

==New York State==

ACADEMY OF TRIAL LAWYERS

*HOW TO SUCCESSFULLY LITIGATE A
PERSONAL INJURY CASE SERIES –
PART 1: GETTING THE CASE,
INVESTIGATION AND READY TO FILE*

Live Streamed – January 6, 2021

Materials By:
Andrew Smiley, Esq.



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Insert firm name and address or letterhead here

RETAINER AGREEMENT

The undersigned, _____ (“Client”), residing _____ hereby retains _____ (“Firm”), who assume responsibility for the representation, to prosecute or adjust a claim for damages arising from personal injuries sustained by, _____ and loss of services of _____ on the ____ day of _____, through the negligence of _____ and/or other persons, and the undersigned hereby gives the aforesaid Firm the exclusive right to take all legal steps to enforce this claim through trial. The Firm shall have the right but not the obligation to represent the Client on appeal.

In consideration of the services rendered and to be rendered by the Firm, the Client hereby agrees to pay the Firm legal fees which shall be thirty-three and one-third (33⅓) percent of the sum recovered, whether recovered by suit, settlement or otherwise.

The Client has been given the following options with respect to how such percentage shall be computed, and has made the selection of how the percentage shall be computed as reflected by the checking and *initialing* of the appropriate box below:

Option Number One: Client Remains Liable for Payment of All Costs and Expenses, Regardless of the Outcome of This Matter. Percentage is 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;

OR

Option Number Two: The Firm Agrees to Pay and Remain Liable for All Costs and Expenses, Regardless of the Outcome of This Matter. Percentage is computed on the gross sum recovered before deducting expenses and disbursements. The Firm agrees to pay all costs and expenses of the action and the Client will not be responsible for any expenses and disbursements in the event the claim or action is dismissed or otherwise rejected by any court of competent jurisdiction.

The following reflects the financial consequences of each of the above two Options, using as an example a case in which there is a recovery of \$100,000 – *and this number is used only as an example that is easy to understand* – and the expenses and disbursements in the case are \$10,000:

Option Number One Example (The Client Remains Liable for Payment of All Costs and Expenses, Regardless of the Outcome of This Matter):

Total recovery	\$100,000.00
Less expenses and disbursements:	-\$10,000.00
<u>Less 33⅓ % of remaining \$90,000.00:</u>	<u>-\$30,000.00</u>
Client's recovery:	\$60,000.00

Option Number Two Example (The Firm Agrees to Pay and Remain Liable for All Costs and Expenses, Regardless of the Outcome of This Matter):

Total recovery:	\$100,000.00
Less 33⅓ % of \$100,000:	-\$33,333.33
<u>Less expenses and disbursements:</u>	<u>-\$10,000.00</u>
Client's recovery:	\$56,666.67

The Client understands and agrees that, if the Client has selected Option Number One, the Firm reserves the right, in its sole discretion, to elect to make payment in the first instance of some or all costs, expenses and disbursements, so as not to hinder the enforcement of the claim or prosecution of the action. If the Firm has advanced these payments, the Client understands that he or she remains fully responsible to reimburse the Firm for such costs, expenses and disbursements. If the Firm elects not to make payment in the first instance of some or all costs, expenses and disbursements, the Client will advance and prepay to the Firm all such costs, expenses and disbursements as they are incurred or anticipated for the enforcement of the claim and the prosecution of the action. The Firm may, in its discretion, require the Client to deposit with the Firm a specified amount of money, as the Firm deems appropriate, in order for such costs, expenses and disbursements to be paid. Should the Client not comply with his or her financial obligations under Option Number One after election to do so or the Client fails to advance the necessary case costs, disbursements and/or expenses, or fails to reimburse the Firm for such costs, disbursements and/or expenses which the Firm has advanced, the Firm may, at the Firm's sole option, pay or absorb such costs, disbursements and/or expenses on the Client's account. In such instance, the Firm shall notify the Client that the Firm is advancing the case costs, disbursements and/or expenses and that the fee shall be calculated on the gross recovery in accordance with the terms of Option Number Two above.

Examples of expenses and disbursements or other services properly chargeable to the enforcement of the claim or prosecution of the action include, but are not limited to, charges for: retaining investigators; storage fees relating to the preservation of evidence; obtaining medical records; retaining expert witnesses and consultants, including locating and preparing expert witnesses and consultants, obtaining expert reports, and testimony, and related transportation, parking, mileage, meals and hotel costs; court filing fees; service of process fees; subpoena fees; costs associated with taking depositions, including stenographer's fees, videographer's fees and video conferencing costs; court reporter fees; notary fees; mediator, arbitrator and/or special master fees; specialized medical and legal research fees; computerized research fees; expenses for focus groups and jury consultants; photography; preparation of exhibits; photocopying and other reproduction costs; fees and expenses of non-expert witnesses; postage and delivery fees; travel costs, including parking, mileage, transportation, meals and hotel costs; long distance telephone and fax charges; and all other necessary and incidental expenses and disbursements incurred on the Client's behalf. This list is not exclusive.

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.

The Client understands and agrees that, without regard to whether the Client has selected Option Number One or Option Number Two, under no circumstances will the Firm be responsible for the payment of any judgment that may be entered against the Client arising out of either the incident or the prosecution of the action, including any bill of costs.

If at any time, the Firm determines that the Client's claim lacks legal or medical merit, or if circumstances arise which make it impossible for the attorneys to represent the Client's interests, then the attorneys may withdraw from representing the Client.

In the event that the claim results in a judgment unfavorable to the undersigned, the Firm shall not be obligated to undertake an appeal on the undersigned's behalf. The retainer agreement is effective only up until settlement or verdict after trial. This retainer agreement anticipates no appeal. If any appeal is required then a new retainer agreement covering the appeal will be negotiated. In the event extraordinary services are required the Firm may apply to the court for greater compensation pursuant to the Judiciary Law and the Special Rules of the Appellate Division regulating the conduct of attorneys.

Either party may terminate this Agreement. If terminated, the Firm has a lien for all work and disbursements to the time of termination. This case is accepted by the Firm subject to investigation.

This constitutes the sole agreement between the Firm and the Client, and any changes or modification shall be by subsequent written agreement signed by the parties hereto or their successors.

Dated:

_____ (L.S.)

STATE OF NEW YORK COUNTY OF NEW YORK ss.:

On the ___ day of _____, 2021, before me, the undersigned, a Notary Public in and for said State, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be individually whose name is subscribed to the within instrument and acknowledge to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or person upon behalf of which the individual acted, executed the instrument.

Notary Public



AUTHORIZATION FOR RELEASE OF HEALTH INFORMATION PURSUANT TO HIPAA

[This form has been approved by the New York State Department of Health]

Patient Name	Date of Birth	Social Security Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form: In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), I understand that:

- This authorization may include disclosure of information relating to **ALCOHOL** and **DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV* RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
- If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
- I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
- I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
- Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
- THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**

7. Name and address of health provider or entity to release this information:

8. Name and address of person(s) or category of person to whom this information will be sent:
SMILEY & SMILEY, LLP, 122 East 42nd Street, Suite 3900, New York, New York 10168

9(a). Specific information to be released:

Medical Record from (insert date) _____ to (insert date) _____

Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers.

Other: _____ Include: *(Indicate by Initialing)*

_____ **Alcohol/Drug Treatment**

_____ **Mental Health Information**

_____ **HIV-Related Information**

Authorization to Discuss Health Information

(b) By initialing here _____ I authorize _____
Initials Name of individual health care provider
to discuss my health information with my attorney, or a governmental agency, listed here:

(Attorney/Firm Name or Governmental Agency Name)

10. Reason for release of information: <input type="checkbox"/> At request of individual <input checked="" type="checkbox"/> Other: Litigation	11. Date or event on which this authorization will expire: One year from date signed
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12. If not the patient, name of person signing form:	13. Authority to sign on behalf of patient:
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All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

Signature of patient or representative authorized by law. Date: _____

* **Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.**

Instructions for the Use
of the HIPAA-compliant Authorization Form to
Release Health Information Needed for Litigation

This form is the product of a collaborative process between the New York State Office of Court Administration, representatives of the medical provider community in New York, and the bench and bar, designed to produce a standard official form that complies with the privacy requirements of the federal Health Insurance Portability and Accountability Act (“HIPAA”) and its implementing regulations, to be used to authorize the release of health information needed for litigation in New York State courts. It can, however, be used more broadly than this and be used before litigation has been commenced, or whenever counsel would find it useful.

The goal was to produce a standard HIPAA-compliant official form to obviate the current disputes which often take place as to whether health information requests made in the course of litigation meet the requirements of the HIPAA Privacy Rule. It should be noted, though, that the form is optional. This form may be filled out on line and downloaded to be signed by hand, or downloaded and filled out entirely on paper.

When filing out Item 11, which requests the date or event when the authorization will expire, the person filling out the form may designate an event such as “at the conclusion of my court case” or provide a specific date amount of time, such as “3 years from this date”.

If a patient seeks to authorize the release of his or her entire medical record, but only from a certain date, the first two boxes in section 9(a) should both be checked, and the relevant date inserted on the first line containing the first box.

January 30, 2020

(client)
123 East 12th Street
New York, New York 10003

Re: Your accident on 1/21/20

Dear Ms. _____:

This shall confirm the fact that you have retained us to represent you with reference to the personal injuries you sustained as a result of a slip and fall accident that occurred on January 21, 2020.

We shall keep you fully informed of our progress by sending you copies of all our correspondence and other communications in connection with your matter. You may rest assured that we shall do everything possible to bring this case to a successful conclusion for you.

If at any time you have any questions or comments, please feel free to telephone me.

With best wishes, I remain,

Very truly yours,

ANDREW J. SMILEY

AJS:mis

January 31, 2020

Via email:

(Property Owner)

Attention:

Re: (CLIENT)
D/A: (d/a)

Dear _____:

This office represents _____, who sustained serious personal injuries as a result of a slip and fall accident in front of _____ Street, New York City on January 21, 2020 at approximately 8:20 A.M.

Please turn this letter over to your insurance company and have your insurance representative contact the undersigned immediately. **You are hereby instructed to preserve any and all surveillance video that may exist related to this occurrence.**

Thank you for your courtesy and cooperation in this matter.

Very truly yours,

ANDREW J. SMILEY

AJS:mis

cc: (client)

August 20, 2020

Via Fax No.: 402-916-3031

National Liability & Fire Insurance

Attention: David Cooper, Liability Adjuster

Re: Claimant: _____
Insured: _____
Claim No.: _____
D/A: May 15, 2020

Dear Mr. Cooper:

Our office represents _____ for serious injuries he sustained as a result of a motor vehicle accident on May 15, 2020, when your insured's motor vehicle rear-ended our client's motor vehicle.

Kindly advise us of the policy limits herein. Please direct all future correspondence concerning this matter to the undersigned.

Thank you for your courtesy and cooperation herein.

Very truly yours,

ANDREW J. SMILEY

AJS:mis
cc: (client)

December 19, 2007

NYC Department of Transportation
Attn: Records Access Officer
55 Water Street, 6th Fl.
New York, N.Y. 10041

Re: Our Client: (client)
D/A: November 16, 2007
Accident Location: On the sidewalk located in front of
premises 800 2nd Avenue, New York,
New York 10017

Dear Ms. _____:

This office represents _____ who sustained severe personal injuries when she was caused to trip and fall on an uneven pavement on the sidewalk at 2nd Avenue between 42nd & 43rd Streets, in front of the premises known as 800 2nd Avenue, New York, New York 10017.

Please furnish our office with any and all Notices of Claim, repair records, work orders and/or permit requests concerning the roadway at the above mentioned location for the time period from November 16, 2005 – November 16, 2007.

If you have any questions, please do not hesitate to contact me.

Thank you for your courtesy and cooperation herein.

Very truly yours,

ANDREW J. SMILEY

cc: (CLIENT)

October 7, 2010

MTA Foil Department
2 Broadway, 21st Floor
New York, N.Y. 10004

Att: FOIL Unit

Re: Injured Party: (client)
Place of Occurrence: Route QMR Bus #3122 at Third Avenue
and East 49th Street, New York, NY
Date of Accident: August 20, 2010

Dear _____:

Please be advised that this office represents _____ with reference to the injuries she sustained when she was hit by the above captioned MTA bus on the above captioned date and place.

Pursuant to the Freedom of Information Law, would you please send us copies of any and all accident reports with reference to this matter.

Thank you for your prompt attention to this matter.

Very truly yours,

ANDREW J. SMILEY

AJS/lv

cc: (client)

February 4, 2020

_____, M.D.
170 Williams Street, 8th Floor
New York, NY 10038
Attn: Medical Records Dept.

Re: (CLIENT)
D/O/S: 01/28/2020 to the present.

Dear Dr. _____:

Please be advised that we are the attorneys who represent _____ for injuries she sustained as a result of an accident on January 21, 2020.

In order to properly prepare our client's case, it is necessary that we obtain a copy of the complete medical record, including patient history, notes, test results, radiology studies, consults, operative reports, etc., relative to our client from **January 28, 2020 to the present.**

A duly executed authorization for the release of this information is enclosed.

Thank you for your courtesy and cooperation herein.

Very truly yours,

ANDREW J. SMILEY

AJS:dmp
Enclosure

cc: (CLIENT)

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