort v. Unexcelled Mfg. Co*., 263 N.Y. 6 (1933).

The corporation's president had presumptive authority to institute action on the corporation's behalf and engage the law firm without formal authorization from the Board of Directors. *Park River Owners Corp. Bangser Klein Rocca & Blum, LLP*, 269 A.D. 313, 313 (1st Dep't 2000).

# SCBA Lawyers Helping Lawyers Committee

**The SCBA Lawyers Helping Lawyers Committee** provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

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