



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5(c) and 1.8(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 97-08
March, 1998

Topic: Contingency Fees

Digest: A lawyer cannot take an additional amount in legal fees for reducing a lien payment which is above and beyond the percentage of the lawyer's fees agreed to by the client in the contingency fee agreement with the lawyer.

Ref.: Illinois Rules of Professional Conduct, Rules 1.5(c) and 1.8(a), ABA Model Rule 1.5
Baier v. State Farm Insurance Company, 66 Ill.2d 119, 361 N.E.2d 1100 (1977)
Durr v. Beatty, 491 N.E.2d 902 (Ill.App.Ct. 1986)
In re Pagano, 154 Ill.2d 174, 607 N.E.2d 1242 (1992)
Lossman v. Lossman, 274 Ill.App.3d 1, 653 N.E.2d 1280 (Ill.App. 2nd Dist. 1995)

FACTS:

Lawyer represents Client as plaintiff in a personal injury matter. Under the terms of the contingency fee agreement, Lawyer is to receive legal fees equal to 33% of any recovery. Lawyer settles the matter with defendant for \$9,000. Client's automobile insurance company ("Carrier") has asserted a subrogation lien of \$3,000 against any recovery based upon medical expenses paid out by Carrier on Client's behalf. The lien is "adjudicated" to \$2,000 pursuant to the common fund doctrine.

QUESTION:

Can Lawyer take an additional fee from Client for reducing the lien?

OPINION:

Contingency fee agreements are governed by Rule 1.5(c) of the Professional Rules of Conduct. Pursuant to Rule 1.5(c):

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination.

For the purpose of this opinion, it is assumed that the contingency fee agreement between Client and Lawyer (the "Fee Agreement") provided that the lawyer's fees should be calculated before any expenses or other amounts such as liens were deducted from the recovery. In short, we assume that Lawyer's fees were to be calculated based upon the gross amount of the recovery as opposed to the net amount after expenses and liens.

According to Rule 1.5 (c), the contingent fee agreement must "state the method by which the fee is to be determined, including the percentage...that shall accrue to the lawyer in the event of settlement...and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." In this case, Lawyer agreed in writing with Client that Lawyer's fees would be fixed and calculated at 33% of the recovery amount before deduction of litigation expenses and other amounts. The gross recovery Lawyer negotiated for Client was \$9,000. Therefore, pursuant to the Fee Agreement, Lawyer was entitled to \$3,000 or 33% of \$9,000. Lawyer is not entitled to any additional amounts.

Furthermore, Lawyer could not later modify the existing Fee Agreement or enter into a second fee agreement with Client in order to obtain a fee for reducing Client's lien. A fee agreement entered into after the lawyer has been retained requires a showing of clear and convincing evidence to rebut the presumption of undue influence. *In re Pagano*, 154 Ill.2d 174, 607 N.E.2d 1242 (1992) (presumption that increase in lawyer's fee is product of undue influence can sometimes be rebutted without client obtaining advice of independent counsel); *Lossman v. Lossman*, 274 Ill.App.3d 1, 653 N.E.2d 1280 (Ill.App. 2nd Dist. 1995) (lawyer rebutted presumption of undue influence as to bonus that was part of the original fee agreement but failed to rebut presumption as to mortgage used to secure fees and 12% interest which were not part of original fee agreement); Comments, ABA Model Rule 1.5 ("modification of a fee agreement to

a lawyer's benefit during a representation is presumptively fraudulent and unenforceable, unless the lawyer demonstrates full disclosure of all relevant information, client consent based on adequate consideration, and client opportunity to seek independent legal advice before agreeing to the modification. *Durr v. Beatty*, 491 N.E. 2d 902 (Ill.App.Ct. 1986"). We assume for purposes of this opinion that Client did not agree to modify the terms of the Fee Agreement based upon the above standards. The concept of undue influence in modifying a preexisting fee agreement is similar to the concept discussed in Rule 1.8(a) with respect to business transactions between a client and his or her lawyer.

Our opinion that Lawyer cannot take a fee from Client greater than that agreed to in the Fee Agreement is consistent with the fund doctrine; the common fund doctrine is not intended to alter the fee arrangement between a lawyer and his or her client, but rather addresses the lawyer's rights to a fee from a subrogee who benefits from the lawyer's work. In *Baier v. State Farm Insurance Company*, 66 Ill.2d 119, 361 N.E.2d 1100 (1977), the Supreme Court of Illinois agreed "that where a fund has been created as the result of legal services performed by an attorney for his client, and a subrogee of the client, who has done nothing to aid in creating the fund, seeks to benefit therefrom, the attorney is entitled to a fee from the subrogee in proportion to the benefit received by the subrogee." Finally, unlike Lawyer in the present inquiry, Baier calculated the fee owed to him by his client **net** of the subrogation lien and then sued State Farm to recover a portion of the lien paid to State Farm as a result of Baier's efforts.

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