NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 719 – 7/28/99

Topic: Retainer agreement; Domestic relations matters; Withdrawal from employment.

Digest: Improper for lawyer to utilize retainer agreement in domestic relations matter which misleads client regarding circumstances under which lawyer may withdraw for nonpayment or other reasons.

Code: DR 2-102(A)(1), 2-110, 7-106(A); EC 7-7, 7-8.

QUESTION

May a lawyer utilize a domestic relations retainer agreement which includes the provisions discussed below by which the client consents in advance that certain specified grounds, including nonpayment, will permit the lawyer to withdraw from the representation?

OPINION

1. Background: Proposed Retainer Agreement

Part 1400 of the Rules of the Appellate Division expressly requires any attorney representing a party in a domestic relations matter to "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." 22 NYCRR §1400.3. The same rule expressly requires the agreement to set forth "under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees." It does not require the attorney to identify other possible grounds for withdrawal, nor does it specify the precise language to be included in the retainer agreement.

The inquirer proposes to utilize a domestic relations retainer agreement which includes the language quoted below.

1. The client shall not bring legal action, conduct a defense or assert a position in litigation or take steps merely for the purpose of harassing or maliciously injuring any person or entity. The client shall not persist in a course of action or conduct which is illegal, criminal or fraudulent or use or attempt to use the Law Firm's services to perpetrate a crime or fraud. The client acknowledges and agrees that such conduct shall be good cause for the law firm to withdraw its representation and the client hereby consents that the law firm may so withdraw under such circumstances upon notice to the client.

2. The client also agrees to follow all instructions and advice which bear upon ethical, strategic or tactical considerations or matters made after discussion and agreement with the Law Firm. In the event that the client fails or refuses to follow such advice or instructions of the firm in any respect and/or engages in other conduct which renders it unreasonably difficult for the firm to carry out employment for the client effectively, the client acknowledges and agrees that such failure, refusal and/or conduct shall be good cause for the Law Firm to withdraw its representation. The client reserves the right to present any defenses to said withdrawal of the Law Firm from representation upon these grounds.

3. While no expert shall be retained without the client's prior approval, if the client refuses or fails to engage the experts recommended by the Law Firm, the client acknowledges and agrees that such refusal or failure would represent a serious conflict within the attorney client relationship and would render it unreasonably difficult, if not impossible, for the law firm to carry out employment effectively and would therefore be good cause for the Law Firm to withdraw its representation. The client reserves the right to present any defenses to said withdrawal.

4. In the event that any bill remains unpaid beyond such 30 day period, or the client fails or refuses to execute an Amendment to the Retainer Agreement, setting forth a rate change, the client agrees that such conduct shall be a deliberate disregard of this agreement and the obligation to the law firm as to expenses and fees. The Client agrees that the firm may cease or suspend any work or services with respect to the client's matter, during the preparation and pendency of the motion to withdraw, and may withdraw its representation, at the option of the firm upon notice to the client as long as to do so is without foreseeable prejudice to the client's rights. ... Should the firm so elect to withdraw its representation under such circumstances, the client hereby agrees that such account delinquency shall be good cause and grounds for such withdrawal. The client reserves the right to present any defenses to such withdrawal.

2. General principles

Two general principles govern our analysis.

The first is that the retainer agreement may not authorize the attorney to withdraw from the representation under circumstances in which withdrawal would be impermissible under DR 2-110 of the Code of Professional Responsibility. DR 2-110 contains express provisions regarding withdrawal from employment by a lawyer. DR 2-110(B) sets forth conditions under which a lawyer must seek to withdraw from the representation, while DR 2-110(C) sets forth conditions under which it is permissible for a lawyer to do so. Except as required or permitted by DR 2-110, a lawyer may not terminate an ongoing lawyer-client relationship. Even where grounds for withdrawal are present, a lawyer engaged in a proceeding before a tribunal must obtain the tribunal's permission before withdrawing if its rules so require. DR 2-110(A)(1). Furthermore, the lawyer may not terminate the representation until the lawyer has taken steps to the extent reasonably practicable to avoid any foreseeable prejudice to the rights of the client. Those steps should include giving due notice to the client, allowing the time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules. DR-2-110(A)(2).

DR 2-110 does not authorize a lawyer to enter into, or act in reliance on, a retainer agreement which purports to set forth conditions for terminating the representation that would not otherwise justify withdrawal under DR 2-110. It is axiomatic that a lawyer may not enter into an agreement with a client in which the client expressly authorizes or permits the lawyer to violate a Disciplinary Rule. DR 1-102(A)(1) expressly states that a lawyer or law firm shall not violate a Disciplinary Rule. There is no general exception in the Code authorizing a lawyer to violate a disciplinary rule pursuant to the client's consent or agreement. Further, although DR 2-110(C)(5) specifically permits withdrawal if the "client knowingly and freely assents to termination of the employment," it does not authorize an agreement *in advance* by which the client assents to termination upon some future occurrence that is unrelated to achieving the objectives of the representation. For assent to be made "knowingly," it must be made with knowledge and understanding of all the facts and circumstances at the time of the termination of the employment.

The second general principle is that the retainer agreement may not mislead the client with regard to the attorney's obligations, including the obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation. As this Committee said in N.Y. State 599 (1989), which concluded that a retainer agreement may not properly include a nonrefundable retainer provision, "such a provision would be improper in agreements with a client of limited education or experience, or with any client who for any reason is unlikely to have an adequate understanding of the circumstances ... that might entitle the client to [object to the lawyer's withdrawal].... The essence of the matter is clarity - clarity that will assure the client's full understanding...."

Needless to say, nothing in Part 1400 of the Rules of the Appellate Division purports to authorize an attorney representing a party in a domestic relations matter to enter into a retainer agreement that contravenes DR 2-110 or is misleading, or otherwise to contravene provisions of the Code of Professional Responsibility. Thus, provisions of a retainer agreement referring to the conditions under which a lawyer shall or may withdraw from the representation must accord with DR 2-110 and do so in a manner that is understandable and not misleading to the client. Further, no matter what any retainer agreement may provide, a lawyer may not withdraw from representing a client unless under DR 2-110 he has proper grounds for withdrawing, obtains any required permission from a tribunal and takes appropriate steps to avoid foreseeable prejudice to the rights of the client.

3. Analysis of the Proposed Retainer Agreement

Overall, the proposed agreement is misleading in several respects. First, it is misleading to the client when it states that the enumerated circumstances "shall be good cause for ... withdrawal." This implies to the client that the lawyer has an absolute right, and perhaps even a duty, to withdraw under any of these circumstances. The agreement would be less confusing if it utilized language to the effect that the enumerated circumstances "*may* be good cause for withdrawal."

Additionally, the agreement would tend to mislead the client concerning the limitations imposed on the ability of the lawyer to withdraw. As discussed above, DR 2-110 forbids a lawyer from withdrawing until the lawyer has obtained the consent of the tribunal, if required, and taken appropriate steps to avoid foreseeable prejudice to the rights of the client. The agreement makes no express reference to these requirements[1] as it must in order to avoid misleadingly implying that a lawyer may terminate the representation without complying with them.

The reference in paragraphs 2, 3 and 4 to "defenses to withdraw" is also somewhat confusing. The agreement by this language apparently contemplates objections which might be raised by the client before any tribunal whose consent may be required. It is not clear how any such "defenses" could be raised if the consent of a tribunal is not required or sought by the lawyer. In that event, if the lawyer's withdrawal is not proper, the client may complain to the appropriate grievance committee, but that would not constitute a "defense," and a grievance committee has no jurisdiction to undo a withdrawal.

In addition, as discussed below, problems are raised by individual provisions.

Paragraph 1

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[1] Only quoted paragraph 4 minimally alludes to obtaining the consent of the tribunal by referring to "the motion to withdraw." It also states that the lawyer may withdraw for nonpayment (*but not for other reasons*) only "as long as to do so is without foreseeable prejudice to the client's rights."

The circumstances identified in quoted paragraph 1 would generally provide permissible, if not mandatory, grounds for the lawyer to seek to withdraw from the representation. The client conduct described in the quoted paragraph would implicate one or more of the following provisions: DR 2-110(B)(1), which requires a lawyer to withdraw from employment if "the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person;" DR 2-110(C)(1)(c), which permits the lawyer to withdraw if the client "[i]nsists that the lawyer pursue a course of conduct which is illegal"; DR 2-110(C)(1)(b), which permits a lawyer to withdraw if the client "[p]ersists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent"; and DR 2-110(C)(1)(g), which permits the lawyer to withdraw if the client "[h]as used the lawyer's services to perpetrate a crime or fraud."

This provision is nevertheless improper, however, insofar as it refers to the client's "consent[] that the law firm may so withdraw under such circumstances upon notice to the client." As noted above, the lawyer may not withdraw under DR 2-110 if the tribunal's permission is required and has not been obtained or if necessary steps have not been taken to avoid prejudice to the client. To the extent that the provision purports to allow the lawyer to withdraw without obtaining the tribunal's permission or averting prejudice, it contravenes DR 2-110. Even if the agreement is not intended to have this meaning, the reference to the client's express consent to the lawyer's withdrawal implies that the client has no right to object to the withdrawal even on the grounds that it would be prejudicial to the client. Because that language misleads the client about the client's rights, it is not proper for the lawyer to include such language in a retainer agreement.

Paragraphs 2 and 3

Quoted paragraphs 2 and 3 would permit the lawyer to withdraw from the representation if the client fails to follow all instructions and advice of the firm "which bear upon ethical, strategic or tactical considerations or matters" (quoted paragraph 2), or fails to approve and engage the expert recommended by the firm (quoted paragraph 3). This paragraph purports to describe circumstances under which the client's conduct would, in the language of DR 2-110(C)(1)(d), " render[] it unreasonably difficult for the lawyer to carry out employment effectively," and therefore permit the lawyer to withdraw from the representation. However, this provision is misleading, because it is not invariably the case that a client's failure to approve the expert recommended by counsel and to follow all other advice of counsel bearing upon ethical, strategic or tactical considerations will "render[] it unreasonably difficult for the lawyer to carry out employment effectively." At times, it may be possible for the lawyer to represent the client effectively notwithstanding the client's rejection of the lawyer's advice.

Furthermore, at times the Code may require the lawyer to accede to the client's decisions concerning the representation. EC 7-7 and EC 7-8 are the relevant provisions. EC 7-7 provides:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer....

EC 7-8 provides:

> ... In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

The quoted paragraphs 3 and 4 contravene these provisions to the extent that the lawyer might read them to compel the client to accept the lawyer's advice with respect to decisions that, under the Code, are for the client to make. Even if the quoted paragraphs might be interpreted more narrowly, they are, in the very least, misleading to the client concerning which decisions are ultimately for the lawyer and which may be made by the client.

Paragraph 4

The quoted paragraph 4 is improper, first, because it would permit the lawyer to terminate the representation upon the client's "failure to pay a bill within 30 days" without regard to whether the client's nonpayment was deliberate. This paragraph is apparently meant to refer to DR 2-110(C)(1)(f), but the disciplinary rule permits a lawyer to withdraw only if the client *"[d]eliberately* disregards an agreement or obligation to the lawyer as to expenses or fees." As the Committee stated in N.Y. State 440 (1976),

> DR 2-110(C)(1)(f) also provides for withdrawal by a lawyer if his client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." The key word is "deliberately." "Mere failure to pay an agreed fee, which is not deliberate, is not a ground for requesting such permission (to withdraw)." N.Y. State 212 (1971); N.Y. State 187 (1971).

See also N.Y. 598 (1988) (discussing when a failure to pay a legal fee is "deliberate"). To the extent that the quoted paragraph 4 is meant to authorize the lawyer to terminate the relationship for nonpayments that are not deliberate, this provision contravenes DR 2-110. In the very least, the provision is misleading insofar as it suggests to the client that the lawyer may withdraw where the client's failure to pay a bill was unavoidable or unintentional, not deliberate.

Additionally, the quoted paragraph 4 is improper insofar as it obligates the client "to execute an Amendment to the Retainer Agreement, setting forth a rate change," apparently at any time the lawyer demands regardless of the amount of the rate change, and authorizes the lawyer to terminate the representation "if the client fails or refuses " to do so. Under DR 2-106, any amended fee agreement, like an initial fee agreement, must be reasonable and not excessive; further, a lawyer may not use the threat of withdrawal to coerce a fee increase after the representation has commenced. *See, e.g.*, *McConwell v. FMG of Kansas City, Inc.*, 861 P.2d 830, 843 (Kan. Ct. App. 1993). Where a prior fee agreement is modified, its reasonableness and fairness have generally been closely scrutinized. *See, e.g.*, *Anderson v. Sconza* , 534 N.E.2d 445, 448 (Ill. App. 1989); Chicago Op. 93-1; ABA/BNA Lawyers' Manual on Professional Conduct 41:112 & 41:313. Although an initial retainer agreement might reasonably provide for periodic increases in the lawyer's hourly fee where the representation is expected to be long-term, the quoted paragraph does not do so, but purports to obtain the client's consent to whatever rate change the lawyer proposes without specifying when rate changes will be made or how they will be determined. This provision is misleading, if not entirely improper, insofar as it purports to authorize the lawyer to terminate the representation because of the client's refusal to accept any rate change, however unreasonable or coercive, in the middle of the representation.[2]

CONCLUSION

For the reasons stated, the question posed is answered in the negative.

(5-99)

[2] The inquirer raises an additional concern that the proposed agreement requires written notice from the client to initiate a fee arbitration proceeding or to cancel the agreement, even though neither Part 136 of the Rules of the Chief Administrator nor Part 1400 of the Rules of the Appellate Division requires such notice to be in writing. Although this Committee does not generally construe court rules outside of the Code of Professional Responsibility, if the requirement of written notice contravenes such rules, as it appears to do, a lawyer's use of an agreement containing that requirement constitutes a violation of DR 7-106(A), which provides, "A lawyer shall not disregard ... a standing rule of a tribunal . ..."