

2nd Department Interprets Engagement Rule

BY LAZAR EMANUEL

We might have expected that a controversial Rule promulgated by the Appellate Divisions in concert especially one that has received disparate interpretation in the lower courts - would be clarified by a joint statement of the Four Departments, instead of by a ruling on appeal by only one of the Departments. But no - instead of clarification and certitude, we have a continuing quandary resulting from a decision on appeal by the Second Department acting alone in *Rubenstein v. Ganea*, April 3, 2007, Docket # 14193. The quandary - do lawyers in the other Departments have to wait for a decision in the Court of Appeals before they can be sure of the consequences of failing to provide clients in civil matters with either a letter of engagement or a signed retainer agreement?

The Rule we're talking about is contained in 22 NYCRR 1215.1, the "letter of engagement" Rule, adopted by the Appellate Divisions on March 4, 2002. The Rule requires lawyers in all civil matters involving an anticipated fee greater than \$3,000 (except in matrimonial matters) to provide the client with a letter of engagement "before commencing the representation, or within a reasonable time thereafter." The letter must explain the scope of services to be provided, the fees and expenses the lawyer will charge in the representation, the lawyer's billing practices, and, where applicable, the right of the client to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator. The Rule permits a lawyer to substitute a retainer agreement for the letter of engagement, provided it recites the same items.

The issue in *Rubenstein* was: What are the consequences to a lawyer who violates the Rule and fails to give the client a letter of engagement or fails to have the client sign a retainer agreement? The Second Department weighed three alternative consequences, each the basis for decisions in the lower courts: 1) permit quantum meruit recovery of fees notwithstanding noncompliance with the Rule, *Matter of Feroletto*, 6 Misc 3d 680; 2) permit the lawyer to retain any fees he may have collected, but prohibit him from collecting any additional fees, *Beech v. Gerald B. Lefcourt P.C.*, 12 Misc 3d 1167(A); and 3) prohibit any fees whatever, *Nadelman v. Goldman*, 7 Misc 3d 1011(A).

Facts In *Rubenstein*

Attorney Seth Rubenstein reached an agreement with Cynthia Ganea to represent her in a proceeding anticipating her appointment as guardian for her husband. Lawyer and client agreed on an hourly fee of either \$450 or \$325, depending on the rate of the lawyer who did the work. They also agreed that any fees awarded by the court would be credited against Rubenstein's fees. The fees in the guardianship proceeding came to \$58,212.50, plus disbursements. The court awarded Rubenstein a total of \$18,375 in counsel fees, leaving an outstanding balance of \$39,837.50. In addition, Rubenstein billed Ganea \$7,741 for legal services not related to the guardianship proceeding.

After an unsuccessful effort at compromise, Rubenstein sued for fees and disbursements totaling \$47,977.81. Ganea answered that Rubenstein's failure to deliver a letter of engagement precluded his recovery and that, in any event, the fee awarded by the court in the guardianship proceeding satisfied his

claim for fees. Ganea moved for summary judgment. In opposition, Rubenstein argued that 22 NYCRR 1215.1 had been adopted only a short time before the engagement and that he was not sure whether he had been aware of the Rule or that it applied to non-matrimonial actions. Further, Rubenstein maintained that he had clearly explained the terms of the engagement to Ganea, including the terms controlling fees and payments, that she had agreed to the terms, and that he had offered to arbitrate the dispute.

The lower court ruled that in the absence of a written letter or retainer agreement, Rubenstein was limited to fees measured in quantum meruit, and that the award of fees by the court in the guardianship proceeding constituted res judicata and prevented him from recovering any additional fees related to that proceeding.

On appeal by both parties, the Second Department conducted an extensive review of the purpose of 22 NYCRR 1215.1 and compared it to the intent behind 22 NYCRR 1400.3, which controls retainer agreements in all matrimonial matters. The Court recited the many respects in which the latter requires infinitely more detail than the former (e.g., the amount of any advanced retainer, the client's right to cancel at any time, rendition of bills no less frequently than every sixty days, circumstances under which the lawyer may withdraw, compulsory arbitration of disputes, a Statement of the Client's Rights and Responsibilities, etc.).

Two Essential Differences

The Court pointed to two other differences between the two Sections which it considered persuasive:

1. Section 1400.3 was specifically intended to curb abuses; Section 1215.1 was not.

The language of 22 NYCRR 1215.1 contains no express penalty for noncompliance...Indeed, the intent of Rule 1215.1 was not to address abuses in the practice of law, but rather, to prevent misunderstandings about fees that were a frequent source of contention between attorneys and clients. This intent was described by Chief Administrative Judge Jonathan Lippman upon the rule's adoption, that "this [rule] is not about attorney discipline in any way, shape or form, and we certainly do not expect in any significant degree there to be a large number of disciplinary matters coming out of this rule"...The purpose of the rule therefore is to aid the administration of justice by prodding attorneys to memorialize the terms of their retainer agreements containing basic information regarding fees, billing, and dispute resolution which, in turn, minimizes potential conflicts and misunderstandings between the bar and clientele.

2. Section 1400.3 is backed and supported by a specific provision of the Code of Professional Responsibility (DR 2-106(C)(2)(b)); Section 1215.1 is not mentioned in the Code at all.

DR 2-106(C) provides: A lawyer shall not enter into an arrangement for, charge or collect ...(2) Any fee in a domestic relations matter...(b) Unless a retainer agreement is signed by the lawyer and the client setting forth in plain language the nature of the relationship and the details of the fee arrangement...

Responding to the lack of a corresponding DR related to Section 1215.1, the Court said:

Since Rule 1215.1 is not underscored by a specific Disciplinary Rule and is not intended to protect

clients against abusive practices, it lacks the "bite" of 22 NYCRR 1400.3 and ... DR 2-106(C). That crucial distinction was recognized by Bronx County Surrogate Lee Holzman in *Matter of Feroletto, supra*, [see, cite above] wherein it was held that an unintentional failure of an attorney to provide a letter of engagement in a non-matrimonial matter did not warrant the harsh result of precluding the attorney from a quantum meruit fee, particularly where the client conceded that the attorney was to be compensated for the services rendered...

After reviewing the many lower court cases which have attempted to wrestle with the treatment of a lawyer who fails to issue a letter of engagement or to sign a retainer agreement under Section 1215.1, the Court came down in favor of those cases which nevertheless recognize the lawyer's right to a fee based on quantum meruit. A ruling denying a lawyer any fee because of his neglect "is not appropriate and could create unfair windfalls for clients, particularly where clients know that the legal services they receive are not pro bono and where the failure to comply with the rule is not willful."

In *Rubenstein*, the Court found that client Ganea had conceded that she did not expect a free pass to legal services, and that lawyer Rubenstein's failure was "unintentional, no doubt attributed to the promulgation of the rule only seven weeks prior to his retention..." [Editor's note: the Court did not say whether it would have reached a different conclusion if the client had not comprehended that a fee would be required or if Rubenstein had been either willful or negligent in failing to provide the letter of engagement.] The Court rejected client Ganea's argument that permitting a lawyer to recover fees despite his violation of Section 1215.1 would make the rule itself "impotent and unenforceable."

Attorneys continue to have every incentive to comply...as compliance establishes in documentary form the fee arrangements to which clients become bound, and which can be enforced through Part 137 arbitration or through court proceedings. Attorneys who fail to heed Rule 1215.1 place themselves at a marked disadvantage, as the recovery of fees becomes dependent upon factors that attorneys do not necessarily control, such as meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon. There is never any guarantee that an arbitrator or court will find this burden met or that the fact-finder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned under a clearly written retainer agreement or letter of engagement.

Applying these principles to the decision of the lower court, the Court found the following:

1. In a guardianship proceeding under Mental Health Law § 81.16(f), the court may award reasonable fees to petitioner's attorney. The award is discretionary and is based upon several factors, including the impact on the estate.
2. The award of fees by the court does not preclude recovery of additional fees by the attorney if either a) the client has agreed to additional fees under the retainer, or b) the amount of fees has not been agreed upon but the attorney renders services in quantum meruit the value of which exceeds the court's award.
3. The attorney...bears the burden of establishing that he reached a clear agreement with [the client] that she would be responsible for fees incurred in the guardianship proceeding, including the amount that the fair value of legal services exceeds the amount awarded by the guardianship.... Any

misunderstanding or lack of clarity arising from [the attorney's] failure to provide a letter of engagement or enter into a signed retainer agreement shall be resolved in favor of the client....

The Court allowed attorney Rubenstein to proceed with collection of his additional fees in quantum meruit, including those fees which did not relate to the guardianship proceeding.

Significance of Decision

The impact of the Court's decision on lawyers in the Second Department is clear: You will not be disciplined for failure to conform to Section 1215.1, but you will be put to the burden of showing that your failure was not willful or deliberate, that the client understood that she was to pay for your services, and that your fees were reasonable and justified. Your fees will be measured by their value in quantum meruit, not by your own judgment of their value.

The implication of the decision on lawyers in the other Departments is not so clear. Is it possible they will be required to disgorge fees already paid, or to forego fees which are unpaid? The answer resides with the Appellate Division judges in the other Departments, or, perhaps, with the Court of Appeals.

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