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Up Close and Professional With New York's Engagement Letter Rules

By Devika Kewalramani

A lawyer is asked to represent a client. After consulting the applicable rules, the lawyer promptly prepares and sends a letter to the client, reflecting the scope of services and fees to be paid. The lawyer provides services, but the client fails to pay the fee. Has the lawyer done everything necessary, at least with regard to the engagement letter, to allow recovery of the fee? Has the lawyer satisfied the ethical rules concerning engagement letters and retainer agreements?

New York's engagement letter rule (Rule 1215),¹ just a page long and more than eight years old, plays a major role in the day-to-day practice of law. It applies in most situations where a New York lawyer represents a client and expects to be paid for legal services. However, there are gray areas and gaps that it does not specifically cover.

In addition to issues of fee recovery, Rule 1.5(b) of New York's new Rules of Professional Conduct (RPC)² adds a disciplinary sting to Rule 1215 and to the failure to create a written engagement letter or retainer agreement when required.

This article will discuss the interplay between Rule 1215 and the new and yet untested ethics rule RPC 1.5(b), which is more stringent in some respects. In addition, this article will review recent case law on recovery of fees in the absence of an engagement letter or retainer agreement.

Two Rules Compared

Rule 1215 is a court rule without any stated penalty for noncompliance.³ In contrast, RPC 1.5(b) is an ethics rule requiring a minimum level of conduct below which no lawyer can fall without being exposed to disciplinary action.⁴

Rule 1215.1 requires an attorney to either provide a written engagement letter to a client or enter into a signed written retainer agreement with a client before the engagement begins or within a reasonable time thereafter. Either an engagement letter or a retainer agreement is sufficient to satisfy Rule 1215.1.⁵ Rule 1215.1(c) states, "[I]nstead of providing the client with a written letter of engagement, an attorney may comply . . . by entering into a signed written retainer agreement with the client."

Rule 1215.1(b) requires the writing to cover:

1. the scope of services;
2. fees, expenses and billing practices; and
3. where applicable, the client's right to arbitrate fee disputes pursuant to Part 137 of the Rules of the Chief Administrator of the Courts (the Fee Dispute Resolution Program, or FDRP).⁶

The ethics rule, RPC 1.5(b), requires an attorney to create a writing, but only when such a writing is required by statute or court rule.⁷ Since Rule 1215 is a court rule, a writing is required under RPC 1.5(b) if it is also required

under Rule 1215. RPC 1.5(b) independently specifies what such a writing must include:

1. the scope of representation; and
2. the basis or rate of fees and expenses.

Hence, it appears that the two rules may easily be satisfied with one writing.

Although Rule 1215 and RPC 1.5(b) are intertwined, the two rules have overlapping provisions that are both similar and different, leading to possible confusion as to how to comply with their respective requirements.

First: Rule 1215.1 requires that a lawyer provide an engagement letter or make a retainer agreement before or within a reasonable time after commencing a representation. Only an engagement letter can be reasonably deferred if (1) it is impracticable to get the letter done before or (2) the scope of the services to be provided cannot be determined at the time of the commencement of representation.⁸ No comparable delay is expressly allowed for retainer agreements. RPC 1.5(b) has timing requirements for written communications to clients identical to Rule 1215's retainer agreements.

Second: Rule 1215.2 has four exceptions to its requirements for a writing:

1. where the fee to be charged is expected to be less than \$3,000,
2. where the attorney's services are of the same general kind as previously rendered to and paid for by the client,
3. in domestic relations matters subject to 22 N.Y.C.R.R. Part 1400, or
4. where the attorney is admitted to practice in another jurisdiction and maintains no office in New York State or where no material portion of the services are to be rendered in New York.

In contrast, RPC 1.5(b) has only one exception: a writing is not required when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. The exception in Rule 1.5(b) is comparable to Rule 1215's exception for "services of the same general kind" but is narrower because it applies only to "regularly represented clients." There is a possible trap for the practitioner here: RPC 1.5(b) first says that it requires a writing only when required by a court rule, but contains fewer exceptions to the writing requirement than Rule 1215. A possible construction is that RPC 1.5(b) requires a writing only when none of the Rule 1215 exceptions applies, and that its one specified exception applies where some other rule would otherwise require a writing.

Third: Rule 1215 requires a lawyer to give a client an updated writing if there is a *significant* change in the scope of services or fee to be charged, whereas RPC 1.5(b) requires an attorney to communicate to a client (not nec-

essarily in writing) *any* change in the scope of the representation or the basis or rate of the fee or expenses.

Fourth: While Rule 1215 requires that a lawyer must, where applicable, include in the writing to the client notice of its right to arbitrate fee disputes under the FDRP, RPC 1.5(b) does not require such notice. However, another ethics rule, RPC 1.5(f), provides that, where applicable, a lawyer must *resolve* fee disputes by arbitration at the election of the client under the fee arbitration program.

Consequences of Noncompliance

What if a lawyer has no written engagement letter or retainer agreement in violation of Rule 1215? Will noncompliance with Rule 1215 result in an ethical violation under RPC 1.5(b), thereby subjecting the lawyer to professional discipline? What effect will noncompliance have on the right to a fee for services?

Rule 1215 is silent on penalties for failure to comply. RPC 1.5(b), by contrast, is an ethics rule, exposing the lawyer to sanctions for noncompliance.⁹ There is no reported case on disciplinary sanctions against lawyers and/or law firms for the absence of a writing under Rule 1.5(b).

Much of the case law on Rule 1215 relates to fee disputes between a lawyer and a client. The typical scenario is where the lawyer renders legal services for a client solely on the basis of an oral fee arrangement. When the lawyer seeks to recover the fee, the client refuses to pay citing, *inter alia*, the lawyer's failure to comply with Rule 1215.

The leading New York case on the consequences of noncompliance with Rule 1215 is *Seth Rubenstein, P.C. v. Ganea*.¹⁰ The Second Department held that a lawyer who failed to give an engagement letter or make a retainer agreement in violation of Rule 1215 could still recover the reasonable value of services rendered on a quantum meruit basis (as opposed to being able to recover the full amount of fees under an engagement letter or retainer agreement).

In that case, the lawyer had already recovered a partial fee through an award from the estate of a person subject to guardianship. The issue was payment of an additional amount, the client asserting that the absence of a writing should completely bar any additional recovery. The Second Department considered the three differing conclusions that trial courts had come to – that no fee could be collected, that the lawyer could retain whatever had been paid but recover no more, or that an award could be made in quantum meruit. The Second Department adopted the quantum meruit rule:

Providing that Rubenstein establishes the client's knowing agreement to pay for legal fees not fully compensated by an award from the AIP's estate, Rubenstein may recover in quantum meruit the fair and reasonable value of the services rendered on behalf of Ganea prior to his discharge as counsel.¹¹

The court also said that a lawyer failing to meet the writing requirement of Rule 1215.1 “bears the burden of establishing that the terms of the alleged fee arrangement were fair, fully understood, and agreed to by [the client].” However, this language appears to be inconsistent with the holding that the fee would be measured by quantum meruit rather than by the terms of the alleged fee arrangement. It may be that this language was directed to the particular issue in that case: whether the client understood that the amount awarded by the guardianship court would not be the total legal fee.

The First, Second and Fourth Departments of the Appellate Division have relied on *Rubenstein* to hold that noncompliance with Rule 1215 does not bar fee recovery on a quantum meruit basis.¹²

The question whether an engagement letter must be signed was recently addressed in *Pechenik & Curro, P.C. v. Weaver*.¹³ There, an attorney sued a client for fees. The attorney had sent the client an engagement letter and discussed its contents with the client but the client did not sign and return it. The client contended that Rule 1215.1 not only requires a written engagement letter but that it be signed by the client in order to be effective. The client’s motion for summary judgment and to dismiss was denied. The court considered the wording of Rule 1215 and did not find a requirement that a client must sign an engagement letter. The court held, “[T]he plain wording of the regulation supports this conclusion and also the fact that the regulation provides in the alternative that an attorney may enter into a signed written retainer agreement with the client in order to comply with the regulation.”¹⁴

Why Comply

So, if an attorney is permitted to recover legal fees on a quantum meruit basis despite a violation of Rule 1215, why should the attorney seek to comply with the requirements of Rule 1215?

First: The New York Court of Appeals has not yet weighed in on whether an attorney can recover legal fees from a client in the absence of an engagement letter or retainer agreement.

Second: Even if a fee may be recovered, quantum meruit and the agreed fee may be different. The *Rubenstein* court had this to say:

Attorneys continue to have every incentive to comply with [Rule 1215], as compliance establishes in documentary form the fee arrangements to which clients become bound, and which can be enforced through 22 NYCRR part 137 arbitration or through court proceedings. Attorneys who fail to heed [Rule 1215] 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 factfinder 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.¹⁵

Third: There is the practical problem of proving even the right to quantum meruit. In the absence of a writing, the client may contend that there was never any agreement to pay for services, written or oral, which is a requirement for a quantum meruit recovery. This is illustrated by *Barry Mallin & Assocs. P.C. v. Nash Metalware Co.*¹⁶ There, unlike in *Rubenstein*, the client disputed even an oral agreement for legal services. The Court found that the lawyer failed to establish a meeting of the minds sufficient to create an enforceable agreement for legal services and refused even a quantum meruit award.

Finally, although there is no precedent yet under ethics rule RPC 1.5(b), no attorney should want to be the subject of the first professional discipline case under that section. ■

1. N.Y. Comp. Codes R. & Regs. tit. 22, § 1215 (N.Y.C.R.R.). Rule 1215 became effective on March 4, 2002, and was amended on April 3, 2002.

2. 22 N.Y.C.R.R. § 1200. RPC became effective on April 1, 2009, and was amended on May 4, 2010.

3. Upon adoption of Rule 1215, the Chief Administrative Judge said, “[T]his 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.” John Caher, *Rule Requires Clients Receive Written Letters of Engagement*, 227 N.Y.L.J. 1 (2002).

4. See RPC Scope [6] published by the New York State Bar Association.

5. There are some differences between an engagement letter and a retainer agreement. First, an engagement letter is a “letter” a lawyer gives to a client whereas a retainer agreement is a signed “agreement” the lawyer enters into with a client. Second, while Rule 1215 permits lawyers, in certain circumstances (discussed below) to provide a writing to a client about the engagement after the engagement begins, it appears that only engagement letters (not retainer agreements) may be deferred.

6. 22 N.Y.C.R.R. § 137. This rule established, in 2002, a statewide fee dispute resolution program to resolve attorney-client disputes over legal fees through arbitration.

7. “This information . . . shall be in writing where required by statute or court rule.” RPC 1.5(b).

8. Rule 1215.1(a).

9. See RPC Scope [6] and [11] published by the New York State Bar Association.

10. 41 A.D.3d 54, 833 N.Y.S.2d 566 (2d Dep’t 2007).

11. *Id.* at 64.

12. *Strobel v. Rubin*, No. 570022/09, 2009 WL 2517022 (1st Dep’t 2009); *Nabi v. Sells*, 70 A.D.3d 252, 892 N.Y.S.2d 41 (1st Dep’t 2009); *Utility Audit Grp. v. Apple Mac & R Corp.*, 59 A.D.3d 707, 874 N.Y.S.2d 525 (2d Dep’t 2009); *Chase v. Bowen*, 49 A.D.3d 1350, 853 N.Y.S.2d 819 (4th Dep’t 2008).

13. No. 222877, 2009 WL 2877598 (Sup. Ct., Rensselaer Co. 2009).

14. *Id.*

15. *Rubenstein*, 41 A.D.3d at 64.

16. 18 Misc. 3d 890, 849 N.Y.S.2d 752 (Sup. Ct., N.Y. Co. 2008).

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