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By Jonah Orlofsky

The Attorney-Client **Relationship**

Can Your Retainer Agreement Include A Fee Provision?

A client has just refused to pay the final few thousand dollars in fees. You did great work and really want that fee. It's clear, however, that you'll have to sue to get it, and that raises the question of whether it's worth the time and expense of litigation for such a small claim. Wouldn't it be nice to have a provision in your retainer agreement that you can collect the attorneys' fees and expenses incurred in a suit to collect unpaid fees? To some lawyers, a provision like that may be unseemly, but to others, it's just good business.

BUT IS IT LAWFUL? A RECENT SECOND DISTRICT appellate decision holds that such a provision can be lawful. *Timothy Whelan Law Assoc. v. Kruppe*, Ill.App.3d 359 (2nd Dist. 2011) ("*Whelan Law*"). But comparing *Whelan Law* with a prior First District decision, *Lustig v. Horn*, Ill.App.3d 319 (1st Dist. 2011), reveals that it's a tricky proposition insuring that a provision will be enforceable.

In *Lustig*, the attorney's retainer contract provided that "in the event of default in payment client will pay reasonable attorney's fees and costs incurred in collecting said amount which may be due, whether by suit or arbitration." The client argued that this provision was void because it violated the Rules of Professional Responsibility and was against public policy. According to the client, this provision set up an automatic conflict between the attorney and client and could be used as a weapon to dissuade the client from contesting unreasonable fees.

The *Lustig* court agreed with the client, first noting that a fiduciary relationship exists as a matter of law between an attorney and a client, and that a presumption of "undue influence" arises when an attorney enters into a transaction with his client during the existence of the fiduciary relationship. This presumption can be rebutted, but the attorney must do so by clear and convincing evidence. This portion of the *Lustig* decision is consistent with well-settled law. *E.g.*, *Bruzas v. Richardson*, 408 Ill. App. 3d 98, 103, 1214 (2011) ("a presumption of undue influence arises when an attorney enters into an agreement or transaction with a client after the attorney-client relationship exists and the attorney benefits from the agreement or transaction").

Presumption of Undue Influence

The presumption of undue influence can be rebutted if the evidence shows that: (1) the fiduciary made a full and fair disclosure of all material facts, and (2) the transaction was fair. The *Lustig* court found the attorney had failed to overcome that presumption because there was no evidence that any explanation was provided concerning the details and implications of the fee provision, and more critically, because the provision was not fair. Fairness was wanting because the fee provision was "not necessary to protect the attorney's interest and merely served to "silence a client should that client protest the amount billed." The Court went so far as to state that the provision was "potentially violative of the Rules of Professional Conduct," although it never specified which rule might be involved. While the Court did not state that the provision was *per se* unlawful, it is hard to imagine how a fee provision in a retainer agreement would stand up under the Court's reasoning.

A decade later, however, the Second District in *Whelan Law* had no problem upholding the legality of a nearly identical provision that provided for the inclusion of reasonable attorneys' fees and costs in the event it was necessary to bring a collection action for nonpayment of fees and costs. The key difference between the two situations, according to the Court in *Whelan Law* was that the agreement in *Lustig* was entered into *after* the attorney-client relationship had begun. The *Lustig* decision was careful to point out that the attorney-client relationship had begun before the retainer was signed, as evidenced by the fact that attorney eventually billed for at least five hours of work prior to that date. This distinction was critical because before the attorney-client relationship is established, clients can walk away if they don't like the contract. Contracts entered into after a fiduciary relationship has begun are subject to the presumption of undue influence, but the parties are free to enter into any contract they choose before the relationship has begun. Since the retainer agreement was entered into before the attorney-client relationship had commenced, the Court in *Whelan Law* held that there was no presumption of undue influence and no other reason to strike down the fee clause in the retainer agreement.

The *Whelan Law* decision appears, on the surface, to draw a bright line that is easy to apply. If you want to include a fee provision in your retainer agreement, do so before you begin acting as an attorney. In drawing this line, moreover, the *Whelan Law* court

is consistent with well-established fiduciary duty law. The Illinois Supreme Court has held that "as a general rule, an agent's fiduciary duty is limited to actions occurring within the scope of his agency and that the creation of the agency relationship is not itself within that scope." *Martin v. Heinold Commodities, Inc*., 117 Ill. 2d 67, 78. If the agreement is made before the fiduciary relationship is created, the negotiation of the agreement is not subject to the rules governing transactions between fiduciaries and beneficiaries, which means lawyers should be able negotiate retainer agreements without the presumption of undue influence that arises in transactions between an attorney and client. As long as the fiduciary relationship has not yet begun, a retainer agreement should be like any other service contract between two arms-length parties.

No Bright Line

The bright line, however, is not so bright. First, the lawyer seeking to include a fee provision in a retainer agreement must be scrupulously clear that the attorney-client relationship has not begun prior to the moment the retainer agreement is executed. This means the attorney can never bill for any time prior to its execution, and that the attorney should not provide any advice to the prospective client nor do anything that could be considered as triggering the attorney-client relationship.

Further complicating that situation is the fact that Illinois courts have held that a fiduciary duty can arise even before the fiduciary relationship is formed. In *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 67, the Illinois Supreme Court held that a pre-agency fiduciary relationship could arise based either on certain pre-agency contacts, or "where the very creation of the agency relationship involves a special trust and confidence on the part of a principal in the subsequent fair dealing of an agent, the prospective agent may be under a fiduciary duty to disclose the terms of his employment as an agent." In a subsequent decision in the same case, the court found that a pre-agency fiduciary relationship existed between a stock broker and his customer because the proposed transaction was complex and therefore the customer "had to rely upon the broker to state very clearly what the compensation to the broker was." *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 47.

For the practitioner who wants to include a fee provision in a retainer agreement, two conclusions emerge. First, the retainer must be signed because any action has been undertaken that the client could consider legal representation. This is no simple matter, because courts are very quick to find that an attorney-client relationship has been established. *Herbes v. Graham*, 180 Ill. App. 3d 692, 699 ("an attorney-client relationship need not be explicit or expressed and is not dependent on the amount of time the client spends with the attorney, the payment of fees or execution of a contract, the consent of the attorney, or the actual employment of the attorney").

Second, to be fully safe, the lawyer should specifically discuss this provision with the client. While there was no evidence in *Whelan Law* of any such discussion, and the Court upheld the fee provision, a client in a future proceeding could make an argument based on *Martin v. Heinold* that that nature of the attorney-client relationship is such that the lawyer needs to fully explain such a provision and its consequences. The need for a full discussion of the provision is particularly acute for those practicing in the First District, because *Lustig* held that a fee provision in a retainer was "clearly unfair" and potentially violative of the Rules of Professional Conduct. Assuming a subsequent First District decision accepted the *Whelan Law* distinction between pre and post-retention conduct, it would nonetheless seem likely that the First District would require a very clear disclosure of the clause and its consequences before upholding a provision that it found so questionable.

One final practice pointer: If you want fees for collecting a fee, you need to hire a lawyer. The general rule is that lawyers cannot receive a fee when representing themselves. *In re Marriage of Tantiwongse*, 371 Ill. App. 3d 1161, 1164 ("Lawyers representing themselves simply do not incur legal fees.") ■

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