

Professional Conduct for Family Law Attorneys

By Joel R. Brandes¹

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¹ Joel R. Brandes, a member of the New York Bar, practices law in New York City and lives in Fort Lauderdale, Florida. He is the author of the treatise *Law and the Family New York*, 2d (6 volumes), *Law and The Family New York*, 2d Revised (9 volumes), *Law and the Family New York Forms* (5 volumes), and *Law and the Family New York Forms 2019 Edition*. (Thomson Reuters) and *The New York Matrimonial Trial Handbook* (Bookbaby). He writes and publishes *Bits and Bytes*,™ a bi-monthly electronic newsletter, a website, *New York Divorce and Family Law* (www.nysdivorce.com), and two blogs, “*New York Divorce and Family Law*” (<https://brandeslaw.blogspot.com/>) and “*A Child is Missing: The International Child Abduction Blog*”(<https://joelbrandes.blogspot.com/>). Mr. Brandes was counsel in the landmark Court of Appeals cases of *Morone v Morone*, *Tucker v Tucker* and *McSparron v McSparron*, and has more than 120 reported New York trial or appellate decisions. He earned his J.D. at Brooklyn Law School and his LL.M. at New York University.

Rules of Professional Conduct -- In general

Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses-- Special rules for lawyers in domestic relations matters

Rule 1.5 (d) specifies certain kinds of circumstances in which a lawyer is prohibited from charging a fee. Subdivisions (d) (4) and (5) apply only to domestic relations matters. "Domestic relations matter" denotes 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 in 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.¹ The definition of "domestic relations matter" is identical to the one that appears in ▶22 NYCRR Part 1400.1.²

Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses-- Nonrefundable fee and minimum fee

A lawyer may not enter into an arrangement for, charge or collect a nonrefundable retainer fee.¹ However, 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.² provides: "Reasonable," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.³

¹▶ 22 NYCRR Part 1200, Rule 1.0(g).

²▶ 22 NYCRR 1400.1 provides:

▶ This Part shall apply to all attorneys who, on or after November 30, 1993, 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. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where a client is other than a minor, the provisions of section 1400.2 of this Part shall apply to the extent they are not applicable to compensation.

¹▶ 22 NYCRR Part 1200, Rule 1.5(d)(4).

²▶ 22 NYCRR Part 1200, Rule 1.5(d)(4).

³▶ 22 NYCRR Part 1200, Rule 1.0(q).

Rule 1.5 (d) (4) compliments ▶ 22 NYCRR 1400.4⁴ and is in accord with the former rule in New York which prohibited nonrefundable retainer fees.⁵

Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses-- Contingent fee

Rule 1.5 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.¹ The term “Domestic relations matter” denotes 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 in 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.²

This rule prohibits an attorney from entering into an agreement for a contingent fee for collection of an award of postjudgment balances due under support, alimony or other financial orders.³

⁴▶ Section 1400.4. provides:

▶ Section 1400.4. Nonrefundable retainer fee. An attorney shall not enter into an arrangement for, charge or collect a nonrefundable retainer fee from a client. An attorney may enter into a “minimum fee” arrangement with a client that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

⁵▶ In ▶ Matter of Cooperman, 187 A.D.2d 56, 591 N.Y.S.2d 855 (2d Dep't 1993), order aff'd, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (1994), the Second Department held that that the use of a “non-refundable fee” retainer was unethical and violative of an attorney’s obligation to refund any unearned fees upon discharge by his client. This retainer was not a “minimum fee agreement” which forecasts the minimum amount a client can expect to pay, and under which an attorney can expect to be paid in quantum meruit if discharged before completion. The continued use of these agreements, after repeated cautioning, warranted a two-year suspension from practicing law. It ordered that the Respondent be suspended from practicing law for a two-year period. The Court of Appeals granted leave to appeal (▶ Matter of Cooperman, 82 N.Y.2d 745, 602 N.Y.S.2d 798, 622 N.E.2d 299 (1993)) and affirmed holding that special non-refundable retainer fee agreements are prohibited and unacceptable and may subject an attorney to professional discipline.

¹▶▶ 22 NYCRR Part 1200, Rule 1.5(d)(5)(i).

²▶▶ 22 NYCRR Part 1200, Rule 1.0(g).

³▶▶ Comment [6] to Rule 1.5, New York State Bar Association, Rules of Professional Conduct, as amended through January 1, 2018 states: [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision also precludes a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. See Rule 1.0(g) (defining “domestic relations matter” to

The former rule in New York, which was enunciated in ▶22 NYCRR 1200.11 [▶DRL 2-106], which is identical to the new rule. It provided, in part, that: “C. A lawyer shall not enter into an agreement for, charge or collect: ... (2) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of maintenance, support, equitable distribution, or property settlement; ...” Although the former New York rule did not prohibit an attorney from entering into an agreement for a reasonable contingent fee for collection of an award of past due maintenance and a distributive award under a final judgment of divorce the Second Department held in an action by a law firm to collect a legal fee from a former client, that the better rule was that all contingency fees were prohibited in matrimonial matters.⁴

In accord with the Second Department's holding in *Ross v. DiLorenzo*,⁵

include an action to enforce such a judgment).

New York State Bar Association, Committee on Professional Ethics, Opinion 747 has opined that a lawyer may not enter into an arrangement for, charge or collect a contingent fee in a post-divorce action to collect unpaid maintenance, child support and/or alimony under a final judgment previously entered.

⁴ ▶ *Ross v. DeLorenzo*, 28 A.D.3d 631, 813 N.Y.S.2d 756 (2d Dep't 2006).

⁵ ▶ *id.*

In ▶ *Medina v. Richard A. Kraslow, P.C.*, 149 A.D.3d 928, 53 N.Y.S.3d 116 (2d Dep't 2017) the plaintiff retained the defendant herein to represent her in the postjudgment matters relating to her divorce. They entered into a retainer agreement under which the plaintiff paid a minimum fee of \$10,000 and agreed to pay a 25% contingency fee of all amounts recovered. The defendant negotiated an enforcement stipulation, and retained \$163,750 representing 25% of all but \$25,000 of the cash and retirement funds that the plaintiff recovered under that enforcement stipulation. The plaintiff subsequently commenced an action, alleging that the defendant violated ▶ rule 1.5 of the Rules of Professional Conduct (▶22 NYCRR 1200.0) and ▶22 NYCRR part 1400. The Appellate Division held that plaintiff should have been granted summary judgment on the issue of liability but not damages. It found that plaintiff demonstrated, *prima facie*, through the submission of the parties' retainer agreement, that the defendant charged her a contingency fee in violation of ▶ rule 1.5(d)(5)(i) of the Rules of Professional Conduct (▶22 NYCRR 1200.0). Because the defendant's fee was to be “determined by reference to the amount of ... equitable distribution” in the form of the money judgment and subsequent enforcement stipulation, the retainer agreement violated ▶ rule 1.5(d)(5)(i) of the Rules of Professional Conduct (▶22 NYCRR §1200.0). The enforcement of an equitable distribution award reduced to a money judgment is not exempt from rule 1.5(d)(5)(i) (see [▶22 NYCRR 1200.0] rules 1.5 comment [6]; NY St Bar Assn Comm on Prof Ethics Op 747; Simon's New York Rules of Professional Conduct Annotated, at 202 [2016]). The plaintiff also demonstrated *prima facie* that the defendant violated the rules set forth in ▶22 NYCRR 1400.3. In that respect, 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 (▶22 NYCRR 1400.3). Additionally, the plaintiff did not receive itemized bills from the defendant (see *id.*). The Appellate Division also held that plaintiff did not, however, demonstrate her *prima facie* entitlement to judgment as a matter of law on the issue of damages. Although the retainer agreement did not substantially comply with ▶22 NYCRR 1400.3 and was “unenforceable as violative of public policy” because of the improper contingency fee, the plaintiff was not automatically entitled to a full refund of the money paid to

New York continues to prohibit an attorney from entering into an agreement for a reasonable contingent fee for collection of an award of postjudgment balances due under support, alimony or other financial orders.

Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses-- Requirement of written retainer

In domestic relations matters¹ a lawyer may not enter into an arrangement for, charge or collect any fee if a written² 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.³ This rule compliments ▶22 NYCRR 1400.3 which requires written retainer agreements in domestic relations matters.⁴

the defendant. Despite the improper contingency fee, the defendant could recover for “the reasonable value of its services” under a theory of quantum meruit, and despite the noncompliance with ▶22 NYCRR 1400.3, the defendant could retain properly earned fees that the plaintiff had already paid.

¹▶ The term “Domestic relations matter” denotes 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 in 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. ▶22 NYCRR Part 1200, Rule 1.0(g).

²▶ ▶22 NYCRR Part 1200, Rule 1.0(x) provides: “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

³▶ ▶22 NYCRR Part 1200, Rule 1.5(d)(5)(ii).

⁴▶ ▶22 NYCRR 1400.3 provides:

Section 1400.3. Written retainer agreement

An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth. Where substitution of counsel occurs after the filing of the net worth statement, a signed copy of the attorney’s retainer agreement shall be filed with the court within 10 days of its execution. A copy of a signed amendment shall be filed within 15 days of signing. A duplicate copy of the filed agreement and any amendment shall be provided to the client. The agreement shall be subject to the provisions governing confidentiality contained in ▶Domestic Relations Law, section 235(1). The agreement shall contain the following information:

RETAINER AGREEMENT

1. Names and addresses of the parties entering into the agreement;
2. Nature of the services to be rendered;
3. Amount of the advance retainer, if any, and what it is intended to cover;
4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer,

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 prior to the signing of a written retainer agreement.⁵ This rule compliments ▶22 NYCRR 1400.2 which prescribes the contents of the Statement of Clients Rights in domestic relations matters.⁶

the written retainer agreement shall provide how the attorney's fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client;

5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;
6. How the attorney will be paid through the conclusion of the case after the retainer is depleted; whether the client may be asked to pay another lump sum;
7. Hourly rate of each person whose time may be charged to the client; any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect;
8. Any clause providing for a fee in addition to the agreed-upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.
9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received;
10. Client's right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case;
11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary;
12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court;
13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

⁵▶▶22 NYCRR Part 1200, Rule 1.5(e).

⁶▶ By Joint orders, effective February 15, 2019, and June 1, 2019, the Judicial Departments of the Appellate Division amended the rule regarding the Statement of Client's Rights and Responsibilities set forth in section 1400.2 of Part 1400 of Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York.

The amended Rule provides as follows:

Section 1400.2. Statement of client's rights and responsibilities

An attorney shall provide a prospective client with a statement of client's rights and responsibilities in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement. If the attorney is not being paid a fee from the client for the work to be performed on the particular case, the attorney may delete from the statement those provisions dealing with fees. The attorney shall obtain a signed acknowledgment of receipt from the client. The statement shall contain the following:

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

An attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and the attorney, please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled once you retain the attorney, you are responsible to ask your attorney. Your attorney should be readily available to represent your best interests and to keep you informed about your case. An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that you reveal in the course of the relationship, to the extent permitted by law. You are responsible to communicate honestly, civilly and respectfully with your attorney.

If you are hiring an attorney you and your attorney are required to sign a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. Before you sign the retainer agreement, you are responsible to read it and ask the attorney any questions you have before you sign it. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract. The retainer fee you pay to the attorney, as is written in the retainer agreement, may not be enough money to pay for all the time that the attorney works on your case.

You may refuse to enter into any fee arrangement that you find unsatisfactory.

An attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained.

An attorney may not request a retainer fee that is nonrefundable. That is, should you discharge the attorney, or should the attorney withdraw from the case with Court permission, before the retainer has been used up, the attorney is entitled to be paid commensurate with the work performed on your case and any expenses. The attorney must return to you any balance of the retainer that has not been used. However, the attorney may enter into a minimum fee arrangement with you that provides for the payment of a specific amount below which the fee will not fall based upon the attorney's handling of the case to its conclusion.

You are entitled to know the approximate number of attorneys and other legal staff members who will be working on your case at any given time and what you will be charged for the services of each.

You are entitled to know in advance how you will be asked to pay legal fees and expenses, and how the retainer, if any, will be spent.

You may be responsible at the beginning of the case or before or after the trial to contribute to or pay the other party's attorney's fees and other costs if the Court has ordered you to do so.

The other party may be responsible to contribute to or to pay your attorney's fees, if the Court orders the other party to do so. However, if the other party fails to pay the Court ordered fee, you are still responsible for the fees owed to your attorney and experts in your case.

You are required to pay for court filing fees, process servers as well as fees for expert reports, testimony, depositions and/or trial testimony and you may seek reimbursement from the other party.

If you engage in conduct which is found to be frivolous or meant to intentionally delay the case you could be fined or sanctioned and/or responsible for additional fees.

At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case. That estimate shall be made in good faith but may be subject to change due to facts and circumstances that develop during your case. There are no guarantees that the cost of your case will be as originally estimated.

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

You are expected to review the itemized bills sent to you by your attorney, and to raise any objections or errors in a timely manner in writing. Time spent in discussion or explanation of bills will not be charged to you.

You are responsible to be honest and truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable her or him to competently prepare your

case. Attorneys and clients must make reasonable efforts to maintain open communication during business hours throughout the representation. An attorney may seek to be relieved as your attorney if you are not honest and truthful with her or him.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

Your attorney is required to discuss the following with you: a) the automatic orders that are in effect once either party files a summons with notice; b) the law that provides for the financial support of the children, the Child Support Standards Act, if you and the other party have children under the age of twenty-one; and c) the law that provides for the financial support of the parties, the Maintenance Guidelines Statute.

You are responsible to be present and on time in court at the time that conferences, oral arguments, hearings and trials are conducted unless excused by the Judge or the part rules of the assigned Judge.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case. Your attorney has the right to send you written communications if your attorney disagrees with how you want your case handled.

Your attorney's written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. If an action or proceeding is pending, the court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment. In some cases your attorney may exercise a "retaining lien" which, subject to Court proceedings, may allow them to keep your file as security.

You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to pay for legal fees. Your attorney's written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney's security interest in the marital residence cannot be foreclosed against you.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

Once your Judgment of Divorce is signed, if you are re-retaining an attorney you must sign a new retainer agreement.

If you are expecting your attorney to prepare and file documents related to the transfer of a house, co-op or lease, that must be specified in the retainer agreement. The signing of an agreement or Court order that transfers title does not transfer a co-op apartment or a house. A separate document must be prepared and filed.

In the event of a fee dispute, you may have the right to seek arbitration pursuant to Part 137 of the Rules of the Chief Administrative Judge where the dispute involves a sum of more than \$1,000.00 or less than \$50,000.00 unless you agree otherwise. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:

Attorney's signature
Client's signature
Date Form 1400.2-1(2/19)

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

(To be used only when representation is without fee)

An attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and the attorney, please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled once you retain the attorney, you are responsible to ask your attorney. Your attorney should be readily available to represent your best interests and to keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that you reveal in the course of the relationship to the extent permitted by law. You are responsible to communicate honestly, civilly and respectfully with your attorney.

Even though you are being represented by an attorney without fee, you may be responsible at the beginning of the case or before or after the trial to contribute to or pay the other party's attorney's fees and other costs if the Court has ordered you to do so.

Even though you are being represented by an attorney without fee, the other party may be responsible to contribute to or to pay your attorney's or expert fees in your case, if the Court orders the other party to do so.

You may be required to pay for court filing fees, process servers as well as fees for expert reports, testimony, depositions and/or trial testimony and you may seek reimbursement from the other party. The attorney will discuss this with you.

If you engage in conduct which is found to be frivolous or meant to intentionally delay the case you could be fined or sanctioned and/or responsible for additional fees.

You are responsible to be honest and truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable her or him to competently prepare your case. Attorneys and clients must make reasonable efforts to maintain open communication during business hours throughout the representation. An attorney may seek to be relieved as your attorney if you are not honest and truthful with her or him.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

Your attorney is required to discuss the following with you: a) the automatic orders that are in effect once either party files a summons with notice; b) the law that provides for the financial support of the children, the Child Support Standards Act, if you and the other party have children under the age of twenty-one; and c) the law that provides for the financial support of the parties, the Maintenance Guidelines Statute.

You are responsible to be present and on time in court at the time that conferences, oral arguments, hearings and trials are conducted unless excused by the Judge or the part rules of the assigned Judge.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case. Your attorney has the right to send you written communications if your attorney disagrees with how you want your case handled.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

If you are expecting your attorney to prepare and file documents related to the transfer of a house, co-op or lease, you may have to make arrangements with another attorney to do so, and if the attorney charges you a fee, you must sign a retainer agreement with the other attorney. The

**Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses--
Security interest, confession of judgment or lien**

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 approval from a tribunal² after notice to the adversary.³ This rule compliments ▶22 NYCRR 1400.5(a).⁴

**Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses--
Prohibition of foreclosure of mortgage**

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.² This rule compliments ▶22 NYCRR 1400.5 (b).³

_____ signing of an agreement or Court order that transfers title does not transfer a co-op apartment or a house. A separate document must be prepared and filed.

Receipt Acknowledged:

_____ Attorney's signature
Client's signature
Date Form 1400.2-2(6/19)

²▶ ▶22 NYCRR Part 1200, Rule 1.0(w) provides: "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

³▶

▶22 NYCRR Part 1200, Rule 1.5(d)(5)(ii).

⁴▶ ▶22 NYCRR 1400.5 (a) provides:

Section 1400.5. Security interests

(a) An attorney may obtain a confession of judgment or promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee only where:

1. the retainer agreement provides that a security interest may be sought;
2. notice of an application for a security interest has been given to the other spouse; and
3. the court grants approval for the security interest after submission of an application for counsel fees.

²▶ ▶22 NYCRR Part 1200, Rule 1.5(d)(5)(iii).

³▶▶22 NYCRR 1400.5 (b) provides:

▶(b) Notwithstanding the provisions of subdivision (a) of this section, an attorney shall 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.

**Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses--
Arbitration of fee disputes**

Where applicable, a lawyer must resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.¹ This rule compliments ▶22 NYCRR 1400.7.²

Rule 1.5-- Fees and division of fees-- Illegal or excessive fees or expenses

Rule 1.5, entitled “fees and division of fees,” prohibits a lawyer from charging an illegal or excessive legal fee or expense. It provides that a lawyer “shall not make an agreement for, charge, or collect an excessive or illegal fee or expense.”¹ A fee is excessive when, after a review of the facts, a reasonable lawyer² would be left with a definite and firm conviction that the fee is excessive.³

¹▶▶22 NYCRR Part 1200, Rule 1.5(f).

²▶▶22 NYCRR 1400.7 provides:
Section 1400.7. Fee arbitration

In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration pursuant to a fee arbitration program established and operated by the Chief Administrator of the Courts and subject to the approval of the justices of the Appellate Divisions. See ▶22 NYCRR Part 137 which establishes the New York State Fee Dispute Resolution Program.

¹▶

▶22 NYCRR Part 1200, Rule 1.5(a).

New York State Bar Association, Committee on Professional Ethics, Opinion 910 has opined that in a matrimonial matter, the likelihood of nonpayment of the legal fee does not alone justify charging a multiple of the Firm’s normal hourly rates. A law firm in a matrimonial matter may obtain one or more confessions of judgment from the client for legal fees already earned provided that the lawyer has explained the character of the confession of judgment and the effect on the client’s credit standing, and the firm may obtain a statutory or contractual security interest in property of the client to secure legal fees and expenses. In either case, the confession of judgment or security interest must be provided for in a written retainer agreement signed by the client and must be approved by the tribunal after notice to the adversary. A lawyer may request a client to amend a retainer agreement. Whether such an amendment must meet the requirements for fee agreements under Rule 1.5 or for business transactions between the lawyer and client under Rule 1.8(i) depends on the circumstances in which the amendment is requested and the nature of the amendment. Any amendment of a retainer agreement in a matrimonial matter must comply with Rule 1.5(d)(5) and applicable court rule.

²▶▶22 NYCRR Part 1200, Rule 1.0(q) provides that “Reasonable” when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

³▶▶22 NYCRR Part 1200, Rule 1.5(a).

Rule 1.5 contains a list of factors to be considered when determining if a fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

- ▶ 1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
- 2. the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
- 3. the fee customarily charged in the locality for similar legal services;**
- 4. the amount involved and the results obtained;**
- 5. the time limitations imposed by the client or by circumstances;**
- 6. the nature and length of the professional relationship with the client;**
- 7. the experience, reputation and ability of the lawyer or lawyers performing the services; and**
- 8. whether the fee is fixed or contingent.**

Rule 1.5 requires that lawyer's charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Rule 1.5 also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.⁴

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.⁵

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.⁶

⁴▶ See ▶ Comment [1] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007.

⁵▶ See ▶ Comment [4] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007.

⁶▶ See ▶ Comment [5] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007.

Rule 1.8-- Current clients: specific conflict of interest rules-- Compensation from third persons for representing a client

Matrimonial lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person is usually a relative or friend. Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.³

A lawyer may not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless the client gives informed consent;¹ there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and the client's confidential information is protected as required by Rule 1.6.²

Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7.⁴ The lawyer must also

³ See ▶ Comment [11] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007. See also ▶ 22 NYCRR Part 1200, Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

¹ "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives. ▶ 22 NYCRR Part 1200, Rule 1.0(j).

² ▶ 22 NYCRR Part 1200, Rule 1.8(f).

⁴ ▶ 2 NYCRR Part 1200, Rule 1.7 provides:
Rule 1.7: Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

1. the representation will involve the lawyer in representing differing interests; or
2. there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- i. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- ii. the representation is not prohibited by law;

conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.⁵

Rule 1.8-- Current clients: specific conflict of interest rules-- Sexual relations with client

A lawyer may not in domestic relations matters, enter into sexual relations² with a client during the course of the lawyer's representation of the client.³ This rule does not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.⁴

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement

iii. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

⁵▶ See ▶ Comment [12] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007.

²▶ Sexual relations” denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse. ▶22 NYCRR Part 1200, Rule 1.0(u).

³▶ ▶22 NYCRR Part 1200, Rule 1.8(j)(1)(iii).

⁴▶ ▶22 NYCRR Part 1200, Rule 1.8(j)(2).

renders it unlikely that the client could give adequate informed consent, Rule 1.8 prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.⁵

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.⁶

The prohibitions in paragraph (j)(1) apply to all lawyers in a firm who know of the representation, whether or not they are personally representing the client. The Rule prohibits any lawyer in the firm from exploiting the client-lawyer relationship by directly or indirectly requiring or demanding sexual relations as a condition of representation by the lawyer or the lawyer's firm. Paragraph (j)(1)(i) thus seeks to prevent a situation where a client may fear that a willingness or unwillingness to have sexual relations with a lawyer in the firm may have an impact on the representation, or even on the firm's willingness to represent or continue representing the client. The Rule also prohibits the use of coercion, undue influence or intimidation to obtain sexual relations with a person known to that lawyer to be a client or a prospective client of the firm. Paragraph (j)(1)(ii) thus seeks to prevent a lawyer from exploiting the professional relationship between the client and the lawyer's firm. Even if a lawyer does not know that the firm represents a person, the lawyer's use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law. Where the representation of the client involves a domestic relations matter, the restrictions stated in paragraphs (j)(1)(i) and (j)(1)(ii), and not the per se prohibition imposed by paragraph (j)(1)(iii), apply to lawyers in a firm who know of the representation but who are not personally representing the client. Nevertheless, because domestic relations matters may be volatile and may entail a heightened risk of exploitation of the client, the risk that a sexual relationship with a client of the firm may result in a violation of other Rules is likewise heightened, even if the sexual relations are not per se prohibited by paragraph (j).⁷

⁵ See ▶ Comment [17] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007.

⁶ See ▶ Comment [18] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007. See Rule 1.7(a)(2).

⁷ ▶ New York State Bar Association, Rules of Professional Conduct, as amended through January 1, 2018, Rule 1.8, Comment [17A].