

APPENDIX B

Retainer Agreements

General Comments on Drafting a Retainer Agreement Affecting Matrimonial Clients

Perhaps unfairly, some states require lawyers in matrimonial matters, as distinguished from lawyers in other areas, to enter into specific form retainer agreements with clients. When such a requirement exists, no deviance is allowed. This Sample Retainer Agreement in this Appendix encompasses (with minor clarifications and adjustments), the regulations promulgated by the Chief Judge of the New York Court of Appeals as Chief Administrator of the New York State Court System and the Order amending the Disciplinary Rules of the Lawyer's Code of Professional Responsibility promulgated for the Appellate Divisions of the Supreme Court, First, Second, Third and Fourth Judicial Departments. The Sample Agreement, among other things, provides for fee arbitration at the request of the client in the event of a fee dispute; explains the law with respect to the attorney retaining a security interest in a client's property including the nonforeclosability on the marital residence and provides for furnishing the client with a copy of a Statement of Client's Rights and Responsibilities. It additionally provides for the client's right to cancel the Agreement at any time, provides for the determination of fees and how payment shall be effectuated in the event of discharge or withdrawal prior to completion of the case.

The Retainer Agreement set forth here complies with the New York rules with respect to the impermissibility of a non-refundable retainer fee, but it does provide for a "minimum fee" arrangement. Although the Agreement reflects New York law, it should be considered for use by attorneys in virtually all states as a guide in preparing a fair arrangement between attorney and client.

Sample Retainer Agreement

THIS AGREEMENT FOR LEGAL SERVICES by and between _____ (Law Firm) and _____ (Client) entered into the _____ day of _____, 19 __. This Agreement constitutes a binding legal contract and should be reviewed carefully. This letter confirms that you have retained this firm as your attorneys to render services in connection with:

- (1) to represent you in the pending matrimonial action in the _____ Court, _____ County;
- (2) the prosecution or defense of a divorce action, including the attempt to negotiate a resolution of the matter;
- (3) the negotiation, preparation, and/or review of a separation agreement or other marital settlement agreement;
- (4) the prosecution or defense of a Family Court proceeding concerning _____.

It is further understood that:

- (1) The retainer fee does not include any services rendered in Appellate Courts or any actions or proceedings other than the action for which this office has been retained;
- (2) With respect to the matter which is specified above, this Retainer Agreement and any sums paid to this firm pursuant hereto, do not cover any services relative to any appeal or any other service which might be required following the entry of a final judgment or order including but not limited to such matters as enforcement or modification of such final judgment or order. Our

representation shall terminate with the entry of final judgment in your matter, unless extended by mutual agreement between us in writing.

The Client authorizes the Law Firm to take any steps which, in the sole discretion of the Firm, are deemed necessary or appropriate to protect the client's interest in the matter.

In order for us to begin our representation, you have agreed to pay us and we have agreed to accept a retainer payment of \$_____. This retainer payment does not necessarily represent the amount of the overall fee which you may incur by virtue of our services. The amount of the eventual fee will be based upon our regular schedule of established hourly time charges, along with any out-of-pocket disbursements (such as court costs, messenger services, transcripts of proceedings, long distance telephone calls, telefaxes, process service fees, mileage, deposition and court transcripts, and excess postage) which are incurred in your behalf.

The Client understands that the hourly rates apply to all time expended relative to the Client's matter, including but not limited to, office meetings and conferences, telephone calls and conferences either placed by or placed to the Client, or otherwise made on the Client's behalf or related to the Client's matter, preparation, review and revision of correspondence, pleadings, motions, disclosure demands and responses, affidavits and affirmations, or any other documents, memoranda, or papers relative to the Client's matter, legal research, court appearances, conferences, file review, preparation time, travel time, and any other time expended on behalf of or in connection with the Client's matter.

If your matter is concluded, whether by settlement (e.g., a separation agreement or stipulation of settlement) or by judicial determination, with the expenditure of fewer hours by the Law Firm than would fully absorb the minimum fee on a purely mathematical basis, the Law Firm retains the minimum fee nonetheless. In other words, there would be no refund of any part of the retainer fee [or the sum of \$_____, i.e., the "minimum fee" herein] under such circumstances.

An example of how the minimum fee operates is as follows: If the firm resolves the matter with the expenditure of only four hours of time by a partner, and six hours of time expended by an associate attorney, there would be no refund to the client even though the time charges add up to less than the minimum fee.

Notwithstanding the above if the attorney-client relationship is terminated without your matter having been concluded, e.g., if you and your spouse were to reconcile and the action was discontinued, or if you were to discharge the Law Firm as your attorneys, or if the Law Firm were to withdraw its representations, a fair and reasonable fee would be determined in accordance with legally accepted standards. Presently, the legally recognized elements of a reasonable fee, as set forth in the code of Professional Responsibility, are as follows:

- € The fee customarily charged in the locality for similar legal services.
- € The amount involved and the results obtained.
- € The time limitations imposed by the client or by circumstances.
- € The nature and length of the professional relationship with the client.
- € The experience, reputation and ability of the lawyer or lawyers performing the services.

You should know that the Code of Professional Responsibility provides: "A lawyer shall not enter into an arrangement for, charge or collect ... [a]ny fee in a domestic relations matter, the payment or amount of which is contingent

upon the securing of a divorce or upon the amount of maintenance, support, equitable distribution, or property settlement...."

The Client has the absolute right to cancel this Retainer Agreement at any time. Should you exercise this right, you will be charged only the fee expenses (time charges and disbursements) incurred within that period, and the fair and reasonable fee would be determined in accordance with legally accepted standards, with the unearned balance of the retainer fee, if any, being promptly refunded to you. Presently, the legally recognized elements of reasonable fee, as set forth in the Code of Professional Responsibility, are as follows:

€ The time and labor required, the novelty and difficult of the questions involved and the skill requisite to perform the legal services properly.

€ The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (You should know that the Law Firm, by accepting retention as your attorney, is clearly precluded from representing the opposing party against you.)

€ The fee customarily charged in the locality for similar legal services.

€ The amount involved and the results obtained.

€ The time limitations imposed by the client or by circumstances.

€ The nature and length of the professional relationship with the client.

€ The experience, reputation and ability of the lawyer or lawyers performing the services.

€ Whether the fee is fixed or contingent. (You should know that the code of Professional Responsibility provides: A lawyer shall not enter into an arrangement for a charge or collect ... [a]ny fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the maintenance, support, equitable distribution, or property settlement ...").

You agree to pay the Law Firm such additional fees earned and to reimburse the Firm for advances on your behalf that may be due from time to time not later than ten days from the date that the Firm submits a bill to you for same. If an amount due is not paid within ten days after our statement to you of the amount due, interest at the prevailing statutory rate as set forth in the Civil Practice Law and Rules shall be added to the balance due the Law Firm.

The retainer fee shall be credited toward an hourly rate of \$_____ per hour for time I personally expend; \$_____ per hour for time expended by _____, a member of the firm; \$_____ per hour for time expended by _____, an associate in this office; \$_____ per hour for time expended by _____, an associate of this office; \$_____ per hour for time expended by _____, an associate in this office; and \$_____ per hour for the time expended by paralegals in this office.

In addition to the foregoing, your responsibility will include direct payment or reimbursement to this firm for disbursements advanced on your behalf, the same to include, but not necessarily be limited to court filing fees, recording fees, charges of process servers, travel expenses, copying costs, messenger services, necessary secretarial overtime, transcripts and the customary fees of stenographers referable to examinations before trial in the event such examinations are utilized. If the services of an "outside" stenographer for examinations and/or depositions are necessary, we require \$500 deposit for scheduled half day examinations, and \$1,000 for the full day. It is specifically understood and agreed that such payment shall be made prior to commencing such examination and will be placed in our escrow account. The same shall apply to all court filing fees. The foregoing are all your responsibility.

Each letter will be billed at a minimum of .25 hour and every telephone conversation at a minimum of .17 hour. This amount has been arrived at as a result of calculating the time involved in retrieving the file, and examining the documents or letters required to dictate the letter or respond to the call, in addition to the time required to consider the problem arising from or to be dealt with in the call or letter.

As it is not possible to predict with accuracy the period of time of this firm's representation of you, and for the purpose of providing you with a degree of certainty with regard to the firm's hourly charges during the period of representation, the Firm herewith agrees to maintain the foregoing hourly rates for a period of one year. Thereafter, the firm shall have the right to increase such rates, but in no event beyond a ten percent per year increase, and such increase shall be reflected in an amended written retainer agreement signed by you and the Law Firm.

You will be billed periodically generally each month but in no event less frequently than every sixty days. Included in the billing will be a detailed explanation of the services rendered, by whom rendered, and the disbursements incurred by our firm in connection with your matter. Upon receipt of our bill, you are expected to review the bill and promptly bring to our attention any objections you may have to the bill. While we strive to keep perfectly accurate time records, we recognize the possibility of human error, and we shall discuss with you any objections you raise to our bill. You will not be charged for time expended in discussing with us any aspect of the bill rendered to you.

We shall keep you informed of the status of your case, and agree to explain the laws pertinent to your situation, the available course of action, and the attendant risks. We shall notify you promptly of any developments in your case, including court appearances, and will be available for meetings and telephone conversations with you at mutually convenient times. We do insist that appointments be made for personal visits to our offices. Copies of all papers will be supplied to you as they are prepared (unless you request to the contrary), and you will be billed a reasonable photocopy charge (at present, \$.25 cents per page) for these materials which will be included in our periodic billing.

It is not and has not been our practice to seek security interests from clients. However, you are advised that the law requires, if we did seek same, that a security interest take the form of a confession of judgment, promissory note, or mortgage upon specified property. In either event, a lien would attach to your property. In the case of your marital residence, any such security interest would be non-foreclosable, i.e., we would not force a sale of your home but would be paid at the time you sell the premises. You are advised that any such security interest can be granted to us only with the permission of the justice assigned to your case upon an application on notice to the opposing party and after an application has been made for your spouse to pay the outstanding fees. However, we want to reiterate, it is not and has not been our practice to seek security interests from clients.

In the event such application for payment of counsel fees by your spouse and a security interest for the fees due this firm is made to the court, you agree to cooperate in connection with such application and to consent to the relief being requested from the court. Failure on your part to so cooperate and consent shall be deemed as a basis for withdrawal by the Law Firm from your representation.

In the event that any bill from the Law Firm remains unpaid beyond a thirty day period, you agree that the Law Firm may withdraw its representations, at the option of the firm. In the event that an action is pending, and absent your consent, an application must be made to the court for such withdrawal. When the fee is unpaid for the period set forth above, you acknowledge that in

connection with any such withdrawal application, that the account delinquency shall be good cause for withdrawal.

While we seek to avoid any fee disputes with our clients, and rarely have such disputes, in the event such a dispute does arise, you are advised that you have the right, at your election, to seek arbitration to resolve the fee dispute. In such event, we shall advise you in writing by certified mail that you have thirty days from receipt of such notice in which to elect to resolve the dispute by arbitration, and we shall enclose a copy of the arbitration rules and a form for requesting arbitration. The decision resulting from arbitration is binding upon both you and this Firm.

Under prevailing law, an application may be made to the court in which your action is pending, either prior to trial or at the trial, for your spouse to pay all or part of your legal expenses incurred and/or to be incurred in this matter. There is no certainty that any such recovery may actually occur, as the application rests in the discretion of the court. In the event such an award of fees is made and collected, the amount collected shall be credited to your bill. At the end of your case (i.e., a final judgment in the matrimonial action) any amount collected that exceeds your billing will be refunded to you. Conversely, you shall remain liable for any balance due to us after crediting any amount collected from your spouse.

You have been advised that in order for us to properly protect your interests, it may be necessary to retain outside experts such as appraisers, actuaries and accountants. You will be responsible for the costs incurred for any such service which in some cases may have to be paid in advance depending upon the requirements of the particular expert. No expert or appraiser shall be retained without your prior approval. If necessary and applicable, an application will be made to the court to have your spouse pay all or part of the aforementioned fees for experts.

You understand that no one particular member of the Law Firm is being retained but, rather, the Law Firm, as an entity, is undertaking your legal representation pursuant to this Retainer Agreement and that the Law Firm reserves the right to assign and delegate all aspects of such representation as the Law Firm, in its sole discretion, deems appropriate.

Such assignment and delegation may include, but is not limited to preparation of pleadings, motions, disclosure demands and responses, settlement negotiations, preparation of agreements, preparation and conduct of examinations before trial, court appearances, trial work, and any other matter deemed by the Law Firm to be appropriately delegated.

Likewise, law clerks and paralegals are often called upon to assist in document production, file organization, preparation and review of financial statements and data, and such other duties as are assigned by the firm.

You acknowledge that you have read this agreement in its entirety, have had full opportunity to consider its terms, and have had full and satisfactory explanation of same, and fully understand its terms and agree to such terms.

You fully understand and acknowledge that there are no additional or different terms or agreements other than those expressly set forth in this written agreement.

You acknowledge that you were provided with and read the Statement of Client's Rights and Responsibilities, a copy of which is attached to this Retainer Agreement.

We have informed you that pursuant to Court Rule, we are required, as your attorneys, to certify court papers submitted by you which contain statements of fact, and specifically to certify that we have no knowledge that the substance of the submission is false.

Accordingly, you agree to provide us with complete and accurate information which forms the basis of court papers and to certify in writing to us, prior to the time the papers are actually submitted to the court, the

accuracy of the court submissions which we prepare on your behalf, and which you shall review and sign.

You are aware of the hazards of litigation and acknowledge that we have made no guarantees in the disposition of any phase of the matter for which you have retained this office. If this fee arrangement meets with your approval, kindly sign your name where indicated on the copy of this letter and return same to me in the envelope enclosed for your convenience. You acknowledge that pursuant to Court Rule, a copy of this Retainer Agreement is required to be filed with the court in which your action is pending.

Very truly yours,

[Attorney]

I HAVE READ AND UNDERSTAND
THE ABOVE LETTER,
HAVE RECEIVED A COPY, AND
ACCEPT ALL OF ITS TERMS:

[Client]

Provision for the Client to Pay a Bonus to the Attorney or Exception Expertise and Inventiveness

The New York Rules do not provide for any sort of bonus provision. However, all lawyers, albeit rarely, come across cases in which a relatively minimal fee is paid, and because of the lawyer's expertise or inventiveness, they are able to have the client reap huge economic benefits. The following is a clause that should violate no professional guideline since it merely represents a recognition that a fair discussion may be had. It places no legal or otherwise obligation on the client.

Sample Bonus Provision

The above provisions describe your total legal and financial obligation to this firm. If, however, the results achieved for yourself are vastly disproportionately greater than the fee paid or to be paid to the firm, you will be asked to discuss a bonus payment to us based on all appropriate legal criteria in situations such as this. The foregoing is not a legally enforceable obligation and shall not constitute a lawful or legal obligation of yourself, nor a claim by ourselves, but rather represent an acknowledgment that such payment of a bonus should be discussed as a matter of common fairness and equity.