

New York State Bar Association

Committee on Professional Ethics

Opinion 739 – 4/16/01

Topic: Lawyer referral service; legal fees, domestic relations

Digest: Lawyer who represents low or moderate income individual in matrimonial action for a reduced fee may include in retainer agreement provision contemplating an application to the court for counsel fees from the client's spouse at lawyer's customary rate.

Code: Canon 2, EC 2-25, DR 1-102, DR 2-103(D)(3), DR 2-106(C)(2)(a), Canon 9.

QUESTION

May an attorney who has agreed to represent a low or moderate income individual in a matrimonial action as part of a bar association sponsored lawyer referral service include in the retainer agreement a provision contemplating an application to the court for counsel fees from the client's spouse based on the attorney's customary rate instead of the reduced rate afforded the client?

OPINION

Consistent with Canon 2's admonition that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available," the Code of Professional Responsibility authorizes bar associations to sponsor or operate lawyer referral services to aid individuals who need assistance in locating lawyers competent to handle their particular problems. DR 2-103(D)(3). Lawyers participating in certain bar association sponsored lawyer referral services fulfill their responsibility to render public interest and pro bono legal service by providing professional services at a reduced fee to individuals of limited financial means. EC 2-25 ("A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by

providing professional service at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or organizations, or by participation in programs and organizations specifically designed to increase the availability of legal services.”)

The question presented here is whether a lawyer who has agreed to represent an individual of limited financial means at a reduced rate in a matrimonial action may include in the retainer agreement a provision contemplating that the lawyer may apply to the court pursuant to Domestic Relations Law §237 for counsel fees from the client’s spouse, based on the lawyer’s higher customary rate.

There is nothing in DR 2-103 itself that would prohibit the proposed retainer agreement. New York has not adopted regulations governing referral services, nor are there any ethics opinions that address this question. Whether such an arrangement is ethically permissible depends, in our view, on whether it would constitute a contingent fee in violation of DR 2-106(C)(2). Because we conclude that it does not constitute a prohibited contingency fee, we answer this question in the affirmative, subject to the conditions we outline below.

For at least a century, the New York courts have proscribed retainer agreements providing for a contingency fee dependent upon procuring a divorce or on the amount of alimony obtained. *See Van Vleck v. Van Vleck*, 47 N.Y.S. 470 (4th Dep’t 1897). That prohibition survives today in DR 2-106(C)(2)(a), which provides that:

[A] lawyer shall not enter into an arrangement for, charge, or collect any fee in a domestic relations matter the payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution or property settlement.

The public policy reasons behind the prohibition of contingent fees in matrimonial actions is to avoid a situation where a lawyer may have an incentive to promote the breakup of the marriage. Although the proposed retainer might be seen as creating a “contingency” because the lawyer is paid at one rate by the client and another if the court orders payment from the client’s spouse, it would not appear to be a contingency fee prohibited by the Code. The higher fee which the lawyer may receive from the client’s spouse is not contingent upon the dissolution of the marriage or on the amount or distribution of the marital assets because a reconciliation or settlement between the parties does not, by itself, preclude an application for counsel fees made within the context of a pending action. *Sadofsky v. Sadofsky*, 78 A.D.2d 520, 431 N.Y.S.2d 594 (2nd Dept. 1980)(approving wife’s application for fees pursuant to DRL §237 although fee application was filed after the parties reconciled, on the grounds that the statute does not require a contrary result, and because applications for counsel fees

may be prosecuted by an attorney in his or her own name in the same proceeding). Accordingly, the proposed retainer agreement will not have the effect, or be seen as having the effect, of creating an incentive for the lawyer to seek a dissolution of the marriage in order to assure or enhance the lawyer's fee.

Moreover, we note that an analogous "contingency" results when a court permits a party to a matrimonial action to proceed *in forma pauperis* pursuant to CPLR §1102(d) and assigns counsel without compensation without prejudice to a motion by counsel for compensation pursuant to Domestic Relations Law §237, as is the practice in at least some courts. Lawyers in these courts may fulfill their pro bono responsibilities by representing indigent clients without forgoing the ability to seek compensation from the client's spouse at the lawyer's customary rate. In light of this practice, bar associations sponsoring reduced fee lawyer referral services may believe that prohibiting lawyers who voluntarily agree to represent clients for a reduced fee from applying for compensation at their customary rates may have the effect of discouraging lawyers from participating in such programs. Because we conclude that the proposed retainer provision is not prohibited by DR 2-106(C)(2)(a), we find no basis for substituting our judgment for that of the sponsoring bar association. Nor are we unmindful of the public policy behind the provisions of the Domestic Relations Law authorizing the court to order that the more affluent spouse bear the cost of the less affluent spouse's lawyer.

For the same reasons, we find no reason to limit our conclusion to lawyers who undertake reduced rate representation under the aegis of a bar association program. It is of vital interest to the profession that lawyers be encouraged to accept pro bono assignments, including assignments at reduced fees, and we are loath to place obstacles in the path of attorneys who are willing to render such service either through participation in a bar association program or on their own. EC 2-25.

We note that DR 2-106(C)(2)(b) requires that in domestic relations matters a written retainer agreement be signed by the lawyer and the client "setting forth in plain language the nature of the relationship and the details of the fee agreement." Accordingly, the lawyer should state his or her intention to seek court-ordered counsel fees from the client's spouse at the lawyer's customary rate, rather than at the reduced rate being charged to the client, in plain language in the written retainer.

Finally, we caution that in any ultimate application to the court for counsel fees, the lawyer should disclose to the court the terms of the retainer, including the fact that the lawyer has agreed to represent the client for a reduced fee. See DR 1-102(A)(5) (forbidding conduct prejudicial to the administration of justice); see also DR 1-102(A)(4) ("A lawyer...shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."). In this way, the court can

make a fully informed decision whether, in light of the lawyer's agreement to accept a reduced fee from the client, it is appropriate to grant the application.

Because it is not within the Committee's jurisdiction to consider questions of law, we do not opine on whether the proposed retainer agreement comports with the requirements of Part 1400 of the Rules of the Appellate Divisions governing fees in domestic relations cases.

CONCLUSION

A lawyer who has agreed to represent a low or moderate income individual in a matrimonial action for a reduced fee may include in the retainer a provision contemplating an application to the court for counsel fees from the client's spouse at the lawyer's customary rate, provided that in the making of an application, the lawyer informs the court of the terms under which the lawyer has accepted the engagement.

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