From: Peter Petrou
To: Comments Mailbox
Subject: [External]Comment on retainers that would prohibit waiver of fee-shifting
Date: Sunday, September 18, 2022 8:37:55 PM

Dear Judge Grant:

I write in response to the Court's request for comment on whether an attorney should be prohibited from including a clause in their retainer agreements that waive an attorney's right in fee shifting cases.

By way of background, I have practiced law since 1984, currently serve on the DRB, have represented parents in special education matters involving fee shifting, and I am the parent of a special needs child.

I respectfully submit such a clause cannot be reconciled with RPC 1.2(a), and there is no reason to carve out an exception to the scope of that Rule.

Special ed cases, in particular, involve time-sensitive rights and emotional stresses that make a delayed resolution potentially harmful even when the end result is a favorable ruling or judgment. School districts may consent (and often have) to provide services of debatable necessity solely to put the matter behind them. Parents often get what they want simply because a district's defense costs may exceed the cost of the services offered. In such cases, it is reasonable for the district to insist on a waiver of fees to ensure the settlement truly results in closure.

Time-sensitive services for a student should not be hostage to an attorney's need to let litigation (and appeals) play out in order to support fee-shifting. This would create a tail-wagging-the-dog scenario. The litigation becomes a process solely for the lawyer's interests that blocks a settlement promoting the client's substantive rights. Making settlements more difficult would also waste judicial and quasi-judicial resources.

Claims arising under the LAD and similar fee-shifting statutes raise similar concerns (e.g., an offer of reinstatement) where the client should decide whether a proposed settlement is worth more than preserving fee-shifting.

The attorney retains the ability to protect his/her financial interests through alternate fee arrangements. The retainer could provide for an hourly rate (or other alternate or hybrid fee calculation) in the event a settlement extinguishes statutory fee-shifting. The client may still face a hard choice of whether to pay the lawyer out of his or her pocket, but at least it remains the client's choice.

This issue addressed here arises because fee-shifting is a supplemental right of the client under most – if not all – fee shifting statutes, and therefore may be waived. It is not a separate cause of action/claim of the attorney. In areas of the law often involving the rights of our more vulnerable citizens, such as special education matters, it may make sense to protect counsel acting as "private attorneys general" by creating a right to recover fees in the attorney independent of the client's substantive rights. But that requires a legislative solution.

Fee-shifting statutes could also be amended by prohibiting settlement agreements from including a waiver of fee-shifting.

While such legislative solutions will have their own pros and cons, the point is that the concerns of attorneys in these practice areas can be addressed by alternate means, without impairing a fundamental ethical right of the client to have his or her personal interests ultimately dictate the course of a litigation.

PETER PETROU, ESQ.
Attorney-at-Law
A Professional Corporation
18 Rockaway Place
Parsippany, NJ 07054
(973) 452-8875 (cell)
(973) 352-6421 (fax)
Pete@PetrouLaw.com