

American Bar Association Young Lawyers Division The Young Lawyer

Get It Write: Retainer Agreement Do's and Don'ts

By Dolores Dorsainvil

The retainer agreement is by far one of the most important documents that you will use in your legal practice. It also is a deceptively simple concept. Well-written retainer agreements can help minimize risk of misunderstandings in attorney-client relationships and provide protections for attorneys and clients. Retainer agreements that conform to ethical rules also can mean the difference between harmonious attorney-client relationships and possible state bar complaints.

Remembering the following list of do's and don'ts can help your practice and help ensure that you are in compliance with the ABA Model Rules of Professional Conduct (Model Rules).

Do's

- Do communicate the terms of compensation for your legal services in your retainer agreements pursuant to Model Rule 1.5(b). It is your obligation as an attorney to ensure that clients understand how you are to be paid regardless of how your "basis or rate of fee" is determined. For example, your fee could be contingent upon the outcome of the representation, a flat fee, an advanced fee that is earned based on an hourly rate, or a combination of these fees.
- Do clearly communicate "the scope of the representation," in your retainer agreements. You should describe as clearly and plainly as possible your legal services to clients. This portion of your agreements also may mention legal services that are not provided. For example, if you are an immigration lawyer and you are retained only to assist with filing application forms and representing a client at a hearing before the immigration court, you should state clearly in your retainer agreement with the client that your representation does not include any appellate work arising from the case. This can eliminate any confusion if such a client is denied requested relief.

Don'ts

- There are some agreements that you should *not* have in your retainer agreements because they may represent ethical violations:
- Do not attempt in your retainer agreements to negotiate literary or media rights to a portrayal based on information related to representation. (Model Rule 1.8(d)). We see more and more high-profile cases that are made into movies and television programs. As an attorney, you have an ultimate duty of loyalty to your clients, and any attempt to "sell their story" is not only a conflict of interest but also a breach of confidentiality.
- Do not attempt to prospectively limit your malpractice liability in your retainer agreements. Malpractice liability limitations in your agreements could violate Model Rule 1.8(h). This Rule is designed to ensure that attorneys do not take advantage of clients who do not seek independent legal counsel to evaluate the desirability of an agreement to settle a malpractice claim *before* a dispute arises. For example, you could be subject to discipline for having a provision in a retainer agreement that generally prohibits a client from filing a civil action against you.
- Do not make an agreement with clients that can improperly curtail or terminate your services to the clients' detriment. For example, under Comment [5] of Model Rule 1.5, it is improper to enter into an agreement to provide legal services up to a stated dollar amount if you know that more extensive services will be required to fulfill a client's objectives. Although under Model Rule 1.2, you may reasonably limit the scope of representation with your client's consent, you do not want to be in a situation where you request to withdraw from representation during a crucial point of litigation and leave your client to fend for himself.
- Do not make an agreement with clients where you divide the fee with another attorney who is not in the same firm without the client's consent. Such an agreement would violate Model Rule 1.5(e). For example, if you are retained to do transactional work and later discover that litigation is necessary, you must consult with your client and obtain client consent prior to the entry of co-counsel. Failure to perform this simple task would violate client trust that you would not disclose confidential information.

Although not every jurisdiction requires you to have a written retainer agreement in every instance, the best practice is to set forth the parties' expectations in writing early on and in accordance with the guidelines offered here. This can help to ensure that both you and your clients understand your respective responsibilities, help avoid any bar complaints or grievance actions, and provide a strong foundation for a mutually beneficial relationship.

NEXT STEPS

Professional Responsibility Reminders (YLD 101 Practice Series)

www.abanet.org/yld/101practiceseries/ethicsprofessionalresponsibility.shtml

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