THE MATRIMONIAL RULES

QUESTIONS AND ANSWERS

I. RULES GOVERNING CONDUCT

1. Applicability:

Q: Do the rules regarding attorney conduct apply to simple support matters before Family Court Hearing Examiners?

A: Yes, the rules apply to all actions or proceedings in either Supreme Court or Family Court, or any court of appellate jurisdiction wherein the issues of divorce, separation, annulment, custody, visitation, maintenance, child support or alimony are involved. [22 NYCRR § 1400.1]

Q: Do the rules apply to the representation of a client with respect to the negotiation of a Separation Agreement?

A: Yes, for the most part. The rules pertaining to the Statement of Client's Rights and Responsibilities [22 NYCRR § 1400.2; § 1200.10-a]; the written Retainer Agreement [§ 1400.3; § 1200.11(c)(2)(ii)]; security interests [§ 1400.5; § 1200.11(c)(2)(iii)]; the prohibition against beginning a sexual relationship with a client [§ 1200.3(a)(7)]; and fee arbitration [§ 1400.7; § 136] pertain to any "representation" of a client by an attorney in "Domestic Relations matters" in general. Moreover, good practice and the probability of recourse to Court upon reaching an impasse in negotiations would make adherence with the rules advisable from the outset of the attorney-client relationship.

2. Statement of Client's Rights and Responsibilities:

Q: What is a Statement of Client's Rights and Responsibilities?

A: The Statement of Client's Rights and Responsibilities is a form explaining in detail what the client should expect during the course of a matrimonial action, including both the objectives of the attorney and the client. The content of the Statement of Client's Rights and Responsibilities is expressly set forth in the text of the rules themselves [22 NYCRR § 1400.2], as well as in a mandated, one-page form published by the Unified Court System of the State of New York. [See Appendix A]

Q: When must an attorney give the client the Statement of Client's Rights and Responsibilities?

A: The client must receive the Statement of Client's Rights and Responsibilities at the time of the initial conference and before the signing of the Retainer Agreement. An acknowledgment of the client's receipt of the Statement of Client's Rights and Responsibilities, signed by the client, must be obtained by the attorney. [22 NYCRR § 1400.2; § 1200.10-a]

3. Retainer Agreement:

Q: Must the attorney have a written Retainer Agreement with the client?

A: Yes, if there is any arrangement for, charge, or intent to collect a fee for services to be rendered to the client. In the case of Pro Bono representation or institutional representation wherein a fee is not to be charged, the Retainer Agreement is not required, and the clauses pertaining to attorney's fees in the Statement of Client's Rights and Responsibilities may be redacted from that statement before it is given to the client. [§1400.1 and 1400.2]

Q: What must the Retainer Agreement contain?

A: The rules set forth 13 specific areas which must be explained and addressed in the Retainer Agreement. While the text of the Retainer Agreement is not mandated as with the Statement of Client's Rights and Responsibilities, the rules require that the terms of compensation and nature of services to be rendered be set forth in "plain language." [See Appendix B]

Q: Must an attorney's Retainer Agreement always include language concerning all 13 subjects set forth in the rules?

A: Yes, if those subjects are in any way relevant to the retention. However, if one or more of these subjects do not pertain to the representation, they need not be included.

Q: Must an attorney's Retainer Agreement be limited to just the 13 subjects set forth in the rules?

A: No. The Agreement an attorney makes with a client may contain any provision which they negotiate, as long as the agreement does not violate the Code of Professional Responsibility or run afoul of certain special limitations applicable in matrimonial actions (e.g., those regarding security interests, non-refundable retainers, etc.).

Q: Is the Retainer Agreement to be filed?

A: The rules provide that a signed copy of the Retainer Agreement shall accompany the client's Net Worth Statement filed with the Court. The Net Worth Statement and Retainer Agreement must be filed in all matrimonial actions and proceedings in which alimony, maintenance or support is in issue. [FCA § 236 Part A(2)] It must be filed in the Court in which the action or proceeding is pending. The Retainer Agreement is then reviewed by the Court to assure its compliance with the rules. [§202.16(c)(1)]

Q: What is the scope of the Court's review of the Retainer Agreement?

A: The Court's review of the Retainer Agreement is to assure that the Agreement complies with the requirements set forth in the rules. [§1400.3]

4. Security Interest:

Q: Do the rules prohibit an attorney from taking a security interest in a client's real or personal property in order to secure the payment of my fees?

A: No. However, the rules do limit the use of certain security devices and regulate the manner in which a security interest may be obtained. [§202.16(c)(2) and §1200.11(c)(2)(C)]

Q: What is considered a security interest under the rules?

A: The rules apply when an attorney seeks to obtain a confession of judgment, promissory note, lien on real property, or a security interest to secure his or her fee. [§1200.11(c)(2)(C)]

Q: What does an attorney have to do to obtain a security interest during the course of his or her representation of the client?

A: The rules require the following:

(1) The client must be advised in the written Retainer Agreement whether, and under what circumstances, the attorney might seek a security interest.

(2) An application must be made to the Court, on notice to the adversary, for approval of the proposed

security interest.

(3) The Court may grant the application only after review of the parties' finances and on application for attorney's fee. [§ 1400.5]

Q: Is there any limitation upon the collection of attorney's fees via a court-approved security device?

A: Only if the secured property is the marital residence. While there are no limitations on the enforcement of other security interests, the rules provide that an attorney shall not foreclose upon 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. [§1200.11(c)(2)(C); §1400.5(b)]

5. Non-refundable Fee:

Q: Can an attorney charge the client a fee to retain his or her services which is not refundable if the client wishes to discontinue the action or retain another attorney?

A: No. The rules expressly prohibit non-refundable retainer fees or the charging of any fee beyond an agreed-upon hourly rate, which is not refundable in the event the attorney is discharged prior to the conclusion of the action. [§1200.11(c)(2)(B)]

See Also, Matter of Cooperman, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (1994).

Q: Do the rules prohibit an attorney from collecting a bonus, minimum fee or other fee beyond the hourly rate if the attorney concludes the matter for which he or she was retained?

A: No. The rules allow for minimum fee arrangements, provided the same are reasonable and are based upon the continuation of representation to the conclusion of the action or proceeding. In addition, the minimum fee arrangement must be explained in detail in the Retainer Agreement signed at the outset of the attorney-client relationship.

6. Fee Arbitration:

Q: In the event that the attorney has a dispute with the client regarding fees charged, must the attorney submit the dispute to arbitration?

A: The rules require that an attorney must submit a fee dispute to arbitration, at the election of the client. Furthermore, in the event of a fee dispute, the attorney is required to provide the client with the necessary information regarding arbitration.

Q: May an attorney require a client to submit a fee dispute to the arbitration process?

A: No. The rules only require the submission of a fee dispute to arbitration upon the election of the client. Therefore, the client has the option to refuse arbitration if he or she so desires.

Q: Are there specific rules governing the Fee Dispute Arbitration process?

A: Yes. The Rules of the Chief Administrator, Part 136 detail the rules governing the Fee Dispute Arbitration process. Also, an informational pamphlet like this one, explaining Fee Dispute Arbitration, is available through the office of the Administrative Judge for each District of the New York State Supreme Court.

II. RULES GOVERNING CASE MANAGEMENT

1. Application:

Q: Do the Case Management Rules apply to all matrimonial and family law matters?

A: No. The Case Management Rules apply only to contested actions and proceedings in the Supreme Court in which Statements of Net Worth are to be filed pursuant to Domestic Relations Law §236 and in which a judicial determination is to be made with respect to counsel fees pendente lite, maintenance, custody and visitation, child support and/or the equitable distribution of property. This would also include those actions referred to Family Court by the Supreme Court pursuant to §464 of the Family Court Act. [22 NYCRR §202.16(a)]

2. Case Management Time Constraints:

Q: What are the rules supposed to accomplish with respect to case management?

A: The rules are intended to promote efficient, cost-effective resolution of matrimonial actions through early Court intervention.

Q: Through the requirement that the plaintiff either file a Request for Judicial Intervention (RJI) no later than 45 days from the date of service of the summons and complaint (or summons and notice) or no later than 120 days from the date of service if a notice of no necessity is filed with the Court. Whether the RJI is filed within 45 days or 120 days, the Court will schedule a preliminary conference within 45 days from the filing of the RJI. [§202.16(a)]

3. Certification of Documents:

Q: What is an attorney or self-represented litigant required to certify?

A: Pursuant to amendments to become effective on March 1, 1998, every pleading, written motion, and other paper served on another party or filed or submitted to the Court shall be signed by an attorney (or by a party if the party is not represented by an attorney) with the name of the attorney or party clearly printed or typed directly below the signature. By signing a paper, an attorney or party certified that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in subsection © of section 130-1.1, including that the substance of the factual statements therein is not false. [§130-1.1]

4. Preliminary Conference:

Q: How does a preliminary conference differ from a pre-trial conference?

A: Unlike a traditional pre-trial conference, which generally is scheduled after the filing of a Note of Issue and Statement of Readiness, the preliminary conference is designed to provide early court intervention, diminish motion practice, schedule discovery, and limit issues, so as to promote the expeditious conclusion of matrimonial actions. [§202.16(f)]

Q: Does an attorney schedule a preliminary conference?

A: No. It is not the attorney's responsibility to schedule the preliminary conference. The Court is required to schedule a preliminary conference within 45 days of the assignment of the case, which assignment is made upon the filing of a Request for Judicial Intervention. However, it is the attorney's responsibility to file the Request for Judicial Intervention.

Q: What notice is given of the preliminary conference date?

A: Preliminary conferences are scheduled by means of a preliminary conference order, which, in addition to setting the time and place of the conference, will also specify the papers to be provided to the Court, including the parties' Net Worth Statements. Statements of Net Worth are to be filed and exchanged by the parties no later than 10 days prior to the preliminary conference. In addition, the parties must provide the Court and opposing counsel with a copy of the Net Worth Statement at the time of the conference. [§202.16(f)(1)]

Q: Assuming the action cannot be settled at the preliminary conference, what do the rules require to be accomplished?

A: The rules provide that at the close of the preliminary conference, the Court "shall":

(1) Direct the parties to stipulate in writing or on the record as to all resolved issues, which the Court shall then "so order";

(2) Direct the parties to stipulate, in writing or on the record, as to all issues with respect to fault, custody and finances that remain unresolved;

(3) Fix a schedule for discovery as to all unresolved issues; and

(4) In a non-complex case, the Court must also schedule a date for trial not later than six months from the date of the conference. [§202.16(f)(3)]

Q: What else do the rules empower the Court to do at the preliminary conference?

A: The rules also provide that at the close of the preliminary conference, the Court shall schedule a compliance conference so as to enforce the directions made at the preliminary conference without the necessity of additional motion practice, unless the Court dispenses with the conference based upon a stipulation of compliance filed by the parties.

The Court also may:

(1) Grant pendente lite relief, including the award of interim attorney's fees;

(2) Appoint a Law Guardian or direct the parties to file with the Court a list of suitable law guardians for selection by the Court within 30 days of the conference; and

(3) Direct that a list of expert witnesses be filed within 30 days of the conference, from which the Court may select a neutral expert. [§202.16(f)(3)]

Q: If an issue is not identified as unresolved at the time of the preliminary conference, are the parties barred from ever raising it during the course of the action?

A: The rules do not completely preclude the subsequent assertion of such an issue, but they do provide that the issue may not be asserted absent a showing of "good cause."

Q: Must an attorney bring his or her client to the preliminary conference or compliance conference?

A: Both parties personally must be present in Court at the time of the preliminary conference. The parties also must be present in Court at the time of the compliance conference, but the Court may excuse their presence. If the parties are present in Court, the judge personally shall address them at some time during the conference. The level of contact between the parties and the judge may vary from case to case; the judge is not required to invite the parties to participate in the conference. Instead, the judge may address the parties briefly either before or after the conference.

5. Expert Witnesses:

Q: Do the rules change the procedure to be followed with regard to an expert witness whom a party expects to call at the time of trial?

A: Yes. The rules expand the disclosure requirements of CPLR §3101(d) and require the exchange and submission to the Court of a written report from each expert no later than 60 days before the date set for trial. Reply reports, if any, must be exchanged and submitted no later than 30 days before such date. [§202.16(g)]

Q: Are there any penalties for the failure to submit a report pursuant to the rules?

A: Yes. The Court may, in its discretion, preclude the use of an expert, and the rules specifically require that the late retention of experts and consequent late submission of reports shall only be permitted upon a showing of good cause. Furthermore, the reports exchanged between the parties shall be the only reports admissible at trial except for good cause shown. [§202.16(g)]

Q: Since the reports are to be filed with the Court, are they to be used differently from the disclosure previously available under CPLR§3101(d)?

A: Yes, within the Court's discretion. Pursuant to the rules, the Court has the discretion to permit the use of the written report as a substitute for direct testimony, where the reports are submitted by the expert under oath and the expert is present and available for cross-examination. More importantly, the Court has the discretion, in a proper case, to hold a party bound by an expert's report in his or her direct case.

6. Interim Counsel Fees:

Q: Do the rules require the granting of interim awards of counsel fees?

A: While the rules do not mandate the granting of interim attorney's fees, they do require an articulation of the reason and rationale of the Court's decision when an application for interim fees is denied or deferred. [§202.16(k)(7)]

III. DISCIPLINARY RULES OR COURT RULES

Q: Do these rules merely govern practice in the Courts or are there more far-reaching implications?

A: Some of the rules are incorporated into the Disciplinary Rules of the Code of Professional Conduct, and, as such, violation of the rule can subject an attorney to any disciplinary measure provided with respect to the violation of the Disciplinary Rules. For example, the prohibition against commencing a Sexual Relationship with a client during the course of representation appears only in the Disciplinary Rules. [§1200.3(7), (DR1-102)].

Other regulations incorporated into the Disciplinary Rules include:

1. Requirement of Client's Statement of Rights and Responsibilities (§1200.10-a; 1400.2).

2. Requirements regarding Retainer Agreements and security for fees (§1200.11(e) [DR2-106]; 1400.3;1400.4; 1400.5).

3. Submission to Fee Dispute Arbitration (§1200.11(e) [DR2-106]; 1400.7).

APPENDIX A

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

Your 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 your attorney please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled, do not hesitate to ask your attorney. He or she should be readily available to represent your best interests and 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 are revealed in the course of the relationship.

You are entitled to a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. 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.

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

Your 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.

Your attorney may not request a retainer fee that is nonrefundable. That is, should you discharge your attorney, or should your attorney withdraw from the case, before the retainer is used up, he or she is entitled to be paid commensurate with the work performed on your case and any expenses, but must return the balance of the retainer to you. However, your 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 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.

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, which estimate shall be made in good faith but may be subject to change due to facts and circumstances affecting the case.

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 by counsel, and to raise any objections or errors in a timely manner. Time spent in discussion or explanation of bills will not be charged to you.

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

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.

You have the right to be present in court at the time that conferences are held.

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'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.

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 cover 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.

In the event of a fee dispute, you may have the right to seek arbitration. 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

APPENDIX B

WRITTEN 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, 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, which is binding upon both attorney and client; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

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