

# Pro Bono Matrimonial Retainer May Provide For Fee Application

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NYSBA Opinion 739, issued on April 16, 2001, deals with lawyers who have agreed to take pro bono client assignments from a lawyer referral service sponsored by a bar association. The question raised in the Opinion: May the lawyer insert in the client retainer agreement a provision enabling the lawyer to apply to the court for counsel fees to be paid by client's spouse at the lawyer's usual rate instead of the pro bono rate?

Lawyers regularly participate in referral services offered by bar associations and other groups to persons of limited or reduced financial means. In doing so, the lawyers fulfill the mandate of EC 2-25:

A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by providing professional service at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or organizations, or to participation in programs and organizations specifically designed to increase the availability of legal services.

No New York regulation or rule governs the fees which may be charged by bar association referral services. And no Ethics Opinion has ever considered whether a pro bono matrimonial lawyer may provide in the client retainer agreement for a subsequent application to the court for additional counsel fees to be paid by the client's spouse. At first blush, such a provision may seem to constitute a contingent fee. Contingent fees in matrimonial matters have been outlawed in New York for many years. The prohibition against matrimonial contingent fees is codified in DR 2-106(C)(2)(a) of the Code of Professional Responsibility. The public purpose supporting the prohibition is to discourage any financial incentive for lawyers to promote the breakup of marriages.

This public purpose is not violated by a retainer provision enabling the client's lawyer to apply to the court for additional compensation at his usual rate, to be paid by the client's spouse. The additional compensation is just as consistent with the lawyer's promotion of a reconciliation or settlement to preserve the marriage as with her promotion of a separation or divorce.

Accordingly, the provision does not violate the prohibition against contingent fees in a matrimonial action. Rather, it is analogous to the practice in some courts of allowing counsel who are assigned to matrimonial clients in forma pauperis to apply for compensation under Domestic Relations Law §237. Also, it will serve to encourage participation by lawyers in referral services for needy matrimonial clients, a public policy goal which is promoted both by the Domestic Relations Law and the New York State Bar Association.

However, the lawyer who wishes to provide in the matrimonial retainer agreement for additional compensation by the court must satisfy two conditions.

First, the lawyer should state in the retainer agreement itself, her intention to apply to the court for additional compensation at her usual rate to be paid by the client's spouse. This statement should be in "plain language." As required by DR 2-106(C), the entire retainer agreement should be signed by both the lawyer and the client and should set forth all the details of the fee arrangement.

Second, when the lawyer applies to the court for additional compensation, she should disclose to the court all the terms of the retainer, "including the fact that the lawyer has agreed to represent the client for a reduced fee." This will enable the court to make an informed decision whether it's appropriate to grant the application for increased compensation.