LAW AND THE FAMILY

"Amendment to Rules of Conduct for Divorce Lawyers"

Joel R. Brandes and Carole L. Weidman

New York Law Journal

August 23, 1994

AFTER MONTHS of haggling, the Appellate Divisions added a new Part 1400 to Title 22 of the Official Compilation of Codes Rules and Regulations of the State of New York (22 NYCRR), which took effect Nov. 30, titled "Procedure for Attorneys in Domestic Relations Matters." New Part 1400 requires attorneys representing clients in certain matrimonial matters to provide prospective clients with a statement of Clients Rights and Responsibilities; [FN1] requires retainer agreements for such matters to be in writing and prescribes their contents; [FN2] prohibits attorneys from taking non-refundable retainer fees from such clients; [FN3] limits those circumstances in such cases in which the attorney may obtain security to insure payment of his or her fee; [FN4] requires the filing of a closing statement with the clerk of the court at the conclusion of the attorney's representation of the client, [FN5] and gives the client, but not the attorney, the right to compel the attorney to submit to binding arbitration of fee disputes. [FN6]

Simultaneously with the addition of Part 1400, the Presiding Justices of the Appellate Divisions amended the Disciplinary Rules of the Lawyers Code of Professional Responsibility, which also took effect Nov. 30. The Chief Administrative Judge of the Courts adopted a New Part 136 of the Rules of the Chief Administrator, relating to mandatory "Fee Arbitration In Matrimonial cases" and amended s202.16 of the Uniform Civil Rules for the Supreme Court and County Court in relation to calendar control of disclosure in matrimonial actions.

In earlier columns we discussed these new rules and concluded that, while serving a noble purpose, some of them appeared to create substantive law in derogation of the rule-making authority of the courts and in contravention of s 474 of the Judiciary Law, which ensures an

attorney's right to enter into agreements for the payment of fees. [FN7] Nonetheless, be forewarned. One must exercise extreme caution with these rules. Failure to follow the rules will subject a lawyer to disciplinary action.

Recent Amendment

On June 16, the Presiding Justices of the Appellate Divisions amended 22 NYCRR 1200.11 and 1200.10-a (Disciplinary Rules) and 22 NYCRR 1400.1 and 1400.3 of new Part 1400 to clarify and expand on which situations they apply.

Before its amendment, s1400.1 limited application of the rules: "This section shall apply to all attorneys who, on or after November 30, 1993, undertake to represent a client in a claim, action or proceeding, in either Supreme Court or Family Court, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings."

Section 1400.1 as originally enacted applied only to attorneys who represented clients in certain types of actions or proceedings in the Supreme Court or Family Court. The specific limitation that the representation of a client be in "a claim, action or proceeding, in either Supreme Court or Family Court," coupled with the requirement of the filing of the retainer agreement [FN8] and closing statement [FN9] with the Supreme Court, appears to exclude representation of a client in the negotiation and execution of a pre-nuptial agreement, "opting-out" agreement and separation agreement.

Section 1400.1 has now been amended to change the word "section" to "Part" and to provide:

This Part shall apply to all attorneys who, on or after November 30, 1993 undertake to represent a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where the client is other than a minor, the provisions of section 1400.2 shall apply to the extent they are not applicable to compensation.

The amendment clarifies a technical error to make it clear that the entire Part 1400 applies in cases that come within the ambit of the rule and

expands its coverage to a claim, action or proceeding in any court of appellate jurisdiction. While it would have been simpler to say that it applies to appeals from such proceedings from Family Court or Supreme Court, this is what was intended. It partially deals with the problem of how to determine, at the initial consultation or time of being retained, whether the prospective client's case is going to result in the commencement of a claim, action or proceeding, triggering the application of the rule that requires giving the client the statement of client's rights and entering into the written retainer agreement.

Many times an action is not contemplated by the client when coming to the attorney for a consultation. Often a client comes in solely for "a separation agreement." The amendment to s1400.1 makes it clear that representation of a client preliminary to the commencement of a claim, action or proceeding designated in the rule will trigger its application.

Definition of 'Preliminary'

While the amendment is helpful, still unclear is the meaning of "preliminary" to a claim, action or proceeding that appears to remain a question of "state of mind." Surely there will be those who will argue that a pre-nuptial agreement, "opting-out" agreement and separation agreement after its execution, will attest to the preliminary nature of the client's actions before the filing of an action in Supreme Court or Family Court for divorce, custody, support or maintenance, after its execution. But if they intended for the rule to include these sorts of agreements would not someone have spelled it out in the amendment? And what about those who have consulted with divorce lawyers with an eye toward "divorce planning?" How many years before an action will be considered "preliminary?"

Section 1400.1 was also amended to exclude from its mandate a litany of persons including assigned counsel, law guardians, pro bono counsel and/or other cases where the attorney represents a client without compensation from his or her client, such as where the attorney will look to a court award from the clients spouse for payment of the fee. In those instances attorney's only obligation is to provide the client with the statement of clients Rights and Responsibilities, deleting the provisions referring to fees. [FN10]

Section 1400.3 provides that an attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client, shall execute a written agreement with the client, setting forth in plain language the terms of compensation and the nature of the services to be rendered. The agreement, and any amendment to it must be signed by the attorney and the client. In actions in the Supreme Court, the signed

agreement must be filed with the statement of net worth. A copy of a signed amendment must be filed within 15 days of signing. A duplicate copy of the filed agreement and any amendment must be provided to the client.

Section 1400.3 has been amended to provide that "[W]here substitution of counsel occurs after the filing of the net worth statement a signed copy of the attorneys retainer agreement shall be filed with the court within 10 days of its execution."

Fee for Legal Service

At the same time that Part 1400 was enacted, s1200.11 of the Disciplinary Rules was amended to add new ss(c)(2)(B), (c)(2)(C) and (e). They make it a violation of the Disciplinary Rules for an attorney to fail to comply with ss 1400.4, 1400.5 and 1400.7 and the first part of s1400.3. They provide as follows:

s1200.11 [DRL 2-106] Fee for Legal Services

(c) A lawyer shall not enter into an agreement for, charge, or collect:

- - - -

(2) Any fee in a domestic relations matter,

(B) Unless a written retainer agreement is signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement. A Lawyer shall not include in the written retainer agreement a non-refundable fee clause; or

(C) Based upon a security interest, confession or judgment or other lien, without prior notice to the client in a signed retainer agreement and approval from the Court after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

- - - -

(e) In domestic relations matters, a lawyer shall resolve fee disputes by arbitration at the election of the client. [FN11]

As is apparent, 22 NYCRR s1200.10-a, provided that "In domestic relations matters" an attorney must deliver to a prospective client a "Statement of Client's Rights and Responsibilities," at the initial

conference and before the signing of a written retainer agreement. While amending the disciplinary rules to require that a statement of client's rights be provided in "domestic relations matters," the rule did not define "domestic relations matters."

The recent amendments to 22 NYCRR ss1200.11 and 1200.10-a resolve this matter as each section was amended to insert, after the words "domestic relations matters" the words "to which Part 1400 of the joint rules of the Appellate Divisions is applicable" so that it is clear that they apply only to domestic relations matters in which Part 1400 of the joint rules of the Appellate Divisions is applicable." It is now clear that the rules apply only to domestic relations matters in which Part 1400 of the joint rules of the appellate division is applicable.

In an era of lawyer discontent and law firm downsizing, the stance set forth in the new rules has done little to beef up the divorce lawyer image, which has suffered by its tumultuous past. But of course this was not its mission. Or was it? Perhaps in some measure the tantalizing prospect of actually building the image of lawyers as earnest, knowledgeable and honest (as is true of the bulk) may have entered the minds of the creators of this legislation. After all, the world is not exactly overflowing with resounding applause for the virtues and perfection of divorce lawyers.

In short, it seems a higher authority is in pursuit of a campaign to reignite the confidence of New Yorkers in their divorce lawyers by requiring matrimonial lawyer's to toe the line. Regulating our own may indeed be useful. However, things taken in excess frequently defeat the purpose. And of course, one must ponder whether any rules will solve the problems. Consider the wisdom of the words of John Quincy Adams in 1787:

The mere title of lawyer is sufficient to deprive a man of the public confidence. The most innocent and irreproachable life cannot guard a lawyer against the hatred of his fellow citizens.

FN1. See 22 NYCRR 1400.2

FN2. See 22 NYCRR 1400.3. As originally enacted, s1400.3 provided that an attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client, shall execute a written agreement with the client, setting forth in plain language the terms of compensation and the nature of the services to be rendered. The agreement, and any amendment thereto, must be signed by the attorney and the client. In actions in the Supreme Court, the signed agreement must be filed with the statement of net worth. A copy of a signed amendment must be filed within fifteen days of signing. A duplicate copy

of the filed agreement and any amendment must be provided to the client. The agreement must provide:

1. Names and addresses of the parties entering into the agreement;

2. Nature of the services to be rendered;

3. Amount of the advance retainer, if any, and what it is intended to cover;

4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged before the depletion of the advance retainer, the written retainer agreement shall provide how the attorney's fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client;

5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;

6. How the attorney will be paid through the conclusion of the case after the retainer is depleted: whether the client may be asked to pay another lump sum;

7. Hourly rate of each person whose time may be charged to the client: any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect;

8. Any clause providing for a fee in addition to the agreed-upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.

9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received;

10. Client's right to be provided with copies of correspondence and documents relating to the case and to be kept apprised of the status of the case.

11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary;

12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court.

13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration, which is binding upon both attorney and client; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

FN3. See 22 NYCRR 1400.4, which provides that an attorney shall enter into an arrangement for, charge or collect a non-refundable retainer fee from a client. However, an attorney may enter into a "minimum fee" arrangement with a client that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

FN4. See 22 NYCRR 1400.5, which allows an attorney to obtain a confession of judgment or promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee, only where (1) the retainer agreement provides that a security interest may be sought, (2) notice of an application for the security interest has been given to the other spouse and (3) the court grants approval for the security interest after submission of an application for counsel fees. An attorney who has obtained a security interest by way of a mortgage may not foreclose on the marital residence while the spouse who consented to the mortgage remains the title holder and the residence remains the spouse's primary residence.

FN5. See 22 NYCRR 1400.6, which provides that a closing statement shall be filed with the clerk of the court in connection with every claim, action or proceeding in which a written retainer agreement is filed. The statement shall be subject to the provisions governing confidentiality contained in Domestic Relations Law s235(1). The statement shall be filed within 15 days of entry of the judgment or other act concluding the case and terminating the retainer agreement, and shall include the following information: (1) the caption of the claim, action or proceeding; (2) the name and present address of the client; (3) the date the claim, action or proceeding was commenced and the date it was settled, default entered or order or judgment entered; (4) the terms of the settlement, order or judgment; (5) the amount of fees paid and the dates of payment; (6) whether a security interest was obtained, the amount thereof, the date of court approval and address, if any, of the secured property; (7) the amount of fees outstanding, terms of or payment schedule, if appropriate; (8) the date on which a copy of the closing statement was forwarded to the client and (9) the date, attorneys name, address, telephone number and signature

FN6. See 22 NYCRR 1400.7, which provides: "In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration, which shall be binding on both the attorney and client and subject to review under CPLR Article 75, pursuant to a fee arbitration program established and operated by the Chief Administrator of the Courts and subject to the approval of the justices of the Appellate Divisions."

FN7. See Brandes and Weidman, "Regulation of the Conduct of Divorce Lawyers" New York Law Journal, March 12, 1994, p.3, col. 3. and Brandes and Weidman, "The New Rules on Disclosure," NYLJ, April 26, 1994, p. 3, col. 3.

FN8. 22 NYCRR 1400.3 requires that "in actions in the Supreme Court a copy of the signed retainer agreement shall be filed with the statement of net worth."

FN9. 22 NYCRR 1400.7.

FN10. See 22 NYCRR 1400.2

FN11. 22 NYCRR 1200.11; New Part 136 of the Rules of the Chief Administrator is entitled Fee Arbitration in Matrimonial Cases. It took effect Nov. 30, 1993. 22 NYCRR 136.9 provides that an attorney who refuses to submit to the arbitration process shall be referred to the local grievance committee of the Appellate Division for disciplinary action.

Joel R. Brandes and Carole L. Weidman have law offices in New York City and Garden City. They co-authored, with the late Doris Jonas Freed and Henry H. Foster, Law and the Family, New York (Lawyers' Co-Operative Publishing Co., Rochester, N.Y.) Mr. Brandes and Ms. Weidman co-author the annual supplements.

8/23/94 NYLJ 3, (col. 1)

END OF DOCUMENT

Last modified: