

WHETHER TO SETTLE OR GO TO TRIAL? – THE CLIENT’S DECISION

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An attorney-client retainer agreement that prohibits settlement without the consent of the attorney is void against public policy. (Hall v. Orloff (1920) 49 Cal.App. 745.) Provisions of that nature would interfere with the client’s authority to control the client’s substantive rights. After all, it is the client’s and not the attorney’s case.

This concept was recently applied by the case of Lemmer v. Charney (2011) 195 Cal.App.4th 99 decided in May of this year. In Lemmer, the attorney and client, before any suit was filed, entered into an attorney-client fee agreement that provided that the client would pay an hourly rate for legal services rendered in an employment dispute. (Id. at 102.) Thereafter, a lawsuit was filed. After several months went by following the filing of the lawsuit, client asked the attorney to make a new “contingency fee” agreement. A new contingency fee was entered into after client “... promised to take the case to trial or settlement to ensure plaintiff [attorney] was paid for his legal representation.” (Ibid.)

In reality, the client did not actually intend to take the case to trial if a settlement could not be reached because he believed that the defendant in the litigation would drag the matter out and exhaust his resources. (Ibid.) The client “...did not disclose his true intent to plaintiff [attorney] who relied on defendant’s [client’s] promise to proceed with the case to either settlement or trial.” (Ibid.) “If plaintiff [attorney] had known defendant [client] would not go to trial..., plaintiff [attorney] would



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not have agreed to the contingency fee arrangement.” (Ibid.)

Less than a month before trial, the client disclosed to the attorney that he was afraid to go to trial and instructed the attorney to settle the case as soon as possible. Although the attorney objected, based on the client’s direction which the attorney followed, a “walk away” settlement was achieved. Client never paid lawyer a reasonable fee for services rendered in the lawsuit. (Ibid.)

Attorney sued his client and the client’s wife for conspiracy to defraud attorney by falsely promising to go to trial in order to induce plaintiff to enter into the contingency fee agreement. Attorney also sued client’s wife for interference with prospective economic advantage, claiming she induced the client to end the lawsuit, thereby interfering with his prospective economic advantage from his relationship with client. The trial court ultimately sustained a demurrer without leave to amend. (Id. at 103.) The trial court’s decision was affirmed by the Court of Appeal. (Id. at 106.)

The attorney acknowledged that a clause in a retainer agreement prohibiting settlement without the consent of the attorney is void as against public policy. (Id. at 103-104) However, the attorney contended that this case was different because he did not try to control the settlement, but rather followed his client’s instructions to enter into the “walk away” agreement. (Ibid.)

The appellate court disagreed finding that “[t]he practical effect of permitting plaintiff [attorney] to sue his client for fraudulently inducing plaintiff to enter a contingency fee agreement with a false promise to take the case to trial or settlement is no different than permitting plaintiff [attorney] to enforce an agreement not to abandon the lawsuit without the lawyer’s consent.” (Id. at 104.) “If after carrying out the clients’ instructions to abandon the case, a lawyer may sue the client for fraudulently inducing the contingency fee arrangement, the client will be constrained to pursue a lawsuit he wants to abandon just as if the client had agreed at the outset not to settle without the attorney’s consent.” (Ibid.) Accordingly, the appellate court stated that the law does not recognize a tort cause of action for damages based on a client’s decision to abandon a lawsuit and also found the conspiracy and interference claims against the wife failed for the same reasons. (Id. at 105.)

The Lemmer case serves as a reminder that despite the client causing the attorney to change his fee arrangement based on the client’s promise that he would take the case to trial or settle, the decision of whether to settle or take the case to trial clearly belongs to the client, not the lawyer.

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