Ethical Obligations of Lawyers as Witnesses in Matrimonial Actions

By Chris McDonough and Joel R. Brandes

Domestic Relations Law §237(a) provides that in any action brought for a divorce, the court may direct either spouse to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. Both parties to the action or proceeding and their respective attorneys, must file an affidavit with the court detailing the financial agreement between the party and the attorney."

Rule 1.5 (d)(5) of the Rules of Professional Conduct ("RPC") and 22 NYCRR 1400.3 ("Matrimonial Rules") require a lawyer who represents a client in a domestic relations matter to execute a written agreement with the client, setting forth in plain language the nature of the relationship and the details of the fee arrangement. 22 NYCRR 1400.3 is more specific than RPC Rule 1.5 in setting forth the terms of compensation and the nature of the services to be rendered. It specifies what the written retainer agreement must contain and requires in Supreme Court matters that the signed agreement must be filed with the court, along with the statement of net worth. Matrimonial Rule 1400.2 and RPC Rule 1.5 (e) require that a statement of clients' rights be provided to a prospective client in "domestic relations matters". It must be provided at the initial consultation and must be signed by the attorney and the client.

The failure to comply with Matrimonial Rules 1400.2 and 1400.3 does not preclude the right to make application, pursuant to Domestic Relations Law §237, for

an award of counsel fees from the other spouse in a case where there was "substantial compliance" with those requirements, where the client waives her right to arbitration of the attorney's fee dispute, and counsel rendered substantial services and achieved reasonably favorable results. (*Flanagan v Flanagan*, 267 AD2d 80, 699 NYS2d 406 (1st Dept., 1999); *Mulcahy v. Mulcahy*, 285 A.D.2d 587, 728 N.Y.S.2d 90 (2d Dept. 2001).

In a contested divorce trial, the proof in support of a request for counsel fees is made through the testimony of the client followed by the testimony of the attorney for the client. The client must be called as a witness by counsel who has her identify and then offer into evidence the retainer agreement and statement of clients' rights. Counsel then questions her as to how much she had paid her attorney and experts to date, and how much she presently owes her counsel. Counsel has her identify his bills or invoices which are then offered into evidence. He then has her testify as to how she paid counsel, whether anyone paid any fees on her behalf and whether anyone promised to pay such fees on her behalf.

After the client is cross-examined, counsel for the client testifies next. We note that RPC Rule 3.7(a) limits a lawyer's testimony to the nature and value of legal services rendered. This testimony is presented in narrative form in matrimonial fee applications unless the attorney has co-counsel present to ask the questions. In the usual case counsel first identifies and offers into evidence the documents demonstrating compliance with 22 NYCRR 1400.2, 1400.3 and 22 NYCRR 1200.10-a, if they have not already done so. Next, he offers, in chronological order, testimony as to the legal services rendered, including but not limited to time spent in preparation and service of pleadings, motions, pre-trial discovery, court conferences, preparation of net worth affidavits, statements of proposed disposition, exhibit lists, and witness lists prior to trial as well as

preparation of the pre-trial memorandum of law, and testimony as to the other legal services rendered in preparing for the trial and the actual trial. He then testifies as to time spent in communications and correspondence with the client, the court, the adversary, and the experts related to the case. Finally, he identifies copies of the bills rendered to the client for legal fees and disbursements by his firm if they are in evidence, or offers them into evidence if they are not. He then testifies as to the payments made by the client, or the spouse pursuant to a pendente lite order, or anyone else on her behalf. Counsel may have another attorney testify as to what the prevailing billing rates are for attorneys in the same legal community with similar credentials.

As counsel fee applications come at the end of what is usually a long, drawn out trial, it has become commonplace to stipulate that the application for counsel fees will be "determined upon the submission of affidavits and affirmations " in lieu of testimony. Counsel will usually agree to a schedule for the submission of initial, opposing and reply papers. The unwary are cautioned about agreeing to simultaneous submissions – a tactical mistake, as it denies the moving attorney an opportunity to reply.

Written counsel fee submissions implicate RPC Rule 3.7(a)(2), the advocate-witness rule, and Rule 3.4 (d)(3), Fairness to Opposing Party and Counsel. RPC Rule 3.7(a) states, in relevant part, that: A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:… (2) the testimony relates solely to the nature and value of legal services rendered in the matter; …or (5) the testimony is authorized by the tribunal. Thus, unless authorized by the tribunal, RPC Rule 3.7 (a)(2) permits a lawyer to give testimony which relates *solely* to the nature and value of legal services rendered to the client by the lawyer or the firm without

risking disqualification. (*Henry v. Advance Process Supply Co*. 11 A.D.3d 430, 782 N.Y.S.2d 769 (2 Dept. 2004). However, it does not give attorneys carte blanch to testify to anything beyond the nature and value of the legal services rendered to the client, and certainly not to matters outside the record or inadmissible hearsay (See Lydia D. v Thomas B., 89 A.D.3d 630, 933 N.Y.S.2d 269 (1 Dept., 2011).

RPC Rule 3.4 (d)(3), , provides that "a lawyer shall not: … in appearing before a tribunal on behalf of a client … assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant … but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

The Court of Appeals has held that in exercising its discretionary power to award counsel fees, a court should review the financial positions of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions as well as the delay incurred as a result of obstructionist tactics (*Johnson v Chapin*, 12 NY3d 461, 881 N.Y.S.2d 373 (2009).

Based upon this holding it has become a common practice for the attorney opposing the counsel fee application to argue in his affirmation that fees should be denied or reduced because the party requesting counsel fees: (a) wasted time and delayed the action; (b) is to blame for the excessive time the parties spent in negotiations and for the parties failure to settle the case or stipulate to certain issues; (c) engaged in obstructionist conduct; or (d) brought frivolous motions.

These arguments in an opposing affirmation require factual statements that may go beyond the trial record, and beyond testimony as to the nature and value of legal services rendered to the client by the lawyer or the firm. They appear to us to

violate RPC Rule 3.7. They *may* also constitute a 'personal opinion' as to the justness of the cause or the credibility of a witness, in violation of Rule 3.4 (d)(3), if they are based upon matters outside the record. (See *Matter of Justice v King*, 876 N.Y.S.2d 301 (4 Dept.,2009)

A claim in an affirmation submitted by an attorney opposing a counsel fee application that a party wasted time in settlement negotiations or in repudiating a settlement, based upon conduct outside the courtroom, may be considered a personal opinion in violation of Rule 3.4 (d) (3), and it may be a violation of the advocate-witness rule because it is not testimony as to the nature and value of legal services rendered to the client by the lawyer or the firm.

Where counsel claims that his adversary engaged in obstructionist conduct it may be a violation of the advocate-witness rule because it is not testimony as to the nature and value of legal services rendered to the client by the lawyer or the firm. It is also appears to be a personal opinion in violation of Rule 3.4 (d) (3), unless the attorney can point to evidence in the record of such conduct. Conduct is not obstructionist unless it is intentional and designed to delay the litigation. It requires a finding of conduct which purposely prevents or delays a legal process. It requires deliberate interference; a hard thing to prove.

A claim in a counsel fee affirmation that the adversary engaged in frivolous motion practice is not testimony as to the nature and value of legal services rendered to the client by the lawyer or the firm. Also, it may be a personal opinion in violation of Rule 3.4 (d) (3), unless a court has previously determined that a particular motion was frivolous. A motion is not a frivolous motion just because it is denied. It is frivolous if a court determines it is frivolous in accordance with 22 NYCRR 130-1.1(c) which states conduct is frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an

extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

Conclusion

Can a matrimonial lawyer ethically submit an affirmation in support of, or in opposition to a counsel fee application, which contains statements of his opinion regarding matters outside the record, without running afoul of RPC Rule 3.4 (d)(3)? Does he violate Rule 3.7(a)(2) by submitting an affirmation referring to matters beyond the nature and value of legal services he rendered?

We believe that there is real potential for such violations. During the counsel fee portion of a trial, the judge rules on the admissibility of the lawyer's testimony. He may allow this testimony under the discretion granted the court in Rule 3.7(a)(5) or sustain properly raised objections to it. In either event, the adversary will have the opportunity to present rebuttal testimony. When an attorney submits an affirmation containing facts beyond the nature and value of legal services rendered to the client or provides his opinion or belief as to the actions of opposing counsel, client obstructionism, delay, and credibility, he is providing fact and opinion evidence which is not subject to a ruling on admissibility by the judge, and which may not be subject to rebuttal.

Chris McDonough is Special Counsel to Foley Griffin LLP. He has practice over 30 years exclusively in the field of attorney grievance defense, counselling lawyers and firms on defensive practice and risk management, and is a frequent lecturer and author on matters of professional ethical practice.

Joel R. Brandes is an attorney in New York City. He is the author of the nine-volume treatise Law and the Family New York, 2d, and Law and the Family New York Forms, 2020 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.