

Flat Fee Retainers in Domestic Relations Matters
By Chris McDonough and Joel R. Brandes

A potential client contacts you regarding an appeal from an unfavorable decision in his divorce case. After you provide him with a statement of client's rights and have a consultation with him, you advise him of your retainer and usual hourly rate. The consultation ends with him telling you he has to think about it and will get back to you. A week later he calls you and asks you to quote him a flat fee for handling the appeal. Business has been slow due to the pandemic and you agree, giving him a flat fee quote for handling his matter to conclusion. You modify your usual retainer agreement to reflect it is a flat fee, but before sending him the retainer agreement you have second thoughts. Can I do this without violating the Rules of Professional Conduct ("RPC")(22 NYCRR Part 1200) or the Procedures for Attorneys in Domestic Relations Matters ("Part 1400")(22 NYCRR Part 1400)? You research both sets of Rules, and run a google search for "flat fee matrimonial retainer agreements in New York." Your initial review leaves you concerned that flat fee retainers may not be allowed in matrimonial matters, yet many lawyers are offering flat fees for uncontested divorces and other family law services. Are they violating the Rules?

The Rules

The Procedures for Attorneys in Domestic Relations Matters apply to all attorneys who 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. (22 NYCRR 1400.1) These rules are in addition to the RPC (22 NYCRR Part 1200).

Part 1400 requires that an attorney who undertakes to represent a party in a matrimonial matter and enters into an arrangement for, charges or collects any fee from a client must execute a written agreement with the client. It must set forth in plain language the terms of compensation and the nature of services to be rendered. The agreement must include, pertinent to our discussion, the following information: "Hourly rate of each person whose time may be charged to the client" (22 NYCRR 1400.3, par. 7); and "Frequency of itemized billing, which shall be at least every 60 days"; (22 NYCRR 1400.3, par. 9).

It is this last section of Part 1400 that concerns you. In the usual case where there is a flat/minimum fee, there are no hourly rates and no bills or invoices are issued. Do flat fee retainer agreements in matrimonial matters violate Part 1400 or the RPC?

Not all of the Part 1400 requirements are also contained in the RPC. Only 22 NYCRR 1400.2, 1400.4, 1400.5, and 1400.7 have reciprocal rules in the RPC. The

RPC deal with legal fees in Rule 1.5, but do not have a reciprocal rule as detailed as 1400.3.

In pertinent part, RPC 1.5(d) states:

A lawyer shall not enter into an arrangement for, charge or collect: ...

(2) a fee prohibited by law or rule of court; ...

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; (see 22 NYCRR 1400.4) or

5) any fee in a domestic relations matter if: ...

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement (see Preamble to 22 NYCRR 1400.3).

The only similarity between 22 NYCRR 1400.3, which lists 13 provisions that must be in a retainer agreement for a fee paying matrimonial client, and RPC 1.5(d)(5)(ii) is the language of 22 NYCRR 1400.3, which requires a written agreement with the client that sets forth in plain language the terms of compensation and the nature of services to be rendered. There are no additional mandatory retainer agreement provisions in RPC 1.5(d)(5)(ii).

22 NYCRR 1400.2 has its corollary in RPC Rule 1.5 (e) which states that in domestic relations matters, 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.

Thus, the question becomes: Is a flat fee agreement prohibited by Part 1400, and thus a violation of RPC 1.5(d)(2) as "an arrangement for ...a fee *prohibited by law or rule of court?*"

Looking at Rule 1400.4 and RPC Rule 1.5 (d)(4) together, they do not prohibit a minimum fee retainer as long as it is reasonable, defines the terms in plain language, and sets forth the circumstances under which such fee may be incurred and how it will be calculated.

Yet, Rule 1400.3 specifically demands that the written retainer agreement set forth the hourly rate of each person whose time may be charged to the client (22 NYCRR 1400.3, par. 7); and the frequency of itemized billing, which shall be at least every 60 days (22 NYCRR 1400.3, par. 9).

Impact of non-compliance with Part 1400

The failure to provide the client with a written retainer agreement is a complete bar to recovery of a fee from the client. (Morrison Cohen Singer & Weinstein, LLP v.

Brophy, 19 A.D.3d 161, 798 N.Y.S.2d 379 (1 Dept., 2005)). This failure is a violation of both Part 1400.3 and RPC 1.5(d).

However, is the failure to include in a flat fee retainer the hourly rate of each person whose time may be charged and to submit itemized billing no less than every 60 days a violation of the rules – which can preclude the attorney from his fee? Additionally, is such failure a violation of the RPC that may result in professional discipline?

Where there has been “substantial compliance” with the matrimonial rules, an attorney may be allowed to recover the fees owed to him by his client for services rendered, but not yet paid. In *Flanagan v Flanagan*, (267 A.D.2d 80, 699 N.Y.S.2d 406 (1st Dept., 1999)) although the respondent-attorney did not fully comply with the mandates of 22 NYCRR 1400.2 and 1400.3, which, respectively, require that counsel provide prospective clients with a statement of client’s rights and that specified provisions be included in retainer agreements, there was substantial compliance with those requirements, and defendant waived her right to arbitration of the attorneys’ fees. It was held that this, along with the fact that counsel rendered substantial services and achieved reasonably favorable results, should entitle him to a reasonable fee.

Moreover, substantial compliance with 22 NYCRR 1400.3 may also allow recovery of a fee from an adversary spouse under Domestic Relations Law §237. *Mulcahy v Mulcahy*, 285 A.D.2d 587, 728 N.Y.S.2d 90 (2 Dept., 2001).

The failure to “substantially comply” with the rule requiring periodic billing statements at least every 60 days (Part 1400.3[9]) will preclude an award of counsel fees to an attorney from his client or the spouse. *Greco v. Greco*, 161 A.D.3d 950, 77 N.Y.S.3d 160 (2d Dep’t., 2018). In *Greco*, supra, following the conclusion of the trial on financial issues, the defendant moved for awards of counsel fees from the adversary spouse. The Appellate Division reversed as to one attorney. It held that the failure to substantially comply with the rules will preclude an attorney’s recovery of a fee from his or her client or from the adversary spouse. Specifically, the court found that the lawyer failed to substantially comply with the rules requiring periodic billing statements at least every 60 days (citing *see* 22 NYCRR 1400.3 [9]) and reversed the award of fees. In *Wagman v. Wagman*, (8 A.D.3d 263, 777 N.Y.S.2d 678 (2d Dept., 2004)) the motion for an award of counsel fees from an adversary spouse also was denied for, among other things, not sending the client invoices every 60 days.

Where there is noncompliance with 22 NYCRR 1400.3, a court need not direct the return of a retainer fee already paid for properly earned services (*see*, *Markard v Markard*, 263 AD2d 470; *Mulcahy v Mulcahy*, 285 A.D.2d 587, 588, 728 N.Y.S.2d 90(2 Dept., 2001)). In *Markard* (supra) where the retainer agreement contained a waiver of itemized billing, the Appellate Division held that Supreme Court did not improvidently exercise its discretion by denying the plaintiff’s request for a refund of the retainer fee paid (citing, 22 NYCRR 1400.3, 1400.3 [9]). The courts have discretion to allow an attorney to keep fees already paid even where the retainer fails to comport with Part

1400.3. In Markard the discharge was by consent and was not for just cause, leaving the court to determine the value of the attorney's services on a quantum meruit basis.

Do flat fees in matrimonial cases violate the Rules of Professional Conduct?

As stated, in customary flat / minimum fee arrangements there is no hourly rate and no itemized billing requirement. Does the failure to include these details as mandated by Part 1400 render the fee a “fee prohibited by law or rule of court” and therefore a disciplinary violation under RPC 1.5(d)(2)?

It appears to us that the 13 required retainer provisions in 22 NYCRR 1400.3 are not rules of professional conduct enforceable under the RPC - without more.

The rules in Part 1400 are joint rules of the Appellate Divisions and contain no penalty language in the event of attorney noncompliance, although there can be enforcement of most of them through the specific Disciplinary Rules of the RPC which we have discussed. As far as we can tell none of the legal fee cases involving 22 NYCRR 1400.3 determine that the failure to insert the required retainer provisions is also a violation of the RPC. It appears to us that a matrimonial retainer agreement that does not specify the usual hourly rate of the attorneys, and provide for itemized billing is not “a fee prohibited by law or rule of court” and therefore does not violate Rule 1.5 (d)(2) of the RPC.

Our conclusion is supported by Matter of Kornaker (171 A.D.3d 176, 96 N.Y.S.3d 451 (4th Dept, 2019)) where the court found the attorney in violation of several sections of the RPC and Rule 1400.3 without holding that the Part 1400 violation also violated the RPC. It stated: “We conclude that respondent has violated the following Rules of Professional Conduct (22 NYCRR 1200.0)...: rule 1.3 (a)—failing to act with reasonable diligence and promptness in representing a client; We also conclude that respondent has violated 22 NYCRR 1400.3 by failing to provide to a client in a domestic relations matter a written retainer agreement setting forth in plain language the terms of compensation and nature of services to be rendered and providing for itemized billing statements to be sent to the client at least every 60 days.” (To the same effect see Sanchez v Grievance Committee of Fifth Judicial District, 174 A.D.3d 140, 103 N.Y.S.3d 234 (4 Dept., 2019)).

Conclusion

We do not believe the Appellate Divisions intended to promulgate disciplinary rules that prohibit flat fee retainers in matrimonial matters, especially considering their utility and common usage in uncontested divorces and family court matters, nor do we believe them to be in violation of either Part 1400 or the RPC. We call upon the Judiciary to clarify the rules regarding flat fee retainers in matrimonial matters to address the friction between the rules.

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