

No Legal Fees Without Letter of Engagement

BY LAZAR EMANUEL

The importance of providing the client with a written letter of engagement at the outset of a matter was emphasized recently by Bronx County Supreme Court Justice Yvonne Gonzalez in *Klein Calderoni & Santucci, LLP v. Bazerjian*, NYLJ, 2/10/05. For failure to supply a letter of engagement (or a retainer agreement), the Klein law firm was denied a fee amounting to \$34,862.75.

Client Bazerjian asserted a claim against the September 11th Victim Compensation Board. He was awarded the standard \$65,000 and appealed. The hearing on appeal was held on May 19, 2004. Bazerjian contacted the Klein law firm on May 12 and visited its offices on May 14, five days before the hearing. The firm appeared at the hearing, which resulted in an award to Bazerjian of \$204,451, an increase of \$139,451. The firm billed Bazerjian \$34,862.75, or 25% of the increase over the original award. Bazerjian argued that there was no contingency fee agreement. The law firm insisted there was and sued. It was undisputed that the agreement, if any, had never been reduced to writing.

On a motion and cross motion for summary judgment, the court found for defendant Bazerjian. The court relied on 22 NYCRR §1215.1(a), which provides as follows:

Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

Subsection (b) of the Rule requires that the letter of engagement explain the scope of the legal services to be provided; the fees and expenses to be charged; and, where applicable, that the client may have a right to arbitrate any dispute over fees under Part 137 of the Rules of the Chief Administrator. Subsection (c) provides that a signed retainer agreement between lawyer and client addressing the same matters as in Subsection (b) may be substituted for the letter of engagement.

22 NYCRR §1215.2 creates four exceptions to Section 1215.1: no letter of engagement is required (1) when the fee to be charged is expected to be less than \$3000; (2) where the lawyer's services are of same general kind as previously rendered to and paid for by the client; (3) in domestic relations matters subject to 22 NYCRR §1400.3 (requiring written retainer agreements); and (4) where the lawyer is admitted in another state and has no office in New York, or where no material portion of the services will be rendered in New York.

The Klein law firm argued that the short span of five days between the client's visit to their office and the hearing had made it impracticable for the firm to prepare a letter of engagement. Judge Gonzalez held

that there had been sufficient time and opportunity to provide the letter and that the firm's failure to provide it was deliberate and intentional.

Courts Fashion Appropriate Penalty

The court turned to the issue of the appropriate penalty for failing to provide a client with a letter of engagement. This issue has been the subject of several lower court cases and of comment by several authorities.

The first case to consider the issue was *Feder, Goldstein, Tanenbaun & D'Errico v. Ronan*, 195 Misc.2d 704, N.Y.S.2d 463 (Nassau Cty. Dist. Ct. 2003). The Federal law firm sued to collect its fees in a matter. The court held that the firm's acknowledged failure to provide the client with a written letter of engagement precluded recovery. In *Matter of Feroletto* (2004 NY Slip Op 1345), a case cited by Judge Gonzalez, the Bronx County Surrogate permitted recovery of fees because the failure to provide a letter of engagement was not "willful". The Surrogate distinguished the decision in *Feder, Goldstein*: "The *Feder* case might be used as a 'forbidding precedent' to 'create an unfair windfall for clients' should it be followed where clients know that the services are not pro bono and the failure to comply with the rule is not willful."

Professor Roy Simon (*Simon's New York Code of Professional Responsibility Annotated*) has written:

In my view, failure to provide a letter of engagement should not automatically result in fee forfeiture, but should be a factor that the court may consider. In *Feder, Goldstein*, the court analogized to cases in which courts had denied fees to domestic relations lawyers who had failed to provide written engagement letters pursuant to 22 NYCRR §1400.3, but this analogy is flawed. The *Feder, Goldstein* court seemed unaware that a Disciplinary Rule..., DR 2106(C)(2)(b), expressly prohibits a lawyer from collecting a fee in a domestic relations matter "[u]nless a written retainer agreement is signed by the lawyer and client..."

Judge Gonzalez considered both the *Feder, Goldstein* decision and the *Feroletto* decision and found her answer in the intentional and deliberate conduct of the Klein firm. She relied especially on a statement in the affidavit of one of the firm's lawyers. He stated that, following the hearing, client Bazerjian had asked him "whether he needed to sign something regarding my fee. I told him that he need not because of my past dealings with his coworker clients and my belief that he would honor my bill."

Other Rules Compared

22 NYCRR §1215.1 controlling letters of engagement applies in all matters anticipating the payment of a fee for legal services, with the four exceptions cited above. One of these exceptions relates to domestic relations matters subject to 22 NYCRR §1400.3. It should be noted that the lawyer's letter of engagement required by Section 1215.1 does not have to be signed or acknowledged by the client. In that respect, it is different from the retainer agreement under Section 1400.3 which specifies: "The Agreement and any amendment thereto, shall be signed by both client and attorney..."

22 NYCRR §603.7, dealing with contingent fee retainer agreements in claims for personal injuries and/or property damage also requires a written statement prepared and signed personally by the lawyer. Under this Section, there is the additional requirement that the lawyer file a statement of retainer with the Office of Court Administration. The statement must be filed within thirty days from the date of retainer.

Although her reliance on the letter of engagement rule of 22 NYCRR §1215.1 was sufficient basis for her decision in the Bazerjian matter, Judge Gonzelez nevertheless went on to consider the argument of the Klein law firm that 22 NYCRR §603.7 was not applicable to the matter because it did not concern a claim for negligence. Judge Gonzalez quoted the text of Section 603.7 and pointed out the word “negligence” does not appear anywhere in the Rule. Instead, it applies to “any action or claim for damages for personal injuries or for property damages or for death or loss of services arising from personal injuries...,” regardless of negligence.

The claim of defendant Bazerjian was for an asthmatic condition resulting from his search and recovery efforts during the operations at the World Trade Center following September 11th. It was therefore a claim for personal injuries which satisfied the language of Section 603.7. The issue of negligence was irrelevant to the application of Section 603.7. Failure of the Klein law firm to provide or file a signed retainer agreement under Section 603.7 further precluded any recovery of legal fees by the law firm. The court relied on *Rabinowitz v. Cousins*, 219 AD2d 487 (1st Dept. 1995).

Judge Gonzalez granted the defendant’s motion to dismiss the law firm’s complaint but did not impose sanctions because the firm’s claims were deemed to be not frivolous.

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