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Arbitration of Fee Disputes – Real or only an Illusion?

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Prior to January 1, 2002, the only lawyer/client fee disputes requiring submission to arbitration were disputes in domestic relations matters. Then, on January 1, 2002, Sections 136.1-136.11 of 22 NYCRR (Part 136) were replaced by Part 137, which extended the arbitration rules to all "attorneys admitted to the bar in the State of New York who undertake to represent a client in all civil matters." (For a full discussion of these changes, see *Fee Arbitration Rules to Take Effect June 1*, Roy Simon, NYPRR April 2001.)

Section 137.1 extends to all civil matters in which the fee in dispute involves a sum of "not less than $1,000 or more than $50,000," but the parties to a dispute may agree to submit "other amounts" in dispute to an "arbitral body."

A lawyer's obligation to advise all clients in civil matters of their right to resolve fee disputes through arbitration is con-firmed in DR 2.106(E) and DR 2.106(F), but a distinction is made in these Subsections between matrimonial matters and all other civil matters. Subsection (e) 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…" Subsection F, on the other hand, imposes a broader obligation in matrimonial matters, "in domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement."

In all cases within the monetary limits prescribed, a lawyer is obligated to provide the client with the option to submit a fee dispute to arbitration. This obligation may be fulfilled in several ways.

i. If no provision for arbitration has been made in the agreement of engagement or retainer agreement, and a dispute over fees arises, the lawyer must forward to the client, by certified mail or personal service, a notice of the "Client's right to Arbitrate."
ii. If the retainer agreement provides for arbitration and a fee dispute arises, the lawyer must nevertheless forward to the client, by certified mail or personal service, a notice of the "Client's right to Arbitrate."
iii. "On a form prescribed by the Board of governors," attorney and client may provide in advance for arbitration that is "final and binding upon the parties and not subject to de novo review."

De Novo Review

What, you may ask, is "de novo review" and what's it doing in a program to encourage arbitration of fee disputes? Part 137, Section 12 makes it very clear that "de novo review" is not a review of the arbitration record, but a new trial on the merits. Section 12(D) provides:

> Arbitrators shall not be called as witnesses, nor shall the arbitration award or record of the proceedings be admitted in evidence at the trial de novo.

Because both the lawyer and the client may demand a trial de novo and require the court to reinvestigate all the circumstances which gave rise to the dispute, the client is put at an enormous disadvantage. First of all, he has probably retained an attorney to represent him in the arbitration. Now, confronted by the lawyer's insistence on a trial de novo, he must again retain an attorney who is forced to prepare witnesses and strategies all over again.

The disadvantage to the client was illustrated dramatically in a case decided in July by Manhattan Supreme Court Justice Edmead. In that case, a dispute over fees arose between attorney Richard L. Gold and client Paul Altman, in a matter involving visitation rights and support for a child of Altman and a former girl friend. The arbitration clause in the retainer agreement was drafted by Gold. Gold gave Altman the requisite notices of his right to arbitration, and Altman, represented by other counsel, elected to arbitrate.

The arbitrators – two lawyers and a layman under an arbitration program conducted by New York County Lawyers Association – decided in favor of Altman and reduced Gold's fee from $55,734 to $30,000. As a result, Gold was obligated to return $4,943 in fees previously paid to him by Altman.

In *Morelli & Gold v. Altman*, 602145/07, Gold filed for a trial de novo, arguing that the language in the retainer agreement did not constitute a waiver of his right to a new determination by the Court. Judge Edmead agreed, holding that waiver of a new trial does not occur under Section 137.2(c) unless both parties, after acknowledging that they are not required to waive the right, nevertheless agree "to waive their rights to reject the arbitrator(s)' award by commencing an action on the merits (de novo) within 30 days after the arbitrator(s)' decision has been mailed." Judge Edmead directed Altman to pay the full amount of gold's bill, or an additional $25,437.

In my judgment, Judge Edmead's decision was wrong, and Part 137 is wrong to provide for trials de novo upon request of either party to a fee dispute. Instead, the decision of the arbitrators should be final and binding upon both parties, and retrial of the issues should be regarded as wasteful, unproductive and damaging to the public perception of our profession.

In April 1999, the City Bar issued a report of the Council on Judicial Administration recommending "Mandatory Arbitration of Fee Disputes in all Matters." The report concluded:

Fee arbitration also relieves the courts of the responsibility of resolving such matters, provides a more appropriate vehicle for client discontent in fee matters than currently exists in the disciplinary forums, and positively addresses a source of public dissatisfaction with the profession. …the Council urges the Office of Court Administration to implement a rule requiring fee disputes involving less than $100,000 to be submitted to binding arbitration at the election of the client.

Regrettably, the Courts did not follow these recommendations.

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