

Fee Arbitration Rules To Take Effect June 1

BY ROY SIMON

The Code of Professional Responsibility has always frowned on fee disputes between lawyers and clients. Ethical Consideration 2-23 reflects this disapproval by saying:

A lawyer should be zealous in efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. A lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

At the outset, the profession considered the problem of fee disputes to be especially serious in domestic relations cases. As a result, in 1993 the New York courts adopted special rules to govern fee disputes in matrimonial cases.

The requirement of arbitration in matrimonial fee disputes was implemented in 22 NYCRR §136.1 §136.11 ("Part 136").

The fee arbitration program in Part 136 has worked so well that it is the model for most of the fee arbitration rules in Part 137, which will replace Part 136 on June 1, 2001. In this article, I explain in question-and-answer form the major features of the new fee dispute resolution program, including how the program will affect fee disputes in matrimonial actions.

What do the new fee dispute rules cover?

The basic reach of the new fee dispute program is simple. Section 137.1(a), entitled "Application," says: "This Part shall apply where representation has commenced on or after June 1, 2001, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter." In other words, if you are a New York attorney and you start representing a client in a civil matter after June 1st of this year, then you are probably covered.

Are there any exceptions?

Yes, § 137.1(b) sets forth eight separate exceptions: (1) criminal matters; (2) fee disputes involving less than \$1000 or more than \$50,000 (unless an arbitral body and the parties all consent); (3) "claims involving substantial legal questions, including professional malpractice or misconduct;" (4) claims for relief other than adjusting a legal fee; (5) disputes over a legal fee set by a court; (6) disputes where no legal services have been rendered for more than two years; (7) disputes with out-of-state attorneys who either have no office in New York or did not render any material portion of the services in New York; and (8) disputes where the person requesting arbitration is neither the client nor the client's legal representative.

Stated the other way around, if you are a New York attorney who starts working on any civil matter after June 1st of this year, and your client requests arbitration within two years after you finish your work solely to contest from \$1000 to \$50,000 of your fees, then the new rules apply to you unless the dispute involves “substantial legal questions” such as professional malpractice or misconduct.

Note that the dispute resolution rules cover all types of clients, both individual and organizational. Every client may take advantage of the fee dispute resolution program.

Who determines whether the exceptions apply?

The new rules don’t answer this question. Usually, the attorney can easily determine whether a client’s claim fits within the rules or not, but sometimes, the amount in controversy or the basis of the claim will not be clear. For example, suppose you finish working on a matter where you have billed the client a total of \$90,000 over the last two years. The client has paid all but your last bill, which is for \$20,000. The client says, “Your fee for this matter is way out of line. You got a terrible result and did a lousy job. I demand fee arbitration.” Is the client contesting more than \$50,000 in fees? Is the client accusing you of legal malpractice, breach of fiduciary duties, or professional misconduct? This may be ambiguous.

As a practical matter, you have three choices in this situation: (a) agree to appear before the arbitration panel but tell the arbitrators that an exception applies; (b) refuse to arbitrate and risk a disciplinary charge based on the refusal; or (c) talk to the client to clarify the claim. But if you want to clarify the claim with your client, watch out for DR 6-102 and DR 7-104. If your client (or former client) is not represented by another lawyer in the fee dispute (which is typical), then you must follow DR 6-102, which prohibits you from settling a legal malpractice claim with an unrepresented client or former client “without first advising that person that independent representation is appropriate in connection therewith.” A fee dispute by itself is not a legal malpractice claim, but if you settle the claim with your unrepresented client and the client later says it was a malpractice claim, you may be in trouble.

If your client retains a new lawyer in the fee dispute, then DR 7-104 prohibits you from talking directly with your client unless you either obtain the new lawyer’s express consent pursuant to DR 7-104(A) or you give “reasonable advance notice” to the new lawyer pursuant to DR 7-104(B) that you will be talking to your client. (See EC 7-18.)

What happens to fee disputes in matrimonial matters after June 1, 2001?

Most fee disputes in matrimonial matters will come under the new Part 137 in the same way as fee disputes in all other civil matters, because new Part 137 was accompanied by an Administrative Order by Chief Administrative Judge Jonathan Lippman repealing Part 136. But Part 136 will still apply to matrimonial fee disputes if, prior to June 1, 2001, either a notice to resolve the dispute by arbitration was sent pursuant to § 136.5(a), or a consent to submit the dispute to arbitration was signed pursuant to § 136.5(e). Also, the provision for de novo review in new § 137.8 will not apply to any matrimonial fee dispute in which the retainer agreement provides for binding arbitration of fee disputes.

Can the client still demand arbitration if he’s paid the fee?

Yes. Section 137.2 specifically says that the client may request arbitration “whether or not the attorney already has received some or all of the fee in dispute” Thus, no matter when the client paid the fee, the client may request arbitration under Part 137.

Does an attorney have to agree to arbitration?

Yes. Section 137.2(a) says: "Arbitration under this Part shall be mandatory for an attorney if requested by a client"

If an attorney prefers arbitration, can he insist on it?

An attorney can insist on an arbitration clause in a retainer agreement. Section 137.2(b) says: "The client may consent in advance to submit fee disputes to arbitration under this Part" as long as the consent is "stated in a retainer agreement or other writing that specifies that the client has read" § 137.6 (which sets forth the arbitration procedures) and "agrees to resolve fee disputes under this Part." However, if a client has already signed a retainer that does not require arbitration of fee disputes, then the attorney may no longer insist on an arbitration provision because that would amount to a unilateral change in the retainer terms, which is generally not permitted. However, an attorney always has the right to ask for the client's consent to fee arbitration based on a writing that complies with § 137.2(b).

Who will run the fee dispute resolution program?

Section 137.3 provides for an eighteen-member Board of Governors. Section 137.3(g) says that the Board of Governors, with the approval of the four Presiding Justices of the Appellate Divisions, shall adopt guidelines and standards for: (1) training and qualifying arbitrators; (2) monitoring the operation and performance of arbitration programs; and (3) requiring arbitral bodies to submit annual reports to the Board of Governors.

Who will hear fee disputes?

Section 137.4(a) envisions that fee disputes will ordinarily be heard by an arbitral body approved by the Board of Governors and the appropriate Appellate Department but "established and administered by a local bar association." However, the Board of Governors may also designate the New York State Bar Association, the Unified Court System (through the District Administrative Judges), or other organizations as authorized arbitral bodies.

Where will fee disputes be heard?

Section 137.5 provides that each fee dispute "shall be heard by the arbitral body handling disputes in the county in which the majority of the legal services were performed" unless good cause is shown for a transfer elsewhere. Any disputes between arbitral bodies over venue will be resolved by the Board of Governors.

How will the client find out about the arbitration program?

Whenever an attorney and client cannot agree on the attorney's fee, the attorney must forward a written notice to the client, entitled "Notice of Client's Right to Arbitrate," by certified mail or by personal service. Section 137.6(a) sets down five strict requirements for the notice:

The notice (i) shall be in a form approved by the Board of Governors; (ii) shall contain a statement of the client's right to arbitrate; (iii) shall advise that the client has 30 days from receipt of the notice in which to elect to resolve the dispute under this Part; (iv) shall be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding; and (v) shall be accompanied by a copy of the "request for arbitration" form necessary to commence the arbitration proceeding.

What happens after 30 days have passed since the notice?

If the client does not file a request for arbitration within 30 days after receiving the notice, the attorney may commence a court action. If the client *does* file a timely request for arbitration, then the arbitral body will mail the attorney an “attorney fee response” form. The attorney then has 15 days to file the response with the arbitral body and serve it on the client. Once the arbitral body receives the attorney’s response, it will designate the arbitrator or arbitrators who will hear the dispute.

May the attorney or client refuse to participate in the arbitration process once it starts?

No. Under § 137.11, attorneys are required to participate in an arbitration once a client has filed a valid arbitration request, and an attorney who fails to participate in the arbitration process without good cause “shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.” Moreover, under §137.6(h): “If the attorney without good cause fails to respond to a request for arbitration or otherwise does not participate in the arbitration, the arbitration will proceed as scheduled and a decision will be made on the basis of the evidence presented.” Similarly, once the arbitral body has received the “attorney fee response,” the client may no longer withdraw from the process. If the client seeks to withdraw after the attorney has served his response, “the arbitration will proceed as scheduled whether or not the client appears, and a decision will be made on the basis of the evidence presented.” However, neither the attorney nor the client needs to appear in person. Under § 137.6(i), either party “may participate in the arbitration hearing without a personal appearance by submitting to the arbitrator testimony and exhibits by written declaration under penalty of perjury.”

Will the arbitrators try to mediate the dispute first?

In §137.12, arbitral bodies are “strongly encouraged” to offer mediation services. However, Part 137 does not compel participation in a mediation program, and the mediation program “shall permit arbitration pursuant to this Part in the event the mediation does not resolve the fee dispute.” (The mediation proceedings and all settlement discussions and offers of settlement exchanged during mediation “are confidential and may not be disclosed in any subsequent arbitration.”)

What happens at the arbitration hearing?

Either party may be represented by counsel at his or her own expense. The arbitrators will have the power to subpoena relevant witnesses and documents. The attorney will go first, and will bear the burden of proving “the reasonableness of the fee by a preponderance of the evidence.” The attorney may call witnesses, and must present “documentation of the work performed and the billing history.” The client may then call witnesses and “present his or her account of the services rendered and time expended.” The attorney may present rebuttal evidence, but the client “shall have the right of final reply.” The arbitrators have discretion to observe or disregard the rules of evidence.

Will the proceedings be confidential?

Yes, with narrow exceptions. Section 137.10 provides that “[a]ll proceedings and hearings commenced and conducted in accordance with this Part, including all papers in the arbitration case file, shall be confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter.” Part 137 does not define “ancillary legal action,” and does not define the phrase “take legal action,” but one form of ancillary legal action is professional discipline. Section 137.7(g) provides that if either an arbitrator or arbitral body becomes “aware of evidence of professional misconduct as a result of the fee dispute resolution process, that arbitrator or body shall refer such evidence to the appropriate grievance committee of the Appellate Division for appropriate action.”

For example, if an attorney submits falsified time records to support his fee demand, the falsified records may be used, if necessary, to initiate (and presumably also to prove) disciplinary charges. Similarly, if during the fee arbitration a client learns of a breach of contract, breach of fiduciary duties, or legal malpractice in the underlying representation that is the subject of the fee dispute, the client should be permitted to use evidence from the hearing to initiate (and presumably to prove) a separate civil action against the attorney.

How soon will the arbitrators render a decision?

Section 137.7(f) provides that a written arbitration award specifying the bases for the determination “shall be issued no later than 30 days after the date of the hearing.”

Is the arbitration result final and binding?

That depends. Under §137.2(a), “the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.” However, under §137.2(c), the attorney and client “may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to de novo review.” (Emphasis added.)

How does de novo review work?

If the attorney and client have not agreed to preclude de novo review, then § 137.8 provides that either party to an arbitration “may commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed.” (A party who has failed to participate in the hearing is not entitled to seek de novo review “absent good cause for such failure to participate.”) If neither party commences a court action within 30 days after the arbitration award is mailed, “the award shall become final and binding.”

Roy Simon is the author of Simon’s New York Code of Professional Responsibility Annotated, published annually by West. The 2001 edition is now available.