Chapter 1

Lawyer's Duties and Responsibilities to a Client or Former Client

1-1 INTRODUCTION

Legal malpractice cases present unique issues, as distinguished from other tort causes of action. Further, legal malpractice cannot be discussed without referencing the Rules of Professional Conduct, as a lawyer's duties to a client and others and the lawyer's duties to practice ethically and within the bounds of the Rules are so interwoven.

The most frequent sources of legal malpractice claims and ethical complaints include conflicts of interest, business dealings with clients, breach of the duty of confidentiality, issues relating to attorneys' fees, termination of the attorney-client relationship, and obligations as a fiduciary, trustee, or in real estate transactions. The discussions in the following chapters provide practical advice to the legal profession about how to ensure compliance with the Rules and avoid legal malpractice claims or ethics violations, with a particular focus on litigation ethics.

1-2 ELEMENTS OF LEGAL MALPRACTICE

The elements of legal malpractice are often described as requiring proof the following:

(1) the existence of an attorney-client relationship creating a duty of care upon the attorney;

(2) the breach of that duty;

(3) proximately caused damages.[1]

Numerous cases illustrate the nature and essential components of a legal malpractice case.[2]

The elements of a legal malpractice claim share many of the characteristics of negligence claims against other professions. However, there are significant differences between legal malpractice and other malpractice claims. Most professional negligence cases are based upon the common law, but in New Jersey a legal malpractice case may also be based upon statutory law. Section 2A:13-4 simply states "If an attorney shall neglect or mismanage any cause in which he is employed, he shall be liable for all damages sustained by his client."[3]

1-3 LEGAL MALPRACTICE AND THE RULES OF PROFESSIONAL CONDUCT

Many of the unique aspects of legal malpractice cases are the result of the inter-relationship between the Rules of Professional Conduct and the standard of care for the practice of law in New

---

1. *Gilbert v. Stewart*, 247 N.J. 421, 442-43 (2021) (citing *Nieves v. Off. of the Pub. Def.*, 241 N.J. 567, 579 (2020); *Townsend v. Pierre*, 221 N.J. 36, 51 (2015); *McGrogan v. Till*, 167 N.J. 414, 425 (2001)); *see also* Model Civil Jury Charge 5.51A Legal Malpractice (Revised 10/2022). Relevant model jury charges are found in Appendix C, below.

2. *See, e.g.*, *St. Pius X House of Retreats v. Diocese of Camden*, 88 N.J. 571 (1982); *Conklin v. Hannoch Weisman, P.C.*, 145 N.J. 395 (1996); *Jerista v. Murray*, 185 N.J. 175 (2000); *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.*, 179 N.J. 343 (2004); *Frank H. Taylor & Son, Inc. v. Shepard*, 136 N.J. Super. 85 (App. Div. 1975), *aff'd*, 70 N.J. 93 1976 (1976); *Hoppe v. Ranzini*, 158 N.J. Super. 158 (App. Div. 1978); *Albright v. Burns*, 206 N.J. Super. 625 (App. Div. 1986); *Gautam v. De Luca*, 215 N.J. Super. 388 (App. Div. 1987); *Zendell v. Newport Oil Corp.*, 226 N.J. Super. 431 (App. Div. 1988); *Hofing v. CNA Ins. Cos.*, 247 N.J. Super. 82 (App. Div. 1991); *2175 Lemoine Ave. Corp. v. Finco, Inc.*, 272 N.J. Super. 478 (App. Div. 1994); *Cellucci v. Bronstein*, 277 N.J. Super. 506 (App. Div. 1994), *certif. denied*, 139 N.J. 441 (1995); *Sommers v. McKinney*, 287 N.J. Super. 1 (App. Div. 1996); *DeAngelis v. Rose*, 320 N.J. Super. 263 (App. Div. 1999); *Davin, L.L.C. v. Daham*, 329 N.J. Super. 54 (App. Div. 2000); *Estate of Fitzgerald v. Linnus*, 336 N.J. Super. 458 (App. Div. 2001); *Johnson v. Schragger, Lavine, Nagy & Krasny*, 340 N.J. Super. 84 (App. Div. 2001); *Moscatello ex rel. Moscatello v. Univ. of Medicine & Dentistry of N.J.*, 342 N.J. Super. 351 (App. Div. 2001); *Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 N.J. Super. 1 (App. Div. 2001); *Gilles v. Wiley, Malehorn & Sirota*, 345 N.J. Super. 119 (App. Div. 2001); *Froom v. Perel*, 377 N.J. Super. 298 (App. Div.), *certif. denied*, 185 N.J. 267 (2005); *Lederman v. Prudential Life Ins. Co. of Am., Inc.*, 385 N.J. Super. 324 (App. Div. 2006); *Stoeckel v. Twp. of Knowlton*, 387 N.J. Super. 1 (App. Div.), *certif. denied*, 188 N.J. 489 (2006); *Estate of Albanese v. Lolio*, 393 N.J. Super. 355 (App. Div. 2007); *Kranz v. Tiger*, 390 N.J. Super. 135 (App. Div.), *certif. denied*, 192 N.J. 294 (2007); *Winstock v. Galasso*, 430 N.J. Super. 391 (App. Div. 2013); *Cortez v. Gindhart*, 435 N.J. Super. 589 (App. Div. 2014), *certif. denied*, 220 N.J. 269 (2015); *Innes v. Marzano-Lesnevich*, 435 N.J. Super. 198 (App. Div. 2014), *aff'd as modified*, 224 N.J. 584 (2016).

3. *See* N.J.S.A. 2A:13-4, Liability for damages.

Jersey. The Rules of Professional Conduct regulate every aspect of the practice of law, beginning from the swearing in of an attorney, to the creation of an attorney-client relationship including a duty of care, to the imposition of a duty of care to persons and entities that are not clients, to the duties owed to the Courts, opposing counsel, and the public. The connection between the practice of law and the Rules of Professional Conduct is so intertwined that it is impossible to discuss legal malpractice law without consideration of the Rules of Professional Conduct.

1-4 CREATION OF THE ATTORNEY-CLIENT RELATIONSHIP

A lawyer's primary responsibilities and obligations arise out of the creation of the attorney-client relationship. The attorney-client relationship should be reduced to a written retainer agreement, but some courts have held that the existence of an attorney-client relationship may be established by the conduct of the parties. For this reason, great care should be taken to make certain that both the attorney and the client understand the nature and scope of the relationship.

The creation and scope of the attorney-client relationship were the focus of the court in *Albright v. Burns*,[4] where the plaintiffs, beneficiaries of the estate of Bruchs, sued the co-executor of the estate and the attorney for the estate. The controversy arose after the co-executor, who was to share equally in the estate with the plaintiffs, sold shares of stock owned by the estate. The co-executor had the check made payable to Bruch, but sent the check to the attorney for the estate, who deposited the check into his trust account. The attorney did not inform Bruch of the sale proceeds and disbursed the proceeds to the co-executor in exchange for an unsecured promissory note, and the plaintiffs sued the attorney for the estate.

The court first observed that a legal malpractice claim must be based upon "the existence of an attorney-client relationship creating a duty of care upon the attorney."[5] The court then examined whether there was an attorney-client relationship between the plaintiff, a beneficiary of the estate, and the attorney for the estate, even though

---

4. *Albright v. Burns*, 206 N.J. Super. 625 (App. Div. 1986).
5. *Albright v. Burns*, 206 N.J. Super. 625, 632 (App. Div. 1986).

the beneficiary had not retained him to represent his interests. In answering in the affirmative, the court explained:

> It has been held that an attorney's acceptance of representation need not be articulated and may be inferred from the conduct of the parties . . . . We find sufficient relationship, even though there was an absence of contact between Bruch and the attorney for the estate. The co-executor was acting under the power of attorney he obtained from Bruch. It was his duty to act in Bruch's best interests. The attorney was aware of the relationship and potential conflict.[6]

The court therefore held that the attorney for the estate was liable to the beneficiaries for making an improper payment. The court explained that an executed retainer agreement is not required to create an attorney-client relationship. "[A] member of the bar owes a fiduciary duty to persons, though not strictly clients, who he knows or should know rely on him in his professional capacity."[7] The court explained that whether an attorney has a duty to third persons is determined by considering:

> [V]arious factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[8]

Following this reasoning to its logical conclusion, the Appellate Division held that "privity should not be required between the attorney and one harmed by his breach of duty where the attorney had reason to foresee the specific harm which occurred."[9] Nevertheless, the prudent attorney will obtain an executed retainer

---

6. *Albright v. Burns*, 206 N.J. Super. 625, 632 (App. Div. 1986) (citing *In re Palmieri*, 76 N.J. 51, 58-59 (1978)).

7. *Albright v. Burns*, 206 N.J. Super. 625, 632-33 (App. Div. 1986).

8. *Albright v. Burns*, 206 N.J. Super. 625, 633 (App. Div. 1986).

9. *Albright v. Burns*, 206 N.J. Super. 625, 632-33 (App. Div. 1986).

agreement upon the commencement of the representation of a client.

Similar reasoning is found in *Lenches-Marrero v. Law Firm of Averna & Gardner*[10] which held that acceptance of a referral creates an attorney-client relationship between the client and the attorney who accepts the referral. In that case, the plaintiff retained defendant attorney Gavin to represent her in a personal injury action. The injury had occurred on December 11, 1992, in Puerto Rico, which had a one-year statute of limitations, and thus the statute of limitations expired on December 11, 1993. Gavin referred the case to defendant attorney Averna, who was employed by another law firm. On October 3, 1994, Averna sent plaintiff a letter explaining that he could not represent her because his firm did not practice federal workers' compensation law.

Thereafter, the plaintiff sued Averna, who filed a motion for summary judgment. The trial court granted the motion, concluding "This accident happened in Puerto Rico on December 11, 1992. The statute of limitations, everybody agrees, is one year. There's no proof that Averna even knew about the existence of this case until after the statute of limitations had [expired]."[11]

In reversing, the Appellate Division first observed that "The issue for determination on the motion for summary judgment was whether an attorney-client relationship or a fiduciary duty existed between Averna and plaintiff prior to the expiration of the one-year statute of limitations."[12] The appellate panel explained that the answer to this question depended upon the facts and thus required a remand. In so doing, the court established in language relevant to this discussion that an attorney-client relationship may have been created:

> [I]f defendant Averna had accepted a referral of plaintiff's personal injury case from Gavin prior to the expiration of the statute of limitations and allowed the statute to expire without filing a complaint, then defendants could be liable to plaintiff for legal malpractice or breach of a

---

10. *Lenches-Marrero v. L. Firm of Averna & Gardner*, 326 N.J. Super. 382 (App. Div. 1999).

11. *Lenches-Marrero v. L. Firm of Averna & Gardner*, 326 N.J. Super. 382, 387 (App. Div. 1999).

12. *Lenches-Marrero v. L. Firm of Averna & Gardner*, 326 N.J. Super. 382, 387 (App. Div. 1999).

> fiduciary duty even though plaintiff had never met, had never spoken to, and never had any contact with defendant Averna before the statute of limitations expired.[13]

A similar conclusion was reached in *Procanik v. Cillo*.[14] *Procanik* was a wrongful birth case which involved the relationships among the clients, their attorney, Sherman, and a specialist in medical malpractice law who accepted a referral of the case, Goldsmith. Upon being sued by the plaintiffs, Goldsmith contended that he had not entered into an attorney-client relationship with the plaintiffs. The judge disagreed, stating:

> An attorney-client relationship exists when there is an "identifiable manifestation" that there was reliance on the lawyer in his professional capacity . . . . In *Fuschetti v. Bierman*, . . . the court held that all that is required in establishing an attorney-client relationship is a statement by an attorney that he would "handle" her matter.[15]

The trial court added that a written agreement is not required to establish an attorney client relationship, but to the contrary, "Courts will look to the party's conduct, not necessarily whether there is a formal contract or fee arrangement."[16]

The judge detailed the factual basis for the conclusion that an attorney-client relationship had been created between the plaintiffs and Goldsmith, remarking:

> Here, a fair reading of the letters of counsel indicates that the client and the cause of action were identified to all interested parties. Sherman had met with plaintiffs to discuss their cause of action and, realizing that this matter needed a

---

13. *Lenches-Marrero v. L. Firm of Averna & Gardner*, 326 N.J. Super. 382, 387 (App. Div. 1999).

14. *Procanik v. Cillo*, 206 N.J. Super. 270 (Law Div. 1985), *rev'd in part on other grounds*, 226 N.J. Super. 132 (App. Div.), *certif. denied*, 113 N.J. 357 (1988).

15. *Procanik v. Cillo*, 206 N.J. Super. 270, 281 (Law Div. 1985), *rev'd in part on other grounds*, 226 N.J. Super. 132 (App. Div.), *certif. denied*, 113 N.J. 357 (1988) (first citing *In re Palmieri*, 76 N.J. 51, 60 (1978); and then citing *Fuschetti v. Bierman*, 128 N.J. Super. 290 (Law Div. 1974)).

16. *Procanik v. Cillo*, 206 N.J. Super. 270, 281 (Law Div. 1985), *rev'd in part on other grounds*, 226 N.J. Super. 132 (App. Div.), *certif. denied*, 113 N.J. 357 (1988).

> specialist's attention, he referred the case to [the law firm where Goldsmith was associated at the time the events occurred] recognizing that [the law firm] specialized in the area of medical malpractice. At all times plaintiffs relied upon the judgment and advice of [the law firm]. Accordingly, this court holds that an attorney-client relationship did exist between the [plaintiffs] and [the law firm].[17]

Based upon these cases, when an attorney accepts a referral of a case from another attorney, with notification of the referral to the client, the attorney has entered into an attorney-client relationship with the client.

Who is the "client" was in dispute in *Herbert v. Haytaian*.[18] In that case, the plaintiff asserted a claim for sexual harassment against the then Speaker of the New Jersey General Assembly. The plaintiff's attorney, Mullin, had previously been hired to investigate allegations of sexual harassment of state employees in a department of the government other than where the plaintiff was employed. Mullen subsequently undertook the representation of the plaintiff, but was disqualified by the trial judge who concluded that the representation of the plaintiff in this case "created an appearance of impropriety."[19]

The plaintiff appealed, asserting that Mullin never represented the defendant or the New Jersey Assembly and that he never obtained any confidential information from any source about the plaintiff's case. The Appellate Division affirmed, based upon the fact that Mullin was consulted to investigate allegations of sexual harassment of employees in a state office. The court concluded that Mullin received confidential information as well as the "views and concerns of Hutcheon and Haytaian" on several related issues, and that Mullin expressed his own opinions about these topics. Given this conclusion, the court held that:

> Under these circumstances, an attorney-client relationship was clearly established. The creation

---

17. *Procanik v. Cillo*, 206 N.J. Super. 270, 282 (Law Div. 1985), *rev'd in part on other grounds*, 226 N.J. Super. 132 (App. Div.), *certif. denied*, 113 N.J. 357 (1988).

18. *Herbert v. Haytaian*, 292 N.J. Super. 426 (App. Div. 1996).

19. *Herbert v. Haytaian*, 292 N.J. Super. 426, 430 (App. Div. 1996).

> of an attorney-client relationship does not rest on whether the client ultimately decides not to retain the lawyer or whether the lawyer submits a bill. When, as here, the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case, then an attorney-client relationship is created.[20]

The Appellate Division cited with approval the Restatement of the Law Governing Lawyers[21] which provides an expansive interpretation of the circumstances regarding the creation of an attorney-client relationship. The Restatement suggests that the attorney-client relationship is created when the client "manifests to a lawyer the person's intent that the lawyer provide legal services for the person"[22] and the lawyer either "manifests to the person consent to do so" or even "fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."[23]

Given the advice and instructions above, the prudent lawyer will exercise due care to make certain that the terms and any limitation regarding the scope of representation are comprehensively discussed, understood and reduced to writing. The duty to obtain a written retainer agreement is discussed in the next section.

1-5 DUTIES REGARDING FEES AND TO OBTAIN A RETAINER AGREEMENT

The retainer agreement is the foundation upon which all attorney client relations are based. Rule 1.5 and New Jersey Court Rule 1:21-7 govern many aspects of the creation of the attorney-client relationship and legal fees arising out of that relationship. The failure to strictly comply with the aforementioned can lead to ethical charges and malpractice complaints. These rules should be carefully read by every lawyer.

---

20. *Herbert v. Haytaian*, 292 N.J. Super. 426, 436 (App. Div. 1996).
21. Restatement of the Law Governing Lawyers (Proposed Final Draft No. 1) 26 (1996).
22. *Herbert v. Haytaian*, 292 N.J. Super. 426, 437 (App. Div. 1996).
23. *Herbert v. Haytaian*, 292 N.J. Super. 426, 437 (App. Div. 1996).

Certain provisions of these rules should be emphasized. Rule 1.5 requires that every lawyer's fee must be reasonable. Whether a fee is reasonable is a function of many factors, including the amount of time that was required to provide legal services, the complexity of the issues involved in the case, and the skill and experience needed to provide the services. Other relevant factors may include whether the engagement precluded the lawyer from accepting other legal work and whether the client was aware of that, whether the fee is in accord with the "fee customarily charged in the locality for similar legal services, the nature of the result, the time constraints imposed by the client, the experience and reputation of the lawyers providing the services and whether the fee is contingent."

Rule 1.5 also requires that "the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation," except where there exists a "regular relationship between the attorney and client." It is always the wiser course to reduce the retainer agreement to writing.

Rule 1.5 permits a contingent fee, i.e., one which is dependent on the outcome of the case, in many circumstances but bars such an agreement in others. Every contingent fee agreement must be in writing and state the manner of calculation of the fee including the percentage of the recovery to be paid to the lawyer. At the conclusion of the case every lawyer must provide a written statement detailing how the fee was calculated and how the proceeds of the settlement are to be disbursed. Rule 1.5 further provides that a lawyer cannot enter into a contingent fee agreement in a domestic relations or family law matter or a criminal case. Finally, Rule 1.5(e) prohibits a lawyer from sharing a legal fee with another lawyer not in the same firm, unless the client is notified of the referral fee and the client consents to the participation of all of the lawyers in the case.

New Jersey Court Rule 1:21-7 regarding contingent fees provides specific regulations for the use of contingent fee agreements in New Jersey. The prudent attorney should be familiar and must comply with the terms of this rule. A contingent fee is defined as an agreement for legal services where the compensation is contingent "upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed

or is to be determined under a formula."[24] Several key points of the rule should be emphasized.

1: The contingent fee agreement must be in writing, signed by the lawyer and the client, and a copy must be given to the client.

2: The contingent fee in most personal injury cases and property cases not involving subrogation, is limited to the following:

(1) 33% on the first $750,000 recovered;

(2) 30% on the next $750,000 recovered;

(3) 25% on the next $750,000 recovered;

(4) 20% on the next $750,000.

Recoveries in excess of $3 million require an application to the court to establish the fee above the $3 million threshold.

3: The percentages set forth above are maximums, and a lawyer is permitted to enter into, and advertise, a contingent fee in an amount less than the maximum permitted by the court rule.

4: The fee on a settlement before the commencement of trial on behalf of a minor or someone who is "mentally incapacitated" shall not exceed 25%. If a jury has been impaneled, or in a bench trial if the plaintiff has opened or called a witness, the percentages outlined above shall apply.

5: The fee on a structured settlement, defined as any settlement where payments will be made on an installment or periodic basis, shall be calculated on the purchase price of the annuity plus any cash payment made as part of the settlement.

6: The fee in class actions or cases involving the representation of multiple parties arising out of the same set of facts or involving "substantially identical liability issues," The fee shall be calculated on the "aggregate sum of all recoveries."

---

[24] N.J. Ct. R. 1:21-7.

7: For all recoveries, the fee shall be computed on the net recovery after disbursements related to pursuit of the case. However, there is no deduction for liens on the file.

8: At the conclusion of the case, the lawyer must provide the client with a signed closing statement detailing the recovery, expenses, and calculation of the fee.

9: If upon concluding a matter of the lawyer feels that the contingent fee is inadequate, the lawyer may file a motion seeking to increase the fee. Conversely, a client has a right to ask the court to review the reasonableness of any fee.

10: Although an attorney is not required to take an appeal, the fee shall include all services rendered during appeal or retrial.

Whether an attorney is entitled to a fee in the absence of a written contingent fee agreement has been the subject of analysis by several cases. In *Estate of Pinter v. McGee*,[25] a law firm contended that it had agreed to accept a wrongful death case on a discounted contingent fee basis, but did not enter into a written fee agreement. One of the attorneys at the law firm left and took the case with him on a pro bono basis, with the client being liable only for expenses.[26] The trial court denied the original law firm any fee due to the failure to obtain a properly signed contingent fee agreement. The Appellate Division affirmed, holding:

> [T]he firm's failure to memorialize its contingent fee arrangement violates [New Jersey Court Rule] 1:21-7 and [Rule] 1.5(c), and we cannot sanction circumvention of the rule by permitting recovery on a *quantum meruit* basis. We do not preclude, however, an application for actual out-of-pocket disbursements.[27]

---

25. *Estate of Pinter v. McGee*, 293 N.J. Super. 119 (App. Div. 1996).
26. *Estate of Pinter v. McGee*, 293 N.J. Super. 119, 123-24 (App. Div. 1996).
27. *Estate of Pinter v. McGee*, 293 N.J. Super. 119, 128 (App. Div. 1996).

However, other courts have permitted a *quantum meruit* recovery despite the circumstance of a lawyer not obtaining a properly-executed fee agreement.

The right of an attorney to earn a fee based upon *quantum meruit* despite the failure to obtain a fee agreement was also approved in *Glick v. Barclays De Zoete Wedd, Inc.*[28] In that case, the plaintiffs had retained attorney Strum to represent them in an employment discrimination action against their former employers. Strum agreed to represent the plaintiffs pursuant to a contingent fee agreement which provided that the fee would be between one third and one half of the recovery depending on whether the case settled before the filing of suit, during the pendency of suit, or after a trial.[29] One of the plaintiffs, Kraus, countered with an offer excluding the severance pay package that had been offered by her employer from the amount on which the fee would be calculated, but that the remaining provisions were acceptable. Strum never responded to the plaintiff's proposal.[30]

Approximately two years later, plaintiffs advised Strum that they had retained other counsel. The plaintiffs' new counsel asked Strum for a list of his expenses and promised to protect his lien. Strum sent an invoice for expenses and costs of $10,849.66, but did not submit any invoice for the legal services he had rendered, which included discovery conducted prior to his discharge.[31]

Thereafter, the plaintiffs' new counsel settled the underlying employment discrimination case. Strum demanded that the plaintiffs' new counsel place $250,000 in escrow to protect his lien. Plaintiffs' counsel declined and Strum filed a motion under the docket number of the settled case seeking to compel discovery and for "a hearing on the apportionment of attorney's fees." The trial court heard the motions, but Strum could not produce an executed retainer agreement with the plaintiffs. The trial court therefore held that Strum was not entitled to a fee.[32]

---

28. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299 (App. Div. 1997).
29. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 302 (App. Div. 1997).
30. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 302 (App. Div. 1997).
31. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 304 (App. Div. 1997).
32. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 304-06 (App. Div. 1997).

Strum appealed, contending that his proposed agreement along with Kraus's response met the standards of Rule 1.5(b) and he was entitled to a portion of the fee based upon the doctrine of *quantum meruit*.[33] The Appellate Division concluded that Strum was entitled to a portion of the fee based upon *quantum meruit* despite not having an enforceable contingent fee agreement. The court recognized that the plaintiffs' claim was a tort claim and therefore was regulated by New Jersey Court Rule 1:21-7(g) which requires that a contingent fee agreement "shall be in writing, signed both by the attorney and the client."[34] The court continued:

> Clearly the provisions of [New Jersey Court Rule] 1:21-7(g) were not met by Strum. Although Strum's original proposal was in writing, it was never signed by plaintiffs, nor was a duplicate of the signed document provided to plaintiffs. While Kraus indicated to Strum which provisions of his proposal were acceptable and which were not, Strum never responded to her counter proposal; did not prepare a new agreement; and did not obtain her signature or that of [the other plaintiff] or provide either with a duplicate, thus contravening [Rule] 1:21-7(g).[35]

The Appellate Division then turned to the issue of *quantum meruit*. The court first observed that a client may terminate an employee without cause. "The client's right to terminate at will is not a breach of contract but a contract term implied at law based upon the special relationship of trust and confidence between attorney and client."[36] *Quantum meruit* is designed to prevent a client from being "unjustly enriched by the receipt and retention of a benefit without compensation, where the attorney, in conferring the benefit, expected to be paid."[37] The court explained:

> Where an attorney performs legal services for another at his request, but without any agreement

---

33. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 307 (App. Div. 1997).

34. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 308 (App. Div. 1997) (quoting N.J. Ct. R. 1:21-7(g)).

35. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 308 (App. Div. 1997).

36. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 309-10 (App. Div. 1997) (citing *Cohen v. Radio-Elec. Officers Union*, 275 N.J. Super. 241, 261 (App. Div. 1994)).

37. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 310 (App. Div. 1997).

> or understanding as to the remuneration, the law implies a promise on the party who requested such services to pay a just and reasonable compensation . . . . Because the proper measure of compensation under *quantum meruit* is as much as is deserved . . . the crucial factor in determining the amount of recovery is the contribution which the lawyer made to advancing the client's cause . . . Thus, if a retiring lawyer cedes to his successor a substantially prepared case which resulted from an extensive investment of time, skill and funds, the retiring lawyer might be entitled to compensation greater than the standard hourly rate . . . . In comparison, if a ceding lawyer's work contributed to a recovery by the client, but the new attorney was crucial in the success of the case, then the predecessor's compensation should be based, at most, upon a standard hourly rate . . . . Finally, if the predecessor's work, no matter how extensive, contributed little or nothing to the case, then the ceding lawyer should receive little or no compensation . . . . Where the attorney is discharged for good cause, he or she may not be entitled to any recovery, except reimbursement of the reasonable costs incurred in the representation.[38]

Having noted these principles, the court turned to the issue of whether Strum was entitled to fees in this case.

The Appellate Division noted that both *LaMantia v. Durst*[39] and *In re Estate of Travarelli*[40] had permitted a *quantum meruit* recovery despite the absence of a written retainer agreement. The *Glick* court distinguished the holding in *Estate of Pinter v. McGee*, discussed above, stating:

> To us, it is too harsh a result to deny all compensation to an attorney who was retained and rendered

---

38. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 310-11 (App. Div. 1997) (citations omitted).

39. *La Mantia v. Durst*, 234 N.J. Super. 534 (App. Div.), *certif. denied*, 118 N.J. 181 (1989).

40. *In re Estate of Travarelli*, 283 N.J. Super. 431 (App. Div. 1995).

> services in good faith based solely on a failure to obtain a written fee agreement in conformity with [New Jersey Court Rule] l:21-7 (or [Rule] l.5(c)) where no wrongful or unethical conduct is found to exist. Indeed this kind of a situation is exactly what the doctrine of *quantum meruit* was meant to remedy. We agree with Judge Shebell's concurrence in *Pinter*, that failure to comply with the contingent fee rule "merely bars the award of a contingent fee, but not a reasonable fee based on the services actually rendered." . . . For that reason, the trial judge's refusal to consider *quantum meruit* recovery is reversed. The matter is remanded for a determination of Strum and [another attorney apparently retained by Strum]'s entitlement to legal fees based upon the doctrine of *quantum meruit*.[41]

However, by being limited to *quantum meruit*, the attorney may have lost the opportunity to recover a larger contingent fee as permitted New Jersey Court Rule 1:21-7.

The critical nature of the retainer agreement was discussed in *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*.[42] In that case, the plaintiff law firm A.G. was retained by the defendant to investigate a claim of improper conduct by attorneys for a financial institution in another case. Thereafter, A.G. was retained by the defendants to represent them in the initial litigation with the financial institution. Ultimately, A.G. and the defendants had a dispute regarding the handling of the case and billing.[43] A.G.'s Master Retainer Agreement provided in relevant part:

> [I]f the firm withdraws from a client's matter and is further entangled with the client, its time will be billable to and payable by the client, together with expenses; the initial advance retainer would be placed in the firm's general operating account rather

---

41. *Glick v. Barclays De Zoete Wedd, Inc.*, 300 N.J. Super. 299, 313 (App. Div. 1997) (citing *Estate of Pinter v. McGee*, 293 N.J. Super. 119 (App. Div. 1996)).

42. *Alpert, Goldberg, Butler, Norton, Weiss, P.C. v. Quinn*, 410 N.J. Super. 510 (App. Div. 2009).

43. *Alpert, Goldberg, Butler, Norton, Weiss, P.C. v. Quinn*, 410 N.J. Super. 510 (App. Div. 2009).

> than its trust account "because of the ongoing cash flow drain this file will engender"; balances owed and unpaid beyond thirty days will bear interest at the rate of twelve percent per annum; if there is a fee dispute or any proceedings relating to or arising from A.G.'s fees and expenses, the client will continue to pay the hourly fees and expenses for any time and expense that continues to be incurred by the firm by virtue of any fee dispute or related proceedings; the client will pay fees for any time and expense incurred by the firm in seeking to be relieved of counsel and dealing with any successor firm; photocopying charges are to be billed at twenty-five cents per page; and "extraordinary secretarial overtime" will be billed at $50 an hour. Another significant provision in A.G.'s Master Retainer is that no bills will be discounted unless the client agrees not to challenge any of the items billed in the "traditional" manner.[44]

Shortly before trial, A.G. was relieved as counsel with the consent of the defendants. After filing the appropriate pre-suit notices required by New Jersey Court Rule 1:20A-6 and Section 2A:13-6, the plaintiff law firm filed suit against the former clients seeking to recover unpaid legal fees. The defendants filed a counterclaim, and the plaintiff law firm filed a motion for summary judgment. The defendant clients opposed the motion by asserting that the plaintiff law firm had been negligent. The plaintiff law firm filed a motion for summary judgment which was granted by the trial court.

The Appellate Division began its review by focusing on the requirement that a retainer agreement explain in terms the client can understand all fees to be charged to the client. The court stated:

> Full and complete disclosure of all charges which may be imposed upon the client is also necessitated by [Rule] 1.4(c). That reads, "[a] lawyer shall explain a matter to the extent reasonably necessary

---

44. *Alpert, Goldberg, Butler, Norton, Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 521 (App. Div. 2009).

to permit the client to make informed decisions regarding the representation." If the client does not know what charges and costs beyond the hourly rate he may be exposed to, how can the client be expected to make an informed decision regarding representation. Merely directing the client to ask for another document that is not directly presented and explained to the client but will bind him or her does not fulfill the lawyer's obligation pursuant to [Rule] 1.4(c). This obligation to thoroughly explain all the terms of retention is particularly appropriate, given that the lawyer has a unique and fiduciary relationship with the client . . .

[Rule] 7.1(a) also supports the need to fully disclose at the time of retention the significant terms which may financially affect the client. [Rule] 7.1(a) provides an attorney "shall not make false or misleading communications about the lawyer, [or] the lawyer's services . . . A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading . . . ." Omitting significant costs and potential obligations that the client may owe his or her lawyer and referring to them as mere "details" in a standard policy statement may well be deemed materially misleading on an attorney's part . . . [Rule] 1.5(b) requires an attorney to present a client the attorney has not regularly represented, in writing, at the time of retention, all of the fees and costs for which the client will be charged, as well as the terms and conditions upon which the fees and costs will be imposed. In that manner, the client can truly assent to the retention. The client will then be able to make an informed decision as to whether he or she desires to retain the attorney, and the chances for misunderstanding and fraud will be greatly diminished. Absent such complete detailed written

> disclosure presented to and assented to by the client, we hold that the attorney may not, consistent with [Rule] 1.5(b), collect such fees and costs.[45]

The Appellate Division concluded that the law firm did not provide information to the client regarding important details of the retainer, including interest charges, collection fees, withdrawal fees, and overtime fees. These charges were referred in the firm's Master Retainer Agreement, but this was not provided to the client when the law firm was initially retained. The court cited *Kamaratos v. Palias*[46] where the Appellate Division had held that an attorney had a duty to make "a full disclosure to the client of the ramifications of the agreement to arbitrate," in support of the *Alpert* court's conclusion that:

> In the instant matter, we find that plaintiff failed to appropriately comply with [Rule] 1.5(b) with regard to sums sought under A.G.'s Master Retainer; that contract principles do not support the claim of plaintiff that it had an enforceable contract for such sums; and that there is also a strong public policy in fostering faith and confidence in our attorneys and enforcing the "American Rule," such that absent strict compliance with [Rule] 1.5(b), and with an enforceable contract, the fees and charges under A.G.'s Master Retainer violate public policy; and, therefore, A.G.'s Master Retainer is not enforceable.[47]

The unique nature and critical importance of the retainer agreement was emphasized in *Balducci v. Cige*.[48] In that case, Justice Albin instructed:

> A retainer agreement between a lawyer and a client is not an ordinary contract subject to the rules of the marketplace. It is a contract that must conform

---

45. *Alpert, Goldberg, Butler, Norton, Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 531-32 (App. Div. 2009).

46. *Kamaratos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003).

47. *Alpert, Goldberg, Butler, Norton, Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 537 (App. Div. 2009).

48. *Balducci v. Cige*, 240 N.J. 574 (2020).

> to the Rules of Professional Conduct that guide lawyers in their dealings with prospective clients. A lawyer stands in a fiduciary relationship with a prospective client and must act within the ethical constraints commanded by professional standards of responsibility. A retainer agreement must be fair and understandable, and the fee arrangement must be reasonable. The oral assurances that the attorney gives the client should not be different from the written words in the retainer agreement.[49]

The plaintiff had retained the defendant attorney to represent her son in a lawsuit brought against a school district pursuant to New Jersey's Law Against Discrimination (LAD).[50] The Court observed:

> [T]he written retainer agreement seemingly ensured [defendant attorney] the highest calculation of legal fees under three potential scenarios: (1) his hourly rate multiplied by hours worked, regardless of whether the lawsuit prevailed; (2) a contingent fee of thirty-seven and one half percent (37 1/2%) of the net recovery combined with any statutory attorney's fees awarded under LAD; or (3) the statutory attorney's fees under LAD awarded by judgment or settlement. The agreement guaranteed that [the defendant attorney] would bear no financial risk but possibly benefit from a windfall of legal fees.[51]

During the lawsuit, the plaintiff terminated the attorney's representation and filed a declaratory judgment action seeking to void the retainer agreement. The trial court found that the defendant attorney "orally promised [the plaintiff] that she would not be responsible for legal fees if the lawsuit did not succeed, despite the terms of the retainer agreement,"[52] and held "a reasonable client would have understood [the] retainer agreement" only required the

---

49. *Balducci v. Cige*, 240 N.J. 574 (2020).
50. N.J.S.A. 10:5-1 to -50.
51. *Balducci v. Cige*, 240 N.J. 574, 580-81 (2020).
52. *Balducci v. Cige*, 240 N.J. 574, 581 (2020).

client to pay legal fees if she prevailed in the lawsuit.[53] The trial court further held that the attorney did not inform the plaintiff that she "was required to pay legal fees regardless of the case's success," in violation of Rule 1.4(c).[54] Therefore, the trial court concluded the attorney "was entitled only to the quantum meruit of his legal fees."[55] The Appellate Division affirmed, and in doing so provided guidance "imposing new ethical obligations on attorneys handling LAD and other fee shifting claims."[56]

In affirming, the New Jersey Supreme Court concluded that some of "the ethical pronouncements" in the opinion of the Appellate Division "appear too broad and some unsound, and others are worthy of the deliberative process by which new ethical rules are promulgated by this Court."[57] Justice Albin first explained:

> [T]he unique and special relationship between an attorney and a client requires that a retainer agreement satisfy not only ordinary principles governing contracts, but also the professional ethical standards governing the attorney client relationship.[58]

The Court emphasized:

> [A] lawyer's fee shall be reasonable . . . . Every lawyer must set forth "the basis or rate of the fee . . . in writing to the client . . . . That professional imperative requires that the lawyer also make a [f]ull and complete disclosure of all charges which may be imposed upon the client."[59]

Therefore, "Fee agreements that contravene the Rules of Professional Conduct and public policy are not enforceable."[60]

The Court imposed an "informed consent" standard regarding disclosure and explanation of the terms of the contingent fee

---

53. *Balducci v. Cige*, 240 N.J. 574, 586-87 (2020).
54. *Balducci v. Cige*, 240 N.J. 574, 587 (2020).
55. *Balducci v. Cige*, 240 N.J. 574, 587 (2020).
56. *Balducci v. Cige*, 240 N.J. 574, 581 (2020).
57. *Balducci v. Cige*, 240 N.J. 574, 581 (2020).
58. *Balducci v. Cige*, 240 N.J. 574, 592 (2020).
59. *Balducci v. Cige*, 240 N.J. 574, 592 (2020) (citing N.J. Rules of Pro. Conduct R. 1.5(a) and (b)).
60. *Balducci v. Cige*, 240 N.J. 574, 592 (2020).

agreement, stating "A lawyer also has a corresponding duty to 'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,' [Rule] 1.4(c), and is forbidden from making 'false or misleading communications' relating to 'legal fees,' [Rule] 7.1(a)(4)."[61] For these reasons, "the attorney bears the burden of establishing the fairness and reasonableness of the transaction" and a contingent fee agreement "susceptible to two reasonable interpretations should be construed in favor of the client."[62] Justice Albin added that although New Jersey "court rules do not place fixed fee caps on contingent fees in statutorily based discrimination cases . . . . Nevertheless, in all cases, the contingent fee must conform to the rule of reasonableness articulated in [Rule] 1.5(a)."[63]

The Court disagreed, however, with certain of the Appellate Division's guidance "because of their potentially far-reaching impact on the practice of law."[64] For example, the Court took issue with the Appellate Division:

> Mandating that LAD attorneys—or attorneys in other fee shifting cases— "provide examples of how much hourly fees [and costs] have totaled in similar cases" imposes a difficult, if not impossible, task. The attorney would have to know whether the "similar case" settled or was tried, the nature and length of the discovery process, the number of depositions conducted and expert witnesses retained, the overall complexity of the litigation, and many other factors. [Amicus curiae] pose a practical question: how are they to acquire meaningful information about comparable hourly fees and costs?[65]

Similarly, the Court explained: "[W]e have doubts about the soundness of the Appellate Division's command that 'the attorney must inform the client [that] other competent counsel represent

---

61. *Balducci v. Cige*, 240 N.J. 574, 592 (2020).
62. *Balducci v. Cige*, 240 N.J. 574, 594 (2020).
63. *Balducci v. Cige*, 240 N.J. 574, 598 (2020) (citing N.J. Ct. R. 1:21-7(e)).
64. *Balducci v. Cige*, 240 N.J. 574, 601 (2020).
65. *Balducci v. Cige*, 240 N.J. 574, 601 (2020).

clients in similar cases solely on a contingent fee basis, without an hourly component."[66] Furthermore,

> Must an attorney refer a potential client to a competitor who may be less experienced or skilled merely because that attorney advances litigation costs? The answer to that question suggests that the Appellate Division's disclosure requirement must be considered critically. It bears mentioning that, in the age of the Internet, much information is available to an inquisitive client in searching for an attorney.[67]

The requirements of a retainer agreement were central to the dispute in *Arbus, Maybruch & Goode, LLC v. Cohen.*[68] In that case, the plaintiff law firm AMG was retained to represent the defendant in a complex lawsuit involving a claim of negligent construction. The Appellate Division explained "When AMG commenced representing defendants in the Sollecito matter, discovery had already commenced. AMG was the seventh law firm to represent defendants in the Sollecito matter, in which there were thirty different parties, sixteen different law firms, and tens of thousands of pages of discovery."[69]

The parties signed a retainer agreement which explained the billing rates, required a retainer, and explained the client would be responsible for specifically listed costs, such as expert reports. The law firm then provided substantial services pursuant to this agreement:

> AMG prosecuted the Sollecito matter for more than two years, for which it billed approximately 720 hours, evidenced by the monthly and bimonthly invoices appended to the record, dating from February 2018 through June 2020. The scope of work performed by AMG included twenty-two days of depositions, thirty-three motions, five oral argument appearances, multiple case management conferences, mediation, and an order to show cause.

---

66. *Balducci v. Cige*, 240 N.J. 574, 604 (2020).
67. *Balducci v. Cige*, 240 N.J. 574, 604 (2020).
68. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509 (App. Div. 2023).
69. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509, 512 (App. Div. 2023).

> AMG concluded its representation of defendants having billed $279,660.60 in fees and $14,245.50 in expenses. Defendants paid $191,000, leaving a remaining balance of $102,906.10 unpaid.[70]

The plaintiff agreed to represent the defendant in a second lawsuit filed against the defendant in New York by their former legal counsel. AMG spent approximately 131 hours, incurring legal fees totaling $47,260, and expenses of $3,151.65. Defendants paid a total of $11,500, and a balance of $38,911.65 remains unpaid. In response to the plaintiff's lawsuit for fees, the defendants contended "the agreements did not permit billing on an "incremental" basis.[71]

The plaintiff filed a motion for summary judgment, and the trial judge held that "the billable increments of one-tenth of an hour were reasonable, and AMG's legal fees were reasonably presented and assented to by the parties in both retainer agreements."[72] The trial court concluded the fees were reasonable and awarded fees and costs, as permitted by the contingent fee agreement.

In affirming, the Appellate Division first observed:

> "[A] lawyer's fee shall be reasonable." [Rule] 1.5(a). Lawyers must set forth "the basis or rate of the fee . . . in writing to the client." [Rule] 1.5(b). "That professional imperative requires that the lawyer also make a '[f]ull and complete disclosure of all charges which may be imposed upon the client.'"[73]

The Appellate Court then turned to the law controlling a retainer agreement, stating:

> [New Jersey] jurisprudence has interpreted sufficient writings to require, in addition to a sum certain for an initial retainer fee, a disclosure of the out-of-pocket costs of representation, such as photocopying and secretarial overtime . . . . A sufficient writing may include a scope of work to be performed, especially if a lawyer has not

---

70. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509, 513 (App. Div. 2023).

71. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509, 514 (App. Div. 2023).

72. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509, 514 (App. Div. 2023).

73. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509 (App. Div. 2023) (citing *Balducci v. Cige*, 240 N.J. 574, 592-93 (2020)).

> regularly represented that client . . . . Additionally, the disclosure of fees and costs through a sufficient writing must be made at the outset of representation, or reasonably close enough thereto, so as not to constitute a material omission or a surprise charge. [Rule] 1.5(b)[.][74]

The Appellate Division then concluded:

> [W]e find AMG's agreements with defendants comport with [Rule] 1.5, fully apprising defendants of their fee, and affirm for substantially the same reasons as the trial court . . . . We add only the following observation regarding defendants' claim a retainer agreement must include the unit of incremental billing by which a client will be charged.[75]

The court added "there is no specific pronouncement requiring a retainer agreement to explicitly set forth the unit of incremental billing to be used."[76] The appellate panel affirmed the award of costs and fees, stating:

> [W]e also conclude the trial court's award of attorneys' fees and costs was supported by *Rule* 4:42-9(a)(8) and *N.J.S.A.* 2A:13-6.1 "Attorney's fees may be allowed where the parties have agreed thereto in advance by stipulation in a . . . contract." . . . The fees awarded here were based upon a reasonable hourly rate, as determined by the trial judge, who made detailed findings regarding the type of matter involved, the rates charged by other New Jersey attorneys possessing similar experience in like matters, and regional considerations regarding the amount billed.[77]

---

74. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509, 517 (App. Div. 2023) (citing *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 532 (App. Div. 2009), for the proposition that failing to simultaneously present at signing the fee agreement and a separate master retainer agreement which included charges, including 12 percent interest on late charges, collection fees, and secretarial overtime, deemed unreasonable omission in violation of Rule 1.5(b)) (other citations omitted).

75. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509, 517-18 (App. Div. 2023).

76. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509, 518 (App. Div. 2023).

77. *Arbus, Maybruch & Goode, LLC v. Cohen*, 475 N.J. Super. 509 (App. Div. 2023) (citing Pressler and Verniero, Current N.J. Court Rules, cmt. 2.10 on R. 4:42-9 (2023)).

See also *Hrycak v. Kiernan*,[78] where the plaintiff attorney sued the defendant to recover fees earned in a matter in the chancery division. The retainer agreement provided that if the plaintiff was required to sue for fees, the defendant "shall be responsible for all fees and attorney['s] fees with a minimum of $450.00 attorney's fees for the filing of same."[79] Prior to filing suit, a fee arbitration committee had determined the unpaid balance was $2,231.57, and the defendant did not appeal the arbitration decision.

The plaintiff attorney filed suit seeking the unpaid balance and $450 in attorney's fees. The plaintiff provided an accounting of the work performed in filing the complaint. The trial court entered judgment in the amount of $2,231.57 but denied the request for attorney's fees.[80]

The Appellate Division reversed, explaining that such agreements between attorneys and their clients "are enforceable as long as they are fair and reasonable."[81] The court distinguished *Gruber & Colabella, P.A. v. Erickson*,[82] where the court held that a retainer agreement adding one-third of the outstanding balance of fees to the amount due if the lawyer was required to file suit to collect was unenforceable. The *Hrycak* court explained:

> After arbitration, when [the defendant] still refused to honor his obligation, [the plaintiff attorney] was forced [to] take the matter to the Law Division to perfect his rights. For [the plaintiff attorney]'s reasonable time and effort in seeking his fee, especially where the balance awarded was unjustifiably withheld, we see no reason why he should be denied compensation for additional work required in enforcing the award as covered by the retainer agreement.[83]

The message of these cases is clear. The prudent attorney will prepare a written retainer agreement, have it properly executed,

---

78. *Hrycak v. Kiernan*, 367 N.J. Super. 237 (App. Div. 2004).
79. *Hrycak v. Kiernan*, 367 N.J. Super. 237, 239 (App. Div. 2004).
80. *Hrycak v. Kiernan*, 367 N.J. Super. 237, 239 (App. Div. 2004).
81. *Hrycak v. Kiernan*, 367 N.J. Super. 237, 240 (App. Div. 2004).
82. *Gruber & Colabella, P.A. v. Erickson*, 345 N.J. Super. 248 (Law Div. 2001).
83. *Hrycak v. Kiernan*, 367 N.J. Super. 237, 241 (App. Div. 2004).

and provide a copy to the client. The retainer agreement should specify the nature and scope of the agreement and specify any limitations on the scope of the agreement.

1-6 LIMITATIONS ON THE SCOPE OF REPRESENTATION - SCOPE AND LEGALITY

A lawyer is permitted to explicitly limit the representation of a client to specific parameters. Rule 1.2, Scope and Allocation of Authority Between Client and Lawyer, permits a lawyer to limit the scope of the representation, provided the client gives consent after being fully informed of all relevant information.

Further, Rule 1.2 requires a lawyer to consult with the client and follow the instructions of a client regarding settlement decisions. Rule 1.2 similarly obligates criminal defense lawyers to consult with the client and follow the client's instruction regarding whether to plead guilty or go to trial, and whether the client will testify. Obviously, a lawyer is not permitted to assist the client "in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law."[84] However a lawyer may represent a client "in a good faith effort to determine the validity, scope, meaning or application of the law."[85]

Rule 1.2 has been the subject of several opinions. In *Lerner v. Laufer*,[86] the court addressed "the issue of whether and to what extent, if any, an attorney may limit the scope of his representation of a matrimonial client in reviewing a mediated property settlement agreement."[87] In that case, the plaintiff retained the defendant attorney to review a property settlement agreement in a divorce proceeding. When being retained, the defendant attorney advised the plaintiff that he had not conducted any discovery in the case, had not reviewed any tax returns nor other financial information, could not verify her husband's income, had no information regarding the value of properties, had no information regarding

---

84. N.J. Rules of Pro. Conduct R. 1.2(d).

85. N.J. Rules of Pro. Conduct R. 1.2(d).

86. *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).

87. *Lerner v. Laufer*, 359 N.J. Super. 201, 204 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).

the value of stock owned by the couple, and was not able to review any documentation regarding other financial information.[88] The defendant attorney confirmed this in a letter sent to the plaintiff shortly after he was retained, and prudently advised:

> Based upon the fact that I have not had an opportunity to conduct full and complete discovery in this matter, including but not limited to appraisals of real estate and business interests, depositions and interrogatories, I am not in a position to advise you as to whether or not the Agreement is fair and equitable and whether or not you should execute the Agreement as prepared. Accordingly, it is difficult for me to make a recommendation as to whether you should accept the sum of $500,000.00 and 15% of the stock that the two of you have acquired during the marriage in consideration for waiving your right to 85% of the stock that was acquired during the marriage.[89]

After providing this information, the lawyer confirmed that he had reviewed and suggested modifications to the property settlement agreement but that he was relying on the opinion of his client that "the Agreement represents a fair and reasonable compromise of all issues arising from the marital relationship . . . You have further indicated to me that the Agreement will be providing you with a substantial amount of assets in excess of Three Million Dollars, and that you will be receiving alimony payments as specifically set forth in Paragraph 5 of the Property Settlement Agreement [PSA]."[90] The defendant lawyer concluded his letter to the plaintiff by advising:

> This letter will also confirm that you are accepting my services based upon the representations specifically set forth above and that under no circumstances will you now or in the future be

88. *Lerner v. Laufer*, 359 N.J. Super. 201, 205 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
89. *Lerner v. Laufer*, 359 N.J. Super. 201, 205 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
90. *Lerner v. Laufer*, 359 N.J. Super. 201, 205-06 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).

> asserting any claims against me or my firm arising from the negotiation or execution of your [PSA].[91]

The plaintiff acknowledged that she read and signed the letter and a retainer agreement with the defendant attorney. The retainer agreement provided in relevant part:

> The legal services which I anticipate will be rendered to you will involve legal research and factual investigation as to (i) assets which you owned at the time you were married, assets which were acquired over the course of the marriage; (ii) income and your ability/need for support; (iii) grounds for divorce; (iv) custody and visitation, and (v) payment of counsel fees and costs.[92]

After the plaintiff's divorce was finalized, the plaintiff was advised that a company that she had owned with her husband was about to go public. The divorce was vacated and a new PSA was negotiated.

Thereafter, the plaintiff sued her attorney, asserting that the defendant attorney negligently negotiated and drafted the PSA. The plaintiff specifically alleged that the defendant was negligent for "failing to conduct appropriate discovery concerning the assets subject to equitable distribution," as well as for failing to retain experts to value the assets and failing to determine the appropriate amount of alimony and equitable distribution.[93]

> After exchanging discovery, the plaintiff served the report of an expert who concluded that the defendant attorney was negligent. This expert opined and based her opinion on the conclusion that "[Rule] 1.2(c) prohibits an attorney from limiting the scope of his or her representation absent the consent of the client after consultation. In light of the prohibition in [Rule] 1.8(h) against prospectively limiting malpractice liability, it is doubtful as to whether and under what circumstances any such arrangement would be enforceable." The expert

---

91. *Lerner v. Laufer*, 359 N.J. Super. 201, 206 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
92. *Lerner v. Laufer*, 359 N.J. Super. 201, 206 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
93. *Lerner v. Laufer*, 359 N.J. Super. 201, 209 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).

> enumerated the specific acts of negligence by the defendant attorney, stating:
>
> [The defendant attorney] his duties of competence, faithfulness and good judgment in failing to discuss the current state of the law with his client and in failing to advocate on her behalf for a truly "equitable distribution" of the marital assets. A review of the original PSA would raise a red flag for the ordinary attorney representing someone in a marriage of over twenty years. Simply, there are a myriad of questions a reasonable general practitioner would ask with a factual scenario such as the one in this case . . . . Does the client understand what she is giving up, that she would be entitled to a fifty/fifty, or close to fifty/fifty split of all assets based on the duration of the marriage and other relevant facts of the case? What are the details of the mediator's role here? What are the details of the Mediator's knowledge regarding the IPO? . . . He clearly never explained to her that she was entitled to fifty/fifty or close to a fifty/fifty split of the assets and debts as it pertains to equitable distribution. His advice to her was "well basically, you know, in equitable distribution, it's divided in an equitable fashion and certain assets are divided in different ways." This advice was not enough. In my opinion he had a duty to discuss the facts of her case and how they fit squarely into a fifty/fifty scenario, and by omitting to do so, he breached said duty.[94]

The expert further concluded that the defendant attorney's negligence was a proximate cause of damage to the wife. This opinion was based upon a review of tax returns and other financial information that was never made available to the defendant attorney.

The defendant attorney moved for summary judgment based up on the limitation of representation stated in the initial

---

94. *Lerner v. Laufer*, 359 N.J. Super. 201, 212 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).

retaining letter. The trial judge granted the motion and dismissed the case, reasoning that the rules of professional conduct permit a lawyer to limit the scope of the representation and that the defendant attorney did so in this case.[95] In affirming the dismissal, the Appellate Division held:

> [Rule] 1.2(c) expressly permits an attorney with the consent of the client after consultation to limit the scope of representation . . . . To us that means if the service is limited by consent, then the degree of care is framed by the agreed service. We agree with the motion judge that [plaintiff's expert's] report fails to establish an authoritative or recognized standard of care that rises above [Rule] 1.2(c) and requires an attorney to advise against a mediated PSA or to discourage a client from entering into one even where there has been little or no discovery, property or business appraisals, accountings for or proof of family income or expenses or other uncovering of facts bearing upon the terms of the agreement. In a mediated agreement, all of those things are self-determined. We, therefore, see no just reason in law or policy to deny attorneys practicing matrimonial law the right to assert as a defense to claims of malpractice that they were engaged under a precisely drafted consent limiting the scope of representation.[96]

The Appellate Division expressly held that it was not a deviation from the standard of care for a lawyer to limit the scope of representation and not perform any of the other services that might otherwise be performed in such representation.[97]

Nevertheless, the court criticized certain conduct of the defendant attorney. The retainer letter contained a provision prohibiting the client from bringing a lawsuit against the attorney. The Appellate Division observed that the defendant attorney's attempt to limit the right of the plaintiff to sue "violated the express terms of

---

95. *Lerner v. Laufer*, 359 N.J. Super. 201, 214 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
96. *Lerner v. Laufer*, 359 N.J. Super. 201, 218 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
97. *Lerner v. Laufer*, 359 N.J. Super. 201, 218 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).

[Rule] 1.8(h). Such a provision should not be included in a consent to limit the scope of representation presented to a client for consideration or signature."[98] The Appellate Division stated that such a "limitation was unenforceable."[99]

The right of a lawyer to limit the scope of the representation was likewise approved in *Estate of Albanese v. Lolio*.[100] In that case, the plaintiff, who was the executrix of her mother's estate, and individual family members who were beneficiaries of the estate, sued the defendant attorneys alleging they gave improper advice regarding federal estate taxes resulting in a large tax liability to the beneficiaries of the estate. The plaintiffs claimed that because of the improper advice of the defendant attorneys, the executrix "withdrew funds from the IRA and thereafter made equal distributions to plaintiffs in April 2001. This resulted in a personal income tax burden on the individual plaintiffs of approximately $298,000 each."[101]

The defendant attorneys asserted that they were retained only to represent the executrix of the estate. The defendant attorneys relied upon a retainer agreement which stated that the decedent's daughter, as executrix, retained the defendant attorney "to represent the Estate,"[102] and that the retainer agreement did not mention the beneficiaries or that the retainer in any way included the obligation to provide tax advice to the beneficiaries. The Appellate Division noted that the retainer agreement provided that the defendant attorneys would:

> [A]dvise us and cause all necessary and proper steps to be taken for the purpose of fixing and paying any and all Federal and State estate taxes and other transfer taxes, the collection of all assets . . . , the payment of all debts . . . , the distributions of the assets that may then remain . . . , the accounting for the acts of the Executrix as the representative of such Estate, and in general the doing of all acts

---

98. *Lerner v. Laufer*, 359 N.J. Super. 201, 220 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).

99. *Lerner v. Laufer*, 359 N.J. Super. 201, 212 (App. Div.), *certif. denied*, 177 N.J. 223 (2003); see also the discussion of the ability to limit the scope of representation and the attorney's duty to the criminal defendant, below.

100. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355 (App. Div. 2007).

101. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 362-63 (App. Div. 2007).

102. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 362 (App. Div. 2007).

> and things necessary for the full and complete settlement of the Estate of the decedent.[103]

The retainer agreement further required the defendants to be responsible for duties "including, but not limited to, calculating tax needs" and for "collaboration with the Executrix to obtain the most beneficial tax results."[104]

The Appellate Division framed the issue as "whether the defendants owed plaintiffs a duty of care." The court explained that the determination as to whether a lawyer owes a duty to a third party requires balancing "the attorney's duty to represent clients vigorously with the duty not to provide misleading information on which third parties foreseeably will rely."[105] Based upon the above, the court reversed the dismissal as to the executrix but affirmed as to the beneficiaries of the estate, explaining:

> Defendants' relationship to Clara [the executrix] is unclear. The retainer agreement created a relationship between defendants, on the one hand, and Clara "individually and as executrix," on the other. It required defendants to advise us and cause all necessary and proper steps to be taken for the purposes of fixing and paying any and all Federal and State estate taxes and other transfer taxes . . . , the distribution of the assets that may then remain of the said decedent among those entitled thereto, the accounting for the acts of the Executrix as the representative of such Estate.[106]

The Appellate Division deemed the retainer agreement as to the executrix to be ambiguous and construed it against the defendant attorney. "Defendants had an obligation to define the scope of their representation of Clara more clearly."[107] However, in affirming the dismissal as to the beneficiaries of the estate, on technical grounds since they had not asserted a claim against the executrix, the court noted:

---

103. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 362 (App. Div. 2007).
104. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 362 (App. Div. 2007).
105. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 368 (App. Div. 2007).
106. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 374 (App. Div. 2007).
107. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 373 (App. Div. 2007).

> [W]e were told at oral argument that neither sister has charged Clara with a breach of fiduciary duty, commenced any type of action against her, or contested any accounting . . . As a result, we decline to hold defendants liable to Clara's sisters. This is particularly so because there are no allegations of any communications by defendants with or directed to the sisters, and under the retainer agreement, defendants represented the Estate and its executrix, not the beneficiaries who may have different interests.[108]

The lessons of these cases are clear. An attorney should always obtain a written retainer agreement. The retainer agreement should clearly and unambiguously specify the terms of the engagement, any limitations on the terms of the engagement, and the manner and rate by which fees will be calculated. The failure to comply with the rules of professional conduct discussed above, may result in claims of both ethical misconduct and legal malpractice.

1-7 DUTY OF DILIGENCE

A lawyer has a duty to diligently represent his clients. This duty is codified in the New Jersey statutes as well as the Rules of Professional Conduct. Section 2A:13-4 simply states: If an attorney shall neglect or mismanage any cause in which he is employed, he shall be liable for all damages sustained by his client. The Rules of Professional Conduct similarly mandate that attorneys diligently represent their clients. Rule 1.3 Diligence, states: A lawyer shall act with reasonable diligence and promptness in representing a client. Due diligence requires litigation attorneys to promptly and properly investigate their cases, formulate appropriate strategies, file all necessary pleadings, obtain and serve required expert reports on a timely basis, and maintain adequate communications with the client. The failure to act with due diligence may result in dismissal of a client's case.[109]

---

[108] *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 377 (App. Div. 2007).

[109] *See, e.g.*, *Tynes v. St. Peter's Univ. Med. Ctr.*, 408 N.J. Super. 159 (App. Div. 2009) (declining to grant counsel's request for a third discovery extension where the trial court observed that there "was more than enough time for plaintiffs to depose [the hematologist] and serve their expert reports").