The New York State Attorney-Client Fee Dispute Resolution Program
Introduction to the Part 137 Program
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Today's Presenters

- Dan Weitz, Esq. is currently the Director of the Division of Professional and Court Services, which houses the ADR Office and the ADR Office supports the Part 137 program. Dan served as Co-Counsel to the BOG since its inception (around 2001) up until his appointment to Director in 2017.
- Martha (Meg) Gifford, Esq. is Chair of the Board of the Fee Dispute Resolution Program, having served on the task force that created the Fee Dispute Resolution Program and on the Board since the Program started. She currently has a solo practice in antitrust counseling, is a past chair of the NYSBA Antitrust Law Section and a past President of the Women's Bar Association of the State of New York.
- Amy Pontillo, Esq. – Senior Counsel to the Office of ADR Programs. Amy has been with the ADR office since 1999. She served as co-counsel to the Board with Dan from 2007 until 2017 when he moved on; she now serves as Counsel to the Board and the programs. Amy is also the currently the Chair the Committee on Animals and the Law of the State Bar.

Program Agenda

- History of Part 137, the why and how
- Program Structure and Operation, the local programs and the Board
- Jurisdiction, what kinds of cases
- Case Mechanics, life of a case
- Arbitrator powers and assignment, some of your powers – like oaths and subpoenas- and how you'll get assigned to cases
- Burden of Proof- what's the standard and who bears the burden?
- Hearing, Jurisdictional and practical issues, arbs resolving jurisdictional issues and alt format hearings
- Award, calculating the award form and writing a statement of reasons
- Prior written agreements to arbitrate, some of the necessary elements
- What is a reasonable fee, looking at the Disciplinary Rule 1.5
- Legal Issues

Why Part 137?

- Promote Public Trust and Confidence
- Resolve Disputes without the formality time and expense of litigation
- Provide for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation.

Program Structure- The Board and Counsel

- Board of Governors-
    - oversees the program It approves, monitors & evaluates local programs, it ensures that services are available throughout the state.
    - The Board also resolves legal issues presented by local program administrators.
        - 18-members
        - 12 attorneys
        - 6 non-attorneys
    - Chaired by Martha Gifford (Meg was part of the task force assigned to look into legal profession and expanding fee arbitration; she was one of the founding members; responsible for approving programs and rules).

- Local Programs serve each judicial district
- Counsel supports the Board and the Programs

Application

Arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances.
The rule applies to:

- All NYS admitted attorneys
- Most civil matters
- Representation began on or after January 1, 2002
- Disputed amount is between $1,000 and $50,000
- Also applies to fees already paid

The rules does not apply to:

- criminal matters
- substantial legal questions, including professional malpractice or misconduct*
- damages or relief other than adjustment of the fee
- fee is determined by statute, court rules, or court order
- No services for two years
- Services rendered outside New York State
- Request is filed by someone other than the client or client’s representative.

What is a substantial legal question?

- Explicit claims of legal malpractice & attorney misconduct
- Complex or protracted issues
- Case-by-case

…and why exclude them?

- Time and informality
- 137.0 Scope
- Appellate Divisions' authority over disciplinary actions
- Volunteers
- Issue Preclusion- more later

Program Structure- Local Programs (Arbitral Bodies)

- Local bar associations or Judicial District Administrative Offices (or a hybrid).
- Local program rules and procedures
    - Arbitrator qualifications & assignment protocols
    - Fees
- Local programs serve as first point of contact for arbitrators, attorneys, and clients
- Determine Jurisdiction
- Handle Case administration
- Determine Venue

Venue

137.5

- Is determined by where the majority of the legal services were performed.
    - Generally, it's where the attorney's office is located, but it could be the county where a case was filed. The local program will have to make a judgment based on the information the parties filed.
- Administrators may transfer cases upon a showing of good cause.
- Board intervention if a dispute over venue arises between programs.

Six Ways Cases Get to dispute resolution under part 137 (137.2)

1. Attorney sends client notice of the right to arbitrate. [137.2 (a) & 137.6(a)(1)]

2. Client pursues arbitration on his/ her own. Client hears about the program from the website, the court, the help center, and downloads forms
3. Client Consents in advance to arbitrate potential fee disputes. [137.2 (b)]
4. Client consents in advance to arbitrate potential fee disputes and waive the right to trial de novo. [137.2 (c)]
5. Client and attorney agree in advance to arbitrate potential fee disputes in another arbitral forum- not Part 137. [137.2 (d)].
6. Client and attorney may consent to mediate fee dispute*. [137.12] Mediation is a voluntary process for both parties; parties may continue to arbitration if they don't reach resolution in mediation; only NYCLA has an approved mediation program for Part 137.

Arbitration Procedure Timeline

What is a fee dispute?

More detail later, but we'll see shortly that it can be an explicit claim but also it can be non-payment. If an attorney is thinking about suing for a fee, the attorney should be thinking about Part 137 first.

137.6

- Attorney serves client by certified mail or personal service
- Client has 30 days to file
- If client does not file, then attorney may go to court for the fee
- If client filed, Local program sends Client request form to attorney
- Attorney has 15 days from the mailing of the client request, to send in attorney response and certify a copy was served on client (137.6(d)).
- The administrator then schedules the hearing (this may take several weeks; particularly if a panel is required); parties are given 15 days' notice of the date, time, and location of the hearing.
- The hearing takes place- hearings are generally no more 2 hours and most arbitrations require only one hearing.
- Parties are dismissed, and arbitrators deliberate outside of their presence. Arbitrators may also deliberate after they leave the hearing and reconvene with one another by phone, email, etc.
- Arbitrators must issue the award 30 days after the date of the hearing. (137.7 (f))
- If an aggrieved party chooses to commence a trial de novo (on the merits), he/she must do so within 30 days of the mailing of the award (137.8), otherwise the award becomes final and binding (but subject to confirmation)

The Hearing

Arbitrator Assignment

- Disputes involving $10,000 or more are assigned to a panel
  - Panels- at least one non-attorney member of the public/ Chair is an attorney.
  - Parties may waive the panel in writing (UCS 137-17)
- Disputes involving less than $10,000 go to one attorney arbitrator
- Decisions
  - On the merits: Majority rule; no dissents on the award
  - Procedural Disagreements: resolved by the Chair unless otherwise stated in local rules.
  - Procedural- for example, ruling on objections, allowing /excluding certain testimony or evidence, adjournments, etc.

Arbitrators

Conflicts

a. Check for conflicts before you accept a case
b. Recuse/ do not accept if:
   i. Personal bias against a party or subject matter
   ii. Financial interest in the subject matter
   iii. Close personal or financial relationship
c. Disclose

   Section 9. F. All arbitrators must conduct a conflict of interest check prior to accepting a case. A person who has any personal bias regarding a party or the subject matter of the dispute, a financial interest in the subject matter of the dispute, or a close personal relationship or financial relationship with a party to the dispute shall not serve as an arbitrator. An arbitrator shall disclose any information that he or she has reason to believe may provide a basis for recusal. Standards and Guidelines

d. Either party may request that an arbitrator be removed: 137.6(f) personal or professional relationship; No later than five days before the scheduled hearing date
   i. What if the conflict arises at the hearing? (disclose, talk to administrator, signed writing)
   ii. 137.6(f); the local program makes the final decision concerning removal.

Immunity 137.7 (h) ; If acting within your role as arbitrator, immune from suit. Also see S&G Section 9. I, arbitrators not competent to testify in a subsequent proceeding or trial de novo.

Defense and Indemnification: 2004 N.Y. Op. Atty. Gen. (No. 2004-F3);

If an arbitrator gets sued, he/ she should contact the local program administrator immediately, who will then contact counsel.

The Burden of Proof in a Part 137 Hearing

Burden of proof is on the Attorney to prove the reasonableness of the fee by a preponderance of the evidence.

Other Standards (for comparison)

A mere scintilla: *A glimmer; a spark; the slightest particle or trace.*
"Scintilla of evidence" is a metaphorical expression describing a very insignificant or trifling item of evidence. The common-law rule provides that if there is any evidence at all in a case, even a mere scintilla, that tends to support a material issue, the case cannot be taken from the jury but must be left to its decision.
Substantial Evidence: Standard of review used at the appellate level to review a trial court's decision, where the court asks whether there exists substantial evidence to support the findings of the court below. [means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."]
Preponderance (Part 137): A requirement that more than 50% of the evidence points to something. This is the burden of proof in a civil trial. The party with the stronger evidence, however slight the edge may be.
Clear and Convincing A medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not that it is true. This standard is employed in both civil and criminal trials.
Beyond a reasonable doubt (Criminal trial) Sufficient doubt on the part of jurors for acquittal of a defendant based on a lack of evidence.

Order of the Proceeding 137.7(d)

The order is very important and goes to the burden of proof
What happens if the client goes first? Shifts the burden to the client to show the fee was unreasonable and then attorney only has to answer to the case the client presented.

- Attorney presents his/her case using documentation of the work performed and billing history
- Client may then present his or her account of the services rendered and time spent
- Parties may call witnesses
- The client has the right of final reply
- See 'Arbitrators' Information Sheet' (see manual appendix F 24)

Arbitrator Powers

- Take and hear evidence
- Administer oaths and affirmations
  - Oath /affirmation info on pdf page 16 of Manual (page 13 hardcopy)
  - Oaths/ Affirmations: If witnesses will be called, may want to swear-in all parties and witnesses together, then sequester witnesses until they are to testify.
- Subpoena attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.
- Rules of evidence need not be observed (but the order of the proceeding does! Remember 137.7(d))

Party rights and others in the room

- Parties are entitled to Stenographic or other record
  - Party who wants the stenographic record pays for stenographer and others who want copies pay for them.
- Parties may call witnesses
- Attorney and/or a “support person”
  - Note on witness as support person- if a party expects to call their support person as a witness, then they may have to decide in which capacity they want to use the person’s services. If a support person is present for other witness testimony and case presentations, their testimony may be tainted by what has already been presented.
- Interpreters
  - Programs will coordinate with the Office of Language Services to provide interpreters, including sign interpreters, for parties.

Threshold jurisdiction questions

Arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances.

The local program administrator decides jurisdiction; however, sometimes issues arise during the hearing that were not apparent at intake.

The following are some examples of threshold jurisdictional questions that arbitrators may have to resolve:

- Jurisdiction
  - Did the client timely file the request for fee arbitration after attorney sent notice?
    - Attorney may claim that client filed late (if attorney does not object to what appears to be an untimely filing, then the hearing goes forward); arbitrator may have to look at the evidence to determine whether filing was timely.
  - Have more than 2 years passed since the last date of services?
    - Parties may dispute the last date of services and it may be difficult for the administrator to determine when the last date of services was without a more rigorous review of the information. Arbitrators may be charged with determining this information.
  - Is the amount in dispute greater than $50,000?
    - Client may claim she is disputing only $10,000 of a bill; attorney may claim that there are $41,000 in outstanding fees (see more about determining amount in dispute in award slides)

- Does this case present substantial legal questions?
  - Does this claim involve malpractice or misconduct?
  - If the arbitrator determines the case involves substantial legal questions, then the program does not have jurisdiction. Even if it appears that the fee issue is separable, it is better to err on the side of caution and stop the hearing.

Confidentiality- 137.10

All 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.
Ancillary legal action

- Disciplinary investigations
- Award enforcement CPLR 75

Participation

- Personal appearance is not required.
- Parties may participate on paper
- Party must submit Testimony and exhibits under written declaration under penalty of perjury. 137.6(i)
- Other options?
  - Skype, video conference, teleconference

- Sometimes a party will not be in town but has agreed to call in or skype in.
- Arbitrators should make decisions to hold hearings in alternative formats on a case-by-case basis after hearing requests and objections.
- Arbitrators should be cognizant of parties who may not be able to participate in-person because of disabilities. Some people may be homebound and cannot physically make it to a hearing location.

Failure to participate

- The arbitration proceeds and a decision is made on the evidence presented.
    - What if attorney doesn't show? Did she/he meet the burden?

- Attorney fails to participate:
    - The attorney shall be referred to the appropriate grievance committee of the Appellate Division. 137.11
- If the attorney without good cause fails to respond to a request for arbitration: 137.(6)(h)
    - Arbitrators have the discretion to decline to accept a late fee response. Standards Section 6. C.
        - Arbitrators discretion to not accept a late filing- ask why is this a problem? How does it affect the client?
        - This section of the Standards was meant to address the situation where an attorney failed to respond to a client request and then appears at a hearing with "voluminous" documents. If attorney decides to present evidence that the client did not have before the hearing, then the client would not be prepared to respond.

- The client may not withdraw from arbitration once the arbitral body receives the Attorney Fee Response. 137.6(g)

- Difference between participation and attendance. Remember, Parties can participate on paper under penalty of perjury and not have to "attend" a hearing.

The Award

- Issued within 30 days of the hearing
- In writing, specifying bases for the determination (keep it brief)

    For example: Based upon my review of the evidence—including the attorney's billing statements and the testimony of both the client and the attorney—I find that the attorney has proved by a preponderance of the evidence that the attorney's fee of $2,500.00 is reasonable. (page 28 in the manual)

    - Signed, affirmed (remember no dissents)
    - Remember to date the award! And double-check the date/ year.
- Send the award to the administrator to distribute
- Thirty days after mailing, award becomes final and binding (may still have to confirm award)

The Award Form

Award Example 1

Facts: The total bill for services rendered is $20,000. Client has already paid $15,000. Client challenges $5,000 of the $15,000 he already paid. Client is silent as to the balance of the bill, $5,000. Attorney is seeking $5,000 balance of the $20,000 bill.

1. How much is in dispute? $10,000 ($5,000 already paid +$5,000 attorney wants)
2. If you decided attorney was entitled to $7,500, how would you calculate the award on the form?
3. What would you write in the Statement of Reasons?

Arbitration Award

In the Matter of Fee Dispute
Arbitration between
Amy Pontillo, Client
and
Dan Weitz, Attorney

Line 1 The amount in dispute is: $10,000
Line 2 The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client): $7,500
Line 3 The AMOUNT of this total PREVIOUSLY PAID by the client is: $5,000
Line 4a) The BALANCE DUE by the client to the attorney is: $2,500
or
Line 4b) The AMOUNT TO BE REFUNDED by the attorney is: $0.00
Statement of Reasons: Based upon testimony and documentary evidence presented, the attorney showed by a preponderance of the evidence that she is entitled to $7,500. Accordingly, the client shall pay $2,500 to the attorney.

Award Example 2

The total bill for services rendered is $2,000. Client has already paid $1,400. Client challenges $600 of the $1,400 she has already paid and the balance of the bill, $600. Attorney is seeking $600, the balance of the bill.

1. How much is in dispute?
2. Do you have jurisdiction?
3. If you decided attorney was entitled to $900, how would you calculate the award on the form?
4. What would you write in the Statement of Reasons?

Arbitration Award

In the Matter of Fee Dispute
Arbitration between
Amy Pontillo, Client
and
Dan Weitz, Attorney

Line 1 The amount in dispute is: $1,200
Line 2 The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client): $900
Line 3 The AMOUNT of this total PREVIOUSLY PAID by the client is: $600
Line 4a) The BALANCE DUE by the client to the attorney is: $300
or
Line 4b) The AMOUNT TO BE REFUNDED by the attorney is: $0.00

Statement of Reasons: Based upon testimony and documentary evidence presented, the attorney showed by a preponderance of the evidence that she is entitled to $900 of the disputed amount. Accordingly, the client shall pay $300 to the attorney.

Trial de novo

137.8(c)

- Either party may commence an action in court on the merits within 30 days of the mailing
- Arbitrators may not be called as witnesses
    - Also see S&G Section 9. I, arbitrators not competent to testify in a subsequent proceeding or trial de novo.
- The award may not be admitted into evidence
- Any record made may not be admitted into evidence

Prior written agreements to arbitrate

Prior written agreement: Knowing and Informed Consent to arbitrate fee disputes [137.2(b)]

Necessary Components

137.2(b)See Form: 137-13; F 19

- The consent must be Knowing and Informed
  - signed writing
  - state that the client has read the official instructions and procedures for Part 137,
  - Indicate that the client agrees to resolve fee disputes pursuant to the Part 137 program.
  - Trial de novo
  - http://www.nycourts.gov/admin/feedispute/pdfs/137-13.pdf

Prior written agreement: Knowing and Informed Consent to arbitrate fee disputes and to waive de novo [137.2(c)]

Necessary Components

137.2(c); Standards 6B2;
See form 137-14 F 20

- 137.2(c) Indicate that the client agrees to resolve fee disputes pursuant to the Part 137 program
- 137.2 (c) state that the client has read the official instructions and procedures for Part 137
- 137.2 (c), signed writing
- Client understands he/she is waiving the right to a trial de novo
- http://www.nycourts.gov/admin/feedispute/pdfs/137-14.pdf

Cases
Goldberg v. 30 Carmine,
2010 NY Slip Op 20078, 27 Misc.3d 680, 896 NYS2d 660 (Sup. Ct. New York County March 3, 2010).
Where the retainer agreement did not contain the waiver language prescribed by the Board of Governors, the award was not considered final and binding and client retained the right to a trial de novo. The Court held that there must be proof that waiver was voluntary and intentional and that there would have otherwise been a known and enforceable right- even

here where the client also happened to be an attorney. The retainer must explicitly provide that the client understands he or she is waiving the right to reject an arbitration award and subsequently commence a trial de novo in court.
Jewell v. Iver
An attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client (id.; Cohen v. Ryan, 34 A.D.2d 789, 790, 311 N.Y.S.2d 644). As the Appellate Division stated in Smitas v. Rickett (supra), [(e]ven in the absence of fraud or undue influence, an agreement to pay a legal fee may be invalid if it appears that the attorney got the better of the bargain, unless [she] can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence in the attorney".

Prior written agreement: Knowing and Informed Consent to arbitrate Outside of Part 137 [137.2(d)]

Necessary Components

137.2(d) and Standards and Guidelines Section 6(B) 4 arbitration process will be conducted according to the rules of the arbitration provider, not Part 137.
** Include the fees, if any.

- 137.2 (d) state that the client has read the official instructions and procedures for Part 137
- 137.2(d) Read the rules and instructions of the outside arbitral forum
- 137.2 (d) signed writing
- 137.2(d) The arbitration must be final & binding.
- 137.2(d) Client understands (s)he has the right to use Part 137 and is not required to arbitrate in the outside forum.

- http://www.nycourts.gov/admin/feedispute/pdfs/137-16.pdf
- See form UCS 137-16; F22

What is a reasonable fee?

Rules of Professional Conduct: Rule 1.5
"A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

- Time & labor required, novelty and difficulty of the questions involved, and the skill to properly perform legal services.
- The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation and ability of the lawyer(s) performing the services.
- Whether the fee is fixed or contingent usually won't see contingent fees in program.

What is a fee Dispute? What triggers the Notice Requirement?

Does client have to explicitly dispute the fee?
What if the client just doesn't pay?

History:

Under Part 136- The fee dispute arises when (triggering notice):

- First Dept. Paikin v Tsirelman: Client does not have to explicitly contest the fee. Attorney cannot commence an action in court unless she provides notice first.
- Second Dept. Scordio v Scordio: Client must contest the fee. How would the attorney know that the client is disputing the fee? What if client just can't pay? That's not a fee dispute if client doesn't explicitly say he is disputing the fee.

  Under Part 137

Under Part 137

Still some disparity in case law, but the cases, even trial court decisions from the 2nd dept, generally were going in the direction of Paiken from the First Dept.- non-payment triggers notice. The rationale in many of the cases is that Part 137 was intended to be broader than 136 and cast a wider net.

Notice: Rule Amendment

Effective January 1, 2018, Section 137.6 is amended as follows:
Section 137.6 Arbitration procedure.
(a)(1) Except as set forth in paragraph (2), where the attorney and client cannot agree as to the attorney's fee or where the attorney seeks to commence an action against the client for attorney's fees, the attorney shall forward a written notice to the client, entitled Notice of Client's Right to Arbitrate by certified mail or by personal service.

- Now with the amendment, it's clear that whether or not client disputed the fee, attorney must send notice before commencing an action in court. Even where the client concedes that money is owed and says he just can't pay.

Cases

Paikin , In 1999, the First Department, in Paiken, held that an attorney could not rely on the account stated as a reason for not complying with the notice requirements of Part 136. Providing notice of the right to arbitrate is a condition-precedent to commencing an action in court for attorney's fees. And the client's mere non-payment triggers the attorney's notice requirement. The court said to hold otherwise would effectively eviscerate the fee arbitration rules.

In Scordio, the court held that the client must explicitly dispute the fee in order for the attorney to be obligated to send notice of the right to arbitrate.

- Rotker v. Rotker, *195 Misc.2d 768, 761 N.Y.S.2d 787 (Sup. Ct., Westchester County 2003). (Followed* Scordio*)*
- Wexler v. Grant, *Supreme Court, Nassau County:, 12 Misc.3d 1162A (2006). (followed* Paiken*)*
- Messenger v. Deem, *26 Misc. 3d 808; 893 N.Y.S.2d 434; 2009 N.Y. Misc. LEXIS 3313 (Sup. Ct. Westchester 2009). (Followed* Paiken*)*
- Tomei v Schwartz, 45 Misc. 3d 1207(A) Court: New York City Civil Court Date: October 10, 2010 (follows Paiken and Wexler & Burkhart, LLP. v. Grant, 12 Misc. 3d 1162(A), 1162A (N.Y. Sup. Ct. 2006;

(Tomei) "These courts have noted that Rule 137.1(b) lists only eight situations where offering arbitration as set forth in Part 137 is inapplicable. Therefore absent one of these eight exceptions an attorney must offer participation in the program to a non-paying client. These cases work from the presumption that if not being paid for any reason, the attorney should offer fee dispute resolution to the client, because not to do so undercuts the very purpose of the Rule to provide "for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation" [§137.0]. "

Issue Preclusion

Does a client waive the right to seek malpractice damages against an attorney by participating in a Part 137 arbitration?

Cases involving malpractice claims are typically screened out of the program.

*Remember if malpractice or other substantial legal question arises during the hearing, it's best to err on the side of caution and stop the arbitration.

Under Part 136 Clients waived right to seek malpractice damages if they participated in a Part 137 arbitration- Altamore v Friedman (193 AD2d 240 [2d Dept 1993]) and Wallenstein v. Cohen (2007 Slip Op 9023 [2d Dept 2007]).

Under Part 137 (2d Dept)

Mahler v. Campagna (60 A.D.3d 1009 (2d Dept. 2009). Soni v. Pryor, 2013 N.Y. Slip Op. 00324, 2013 WL 239044.

The court held that plaintiff was not collaterally estopped from bringing subsequent malpractice action against attorney who was awarded partial fee in 137 arbitration. Allegations of malpractice and misconduct could not properly have been considered by the arbitrators as such issues are specifically excluded by the rule.
Issue Preclusion:
A party will not be permitted to "relitigate" an issue where:

1. The identical issue was decided in a prior action and is decisive in the present action, and
2. The party had a full and fair opportunity to contest the prior issue

Should arbitrators Assess the Quality of the Representation?

What should you do when the client claims that the attorney's performance was so substandard that it constitutes malpractice?

- Explain that the panel cannot decide claims of malpractice.
- Explain that the client might be precluded* from bringing a malpractice action if the arbitrators decide the case. *whether a client will be precluded from pursuing a malpractice claim is a fact-specific inquiry; arbitrators and staff should refrain from making positive statements concerning legal matters, including matters involving legal malpractice.
- Ask the client what the client wants to do.
- legal information versus legal advice

Failure to Comply with certain rules

What happens if the attorney fails to comply with court rules governing attorney conduct?

- Under 22 NYCRR 1215, the "letter of engagement rule", the 2d Dept in *Rubenstein* attorney was entitled to a fee calculated on a *quantum meruit* basis in a non-matrimonial matter, despite failure to provide client with a written letter of engagement (Manual appendix D 18)
- Check local rules re: attorney's failure to follow Part 1400. (Manual appendix D20) See appendix H8 for BOG correspondence (page 186) in manual
- Upon consultation with the Administrative Board of the Courts, the Board of Governors has concluded that local programs should exercise jurisdiction over these fee disputes. However, it is important that arbitrators be made aware of the case law in their department as it relates to the attorney's right to recover legal fees where the attorney has failed to provide a written retainer agreement as required in domestic relations matters.

Should an arbitrator award attorney's fees and other fees associated with defending a fee arbitration?

- Almost always NO.
    - Must either be a statute allowing for such fees or a contract between the parties providing for them.
    - Statute? No provision in Part 137 allowing for fees.
    - Contract? Example, retainer states, If lawyer has to take steps to collect fees, client is responsible for the attorney's expenses.
    - Use Discretion. BUT CAUTION AGAINST AWARDING THESE FEES
        - Courts scrutinize such agreements due to the special nature of the attorney-client relationship.
        - If it appears that the attorney is getting the better of the deal or if the agreement is fundamentally unfair, the court will not uphold it.
        - May have the effect of silencing a client's complaint about fees for fear of retaliation.

See Newkirk v. Fourmen Construction Inc. and Ween v. Dow And Jewell v. Iver
An attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client (id.; Cohen v. Ryan, 34 A.D.2d 789, 790, 311 N.Y.S.2d 644). As the Appellate Division stated in Smitas v. Rickett (supra), [(e]ven in the absence of fraud or undue influence, an agreement to pay a legal fee may be invalid if it appears that the attorney got the better of the bargain, unless [she] can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence in the attorney".

- Filing fees to use the program are different.
    - Prevailing party may request that the award reflect the fee the party paid to use the program. Check local program rules.

May arbitrators award interest?

Yes, at arbitrator's discretion. Interest is a question of law and fact for the arbitrator to determine.

- Arbitrator may consider awarding interest at a party's request
- Does not have to be statutory interest; but cannot be usurious
  Levin & Glasser v. Kenmore Property, LLC,
  2010 NY Slip Op 898; 70 A.D.3d 443; 896 N.Y.S.2d 311; 2010 N.Y. App. Div. LEXIS 903(App. Div. 1st Dept. 2010).

Non-compliance with award

Attorney's obligation to participate in Part 137 extends to honoring the award (Spina v. de Filipo- if you are not going to commence an action on the merits [de novo] or seek to vacate, then you must pay).

Questions?

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