

08-4966-cv
Rodriguez v. Custodio

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: August 25, 2009

Decided: February 18, 2010

Errata Filed: March 3, 2010)

Docket No. 08-4966-cv

WAGNER & WAGNER, LLP, DANIEL J. BAURKOT, ESQ.,

Non-Party-Appellants,

DAYANARA RODRIGUEZ, an infant by her Parents and Natural
Guardians, EVELYN CUSTODIO and LEE RODRIGUEZ, EVELYN CUSTODIO,
individually, and LEE RODRIGUEZ, individually,

Plaintiffs,

v.

ATKINSON, HASKINS, NELLIS, BRITTINGHAM, GLADD & CARWILE, P.C.,

Non-Party-Appellee,

INTERNATIONAL SALES, INC., INTERNATIONAL GROUP OF COMPANIES,

Defendant-Cross-Claimant-Cross-Defendants,

TARGET CORPORATION,

Defendant-Third-Party-Plaintiffs,

ROYAL CONSUMER INFORMATION PRODUCTS, INC.,

Defendant-Cross-Defendant-Cross-Claimant-Third-
Party-Plaintiffs.

B e f o r e: WINTER, POOLER, and KATZMANN, Circuit Judges.

Appeal from an order of the United States District Court for

1 the Eastern District of New York (John Gleeson, Judge)
2 determining attorneys' fees after an infant compromise hearing.
3 Appellants argue that the district court inappropriately inquired
4 into the fee splitting agreements among the attorneys and then,
5 after concluding a violation of New York Disciplinary Rule 2-107
6 had occurred, erroneously took the amount of fees that would go
7 to plaintiffs' original attorney and instead awarded them to the
8 plaintiffs. On September 1, 2009, we issued an order affirming
9 the district court and issuing the mandate forthwith. Given
10 evidence that the annuity called for by the settlement had not
11 been established, we appointed pro bono counsel to represent the
12 plaintiffs in all matters in these proceedings. Our order stated
13 that an opinion would follow. We now issue this opinion.

14 EDWARD WAGNER (Michael P.
15 Atkinson, on the brief), Wagner &
16 Wagner, LLP, Staten Island, New
17 York (Daniel J. Baurkot, Basking
18 Ridge, New Jersey), for Non-Party-
19 Appellants.

20
21 STACIE L. HIXON, Atkinson, Haskins,
22 Nellis, Brittingham, Gladd, &
23 Carwile, Tulsa, Oklahoma, for Non-
24 Party-Appellees.

25
26 WINTER, Circuit Judge:

27 Wagner & Wagner, LLP, and Daniel J. Baurkot, Esq., appeal
28 from Judge Gleeson's adoption of Magistrate Judge Mann's Report
29 and Recommendation.

30 After an infant compromise hearing, Judge Mann awarded
31 \$107,654.56 in attorneys' fees and \$49,866.84 in expenses
32 to Atkinson, Haskins, Nellis, Brittingham, Gladd, & Carwile, P.C.

1 (the "Atkinson firm" or "appellees"), and \$133,286.60 in
2 attorneys' fees and \$2,378.86 in expenses to Wagner & Wagner,
3 LLP. She denied an award of fees to Baurkot because Wagner &
4 Wagner's sharing of the fees with Baurkot was not properly
5 disclosed to plaintiffs and Baurkot had performed no services of
6 value in the litigation. Therefore, she concluded, the fee
7 sharing agreement was in violation of New York Disciplinary Rule
8 2-107 ("DR 2-107").¹ The magistrate judge awarded Baurkot's
9 portion of the fee to the plaintiffs. Appellants then took this
10 appeal. The Atkinson firm has filed a brief responding to Wagner
11 & Wagner's argument that if we affirm the award to the
12 plaintiffs, the fee splitting agreement between Wagner & Wagner
13 and the Atkinson firm requires a redistribution of fees between
14 the two firms.

15 On September 1, 2009, we issued an order affirming the
16 district court's order. Given the nature of this appeal -- taken
17 by attorneys who continue to represent the plaintiffs from a
18 judgment in plaintiffs' favor and evidence that the annuity
19 called for in the settlement had not been established -- we
20 appointed pro bono counsel to represent the plaintiffs and
21 forbade appellants from contacting plaintiffs except through pro
22 bono counsel. Our order stated that an opinion would follow.
23 This is that opinion.

¹New York modified its disciplinary code effective April 1, 2009, but the revisions would not affect the outcome in this matter. The principles embodied in former DR 2-107 are now contained in Rule 1.5(g)-(h), N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.

1 BACKGROUND

2 a) The Underlying Action

3 After his two-year-old daughter was injured by a paper
4 shredder, Lee Rodriguez contacted Baurkot to discuss legal
5 assistance. On April 4, 2005, Baurkot contacted Wagner & Wagner,
6 after which representatives of Wagner & Wagner met with Rodriguez
7 and his wife, Evelyn Custodio, the mother of the injured girl.
8 During that meeting, plaintiffs retained Wagner & Wagner on a
9 one-third contingency-fee basis to reach a settlement or bring an
10 action on behalf of their daughter and themselves as plaintiffs.
11 Appellants then executed a fee agreement between themselves,
12 providing that Wagner & Wagner would receive two-thirds of any
13 recovered fee and Baurkot would receive the remaining one-third.

14 In 2006, the Atkinson firm, which had experience with
15 similar cases, contacted Wagner & Wagner. After consultation
16 with Baurkot and the plaintiffs, Wagner & Wagner retained the
17 Atkinson firm. The retention agreement provided that the
18 Atkinson firm would receive 35% of any contingency fee received,
19 while Wagner & Wagner would receive 65% of the fee, to be shared
20 with Baurkot pursuant to the existing agreement.

21 Ultimately, the action was brought in the Eastern District,
22 with Wagner & Wagner as the attorneys of record and the Atkinson
23 firm as lead counsel. This led to an agreement to settle the
24 matter for \$975,000.00, that, after the payment of fees, was to
25 fund an annuity in the infant plaintiff's name.

26 b) Attorneys' Fee Proceedings

1 Pursuant to Local Civil Rule 83.2(a),² the magistrate judge
2 held an infant compromise hearing to review the proposed
3 settlement and award of fees. Although the attorneys were in
4 agreement regarding the sharing of the fee award and the
5 plaintiffs consented to the fee, the judge sua sponte questioned
6 whether DR 2-107 permitted Wagner & Wagner to share its fee with
7 Baurkot. She expressed concern that Baurkot had not performed
8 any work in the matter and that his fee was simply a referral
9 fee.³ This concern arose at least in part, because (i) Wagner &
10 Wagner failed to initially disclose Baurkot's share of the fee to
11 the court and (ii) prior to the disclosure of Baurkot's share in
12 a supplemental petition filed the day before the infant
13 compromise hearing, the magistrate judge had never heard of
14 Baurkot.

15 When the plaintiffs were questioned about their contact with
16 Baurkot, Custodio stated that she could not recall his name.
17 Rodriguez testified that he had spoken to Baurkot once over the
18 phone and had a sense that Baurkot would receive a portion of the
19 fee because he was the first attorney contacted, but that he "was

²Local Civil Rule 83.2(a)(1) provides:

An action by or on behalf of an infant or incompetent shall not be settled or compromised, or voluntarily discontinued, dismissed or terminated, without leave of the court embodied in an order, judgment or decree. The proceeding upon an application to settle or compromise such an action shall conform, as nearly as may be, to the New York State statutes and rules, but the court, for cause shown, may dispense with any New York State requirement.

³The magistrate judge expressed no concern over the division of fees between Wagner & Wagner and the Atkinson firm.

1 not sure whether he was going to be working on the case or not.”
2 The attorneys from Wagner & Wagner stated only that Baurkot “has
3 been involved and been in constant contact with [Wagner & Wagner]
4 throughout the litigation.” They also added conclusory
5 statements relating to Baurkot’s routine involvement in other
6 cases that he had referred to Wagner & Wagner. Dissatisfied with
7 this record, the magistrate judge requested submissions from
8 Baurkot and Wagner & Wagner regarding the specific services
9 Baurkot provided in the present litigation.

10 Both Wagner & Wagner and Baurkot submitted supplemental
11 affidavits and memoranda of law. Wagner & Wagner also submitted
12 its entire file in the case. Baurkot claimed that after he was
13 first contacted by Rodriguez, they had several other telephone
14 conversations that enabled Baurkot to conduct a preliminary
15 investigation. Baurkot also claimed that once he concluded that
16 Wagner & Wagner should become involved in the matter, he
17 introduced Rodriguez to members of Wagner & Wagner over the
18 telephone on August 3, 2005. According to Baurkot, he advised
19 plaintiffs of the arrangement between himself and Wagner & Wagner
20 during that phone call, and they agreed to it. Baurkot also
21 asserted that he was involved in strategic decisions about the
22 case, including the decision to file the claim in federal court
23 instead of state court and the decision to bring in the Atkinson
24 firm.

25 Edward Wagner, a member of Wagner & Wagner, submitted an
26 affidavit stating that Wagner & Wagner informed plaintiffs of the

1 arrangement between Wagner & Wagner and Baurkot during a meeting
2 with the plaintiffs on August 4, 2005, and that the parents
3 agreed to the arrangement. He also asserted that Baurkot was
4 involved in the decision to file suit in federal court and that
5 Baurkot was involved throughout the case, even reminding him of
6 specific facts on one occasion. However, Wagner acknowledged
7 that he could not describe with greater particularity the amount
8 or type of work performed by Baurkot.

9 Wagner & Wagner's file contained several hundred pages of
10 documents, but only four that referred to Baurkot. These four
11 dealt exclusively with the retaining of Wagner & Wagner and the
12 Atkinson firm and with resultant fee agreements. None of the
13 documents involved constituted legal services on behalf of the
14 plaintiffs. Nor did any of the documents submitted show the
15 parents consented to the fee-splitting arrangement.

16 On August 7, 2008, the magistrate judge issued her Report
17 and Recommendation. After acknowledging that both Wagner &
18 Wagner and plaintiffs agreed that their retainer agreement
19 provided for a one-third contingency fee, she examined each
20 individual fee request and determined that both Wagner & Wagner's
21 request for fees of \$133,286.60, representing two-thirds of 65%
22 of the total one-third contingency fee, and the Atkinson firm's
23 request for \$107,654.56 in fees, representing 35% of the total
24 one-third contingency fee, were reasonable.

25 The magistrate judge then denied any portion of the
26 attorneys' fees to Baurkot because DR 2-107 prohibited it.

1 First, she found that DR 2-107 was violated because plaintiffs
2 never received the required disclosure of the fee-sharing
3 agreement. The judge rejected Wagner & Wagner's and Baurkot's
4 contentions that they had orally sought and received the required
5 consent. Instead, the magistrate judge relied on the plaintiffs'
6 testimony indicating they were unaware that Baurkot would be
7 working on the case.

8 Second, the magistrate judge concluded that DR 2-107 was
9 violated because the requirement that either the work done be in
10 proportion to the fee received or that the attorneys agree in a
11 writing to undertake joint responsibility was not met. In so
12 finding, she relied on several pieces of evidence, including:
13 (i) Wagner & Wagner's initial failure to disclose Baurkot's share
14 of the fee to plaintiffs; (ii) Wagner & Wagner's and Baurkot's
15 failure to show specific work he performed on the case; and (iii)
16 the lack of any documents in Wagner & Wagner's file to
17 corroborate the claim that Baurkot performed services on the
18 case.

19 The magistrate judge determined that the portion of the fee
20 claimed by Baurkot should be awarded to the plaintiffs, rather
21 than going to Wagner & Wagner. She expressed a concern that the
22 fee would still find its way to Baurkot if Wagner & Wagner
23 received it, and, moreover, noted that Wagner & Wagner had
24 acknowledged that it considered \$133,286.60 fair and adequate
25 compensation for its efforts.

26 Wagner & Wagner and Baurkot filed timely objections to the

1 Report and Recommendation. They objected to those parts of the
2 order that determined that Baurkot's portion of the fee should go
3 to plaintiffs. These objections included an objection to the
4 awarded fees because they resulted in a 55.3%/44.7% split between
5 Wagner & Wagner and the Atkinson firm, rather than the agreed
6 upon 65%/35% split. However, Wagner & Wagner and Baurkot
7 specifically stated that "[t]he Wagner Firm, [sic] is not
8 suggesting that the fee to the Atkinson Firm be reduced. . . .
9 What we are stating is that since the fee to the Atkinson Firm is
10 35% of the full one-third contingency fee, the fee to the Wagner
11 Firm should be 65% of the full one-third contingency fee." Judge
12 Gleeson adopted the magistrate judge's Report and Recommendation
13 in full. This appeal followed.

14 DISCUSSION

15 In the context of an infant compromise hearing, we review a
16 district court's award or denial of attorneys' fees for an abuse
17 of discretion. See Chen v. Chen Qualified Settlement Fund, 552
18 F.3d 218, 225 (2d Cir. 2009) (per curiam); see also Reiter v. MTA
19 N.Y. City Transit Auth., 457 F.3d 224, 229 (2d Cir. 2006).

20 Appellants argue that the district court erred: (i) when it
21 looked beyond the contingency agreement between Wagner & Wagner
22 and the plaintiffs to the fee splitting agreements among the
23 attorneys; (ii) when it found that DR 2-107 was violated; and
24 (iii) when it granted Baurkot's portion of the fee to the
25 plaintiffs instead of to Wagner & Wagner, thus altering the

1 65%/35% proportional division agreed upon by Wagner & Wagner and
2 the Atkinson firm. We disagree.

3 With regard to (i), in an infant compromise hearing, the
4 district court is not confined to the overall award of attorneys'
5 fees, and it is not excluded from considering the division of
6 those fees among the various attorneys. District courts have
7 broad discretion when conducting an infant compromise hearing.
8 See Local Civil Rule 83.2(a)(1); supra Note 2. In particular,
9 both the Local Civil Rules and New York State law grant broad
10 authority to determine the reasonableness of attorney's fees.
11 See Local Civil Rule 83.2(a)(2) ("The court shall authorize
12 payment to counsel for the infant or incompetent of a reasonable
13 attorney's fee and proper disbursements from the amount recovered
14 in such an action, whether realized by settlement, execution or
15 otherwise and shall determine the said fee and disbursements,
16 after due inquiry as to all charges against the fund.");
17 Goldstein v. St. Luke's-Roosevelt Hosp. Ctr. (In re Goldstein),
18 430 F.3d 106, 111 (2d Cir. 2005) (per curiam) ("[W]hen [the
19 attorney] moved under Local Rule 83.2(b) for approval of the
20 request for fees and costs, he thereby opened up the issue of the
21 quality, or lack thereof, of his representation and the
22 reasonableness of his fees."); N.Y. Judiciary Law § 474 ("An
23 attorney may contract with the guardian of an infant to
24 prosecute, by suit or otherwise, any claim for the benefit of an
25 infant for a compensation to said attorney dependent upon the

1 success in the prosecution of such claim, subject to the power of
2 the court . . . to fix the amount of such compensation.”); White
3 v. DaimlerChrysler Corp., 871 N.Y.S.2d 170, 173-74 (App. Div. 2d
4 Dep’t 2008) (noting that under N.Y. Judiciary Law § 474, a
5 contract between the attorney and the infant guardians providing
6 for a contingency fee is to be considered by the judge, but it is
7 not binding).

8 When multiple attorneys are involved in such an inquiry, fee
9 splitting agreements offer no more than non-mandatory guidance
10 because the court is under a duty to evaluate the quantity and
11 quality of the representation by each attorney in order to ensure
12 that the fees are appropriate. See, e.g., Ford v. Albany Med.
13 Ctr., 724 N.Y.S.2d 795, 796-98 (App. Div. 3d Dep’t 2001) (looking
14 beyond the retainer agreement to the fee sharing agreement
15 between the attorneys as well as the amount of work performed by
16 each attorney).⁴

⁴Appellants argue that the district court erred when it relied on Ford, 724 N.Y.S.2d 795, because of statements made by this court in Ballow Brasted. See Ballow Brasted, 435 F.3d at 242 n.7 (“To the extent Ford and Benjamin can be read to conflict, we follow the decision of the Court of Appeals in Benjamin.”). However, those statements were clearly dicta, at least when sought to be applied in the circumstances before us. Ballow Brasted arose as the result of a dispute amongst attorneys outside the context of an infant compromise hearing, see id. at 236-37, in circumstances in which Ford and Benjamin might be read to be in conflict with one another. Compare Ford, 724 N.Y.S.2d at 797-98 (looking into the amount of work performed by the attorneys where a violation of DR 2-107 was alleged) with Benjamin, 650 N.E.2d at 832-33 (refusing to look into the amount of work performed by the attorneys where a violation of DR 2-107 was alleged). In the context of a court determination of attorneys’ fees during an infant compromise hearing, the cases do not conflict because only Ford is applicable. Compare Ford, 724 N.Y.S.2d at 796-97 (arising in the context of a dispute amongst the attorneys during an infant compromise hearing), with Benjamin, 650 N.E.2d at 830 (arising in the context of a dispute amongst the attorneys not during an infant compromise hearing).

1 We, therefore, see no reason why a court may not inquire as
2 to the roles played and services provided by each firm. If a
3 firm that plays an active role and provides substantial services
4 seeks a fee that will be shared with a firm that has played no
5 role and provided no services, the fee request may well be
6 unreasonable.

7 Appellants rely on a number of cases to support their
8 argument that consideration of the appropriateness of attorneys'
9 fees does not extend to fee-splitting agreements among the
10 attorneys. However, these cases are easily distinguished.
11 Although each determined that it would be inappropriate to alter
12 a fee splitting agreement between attorneys based on a violation
13 of DR 2-107, they all arose in the context of a dispute between
14 the attorneys rather than a dispute arising in the context of an
15 infant compromise hearing. The different contexts involve
16 differing interests and impose different obligations on the
17 reviewing courts. See Ballow Brasted O'Brien & Rusin, P.C. v.
18 Logan, 435 F.3d 235, 236-37 (2d Cir. 2006); Samuel v. Druckman &
19 Sinel, LLP, 906 N.E.2d 1042, 1044-45 (N.Y. 2009); Benjamin v.
20 Koepfel, 650 N.E.2d 829, 830-33 (N.Y. 1995). Indeed, only one of
21 those cases, Samuel, involved an underlying matter with an infant
22 plaintiff, and even there, the decision was in the context of a
23 declaratory action involving a dispute between the attorneys
24 after the infant compromise hearing. See Samuel, 906 N.E.2d at
25 1043-44; cf. Ford, 724 N.Y.S.2d at 796-98 (examining the amount

1 of work performed by the attorneys in a fee dispute involving an
2 infant compromise hearing).

3 Therefore, the policies applied in those cases -- i.e., the
4 desire to prohibit "efforts by clients or customers to use public
5 policy as a sword for personal gain rather than a shield for
6 public good," Benjamin, 650 N.E.2d at 831 (internal quotation
7 marks omitted); the fact that "it ill becomes [attorneys seeking
8 to avoid sharing fees], who are also bound by the Code of
9 Professional Responsibility, to seek to avoid on 'ethical'
10 grounds the obligations of an agreement to which they freely
11 assented and from which they reaped the benefits," id. at 832-33;
12 and the desire to avoid "inquir[ing] into the precise worth of
13 the services performed by the parties" where the dispute is
14 "among attorneys over the enforcement of fee-sharing agreements,"
15 id. at 832, -- simply do not apply here. In the present context,
16 the guiding policy is protection of the infant interests. See
17 White, 871 N.Y.S.2d at 173-74.

18 Therefore, the district court did not err in looking beyond
19 the retainer agreement between Wagner & Wagner and the plaintiffs
20 to the actual work performed by the various attorneys.

21 We turn now to whether the court erred in denying fees to
22 Baurkot. DR 2-107 imposes three requirements before a fee may be
23 shared among attorneys: (i) "[t]he client consents to employment
24 of the other lawyer after a full disclosure that a division of
25 fees will be made"; (ii) "[t]he division is in proportion to the

1 services performed by each lawyer, or, by a writing given the
2 client, each lawyer assumes joint responsibility for the
3 representation"; and (iii) "[t]he total fee of the lawyers does
4 not exceed reasonable compensation for all legal services they
5 rendered to the client." N.Y. Disciplinary R. 2-107(A). The
6 district court found that a fee award to Baurkot violated both
7 (i) and (ii). We agree.

8 With regard to (i), the district court was well within its
9 role as fact finder when it rejected appellants' self-serving
10 affidavits and statements, which were notably unsupported by any
11 documentary evidence, in favor of the plaintiffs' testimony.
12 Rodriguez's testimony, while indicating a speculative awareness
13 that Baurkot would receive a fee in the case -- "Yeah, I have
14 some idea that he was [getting part of the fee] because he was -
15 we first contacted him" -- stated that he was unaware that
16 Baurkot would actually be working on the case, in contrast to
17 appellants' claims. Therefore, the district court did not err in
18 determining that appellants did not obtain informed consent from
19 the client for the fee-sharing agreement.

20 Nor did the district court err in finding that the second
21 requirement of DR 2-107(A) was not met. The evidence
22 demonstrated that Baurkot performed no services of value on the
23 case, and thus the agreed fee division was not "in proportion to
24 the services performed by each lawyer." N.Y. Disciplinary R. 2-
25 107(A) (2); see also Ford, 724 N.Y.S.2d at 797-98. Nor did

1 appellants produce "a writing given to the client" in which "each
2 lawyer assumes joint responsibility for the representation."
3 N.Y. Disciplinary R. 2-107(A) (2). Therefore, the district court
4 properly found that the second requirement of DR 2-107 was also
5 not met.

6 Appellants also contend that, even if there was a violation
7 of DR 2-107, it was a prospective violation of technical
8 requirements and curable -- presumably by providing the client
9 with a "joint responsibility" letter -- before fees have been
10 paid. We disagree. While DR 2-107 does not impose an explicit
11 time requirement, it clearly anticipates compliance with its
12 requirements early on in the representation, as it requires that
13 "[t]he client consents to the employment of the other lawyer
14" N.Y. Disciplinary R. 2-107(A) (1). Moreover, the
15 undertaking of joint responsibility is difficult (to say the
16 least) to accomplish, other than as a charade, after a settlement
17 with the defendant has been reached. Therefore, the district
18 court did not abuse its discretion by not allowing appellants to
19 "cure" the violation after a settlement and scheduling of an
20 infant compromise hearing.

21 Finally, appellants contend that, after determining that
22 Baurkot was not entitled to attorneys' fees because of the
23 violation of DR 2-107, the district court still erred when it
24 distributed those fees to the plaintiffs rather than to Wagner &
25 Wagner. They argue that this altered Wagner & Wagner's agreement

1 with the Atkinson firm because the proportion of the fees that
2 went to Wagner & Wagner and to the Atkinson firm respectively did
3 not conform to the agreed-upon 65%/35% split.

4 However, as noted, the district court had broad discretion
5 to determine the value of the services rendered by each attorney,
6 looking to fee-splitting agreements only for non-mandatory
7 guidance. The district court did not abuse its broad discretion
8 when it determined that Baurkot's fees should not go to Wagner &
9 Wagner because that firm engaged in an ethical violation by
10 failing to get the proper consent from the plaintiffs. See N.Y.
11 Disciplinary R. 2-107(A) ("A lawyer shall not divide a fee for
12 legal services . . ." unless the rule's requirements are met.).
13 Moreover, there was evidence to support the district court's
14 concern that Baurkot would obtain the money if it was awarded to
15 Wagner & Wagner, given that appellants stressed throughout the
16 proceeding the nature of their collaborative efforts in other
17 cases Baurkot referred to Wagner & Wagner. Therefore, the
18 district court did not abuse its discretion in awarding that
19 portion of the fees to plaintiffs.

20 Appellants further suggest that, having determined that they
21 were not entitled to Baurkot's portion of the fee, the district
22 court nonetheless should not have altered its fee splitting
23 agreement with the Atkinson firm. As a result, they seek to
24 redistribute the awarded fees to match the agreed upon split,
25 thus reducing the Atkinson firm's fees.

1 However, a party waives appellate review of a decision in a
2 magistrate judge's Report and Recommendation if the party fails
3 to file timely objections designating the particular issue. See
4 Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003); Mario v. P & C
5 Food Markets, Inc., 313 F.3d 758, 766 (2d Cir. 2002). In their
6 objections to the Report and Recommendation, appellants stated
7 that "[t]he Wagner Firm, [sic] is not suggesting that the fee to
8 the Atkinson Firm be reduced." Such a statement not only failed
9 to raise the claim now made but in effect told the district court
10 not to consider the relief now sought. That statement was,
11 therefore, a waiver. Moreover, even if the argument had not been
12 waived, appellants would still not be entitled to a reduction in
13 the fees awarded to the Atkinson firm because the fee-splitting
14 agreement was not binding on the district court. See Local Civil
15 Rule 83.2(a)(2); Ford, 724 N.Y.S.2d at 796-98.

16 We turn to a final matter. Given that Wagner & Wagner and
17 Baurkot appeal from a judgment benefitting their clients while
18 still claiming to represent those clients and given that said
19 judgment found Wagner & Wagner and Baurkot committed ethical
20 violations, the court made various inquiries at oral argument
21 regarding the legal representation given the plaintiffs. The
22 answers made it apparent that appellants had not obtained written
23 consent from the plaintiffs for this appeal. Moreover, none of
24 the plaintiffs' lawyers knew whether the annuity called for in
25 the settlement agreement, the funding of which did not involve

1 monies at stake in the present dispute, had been established. As
2 a result, both Wagner & Wagner and the Atkinson firm were ordered
3 to submit letters indicating the status of the annuity. These
4 letters indicated that, as of August 27, 2009, the defendants had
5 made the required annuity premium payments, but the annuity had
6 not yet been finalized and issued. Wagner & Wagner blamed the
7 Atkinson firm for the delay. The Atkinson firm blamed Wagner &
8 Wagner for the delay.

9 Concerned by the overall context of the proceeding and the
10 failure to establish the annuity, we entered an order on August
11 28, 2009, indicating an intent to appoint pro bono counsel to
12 represent the plaintiffs and ordering the law firms not to
13 contact them. On September 1, 2009, we entered an order
14 affirming the judgment of the district court, directing that the
15 mandate should issue forthwith, and indicating that an opinion
16 would follow. In that order, we appointed Robert J. Giuffra,
17 Jr., Esq., to represent the plaintiffs on a pro bono basis and
18 instructed Baurkot, Wagner & Wagner, and the Atkinson firm to
19 communicate with plaintiffs only through the pro bono counsel.
20 Finally, the order remanded to the district court to: (i)
21 inquire into whether the district court's order of September 26,
22 2008, was complied with; (ii) ensure that plaintiffs receive the
23 benefits to which they are entitled; and (iii) take any
24 appropriate remedial and disciplinary actions.

25

CONCLUSION

We affirm the district court's order and order the continuation of representation by pro bono counsel. Any further appeal in this matter should be referred to this panel. The party taking the appeal shall notify the Clerk of this provision for reference.