

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 685 - 3/19/97 (12-96)

Topic: Retainers and Statements of Client's Rights and Responsibilities at Consultations in Matrimonial Cases

Digest: Prospective Clients Need Not Be Asked To Sign Retainer Agreement as a Condition to Charging for Consultations, but Must Be Given the Statement of Client's Rights and Responsibilities at Consultations

Code: DR 2-105-a, DR 2-106(B), DR 2-106(C)(2)(b), EC 2-19, EC 4-1

QUESTIONS

1. Must prospective clients in matrimonial matters be asked to sign retainer agreements as a condition to charging for consultations?
2. Must prospective clients in matrimonial matters be given the Statement of Client's Rights and Responsibilities at consultations?

OPINION

We are asked whether DR 2-106(C)(2)(b), one of the rules governing the conduct of attorneys in domestic relations matters that took effect in late 1993, requires a matrimonial practitioner to provide a statement of the client's rights and responsibilities and obtain a signed retainer agreement before charging for a consultation.

DR 2-106(C)(2)(b) provides in relevant part as follows:

A lawyer shall not enter into an arrangement for, charge or collect ... (2)
Any fee in a domestic relations matter to which Part 1400 of the joint rules of the Appellate Divisions [the Procedure for Attorneys in Domestic

Relations Matters, 22 NYCRR § 1400, eff. Nov. 30, 1993] is applicable ...
(b) Unless a written retainer agreement is signed by the lawyer and the client setting forth in plain language the nature of the relationship and the details of the fee arrangement . . .

Also relevant to the inquiry is DR 2-105-a, entitled “Client’s Statement of Rights and Responsibilities in Domestic Relations Matters,” which provides as follows:

In domestic relations matters to which Part 1400 of the joint rules of the Appellate Divisions [22 NYCRR § 1400] is applicable, a lawyer shall provide a prospective client with a statement of client’s rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

The required text of the client’s statement of rights and responsibilities in domestic relations matters is set forth in 22 NYCRR § 1400.2. Details governing the content of retainer agreements in domestic relations matters are set forth in 22 NYCRR §§ 1400.3 and 1400.4.

Retainers for Consultations

Neither DR 2-105-a nor DR 2-106(C)(2)(b) makes any mention of retainer agreements in connection with preliminary consultations, and Part 1400 is entirely silent on the subject. However, section 1400.3 requires a retainer agreement only where an attorney “undertakes to represent a party *and* enters into an arrangement for, charges or collects any fee...” (emphasis added). The charging of a consultation fee alone, absent an agreement to undertake representation of the prospective client, does not trigger the requirement that a retainer agreement be obtained. Section 1400.3 also specifies that the retainer agreement must set forth “the nature of services to be rendered.” Since ascertaining the nature and scope of the services to be rendered (and whether the attorney and prospective client will agree that the attorney at issue render them) is typically a central purpose of an initial consultation, requiring execution of a signed retainer agreement as a precondition to charging for a consultation would appear to be at odds with the basic purposes of a consultation.

The Committee therefore concludes that prospective clients in matrimonial matters need not be asked to sign retainer agreements at consultations. Nothing in the Disciplinary Rules or Part 1400 bars a lawyer from charging a fee for a consultation in a matrimonial matter, provided the fee is not excessive, DR 2-106(B), and the prospective client is advised of it in advance of the consultation.

The Committee notes that “[i]t is usually beneficial to reduce to writing the understanding of the parties regarding the fee. ... [M]any persons who desire to employ a lawyer may have had little or no experience with fee charges of lawyers, and for this reason lawyers should explain fully to such persons the reasons for the particular fee arrangement proposed.” EC 2-19. These observations apply to consultations, and are

especially relevant to the prospective clients whom the matrimonial rules were designed to protect.

Accordingly, although neither a formal retainer agreement nor a written understanding is required as a precondition to charging for a consultation in a matrimonial matter, the prospective client should be accorded a clear understanding of the cost of the consultation and the method by which it will be calculated (*e.g.*, a flat fee, a flat fee per consultation session if more than one is required, an hourly rate, etc.) Furthermore, the attorney must enter into a retainer agreement as soon as the relationship changes from consultation to representation, and may not evade the requirements of DR 2-106(C)(2)(b) by deeming the relationship to be one of continuing consultation when representation has in fact commenced.

The Statement of Client's Rights and Responsibilities

In contrast to a written retainer agreement, the statement of client's rights and responsibilities described in Section 1400.2 is entirely consistent with the purposes of a consultation, and indeed furthers those purposes. DR 2-105-a and Section 1400.2 explicitly require that the statement be provided to the prospective client "at the initial conference and prior to the signing of a written retainer agreement."

The Committee therefore concludes that DR 2-105-a requires attorneys to provide prospective clients in matrimonial matters with the statement of rights and responsibilities set forth in Section 1400.2 at consultations.

Confidentiality of Initial Consultations

The Committee further notes that although a consultation does not require a written retainer agreement, it is usually sufficient to impose on the attorney a duty to preserve the prospective client's confidences and secrets revealed at the consultation, even if the prospective client never engages the lawyer. N.Y. State 628 (1992); ABA 90-358 (1990); *Leisman v. Leisman*, 208 A.D. 2d 688, 688, 617 N.Y.S. 2d 807, 807 (2d Dep't 1994), citing EC 4-1 (confidentiality requirement extends to one "who has employed or sought to employ" the attorney); *Seeley v. Seeley*, 129 A.D. 2d 625, 627, 514 N.Y.S. 2d 110, 112 (2d Dep't 1987) ("The 'fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view toward retention of the lawyer, although actual employment does not result'" (citations omitted.) Nothing in this opinion is intended to alter this obligation.

CONCLUSION

Prospective clients in matrimonial matters must be provided with the statement of client's rights and responsibilities, but need not be asked to sign retainer agreements, at consultations that occur before the attorney has agreed to undertake the representation.
