THE CLIENT RETENTION AGREEMENT -- THE ENGAGEMENT LETTER

by
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INTRODUCTION

What I propose to do in this paper is to review various aspects of engagement or client retention agreements. As background, I have examined some of the forms[1] which are suggested for these agreements and a number of agreements currently in use by lawyers and law firms, principally in the Summit County Ohio area.[2] The purpose of this effort is to examine some key provisions of these agreements and, perhaps, suggest possible improvements.

I make no claim that the sampling of agreements which I have reviewed is either scientific or sufficient for a complete study. I do believe, however, that the variety which I have seen represents enough of a sample in sufficient variety to support the observations herein.

The subject of retention letters is not specifically covered in the Code of Professional Responsibility or the Model Rules.[3] Neither requires such agreements. Indeed, the responses which I received indicate that many lawyers did not make a practice of having written retention agreements prior to the time that written contingency agreements became required in Ohio in certain cases,[4] and still do not use them where not statutorily mandated. I assume, of course, that even lawyers who do not use written agreements must discuss the matter of fees and objectives with the client at an early time and, presumably, reach some verbal agreement with them. Nevertheless, I, at least, believe that retention agreements generally represent good practice for a variety of reasons.

1. Retention agreements allow an explicit description and a continuing

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[1] 3 AM. JUR. LEGAL FORMS 2d *Attorneys at Law* § 30:13-30:21 (1988).

[2] Thirty plus agreements from lawyers or law firms principally located in Summit County Ohio, but also from Cuyahoga, Trumbull, Franklin and Mahoning Counties, Ohio.

[3] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981); MODEL RULES OF PROFESSIONAL CONDUCT (1983).

[4] ORC § 4705.15

> If an attorney and a client contract for the provision of legal services in connection with a claim that is or may become the basis of a tort action and if the contract includes a contingent fee agreement, that agreement shall be reduced to writing and signed by the attorney and the client. The attorney shall provide a copy of the signed writing to the client.

OHIO REV. CODE ANN. § 4705.15(B) (Baldwin 1988).

record of the purpose for and the arrangements under which representation takes place.

A substantial proportion of the number of complaints and disciplinary difficulties seen by disciplinary bodies arise from simple (or complex) misunderstandings between lawyers and their clients. Such misunderstandings, of course, stem from a variety of causes, many of which involve failure of ongoing communications. However, one must wonder if a clear agreement between the lawyer and client on such things as fees, tasks to be performed, cooperation expected from the client, description of costs etc. would not form a good, solid foundation for effective and appropriate communication during the relationship.

2. The regular and routine discussing, reading and signing such agreements present a comfortable and natural opportunity for discussing sensitive matters such as fees and cost.

3. The retention letter allows a specific statement of what a lawyer is expected to do. In particular, the parties can spell out the types of activities the lawyer will undertake to meet the purposes and objectives of the representation.

4. The client has a document which can be the beginning of his file which, hopefully, will be nearly as complete and detailed as the lawyer's own.

Some, perhaps most, lawyers use very simple agreements, barely more than a long paragraph. While not being critical, one must at least point out that such agreements permit very few details concerning the objectives of the representation, the expectations, the method of fee computation nor for describing various items of costs or what may be expected under various contingencies. Some lawyers, on the other hand, use long (5-6 page) agreements which permit very detailed explanations of what it is the lawyer is to do and what the client may expect. Some of these are written in an informal manner and are easily readable, while others look very much like a standard contract and seem to be used for particularly sophisticated clients.

Some plaintiffs lawyers attach the Ohio ATLA (American Trial Lawyers Assoc.) recommended statement of clients rights[5] to their agreement. This is a very impressive document. One must conclude that, if a client were thoroughly familiar with it and if the lawyer(s) carried out all its mandates, any opportunities for misunderstanding would be significantly reduced.

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[5] *See* Ohio Academy of Trial Lawyers, *Statement of Your Rights*, *infra* Appendix.

While it is not the purpose of this paper to critique any individual agreement or document, it should be noted that retention agreements are, in many ways, no different than other agreements. It is highly advisable to use consistent terminology throughout. For example, in contingency fee agreements, the difference between fees and costs is important since the client remains responsible for costs but not for fees (unless there is a recovery). Some retention agreements tend to blur that distinction while seeking to preserve it. One way to blur the distinction is to refer to costs, expenses, fees, compensations etc. in interchangeable ways without ever defining them individually. An illustration of the possible confusion of terms is found in one agreement where, under the heading "Attorney's Fee," it provides "it is mutually agreed that if nothing is recovered on said claim, the Attorney shall receive no compensation." It would seem better to use "fee" in both the heading and the body of the text.

Another source of confusion seems to be the treatment of expert witness costs. Sometimes, in the same agreement, the subject of expert witnesses is treated separately *and* in the general listing of cost items.

NEGOTIATING THE AGREEMENT

There can be no doubt that lawyers and clients may have conflicting interests, and nowhere is this more possible than in contingency fee arrangements. The lawyer's investment of time and money in a case is measured, at least subconsciously, against the value of that case. Frequently one hears that a case is simply "not worth it" to describe lawyer decisions about investments whether of time, research or money. What a lawyer considers a case to be worth in terms of value or investment and what a client considers the same case to be worth may be very different. Nevertheless, clients "negotiate" retention agreements which provide for large financial commitments from the client as well as large time and resource commitments from the lawyer. While it may be subliminally recognized that these agreements may be between persons with conflicting interests, there is little indication that these agreements are routinely (or ever) reviewed by other lawyers in a "second opinion" mode.

We are warned in the Code of Professional Responsibility[6] that a lawyer may not limit his liability for malpractice. A similar provision exists in the Model Rules[7]

[6] DR 6-102

> A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102 (1981).

[7] MR 1.8(h)

> A lawyer shall not make an agreement prospectively limiting the laywers liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client

to the effect that a lawyer may not so limit his liability unless there is a separate negotiation on that limitation in which the client is separately represented. Other than this, I know of no provision of the disciplinary rules which require a client to be separately represented in important transactions with his own lawyer.

While my review has been of documents, and I would hesitate to comment on negotiating these agreements, it is my impression that the contingency fee arrangement normally presented to clients is relatively straight forward and only rarely modified.

We do know, however, that contingency contracts are negotiable. In fact, fee arrangements *should*[8] be negotiable since cases, clients and client's needs are so varied.

In my negotiation class, one of the exercises which I ask the students to perform is a negotiation for legal representation by a client with a lead-pipe cinch case. Obviously these students are not experienced in any way but it is remarkable the different results achieved in these negotiations and, I suspect, could (and perhaps should) be duplicated in real life with knowledgeable third-party advice to clients in negotiating contingency fee agreements.

WHO IS THE LAWYER?

Whom Does The Client Retain?

Some retention agreements identify an individual lawyer, some refer to a firm, some refer to an individual lawyer as the lead lawyer. It seems that this rather clerical point needs to be thought through. The question of individual lawyer responsibility for the case, the question of continuation of firm responsibility after a lawyer dies or leaves the firm and other considerations should be covered. While I don't suggest that any particular form is improper, I do suggest more careful consideration. For example, I saw *no* agreement in which the problem of continuation of representation was treated. The question of what occurs should the lawyer die, become incapacitated, or leave the firm, is simply not addressed. While these are not common eventualities, it would seem that both for the client's peace of mind and even more for internal law firm management, such subjects should be treated. In fact, it would seem that if the lawyer should die or become incapacitated, the client should have an opportunity to decide whether to continue the case with someone else in the firm or[9] to remove the matter to a different firm.

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without first advising that person in writing that independent representation is appropriate in connection therewith.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1983).

[8] Model Code Of Professional Responsibility EC 2-20 (1981); *see* this article at pg. 333.

[9] "(f) [T]he notice makes clear that the client has the right to decide who will complete or continue the matters." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980).

In some retention agreements, one finds a provision which permits the lawyer to retain additional counsel. (I assume without further client consultation.) While this unquestionably simplifies representation in many ways, it appears to be improper in that the client clearly has the right to determine which lawyers are to be used. While one may argue that the original retained lawyer remains responsible and that additional lawyers may not raise the cost of representation, it seems better practice to provide that the client should be informed and have the opportunity to object to the retention of particular lawyers. The Ohio Academy of Trial Lawyers "Statement of Your Rights" does provide for such client consent and seems preferable.[10]

In one agreement, the letterhead apparently listed lawyers who were not partners, so there was a disclaimer of any relationship between the retained lawyer and the other lawyers whose names were carried on the letterhead.

EXPECTATIONS -- TASKS

Agreement concerning the expectations of the parties is critical to the long range success of the relationship. After a reference to the matter by way of date, time and event, most retention agreements simply provide that the lawyer will "represent" the party and "settle" or try the "matter."

Only a few of the agreements speak to the kind of tasks that the lawyer may undertake in fulfilling his overall responsibility of representation. It seems to me that a paragraph which outlines some of those tasks might be helpful (particularly bearing in mind that the agreement is a device and an opportunity to discuss the representation). For example, a paragraph might be inserted to provide that the lawyer will conduct investigations, do legal research, interview witnesses, negotiate, travel, etc.

Generally, the obligations of the lawyer are not spelled out with any great specificity. It is provided, for example, that the lawyer will "handle," "negotiate," "investigate," perhaps "settle" the client's matter. I saw no commitment to "diligence," or even "best efforts." Perhaps the Code of Professional Responsibility[11] and the Model Rules,[12] (the penumbra over these agreements) provide the

[10] *See* Ohio Academy of Trial Lawyers, *Statement of Your Rights*, infra Appendix.

[11] DR 6-101

> (A) lawyer shall not:
>
> Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1981).

[12] Rule 1.1 Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for

obligation to competence and diligence. Absent these codes, it is hard to imagine what the standard might be against which to judge the lawyer's performance under the vague and non-specific provisions frequently found in retention agreements.

CONFIDENTIALITY

Confidentiality is rarely mentioned in these agreements. Perhaps a reference to it would highlight the lawyer's obligations to confidentiality as well as the client's obligation to reveal information, and be candid and cooperative with the lawyer.

COOPERATION

Although one would think it goes without saying, perhaps it would be well to spell out the fact that the client has an affirmative obligation of cooperation with the lawyer. In stressing this affirmative obligation of the client, it might be appropriate to detail what that cooperation might entail. Some agreements did mention the subject of cooperation, but were not explicit in suggesting that court appearances, prompt attendance at discovery, supplying documentation, supplying medical records and information etc. might be required. In addition, the agreements failed to mention that the client, his whereabouts and all his documents and records should be available to the lawyer at all times.

RIGHT TO REPRESENT

The "Exclusive Right to prosecute" the claim is sometimes provided, although, given the client right to terminate which I will review later, it is not clear what this provision adds.

RIGHT TO SETTLE

Some agreements provide that the client will not settle the case without the lawyer's consent. Some provide that the matter may not be settled without the consent of both the client and the lawyer.[13] Both of these provisions would appear to be questionable. It seems clear that the client has the absolute right to decide if a matter is to be settled and, if so, for what amount.

EC 7-8[14] is instructive on this point of the client's right to decide. DR 7-101

the representation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

[13] Giles v. Russell, 222 Kan. 629, 567 P.2d 845 (1977).

[14] EC 7-8

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed or relevant considerations.... A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this

also provides some guidance in this area.[15] The Model Rules are particularly clear on this point; Rule 1.2 provides "a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."[16]

It seems that a more logical and acceptable provision would be that the client has the right to determine and decide the acceptability of any settlement and that this right may be exercised as the client sees fit, perhaps providing for consultation with the lawyer and continued responsibility for costs and, possibly, a quantum meruit fee.

COSTS

In providing for costs in the retention agreements, some agreements preface the matter by reference to the Code of Professional Responsibility (DR 5-103(B)) which requires lawyers to recover costs.[17] This seems a good idea since it helps to explain to the client that recovery of costs is grounded in the Code itself and that lawyers are not permitted to incur them without the obligation to repay. MR 1.8e[18]

> decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

[15] DR 7-101

> A lawyer shall not intentionally:
>
> (1)Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1981).

[16] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

[17] DR 5-103(B)

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client; except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1981).

[18] MR 1.8(e)

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
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> (1) a lawyer may advance court costs and expenses of litigation; the repayment of which may

also provides for costs and expenses which *may* be advanced.

It is clear in almost all agreements that costs and expenses, sometimes generally referred to as "out-of-pocket" expenses are the responsibility of the client and must be paid by the client. However, retention agreements vary considerably as to the specificity concerning what items of cost are to be charged to the client.

Naturally, no listing of costs can be all inclusive and such list is usually preceded by words which indicate that the list is not intended to be inclusive. For example, such lists frequently begin with "such as." Other limiting expressions to define costs include "extra-administrative costs such as copying and long distance telephones," or "duplicating and other unusual" costs. These latter limitations would seem to raise questions and, perhaps, fuel disputes about fitting costs into categories demarcated "unusual" or "extra." One agreement called for reimbursement for "document" copying. Are there other kinds of copying?

Again, recognizing the small sample used, there seem to be some specific items frequently listed, such as: filing fees, court costs, subpoena costs, depositions, witness fees and expert fees. Some more general provisions might include "investigation," "out-of-pocket" investigation, "all expenses," and, the somewhat restrictive, "costs incurred and necessary." Some individual items which would seem to be included in more general terms but which are sometimes separately mentioned include photos, hospital record costs, arbitrator costs, courier service, word processing, witness statements, doctor reports, appraisal and actuarial fees, and fees for other attorneys.

One item of some interest found in a few of these lists is "computer research" listed specifically under costs to be reimbursed by the clients. Since computer research is listed and other research is not, I assume that such "normal" research is covered by the fee. (One agreement did list "research costs" as an item to be recovered without modification with "electronic" or "computer.") I would suggest that computer research is simply a substitute for research of a more normal or historical variety which is *not* a cost to be recovered. If the lawyer chooses to do computer research so as to reduce the time that he or she would otherwise have spent with more normal research, does it make sense that that charge should be a cost to the client? While I do not suggest that charging for computer research is in any way a disciplinary violation, and, if it is to be charged I agree it should be listed, I do suggest that it does not necessarily fit with the other kinds of costs and perhaps should be reexamined.

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be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (1983).

Overtime costs are sometimes charged if they become *necessary*. Overtime costs are, apparently, different than straight time costs for secretaries, paralegals, and the like which are not charged. Obviously, if overtime is to be charged, it should be listed although it seems difficult to identify the work of one particular client that caused the overtime need which, presumably, is the justification for such charge.

One agreement provided for a *surcharge* on all charges and expenses, although the attorney submitting that item wrote that he had never done so.

With all of these various options, perhaps it makes most sense to find the most inclusive categorization and then, perhaps, use a few very specific examples clearly identified as illustrative.

OBLIGATION TO ADVANCE?

Lawyers may advance costs.[19] Must they do so? Does the obligation of competence[20] and diligence[21] demand it?

One agreement provides that the client and the lawyer will *agree* on amounts to be spent. This is an interesting concept since the client ultimately is responsible for the costs and probably should be given the opportunity to decide what the level of cost expenditure should be. On the other hand, the lawyer may feel it necessary to expend certain sums in order to adequately try the case and the client may disagree and not be willing to commit those funds or, of course, vice versa.

In short, the client is obligated to pay these costs. The lawyer, at least impliedly, is obligated to advance them. The question: How much? I saw *no* agreement in which the lawyer committed to any specific or even general amount or

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[19] DR 5-103(B), *supra* note 17, MR 1.8(e), *supra* note 18.

[20] DR 6-101, *supra* note 11.

[21] DR 7-101(A)

> (A) A lawyer shall not intentionally:
>
> (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
>
> (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
>
> (3) Prejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B).

MODEL CODE OF PROFESSIONAL RESPONSIBLITY DR 7-101(A) (1981).

even to the advancement of "necessary" or "usual" costs (although client's obligation to pay costs may be described by these adjectives). Therefore, while the lawyer *may* advance costs which are spelled out very carefully (and limited) in DR 5-103[22], it is not clear what rights a client may have should the lawyer not advance sufficient monies to adequately handle the matter, or should the lawyer and the client disagree as to an appropriate level of costs to be expended. Not only is there no commitment to any specific sum, there is also no limitation.

It is no secret that some cases (especially large, complex, original product liability or anti-trust claims) require enormous investments[23] of money and it is probably no secret that lawyers, on occasion, run out of funds and ability to advance them. Moreover, there could be a legitimate disagreement between the lawyer and the client arising from the different perceptions of risk and benefit. This different perception could very well lead to a difference in attitude toward investment or advance. I saw no agreement that provided for handling this problem.

FEES--IN GENERAL

DR 2-106[24] sets forth, in general, the considerations which should be taken

[22] DR 5-103(B), *supra* note 16.

[23] Jervey, *Grumbling all the Way to the Bank*, AM. LAW., July-Aug. 1989, at 40. Law firm invests $25-$30 million in anti-trust suit.

[24] DR 2-106.

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
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> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
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> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A),(B) (1981).

into account in the establishment of fees. Within the overall limitation that fees not be excessive, the factors which test that determination include time spent, results achieved, novelty or difficulty of the problem and fees customarily charged.[25]

The retention agreements I saw provide for *either* an hourly charge or a contingent fee. Only one of the agreements seemed to provide for the client to exercise an option between an hourly charge and a contingent fee. Another agreement, in an attempt to combine a contingency with an hourly fee provided for a "suit fee" in addition to the contingency *plus* a deposit against costs. This opportunity for the client to select seems to be called for by the Code of Professional Responsibility which provides:

> Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.[26]

Thus, while the client should be given the opportunity to select the payment plan or method which best fits his or her needs, few, if any, retention agreements provide for that choice although, of course, such choice may be spelled out by the lawyer in the

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[25] *See also and similarly*, Model Rule 1.5(a).

> (A) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
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> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983).

[26] MODEL CODE OF PROFESSIONAL RESPONSIBLITY EC 2-20 (1981).

original oral discussion of fees and costs.

DR 2-106[27] provides, as mentioned, for a variety of considerations to determine whether a fee is "excessive" or, as Model Rule 1.5 provides, "reasonable."[28] One could make the argument that a fee established by a single method, whether all hourly or all contingency would not meet the DR 2-106 or Model Rule 1.5 standard in that it would not consider all, or even most, of the various factors set forth. Yet, the single factor fee determinant is the predominant mode. There are, of course, some exceptions. For example, some contingency fee agreements provide for different percentages depending upon the stage of the proceedings: lowest if there is a negotiated agreement; more if there is trial, and still more if there is an appeal. It could be argued that this arrangement provides for a combination of effort, and perhaps difficulty, as factors which are then expressed as different percentage amounts.

On the hourly side, there were a couple retention agreements which provided for hourly charges (different charges for different lawyers or different background and experience) and then provided that such hourly charges were the minimum or threshold charges which would be augmented depending upon result. These provisions would seem to provide for at least a couple of the factors set forth in DR 2-106 and Model Rule 1.5,[29] and probably are, should the hourly charge be a reasonable one, more in conformance with the spirit of DR 2-106. If, on the other hand, all hourly charges are the same whether or not there is an adjustment for result, one might question whether such a method meets the spirit of the rules.

One might hypothesize that a contingency agreement should be one in which there is a real contingency of *no* recovery. Indeed, one very forceful indictment of the contingency system[30] was that, in may cases, there is no *real* possibility of *no* recovery or stated conversely, that recovery is certain and the only question is the amount of recovery. In these circumstances, one could argue that proper incentives for the lawyer and proper consideration for the true contingency situation which exists would require that the percentage change with the amount recovered. For example, perhaps no lawyer is necessary to recover, say, the first $50,000. The lawyer really does his work at some other level, for example, between one and two million dollars.

While we have seen proposals or regulations in various states to scale contingencies so that the contingency goes *down* as the recovery goes up, I suggest

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[27] DR 2-106, *supra* note 24.

[28] MR 1.5(a), *supra* note 25.

[29] DR 2-106, *supra* note 24; MR 1.5(a), *supra* note 25.

[30] Grady, *Some Ethical Questions About Percentage Fees*, 2 LITIGATION, Summer 1976, at 20, 23-24; Brickman, *Contingent Fees Without Contingencies: Hamlet Without The Prince of Denmark*? 37 U.C.L.A. LAW REVIEW 29 (1989).

that, taking into account the results, one could construct a contingency system in which the contingency goes up as the amount of recovery goes up. In any event, I saw *no* contingency agreement tied to dollar results.

PROPERTY

A couple of contracts provided for the recovery of property as well as money. The property recovered is valued in some way at market value and the contingency is applied to that value. Another variation is a provision in one retention agreement that the recovery or adjustment of the property value in a personal injury case is done at no charge.

CLOSING CALCULATION - WHAT COMES FIRST?

One of the key items of accounting for final distribution to the client has to do with the order in which various items are deducted from the gross recovery. The following example illustrates the differences that may occur in the final amount which a client may receive. Assume a $100,000.00 recovery, a 33 1/3 percent contingent fee, and costs of $10,000.00. If costs come out first, and the 33 1/3% contingency is applied to the remainder the lawyer receives $30,000 and the client $60,000 as a final, bottom-line number. If on the other hand, the 33 1/3% comes off the top, the result is different. That scenario results in $57,667 for the client.[31] In short, if the contingent fee comes first, the lawyer receives $3,333 more than if costs come out first, and, conversely, client receives $3,333 less. Using recovery of $250,000, same contingency and $50,000 costs, the difference to the client is

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[31] *Costs First*

$ 100,000-(Recovery)
-10,000 -(Costs)
$ 90,000 -(Net Recovery)

$ 90,000
x .333 (Contingency)
30,000-(Lawyer Fee)

$ 90,000
-30,000
$ 60,000 *to Client*

Plus For Client - $3,333

Contingency First

$ 100,000 -(Recovery)
x .333 -(Contingency)
$ 33,333 -(Lawyer Fee)

$ 100,000
-33,333
$ 66,667
-10,000 Costs)
$ 56,667 *to Client*

approximately $17,000 depending on calculation method.[32]

Not all contingency fee or other agreements spell out which system will be utilized. It would appear that this could be a source of some concern or dispute since the net result is quite different where costs are significant, as they might be in serious, technical, and protracted products liability cases. In fact, some agreements by reason of general confusion about such terms as fees, compensation, costs, expenses and the like are simply confusing. On the other hand, some agreements provide language which could be read to take the contingency first but which may not be fully understood unless one is focused on the issue. For example, "our fee will be *x* percent of any *total amount* recovered for all parties *before* deduction of costs and expenses," or " *x* percent of whatever *gross* amount is recovered."

Some possible questions remain however, such as: What about pre-judgment interest? What about Rule 11 sanction awards for fees? Are these simply a part of "total amount recovered"?

One might argue that, since costs are so clearly different from fees and, in theory at least, are always the responsibility of the client even if there is no recovery, costs should come out of the total first and the contingency be applied to the balance. In any event, the matter should be made clear whichever method is to be used. One method of enhancing clarity is to attach a sample settlement sheet to the agreement although even this may not really focus the client's attention on this very important matter.

Please note that DR2-101 (B)(22) (not applicable in all states) provides that if one advertises a contingengy fee, one must spell out how and when costs are deducted.[33]

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[32]

Costs First	*Contingency First*
$ 250,000-(Recovery)	$ 250,000-(Recovery)
-50,000 -(Costs)	x .333-(Contingency)
$ 200,000 -(Net Recovery)	$ 83,333-(Lawyer Fee)
$ 200,000	$ 250,000
x .333 (Contingency)	-83,333
66,666 -(Lawyer Fee)	$ 166,667
	-50,000 (Costs)
$ 200,000	$ 116,667 *to Client*
-66,666	
$ 133,334 *to Client*	

Plus For Client - $16,667

[33] DR 2-101

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers

FEE CALCULATION: STRUCTURE?

The structured settlement raises interesting problems regarding settlements or final amounts recovered against which the contingency percentage should be applied. Today, many (if not most) large settlements *are* structured and, indeed, the Ohio Tort Reform Act provides for periodic payments of certain recoveries.[34]

Some retention agreements provide for present valuation of structured settlements. The most common arrangement, where mentioned at all, is that the contingency fee will be the agreed upon percentage applied to the current value or calculated current cost of the structured settlement. This still leaves the question of how this sum is to be paid, particularly if it is more than the first payment due to the client. (I understand this is frequently a separate subject in settlement negotiations.) Some agreements provide an option for the attorney with respect to taking the fee resulting from the structure, i.e., early payment or payment over the length of the structure.

Many agreements do not provide for structured settlements. It would appear sensible to make provision for this increasingly common event. If provision is made for applying the appropriate percentage to the current value or current cost of the structure, it might be well also to reference the method by which this valuation will be reached (an agreed upon actuary or computation system), and further provide (as in one agreement) that the cost of obtaining this valuation is a cost which will be included in costs chargeable to the client.

> of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:
>
> (22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(22) (1981). Similar provision in Ohio State Bar proposed revisions to DR 2-101.

[34] ORC § 2323.56

> After the hearing described in division (D)(1) of this section and prior to the entry of judgment in accordance with Civil Rule 58, the court shall determine, in its discretion, whether all or any part of the total of the portions of the future damages described in division (B)(1)(b)(i),(iv), and (v) of this section shall be received by the plaintiff in question in a series of periodic payments rather than in a lump sum. If the court determines that a series of periodic payments shall be received by that plaintiff, it may order such payments only as to the amount of that total that exceeds both two hundred thousand dollars and twenty-five per cent of the total of the damages described in divisions (B)(1)(a) and (b) of this section.

OHIO REV. CODE ANN § 2323.56(D)(3) (Baldwin Supp. 1988). For a discussion on how lawyers' contingent fees are paid in structual settlement situations, see Dubin, *Pay Me Now, or Pay Me For Years*, NAT. L. JOURNAL April 9, 1990 p.13.

POST TRIAL COMPENSATION

An important consideration in retention agreements is providing for what will happen should there be post-trial action or activity. In short, what happens in case of an appeal?

Since "appeal" is not defined in the agreements (except in one agreement that provides for an extra percentage after an appeal is "filed"), it is not entirely clear how one might separate this concept into the various possible activities under a general heading of "appeal" and devise solutions to all situations that might arise. For example, there might be a more or less routine filing of an appeal with the intention that some type of settlement will be worked out. In this instance, although there may technically be an "appeal," there is not much, if any, additional work on the lawyer's part and yet, according to some agreements, there is an additional percentage or a new agreement for additional compensation.

There are instances where there is an appeal by a defendant and, one can argue, there is no recovery at all until the appeal is resolved. Conversely, there may be instances in which the plaintiff wishes to appeal or the lawyer for the plaintiff wishes to appeal. It would seem to me that each of these scenarios would produce a different result as to an equitable arrangement of fees beyond the agreed upon point of a jury verdict.

Some agreements which provide for varying fee percentages depending upon the time that the final settlement is made provide for the highest percentage to be applied should an appeal be necessary before final payment. (Some agreements do not provide for appeal and simply set out one percentage to be applied to the final payment.) Interestingly, however, several agreements provide separately for the appeal process. These agreements provide for a "new and separate" agreement for any post-trial activity, presumably for more fees. While these agreements simply state that there *will* be a new agreement on appeal, the terms of that agreement are not spelled out and it is not clear if the client is, in some way, obligated to reach such an agreement and, if so, on what terms. It is also not clear whether such an agreement will be for a fixed fee or for an additional percentage fee. One such agreement specifically provided that the agreement for post-trial activity would provide for "additional" payment to the lawyer.

Does it matter who appeals? Does it matter that the appeal activity is necessary because the other party filed the appeal? One might ask what would occur in such a case were there to be an agreement for an additional, fixed sum on appeal and the appeal was lost. Would this mean that the client would then not have to pay the percentage contingency since no recovery was had but that the client would be obligated to pay the fixed fee for the appeal?

While there may be no specific ethical or professional responsibility considerations here, it would seem appropriate to spell out the matter of an appeal somewhat more clearly. The use of different percentages for various stages of effort might be an appropriate solution.

Frankly, the provision for an additional (undefined) contract for the appeal process is one which seems fraught with peril as it is impossible to understand exactly what the client's obligations are or, indeed, the lawyers'. To pose a ridiculous example, what if the lawyer, faced with an appeal to save a judgment for $25,000.00, insists on $20,000.00 to prosecute the appeal? Surely the client's original agreement to enter into a separate and new contract would not compel the client to agree to any such amount. If no agreement is reached, what then?

If provision is made for another agreement, it seems to require much more detail, maybe even a sample agreement for appeal. Most agreements simply ignore this matter. Presumably this means the lawyer is obligated to do whatever is necessary to secure or protect recovery.

DIVISION OF FEES

DR 2-107 provides for the rules under which fees may be divided between or among lawyers. Essentially, such division can only be made with client consent[35] in proportion to the services performed and the responsibilities assumed by each.[36] Not surprisingly, there are now several states which have addressed this particular question and made modifications in the strictures of this rule.[37] In essence, what seems to be occurring is a recognition of the value of the referral itself or some further recognition that, so long as the total fee is not larger than it would otherwise have

[35] DR 2-107(A)(1)

> (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

MODEL CODE OF PROFESSIONAL RESPONSIBLITY DR 2-107(A)(1)(1981).

[36] DR 2-107(A)(2)

> (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
>
> (2) The division is made in proportion to the services performed and responsibility assumed by each.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A)(2)(1981).

[37] California, Texas, Connecticut, Massachusetts, Pennsylvania, and Michigan allow lawyers to accept a referral fee without assuming responsibility or providing services for the client. Marcotte, *Mich. Now Allows Referral Fees*, A.B.A. J., May, 1989, at 32. *See Proposed Amendments to the Code of Professional Responsibility*, OHIO OFFICIAL REPORTS (Advance Sheet), May 7, 1990 at A-1.

been, and so long as the client accepts the arrangement, there is no problem with division of fees.

Nonetheless, so long as DR 2-107 is included in a state's rules, it will continue to challenge that division of fees which, in many instances, is routine regardless of service or responsibility.

This particular problem is rarely addressed in retention agreements I saw, except for one agreement which provided for client consent to a co-counsel arrangement and a "division" (unspecified) of fees. Interestingly, the statement of rights adopted by Ohio ATLA provides specifically for this eventuality in paragraph number 4:

> Before signing a fee contract with you, a lawyer must advise you whether he or she intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers he or she should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least one lawyer from each law firm must sign the fee contract.[38]

Further, section 5 of the same document provides:

> If your lawyer intends to refer a case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract which includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible for the acts of the other lawyers involved in the case.[39]

Some agreements provide that the principle lawyer retained by the client shall have the right to associate or employ additional counsel at the expense of the attorney and designating the additional counsel to appear on behalf of the client. Still others provide for the right of the principle attorney to retain other lawyers.

It would seem preferable in these agreements to inform the client concerning additional lawyers to be retained, giving the client the opportunity to consent to such arrangements and providing that the total fee will not exceed the fee set forth in the agreement.

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[38] Ohio Academy of Trial Lawyers, *Statement of Your Rights, infra* Appendix; *Waterman v. Kitrick*, No. 89AP-675 (Ohio Ct. App. Feb. 8, 1990) (WESTLAW, 1990 wl 10982).

[39] *Id.*

CLOSING

Some agreements provide for closing statements and, of course, closing statements are now mandated in Ohio in personal injury litigation.[40] Some retention agreements include proposed or sample closing forms which would appear to be helpful and which serve to highlight the question of whether costs come out of the gross amount or out of the net amount after contingency.

WITHDRAWAL

The mater of lawyer withdrawal is treated in some, but by no means all, agreements. There are, of course, many justifications for mandatory or permissive withdrawal included in DR 2-110. Any withdrawal must be subject to the requirement that the interests of the client be protected and in some instances tribunal approval received.[41]

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[40] ORC § 4705.15(C)

> If an attorney represents a client in connection with a claim as described in division (B) of this section, if their contract for the provision of legal services includes a contingency fee agreement, and if the attorney becomes entitled to compensation under that agreement, the attorney shall prepare a signed closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under that agreement. The closing statement shall specify the manner in which the compensation of the attorney was determined under that agreement, any costs and expenses deducted by the attorney from the judgment or settlement involved, any proposed division of the attorney's fees, costs, and expenses with referring or associated counsel, and any other information that the attorney considers appropriate.

OHIO REV. CODE ANN § 4705.15(C) (Baldwin 1988). One agreement states that it conforms to ORC § 4705.15(C).

[41] DR 2-110 Withdrawal from Employment.

> (A) In general.
>
> (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
>
> (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

MODEL CODE OF PROFESSIONAL RESPONSIBLITY DR 2-110(A)(1),(2) (1981).

DR 2-110

> (B) Mandatory Withdrawal.
>
> A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other

Several retention agreements provide specifically that the lawyer may withdraw if the lawyer concludes that further prosecution of the case or matter is not feasible or, I suppose, promises to be non-productive. (In whose opinion - the lawyer

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matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or as otherwise having steps taken from him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(C) Permissive withdrawal

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

MODEL CODE OF PROFESSIONAL RESPONSIBLITY DR 2-110(B)(C) (1981).

or the client?)

In particular, questions about withdrawal in the retainer agreements seem to revolve around what will happen if the client rejects the settlement advice of counsel. Provisions for such rejection include:

1. If the client rejects a settlement offer, the client is obligated to pay all costs to date whereas previously he was not expected to do so until the case was concluded.

2. After a client has rejected a settlement that is recommended by counsel the client becomes obligated to the lawyer for the fees and costs otherwise outlined in the agreement.

If my reading of these provisions is correct, this would mean that the client upon rejection of a settlement offer, becomes instantly liable for the percentage fee provided for in the agreement applied to the rejected settlement number. In addition, some agreements provide for what occurs when the client simply discharges the lawyer. Here again, there are attempts to provide that the client becomes responsible for the percentage fee provided in the agreement itself. These provisions are very questionable.

It seems clear that the relationship between the lawyer and the client is one which the client may terminate at any time.[42] It would appear that the law of the United States, in general, is that the attorney, therefore, has no cause of action for breach of contract for the discharge. Nonetheless, the lawyer *may* have a claim for the value of services rendered[43] In so far as the client's obligation to pay a contingency fee at the time that an offer is made and rejected, the answer seems to

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[42] *See* Fracasse v. Brent, 6 Cal. 3d 784, 790, 494 P.2d 9, 13, 100 Cal. Rptr. 385, 388-89 (1972). *See also* Ohio ATLA standard form:

> 2. You have a right to have your contract in writing. You have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If you withdraw from the contract within the first 3 days you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. But if your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

Ohio Academy of Trial Lawyers, *Statement of Your Rights*, par.. 2, *infra* Appendix.

See also Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed under Contingent Fee Contract is Discharged without Cause*, 92 A.L.R. 3rd 690 (1979).

[43] Fox & Assoc. Co., L.P.A. v. Purdon, 44 Ohio St. 3d 69, 541 N.E.2d 448 (1989).

be that the client is not so obligated.[44] In other words, the client has the right to reject settlement offers.[45] If the client rejects such offer, it would not appear that there is an immediate obligation to the lawyer since the client had the right to reject. The lawyer, on the other hand, may have the right, if he wishes to exercise it, of withdrawing from the case (DR 2-110) and suing on a quantum meruit theory.

The general rule in the United States appears to be that, after a lawyers withdrawal from a case, whether for cause or not, the lawyer has a right to be paid on a quantum meruit basis. This means that the lawyer is entitled to recover the fair value of the services rendered.[46] For example, in Ohio, it is now clear as a result of the *Fox* case decided in July 1989 that the Supreme Court now embraces the same right to a quantum meruit recovery although the manner of calculation is not clear. (Calculation was for the lower court after remand).

To summarize:

1. It seems appropriate to try to cover the question of fees in circumstances in which the relationship between the lawyer and the client is disrupted or ended. However, it would appear that attempts to do this by requiring immediate payment of the contingent fee are overreaching and improper.

2. A client may discharge a lawyer. It is part of the lawyer-client relationship. There seems to be *no* cause of action for breach of contract.

3. Nevertheless, lawyers are entitled to be paid for what they have done at the time the relationship is severed. The payment is on a quantum merit basis and is designed to pay the lawyer the value of his or her services. There are a number of factors which are considered by the courts in establishing this amount, i.e., "The nature of the litigation, its difficulty, the skill required, the skill employed, the attention given, the success or failure, the attorney's efforts, the attorney's skill and learning, including his age and experience in the particular type of work demanded."[47]

4. It seems clear that the obligation of the client to pay is not an obligation which arises immediately upon the discharge of the

[44] *See* Michael D. Tulley Co., L.P.A. v. Dollney, 42 Ohio App. 3d 138, 140, 537 N.E.2d 242, 245 (1987); Bernard v. Moretti, 34 Ohio App. 3d 317, 518 N.E.2d 599 (1987); *Fox*, 44 Ohio St. 3d 69, 541 N.E.2d 448. *But see Hagans, Brown & Gibbs v. First National Bank of Anchorage*, 783 P.2D 1164 (Alaska 1989)(Client who refuses to accept settlement in order to renegotiate attorney's fees may have breached duty of good faith and fiar dealing).

[45] EC 7-8, *supra* note 13; MR 1.2, *supra* note 16.

[46] *See* Fracasse v. Brent, 6 Cal. 3d at 792, 494 P.2d at 14-15; Fox & Assoc. Co., L.P.A. v. Purdon, 44 Ohio St. 3d 69, 541 N.E.2d 448; Annotation, *supra* note 42.

[47] City of Los Angeles v. Los Angeles - INYO Farms, 134 Cal. App. 268, 276, 25 P.2d 224, 227-28 (1933).

lawyer when the contract itself provided for a contingency fee based upon recovery. The lawyer may not automatically recover a contingency based upon the last offer when no recovery has been realized.

5. In any event, an attempt to cover this question should probably be limited to an attempt to set forth some standards for the application of the quantum meruit doctrine, i.e., setting forth an hourly fee rate.

CONFLICT

The area of conflict is one which has become more and more important although the more typical personal injury retention and fee agreement is not likely to result in conflict. However, entering into an agreement to represent a company on a broad or even a narrow basis *can* give rise to serious conflict questions in the future. Retention agreements represent a good opportunity at the earliest time to address the possible conflict question.

First, the agreement should spell out in detail exactly what the matter is that is being handled. This serves to limit the overall representation and to highlight the limits of the representation.

Second, the retention agreement might call attention to the fact that the Firm represents other parties and spell out exactly what the Firms' intentions are with respect to potential conflict. For example, the letter might indicate that the Firm agrees not to represent anyone else in the same matter or in matters which might call upon the use of any confidential information secured in the course of the subject representation. Otherwise, the firm is free to take on new clients.

Third, it might be important for the firm to set forth some of the other clients it represents or other areas in which it practices so as to signal possible conflicts which might call into question the continued representation of the client.

Fourth, the representation agreement might provide for how the client wants conflicts of this type resolved. The agreement might provide an appropriate source in the client organization to help resolve the conflict or, perhaps, waive any conflict rights.

DISPUTES

Two agreements provided for action in case of dispute about the agreement or the fees that are to be charged, providing that matters of dispute would be referred to the appropriate dispute resolution systems of the Bar Association for ultimate resolution.

Although a lawyer may not limit his own liability for malpractice,[48] I see no reason why he may not provide some options for resolving disputes which may arise. In fact, it seems that such provision would enhance client satisfaction and perhaps resolve matters before a client perceived the need to file a complaint.[49] One agreement provided that the agreement should be considered a "work product" and be construed in accordance with Ohio law.

DISCLAIMER

Although one would suppose it might go without saying, there were a couple agreements which specifically stated that the attorneys made no promises or guarantees of any outcome.

CONCLUSION

The retention agreement is a key document in the lawyer-client relationship and affords a unique opportunity for Lawyer and client to discuss the elements, expectations and costs of the relationship which is to follow. It is a special opportunity to consider and delineate the expectations on both sides, the cooperation and responsiveness needed from the client and the communication, dedication and concern expected from the lawyer. It sets the tone for the ease or difficulty of that relationship as time goes on.

Some agreements take advantage of this opportunity. Most do not. Most are surprisingly sparse and many would not be readily understood if one is not alert to the kinds of questions that the sometimes elliptical language is designed to address or, perhaps, to obfuscate. Worse, many of the agreements seem to be overreaching in the area of lawyer withdrawal after some settlement offer is made, most do not seem to reflect the prevailing law on the subject of the client right to terminate, and many leave the accounting to be made at the termination of the relationship difficult to monitor.

I believe that lawyers should take a new look at this contract in the same critical light with which they would view a proposal for a large contractual agreement presented to a client in an arms length setting.

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[48] DR 6-102, *supra* note 7.

[49] *See also* Reich, *Ease of Arbitration*, A.B.A. J., Aug. 1989, at 100; Anderson v. Elliott, 555 A.2d 1042 (Me. 1989) (upholding mandatory fee arbitration).

APPENDIX

STATEMENT OF YOUR RIGHTS

The Ohio Academy of Trial Lawyers wants you to be aware of your rights regarding the proposed contingency fee agreement. The Ohio Academy of Trial Lawyers wants you to make an intelligent and informed decision concerning your contract. This statement is not a part of the actual contract between you and your lawyer, but as a potential client, you should understand your rights:

1. You, the client, have the right to talk to your lawyer about the fee to be paid. There is no legal requirement that a lawyer charge a client an hourly rate, a set fee, or a percentage of money received. You have the right to discuss the hourly rate, set fee or percentage as in any other contract. If you do not reach an agreement with one lawyer you may talk with other lawyers.

2. You have a right to have your contract in writing. You have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If you withdraw from the contract within the first 3 days you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. But if your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training and experience. If you ask, the lawyer should tell you specifically about his or her actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a fee contract with you, a lawyer must advise you whether he or she intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the cases to other lawyers he or she should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least one

lawyer from each law firm must sign the fee contract.

5. If your lawyer intends to refer a case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract which includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible for the acts of the other lawyers involved in the case.

6. You the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to advance money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money which you might have to pay to your lawyer for costs, and liability you might have for attorney's fees to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement you need not pay any money to anyone, including your lawyer. You also have the right to have every law firm working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time, you, the client, believe that your lawyer has charged an excessive fee, you, the client, have the right to report the matter to the Ohio Supreme Court, the Ohio State Bar Association, or the Ohio Academy of Trial Lawyers. You may reach a representative of the Ohio Academy of Trial Lawyers by telephoning (614) 488-3151. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement.

CLIENT SIGNATURE	ATTORNEY SIGNATURE
Date	Date