

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 819 – 12/18/07

Topic: Settlement of fee arrangements and improper fee splitting.

Digest: A lawyer may agree with a client to accept less than the judicially-determined fee in a domestic relations matter, as long as doing so is not inconsistent with any statements the lawyer has made to a tribunal or any such inconsistent statements are corrected.

Code: DR 1-102(A)(4), DR 2-106(C)(2), DR 3-102(A), DR 7-102(A)(5), DR 9-102(C)(4).

QUESTION

1. After a court awards legal fees to a lawyer pursuant to section 237 of the Domestic Relations Law, none of which the other party has yet to pay to the lawyer, may the lawyer, as part of a settlement with the lawyer's own client, agree with the lawyer's client to accept less than the full award of legal fees and, in the event the responsible party later pays any part of the award, to reimburse the client for amounts collected from the responsible party up to the amount of the agreed settlement?

BACKGROUND

2. A lawyer enters into a fee agreement with a client for the provision of legal services relating to the New York Domestic Relations Law. The fee agreement provides for the client to pay an initial retainer to be credited against total hourly charges. At the conclusion of the matter, the court awards the lawyer an amount equal to the lawyer's total hourly charges pursuant to section 237 of the Domestic Relations Law, which the adverse party is obliged to pay to the lawyer. The adverse party does not pay.

3. To settle the debt created by the fee agreement between the lawyer and the client, the lawyer agrees to accept, in full satisfaction of the amounts owing by the client, an immediate payment equaling the initial retainer plus an additional amount that is less than the lawyer's total time charges (and hence less than the judicial award). In return, the client seeks the lawyer's agreement that, if the adverse party pays the lawyer any amount up to the settlement amount, then the lawyer will remit such sums to the client to make the client whole. The lawyer is concerned whether the reimbursement of such amounts would constitute an illicit fee-sharing arrangement with a non-lawyer.

OPINION

4. In our view, no such concern is warranted. We assume for our purpose that the arrangement with the client comports with DR 2-106(C)(2), which governs fee agreements in domestic relations matters, as well as Part 1400 of the Rules of the Appellate Divisions, entitled “Procedure for Attorneys in Domestic Relations Matters.” Because our charter is limited to addressing matters of ethics and not questions of law, nothing here is meant to be a legal opinion on the meaning of section 237 of the Domestic Relations Law. Subject to the foregoing, and to the caveat below, we do not believe that the proposed settlement is an unethical fee-sharing compact.

5. Section 237 of the Domestic Relations Law authorizes a court, in circumstances set forth there, to order a party to a matrimonial action to pay counsel fees “directly to the attorney of the other spouse to enable that spouse to carry on or defend the action or proceeding as, in the court’s discretion, justice requires.” The purpose of the statute is to “redress the economic disparity between the monied spouse and the non-monied spouse” by investing the court with the discretion “to make the more affluent spouse pay for the legal expenses of the needier one.”¹ Although the statute provides for the payment to be made directly to the attorney, courts may direct the payment to be made to the party if that party has already advanced funds to his or her counsel.²

6. When a court awards a fee under section 237, the amounts that may be paid by the responsible party are to replace those that may have been paid by the client, but the award does not release the client from liability from the full amount of any fee agreement if the responsible party does not pay. Thus a court is not permitted, in granting an award under that section, to preclude the lawyer “from seeking to recover payment of the full amount of the attorneys’ fees in [a] separate action based on the retainer agreement entered into by” the lawyer and client.³ Likewise, a court may direct a lawyer, and the lawyer would be required in the absence of an overriding contractual arrangement, to refund to the client any amounts previously paid to the lawyer by the client that the lawyer receives from the adverse party in satisfaction of a section 237 award.⁴ The settlement proposed here is consistent with the fee award: the client will end up paying an agreed amount in fees, but only to the extent the responsible party fails to pay the awarded amount.

¹ *O’Shea v. O’Shea*, 93 N.Y.2d 187, 190, 711 N.E.2d 193, 195, 689 N.Y.S.2d 8, 9-10 (1999) (footnote omitted).

² *Ross v. Ross*, 90 A.D.2d 541, 542, 455 N.Y.S.2d 113, 115 (2d Dep’t 1982).

³ *Law Firm of Joel R. Brandes, P.C. v. Ferraro*, 257 A.D.2d 610, 610, 685 N.Y.S.2d 83, 84 (2d Dep’t 1999); *accord Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54, 65, 833 N.Y.S.2d 566, 574 (2d Dep’t 2007) (“an award of attorney’s fees to a spouse pursuant to Domestic Relations Law § 237(a) does not preclude attorneys from seeking, from their own client, the balance of fees earned if the retainer agreement permits it”).

⁴ *Tarr v. Tarr*, 45 A.D.2d 1050, 1050, 358 N.Y.S.2d 172, 173 (2d Dep’t 1974); see DR 9-102(C)(4) (A lawyer shall “[p]romptly pay or deliver to the client . . . as requested by the client . . . funds . . . in the possession of the lawyer which the client . . . is entitled to receive.”)

7. We conclude that the proposed settlement does not violate any Disciplinary Rule, and in particular DR 3-102(A). “The purpose of the rule against fee sharing is to remove any incentive for non-lawyers to engage in undesirable behavior such as (1) interfering with a lawyer’s professional judgment in handling a legal matter, (2) using dishonest or illegal methods . . . in order to win a case . . . , or (3) encouraging or pressuring a lawyer to use such improper methods.”⁵ Such perils typically arise from the sharing of fees with non-client third parties.⁶ None of these concerns exists in the allocation of fees between a lawyer and a client, and certainly not in the context of a fee-shifting statute that is designed to ensure that the client is made whole for fee amounts the client may have paid.

8. We caution that the arrangement with the client must be consistent with any statements or submissions made to the court in connection with the application for an award of counsel fees. A lawyer may not engage in conduct involving fraud or dishonesty,⁷ and shall not make any knowingly false statement of law or fact in the course of representing a client.⁸ It is essential that the lawyer comply with any representation made to the court concerning the use of the funds awarded, or amend any such statement if needed.

CONCLUSION

9. Subject always to a lawyer’s obligation to avoid false or misleading statements to a tribunal, a lawyer may settle a fee agreement with a client by accepting less than the judicially-determined fee in a domestic relations matter and agreeing to reimburse the client for amounts the lawyer later receives pursuant to a fee award up to the amount of the agreed-upon settlement.

(9-07)

⁵ R. Simon, SIMON’S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 532 (2007 ed.).

⁶ See, e.g., N.Y. State 727 (2000); N.Y. State 705 (1998).

⁷ DR 1-102(A)(4).

⁸ DR 7-102(A)(5).