



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

June 22, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed Amendment to the Statement of Client's Rights and Responsibilities in a Domestic Relations Matter (22 NYCRR §1400.2)

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of the Statement of Client's Rights and Responsibilities required to be provided in a domestic relations matter pursuant to section 1400.2 of the Rules of the Appellate Division (22 NYCRR §1400.2) (Exh. A). This proposed amendment, which has been recommended by the Chief Administrative Judge's Matrimonial Advisory Committee (Exh. B), is designed to provide clarification on a wide range of practice issues that have arisen in the more than two decades since the Statement was last revised, including: (i) the requirement of a written retainer agreement; (ii) various matters bearing upon payment of legal fees; (iii) possible imposition of sanctions upon parties for frivolous or dilatory conduct; (iv) responsibility of parties for truthful and open communications with their counsel; (v) responsibility of parties to be present and on time at various court proceedings; (vi) responsibility of attorneys to discuss with their clients automatic orders, the Child Support Standards Act and the Maintenance Guidelines Statute; (vii) possible filing of a file retaining lien in a fee dispute; and (viii) the requirement to re-retain an attorney after a judgment of divorce has been signed.

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Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than August 20, 2018.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

22 NYCRR 1400.2.
Statement of Client's Rights and Responsibilities
Proposal of Matrimonial Practice Advisory and Rules Committee 4/20/18

An attorney shall provide a prospective client with a statement of client's rights and responsibilities in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement. If the attorney is not being paid a fee from the client for the work to be performed on the particular case, the attorney may delete from the statement those provisions dealing with fees. The attorney shall obtain a signed acknowledgment of receipt from the client. The statement shall contain the following:

UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

[Your] An attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and [your] the attorney, please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled once you retain the attorney, [do not hesitate] you are responsible to ask your attorney. [He or she] Your attorney should be readily available to represent your best interests and to keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that [are revealed] you reveal in the course of the relationship, to the extent permitted by law. You are responsible to communicate honestly, civilly and respectfully with your attorney.

If you are hiring an attorney you and your attorney are [entitled] required to sign a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. Before you sign the retainer agreement, you are responsible to read it and ask the attorney any questions you have before you sign it. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract. The retainer fee you pay to the attorney, as is written in the retainer agreement, may not be enough money to pay for all the time that the attorney works on your case.

You may refuse to enter into any fee arrangement that you find unsatisfactory.

[Your] An attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained.

[Your] An attorney may not request a retainer fee that is non-refundable. That is, should you discharge [your] the attorney, or should [your] the attorney withdraw from the case with Court permission, before the retainer [is] has been used up, [he or she] the attorney is entitled to be paid commensurate with the work performed on your case and any expenses [but must return the balance of the retainer to you]. The attorney must return to you any balance of the retainer that has not been used. However, [your] the attorney may enter into a minimum fee arrangement with you that provides for the payment of a specific amount below which the fee will not fall based upon the attorney's handling of the case to its conclusion.

You are entitled to know the approximate number of attorneys and other legal staff members who will be working on your case at any given time and what you will be charged for the services of each.

You are entitled to know in advance how you will be asked to pay legal fees and expenses, and how the retainer, if any, will be spent.

You may be responsible at the beginning of the case or before or after the trial to contribute to or pay the other party's attorney's fees and other costs if the Court has ordered you to do so.

The other party may be responsible to contribute to or to pay your attorney's fees, if the Court orders the other party to do so. However, if the other party fails to pay the Court ordered fee, you are still responsible for the fees owed to your attorney and experts in your case.

You are required to pay for court filing fees, process servers as well as fees for expert reports, testimony, depositions and/or trial testimony and you may seek reimbursement from the other party.

If you engage in conduct which is found to be frivolous or meant to intentionally delay

the case you could be fined or sanctioned and/or responsible for additional fees.

At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case [, which]. That estimate shall be made in good faith but may be subject to change due to facts and circumstances [affecting the] that develop during your case. There are no guarantees that the cost of your case will be as originally estimated.

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

You are expected to review the itemized bills sent [by counsel] to you by your attorney, and to raise any objections or errors in a timely manner in writing. Time spent in discussion or explanation of bills will not be charged to you.

You are [expected] responsible to be honest and truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable [him or her] her or him to competently prepare your case. Attorneys and clients must make reasonable efforts to maintain open communication during business hours throughout the representation. An attorney may seek to be relieved as your attorney if you are not honest and truthful with her or him.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

Your attorney is required to discuss the following with you: a) the automatic orders that are in effect once either party files a summons with notice; b) the law that provides for the financial support of the children, the Child Support Standards Act, if you and the other party have children under the age of twenty-one; and c) the law that provides for the financial support of the parties, the Maintenance Guidelines Statute.

You [have the right] are responsible to be present and on time in court at the time that conferences [are held], oral arguments, hearings and trials are conducted unless excused by the Judge or the part rules of the assigned Judge.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case. Your attorney has the right to send you written communications if your attorney disagrees with how you want your case handled.

Your attorney's written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. If an action or proceeding is pending, the court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment. In some cases your attorney may exercise a "retaining lien" which, subject to Court proceedings, may allow them to keep your file as security.

You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to [cover] pay for legal fees. Your attorney's written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney's security interest in the marital residence cannot be foreclosed against you.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

Once your Judgment of Divorce is signed, if you are re-retaining an attorney you must sign a new retainer agreement.

If you are expecting your attorney to prepare and file documents related to the transfer of a house, co-op or lease, that must be specified in the retainer agreement. The signing of an agreement or Court order that transfers title does not transfer a co-op apartment or a house. A separate document must be prepared and filed.

In the event of a fee dispute, you may have the right to seek arbitration pursuant to Part 137 of the Rules of the Chief Administrative Judge where the dispute involves a sum of more than \$1,000.00 or less than \$50,000.00 unless you agree otherwise. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:

_____	Attorney's signature
_____	Client's signature
_____	Date Form 1400.2-1(1/95)

EXHIBIT B

MEMORANDUM

To: John W. McConnell, OCA Counsel
From: Susan W. Kaufman, Counsel to the Matrimonial Practice Advisory and Rules Committee
cc: Hon. Jeffrey S. Sunshine, Chair of the Matrimonial Advisory and Rules Committee
Date: May 22, 2018

Re: Proposed Revision to 22NYCRR 1400.2
Statement of Client's Rights and Responsibilities

The Matrimonial Practice Advisory and Rules Committee recommends that the Chief Administrative Judge consider a proposal for the Appellate Divisions to adopt a revision to the Statement of Client's Rights and Responsibilities required pursuant to 22 NYCRR 1400.2. The proposed revision (copy attached) would update the document which was originally adopted in 1994 and last amended in 1995, and would provide certain clarifications of the rights and responsibilities based on actual experience of members of our Committee who are practicing matrimonial attorneys and Judges familiar with matrimonial litigation as it is practiced today. Without detracting from the information provided in the existing form, the revisions will reduce the number of attorney client disputes by clarifying matters that are not clear in the existing form. Adoption of the revised form will improve satisfaction of the both litigants and attorneys with the matrimonial litigation process. It will also improve court operational efficiency and further the Excellence Initiative by reducing delays caused by attorney withdrawal or substitution of counsel as well as the volume of malpractice and fee dispute litigation.

The revised form is much clearer regarding responsibilities of the client. The existing form provides that a prospective client is entitled to a written retainer agreement detailing the fee arrangement in plain language, and is entitled to have the attorney clarify any terms of the retainer agreement before the client signs it. The revised form adds that the client and the attorney are both required to sign the retainer agreement before the attorney is hired, and that the client is responsible to read the agreement and ask the attorney any questions about it before signing it. Similarly, the revised form provides that it is the *responsibility, (rather than merely a right as specified in the existing form)*, of the prospective client to be present and on time at conferences, oral arguments, hearings and trials, unless excused by the court. While the existing form provides that the attorney must show the client courtesy and represent the client zealously and preserve the client's confidences, the revised form adds that the duty to preserve confidences is to the extent permitted by law, recognizing that the attorney may have an ethical duty not to preserve client confidences in certain instances. This takes into account changes in the professional ethics requirement since the statement was first created. The revised form imposes on the prospective client, not just the attorney, the responsibility to communicate honestly, civilly and respectfully with the attorney. Under the revised form, both attorney and client are expected to be available for open communications during regular business hours, a basic requirement which is unfortunately not always adhered to.

The most common issue that arises in attorney client disputes is the amount of the attorney's fees. The existing form provides that the client is entitled to understand the retainer fee and the proposed rates. Understanding the retainer fee and the rates would arguably include understanding that the retainer fee may not be sufficient to pay for all the hours billed on the case. However, this is often a basis for misunderstanding if not clarified. Thus, the revised form makes this clear. Clients are also put on notice that they must raise any objections to bills from their attorney *in writing, rather than just promptly*. This will prevent disputes arising as to whether the client in fact raised a timely objection. Additionally, the revised form adds that estimates of future costs by the attorney given in good faith are not guarantees. Clients are also advised about the possibility of their attorney obtaining a retaining lien to secure payment of their unpaid fees, while the existing form mentions only the possibility of a charging lien.

Disputes between attorneys and clients often result in requests by attorneys to withdraw from the case. The revised form makes clear that the attorney may only withdraw from the case *with Court permission* unless the client consents. The revision also points out that the attorney may send the client written communications if the attorney disagrees with the client about how the case should be handled, and the attorney may seek to be relieved if a client is not truthful with them.

Attorney client relations often suffer when clients are surprised by additional fees and costs in the litigation, quite apart from the attorney's fees. For this reason, the form puts clients on notice that they may be ordered to contribute to their spouse's counsel fees and expenses, or that their spouse may be ordered to contribute to their counsel fees and expenses, and that those expenses may include court filing fees, and fees for experts and process servers. Notice is also given that frivolous conduct may result in sanctions or fines. Moreover, rather than advise the client about the right to seek arbitration in the event of a fee dispute in general terms as in the existing form, the revised form refers the client directly to Part 137 of the Rules of the Chief Administrative Judge and provides specifics about the jurisdictional amounts to qualify.

The revised form reinforces the recently adopted amendments to 22 NYCRR 202.50(b) designed to protect parties regarding issues of title to the marital home during a divorce, especially where there is a foreclosure action. The revised form points out that the attorney should not be expected to prepare and file documents to transfer title to the marital home unless the retainer agreement so specifies, and that an agreement or court order requiring transfer of title to the marital home is not sufficient to transfer title without a separate document being prepared and filed. The revised form also alerts the client that a new retainer agreement is required once the Judgment of Divorce is signed if the client wants to retain the attorney for further services.

The revised form, unlike the existing form, advises clients to expect their attorney to discuss with them certain key provisions of matrimonial law as it has evolved to date, including the Automatic Orders, the Child Support Standards Act, and the Maintenance Guidelines Law.

Finally, the attorney is referenced in the revision as "the attorney" rather than "your attorney" to make clear that the form must be given to the prospective client before an attorney client relationship is formed, especially where the statement is provided during a consultation

prior to retention. Similarly references to the attorney as “he or she” are changed to “the attorney” for purposes of gender neutrality.