

# Arbitration Clause in Engagement Letter Violates Public Policy

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In *Larrison v. Scarola Reavis & Parent LLP* (Sup. Ct., N.Y. County, NYLJ December 29, 2005), Justice Zweibel prevented a law firm (SRP) from resolving a fee dispute in binding arbitration before the American Arbitration Association on the grounds that the arbitration provision in the firm's letter of engagement was void against public policy. In addition to providing for binding arbitration before the AAA, the arbitration provision stated as follows:

“...provided, however, that no claim that you may have against SRP, whether asserted as a claim, counterclaim or otherwise, shall be referred to or resolved by arbitration unless SRP specifically agrees after description of such claim to SRP by you in writing...”

On January 1, 2002, New York's Chief Administrative Judge announced the adoption of Part 137, which established the New York State Fee Dispute Resolution Program (22 NYCRR 137.0-137.12). The Program provided “for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation.”

With eight exceptions not relevant to the SRP matter, Part 137 applies to “all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.” Section 137.2 enables any client to seek arbitration under Part 137 “in the event of a fee dispute between attorney and client.” If the client requests arbitration, the arbitration is mandatory as to the attorney, and the arbitration award is final and binding “unless de novo review is sought as provided in section 137.8.”

## De Novo Review of Award

Under 137.8, either party may request a court's de novo review of the arbitration award within 30 days after the award has been mailed. If a request for de novo review is not made within the 30 days, the award becomes final and binding. The parties may, however, agree in advance to waive de novo review and to be bound by the arbitration award, provided the agreement is in writing.

The client may consent in advance to arbitration under Part 137, provided the consent is stated in the retainer agreement “or other writing” that “specifies” that the client has read the official written instructions and procedures for Part 137.

If the client and the attorney have not agreed to arbitration before the fee dispute arises, the attorney must send the client a “Notice of Client's Right to Arbitrate” by certified mail or personal service. The notice must advise the client of his right to elect arbitration within 30 days following receipt of the notice. It must also contain written instructions about the procedures of the arbitral body and be accompanied by a copy of the “request for arbitration” form which the client is required to complete.

If the client has consented to arbitration in advance of the dispute, the attorney must still forward to the client by certified mail or personal service, a copy of the “request for arbitration” form completed by the attorney, together with “such notice and instructions” as shall be required by the Board of Governors.

Part 137 provides for the creation of a Board of Governors who shall:

...adopt such guidelines and standards as may be necessary and appropriate for the operation of programs under this Part, including, but not limited to, accrediting arbitral bodies to provide fee dispute resolution services under this Part...

Section 137-4 provides for the designation of arbitral bodies by the Board of Governors “in each county or in a combination of counties.” An “arbitral body” may be a local bar association or the New York State Bar Association, or “such other entity as the Board of Governors may recommend.” Section 137.6 sets forth the procedure to be followed by an arbitral body in conducting arbitration.

The Fee Dispute Resolution Program was carried over into the New York Code of Professional Responsibility. DR 2-106(E) as amended now provides:

Where representation is in a civil matter, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the justices of the Appellate Divisions.

### **Part 1215 of the Rules**

The Program is also reflected in Part 1215 of the Court’s rules, which became effective on March 4, 2002 (22 NYCRR 1215). Part 1215 deals with Written Letters of Engagement. With four exceptions not relevant to *Larrison*, Part 1215 provides that a lawyer who undertakes the representation of a client in any matter providing for payment or collection of a fee shall either (1) provide the client with a written letter of engagement, or (2) enter into a signed retainer agreement with the client.

In either event, the document must address the following matters (section 1215.1(b)):

(1) Explanation of the scope of legal services to be provided; (2) Explanation of attorney’s fees to be charged, expenses and billing practices; and, where applicable, shall provide that a client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

In *Larrison*, plaintiff retained SRP in March 2004, two years after the adoption of Part 137 and Part 1215. In her petition for a preliminary order enjoining SRP from pursuing the arbitration before the AAA, plaintiff alleged that SRP had not provided her with a copy of the Part 137 rules or advised her of her rights under the rules. She was not told that she could elect non-binding arbitration of the fee dispute; that the arbitration would enable her to assert her claims and counterclaims against SRP; that she could seek de novo judicial review of the arbitration award; or, that she could conduct the arbitration without becoming responsible for attorney’s fees incurred by SRP.

Plaintiff also alleged that no SRP attorney had ever advised her that under Part 137, she was entitled to reject SRP's proposal for binding arbitration by the AAA and proceed instead under the terms and procedures of Part 137.

In granting plaintiff a permanent stay of the arbitration proceedings, Judge Zweibel trumpeted a warning to New York lawyers to comply with the terms of Part 137 and to satisfy the requirements of Part 1215.

In setting up Rule 137 and a comprehensive regulatory alternate fee resolution scheme, it appears to this Court that the Chief Administrator...has indicated his intent to preempt any other action affecting this critically important aspect of the practice of law. In fact, this Court is not sure that, without explicit Court approval, the parties, by private agreement, can alter or expand upon the available dispute resolution options. Without deciding this issue, the Court finds that SRP is attempting to enforce an agreement that is patently unethical and therefore illegal. There is no requirement that this Court indulge in extended legal analysis before coming to the conclusion that this type of agreement constitutes prohibited conduct and is against public policy. This Court certainly has the authority to stay this arbitration, even though already commenced, since, on its face, the arbitration agreement and Engagement Letter are patently in violation of the rules set forth in Part 137 of the Rules of the Chief Administrator.