A Primer on the Enhanced Scrutiny in the Ethical Rules Impacting Domestic Relations Practitioners

By Chris McDonough and Joel R. Brandes

The New York Rules of Professional Conduct ("RPC") are disciplinary rules which all lawyers are bound to follow. These rules were adopted effective April 1, 2009 and are published as Part 1200 of the Joint Rules of the Appellate Division (22 NYCRR 1200). Part 1400 of the Joint Rules of the Appellate Divisions contains additional specific disciplinary rules that apply to all attorneys who handle "domestic relations matters" (22 NYCRR 1400). Part 1400 was specifically "promulgated to address abuses in the practice of matrimonial law and to protect the public. [1]

The recent decision in *Adjmi v Tawil*[2] demonstrates that an attorney who does not comply with the matrimonial rules can be denied counsel fees when he makes an application for fees pursuant to the Domestic Relations Law. In *Adjmi*, the Appellate Division reversed an award of counsel fees to the wife of an apparently wealthy man because her attorney failed to comply with 22 NYCRR Part 1400. The Court held that the award of counsel fees to defendant "…was precluded by her attorney's failure to comply with the rules pertaining to domestic relations matters (22 NYCRR part 1400). Defendant was represented in the matrimonial proceedings by her father, a patent lawyer, for more than a year. However, she did not execute a retainer agreement until shortly before the trial, and she testified that her father had

[1] Seth Rubinstein, P.C. v Ganea, 41 A.D.3d 54, 833 N.Y.S.2d 566 (2d Dept.,2007); Julien v Machson, 245 AD2d 122, 66 NYS2d 147.

[2] --- N.Y.S.3d ----, 2020 WL 573175 (1st Dept.,2020)

never sent her an itemized bill (*see* 22 NYCRR 1400.3)". (citations omitted)

Both Rule 1.0 (g) of the Rules of Professional Conduct and 22 NYCRR 1400.1 define "Domestic relations matter" as representation of 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 any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.[3] In this article, we compare and contrast the Rules of Professional Conduct ("RPC") applicable to all attorneys, with those specific rules applicable to lawyers in domestic relations matters, and explain how to avoid a situation like that which occurred in *Adjmi v Tawil*. In addition to the written retainer rule and billing requirements present in *Adjmi*, we will also discuss the heightened scrutiny in domestic relations matters regarding fees and arbitration.

22 N.Y.C.R.R. 1215, adopted March 4, 2002, governs written engagement agreements in matters other than domestic relations matters. Known as the "letter of engagement rule," 1215 was promulgated by joint order of the Appellate Divisions and applies to all civil actions where a fee is charged. The intent of Rule 1215 was to prevent misunderstandings about fees, which are a frequent source of contention between attorneys and clients. The rule was not originally intended to be a disciplinary rule.[4] It provides that "an attorney who undertakes to represent a client for a fee must provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter." The letter of engagement must include an explanation of the scope of the legal services to be

[3] RPC Rule 1.0(g).
[4] Seth Rubinstein, P.C. v Ganea, 41 A.D.3d 54, 833 N.Y.S.2d 566 (2d Dept.,2007)

provided; an explanation of attorney's fees to be charged, expenses and billing practices; and where applicable, must provide that the client may have a right to arbitrate fee disputes. 22 N.Y.C.R.R. 1215 does not apply where the fee to be charged is expected to be less than $3,000 or where the attorney's services are of the same general kind as previously rendered to and paid for by the client. RPC Rule 1.5(b) incorporates the letter of engagement rule.

While RPC Rule 1.5(d)(5)(ii) also requires written retainer agreements in domestic relations matters, 22 NYCRR 1400.3 is much more extensive and as we have seen, failure to comply with 1400.3 can result in the loss of the lawyer's fee. Rule 1400.3 requires a description of the parties and the services to be rendered, the amount of any advanced retainer, circumstances under which any portion of the retainer may be refunded, the clients' right to cancel the agreement at any time, the terms of payment through the conclusion of the case, the frequency of billing which must be not less than every 60 days, the client's right to copies of case-related documents and correspondence, security interests, circumstances under which an attorney may withdraw as counsel, the arbitration of any disputes, and affixed to each retainer agreement must be a Statement of Client's Rights and Responsibilities.

An attorney is precluded from seeking fees from his or her client where the attorney has failed to comply with 22 NYCRR 1400.3, which requires the execution and filing of a retainer agreement that sets forth, *inter alia*, the terms of

compensation and the nature of services to be rendered. [5] The absence of a written agreement relative to the attorney's work is a violation of RPC Rule 1.5(d)(5)(ii).[6]

Both RPC Rule 1.5(e) and 22 NYCRR 1400.2 provide that in domestic relations matters a lawyer must provide a prospective client with a statement of client's rights and responsibilities at the initial conference and before the signing of a written retainer agreement. 22 NYCRR 1400.2, which was amended in 2019, tightens the requirement and sets forth the greater detail that must be contained in the Statement of Clients' Rights in domestic relations matters. There is no requirement that a statement of client's rights be physically provided to a client in any other type of matter.

In matrimonial actions counsel fee awards are authorized by DRL§ 237 which contains a rebuttable presumption that they shall be awarded to the non-monied spouse. However, where an the attorney fails to "substantially" comply with 22 NYCRR 1400.2 and 1400.3, a counsel fee award may be denied,[7] or the request reduced,[8] depending upon the circumstances of the case. Loss of all or part of a legal fee is not always the case. The First Department has held that where there has been "substantial compliance" with the matrimonial rules, an attorney will be allowed to recover the fees owed for services rendered, but not yet paid. [9] The Second Department has held that an attorney's "utter failure" to abide by these

[5] Mulcahy v Mulcahy, 285 A.D.2d 587, 588, 728 N.Y.S.2d 90 (2 Dept., 2001); Julien v Machson, 245 AD2d 122 (1st Dept.,1997)
[6] See Castellano v. Ross, 19 A.D.3d 1020, 798 N.Y.S.2d 271 (4th Dep't 2005).
[7] Rosado v. Rosado, 100 A.D.3d 856, 955 N.Y.S.2d 119 (2d Dep't 2012); Greco v. Greco, 161 A.D.3d 950, 77 N.Y.S.3d 160 (2d Dep't 2018)
[8] Moyal v. Moyal, 85 A.D.3d 614, 927 N.Y.S.2d 19 (1st Dep't 2011)
[9] See Flanagan v. Flanagan, 267 A.D.2d 80, 699 N.Y.S.2d 406 (1st Dept.,1999).

rules precludes the attorney from collecting fees, even if the services were already rendered.[10]

RPC Rule 1.5 (d) (4) and 22 NYCRR 1400.4 are in accord in prohibiting nonrefundable retainer fees[11] while permitting a retainer containing a "minimum fee" clause if it meets certain specific requirements.

RPC Rule 1.5(d)(5)(iii) and 22 NYCRR 1400.5(a) provide that in domestic relations matters a lawyer may not enter into an arrangement for, charge or collect any fee if the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and receiving approval from a tribunal after notice to the adversary. RPC Rule 1.5(d)(5)(iii) and 22 NYCRR 1400.5 (b) provide that in domestic relations matters a lawyer may 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. Both rules apply only in domestic relations matters.

RPC Rule 1.5(d)(5)(i), another rule which only applies in domestic relations matters, provides that in domestic relations matters a lawyer may not enter into an arrangement for, charge or collect any fee if the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement. This rule prohibits an attorney from entering into an agreement for a contingent fee for collection of an

[10] Mulcahy v. Mulcahy, 285 A.D.2d 587, 728 N.Y.S.2d 90 (2d Dept.2001)
[11] Matter of Cooperman, 82 N.Y.2d 745, 602 N.Y.S.2d 798 (1993) (2-year suspension)

award of post-judgment balances due under support, alimony or other financial orders. All contingency fees are prohibited in matrimonial matters [12]

In *Medina v. Richard A. Kraslow, P.C.,*[13] a post-judgment matter relating to plaintiff's divorce, plaintiff agreed to pay a minimum fee of $10,000 and a 25% contingency fee on all amounts recovered. Her attorney negotiated a settlement and retained $163,750 representing 25% of the cash and retirement funds that the plaintiff recovered under that settlement. The plaintiff subsequently commenced an action, alleging that the defendant violated Rule 1.5 of the Rules of Professional Conduct and 22 NYCRR part 1400. The Appellate Division held that the retainer agreement violated Rule 1.5(d)(5)(i) and that the enforcement of an equitable distribution award reduced to a money judgment is not exempt. The plaintiff also demonstrated prima facie that the defendant violated 22 NYCRR 1400.3 because the retainer agreement did not specify how the defendant's fee would be calculated if the plaintiff discharged the defendant "during the course of the representation" and did not specify how frequently itemized bills would be provided. Additionally, the plaintiff did not receive itemized bills from the defendant. Despite the improper contingency fee, the plaintiff was not prima facie entitled to judgment as a matter of law on the issue of damages, as the attorney could recover for "the reasonable value of services" under a theory of quantum meruit, and despite the noncompliance with 22 NYCRR 1400.3, the lawyer could retain properly earned non-contingent fees that the plaintiff had already paid.

22 NYCRR 1400.7 provides that in a domestic relations matter, a lawyer

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[12] Ross v. DeLorenzo, 28 A.D.3d 631, 813 N.Y.S.2d 756 (2d Dep't 2006).
[13] 149 A.D.3d 928, 53 N.Y.S.3d 116 (2d Dep't 2017)

must resolve fee disputes by arbitration at the election of the client according to the fee arbitration program established by the Chief Administrator of the Courts. In non-matrimonial matters Rule 1.5(f) requires arbitration only 'where applicable".

Conclusion

All lawyers must adhere to the Rules of Professional Conduct. The failure to adhere to them can result in disbarment [14] or suspension.[15] Attorneys who practice exclusively in the area of domestic relations are generally aware that they must also observe the more stringent requirements of 22 NYCRR 1400, especially 1400.2 and 1400.3

It is the general practice attorney who only occasionally takes a domestic relations matter that we see most often getting caught up for failing to observe the more stringent requirements that apply to domestic relations matters. Those attorneys would be well advised to make certain that they are aware of the distinctions and differences between the Rules of Professional Conduct and the rules pertaining to Attorneys in Domestic Relations Matters. Failure to fully comply with the enhanced requirements pertaining to domestic relations matters can result not only in loss of legal fees but grievances as well.

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[14] See In re Tavon, 66 A.D.3d 224, 884 N.Y.S.2d 111 (2d Dept.,2009)
[15] See In re Pollard 290 A.D.2d 83, 734 N.Y.S.2d 600 (2 Dept., 2001)

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