



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 910 (3/14/12)

Topic: Attorneys fees; likelihood of payment as basis for increasing hourly rate; seeking security interest and confession of judgment; amending fee agreement.

Digest: 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. The lawyer may obtain a confession of judgment from the client for legal fees already earned or take a security interest in property of the client to secure fees and expenses, under the conditions described in the opinion. The lawyer may request a client to amend a retainer agreement. Whether such 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.

Rules: 1.5(a), 1.5(b), 1.5(d), 1.8(i),

FACTS

1. A law firm ("Firm") represents a client ("Client") who is the wife in a domestic relations matter. The Client has a balance due to the firm for services performed to date, and the Firm believes it is unlikely that the Client will be able to pay the balance until she receives a final judgment of support. The Firm has consulted an actuary, which determined that to compensate for the risk of non-payment, the Firm needs to charge the Client three times the original rate -- \$735 per hour rather than \$245 per hour.

QUESTION

2. May the Firm renegotiate its retainer arrangement with a matrimonial client as follows: (1) increase the hourly fee from \$245 to \$735, (2) have the client agree to file confessions of judgment with the appropriate court as the fees accumulate, and (3) secure the client's payment obligation with the client's share of the marital property?

OPINION

3. This opinion first discusses whether each of the new terms would be appropriate in an original retainer agreement in a matrimonial matter and then discusses the issues surrounding renegotiation of an attorney's retainer agreement.

A. Charging three times the normal rate to compensate for the risk of non-payment

4. Rule 1.5 of the Rules of Professional Conduct (the "Rules") prohibits a lawyer from

making an agreement for or charging an excessive or illegal fee. It provides that a fee is excessive when "a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive." It also sets forth a list of eight factors to be considered in determining whether the fee is excessive. These include the time and labor involved, the fee customarily charged in the locality for similar legal services, the experience, reputation and ability of the lawyer providing the services, the results obtained and whether the fee is fixed or contingent. They do not include the risk that the client will be unable to pay the fee.

5. To be sure, the list of factors is not exclusive. The Rule states that the factors to be considered include the listed factors. However, it is significant that ability to pay was not included in the listed factors (either in justifying a higher fee or in encouraging a lower fee).

6. Under Rule 1.5(a)(8), a lawyer may charge a larger fee if the fee is contingent rather than fixed. However, under Rule 1.5(d)(5), a lawyer may not charge a contingent fee in a domestic relations matter if the fee is contingent upon securing a divorce or is determined by reference to the amount of equitable distribution or property settlement. Even if there were no such prohibition, we believe a contingent fee under the Rules is one where the payment of which depends on a successful outcome of the matter, and not on the law firm's likely success in collection of the fee.

7. Therefore, the reasonableness of the hourly fee of \$725 per hour depends on the factors set forth in Rule 1.5, particularly the fee customarily charged in the locality for similar legal services [Rule 1.5(a)(3)] and the experience, reputation and ability of the lawyer or lawyers performing the services [Rule 1.5(a)(7)].

8. One consideration in determining the reasonableness of the fee arrangement with the Client is the fact that New York law makes provision to assist the less monied spouse in a matrimonial case. Section 237 of the New York Domestic Relations Law provides that, in many matrimonial proceedings, the court has the discretion to direct either spouse to pay counsel fees directly to the attorney of the other spouse to enable the other spouse to carry on or defend the action. The court will consider the circumstances of the case and of the respective parties, including (1) the nature of the marital property involved; (2) any difficulties involved in identifying and evaluating the marital property; (3) the lawyer's services rendered and an estimate of the time involved; and (4) the applicant's financial status. There is a rebuttable presumption that counsel fees should be awarded to the less monied spouse. Section 237 allows an application for the award of fees and expenses at any time or times prior to final judgment, upon the filing of an affidavit with the court detailing the financial agreement between the party and the attorney, which includes the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, and any additional costs, disbursements or expenses. This Domestic Relations Law provision allows the court to determine the reasonableness of the fee arrangements.

9. In our opinion, the likelihood of nonpayment does not alone justify charging a multiple of the Firm's normal hourly rates. If the Client cannot pay the Firm's normal rates, he or she is unlikely to be able to pay three times those rates. However, if a security interest in the Client's share of the marital property and/or support payments will cover the attorneys' fees, and the

lawyer has a lien or security interest in such property, then the lawyer will eventually collect the agreed-upon fee.

10. If the Client's share of the marital property or support payments is unlikely to cover the attorney's fee, and the tripling of the attorney's fee is thus an attempt to obtain a larger share of the recovery, we believe it is more likely to meet the requirements for an excessive fee.

11. Whether an hourly rate that is three times the lawyer's normal rate could ever be reasonable depends on a number of factors, including whether the lawyer's normal rate is significantly below the fee customarily charged in the locality for similar legal services and whether the lawyer has applied to the court for an award of fees and expenses. Absent unusual factors, it seems likely that a three-fold increase in fees would produce a fee that is excessive.

B. Confession of Judgment and Security Interest in Client Property

Confessions of Judgment

12. A confession of judgment is a writing in which a debtor permits judgment against him or her to be entered by the creditor without the institution of legal proceedings. Under New York law, confessions of judgment may be for the purpose of paying a debt, or for securing a debt. *See* CPLR 3218. Although Rule 3218 of the CPLR authorizes a confession of judgment for amounts to become due, and authorizes confessions of judgment either as a payment device or as security, both ethics opinions and case make clear that a confession of judgment to secure attorneys fees may be taken only as a form of security and not of payment, and that it may be taken only to secure payment for services previously rendered. *See* N.Y. County 430 (1950) (confession of judgment against realty as security for fees and not as payment of the fee); N.Y. State 474 (1977) (without passing on the legal effect of an affidavit confessing judgment that was signed prior to performance of legal services, an attorney should not obtain such an affidavit until after having rendered services); *Katlowitz v. Halberstam*, 284 A.D.2d 306, 284 N.Y.S.2d 438 (2001) (an attorney's use of a confession for unearned and prospective fees is impermissible [citing N.Y. State 474]).

13. In N.Y. State 474, we stated that a confession of judgment was not unethical, as long as (1) the lawyer obtained it after having rendered the services, (2) the lawyer complied with the requirements of applicable law, including CPLR 3218, (3) the amount of the confession is commensurate with the value of the services rendered, and (4) the client clearly understands the character, effect and purpose of the confession of judgment. This includes the potential effect of a confession of judgment on the client's credit standing and employment opportunities. The opinion is based on EC 5-7 and DR 5-103(A) (1), the prohibitions on lawyers acquiring a proprietary interest in the client's cause of action, and the predecessors to Rule 1.8 (i).

14. Methods of securing payment of fees that involve court action, such as a confession of judgment, have been given special scrutiny because of the admonition in lawyer codes, formerly in EC 2-23 and now in Comment 9 to Rule 1.5, which provides, "A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject."

15. In addition, Rule 1.5(d)(5)(iii) contains specific provisions with respect to confessions of judgment or security interests in a matrimonial matter. It prohibits a lawyer from charging a fee in a domestic relations matter if, "(iii) 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 tribunal after notice to the adversary." The requirements of this rule are similar to those of the applicable court rules.¹

Security Interests

16. Rule 1.8(i) authorizes a lawyer to acquire a lien "authorized by law" to secure the lawyer's fee or expenses. As noted in Comment 16, this provision includes liens granted by statute, liens originating in common law and liens acquired by contract with the client. One such lien granted by statute is the "charging lien," granted by Section 475 of the Judiciary Law, which attaches to funds created by the attorney's efforts.² The question raised in this opinion involves a charging lien. However, while such a lien would appear to be authorized implicitly by Rule 1.8(i), as noted above, Rule 1.5(d)(5)(iii) prohibits a lawyer from entering into a retainer agreement containing a security interest or other lien without approval from a tribunal after notice to the adversary. If the proposed lien did not involve the property created by the attorney's efforts in the representation, but rather involved a contractual security interest in other property, then the acquisition of such lien would be a business or financial transaction with a client governed by the requirements of paragraph 1.8(a). *See* Rule 1.8, Cmt 16.

C. Amending a Fee Arrangement

17. The Rules stress the importance of fee agreements between the lawyer and client. Rule 1.5(b) provides:

A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule.

¹ Section 202.16 of the Uniform Rules of the Supreme Court and County Court -- the rule governing matrimonial actions -- contains a special procedure for obtaining a security interest in a matrimonial action. ("An attorney seeking to obtain an interest in any property of his or her client to secure payment of the attorney's fee shall make application to the court for approval of said interest on notice to the client and his or her adversary. The application may be granted only after the court reviews the finances of the parties and an application for attorney's fees.") Similarly, Section 1400.5 of the Joint Rules of the Supreme Court, Appellate Division, 22 NYCRR Section 1400.5, contains the procedure for obtaining a confession of judgment or security interest ("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 for a security interest, (2) notice is given to the other spouse, (3) the court grants approval after submission of an application for counsel fees.") These rules are designed to ensure that the court is involved in approving a security interest or confession of judgment, with input from all relevant parties and due regard to the financial condition of the parties and whether a grant of legal fees from the spouse is appropriate.

² Under Section 475, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in the client's favor, and the proceeds thereof in whatever hands they may come.

See also 22 N.Y.C.R.R. Part 1215 (court rule requiring engagement letters).

18. The court rules governing matrimonial actions require that fee agreements in such actions be in writing, and signed by both the client and the attorney. *See* 22 NYCRR 1400.3 ("Part 1400.3"). In actions in Supreme Court, a copy of the signed agreement must be filed with the court within 15 days of execution, along with the statement of net worth. Part 1400.3 sets forth the information that must be included in the fee agreement, which includes (1) the hourly rate of each person whose time may be charged to the client; (2) 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; and (3) 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.

19. As a comment to Rule 1.8 states, ordinary fee arrangements between the lawyer and client reached at the inception of the client-lawyer relationship are governed by Rule 1.5. *See* Rule 1.8, Comment [4C]. Retainer agreements, like all contracts, may be amended with the agreement of the lawyer and client. However, such an amendment raises ethical concerns, because lawyer is often in a position to take unfair advantage of the client. The client may expect the lawyer to exercise professional judgment on his or her behalf, and may believe that any proposed amendment is designed to be in the client's best interest. Moreover, the client is dependent upon the continued participation of the lawyer to achieve the goals of the representation and often has considerable sunk costs at the time an amendment is proposed. Therefore, the client may feel undue pressure to accede to the lawyer's wishes. The Rules consider certain amendments to be normal fee negotiations between the lawyer and client, which are subject to Rule 1.5, while others are considered a "business transaction with a client" that are subject to Rule 1.8.³

20. A number of factors will determine whether the higher scrutiny of Rule 1.8 is warranted. Since the lawyer is the drafter of the contract and should be expected to anticipate most changes in the representation, the first consideration is whether there has been a material change in circumstances. A related factor is the length of time since the contract was entered into, which will affect the reasonableness of the lawyer's failure to anticipate the changed circumstances in the original contract. For example, if the representation was expected to be completed within a year, and the contract therefore did not make provision for the law firm's customary annual increases in billable rates, an amendment a year later would be tested under Rule 1.5, and not Rule 1.8.

21. The sophistication of the client must also be considered. If client is a frequent user of legal services, he or she may be in a much better position to determine the reasonableness of the proposed amendment. *See* N.Y. State 599 (1989) (retainer agreement with a client of limited

³ Courts reviewing the reasonableness of fees may give extra scrutiny to amended fee arrangements where they believe the circumstances gave the client little choice but to agree. This extra scrutiny is different from the higher standards under Rule 1.8, although the outcome may be the same. *See, e.g. Baye v. Grindlinger*, 78 A.D.2d 60, 432 N.Y.S.2d 624 (2d Dep't 1989) (where amendment was on eve of trial, court requires attorney to show that the terms are fair and reasonable and fully understood by the client).

education or experience).

22. Another factor is whether the amendment benefits the client. (New York case law often applies higher scrutiny to modifications of retainer agreements that "are beneficial to the attorney".) *See, e.g. Baye v. Grindlinger*, 78 A.D.2d 60, 432 N.Y.S.2d 624 (2d Dep't 1989), *Naiman v. N.Y. Univ. Hosps Ctr.*, 351 F. Supp.2d 257, 264 (S.D.N.Y. 2005). For example, where the client is no longer able to pay an agreed-upon hourly rate, and the contract is amended to provide for a contingent fee, such an amendment has been held to be subject to Rule 1.5 rather than Rule 1.8. ABA Formal Opin. 11-458 (2011).

23. The circumstances in which the amendment is requested may also be significant. For example, a change requested on the eve of trial puts extraordinary pressure on the client to accede. *See Baye v. Grindlinger*, supra, N.Y. State 719 (1999) and cases cited therein (amendment after threat of withdrawal).

24. Yet another factor is whether the client has deliberately disregarded an agreement or obligation to the lawyer as to fees or expenses, or otherwise taken action that would authorize the lawyer to withdraw from the representation. *See N.Y. State 783* (2005) (where the client deliberately disregards an agreement to pay legal fees, even though the retainer agreement is silent as to interest on delinquent charges, the lawyer may condition continued representation on the client's agreement to prospectively pay interest on past due balances for future services, in compliance with the predecessor to Rule 1.5). The opinion notes that amending the retainer to provide for interest is more beneficial to the client than withdrawal by the lawyer and does not suggest that the predecessor to Rule 1.8(i) is applicable. N.Y. State 598 (1988) (discusses when a failure to pay a legal fee is "deliberate").

25. Part 1400.3 requires that any changes in the lawyer's hourly rate or fees 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. Thus, it clearly anticipates that the fee agreement may be amended.

26. Certain amendments to a retainer agreement are considered business transactions with the client. For example, Comment 16 to Rule 1.8 provides that, when a lawyer negotiates a contractual security interest in property other than that recovered through the lawyer's efforts in the litigation, the acquisition of the security interest is a business or financial transaction with a client that is governed by the requirements of Rule 1.8(a). *See also ABA 11-458* (2011) (changes in existing fee arrangements that involve a lawyer's acquiring an interest in the client's business, real estate or other nonmonetary property normally will require compliance with Rule 1.8(a)), ABA 02-472 (the client must be afforded the protections of Rule 1.8(a) in the structuring of a secured obligation); N.Y. City 1988-7; N.Y. City 1988-4 (1987); Pa. Eth. Op. 91-08 (1991) (asking a client to sign a promissory note containing a confession of judgment invokes Rule 1.8).

27. If Section 1.8(a) is applicable, the following requirements apply:

(1) the transaction must be fair and reasonable to the client and the terms of the transaction must be fully disclosed and transmitted in writing in a manner that can be

reasonably understood by the client;

(2) the client must be advised in writing of the desirability of seeking, and be given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

28. The lawyer has the burden of demonstrating that the terms of the amendment are fair and reasonable. Although Rule 1.8(a) requires that the client be given a reasonable opportunity to seek the advice of independent legal counsel in the negotiation of a business transaction with the lawyer, it is not clear whether a client who cannot afford to pay Firm 1 will have a meaningful opportunity to employ a second law firm. However, since an amendment to a retainer agreement in a matrimonial action must be approved by the court on notice to the adversary, we believe that the interests of the client are subject to sufficient independent scrutiny.

29. In addition, it goes without saying that the lawyer must explain the lawyer's proposed modification of a fee arrangement, and advise the client that he or she need not agree to pay the modified fee to have the lawyer continue the representation. This disclosure is necessary to enable the client to make an informed decision about the client's ability and willingness to pay the modified fee for continued representation.

CONCLUSION

30. 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.