SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

BETTER BILLING SERIES: Fee Disputes

Presenters:

Diane Carroll, Esq.
Nicholas Gabriele, Esq.

Program Coordinators: Allison C. Shields, Esq. and Debra L. Rubin, Esq.

August 10, 2016
SCBA Center - Hauppauge, NY

Diane C. Carroll

Diane was admitted to practice in 1986 and has for the past 30 years exclusively practiced Matrimonial and Family Law. Diane is admitted to the Supreme Court of the United States; United States Court of Appeals for the Federal Circuit; United States Court of Federal Claims; United States Military Court; Federal Eastern District of New York; and the Appellate Division, Second District.

Diane enjoys her involvement with the Suffolk County Bar Association. She is the prior co-chair for the Fee Dispute Committee for the Suffolk County Bar Association. She is the prior co-chair of the Suffolk County Grievance Committee. She is a member of the Suffolk County Bar Association; Suffolk County Grievance Committee; the Matrimonial and Family Law Committee; Nassau County Bar Association; New York County Civil and Criminal Bar Association; Queens County Bar Association; National Trial Lawyers Association; Bench Bar Committee; Suffolk County Women's Bar Association; and Huntington Lawyers. Diane is a Matrimonial Fee Dispute Arbitrator and Grievance Committee Investigator.

Diane assisted in the drafting of the Suffolk County Bar's Program under Chief Administrative Judge Jonathan Lippman, Rule 137. Diane authored our original forms for Fee Dispute Resolution and Panel; which efforts were recognized by the Directors' Award, being awarded to her on May 31, 2002. Diane has received the highest rating for Peer Review (AV) from Martindale-Hubbell, the highest rating for ethics and legal ability. Diane facilitates the PEACE Program with Justice Andrew A. Crecca for Suffolk County and has done so for over a decade. She has been published in the Suffolk County Lawyer, as well as being a speaker for the Suffolk County Bar. Diane traveled to Albany to speak before the Law Revision Committee, as it pertained to the enacted "no-fault" ground (Domestic Relations Law 170.7) and its accompanying temporary maintenance statute. Diane was consulted and featured in a Newsday article regarding the no-fault law in March 2012. Her involvement was recognized by our bar with Diane being awarded the 2012 Directors' Award. Diane has appeared in Long Island Pulse Magazine as one of New York's "Top Rated Lawyers" as well as Newsday's "legal Leader in 2015."

Diane cites her two greatest achievements to be her sons, Bryan, who is serving his country as a Navy Corpsman aboard the USS Stennis and Jared a senior at Binghamton University. She is an active member of the Habitat for Humanity Partners Council, the World Wildlife Foundation, and the New York ASPCA. Diane is a contributor and advocate for Save The Chimps, and The Elephant Sanctuary. Diane is a zealous animal advocate.

Suffolk County Bar Association

Dispute Resolution Program Rules

Suffolk County Bar Association
560 Wheeler Road
Hauppauge, New York 11788-4357
(631) 234-5511

Section 1 Establishment of Program

This program is established pursuant to part 137 of the Rules of the Chief Administrator, Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York and the Standards and Guidelines approved as of October 3rd, 2001.

Section 2 Definitions

The following definitions will apply throughout these rules, except as otherwise provided:

A. "Program" means the Suffolk County Bar Association Dispute Resolution Program established pursuant to Part 137 of the Rules of the Chief Administrator

B. "Client" means a person or entity receiving legal services or advice from a lawyer on a fee basis in the lawyer's professional capacity

C. "Administrator" means the person primarily responsible for administration of the Program as designated by the Suffolk County Bar Association

D. "SCBA" means the Suffolk County Bar Association

E. "Arbitrator" means a person who serves as an arbitrator under the Program

F. "Case" means any case or controversy cognizable under the Program where the amount in dispute is at least in the sum of $1,000.00

G. "Board" means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator

H. "Fee Dispute" means the committee appointed by the Suffolk County Bar Association Board of Directors which oversees the Dispute Resolution Program and make decisions concerning administration of the Program.

Section 3 Application

These rules apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the Bar of the State of New York who undertake to represent a client in a civil matter, where the majority of legal services are performed in Suffolk County or where the attorney maintains an office for the practice of law in Suffolk County.

These rules shall not apply to any of the following:

1. representation in criminal matters;

2. amounts in dispute involving a sum of less than $1,000.00 or more than $50,000.00, except that an arbitral body may hear disputes involving other amounts if the parties have consented in writing;

3. claims involving substantial legal questions, including professional malpractice or misconduct;

4. claims against an attorney for damages or affirmative relief other than adjustment of the fee;

5. disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;

6. disputes where no attorney's services have been rendered for more than two years;

7. disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York; and

8. disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

Section 4 **Arbitrators**

Applicants for membership as an Attorney Arbitrator must meet or exceed the following requirements:

A. Minimum of five (5) years of admission to the Bar

B. Member in good standing of the Suffolk County Bar Association or other recognized bar groups

C. Ability to evaluate and apply legal principles

D. Ability to manage the hearing process

E. Minimum of six (6) hours of fee dispute resolution training or comparable training and experience in arbitration and/or other forms of dispute resolution

F. Other relevant experience or accomplishments

G. Freedom from bias and prejudice

H. Thorough and impartial evaluation of testimony and other evidence

I. Willingness to devote time and effort when selected to serve

J. Willingness to successfully complete training under the guidelines of the Program

Applicants for membership as a Non-Attorney Arbitrator must meet or exceed requirements E through J above.

All training of arbitrators will be provided by the New York State Office of Court Administration at its sole cost and expense, or by the Suffolk County

Bar Association, or other recognized dispute resolution programs approved by the board.

Arbitrators will serve on a voluntary basis, without financial compensation.

Section 5 Initiating the Arbitration

The Submission Process

Client:
A client with a fee dispute starts the process by filing a request for dispute resolution with the Administrator of the Program together with the required filing fee of $150.00 *see Financial Hardship Policy. Forms can be obtained by calling the Administrator at 631/234-5511, extension 222, by obtaining the form in person at the Suffolk County Bar Association, located at 560 Wheeler Road, Hauppauge, New York 11788-4357 or by requesting said form by facsimile transmission to the administrator (631/234-5899) or by e-mail to the administrator at fee@scba.org between the hours of 9:00 a.m. and 5:00 p.m., Monday to Friday, or you may download forms on the SCBA wesbsite at www.scba.org/fee_dispute/fee_overview.html

Attorney:
An attorney starts the process by sending a Notice of Right to Arbitrate and required forms to the client. If there is a prior written agreement to arbitrate, the initiating party shall submit a copy to the Administrator with their request to arbitrate. If the client fails to then file a request to arbitrate within 30 days, the attorney who's written agreement provides for such dispute resolution may file the request to arbitrate. An attorney is required to send by certified mail or by personal service, the notice of right to arbitrate with appropriate forms upon initiation of any dispute involving fees between client and attorney, and/or prior to commencement of any civil action for collection of fees.

A party may make application to the Administrator to have the filing fee waived, based upon limited financial resources which make the filing fee a financial burden or would prevent said client from utilizing this resolution program. The request must be made in writing to the Administrator who will have the discretion to grant or deny the request. Should the arbitration result in a finding in favor of the client for whom the fee was waived, the waived filing fee will be deducted from such award, and paid directly by the attorney to the Association, after deduction from said award.

The request for arbitration must contain the name and address of the parties along with the telephone numbers of the parties to be contacted, and a brief description of the claim and the amount involved.

Upon receipt of the request for arbitration, the Administrator will mail a copy of the request for arbitration to the named attorney, together with an attorney fee response, to be completed by the attorney and returned

to the Administrator within 15 days of mailing. The attorney will include with the attorney fee response, a copy of retainer or letter of engagement, if any, and an affidavit that a copy of the response was served on the client.

Upon receipt of the attorney fee response, or if no response is received within 15 days of mailing of the attorney fee response form to the attorney, the Administrator will endeavor to appoint an arbitrator or arbitrators to the case with experience in the subject matter of the representation. Arbitrators will be assigned from a panel of neutrals who have qualified to act as arbitrators in fee dispute matters. Disputes involving a sum of less than $10,000.00, but more than$1,000.00, will be submitted to one attorney arbitrator. Disputes involving a sum of $10,000.00 or more, but less than $50,000.00 (unless by agreement of the parties), will be submitted to a panel of three arbitrators, which will include one non-lawyer, unless otherwise provided for in writing.

When a party and attorney are notified of the appointment of the arbitrator(s), any conflict of interest shall promptly be disclosed in writing but not less than five (5) days prior to the scheduled hearing.

Upon receipt of a case, the Administrator will notify the parties of a date, time, and place for the hearing, which notice will be at least fifteen (15) days prior to the scheduled date, with the identity of the arbitrator or arbitrators. All arbitrations will be held at the offices of one of the arbitrators or at the Suffolk County Bar Association.

Section 6 **Powers of arbitrator and conduct of the hearing**

An arbitrator has the following powers:

A. Issue subpoenas and administer oaths

B. Take and hear evidence pertaining to the proceeding

C. Rules of Evidence need not be observed at the hearing and either party, at his or her expense, may be represented by counsel. Representation by counsel must be disclosed on filing form or response

D. Arbitrator(s) may adjourn or postpone the hearing

The burden will be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client must present his or her account of the service rendered and time expended. Witnesses may be called by the parties. Participation may be by written statement sworn to under penalties of perjury. The client will have the right of final reply.

Any party may provide for stenographic or other record at the party's expense, providing that the panel is given duplicate copy at time of hearing upon request by the panel. Any other party to the arbitration will be entitled to a copy of said record, upon written request and payment of the expense for such record.

The arbitration awards will be issued to the parties no later than thirty (30) days after the completion of the hearing. Arbitration awards will be in writing and specify the basis for the determination. Except as set forth herein, all arbitration awards will be final and binding, unless a *trial de novo* is commenced under the Rules within the time set forth therein.

Neither the Associations, nor the Committee, its Chair or members, Administrator, Arbitrator and staff person acting under these Rules, shall be a necessary party in any judicial proceeding relating to any arbitration conducted in accordance with these Rules. None of the parties listed in the preceding sentence shall be liable for any act or omission relating to any dispute in connection with any arbitration conducted under these Rules. Without limiting the scope of the preceding two sentences, it is intended that the Committee, its Chair and its members, and any Arbitrator acting under these Rules have the same immunity as a judicial officer of body would have in a court proceeding. The parties to any arbitration held under these Rules will be deemed to have conferred the immunity described above.

The hearing will be conducted by either the sole or all of the arbitrators in case of a controversy in excess of $6,000.00, but a majority may determine any question and render an award.

Section 7 **Trial de novo**

A party aggrieved by the arbitration award may, unless there is a written agreement to the contrary, commence an action on the merits of its fee dispute (a *trial de novo*) in a court with jurisdiction over the amount in dispute, within thirty (30) days after the arbitration award has been mailed. If no action is commenced within thirty (30) days of the mailing of the arbitration award, the award shall become final and binding. Upon filing of a demand for *trial de novo*, the aggrieved party shall also mail a copy of the demands to the Administrator and other side.

Any party who does not participate in the arbitration hearing will not be entitled to a *trial de novo* absent good cause for such failure to participate.

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*.

Section 8 Communication with arbitrators

No party and no one acting on behalf of any party will communicate unilaterally concerning the arbitration with an arbitrator or a candidate for an arbitrator. Unless the parties agree otherwise or the arbitrator so directs, any communication from the parties to an arbitrator will be sent to the other party.

Section 9 Enforcement of arbitration awards

Any award that has become final and binding may be entered as a judgment upon moving to confirm said decision in a court of competent jurisdiction, by appropriate notice, pursuant to the CPLR Article 75.

Section 10 Vacancies

If, after an arbitrator is assigned to the case, the arbitrator is unable to perform his or her duties, they will promptly notify the Administrator, who will appoint a substitute arbitrator.

In the event that one arbitrator on a panel of arbitrators is unable to attend the hearing or continue, the remaining arbitrators may continue with the hearing to the determination of the controversy, unless one party objects. Upon receipt of an objection, the arbitration will be deemed terminated and the matter will be reassigned by the Administrator, who will appoint a substitute arbitrator to take the place of the arbitrator who was unable to begin or conclude the arbitration hearing.

Section 11 Attendance at hearings

The arbitrators will maintain the privacy of the hearings unless the rules or the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend the hearing. All attorneys are required to participate in the arbitration program. The arbitrators shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It will be discretionary with the arbitrators to determine the propriety of the attendance of any other person, other than a party and its legal representatives.

Section 12 Arbitration in the absence of a party or representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to participate or fails to obtain a postponement. An award will not be made solely on the default of a party. The arbitrator will require the party who is present to submit such evidence as the arbitrator may require to support the participant's position.

Section 13 Waiver of rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with, and who fails to state an objection at the time of said arbitration or prior thereto, will be deemed to have waived the right to object.

Section 14 Majority decision

When the panel consists of more than one arbitrator, unless required by law or by these rules, the majority of the arbitrators (or the remaining arbitrators in the case of a vacancy under Section 10) must make all decisions.

Section 15 Interpretation and application of rules

The arbitrators will interpret and apply these rules in so far as they relate to the arbitrator's powers and duties. When there is more than one arbitrator, and a difference arises among them concerning the meaning or application of these rules, it will be decided by a majority vote. In the event that the Administrator or an arbitrator(s) is unable to resolve any issue concerning the arbitrator(s) duties or administration of this Program, said question will be referred to the Fee Dispute Resolution Committee for a final decision.

Section 16 Time of award

Unless otherwise agreed by the parties, the award shall be issued not later than thirty (30) days from the date of the completion of the hearing. The Administrator will, upon receipt of the award from the arbitrator or chair of the panel, mail the same to the parties at the address given by the parties for that purpose. The decision will be accompanied by a letter advising the parties of their rights regarding the decision.

Section 17 Record Keeping

A. The Administrator will maintain a separate folder for each "Request for Arbitration" form received. The records are to be kept at the Suffolk County Bar Association for two (2) years. At the end of the two years, they may be disposed of as the Administrator sees fit.

B. With the exception of the award itself, all records, documents, files, proceedings, and hearing pertaining to the arbitration of a dispute under these rules, in which both parties have consented to be bound by the results, may not be open to the public or any person not involved in the dispute, and shall be confidential except to the extent necessary to take ancillary legal action with respect to this fee matter.

C. The Association will maintain the names, addresses, telephone numbers, and summary of credentials of the arbitrators and will update the same from time to time.

Section 18 Financial Hardship Policy

The program's standard policy is to make the program accessible to all who choose to use it. Toward that end, the program maintains a reasonable fee schedule that considers the financial exigencies of the non-lawyer participants, provides extended payment plans, and/or grants full or partial fee waivers under circumstances of extreme financial hardship. Every attempt will be made to keep the names of the individuals who seek hardship assistance and the information disclosed confidential.

Section 19 Amendment of Rules

These rules may be amended from time to time, upon majority vote of the Board of Directors of the Suffolk County Bar Association, the Board of Governors, and the Presiding Justice of the Appellate Division, 2nd Department.

STANDARD INSTRUCTIONS TO CLIENTS FOR ARBITRATION OF FEE DISPUTES IN THE COUNTY OF SUFFOLK PURSUANT TO RULE 137

Part 137 of the Rules of the Chief Administrator, Title 22, provides a procedure for the arbitration of fee disputes for amounts between $1,000.00 and $50,000.00, between attorneys and clients in civil cases. A copy of Part 137 will be made available upon request. Your attorney may not bring an action in court to obtain payment of a fee, unless he or she first has notified you of your right to elect to resolve the dispute by arbitration or the written agreement between you and your attorney provides for arbitration which will be binding on both you and your attorney and cannot be appealed except in certain limited circumstances.

If the amount in dispute is under $10,000.00, but more than $1,000.00, the arbitration will be heard by one attorney arbitrator. If the amount in dispute is $10,000.00 or more, but less than$50,000.00 (unless by agreement of the parties), the arbitration will be heard by a panel of three arbitrators, consisting of two attorneys and one layperson, who shall be selected at random from a pool of arbitrators comprised of laypersons. All arbitrators will be selected by the appropriate Dispute Resolution Committee of the Suffolk County Bar Association.

Arbitration is available only if you dispute the amount of the fee paid or owed. In order to elect to resolve this dispute by arbitration, you must file the attached "Request for Fee Arbitration" with the Suffolk County Bar Association within 30 days from the receipt of this Notice with the appropriate fee of $150.00, unless other arrangements are made to obtain a waiver of fee. The Suffolk County Bar Association is located at 560 Wheeler Road, Hauppauge, New York 11788-4357, (631) 234-5511; filing of the Request for Arbitration must be made with the Suffolk County Bar Association, who has jurisdiction over the attorneys in the county in which the civil action was brought or would have been brought. If you do not file the Request for Arbitration within those 30 days, you will not be permitted to elect to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee, or may elect arbitration if specifically provided for in their retainer agreement or letter of engagement.

Once you or the attorney timely files the Request for Arbitration, the arbitration hearing will be held as expeditiously as possible, and a decision will be made within 30 days of the date of the hearing. You will receive notice of the decision by mail. You are not required to be represented by an attorney at the hearing, although you may appear with an attorney, if you wish. You may also participate by submission of a notarized written statement served on all named parties.

A stenographic or other recording may be taken of the hearing and a copy to be provided to the panel, upon request by the panel.

(For Office Use Only)
Case No. _____
Date Received:

REQUEST FOR FEE DISPUTE RESOLUTION
(Civil Cases)

1. Name, address, telephone number(s), and e-mail address of client is:
   Name:_____
   Address:_____
   _____
   Home phone No.:_____ Cell phone No.:_____
   E-mail:_____
2. The name, address, telephone number(s), and e-mail of the lawyer or law firm is:
   Name:_____
   Address:_____
   _____
   Office phone No.:_____ Cell phone No.:_____
   E-mail:_____
3. Type of case involved (check all that are applicable):

☐Landlord-Tenant	☐Negligence/PI	☐Real Estate
☐General Civil Litigation	☐Corporate	☐Traffic
☐Malpractice/Medical	☐Family Court/Custody	☐Other_____
☐Family Court/Support	☐Judicial Appointment/FC	_____
☐Wills/Trusts/Estates	☐Appellate	_____
☐Commercial	☐Matrimonial	_____

4. Court in which the civil action was commenced, if applicable (include county): _____Court _____County

5. Set forth the date when the lawyer first agreed to handle case:
   _____

6. Attach a copy of the written retainer agreement or letter of engagement between lawyer and client. Attach copies of any other letters or papers that discuss the fee agreement.

7. Describe briefly what was the fee arrangement:

_____

_____

_____

_____

_____

_____

8. State all amounts paid to the lawyer; provide dates of payment and what the payment was to cover, if applicable:

9. State the total amount of moneys in dispute, including any amount the lawyer says you still owe and any amount you already paid but believe should be refunded (attach a copy of the lawyer's bill, if available):

10. Have you received a "Notice of Client's Right to Arbitrate" from your attorney: _____ (enter "yes" or "no" in space). If yes, please attach a copy.

11. Briefly explain why you disagree with the amount of money for legal services billed, paid, or demanded (use additional sheets, if necessary):

_____

_____

_____

_____

_____

_____

I elect to resolve this fee dispute by arbitration, to be conducted pursuant to Part 137 of the Rules of the Chief Administrator [22 NYCRR] and the procedures of the Suffolk County Bar Association, copies of which I have received. I understand that the determination of the arbitrator(s) is binding upon both the lawyer and client, unless either party rejects the arbitrator's award by commencing an action on the merits of the fee dispute (trial *de novo*) in a court of law within 30 days after the arbitrator's decision has been mailed.

Dated:_____ Signed →:_____

(Print name below signature)

☐ Will be represented by legal counsel
Name_____
Telephone Number_____
E-mail_____

Important: Request for Fee Arbitration must be filed with the Suffolk County Bar Association, if the attorney is physically present in Suffolk County (has office in Suffolk) or if the majority of the legal services have been performed in Suffolk County. The Request must be filed within 30 days of the receipt from the lawyer of notice of the client's right to request arbitration. If the client does not file the Request for Fee Arbitration within those 30 days, the client will not be permitted to elect to resolve the fee dispute by arbitration pursuant to Part 137, unless the attorney elects to resolve this matter by arbitration and the written agreement provides for the same. The lawyer is required to provide the client with the address of the Suffolk County Bar Association upon request. A filing fee of $150.00 is required.

Method of Payment:

☐ Filing Fee of $150.00 paid by check is enclosed.*
☐ I Elect to make payment by credit card.
☐ Visa ☐ Master Card ☐American Express ☐Discover

Name on Credit Card: _____
Account #: _____
Expiration:____ / ____ CVV2: _____ (cc security code)
I hereby authorize the Suffolk County Bar Association in assessing a $150.00 charge to the above credit card account.

→X_____

☐ Request payment plan.
☐ I request a waiver of fee due to hardship (I understand that I must supply written verification of same).

* the filing fee of $150.00 should be remitted with this form unless a waiver is requested. Please Make check payable to "Suffolk County Bar Association".

Please remit this form with payment to: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY 11788-4357, Attention: Fee Dispute Resolution Coordinator.

NOTICE OF RIGHT TO ARBITRATE FEE DISPUTE
PURSUANT TO PART 137 OF THE
RULES OF THE CHIEF ADMINISTRATOR

The amount of $_____ is due and owing for the provision of legal services in the case of _____. If you dispute that you owe this amount, you have the right to elect to resolve this fee dispute by binding arbitration. To do so, you must file a Request For Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions.

If you do not file this request to arbitrate within those 30 days, you will not be permitted to resolve this dispute by arbitration under Part 137, unless our retainer or letter of engagement provides otherwise, and I will be free to bring a lawsuit in court to seek to obtain payment of my fee.

Dated: _____, New York

_____

_____
ATTORNEY'S NAME
Office and P.O. Address
Attorney's Address

Attorney's Telephone Number

(For Office Use Only)
Date Received:

Case No. _____

Matter of the Fee Arbitration between

Client,

-and-

Attorney.

RESPONSE TO REQUEST FOR FEE ARBITRATION TO BE FILED WITHIN 15 DAYS OF MAILING OF COMPLAINT

1. (a) Type of case: _____
   (b) Date representation commenced: _____
   (c) Court where case was filed, if applicable:
   _____ Court _____ County

2. Attach a copy of the written retainer agreement or letter of engagement with the client and copies of any other letters or papers that discuss the fee arrangement.

3. Describe briefly what was the fee arrangement:
   _____
   _____
   _____

4. Attach copies of all itemized bills or bills submitted to the client.

5. Attach copies of all time records maintained in this case.

6. Set forth monies received by attorney on the client's behalf:

Date Received	Amount
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

7. State the amount of the fee, if any, that remains owing to attorney by the client, for which lawyer is asserting a counterclaim: _____

8. State attorney's response, if any, to the client's answer to Question 10 of

the Request for Fee Arbitration form, which explains why the client disagrees with the amount of money the attorney claims is owed by the client:

Certification

I hereby certify and affirm, under penalty of perjury, that all of the foregoing statements made by me are true, that all documents attached are true, and that I have, contemporaneously with filing this form with the Suffolk County Bar Association, mailed a copy by regular mail to the client.

Dated:_____ Signed:_____

[Print name below signature]

IMPORTANT: The attorney must file the Response to Request for Fee Arbitration with the Suffolk County Bar Association within fifteen (15) days of mailing.

SUFFOLK COUNTY BAR ASSOCIATION
DISPUTE RESOLUTION PROGRAM
FEE WAIVER POLICY

The Suffolk County Bar Association ("SCBA") administers a Dispute Resolution Program, in accordance with Part 137 of the Rules of the Chief Judge ("the Program"). The Program's standard policy is to make the Program accessible to all who choose to use it. Toward that end, the program maintains a reasonable fee schedule that considers the financial exigencies of the non-lawyer participants, provides extended payment plans, and/or grants full or partial fee waivers under circumstances of extreme financial hardship. Every attempt will be made to keep the names of the individuals who seek hardship assistance and the information disclosed confidential.

OPTIONS IN LIEU OF FULL PAYMENT UPON PARTICIPATION IN THE PROGRAM

The following options are available to non-lawyer participants who are unable to pay the full filing fee upon filing a request for dispute resolution:

1. **Payment Plans**: Payment of the fee can be extended over a period of time. Payment may be made in a manner designated by the applicant and agreed to with the SCBA via a letter of agreement signed by both. No proof of need is required. Agreement form to be completed and signed. The entire fee, however, must be paid in full prior to hearing on fee dispute.

2. **Total or Partial Fee Waiver:** Those non-lawyer participants who cannot pay the fee, or those with whom a mutually satisfactory payment arrangement cannot be reached, can apply for a fee waiver. An application, including disclosure of financial information, *must* be filed by the applicant. A committee appointed by the Program Chairs will evaluate each application, applying standard poverty guidelines. Form attached.

NOTICE OF HARDSHIP POLICY

The policy, as expressed in the introductory paragraph of this document and as spelled out below will be included in the forms and manual describing the Program, publicity catalogs, brochures, and advertising in our Association's newspaper under the heading "Financial Hardship Policy," and an invitation to call the Program Administrator for more information will be included:

FINANCIAL HARDSHIP POLICY

The Suffolk County Bar Association ("SCBA"), administers a Fee Dispute Resolution Program in accordance with Part 137 of the Rule of the Chief Judge ("the Program). The Program's standard policy is to make the Program accessible to all who choose to use it, and toward that end maintains a reasonable fee schedule that considers the financial exigencies of the non-lawyer participants. The Program provides extended payment plans and/or grants full or partial fee waivers under circumstances of extreme financial hardship. Every attempt will be made to keep the names of individuals who seek hardship assistance, as well as the information they disclose, confidential. For more information, call Tina O'Connor, Program Administrator at (631) 234-5511.

GENERAL FEE POLICY

General Standards for Setting Fees

The Program considers the economic community it serves, as well as the function of the Program and the services and convenience it provides. Thus, our fees are kept reasonable. The present fee of ONE HUNDRED FIFTY ($150.00) DOLLARS has been determined to be reasonable.

ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM

Standards and Guidelines

Pursuant to Part 137 of the Rules of the Chief Administrator, Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, the following Standards and Guidelines are promulgated by the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program ("Board") to implement the Attorney-Client Fee Dispute Resolution Program and Part 137.

SECTION I POLICY

It is the policy of the Appellate Divisions of the Supreme Court and the Board of Governors to encourage out-of-court resolution of fee disputes between attorneys and clients in fair, impartial and efficient programs established and administered by bar associations.

SECTION 2 DEFINITIONS

A. "Client" means a person or entity who receives legal services or advice from a lawyer on a fee basis in the lawyer's professional capacity.

B. "Board" means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator.

C. "Program" means the Attorney-Client Fee Dispute Resolution Program established under Part 137 and these Standards and Guidelines.

D. "Local program" means a bar association-sponsored fee dispute resolution program approved by the Board.

E. "Neutral" means a person who serves as an arbitrator or mediator in a local program under Part 137 and these Standards and Guidelines.

F. "Approval" by the Board of Governors means, where so required by Part 137, recommendation by the Board of Governors with the approval of the appropriate Presiding Justice of the Appellate Division.

SECTION 3 ORGANIZATIONAL FRAMEWORK

A. Arbitration and mediation of fee disputes between attorneys and clients in New York State pursuant to Part 137 shall, to the extent practicable, take place through local programs.

B. Local programs may provide fee dispute resolution services under Part 137 only if they have been duly approved to do so by the Board.

C. A local program may be approved by the Board to provide fee dispute resolution services in more than one county. One or more bar associations may combine to administer a joint local program in one or more counties.

D. In a county where no local program exists, the office of the Administrative Judge of the Judicial District encompassing such county shall administer a program approved by the Board.

SECTION 4 APPROVAL PROCESS

A. In order to receive approval from the Board, a prospective local program must complete an approval form adopted by the Board and provide for the Board's review a written statement of rules and procedures for the proposed local program.

B. The local program's written rules and procedures shall comply with Part 137 and these Standards and Guidelines and shall provide for a fair, impartial and efficient process for the resolution of attorney-client fee disputes.

C. The following information must be provided in the approval form and/or in the local program's proposed rules and procedures submitted to the Board:

1. Whether the local program proposes to charge filing fees; the amount, if any, it proposes to charge; and the local program's fee waiver policy, if any;

2. Procedures governing the selection and assignment of neutrals consistent with section 8 of these Standards and Guidelines;

3. A description of the local program's proposal to recruit,

train and maintain a sufficient qualified pool of neutrals;

4. A contact person who will have responsibility for the administration of the local program, including the contact person's name, telephone and fax numbers, and business and e-mail addresses;

5. Copies of materials, if any, to be provided to clients and/or attorneys explaining the local program;

6. Copies of manuals or materials, if any, to be used in training neutrals; and

7. The local program's mediation rules and procedures, if applicable.

SECTION 5 RESPONSIBILITIES OF LOCAL PROGRAMS

A. Local programs shall be responsible for the day-to-day administration of the Program as set forth in section 137.4(b)(3) and these Standards and Guidelines. Each local program shall designate a contact person to serve as liaison to, among others, the disputants, the public, the members of the bar, the Board of Governors and attorney disciplinary authorities.

B. Local programs shall be responsible for determining that the fee dispute falls within the Program's jurisdiction in accordance with screening guidelines or protocols developed by the Board. Any unresolved inquiries shall be referred promptly to the Board for final resolution.

C. Local programs shall prepare a brief annual written report to the Board containing a statistical summary of fee dispute resolution activity and such other data as the Board may request. Local programs shall be responsible for maintaining a log of complaints made by members of the public, clients, attorneys or neutrals regarding the Program, local programs or their personnel, including neutrals. Local programs shall advise the Board of Governors of all complaints in a timely manner, and the complaint log shall be available for review by the Board of Governors upon request.

D. Fee dispute resolution proceedings shall be conducted on neutral sites such as local program premises, Unified Court System facilities and neutrals' offices; they shall not take place in the office of any interested party unless all parties consent in writing.

SECTION 6 THE FEE DISPUTE RESOLUTION PROCESS

A. Unless the client has previously consented in writing to submit fee disputes to the fee dispute resolution process established by Part 137, arbitration under this Program shall be voluntary for the client. Mediation under this Program shall be voluntary for the attorney and the client.

B. Prior Written Agreements Between the Attorney and Client Under Section 137.2.

1. Under section 137.2(b), the client may consent in advance to submit fee disputes to arbitration under Part 137. To be valid on the part of the client, such consent must be knowing and informed. The client's consent under section 137.2(b) shall be stated in a retainer agreement or other writing specifying that the client has read the official written instructions and procedures for Part 137, and the Board-approved written instructions and procedures for the local program designated to hear fee disputes between the attorney and client, and that the client consents to resolve fee disputes under Part 137.

2. Under section 137.2(c), the attorney and client may consent in advance to submit to arbitration that is final and binding and not subject to a trial de novo. To be valid on the part of the client, such consent must be knowing and informed and obtained in the manner set forth in section 6(B)(1) of these Standards and Guidelines, except that the retainer agreement or other writing shall also state that the client understands that he or she is waiving the right to reject an arbitration award and subsequently commence a trial de novo in court.

3. Where an agreement to arbitrate exists between the attorney and client under either section 137.2(b) or (c), those provisions of section 137.6(a)(1) and (b) relating to the notice of client's right to arbitrate shall not apply and no further notice of the right to arbitrate shall be required. In this circumstance, section 137.6(a)(2) shall apply and either party may commence the dispute resolution process by filing a "request for arbitration" form with the local program designated to hear fee disputes between the attorney and client, together with a copy of the parties'

agreement to arbitrate.

4. Under section 137.2(d), the attorney and client may consent in advance to final and binding arbitration in an arbitral forum other than one created under Part 137. To be valid on the part of the client, such consent must be knowing and informed and must be obtained in a retainer agreement or other writing. Arbitration in an arbitral forum outside Part 137 shall be governed by the rules and procedures of that forum. The Board may maintain information concerning other established arbitral programs and shall provide contact information for such programs upon request.

5. Fee disputes may be referred to local programs by means not specifically described in Part 137, including but not limited to, attorney disciplinary authorities, bar associations, and employees, officers or judges of the courts. In those situations, the local program contact person shall provide the client with information about the Program.

C. Where the attorney fails to complete and return the "attorney fee response" within 15 days as required by section 137.6(d), the arbitrator or panel of arbitrators may in its discretion decline to accept the late fee response into evidence unless the attorney shows good cause for such failure. If in accepting a late attorney fee response the arbitrator or panel of arbitrators determines that the late fee response prejudiced the client's ability to prepare for the hearing, the arbitrators may accord the late fee response whatever weight, if any, the arbitrators find it deserves.

SECTION 7 BOARD OF GOVERNORS

A. The Board shall have the power to interpret Part 137 and these Standards and Guidelines.

B. The Board shall monitor the operation and performance of local programs to ensure their conformance with Part 137 and these Standards and Guidelines.

C. The Board shall have the power to deny or revoke approval to local programs for failure to comply with Part 137 and these Standards and Guidelines or where the Board determines that the local program does not provide for a fair, impartial or efficient fee dispute resolution process.

The Board shall review and approve the appointment of neutrals for service in local programs under Part 137. The Board shall remove neutrals from such service where they have failed to meet the requirements of Part 137.

D. The Board shall maintain a list of approved local programs under Part 137, including information concerning each local program's rules and procedures.

E. The Board shall submit an annual report to the Administrative Board of the Courts regarding the Program and containing recommendations designed to improve it.

F. The Board shall take appropriate steps to educate and inform the public about the Program.

G. The Board shall have the power to perform acts necessary for the effective operation of the Program and the implementation of Part 137 and these Standards and Guidelines.

SECTION 8 SELECTION AND ASSIGNMENT OF NEUTRALS

A. Each local program shall establish procedures governing the selection and assignment of neutrals subject to approval by the Board to ensure that they provide for a fair, impartial and efficient fee dispute resolution process. Each local program shall maintain a list or lists of Board approved neutrals, organized by area of practice, where appropriate. When selecting a neutral, the local program shall select the next available neutral with appropriate experience for the proceeding in question.

B. Unless otherwise approved by the Board:

1. Disputes involving a sum of less than $10,000 shall be submitted to one attorney arbitrator;

2. Disputes involving a sum of $10,000 or more shall be submitted to a panel of three arbitrators, which shall include at least one nonlawyer member of the public.

SECTION 9 QUALIFICATIONS AND DUTIES OF ARBITRATORS

A. Both lawyers and nonlawyers may serve as arbitrators.

B. In recruiting arbitrators, local programs should make every effort to ensure that arbitrators represent a wide range of law practices and firm sizes, a diversity of nonlawyer professions within the community and a cross-section of the community.

C. Prospective arbitrators shall submit a summary of credentials to the local program, copies of which the local program shall keep on record. Each local program shall forward to the Board of Governors a list of persons recommended for approval as arbitrators under Part 137 together with a summary of their credentials.

D. Arbitrators shall be appointed by local programs pursuant to their rules and procedures, subject to approval by the Board of Governors to ensure that such arbitrators meet the requirements of Part 137.

E. All arbitrators must sign a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them, which written oath or affirmation shall be kept on file by the local program.

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.

G. Arbitrators shall serve as volunteers; provided, however, that local programs may provide for reimbursement of arbitrators' expenses.

H. In making an award, arbitrators shall specify in a concise statement the amount of and basis for the award.

I. Arbitrators have a duty to maintain the confidentiality of all proceedings, hearings and communications conducted in accordance with Part 137, including all papers in the arbitration case file, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Arbitrators should refer all requests for information concerning a fee dispute to the local program contact person. Arbitrators shall not be competent to testify in a subsequent proceeding or trial de novo.

SECTION 10 TRAINING OF ARBITRATORS

Arbitrators shall complete a minimum of six hours of fee dispute arbitration training approved by the Board. The Board may take previous arbitration

training and experience under consideration in determining whether the foregoing training requirement has been met; provided, however, that all arbitrators must complete a short orientation program designed to introduce them to Part 137's practices and procedures. Arbitrators may be required to undergo periodic refresher courses.

SECTION 11 MEDIATION

A. Local programs may mediate fee disputes with the written consent of the attorney and client.

B. Participation in mediation does not waive the right to arbitration under Part 137, nor does it waive the right to a trial de novo.

C. Both lawyers and nonlawyers may serve as mediators.

D. In recruiting mediators, local programs should make every effort to ensure that mediators represent a wide range of law practices and firm sizes, a diversity of nonlawyer professions within the community and a cross-section of the community.

E. Mediators shall submit a summary of credentials to the local program, which the local program shall keep on record.

F. Mediators shall complete Board-approved mediation training. The Board may take previous mediation training and experience under consideration in determining whether the foregoing training requirement has been met; provided, however, that all mediators must complete a short orientation program designed to introduce them to Part 137's practices and procedures. Mediators may be required to undergo periodic refresher courses.

G. The local program shall appoint mediators pursuant to its rules of procedure. The attorney or client may challenge a mediator for cause.

H. All mediators must sign a written oath or affirmation to faithfully and fairly mediate all disputes that come before them, which written oath or affirmation shall be kept on file by the local program.

I. All mediators 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 a mediator. A mediator shall disclose any information that he or she has reason to believe may

provide a basis for recusal.

J. Mediators shall serve as volunteers; provided, however, that local programs may provide for reimbursement of mediators' expenses.

K. A mediator may not serve as an arbitrator in a subsequent arbitration involving the parties to the mediation absent the parties' written consent.

L. Mediators have a duty to maintain the confidentiality of the process, including all communications, documents and negotiations or settlement discussions between the parties and the mediator, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Mediators should refer all requests for information concerning a fee dispute to the local program contact person. Mediators shall not be competent to testify in any civil or administrative proceeding, including any subsequent fee arbitration or trial de novo, as to any statement, condition, or decision that occurred at or in conjunction with the mediation.

M. During the mediation, upon any agreement of the parties, in whole or in part, the parties shall reduce such agreement to writing. If no agreement is reached by the parties, the mediator shall, in a manner consistent with section 11(L), so inform the local program contact person in writing, and the dispute will be referred for arbitration.

SECTION 12 TRIAL DE NOVO

A. A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court with jurisdiction over the amount in dispute within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.

B. Each local program shall adopt procedures designed to ensure that a party provides notice to the local program when the party commences an action for de novo review.

C. Any party who fails to participate in the arbitration hearing shall not be entitled to a trial de novo absent good cause for such failure to participate.

D. 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.

SECTION 13 ENFORCEMENT

A. In the event that an attorney does not comply with the arbitration award, the local program may appoint an attorney pro bono to assist the client with enforcement of the award. In such an event, the local program contact person shall first write to inform the client's attorney of the obligation to comply with the award and of the local program's policy, if any, of appointing an attorney to assist the client pro bono.

SECTION 14 FEE DISPUTE RESOLUTION FORMS

A. The following forms are intended to assist in the timely processing of fee arbitration matters. The Board shall develop and disseminate these forms to local programs.

1. Notice of Client's Right to Arbitrate
2. Request for Arbitration
3. Attorney Response
4. Written Instructions and Procedures for Part 137
5. Client Consent to Resolve Fee Disputes Under Part 137.2(b)
6. Consent to Waive Trial De Novo under Part 137.2(c)
7. Consent to Final and Binding Arbitration in an Arbitral Forum Outside Part 137 under Part 137.2(d)
8. Arbitration Award
9. Agreement to Mediate
10. Neutral's Oath

SECTION 15. CORRESPONDENCE

All written requests and correspondence to the Board may be sent to:

Board of Governors
Attorney-Client Fee Dispute Resolution Program
c/o UCS State ADR Office
25 Beaver Street, 8th Floor
New York, New York 10004

NYCOURTS.GOV

Attorney-Client Fee Dispute Resolution Program

Overview

22 NYCRR § 137
Fee Dispute Brochure

This website is designed to educate the public about the FDRP. This site contains information to assist clients and attorneys in making decisions about the program.

The New York State Court System has established a Statewide Fee Dispute Resolution Program (FDRP) to resolve attorney-client disputes over legal fees through arbitration (and in some cases mediation).

In general, a lawyer may not sue a client in court over a fee dispute unless he or she first provided the client with notice of the right to utilize the FDRP. Once the client has received this notice, he or she has 30 days to decide whether to use the FDRP. If the client doesn't choose to participate in the FDRP within 30 days, the lawyer is free to pursue the matter in court.

Fee dispute resolution services are provided by local programs throughout New York. To find out which local program has jurisdiction over your fee dispute first identify the county in which the majority of the legal services in the case were performed. This is usually (but not always) the county where the lawyer's office is located. Then click on the local program's page and download the local program's rules and forms there.

Please note that the FDRP's jurisdiction is limited to resolving attorney-client disputes over legal fees.

The FDRP cannot address claims of lawyer misconduct. In New York, the conduct of attorneys is governed by the Appellate Divisions of State Supreme Court and the Disciplinary and Grievance Committees appointed by the respective Appellate Division.

Get more information on the Grievance Committees.

The FDRP cannot address claims of lawyer malpractice. If you are a client and you believe that your attorney committed malpractice in your case, you should not utilize the FDRP because it is possible that an arbitration decision against you with regard to the fee dispute could adversely affect your ability to pursue malpractice in court at a later date.

Web page updated: September 17, 2014

THE NEW YORK STATE ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM (FDRP)

Published as a public service by the Board of Governors
New York State Attorney-Client Fee Dispute Resolution Program
C/O UCS Office of ADR & CI Programs

25 BEAVER STREET, 8TH FLOOR • NEW YORK, NY 10004 • (877) FEES 137

VISIT US AT WWW.NYCOURTS.GOV/FEEDISPUTE FOR FEE ARBITRATION FORMS OR ADDITIONAL INFORMATION.

INTRODUCTION

The New York State court system has established a Statewide Fee Dispute Resolution Program (FDRP) to resolve attorney-client disputes over legal fees through arbitration (and in some cases mediation). The FDRP is established by Part 137 of the Rules of the Chief Administrator of the Courts, which is reprinted in this booklet.

This booklet has been designed to educate you about the FDRP and to help you make informed choices about whether the FDRP is right for you. Use this booklet if:

- You are trying to decide whether to use the FDRP process to resolve a fee dispute with your attorney, either because your attorney has given you notice of your right to use the FDRP or because you have learned about the FDRP on your own, or
- You are trying to decide whether you and your attorney should agree ahead of time in writing that any fee disputes that may arise between you will be resolved through the FDRP instead of the courts. (If this situation applies to you, it is very important that you read page 3 and the local program brochure located inside of this booklet.)

Please note that the FDRP's jurisdiction is limited to resolving attorney-client disputes over legal fees.

- The FDRP cannot address claims of lawyer misconduct. [1]
- The FDRP cannot address claims of lawyer malpractice. If you believe that your attorney committed malpractice in your case, you should not utilize the FDRP because it is possible that an arbitration decision against you with regard to the fee dispute could adversely affect your ability to pursue malpractice in court at a later date.

WHAT IS FEE ARBITRATION AND THE FDRP?

Lawyers in New York State are generally required to provide their clients with retainer agreements or letters of engagement which discuss the fees and expenses to be charged. At the initial conference with your lawyer, you should request a retainer agreement or letter of engagement and ask any questions you may have regarding the fee to be charged.

Despite the letter of engagement and discussions about fees, sometimes disputes arise. In general, your lawyer may not sue you in court over a fee dispute unless he or she first provided you with notice of your right to utilize the FDRP. Once you have received this notice you have 30 days to decide whether to use the FDRP. If you don't choose to participate in the FDRP within 30 days, your lawyer is free to pursue the matter in court.

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[1] In New York State, there are special attorney disciplinary or grievance committees charged with investigating complaints of professional misconduct. They operate under the authority of the Appellate Divisions of the Supreme Court: First Judicial Department, Manhattan (212) 401-0800; Second Judicial Department, Brooklyn (718) 923-6300; Hauppauge (631) 231-3775; White Plains (914) 949-4540; Third Judicial Department, Albany (518) 474-8816; Fourth Judicial Department, Syracuse (315) 471-1835; Rochester (585) 530-3180; Buffalo (716) 845-3630.

The FDRP is made up of a network of State-approved and monitored local programs that resolve attorney-client fee disputes outside of court through arbitration. Arbitration is a hearing conducted by one or more neutral persons who have special training and experience. One arbitrator or a panel of three arbitrators (at least one of whom must be a nonlawyer) listen to the arguments on both sides and decide the outcome of the dispute. Fee arbitration is fair, inexpensive and usually faster than going to court.

In addition to arbitration, some local programs may offer mediation. This is a process by which both sides meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for you and your attorney to discuss your concerns and reach a satisfactory result without going to court. Unlike an arbitrator, the mediator does not issue a decision. Participation in mediation is voluntary for your attorney and you, and it does not waive your right to arbitration. If you are interested in resolving your dispute through mediation, you may indicate this on the Request for Arbitration form. However, not every local program offers mediation.

If you are interested in using the FDRP process to resolve your dispute, or just want to learn more about the FDRP, please visit the FDRP web site at WWW.NYCOURTS.GOV/FEEDISPUTE.

WHEN DOES THE FDRP APPLY?

- Your attorney practices in New York and your case involved a civil matter (personal injury and criminal cases are not covered)
- The amount in dispute is between $1,000 and $50,000 (fee disputes can involve fees that you have already paid your attorney and for which you seek a refund, or fees that your attorney claims are owed by you)
- The legal representation began on or after January 1, 2002
- Your attorney has rendered services to you within two years prior to the filing of the request for fee arbitration

ALTERNATIVES TO FEE ARBITRATION

Fee arbitration provides clients and attorneys with an out-of-court option for resolving fee disputes, but that doesn't mean it's necessary or a good idea in your case. If you have a problem with your lawyer's bill, you should say so. Sometimes much unpleasantness can be prevented if you and your lawyer simply talk things over. Ask your lawyer to explain why the bill is higher than you expected. You may find out that your case was more complicated than you expected and took more time than you realized. Or your lawyer may agree that it is appropriate to adjust the bill. If discussion does not solve the problem, you can take the dispute to arbitration under the FDRP or choose to resolve it in court.

WHO ADMINISTERS THE PROGRAM AND HOW MUCH DOES IT COST?

The FDRP's Board of Governors has approved a number of local programs which administer the FDRP on a region by region basis. These local programs are run by bar associations or by the court system's regional Administrative Judges. All local programs have been carefully reviewed to ensure that they will resolve fee disputes in a fair, impartial and efficient manner. To find out which local program has jurisdiction over your fee dispute you need to identify the county in which the majority of the legal services in your case were performed. This is usually (but not always) the county where your lawyer's office is located. If you have a question about which local program will handle your dispute, please visit the FDRP's web site, WWW.NYCOURTS.GOV/FEEDISPUTE for an updated list of local programs.

The cost of utilizing the FDRP varies from program to program. You can find out about local program fees by checking the local programs section of the FDRP web site. Local programs charge about the same or less than it costs to file a case in court.

HOW DOES THE FEE ARBITRATION PROCESS START?

There are three ways in which you can enter the FDRP. In all three situations, the filing of a Request for Fee Arbitration form, available at WWW.NYCOURTS.GOV/FEEDISPUTE, officially starts the process.

A. YOUR LAWYER HAS MAILED YOU A NOTICE OF CLIENT'S RIGHT TO ARBITRATE.

A dispute over fees exists between you and your lawyer and he or she has provided you with a form entitled "Notice of Client's Right to Arbitrate" (UCS 137-1). If you are reading this booklet, chances are that you have received this form. You now have 30 days to decide whether to utilize the FDRP by filing a form entitled "Client Request for Fee Arbitration" (UCS 137-4a) with the appropriate local program. (See page 4). Once you file the Client Request for Fee Arbitration your attorney will be required to participate in the FDRP unless your dispute is one that the FDRP is not designed to handle. (See page 4 to find out how the rest of the process works.)

If you do not file the Request for Fee Arbitration within 30 days, you lose your right to utilize the FDRP and your lawyer will be free to take legal action. (CONTINUED ON BACK COVER)

HOW DOES THE FEE ARBITRATION PROCESS START?

(CONTINUED FROM INSIDE)

B. YOU HAVE NOT RECEIVED THE NOTICE OF CLIENT'S RIGHT TO ARBITRATE.

You have not received the Notice of Client's Right to Arbitrate from your lawyer but decided to look into the FDRP on your own. You may have obtained this booklet directly from the FDRP web site, by contacting a local program directly or by asking your attorney to provide you with information about the FDRP. If you believe you have a fee dispute you should read this booklet carefully. If you then want to use the FDRP, complete the Client Request for Arbitration form (UCS 137-4a) and file it with the appropriate local program. Once you file this form, your attorney will be required to participate in the FDRP unless your dispute is one the FDRP is not designed to handle. (See page 4 to find out how the rest of the process works.)

C. YOU AND YOUR LAWYER HAVE AGREED AHEAD OF TIME TO USE THE FDRP.

You and your attorney previously agreed in writing to resolve fee disputes through the FDRP rather than in court. You probably agreed to this option when your attorney first began representing you and after you had the opportunity to read about the FDRP and how it works. If you believe that you have a fee dispute, you may simply file the Client Request for Arbitration form (UCS 137 - 4a) with the local program, together with a copy of the agreement to arbitrate. Filing the request form with the local program will start the process and your attorney will be required to participate. (See page 4 to find out how the rest of the process works.)

Alternatively, your attorney can start the process by filing a Request for Arbitration with the appropriate local program. If your attorney starts the process, you will be required to participate under the terms of your agreement.

See page 4 for more information on how you and your attorney can agree to use the FDRP ahead of time.

I FILED A REQUEST FOR FEE ARBITRATION. WHAT HAPPENS NOW?

The process officially starts once you file the Client Request for Arbitration form with the local program (and pay the administrative fee, if there is one). Upon receiving your Request for Arbitration, the local program administrator will forward it to the attorney, who then has 15 days to complete an Attorney Response form (UCS 137-5a) and return it to the local program, with a copy to you.

Unless the fee dispute is rejected by the local program for jurisdictional reasons, you will then be given 15 days advance notice of the time and place of the arbitration hearing and the identity of the arbitrator(s).

Prior to the arbitration hearing someone from the local program may contact you in an effort to settle the dispute. In addition, some local programs may offer mediation services and you may be asked whether you wish to participate in mediation. Mediation is voluntary for both sides. If one side does not wish to mediate, or the attempt at mediation proves unsuccessful, the next step in the process is the arbitration hearing.

WHAT IS THE PROCEDURE AT THE ARBITRATION HEARING?

Both parties have the right to present evidence and call witnesses. The burden of proof is on the attorney to prove the reasonableness of the disputed fee by a preponderance of the evidence. The attorney must present documentation of the work performed and the billing history. If witnesses are called, both parties have the right to question the witnesses at the hearing. Arbitration is less formal than court, so you do not necessarily need a lawyer to help you prepare for and/or represent you at the hearing. However, you may, of course, appear with an attorney at your own expense.

THE ARBITRATION AWARD

Your arbitration hearing will result in a decision (arbitration award) issued by the arbitrator(s) within 30 days of the hearing. The arbitration award will be final and binding on both you and your attorney, unless either of you seeks a trial de novo within 30 days.

REJECTION OF THE AWARD (TRIAL DE NOVO)

A trial de novo means that either you or your attorney can reject the arbitration award by filing a court action within 30 days after the award has been mailed. The arbitration award is not used as evidence in the court case. Since a trial de novo obviously will add significantly to the time and expense of resolving your fee dispute, you and your attorney may wish to waive this right ahead of time in writing. However, keep in mind that if you do so and agree to final and binding arbitration, the arbitrators' decision can be appealed only on very limited grounds.

SHOULD I AGREE AHEAD OF TIME WITH MY ATTORNEY TO RESOLVE FEE DISPUTES THROUGH THE FDRP RATHER THAN THE COURTS?

It's up to you. Your attorney cannot force you to enter into such an agreement. The FDRP offers a quick, inexpensive and informal means of resolving fee disputes. Litigation in the courts can take longer and cost more. Unlike litigation in the courts, arbitration is confidential and closed to the public. The speed, informality and less confrontational nature of arbitration allows the parties to quickly get on with their lives.

On the other hand, you may prefer the formality of a lawsuit, and to have your dispute resolved by a judge or jury rather than by arbitrators. In a lawsuit, you have the right to conduct depositions and engage in pretrial fact finding, which are generally not permitted in arbitration, and to appeal a judgment that you think is contrary to law.

So think it over carefully. If you want to preserve your right to go to court to resolve disputes over fees, then you may wish to avoid binding and final arbitration and should not waive your right to a trial de novo. On the other hand, if you are interested in achieving closure quickly and inexpensively and want to avoid litigation in the courts, then you may wish to choose final and binding arbitration by waiving your right to a trial de novo.

To enter into a valid agreement ahead of time, the agreement must be in writing and specify that you read the written materials describing the rules and procedures of the FDRP and the appropriate local program. In addition, if you are agreeing to final and binding arbitration, the written agreement must specify that you understand that you are waiving your right to a trial de novo.

NYCOURTS.GOV

Attorney Grievance Committees

Complaints About Attorneys

Attorney/Client Disputes

If you have a complaint against an attorney, you may contact the Attorney Disciplinary / Grievance Committee. The office you need to contact depends upon the location of your lawyer's office. Please note that the New York State Unified Court System **does not** have jurisdiction to investigate complaints concerning representation by attorneys.

Area of Practice:

- First Department Disciplinary Committee
  - **New York & Bronx Counties**
    Departmental Disciplinary Committee for the First Department
    61 Broadway, 2nd Floor
    New York, NY 10006
    (212) 401-0800
- Second Department Grievance Committees
  - **Kings, Queens & Richmond Counties**
    Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts
    Renaissance Plaza
    335 Adams Street, Suite 2400
    Brooklyn, NY 11201-3745
    (718) 923-6300
  - **Dutchess, Orange, Putnam, Rockland & Westchester Counties**
    Grievance Committee for the Ninth Judicial District
    399 Knollwood Road, Suite 200
    White Plains, NY 10603
    (914) 824-5070
  - **Nassau & Suffolk Counties**
    Grievance Committee for the Tenth Judicial District
    150 Motor Parkway, Suite 102
    Hauppauge, NY 11788
    (631) 231-3775
- Third Department Committee on Professional Standards
  - **Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren & Washington Counties**

Committee on Professional Standards
286 Washington Avenue Extension
Suite 200
Albany, New York 12203
(518) 285-8350

- **Fourth Department Disciplinary Committees**

  - **Herkimer, Jefferson, Lewis, Oneida, Onondaga & Oswego Counties**
    Grievance Committee for the Fifth Judicial District
    Syracuse Square
    224 Harrison Street, Suite 408
    Syracuse, NY 13202-3066
    (315) 401-3344

  - **Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne & Yates Counties**
    Grievance Committee for the Seventh Judicial District
    Attorney Grievance Committee
    50 East Avenue, Suite 404
    Rochester, NY 14604-2206
    (585) 530-3180
    Fax: (585) 530-3191

  - **Allegany, Cattaraugus, Chautauqua, Erie, Genessee, Niagara, Orleans & Wyoming Counties**
    Grievance Committee for the Eighth Judicial District
    438 Main Street, Suite 800
    Buffalo, NY 14202-3212
    (716) 845-3630

Attorney/Client Fee Disputes

Part 137 of the Rules of the Chief Administrator establishes a statewide Attorney-Client Fee Dispute Resolution Program

Lawyers' Fund for Client Protection

The Lawyers' Fund was established in 1982 to provide reimbursement to law clients who have lost money or property as a result of lawyer's dishonest conduct in the practice of law. The fund is a remedy for law clients who cannot get reimbursement from the lawyer who caused the loss, or from insurance or other sources.

For information on filing an application to recover funds, contact the New York Lawyers' Fund for Client Protection at 1-800-442-FUND or visit their website at www.nylawfund.org

Web page updated: March 17, 2014

New York State
Fee Dispute Resolution Program

Part 137 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York

Website: www.nycourts.gov/feedispute • E-mail: feedispute@nycourts.gov

Toll-free phone: 1-877-FEES-137 (1-877-333-7137)

§137.0 Scope of Program

This Part establishes the New York State Fee Dispute Resolution Program, which provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged.

§137.1 Application

(a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.

(b) This Part shall not apply to any of the following:

(1) representation in criminal matters;

(2) amounts in dispute involving a sum of less than $1000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;

(3) claims involving substantial legal questions, including professional malpractice or misconduct;

(4) claims against an attorney for damages or affirmative relief other than adjustment of the fee;

(5) disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;

(6) disputes where no attorney's services have been rendered for more than two years;

(7) disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;

(8) disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

§137.2 General

(a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.

(b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for Part 137, and that the client agrees to resolve fee disputes under this Part.

(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. Such consent shall be in writing in a form prescribed by the Board of Governors.

(d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the Board of Governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part.

§137.3 Board of Governors

(a) There shall be a Board of Governors of the New York State Fee Dispute Resolution Program.

(b) The Board of Governors shall consist of 18 members, to be designated from the following: 12 members of the bar of the State of New York and six members of the public who are not lawyers. Members of the bar may include judges and justices of the New York State Unified Court System.

(1) The members from the bar shall be appointed as follows: four by the Chief Judge from the membership of statewide bar associations and two each by the Presiding Justices of the Appellate Divisions.

(2) The public members shall be appointed as follows: two by the Chief Judge and one each by the Presiding Justices of the Appellate Divisions.

Appointing officials shall give consideration to appointees who have some background in alternative dispute resolution.

(c) The Chief Judge shall

designate the chairperson.

(d) Board members shall serve for terms of three years and shall be eligible for reappointment. The initial terms of service shall be designated by the Chief Judge such that six members serve one-year terms, six members serve two-year terms, and six members serve three-year terms. A person appointed to fill a vacancy occurring other than by expiration of a term of office shall be appointed for the unexpired term of the member he or she succeeds.

(e) A majority of current members of the board of governors shall constitute a quorum.

(f) Members of the Board of Governors shall serve without compensation but shall be reimbursed for their reasonable, actual and direct expenses incurred in furtherance of their official duties.

(g) The Board of Governors, with the approval of the four Presiding Justices of the Appellate Divisions, 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; prescribing standards regarding the training and qualifications of arbitrators; monitoring the operation and performance of arbitration programs to insure their conformance with the guidelines and standards established by this Part and by the Board of Governors; and submission by arbitral bodies of annual reports in writing to the Board of Governors.

(h) The Board of Governors shall submit to the Administrative Board of the Courts an annual report in such form as the Administrative Board shall require.

§137.4 Arbitral Bodies

(a) A fee dispute resolution program recommended by the Board of Governors, and approved by the Presiding Justice of the Appellate Division in the judicial department where the program is established, shall be established and administered in each county or in a combination of counties. Each program shall be established and administered by a local bar association (the "arbitral body") to the extent practicable. The New York State Bar Association, the Unified Court System through the District Administrative Judges, or such other entity as the Board of Governors may recommend also may be designated as an arbitral body in a fee dispute resolution program approved pursuant to this Part.

(b) Each arbitral body shall:

(1) establish written instructions and procedures for administering the program, subject to the approval of the Board of Governors and consistent with this Part. The procedures shall include a process for selecting and assigning arbitrators to hear and determine the fee disputes covered by this Part. Arbitral bodies are strongly encouraged to include nonlawyer members of the public in any pool of arbitrators that will be used for the designation of multi-member arbitrator panels.

(2) require that arbitrators file a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them.

(3) be responsible for the daily administration of the arbitration program and maintain all necessary files, records, information and documentation required for purposes of the operation of the program, in accordance with directives and procedures established by the Board of Governors.

(4) prepare an annual report for the Board of Governors containing a statistical synopsis of fee dispute resolution activity and such other data as the Board shall prescribe.

(5) designate one or more persons to administer the program and serve as a liaison to the public, the bar, the Board of Governors and the grievance committees of the Appellate Division.

§137.5 Venue

A fee dispute shall be heard by the arbitral body handling disputes in the county in which the majority of the legal services were performed. For good cause shown, a dispute may be transferred from one arbitral body to another. The Board of Governors shall resolve any disputes between arbitral bodies over venue.

§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, 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. 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.

(2) Where the client has consented in advance to submit fee disputes to arbitration as set forth in subdivisions (b) and (c) of section 137.2 of this Part, and where the attorney and client cannot agree as to

the attorney's fee, the attorney shall forward to the client, by certified mail or by personal service, a copy of the "request for arbitration" form necessary to commence the arbitration proceeding along with such notice and instructions as shall be required by the rules and guidelines of the Board of Governors, and the provisions of subdivision (b) of this section shall not apply.

(b) If the attorney forwards to the client by certified mail or personal service a notice of the client's right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue. An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under this Part of the client's right to pursue arbitration and did not file a timely request for arbitration or (ii) that the dispute is not otherwise covered by this Part.

(c) In the event the client determines to pursue arbitration on the client's own initiative, the client may directly contact the arbitral body having jurisdiction over the fee dispute. Alternatively, the client may contact the attorney, who shall be under an obligation to refer the client to the arbitral body having jurisdiction over the dispute. The arbitral body then shall forward to the client the appropriate papers set forth in subdivision (a) necessary for commencement of the arbitration.

(d) If the client elects to submit the dispute to arbitration, the client shall file the "request for arbitration form" with the appropriate arbitral body, and the arbitral body shall mail a copy of the "request for arbitration" to the named attorney together with an "attorney fee response" to be completed by the attorney and returned to the arbitral body within 15 days of mailing. The attorney shall include with the "attorney fee response" a certification that a copy of the response was served upon the client.

(e) Upon receipt of the attorney's response, the arbitral body shall designate the arbitrator or arbitrators who will hear the dispute and shall expeditiously schedule a hearing. The parties must receive at least 15 days notice in writing of the time and place of the hearing and of the identity of the arbitrator or arbitrators.

(f) Either party may request the removal of an arbitrator based upon the arbitrator's personal or professional relationship to a party or counsel. A request for removal must be made to the arbitral body no later than five days prior to the scheduled date of the hearing. The arbitral body shall have the final decision concerning the removal of an arbitrator.

(g) The client may not withdraw from the process after the arbitral body has received the "attorney fee response." If the client seeks to withdraw at any time thereafter, 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.

(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.

(i) Any 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.

§137.7 Arbitration Hearing

(a) Arbitrators shall have the power to:

(1) take and hear evidence pertaining to the proceeding;

(2) administer oaths and affirmations; and

(3) compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.

(b) The rules of evidence need not be observed at the hearing.

(c) Either party, at his or her own expense, may be represented by counsel.

(d) The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and time expended. Witnesses may be called by the parties. The client shall have the right of final reply.

(e) Any party may provide for a stenographic or other record at the party's expense. Any other party to the arbitration shall be entitled to a copy of said record upon written request and payment of the expense thereof.

(f) The arbitration award shall be issued no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall specify the bases for the determination. Except as set forth in section 137.8, all arbitration awards shall be final and binding.

(g) Should the arbitrator or arbitral body become 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.

(h) In any arbitration conducted under this Part, an arbitrator shall have the same immunity that attaches in judicial proceedings.

§137.8 De Novo Review

(a) A party aggrieved by the arbitration award 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. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.

(b) Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause for such failure to participate.

(c) Arbitrators shall not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

§137.9 Filing Fees

Upon application to the Board of Governors, and approval by the Presiding Justice of the Appellate Division in the judicial department where the arbitral program is established, an arbitral body may require payment by the parties of a filing fee. The filing fee shall be reasonably related to the cost of providing the service and shall not be in such an amount as to discourage use of the program.

§137.10 Confidentiality

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.

§137.11 Failure to Participate in Arbitration

All attorneys are required to participate in the arbitration program established by this Part upon the filing of a request for arbitration by a client in conformance with these rules. An attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.

§137.12 Mediation

(a) Arbitral bodies are strongly encouraged to offer mediation services as part of a mediation program approved by the Board of Governors. The mediation program shall permit arbitration pursuant to this Part in the event the mediation does not resolve the fee dispute.

(b) All mediation proceedings and all settlement discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration.

(3) Employees denied bank credits may resubmit the application with additional documentation or further explanation.

(4) Employees may appeal a denial of bank credits to the Administrative Director based upon the materials submitted to the Director of Human Resources. Appeals shall be taken no later than 30 days after the denial.

(5) The Director of Human Resources or his or her designee may periodically require that an employee receiving bank credits supply medical documentation supporting the need for continued absence and may request that an employee be examined by a physician selected by the court system to determine the need for continued absence.

(6) Employees returning to work at an earlier than anticipated date must return all unused credits to the bank.

(c) All grants of bank credits shall be prospective only.

(d) Employees shall be eligible for ten days of bank credit for each year of court system service up to a maximum of 130 days of bank credit. No grant of credit shall exceed 130 days (at a full-time or part-time rate).

(e) Accruals of annual leave and sick leave. Employees who are using bank credits shall continue to accrue annual leave and sick leave. Accruals of annual leave will be charged prior to the charging of bank credits. Accruals of sick leave will not be charged until bank credits are exhausted.

(f) Accumulation of leave credits shall not extend any employment beyond the time at which it would otherwise terminate by operation of law, rule or regulation.

§ 135.4. Separation From Service

Employees who retire from state service and had an unused grant of bank credits prior to retirement may retain any unused grant of bank credits, up to a maximum of 70 hours, for retirement service credit or to pay for health insurance in retirement pursuant to section 24.4(b) of the Rules of the Chief Judge.

PART 136. FEE ARBITRATION IN DOMESTIC RELATIONS MATTERS [REPEALED]

[Repealed, effective January 1, 2002. "Notwithstanding the above, the provisions of Part 136 shall continue to apply to fee disputes in all domestic relations matters subject to that Part in which representation began prior to January 1, 2002."]

§§ 136.1 to 136.11. [Repealed]

[Repealed, effective January 1, 2002. See also, Part 137.]

PART 137. FEE DISPUTE RESOLUTION PROGRAM

§ 137.0. Scope of Program

This Part establishes the New York State Fee Dispute Resolution Program, which provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged.

§ 137.1. Application

(a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.

(b) This Part shall not apply to any of the following:

(1) representation in criminal matters;

(2) amounts in dispute involving a sum of less than $1000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;

(3) claims involving substantial legal questions, including professional malpractice or misconduct;

(4) claims against an attorney for damages or affirmative relief other than adjustment of fee;

(5) disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;

(6) disputes where no attorney's services have been rendered for more than two years;

(7) disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;

(8) disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

§ 137.2. General

(a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.

(b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for Part 137, and that the client agrees to resolve fee disputes under this Part.

(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. Such consent shall be in writing in a form prescribed by the Board of Governors.

(d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the Board of Governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part.

§ 137.3. Board of Governors

(a) There shall be a Board of Governors of the New York State Fee Dispute Resolution Program.

(b) The Board of Governors shall consist of 18 members, to be designated from the following: 12 members of the bar of the State of New York and six members of the public who are not lawyers. Members of the bar may include judges and justices of the New York State Unified Court System.

(1) The members from the bar shall be appointed as follows: four by the Chief Judge from the membership of statewide bar associations and two each by the Presiding Justices of the Appellate Divisions.

(2) The public members shall be appointed as follows: two by the Chief Judge and one each by the Presiding Justices of the Appellate Divisions.

Appointing officials shall give consideration to appointees who have some background in alternative dispute resolution.

(c) The Chief Judge shall designate the chairperson.

(d) Board members shall serve for terms of three years and shall be eligible for reappointment. The initial terms of service shall be designated by the Chief Judge such that six members serve one–year terms, six members serve two–year terms, and six members serve three–year terms. A person appointed to fill a vacancy occurring other than expiration of a term of office shall be appointed for the unexpired term of the member he or she succeeds.

(e) Eleven members of the Board of Governors shall constitute a quorum. Decisions shall be made by a majority of the quorum.

(f) Members of the Board of Governors shall serve without compensation but shall be reimbursed for their reasonable, actual and direct expenses incurred in furtherance of their official duties.

(g) The Board of Governors, with the approval of the four Presiding Justices of the Appellate Divisions, 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; prescribing standards regarding the training and qualifications of arbitrators; monitoring the operation and performance of arbitration programs to insure their conformance with the guidelines and standards established by this Part and by the Board of Governors; and submission by arbitral bodies of annual reports in writing to the Board of Governors.

(h) The Board of Governors shall submit to the Administrative Board of the Courts an annual report in such form as the Administrative Board shall require.

§ 137.4. Arbitral Bodies

(a) A fee dispute resolution program recommended by the Board of Governors, and approved by the Presiding Justice of the Appellate Division in the judicial department where the program is established, shall be established and administered in each county or in a combination of counties. Each program shall be established and administered by a local bar association (the "arbitral body") to the extent practicable. The New York State Bar Association, the Unified Court System through the District Administrative Judges, or such other entity as the Board of Governors may recommend also may be designated as an arbitral body in a fee dispute resolution program approved pursuant to this Part.

(b) Each arbitral body shall:

(1) establish written instructions and procedures for administering the program, subject to the approval of the board of Governors and consistent with this Part. The procedures shall include a process for selecting and assigning arbitrators to hear and determine the fee disputes covered by this Part. Arbitral bodies are strongly encouraged to include nonlawyer members of

the public in any pool of arbitrators that will be used for the designation of multi-member arbitrator panels.

(2) require that arbitrators file a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them.

(3) be responsible for the daily administration of the arbitration program and maintain all necessary file, records, information and documentation required for purposes of the operation of the program, in accordance with directives and procedures established by the Board of Governors.

(4) prepare an annual report for the Board of Governors containing a statistical synopsis of fee dispute resolution activity and such other data as the Board shall prescribe.

(5) designate one or more persons to administer the program and serve as a liaison to the public, the bar, the Board of Governors and the grievance committees of the Appellate Division.

§ 137.5. Venue

A fee dispute shall be heard by the arbitral body handling disputes in the county in which the majority of the legal services were performed. For good cause shown, a dispute may be transferred from one arbitral body to another. The Board of Governors shall resolve any disputes between arbitral bodies over venue.

§ 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, 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. 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.

(2) Where the client has consented in advance to submit fee disputes to arbitration as set forth in subdivisions (b) and (c) of section 137.2 of this Part, and where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward to the client, by certified mail or by personal service, a copy of the "request for arbitration" form necessary to commence the arbitration proceeding along with such notice and instructions as shall be required by the rules and guidelines of the Board of Governors, and the provisions of subdivision (b) of this section shall not apply.

(b) If the attorney forwards to the client by certified mail or personal service a notice of the clients right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue. An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under this Part of the client's right to pursue arbitration or (ii) that the dispute is not otherwise covered by this Part.

(c) In the event the client determines to pursue arbitration on the client's own initiative, the client may directly contact the arbitral body having jurisdiction over the fee dispute. Alternatively, the client may contact the attorney, who shall be under an obligation to refer the client to the arbitral body having jurisdiction over the dispute. The arbitral body then shall forward to the client the appropriate papers set forth in subdivision (a) necessary for commencement to the arbitration.

(d) If the client elects to submit the dispute to arbitration, the client shall file the "request for arbitration form" with the appropriate arbitral body, and the arbitral body shall mail a copy of the "request for arbitration" to the named attorney together with an "attorney fee response" to be completed by the attorney and returned to the arbitral body within 15 days of mailing. The attorney shall include with the "attorney fee response" a certification that a copy of the response was served upon the client.

(e) Upon receipt of the attorney's response, the arbitral body shall designate the arbitrator or arbitrators who will hear the dispute and shall expeditiously schedule a hearing. The parties must receive at least 15 days notice in writing of the time and place of the hearing and of the identity of the arbitrator or arbitrators.

(f) Either party may request the removal of an arbitrator based upon the arbitrator's personal or professional relationship to a party or counsel. A request for removal must be made to the arbitral body no later than five days prior to the scheduled date of the hearing. The arbitral body shall have the final decision concerning the removal of an arbitrator.

(g) The client may not withdraw from the process after the arbitral body has received the "attorney fee response." If the client seeks to withdraw at any time thereafter, 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.

(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.

(i) Any 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.

§ 137.7. Arbitration Hearing

(a) Arbitrators shall have the power to:

(1) take and hear evidence pertaining to the proceeding;

(2) administer oaths and affirmations; and

(3) compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.

(b) The rules of evidence need not be observed at the hearing.

(c) Either party, at his or her own expense, may be represented by counsel.

(d) The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and the time expended. Witnesses may be called by the parties. The client shall have the right of final reply.

(e) Any party may provide for a stenographic or other record at the party's expense. Any other party to the arbitration shall be entitled to a copy of said record upon written request and payment of the expense thereof.

(f) The arbitration award shall be issued no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall specify the bases for the determination. Except as set forth in section 137.8, all arbitration awards shall be final and binding.

(g) Should the arbitrator or arbitral body become 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 the appropriate action.

(h) In any arbitration conducted under this Part, an arbitrator shall have the same immunity that attaches in judicial proceedings.

§ 137.8. De Novo Review

(a) A party aggrieved by the arbitration award 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. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.

(b) Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause for such failure to participate.

(c) Arbitrators shall not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

§ 137.9. Filing Fees

Upon application to the Board of Governors, and approval by the Presiding Justice of the Appellate Division in the judicial department where the arbitral program is established, an arbitral body may require payment by the parties of a filing fee. The filing fee shall be reasonably related to the cost of providing the service and shall not be in such an amount as to discourage use of the program.

§ 137.10. Confidentiality

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.

§ 137.11. Failure to Participate in Arbitration

All attorneys are required to participate in the arbitration program established by this Part upon the filing of a request for arbitration by a client in conformance with these rules. An attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.

§ 137.12. Mediation

(a) Arbitral bodies are strongly encouraged to offer mediation services as part of a mediation program approved by the Board of Governors. The mediation program shall permit arbitration pursuant to this Part in the event the mediation does not resolve the fee dispute.

(b) All mediation proceedings and all settlement discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration.

APPENDIX A. STANDARDS AND GUIDELINES

Pursuant to Part 137 of the Rules of the Chief Administrator, Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, the following Standards and Guidelines are promulgated by the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Pro-

gram ("Board") to implement the Attorney–Client Fee Dispute Resolution Program and Part 137.

Section 1. Policy

It is the policy of the Appellate Divisions of the Supreme Court and the Board of Governors to encourage out-of-court resolution of fee disputes between attorneys and clients in fair, impartial and efficient programs established and administered by bar associations.

Section 2. Definitions

A. **"Client"** means a person or entity who receives legal services or advice from a lawyer on a fee basis in the lawyer's professional capacity.

B. **"Board"** means the Board of Governors of the Attorney–Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator.

C. **"Program"** means the Attorney–Client Fee Dispute Resolution Program established under Part 137 and these Standards and Guidelines.

D. **"Local program"** means a bar association-sponsored fee dispute resolution program approved by the Board.

E. **"Neutral"** means a person who serves as an arbitrator or mediator in a local program under Part 137 and these Standards and Guidelines.

F. **"Approval"** by the Board of Governors means, where so required by Part 137, recommendation by the Board of Governors with the approval of the appropriate Presiding Justice of the Appellate Division.

Section 3. Organizational Framework

A. Arbitration and mediation of fee disputes between attorneys and clients in New York State pursuant to Part 137 shall, to the extent practicable, take place through local programs.

B. Local programs may provide fee dispute resolution services under Part 137 only if they have been duly approved to do so by the Board.

C. A local program may be approved by the Board to provide fee dispute resolution services in more than one county. One or more bar associations may combine to administer a joint local program in one or more counties.

D. In a county where no local program exists, the office of the Administrative Judge of the Judicial District encompassing such county shall administer a program approved by the Board.

Section 4. Approval Process

A. In order to receive approval from the Board, a prospective local program must complete an approval form adopted by the Board and provide for the Board's review a written statement of rules and procedures for the proposed local program.

B. The local program's written rules and procedures shall comply with Part 137 and these Standards and Guidelines and shall provide for a fair, impartial and efficient process for the resolution of attorney-client fee disputes.

C. The following information must be provided in the approval form and/or in the local program's proposed rules and procedures submitted to the Board:

1. Whether the local program proposes to charge filing fees; the amount, if any, it proposes to charge; and the local program's fee waiver policy, if any;
2. Procedures governing the selection and assignment of neutrals consistent with section 8 of these Standards and Guidelines;
3. A description of the local program's proposal to recruit, train and maintain a sufficient qualified pool of neutrals;
4. A contact person who will have responsibility for the administration of the local program, including the contact person's name, telephone and fax numbers, and business and e-mail addresses;
5. Copies of materials, if any, to be provided to clients and/or attorneys explaining the local program;
6. Copies of manuals or materials, if any, to be used in training neutrals; and
7. The local program's mediation rules and procedures, if applicable.

Section 5. Responsibilities of Local Programs

A. Local programs shall be responsible for the day-to-day administration of the Program as set forth in section 137.4(b)(3) and these Standards and Guidelines. Each local program shall designate a contact person to serve as liaison to, among others, the disputants, the public, the members of the bar, the Board of Governors and attorney disciplinary authorities.

B. Local programs shall be responsible for determining that the fee dispute falls within the Program's jurisdiction in accordance with screening guidelines or protocols developed by the Board. Any unresolved inquiries shall be referred promptly to the Board for final resolution.

C. Local programs shall prepare a brief annual written report to the Board containing a statistical summary of fee dispute resolution activity and such other data as the Board may request. Local programs shall be responsible for maintaining a log of complaints made by members of the public, clients, attorneys or neutrals regarding the Program, local programs or their personnel, including neutrals. Local programs shall advise the Board of Governors of all complaints in a timely manner,

and the complaint log shall be available for review by the Board of Governors upon request.

D. Fee dispute resolution proceedings shall be conducted on neutral sites such as local program premises, Unified Court System facilities and neutrals' offices; they shall not take place in the office of any interested party unless all parties consent in writing.

Section 6. The Fee Dispute Resolution Process

A. Unless the client has previously consented in writing to submit fee disputes to the fee dispute resolution process established by Part 137, arbitration under this Program shall be voluntary for the client. Mediation under this Program shall be voluntary for the attorney and the client.

B. Prior Written Agreements Between the Attorney and Client Under Section 137.2

1. Under section 137.2(b), the client may consent in advance to submit fee disputes to arbitration under Part 137. To be valid on the part of the client, such consent must be knowing and informed. The client's consent under section 137.2(b) shall be stated in a retainer agreement or other writing specifying that the client has read the official written instructions and procedures for Part 137, and the Board-approved written instructions and procedures for the local program designated to hear fee disputes between the attorney and client, and that the client consents to resolve fee disputes under Part 137.

2. Under section 137.2(c), the attorney and client may consent in advance to submit to arbitration that is final and binding and not subject to a trial de novo. To be valid on the part of the client, such consent must be knowing and informed and obtained in the manner set forth in section 6(B)(1) of these Standards and Guidelines, except that the retainer agreement or other writing shall also state that the client understands that he or she is waiving the right to reject an arbitration award and subsequently commence a trial de novo in court.

3. Where an agreement to arbitrate exists between the attorney and client under either section 137.2(b) or (c), those provisions of section 137.6(a)(1) and (b) relating to the notice of client's right to arbitrate shall not apply and no further notice of the right to arbitrate shall be required. In this circumstance, section 137.6 (a)(2) shall apply and either party may commence the dispute resolution process by filing a "request for arbitration" form with the local program designated to hear fee disputes between the attorney and client, together with a copy of the parties' agreement to arbitrate.

4. Under section 137.2(d), the attorney and client may consent in advance to final and binding arbitration in an arbitral forum other than one created under Part 137. To be valid on the part of the client, such consent must be knowing and informed and must be obtained in a retainer agreement or other writing. Arbitration in an arbitral forum outside Part 137 shall be governed by the rules and procedures of that forum. The Board may maintain information concerning other established arbitral programs and shall provide contact information for such programs upon request.

5. Fee disputes may be referred to local programs by means not specifically described in Part 137, including but not limited to, attorney disciplinary authorities, bar associations, and employees, officers or judges of the courts. In those situations, the local program contact person shall provide the client with information about the Program.

C. Where the attorney fails to complete and return the "attorney fee response" within 15 days as required by section 137.6(d), the arbitrator or panel of arbitrators may in its discretion decline to accept the late fee response into evidence unless the attorney shows good cause for such failure. If in accepting a late attorney fee response the arbitrator or panel of arbitrators determines that the late fee response prejudiced the client's ability to prepare for the hearing, the arbitrators may accord the late fee response whatever weight, if any, the arbitrators find it deserves.

Section 7. Board of Governors

A. The Board shall have the power to interpret Part 137 and these Standards and Guidelines.

B. The Board shall monitor the operation and performance of local programs to ensure their conformance with Part 137 and these Standards and Guidelines.

C. The Board shall have the power to deny or revoke approval to local programs for failure to comply with Part 137 and these Standards and Guidelines or where the Board determines that the local program does not provide for a fair, impartial or efficient fee dispute resolution process. The Board shall review and approve the appointment of neutrals for service in local programs under Part 137. The Board shall remove neutrals from such service where they have failed to meet the requirements of Part 137.

D. The Board shall maintain a list of approved local programs under Part 137, including information concerning each local program's rules and procedures.

E. The Board shall submit an annual report to the Administrative Board of the Courts regarding the Program and containing recommendations designed to improve it.

F. The Board shall take appropriate steps to educate and inform the public about the Program.

G. The Board shall have the power to perform acts necessary for the effective operation of the Program and the implementation of Part 137 and these Standards and Guidelines.

Section 8. Selection and Assignment of Neutrals

A. Each local program shall establish procedures governing the selection and assignment of neutrals subject to approval by the Board to ensure that they provide for a fair, impartial and efficient fee dispute resolution process. Each local program shall maintain a list or lists of Board approved neutrals, organized by area of practice, where appropriate. When selecting a neutral, the local program shall select the next available neutral with appropriate experience for the proceeding in question.

B. Unless otherwise approved by the Board:

1. Disputes involving a sum of less than $10,000 shall be submitted to one attorney arbitrator;
2. Disputes involving a sum of $10,000 or more shall be submitted to a panel of three arbitrators, which shall include at least one nonlawyer member of the public.

Section 9. Qualifications and Duties of Arbitrators

A. Both lawyers and nonlawyers may serve as arbitrators.

B. In recruiting arbitrators, local programs should make every effort to ensure that arbitrators represent a wide range of law practices and firm sizes, a diversity of nonlawyer professions within the community and a cross-section of the community.

C. Prospective arbitrators shall submit a summary of credentials to the local program, copies of which the local program shall keep on record. Each local program shall forward to the Board of Governors a list of persons recommended for approval as arbitrators under Part 137 together with a summary of their credentials.

D. Arbitrators shall be appointed by local programs pursuant to their rules and procedures, subject to approval by the Board of Governors to ensure that such arbitrators meet the requirements of Part 137.

E. All arbitrators must sign a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them, which written oath or affirmation shall be kept on file by the local program.

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.

G. Arbitrators shall serve as volunteers; provided, however, that local programs may provide for reimbursement of arbitrators' expenses.

H. In making an award, arbitrators shall specify in a concise statement the amount of and basis for the award.

I. Arbitrators have a duty to maintain the confidentiality of all proceedings, hearings and communications conducted in accordance with Part 137, including all papers in the arbitration case file, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Arbitrators should refer all requests for information concerning a fee dispute to the local program contact person. Arbitrators shall not be competent to testify in a subsequent proceeding or trial de novo.

Section 10. Training of Arbitrators

Arbitrators shall complete a minimum of six hours of fee dispute arbitration training approved by the Board. The Board may take previous arbitration training and experience under consideration in determining whether the foregoing training requirement has been met; provided, however, that all arbitrators must complete a short orientation program designed to introduce them to Part 137's practices and procedures. Arbitrators may be required to undergo periodic refresher courses.

Section 11. Mediation

A. Local programs may mediate fee disputes with the written consent of the attorney and client.

B. Participation in mediation does not waive the right to arbitration under Part 137, nor does it waive the right to a trial de novo.

C. Both lawyers and nonlawyers may serve as mediators.

D. In recruiting mediators, local programs should make every effort to ensure that mediators represent a wide range of law practices and firm sizes, a diversity of nonlawyer professions within the community and a cross-section of the community.

E. Mediators shall submit a summary of credentials to the local program, which the local program shall keep on record.

F. Mediators shall complete Board-approved mediation training. The Board may take previous mediation training and experience under consider-

ation in determining whether the foregoing training requirement has been met; provided, however, that all mediators must complete a short orientation program designed to introduce them to Part 137's practices and procedures. Mediators may be required to undergo periodic refresher courses.

G. The local program shall appoint mediators pursuant to its rules of procedure. The attorney or client may challenge a mediator for cause.

H. All mediators must sign a written oath or affirmation to faithfully and fairly mediate all disputes that come before them, which written oath or affirmation shall be kept on file by the local program.

I. All mediators 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 a mediator. A mediator shall disclose any information that he or she has reason to believe may provide a basis for recusal.

J. Mediators shall serve as volunteers; provided, however, that local programs may provide for reimbursement of mediators' expenses.

K. A mediator may not serve as an arbitrator in a subsequent arbitration involving the parties to the mediation absent the parties' written consent.

L. Mediators have a duty to maintain the confidentiality of the process, including all communications, documents and negotiations or settlement discussions between the parties and the mediator, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Mediators should refer all requests for information concerning a fee dispute to the local program contact person. Mediators shall not be competent to testify in any civil or administrative proceeding, including any subsequent fee arbitration or trial de novo, as to any statement, condition, or decision that occurred at or in conjunction with the mediation.

M. During the mediation, upon any agreement of the parties, in whole or in part, the parties shall reduce such agreement to writing. If no agreement is reached by the parties, the mediator shall, in a manner consistent with section 11(L), so inform the local program contact person in writing, and the dispute will be referred for arbitration.

Section 12. Trial de Novo

A. A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court with jurisdiction over the amount in dispute within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.

B. Each local program shall adopt procedures designed to ensure that a party provides notice to the local program when the party commences an action for de novo review.

C. Any party who fails to participate in the arbitration hearing shall not be entitled to a trial de novo absent good cause for such failure to participate.

D. 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.

Section 13. Enforcement

A. In the event that an attorney does not comply with the arbitration award, the local program may appoint an attorney pro bono to assist the client with enforcement of the award. In such an event, the local program contact person shall first write to inform the client's attorney of the obligation to comply with the award and of the local program's policy, if any, of appointing an attorney to assist the client pro bono.

Section 14. Fee Dispute Resolution Forms

A. The following forms are intended to assist in the timely processing of fee arbitration matters. The Board shall develop and disseminate these forms to local programs.

1. Notice of Client's Right to Arbitrate
2. Request for Arbitration
3. Attorney Response
4. Written Instructions and Procedures for Part 137
5. Client Consent to Resolve Fee Disputes Under Part 137.2(b)
6. Consent to Waive Trial De Novo under Part 137.2(c)
7. Consent to Final and Binding Arbitration in an Arbitral Forum Outside Part 137 under Part 137.2(d)
8. Arbitration Award
9. Agreement to Mediate
10. Neutral's Oath

Section 15. Correspondence

All written requests and correspondence to the Board may be sent to:

Board of Governors

Attorney–Client Fee Dispute Resolution Program

c/o UCS State ADR Office

NYCOURTS.GOV

Attorney-Client Fee Dispute Resolution Program

Other Related Forms

The following forms are model forms for the Part 137 Program. They may be used in the fee dispute process. For a packet tailored for your local program, including form 137-4a "Client Request for Fee Arbitration", please locate your local program and download the forms there.

Form Number	Title	PDF
137-1	Notice of Client's Rights to Arbitrate a Dispute Over Attorney's Fee	
137-2	Notice of Client's Right to Arbitrate a Dispute Over a Refund of Attorney's Fees	
137-3	Standard Written Instructions and Procedures to Clients for the Resolution of Fee Disputes Pursuant to Part 137 of the Rules of the Chief Administrator	
137-4a	Client Request for Fee Arbitration-Go to Local Program	-
137-4b	Attorney Request for Arbitration (amended 2011)	
137-5a	Attorney Response to Request for Fee Arbitration (2014)	
137-5b	Client Response to Request for Arbitration	
137-6	Notice of Arbitration Hearing	
137-7a	Arbitrator's Oath or Affirmation	
137-7b	Arbitrator's Oath or Affirmation (Attorney)	
137-8a	Mediator's Oath or Affirmation	
137-8b	Mediator's Oath or Affirmation (Attorney)	
137-9	Notice of Arbitration Award (amended 2014)	
137-10	Repealed	-
137-11	Settlement	
137-12	Arbitration Award	
137-13	Consent to Resolve Fee Dispute by Arbitration Pursuant to Part 137.2(b) of the Rules of the Chief Administrator	
137-14	Consent to Submit Fee Dispute to Arbitration Pursuant to Part 137.2(c) of Rules of the Chief Administrator and to Waive the Right to Trial De Novo	
137-15	Consent to Submit Fee Dispute to Mediation Pursuant to Part 137 of the Rules of the Chief Administrator	
137-16	Consent to Final and Binding Arbitration in an Arbitral Forum Outside Part 137 Under 137.2(d) of the Rules of the Chief Administrator	
137-17 update	Consent to submit fee dispute to one attorney-arbitrator where the amount in dispute is $10,000 or greater pursuant to Part 137 of the Rules of the Chief Administrator	

Documents are in PDF format
Get Adobe Acrobat Reader

Web page updated: April 17, 2015

UCS 137-1 (11/01)

NOTICE OF CLIENT'S RIGHT TO ARBITRATE

A DISPUTE OVER ATTORNEYS FEES

The amount of $_____ is due and owing for the provision of legal services with respect to _____. If you dispute that you owe this amount, you have the right to elect to resolve this dispute by arbitration under Part 137 of the Rules of the Chief Administrator of the Courts. To do so, you must file the attached Request for Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions. If you do not file a Request for Fee Arbitration within 30 days from the receipt of this Notice, you waive the right to resolve this dispute by arbitration under Part 137, and your attorney will be free to bring a lawsuit in court to seek payment of the fee.

Dated:_____

_____

_____

_____

[Attorney's name and address]

UCS 137-2 (5/02)

NOTICE OF CLIENT'S RIGHT TO ARBITRATE

A DISPUTE OVER A REFUND OF ATTORNEYS FEES

You claim that you are entitled to a refund in connection with legal fees you have paid the undersigned in the matter of _____

_____. The undersigned disputes the refund that you are claiming. You have the right to elect to resolve this fee dispute by arbitration under Part 137 of the Rules of the Chief Administrator of the Courts. To do so, you must file the attached Request for Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions.

If you do not file a Request for Fee Arbitration within 30 days from the receipt of this Notice, you waive the right to resolve this dispute by arbitration under Part 137.

Dated:_____

_____

_____

_____

[Attorney's name and address]

UCS 137-3 (5/02)

STANDARD WRITTEN INSTRUCTIONS AND PROCEDURES TO CLIENTS FOR THE RESOLUTION OF FEE DISPUTES PURSUANT TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

Part 137 of the Rules of the Chief Administrator of the Courts provides a procedure for the arbitration (and in some cases mediation) of fee disputes between attorneys and clients in civil matters. Your attorney can provide you with a copy of Part 137 upon request or you can download a copy at http://www.nycourts.gov/admin/feedispute . Fee disputes may involve both fees that you have already paid to your attorney and fees that your attorney claims are owed by you. If you elect to resolve your dispute by arbitration, your attorney is required to participate. Furthermore, the arbitration will be final and binding on both your attorney and you, unless either of you seeks a trial *de novo* within 30 days, which means either of you reject the arbitrator's decision by commencing an action on the merits of the fee dispute in a court of law within 30 days after the arbitrator's decision has been mailed. Fees disputes which may not be resolved under this procedure are described in Part 137.1 of the Rules of Chief Administrator of the Courts: representation in criminal matters; amounts in dispute involving a sum of less than $1000 or more than $50,000 unless the parties consent; and claims involving substantial legal questions, including professional malpractice or misconduct. Please consult Part 137.1 for additional exclusions.

Your attorney may not bring an action in court to obtain payment of a fee unless he or she first has provided written notice to you of your right to elect to resolve the dispute by arbitration under Part 137. If your attorney provides you with this notice, he or she must provide you with a copy of the written instructions and procedures of the approved local bar association-sponsored fee dispute resolution program ("Local Program") having jurisdiction over your dispute. Your attorney must also provide you with the "Request for Fee Arbitration" form and advise that you must file the

Request for Fee Arbitration with the local program within 30 days of the receipt of the notice. If you do not file the Request within those 30 days, you will not be permitted to compel your attorney to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee.

In order to elect to resolve a fee dispute by arbitration, you must file the attached "Request for Fee Arbitration" with the approved local program. An updated list of local programs is available at http://www.nycourts.gov/admin/feedispute or by calling 877-FEES 137 (877- 333-7137). Filing of the Request for Fee Arbitration must be made with the appropriate local program for the county in which the majority of legal services were performed. Once you file the Request for Fee Arbitration, the local program will mail a copy of the request to your attorney, who must provide a response within 15 days of the mailing. You will receive at least 15 days notice in writing of the time and place of the hearing and of the identity of the arbitrator(s). The arbitrator(s) decision will be issued no later than 30 days after the date of the hearing. You may represent yourself at the hearing, or you may appear with an attorney if you wish.

Some local programs may offer mediation services in addition to arbitration. Mediation is a process by which those who have a fee dispute meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for your attorney and you to discuss your concerns without relinquishing control over the outcome and of achieving a result satisfactory to both of you. Participation in mediation is voluntary for your attorney and you, and it does not waive any of your rights to arbitration under these rules. If you wish to attempt to resolve your dispute through mediation, you may indicate your wish on the Request for Fee Arbitration form.

More information, including an updated list of local programs, is available at:

http://www.nycourts.gov/admin/feedispute or by calling (877) FEES 137.

UCS 137-1 (11/01)

NOTICE OF CLIENT'S RIGHT TO ARBITRATE

A DISPUTE OVER ATTORNEYS FEES

The amount of $_____ is due and owing for the provision of legal services with respect to:

If you dispute that you owe this amount, you have the right to elect to resolve this dispute by arbitration under Part 137 of the Rules of the Chief Administrator of the Courts. To do so, you must file the attached Request for Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions. If you do not file a Request for Fee Arbitration within 30 days from the receipt of this Notice, you waive the right to resolve this dispute by arbitration under Part 137, and your attorney will be free to bring a lawsuit in court to seek payment of the fee.

Dated:_____

_____
(Attorney's Signature)
[print Attorney's name, address and telephone number below]

UCS 137-3 (9/05)

STANDARD WRITTEN INSTRUCTIONS AND PROCEDURES TO CLIENTS FOR THE RESOLUTION OF FEE DISPUTES PURSUANT TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

Part 137 of the Rules of the Chief Administrator of the Courts provides a procedure for the arbitration (and in some cases mediation) of fee disputes between attorneys and clients in civil matters. Your attorney can provide you with a copy of Part 137 upon request or you can download a copy at www.nycourts.gov/admin/feedispute. Fee disputes may involve both fees that you have already paid to your attorney and fees that your attorney claims are owed by you. If you elect to resolve your dispute by arbitration, your attorney is required to participate. Furthermore, the arbitration will be final and binding on both your attorney and you, unless either of you seeks a trial *de novo* within 30 days, which means either of you reject the arbitrator's decision by commencing an action on the merits of the fee dispute in a court of law within 30 days after the arbitrator's decision has been mailed. Fees disputes which may not be resolved under this procedure are described in Part 137.1 of the Rules of Chief Administrator of the Courts: representation in criminal matters; amounts in dispute involving a sum of less than $1,000 or more than $50,000 unless the parties consent; and claims involving substantial legal questions, including professional malpractice or misconduct. Please consult Part 137.1 for additional exclusions.

Your attorney may not bring an action in court to obtain payment of a fee unless he or she first has provided written notice to you of your right to elect to resolve the dispute by arbitration under Part 137. If your attorney provides you with this notice, he or she must provide you with a copy of the written instructions and procedures of the approved local bar association-sponsored fee dispute resolution program ("Local Program") having jurisdiction over your dispute. Your attorney must also provide you with the "Request for Fee Arbitration" form and advise that you must file the Request for Fee Arbitration with the local program within 30 days of the receipt of the notice. If you do not file the Request within those 30 days, you will not be permitted to compel your attorney to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee.

In order to elect to resolve a fee dispute by arbitration, you must file the attached "Request for Fee Arbitration" with the approved local program. An updated list of local programs is available at www.nycourts.gov/admin/feedispute or by calling toll-free 1-(877)-FEES-137 (1-877-333-7137). Filing of the Request for Fee Arbitration must be made

with the appropriate local program for the county in which the majority of legal services were performed. Once you file the Request for Fee Arbitration, the local program will mail a copy of the request to your attorney, who must provide a response within 15 days of the mailing. You will receive at least 15 days' notice in writing of the time and place of the hearing and of the identity of the arbitrator(s). The arbitrator(s) decision will be issued no later than 30 days after the date of the hearing. You may represent yourself at the hearing, or you may appear with an attorney if you wish.

Some local programs may offer mediation services in addition to arbitration. Mediation is a process by which those who have a fee dispute meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for your attorney and you to discuss your concerns without relinquishing control over the outcome and of achieving a result satisfactory to both of you. Participation in mediation is voluntary for your attorney and you, and it does not waive any of your rights to arbitration under these rules. If you wish to attempt to resolve your dispute through mediation, you may indicate your wish on the Request for Fee Arbitration form.

More information, including an updated list of local programs, is available at

http://www.nycourts.gov/admin/feedispute

or by calling 1-(877)-FEES-137 (1-877-333-7137).

Suffolk County Bar Association

Dispute Resolution Program Rules

Suffolk County Bar Association
560 Wheeler Road
Hauppauge, New York 11788-4357
(631) 234-5511

Section 1 Establishment of Program

This program is established pursuant to part 137 of the Rules of the Chief Administrator, Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York and the Standards and Guidelines approved as of October 3rd, 2001.

Section 2 Definitions

The following definitions will apply throughout these rules, except as otherwise provided:

A. "Program" means the Suffolk County Bar Association Dispute Resolution Program established pursuant to Part 137 of the Rules of the Chief Administrator

B. "Client" means a person or entity receiving legal services or advice from a lawyer on a fee basis in the lawyer's professional capacity

C. "Administrator" means the person primarily responsible for administration of the Program as designated by the Suffolk County Bar Association

D. "SCBA" means the Suffolk County Bar Association

E. "Arbitrator" means a person who serves as an arbitrator under the Program

F. "Case" means any case or controversy cognizable under the Program where the amount in dispute is at least in the sum of $1,000.00

G. "Board" means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator

H. "Fee Dispute" means the committee appointed by the Suffolk County Bar Association Board of Directors which oversees the Dispute Resolution Program and make decisions concerning administration of the Program.

Section 3 Application

These rules apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the Bar of the State of New York who undertake to represent a client in a civil matter, where the majority of legal services are performed in Suffolk County or where the attorney maintains an office for the practice of law in Suffolk County.

These rules shall not apply to any of the following:

1. representation in criminal matters;
2. amounts in dispute involving a sum of less than $1,000.00 or more than $50,000.00, except that an arbitral body may hear disputes involving other amounts if the parties have consented in writing;
3. claims involving substantial legal questions, including professional malpractice or misconduct;
4. claims against an attorney for damages or affirmative relief other than adjustment of the fee;
5. disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;
6. disputes where no attorney's services have been rendered for more than two years;
7. disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York; and
8. disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

Section 4 Arbitrators

Applicants for membership as an Attorney Arbitrator must meet or exceed the following requirements:

A. Minimum of five (5) years of admission to the Bar

B. Member in good standing of the Suffolk County Bar Association or other recognized bar groups

C. Ability to evaluate and apply legal principles

D. Ability to manage the hearing process

E. Minimum of six (6) hours of fee dispute resolution training or comparable training and experience in arbitration and/or other forms of dispute resolution

F. Other relevant experience or accomplishments

G. Freedom from bias and prejudice

H. Thorough and impartial evaluation of testimony and other evidence

I. Willingness to devote time and effort when selected to serve

J. Willingness to successfully complete training under the guidelines of the Program

Applicants for membership as a Non-Attorney Arbitrator must meet or exceed requirements E through J above.

All training of arbitrators will be provided by the New York State Office of Court Administration at its sole cost and expense, or by the Suffolk County

Bar Association, or other recognized dispute resolution programs approved by the board.

Arbitrators will serve on a voluntary basis, without financial compensation.

Section 5 Initiating the Arbitration

The Submission Process

Client:

A client with a fee dispute starts the process by filing a request for dispute resolution with the Administrator of the Program together with the required filing fee of $150.00 *see Financial Hardship Policy. Forms can be obtained by calling the Administrator at 631/234-5511, extension 222, by obtaining the form in person at the Suffolk County Bar Association, located at 560 Wheeler Road, Hauppauge, New York 11788-4357 or by requesting said form by facsimile transmission to the administrator (631/234-5899) or by e-mail to the administrator at fee@scba.org between the hours of 9:00 a.m. and 5:00 p.m., Monday to Friday, or you may download forms on the SCBA wesbsite at www.scba.org/fee dispute/fee overview.html

Attorney:

An attorney starts the process by sending a Notice of Right to Arbitrate and required forms to the client. If there is a prior written agreement to arbitrate, the initiating party shall submit a copy to the Administrator with their request to arbitrate. If the client fails to then file a request to arbitrate within 30 days, the attorney who's written agreement provides for such dispute resolution may file the request to arbitrate. An attorney is required to send by certified mail or by personal service, the notice of right to arbitrate with appropriate forms upon initiation of any dispute involving fees between client and attorney, and/or prior to commencement of any civil action for collection of fees.

A party may make application to the Administrator to have the filing fee waived, based upon limited financial resources which make the filing fee a financial burden or would prevent said client from utilizing this resolution program. The request must be made in writing to the Administrator who will have the discretion to grant or deny the request. Should the arbitration result in a finding in favor of the client for whom the fee was waived, the waived filing fee will be deducted from such award, and paid directly by the attorney to the Association, after deduction from said award.

The request for arbitration must contain the name and address of the

parties along with the telephone numbers of the parties to be contacted, and a brief description of the claim and the amount involved.

Upon receipt of the request for arbitration, the Administrator will mail a copy of the request for arbitration to the named attorney, together with an attorney fee response, to be completed by the attorney and returned

to the Administrator within 15 days of mailing. The attorney will include with the attorney fee response, a copy of retainer or letter of engagement, if any, and an affidavit that a copy of the response was served on the client.

Upon receipt of the attorney fee response, or if no response is received within 15 days of mailing of the attorney fee response form to the attorney, the Administrator will endeavor to appoint an arbitrator or arbitrators to the case with experience in the subject matter of the representation. Arbitrators will be assigned from a panel of neutrals who have qualified to act as arbitrators in fee dispute matters. Disputes involving a sum of less than $10,000.00, but more than $1,000.00, will be submitted to one attorney arbitrator. Disputes involving a sum of $10,000.00 or more, but less than $50,000.00 (unless by agreement of the parties), will be submitted to a panel of three arbitrators, which will include one non-lawyer, unless otherwise provided for in writing.

When a party and attorney are notified of the appointment of the arbitrator(s), any conflict of interest shall promptly be disclosed in writing but not less than five (5) days prior to the scheduled hearing.

Upon receipt of a case, the Administrator will notify the parties of a date, time, and place for the hearing, which notice will be at least fifteen (15) days prior to the scheduled date, with the identity of the arbitrator or arbitrators. All arbitrations will be held at the offices of one of the arbitrators or at the Suffolk County Bar Association.

Section 6 Powers of arbitrator and conduct of the hearing

An arbitrator has the following powers:

A. Issue subpoenas and administer oaths

B. Take and hear evidence pertaining to the proceeding

C. Rules of Evidence need not be observed at the hearing and either party, at his or her expense, may be represented by counsel. Representation by counsel must be disclosed on filing form or response

D. Arbitrator(s) may adjourn or postpone the hearing

The burden will be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client must present his or her account of the service rendered and time expended. Witnesses may be called by the parties. Participation may be by written statement sworn to under penalties of perjury. The client will have the right of final reply.

Any party may provide for stenographic or other record at the party's expense, providing that the panel is given duplicate copy at time of hearing upon request by the panel. Any other party to the arbitration will be entitled to a copy of said record, upon written request and payment of the expense for such record.

The arbitration awards will be issued to the parties no later than thirty (30) days after the completion of the hearing. Arbitration awards will be in writing and specify the basis for the determination. Except as set forth herein, all arbitration awards will be final and binding, unless a *trial de* novo is commenced under the Rules within the time set forth therein.

Neither the Associations, nor the Committee, its Chair or members, Administrator, Arbitrator and staff person acting under these Rules, shall be a necessary party in any judicial proceeding relating to any arbitration conducted in accordance with these Rules. None of the parties listed in the preceding sentence shall be liable for any act or omission relating to any dispute in connection with any arbitration conducted under these Rules. Without limiting the scope of the preceding two sentences, it is intended that the Committee, its Chair and its members, and any Arbitrator acting under these Rules have the same immunity as a judicial officer of body would have in a court proceeding. The parties to any arbitration held under these Rules will be deemed to have conferred the immunity described above.

The hearing will be conducted by either the sole or all of the arbitrators in case of a controversy in excess of $10,000.00, but a majority may determine any question and render an award.

Section 7 <u>Trial de novo</u>

A party aggrieved by the arbitration award may, unless there is a written agreement to the contrary, commence an action on the merits of its fee dispute (a *trial de* novo) in a court with jurisdiction over the amount in dispute, within thirty (30) days after the arbitration award has been mailed. If no action is commenced within thirty (30) days of the mailing of the arbitration award, the award shall become final and binding. Upon filing of a demand for *trial de novo,* the aggrieved party shall also mail a copy of the demands to the Administrator and other side.

Any party who does not participate in the arbitration hearing will not be entitled to a *trial de* novo absent good cause for such failure to participate.

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.

Section 8 Communication with arbitrators

No party and no one acting on behalf of any party will communicate unilaterally concerning the arbitration with an arbitrator or a candidate for an arbitrator. Unless the parties agree otherwise or the arbitrator so directs, any communication from the parties to an arbitrator will be sent to the other party.

Section 9 Enforcement of arbitration awards

Any award that has become final and binding may be entered as a judgment upon moving to confirm said decision in a court of competent jurisdiction, by appropriate notice, pursuant to the CPLR Article 75.

Section 10 Vacancies

If, after an arbitrator is assigned to the case, the arbitrator is unable to perform his or her duties, they will promptly notify the Administrator, who will appoint a substitute arbitrator.

In the event that one arbitrator on a panel of arbitrators is unable to attend the hearing or continue, the remaining arbitrators may continue with the hearing to the determination of the controversy, unless one party objects. Upon receipt of an objection, the arbitration will be deemed terminated and the matter will be reassigned by the Administrator, who will appoint a substitute arbitrator to take the place of the arbitrator who was unable to begin or conclude the arbitration hearing.

Section 11 Attendance at hearings

The arbitrators will maintain the privacy of the hearings unless the rules or the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend the hearing. All attorneys are required to participate in the arbitration program. The arbitrators shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It will be discretionary with the arbitrators to determine the propriety of the attendance of any other person, other than a party and its legal representatives.

Section 12 Arbitration in the absence of a party or representative

UCS 137-4b (10/11)

(Office Use Only)
Date Received: .....
Case Number: _____

ATTORNEY REQUEST FOR FEE ARBITRATION

1. Your name, address and telephone number:

   Name:

   Address:

   Telephone Number:

   Email Address:

2. Name, address and office telephone number of the Client whose matter you handled:

   Name:

   Address:

   Telephone Number:

   Email Address (if known):

3. If you filed a lawsuit on your client's behalf, in which county and court was the lawsuit filed?

   Court:_____ County: _____

4. a. On what date did you first agree to handle your client's case?

   _____, 20___

   b. On what date did you last perform services on your client's case?

   _____, 20___

5. Briefly describe the type of legal matter involved and what you agreed to do in the course of representing your client (attach a copy of the written retainer agreement, letter of engagement, or other papers describing the fee arrangement, if any):

6. In the space below, indicate the date, amount and purpose of each payment made to you by your client. Attach additional sheets if necessary.

Date	Amount	Purpose (e.g., attorney's time, out-of-pocket expenses, filing fees, etc.)
_____	$_____	_____
_____	$_____	_____
_____	$_____	_____
_____	$_____	_____

7. How much of your fee is in dispute (attach a copy of your bill, if available):$_____

8. Have you and your client previously agreed to arbitrate this fee dispute? _____. If yes, please attach a copy of the agreement to arbitrate.

9. Briefly describe why you believe you are entitled to the amount set forth in question 7 (use additional sheets if necessary):

10. Indicate whether you wish to resolve this fee dispute through mediation. (Participation in mediation is voluntary for you and your client, and it does not preclude your client or you from pursuing arbitration under these rules in the event that mediation is unsuccessful; note that the local program with jurisdiction over your fee dispute may not offer mediation).

❒ Yes, I wish to attempt to resolve this fee dispute first through mediation.

❒ No, I do not wish to attempt to resolve this fee dispute through mediation.

Dated:_____ Signed: .....

IMPORTANT: You must file this Request for Fee Arbitration, along with a check for the filing fee in the amount of $_____, to:

Local Program Address

UCS 137-5a (8/14)

.....

In the Matter of Fee Dispute Arbitration between

(Office Use Only)

Case Number: _____

, Client

and

, Attorney

.....

ATTORNEY RESPONSE TO REQUEST FOR FEE ARBITRATION

INSTRUCTIONS

Attached is a copy of a "Request for Fee Arbitration" by the above Client. Please complete this attorney response and return it to the local program listed below within 15 days of this mailing along with a certification that you have served the Client with the attorney response and indicating the manner of service.

1. Name, address, telephone number, email address:

2. Set forth in narrative fashion your response to the request for fee arbitration, indicating those items in the request with which you disagree and providing a brief explanation of why you believe you are entitled to the amount of the fee that is in dispute (use additional pages if necessary):

3. (A) Type of Matter: _____

   (B) Amount Received: _____

   (C) Amount in Dispute: _____

   (D) Amount Client Owes (if different from (C)): _____

4. Attach a copy of the written retainer agreement or letter of engagement with the client and copies of all itemized bills submitted to the client.

Dated: _____ Signed: _____

Local Program Address

Reminder: 22 NYCRR § 137.11 Failure to Participate in Arbitration: All attorneys are required to participate in the arbitration program established by this Part upon the filing of a request for fee arbitration by a client in conformance with these rules. An attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.

UCS 137-5b (11/01)

.....

In the Matter of Fee Dispute
Arbitration between

, Client

and

CLIENT RESPONSE
TO REQUEST
FOR FEE ARBITRATION

, Attorney

.....

INSTRUCTIONS

Attached is a copy of a "Request for Fee Arbitration" by the above Attorney. Please complete this client response below and return it to the undersigned within 15 days of this mailing:

1. Name, address, telephone number, email address:

2. Set forth in narrative fashion your response to the request for fee arbitration, indicating those items in the request with which you disagree and providing a brief explanation of why you believe your attorney is not entitled to the amount of the fee that is in dispute (use additional pages if necessary):

3. ☐ I agree to attempt to resolve this fee dispute first through mediation [applicable only if attorney so indicates in item 10 of the request]

Dated: _____ Signed: _____

Local Program Address

UCS 137-6 (2/04)

In the Matter of Fee Dispute Arbitration between

, Client

and

, Attorney

(Office Use Only)

Case Number: _____

NOTICE OF ARBITRATION HEARING

To:

PLEASE TAKE NOTICE, that an arbitration hearing to determine the fee dispute between the above parties will be held on _____ , 200__, at _____ (a.m.) (p.m.), at _____ _____ .

The arbitrator(s) hearing the dispute will be:

_____

_____

_____ .

You are required to bring to the hearing all evidence that you intend to introduce and to present any witnesses that you will call to testify on your behalf. If you wish a record to be made of the arbitration hearing, you may provide, at your own expense, a stenographer or other record. If you have any objection to a particular arbitrator who has been designated to hear this case, you must provide your objections to the undersigned within 5 days of your receipt of this Notice.

Dated: _____, 20__

Local Program Address

_____
Signature

UCS 137-7a (11/01)

ARBITRATOR'S OATH OR AFFIRMATION

I, _____, hereby agree to serve as an arbitrator pursuant to Part 137 of the Rules of the Chief Administrator and I swear or affirm that I will arbitrate all matters coming before me faithfully and fairly.

Signed: .....

Affirmed before me this
____ day of _____, 200__.

_____
(Notary Public)

UCS 137-7b (5/10)

ARBITRATOR'S OATH OR AFFIRMATION (Attorney)

I, _____, hereby agree to serve as an arbitrator pursuant to Part 137 of the Rules of the Chief Administrator. I swear or affirm that I will arbitrate all matters coming before me faithfully and fairly.

I further swear or affirm that as an attorney-arbitrator I am in good standing in the jurisdictions where I am admitted and if admitted to practice in the State of New York, I am current in my registration with the Office of Court Administration.

Signed: .....

Affirmed before me this
____ day of _____, 200__.

_____
(Notary Public)

UCS 137-7b (5/10)

ARBITRATOR'S OATH OR AFFIRMATION (Attorney)

I, _____, hereby agree to serve as an arbitrator pursuant to Part 137 of the Rules of the Chief Administrator. I swear or affirm that I will arbitrate all matters coming before me faithfully and fairly.

I further swear or affirm that as an attorney-arbitrator I am in good standing in the jurisdictions where I am admitted and if admitted to practice in the State of New York, I am current in my registration with the Office of Court Administration.

Signed: .....

Affirmed before me this
____ day of _____, 200__.

_____
(Notary Public)

UCS 137-9 (10/2014)

(Office Use Only)
Case Number: _____

In the Matter of Fee Dispute Arbitration between

,

Client

and

NOTICE OF ARBITRATION AWARD

, Attorney

.....

Attached is the determination of the arbitrator(s) who heard the fee dispute between the above parties. This determination is final and binding on the parties, except that a party dissatisfied with this award may seek one of the following post award options within the time frames indicated:

1. Trial *de novo*: Either party may reject the decision of the arbitrator(s) and 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;

NOTE: Trial *de novo* is not available to parties who have previously waived this right. See 22 NYCRR 137.2(c), 137.8(b) and Standards and Guidelines Section 6(B)(2) and Section 12(C).

OR

2. Vacatur: Either party may seek to vacate the award within 90 days after delivery to the party. This post award option is governed by CPLR 7511.

Please note: In most instances, the party against whom the award has been rendered will pay as the arbitration award becomes binding on the parties if de novo review is not sought. However, if payment does not occur, the arbitration award must be confirmed and entered as a judgment of the court to be enforceable. You have one year after the date of delivery of the award to confirm the award by commencing a proceeding in the appropriate court. Confirmation of arbitration awards is governed by CPLR 7510.

For more information on these options, please see http://nycourts.gov/admin/feedispute/faqs.shtml or contact your local program or an attorney. The local program may not give legal advice.

Dated: _____, 20__

UCS 137-12 (10/03)

(Office Use Only)

In the Matter of Fee Dispute Arbitration between

, Client

and

, Attorney

ARBITRATION AWARD

1. The AMOUNT IN DISPUTE is: $ _____

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): $ _____

3. The AMOUNT of this total PREVIOUSLY PAID by the client is: $ _____

4. (a) The BALANCE DUE by the client to the attorney is: $ _____

-OR-

(b) The AMOUNT TO BE REFUNDED by the attorney is: $ _____

Statement of Reasons: _____

AFFIRMATION

The undersigned arbitrator(s), having been duly appointed pursuant to the Rules of Local Program Name, and pursuant to any applicable Rule of the Chief Administrator, Title 22, of the Official Compilations of Codes, Rules and Regulations, or the Agreement of the parties to the dispute resolved by this award, and having duly taken the oath according to the law and having duly heard the proofs and allegations of the parties hereto, hereby affirm(s), pursuant to CPLR 7507, under the penalties of perjury, that the above award is a true, correct and complete statement of the award rendered in the above-captioned arbitration, duly executed by the undersigned.

_____ _____ _____

(Signatures of Arbitrator(s); print name below signatures)

Dated: _____

[Mail copy to each party]

UCS 137-12 (10/03)

(Office Use Only)

In the Matter of Fee Dispute Arbitration between

, Client

and

, Attorney

ARBITRATION AWARD

1. The AMOUNT IN DISPUTE is: $ _____

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): $ _____

3. The AMOUNT of this total PREVIOUSLY PAID by the client is: $ _____

4. (a) The BALANCE DUE by the client to the attorney is: $ _____

-OR-

(b) The AMOUNT TO BE REFUNDED by the attorney is: $ _____

Statement of Reasons: _____

AFFIRMATION

The undersigned arbitrator(s), having been duly appointed pursuant to the Rules of Local Program Name, and pursuant to any applicable Rule of the Chief Administrator, Title 22, of the Official Compilations of Codes, Rules and Regulations, or the Agreement of the parties to the dispute resolved by this award, and having duly taken the oath according to the law and having duly heard the proofs and allegations of the parties hereto, hereby affirm(s), pursuant to CPLR 7507, under the penalties of perjury, that the above award is a true, correct and complete statement of the award rendered in the above-captioned arbitration, duly executed by the undersigned.

_____ _____ _____

(Signatures of Arbitrator(s); print name below signatures)

Dated: _____

[Mail copy to each party]

UCS 137-12 (10/03)

(Office Use Only)

In the Matter of Fee Dispute Arbitration between

, Client

and

, Attorney

ARBITRATION AWARD

1. The AMOUNT IN DISPUTE is: $ _____

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): $ _____

3. The AMOUNT of this total PREVIOUSLY PAID by the client is: $ _____

4. (a) The BALANCE DUE by the client to the attorney is: $ _____

-OR-

(b) The AMOUNT TO BE REFUNDED by the attorney is: $ _____

Statement of Reasons: _____

_____

_____

_____

AFFIRMATION

The undersigned arbitrator(s), having been duly appointed pursuant to the Rules of Local Program Name, and pursuant to any applicable Rule of the Chief Administrator, Title 22, of the Official Compilations of Codes, Rules and Regulations, or the Agreement of the parties to the dispute resolved by this award, and having duly taken the oath according to the law and having duly heard the proofs and allegations of the parties hereto, hereby affirm(s), pursuant to CPLR 7507, under the penalties of perjury, that the above award is a true, correct and complete statement of the award rendered in the above-captioned arbitration, duly executed by the undersigned.

_____ _____ _____

(Signatures of Arbitrator(s); print name below signatures)

Dated: _____

[Mail copy to each party]

UCS 137-13 (11/01)

(Office Use Only)
Date Received: _____
Case Number: _____

CONSENT TO RESOLVE FEE DISPUTE BY ARBITRATION PURSUANT TO PART 137.2 (b) OF THE RULES OF THE CHIEF ADMINISTRATOR
[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ ("Client"), and _____, Esq. ("Attorney"), agree that in the event a dispute should arise as to the attorney's fee for legal services, they will resolve the fee dispute by arbitration pursuant to Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR), which provides for binding arbitration unless either party rejects the arbitration award by commencing an action on the merits of the fee dispute in a court of law (trial *de novo*) within 30 days after the arbitrator's decision has been mailed.

By signing this agreement, attorney and client indicate that they have received and read the official written instructions and procedures for both Part 137 and the _____. Attorney and Client understand that they are not required to sign this agreement. Client understands that in the absence of this agreement, (s)he would have the right to choose whether or not to participate in this program. This agreement does not foreclose the parties' attempting to resolve this fee dispute at any time through voluntary mediation.

_____ _____

ATTORNEY CLIENT

(Please print names below signatures)

Dated: _____

UCS 137-14 (11/01)

(Office Use Only)
Date Received _____
Case Number: _____

CONSENT TO SUBMIT FEE DISPUTE TO ARBITRATION PURSUANT TO PART 137.2 (c) OF THE RULES OF THE CHIEF ADMINISTRATOR AND TO WAIVE RIGHT TO TRIAL *DE NOVO*

[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ ("Client"), and _____, Esq. ("Attorney"), agree that in the event a dispute should arise as to the attorney's fee for legal services, they will resolve the fee dispute by arbitration conducted pursuant to Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR), except that they agree to be bound by the decision of the arbitrator(s) and agree to waive their rights to reject the arbitrator(s) award by commencing an action on the merits (trial *de novo*) in a court of law within 30 days after the arbitrator(s) decision has been mailed.

By signing this agreement, attorney and client acknowledge that they have received and read the official written instructions and procedures for Part 137 and the written instructions and procedures for the _____. Attorney and Client understand that they are not required to agree to waive their right to seek a trial *de novo* under Part 137. This agreement does not foreclose the parties' attempting to resolve this fee dispute at any time through voluntary mediation.

_____ _____

ATTORNEY CLIENT

(Please print names below signatures)

Dated: _____

UCS 137-15 (11/01)

(Office Use Only)
Date Received _____
Case Number: _____

CONSENT TO SUBMIT FEE DISPUTE TO MEDIATION PURSUANT TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ ("Client"), and _____, Esq. ("Attorney"), agree to attempt to resolve their fee dispute through mediation pursuant to Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR).

By signing this agreement, attorney and client acknowledge that they have received and read the official written instructions and procedures for both Part 137 and the _____ _____. Attorney and Client understand that participation in mediation does not waive any of their rights to arbitration under Part 137 in the event that mediation does not result in a final settlement.

Attorney and Client further agree that all communications made during or in connection with the mediation process are confidential and shall not be disclosed in any subsequent civil or administrative proceeding, including any subsequent fee arbitration or trial de novo.

_____ _____

ATTORNEY CLIENT

(Please print names below signatures)

Dated: _____

UCS 137-16 (11/01)

(Office Use Only)
Date Received: _____
Case Number: _____

CONSENT TO FINAL AND BINDING ARBITRATION
IN AN ARBITRAL FORUM OUTSIDE PART 137
UNDER 137.2 (d) OF THE RULES OF THE CHIEF ADMINISTRATOR
[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ ("Client"), and _____, Esq. ("Attorney"), agree that in the event a dispute should arise as to the attorney's fee for legal services, they will resolve the fee dispute by arbitration before an arbitral forum outside Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR), and that the arbitration shall be governed by the rules and procedures of that forum.

By signing this agreement, attorney and client acknowledge that they have received and read the official written instructions and procedures for both Part 137 and the _____, and the client has been advised: (1) that (s)he has the right to use the fee arbitration procedures of Part 137, and; (2) that (s)he is not required to agree to arbitrate this fee dispute in an arbitral forum outside Part 137. By signing this form, Attorney and Client agree to **waive their rights with regard to arbitration pursuant to Part 137, which includes the right to reject the arbitrator(s) award by commencing an action on the merits (trial de novo) in a court of law.**

_____ _____

(Please print names below signatures)

Dated: _____

UCS 137-17 (7/2014)

CONSENT TO SUBMIT FEE DISPUTE TO ONE ATTORNEY-ARBITRATOR WHERE THE AMOUNT IN DISPUTE IS $10,000 OR GREATER PURSUANT TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

The parties to this agreement, _____ ("Client"), and _____, Esq. ("Attorney") who are involved in fee arbitration pursuant to Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR), agree to waive their right to have their dispute decided by a panel of three arbitrators, one of whom would be a non-attorney member of the public; and to instead have the dispute heard by one arbitrator who is an attorney.

By signing this agreement, attorney and client acknowledge that they have received and read the official written instructions and procedures for both Part 137 and the Local Program Name. Attorney and Client understand that without this consent they have the right to have their fee dispute decided by a panel of arbitrators, including at least one non-attorney member of the public, pursuant to the Standards and Guidelines for Part 137, Section 8. B. 2.

ATTORNEY		CLIENT
	(Please print names below signatures)	

Dated: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------x

Petitioner,

- against -

Respondent.

----------x

NOTICE OF PETITION

Index No.:

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Petition of

of dated . and upon the Suffolk County Bar Association's Arbitration Determination, dated the undersigned will move this Court at Part ____, to be held in and for the County of Suffolk, State of New York, at the Supreme Court located at One Court Street, Riverhead, New York 11901, on the day of at 9:30 o'clock on the forenoon of that day or as soon thereafter as counsel may be heard, for an order:

(a) Confirming the Arbitration Determination and Award, dated , and granting a money judgment in favor of and against respondent, , in accordance with the terms of such Arbitration Determination, in the form submitted herewith; and

(b) For such other and further relief as to this Court may seem just, proper and equitable under the circumstances.

Dated:

Yours, etc.,

At an IAS Term of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse located at One Court Street, Riverhead, New York, on the ____ day of
200

PRESENT:
HON.:_____
JUSTICE

----------x

Plaintiff,

- against -

Defendant,

Third Party Creditor

----------x

ORDER TO SHOW CAUSE

Index No.:

UPON READING AND FILING the annexed affirmation of]

, dated , and upon the Suffolk County Bar Association's Arbitration Determination, dated , finding that the balance due to , , from the plaintiff, , is the sum of $. and upon all the pleadings and proceedings heretofore had herein,

LET plaintiff, show cause before this Court at an Individual Assignment Part thereof, held in and for the County of Suffolk, at the Courthouse located at One Court Street, Riverhead, New York 11901, on the ____ day of

at 9:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, why an Order should not be made and entered herein:

a. confirming the Arbitration Determination and Award, dated , and granting a Money Judgment in favor of and against plaintiff, in accordance with the terms of such Arbitration Determination, in the form submitted herewith; and

b. for such other and further relief as to this Court may seem just, proper and equitable under the circumstances.

SUFFICIENT CAUSE APPEARING THEREFOR, let service of a copy of this Order, together with the papers upon which it is based, upon the plaintiff, , by ordinary mail and by certified mail return receipt requested to her last known address at , on or before the ____ day of ___, 2008, be deemed good and sufficient service.

ENTER:

_____
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------x

Plaintiff,

AFFIRMATION

- against -

Index No.:

Defendant.

Third Party Creditor

----------x

STATE OF NEW YORK)
)ss.:
COUNTY OF SUFFOLK)

being an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms as follows, under penalties of perjury:

1. I am a partner in the firm of formerly known as , and submit this affirmation in support of this application, pursuant to CPLR §7510, to confirm an arbitration award.

2. This firm was the attorney of record for the plaintiff, in connection with a matrimonial action. When a dispute arose as to the fees due and owing to this office, an arbitration before the Arbitration Panel was set up by the Suffolk County Administrative Judge's Office, pursuant to Parts 136/137 of the Rules of the Chief Administrator of the Courts.

3. Following the arbitration proceeding, the panel rendered a determination, finding that the sum of $ was due and owing to . A copy of such Arbitration Determination, dated is annexed as **Exhibit "A"**. A copy of said Arbitration Determination was sent to plaintiff. A copy of the affidavit of service, dated , is annexed as **Exhibit "B"**. More than thirty-five (35) days have passed since such service. To date, no part of said $ has been paid.

4. In accordance with the provisions of Section 7510 of the CPLR, this application is being made to confirm the award of the Arbitration Panel, and to request that a money judgment be granted to against the plaintiff, , in the sum of $. It is respectfully requested that the Court grant the Money Judgment in the form annexed as **Exhibit "C"**.

5. No prior application has been made to this or any other Court for the relief requested herein.

WHEREFORE, your affirmant respectfully requests that the Court grant the relief sought herein, together with such other and further relief as to this Court may seem just, proper and equitable under the circumstances.

Dated:

_____

Unreported Disposition
45 Misc.3d 132(A), 3 N.Y.S.3d 286 (Table),
2014 WL 6638663 (N.Y.Sup.App.Term),
2014 N.Y. Slip Op. 51649(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 Donald O'Sullivan, Plaintiff-Appellant,
v.
Beverly Ward, Defendant-Respondent.

570428/14
Supreme Court, Appellate Term, First Department
Decided on November 21, 2014

CITE TITLE AS: O'Sullivan v Ward

ABSTRACT

Attorney and Client
Attorney's Lien
Failure to Comply with Court Rules Pertaining to Representation in Domestic Relations Matters Precluded Recovery of Fee.

O'Sullivan v Ward, 2014 NY Slip Op 51649(U). Attorney and Client—Attorney's Lien—Failure to Comply with Court Rules Pertaining to Representation in Domestic Relations Matters Precluded Recovery of Fee. (App Term, 1st Dept, Nov. 21, 2014)

PRESENT: Lowe, III, P.J., Shulman, Hunter, Jr., JJ.

Plaintiff appeals from a judgment of the Civil Court of the City of New York, New York County (Frank P. Nervo, J.), entered September 30, 2013, after a nonjury trial, in favor of defendant dismissing the complaint and awarding defendant a recovery of $13,847.20 on her counterclaim.

OPINION OF THE COURT

Per Curiam.

Judgment (Frank P. Nervo, J.), entered September 30, 2013, modified, to vacate the award to defendant and dismiss her counterclaim; as modified, judgment affirmed, without costs.

The evidence, fairly interpreted, supports the trial court's express finding that the plaintiff attorney failed to substantially comply with the Matrimonial Rules (*see* 22 NYCRR Part 1400) requiring the timely filing of the retainer agreement and periodic billing statements to the client (22 NYCRR 1400.3). Thus, the court properly dismissed plaintiff's main action seeking the recovery of unpaid fees from defendant, his former client (*see Hovanec v Hovanec*, 79 AD3d 816, 817 [2010]; *Grald v Grald*, 33 AD3d 922 [2006]).

A different result obtains, however, with respect to defendant's counterclaim seeking recoupment of moneys previously paid to plaintiff. The plaintiff's entitlement to those fees hinged not on his substantial compliance with 22 NYCRR 1400.3, but instead on whether those fees were properly earned (see *Law Off. of Sheldon Eisenberger v Blisko*, 106 AD3d 650 [2013]; *Mulcahy v Mulcahy*, 285 AD2d 587 [2001]). Based on the undisputed trial evidence elicited below, establishing, inter alia, that plaintiff, attended no fewer than six court conferences, engaged in motion practice, and routinely consulted with defendant and at least two experts, a refund of the legal fees and costs previously paid by defendant was unwarranted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: November 21, 2014

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29 Misc.3d 1230(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
City Court, City of Rye.

Noel F. CARACCIO, PLLC, Plaintiff,
v.
Suse J. THOMAS, Defendant.

No. CV 255–10.
|
Dec. 6, 2010.

Attorneys and Law Firms

Noel F. Caraccio, Esq, for Plaintiff.

Arnold S. Kronick, Esq., for Defendant.

Opinion

JOSEPH L. LATWIN, J.

*1 This is an action by a law firm seeking attorneys' fees based upon breach of a retainer agreement and on an account stated in connection with representation of the defendant in a real estate transaction. The defendant moves to dismiss the action based upon: (1) failure to comply with the fee dispute resolution program set forth in 22 NYCRR 137.1(a) and 137.11; (2) non-occurrence of a condition precedent, to wit, the closing of the property; & (3) lack of personal jurisdiction. In addition, upon the Court's own motion, the issue of subject matter jurisdiction was raised.

For the purposes of this motion only, the Court will accept the following facts:

> Plaintiff is a law firm with its offices in the Town of Mamaroneck, New York. Plaintiff has no office for the transaction of business within the City of Rye. Defendant resides in the Town of Mamaroneck. Plaintiff represented defendant in a real estate transaction that had not closed at the time the action was commenced. The retainer agreement states that the "fee will be payable at closing ... However, if the transaction exceeds three (3) months in length, you will be billed monthly for the work to that date." The retainer was dated May 3, 2010. The $7,094.50 bill from plaintiff to defendant was rendered August 20, 2010 —over three months after the retainer letter. The action was filed September 22, 2010. No notice of the right to arbitrate was sent by plaintiff to defendant.

Based upon these facts, the Court inquired as to the basis for subject matter jurisdiction since neither party resides or has a place of business within the Court's jurisdiction and it does not appear that the transaction took place within the City of Rye.

Subject Matter Jurisdiction
Subject matter jurisdiction is the competence of the court to adjudicate a certain kind of case. City Courts are constitutional courts. New York Constitution article VI, § 17. The New York Constitution grants City Courts subject matter jurisdiction as "prescribed the legislature but not in any respect greater than the jurisdiction of the district court ..." New York Constitution article VI, § 17(a). Under New York Constitution article VI, § 16, district courts have jurisdiction not greater than the courts for the city of New York however in actions and proceedings for the recovery of money, actions for the recovery of chattels and actions and proceedings for the foreclosure of mechanics liens and liens on personal property, the amount sought to be recovered or the value of the property shall not exceed fifteen thousand dollars exclusive of interest and costs. The maximum jurisdictional amount was increased from $6,000 to $15,000 by Constitutional Amendment adopted at the general election held in 1983. *See, Payne v. Genato,* 2010 N.Y. Slip Op 52086(U) [Rye City Ct 2010].

In 1964, pursuant to article VI, § 17(b) of the New York State Constitution, the Legislature adopted the Uniform City Court Act ("UCCA") to regulate the City Courts, and establish uniform jurisdiction, practice and procedure. Laws of 1964, ch 497. The Legislature granted City Courts jurisdiction in certain actions for money damages. UCCA § 202. UCCA § 202 provides "[t]he court shall have jurisdiction of actions and proceedings for the recovery of money, actions and proceedings for the recovery of chattels and actions and proceedings for the foreclosure of liens on personal property where the amount sought to be recovered or the value of the property does not exceed fifteen thousand dollars exclusive of interest and costs." This action seeks money damages within the jurisdictional limit of the City Court.

*2 In actions for money under UCCA § 202, in addition to the jurisdictional amount limit, the City Courts have

a residence requirement.[1] That residence requirement is not deemed jurisdictional and may be waived by a party, but, despite the waiver, may subject a case to dismissal on the court's initiative. UCCA § 213(d). *See also Casden v. Broadlake Corp.*, 47 Misc.2d 847, 263 N.Y.S.2d 345 [New Rochelle City Ct 1965] (lack of residence may be waived) and *Downes v. Cirelli*, 52 Misc.2d 637, 276 N.Y.S.2d 542 [Yonkers City Ct 1967] (dismissal lies within court's discretion even where parties submit to the court's jurisdiction). Here, the defendant does not reside within the City of Rye. Neither party has a place for the regular transaction of business nor has a regular employment within the City of Rye. Plaintiff asserts that it is deemed a resident of the City of Rye under UCCA 213(b) since, as a professional limited liability company, it regularly transacts business in the City of Rye by virtue of representing clients and having meetings within the City. *See, Rock Wool Insulation Co. v. Puma*, 48 Misc.2d 193, 264 N.Y.S.2d 638 [App Term 2nd Dept 1965] (plaintiff corporation with no office and which did not regularly transacting business within city means no jurisdiction).

While the "transacts business" phrase within UCCA § 213(b) appears to have the same meaning as that in the long-arm jurisdictional statute, CPLR § 302(a)(1) ("transacts any business") that interpretation is strained since the phrase in CPLR § 302(a)(1) usually refers to the acts of a defendant over whom jurisdiction is sought as opposed to the situation here, where the plaintiff is asserting its own conduct in conferring jurisdiction. Further analogies fail since they concern the ability of New York to exercise jurisdiction over foreign entities, not the availability of domestic entities to voluntarily choose where to litigate in New York. The constitutional underpinnings of one state exercising jurisdiction over a non-resident entity diminish where the question involves which New York court a New York entity chooses to litigate.

To determine the existence of jurisdiction pursuant to CPLR § 302(a)(1), courts evaluate (1) whether the defendant transacts any business in New York, and, if so, (2) whether the plaintiff's causes of action arise from defendant's business transactions in the state. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 NY3d 65, 71, 818 N.Y.S.2d 164 [2006]. Courts look to the "totality of the defendant's activities within the forum" to determine whether a defendant has "transact[ed] business in such a way that it constitutes "purposeful activity" satisfying the first part of the test. *Best Van Lines, Inc. v. Walker*, 490 F3d at 246 [2d Cir2007] (citing *Sterling Nat'l Bank & Trust Co. of N.Y. v. Fidelity Mortgage Investors*, 510 F.2d 870, 873 [2d Cir1975]). Of course, the constitutional underpinnings of the second portion of this test (whether the cause of action arises from the acts in the jurisdiction) in exercising long arm jurisdiction over a non-resident do not translate when it is the plaintiff who is choosing to subject itself to jurisdiction of a court. *McKee Electric Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 283 N.Y.S.2d 34 [1967] (is there need to purposely avail oneself of the privileges of the jurisdiction when the plaintiff purposely avails itself of the privileges simply by invoking the Court's jurisdiction?).

*3 Applying the CPLR § 301 standard of "doing business" to determine a corporation's presence for jurisdictional purposes is equally faulty. Under that test, a foreign business entity is doing business in New York if it is present in New York "not occasionally or casually, but with a fair measure of permanence and continuity." *Tauza v. Susquehanna Coal Co.*, 220 N.Y.2d 259, 267 [1919]. However, that test's focus is upon the foreign corporation's contacts with the local jurisdiction, not the foreign entity's choice of a local forum. Furthermore, this language is not what the Legislature has required in the statutory language of UCCA § 213(b). "Doing business" implies a greater affinity than "transacting business"

Since a party need not plead the basis for jurisdiction or submit the basis for jurisdiction absent a motion to dismiss, the plaintiff has not proffered an evidentiary basis upon which the Court may determine whether or not it has "transacted business" in Rye.

Service of process

Defendant claims that no copy of the process was personally given to her or a neighbor nor was anything left or affixed to her door. The affidavit of service of the summons and complaint filed with the Court asserts service by delivery and mail pursuant to CPLR § 308 by delivery to defendant, who refused to open her door, and then affixation to the door followed by a mailing to defendant's last known residence.

The process server's affidavit constitutes prima facie evidence of proper service pursuant to CPLR § 308(2). *Scarano v. Scarano*, 63 AD3d 716, 880 N.Y.S.2d 682 [2nd Dept, 2009].

To warrant a traverse hearing when the process server's affidavit contains the elements of proper service, the rebutting affidavit must specifically contradict something contained

in the process server's affidavit. *Simonds v. Grobman,* 277 A.D.2d 369, 716 N.Y.S.2d 692 [2nd Dept, 2000]: *& 650 Fifth Avenue Co. v. Travers Jewelers Corp.*, 29 Misc.3d 1215(A), Slip Copy, 2010 WL 4187936 (Table) [Civ Ct New York County, 2010]. The defendant's affidavit specifically denies that any papers were affixed to her door. Accordingly, a traverse hearing is required.

Accordingly, the Court will hold a traverse hearing in this matter. At the traverse hearing, the burden of proving jurisdiction is upon plaintiff, the party who asserts it. *Lamarr v. Klein,* 35 A.D.2d 248, 250, 315 N.Y.S.2d 695, 696 (1st Dept 1970) *aff'd* 30 N.Y.2d 757, 333 N.Y.S.2d 421 (1972); *see also: Saratoga Harness Racing Association, Inc. v. Moss,* 26 A.D.2d 486, 275 N.Y.S.2d 888 (3rd Dept 1966), *aff'd* 20 N.Y.2d 733, 283 N.Y.S.2d 55 (1967); *Carte v. Parkoff,* 152 A.D.2d 615, 543 N.Y.S.2d 718 (2nd Dept 1989); *Zipperman v. Frontier Hotel of Las Vegas,* 50 A.D.2d 581, 374 N.Y.S.2d 697 (2nd Dept 1975).

22 NYCRR 137

Defendant claims the plaintiff failed to comply with the fee dispute resolution program set forth in 22 NYCRR 137. Part 137 of the Rules of the Chief Administrator of the Courts provides for a Fee Dispute Resolution Program. A mandatory Arbitration Procedure is set forth therein for all representations that commenced on or after January 1, 2002, and is applicable "to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter." Pursuant to 22 NYCRR 137.2(a), "[I]n the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part." The plaintiff claims there is no fee dispute since the defendant never disagreed with the amount billed and was discharged before the defendant was billed. Furthermore, defendant never sought arbitration.

*4 In order to seek arbitration where the attorney and client cannot agree as to the attorney's fee, 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 in the approved form. 22 NYCRR 137.6(A)(1). There is no proof that plaintiff served the written notice required by the Rule. If service of a notice is required, its service is a condition precedent to commencement of an action. *Herrick v. Lyon,* 7 AD3d 571, 777 N.Y.S.2d 141 [2nd Dept 2004].

The question becomes when an "attorney and client cannot agree as to the attorney's fee" implicating the Part 137 procedures. The plaintiff claims there is no disagreement concerning the fees since the defendant never objected to the bill.

There is a disagreement between the First Department and the Second Department as to whether the Part 137 obligates an attorney to send a notice offering arbitration in the absence of any fee disagreement with a client. *Compare Paikin v. Tsirelman,* 266 A.D.2d 166, 699 N.Y.S.2d 32 [1st Dept 1999] *with Scordio v. Scordio,* 270 A.D.2d 328, 705 N.Y.S.2d 58 [2nd Dept 2000] (applying Part 136, the predecessor rule to Part 137, dealing with domestic relations cases). In *Messenger v. Deem,* 26 Misc.3d 808, 893 N.Y.S.2d 434 [Sup Ct Westchester County 2009], like here, the attorney claimed notice need not be provided to a client who never disputed the reasonableness of an attorney's legal fees, no notice pursuant to Rule 137 was sent, and the client simply did not pay what was due, the Court questioned the continuing validity of *Scordio.* It cited cases that followed *Scordio. e.g., Helene Greenberg Law Offices v. Disanto,* 5 Misc.3d 130(A), 798 N.Y.S.2d 710 [App Term, 9th and 10th Jud Dists 2004]("should the trial court determine that defendant did not actually dispute the reasonableness of the fees, notice of the right to arbitrate is not required"), and cases that declined to follow *Scordio,* e.g., *Wexler & Burkhart, LLP. v. Grant, supra. Wexler* argues Part 137 applied to all matters, *except for* eight specific instances/conditions, none of which excludes "compliance where a client does not object to the bill, but simply does not pay it", thus "[u]nder the well-established statutory construction doctrine of *expressio unius est exclusio alterius,* where exceptions are created as to certain matters, inclusion of such exceptions should be considered to deny the existence of others not mentioned ..." *Wexler & Burkhart, LLP. v. Grant,* 12 Misc.3d 1162(A), 819 N.Y.S.2d 214 [Sup Ct Nassau County 2006].

The denial of the cause of action clearly shows a disagreement as to any fee being due. This alone should be considered a fee disagreement under Part 137 triggering the notice requirements.

Therefore, should the Court determine that it has jurisdiction, this action will be stayed pending the arbitration of matter pursuant to Part 137 or the defendant's waiver of the right to arbitrate, specifically or by the passage of time after the giving of notice.

Condition Precendent

*5 Te Court will defer ruling on the motion to dismiss for failure of the condition precedent—the closing—to occur until after the Court determines its possessing subject matter and personal jurisdiction and the determination of any **arbitration** under 22 NYCRR **Part** 137.

Accordingly, it is

ORDERED that the defendant's motion to dismiss for lack of personal jurisdiction is granted to the extent of ordering a traverse hearing to be held on **January** 24, 2011 at 1030 a.m., and it is further,

ORDERED that the Court's motion to dismiss for lack of subject matter jurisdiction is held in abeyance pending the traverse hearing at which plaintiff may offer evidence concerning its transacting business in the City of Rye, and it is further

ORDERED that the defendant's motion to dismiss for failure to comply with the provisions of 22 NYCRR 137 is denied pending determination of this Court's jurisdiction, and it is further

ORDERED that the defendant's motion to dismiss due to the non-occurrence of a condition precedent, to wit, the closing of the property is held in abeyance pending the Court determining whether its possesses subject matter and personal jurisdiction and the determination of any **arbitration** under 22 NYCRR **Part** 137.

All Citations

29 Misc.3d 1230(A), 920 N.Y.S.2d 242 (Table), 2010 WL 4942149, 2010 N.Y. Slip Op. 52094(U)

Footnotes

1 UCCA 213 says, in relevant **part** "(a) In an **action** described in § 202, either a plaintiff or a defendant must: 1. be a resident of the city ...; or 2. have a regular employment within the city; or 3. have a place for the regular transaction of business within the city. (b) A corporation, association or partnership shall, for the purposes of this section, be deemed a resident of the city if it has an office or agency or regularly transacts business in the city.

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26 Misc.3d 808
Supreme Court, Westchester County, New York.

Stanley MESSENGER, Esq., Plaintiff,
v.
Anna Marie DEEM, Defendant.

Dec. 7, 2009.

Synopsis

Background: Attorney brought **action** against client, seeking to recover sums for legal services rendered to client during divorce proceedings. Following a jury verdict in favor of attorney, client moved to set aside verdict.

Holding: The Supreme Court, Westchester County, William J. Giacomo, J., held that client sufficiently **disputed** reasonableness of **attorney's fees** to trigger obligation to notify her of right to **arbitrate dispute**.

Motion granted.

West Headnotes (1)

[1] **Alternative Dispute Resolution**
Compulsory **arbitration**

Client sufficiently **disputed** reasonableness of **attorney's fees** so as to trigger attorney's obligation to notify her of her right to **arbitrate dispute**, and thus court lacked subject matter jurisdiction over attorney's **action** to recover fees; even though client did **not** complain on "line by line" basis, she did assert that attorney charged excessive fees, charged for services after his termination, charged for reviewing his own billing practices, and double billed in her answer to attorney's complaint. N.Y.Ct.Rules, §§ 137.0, 137.2, 137.6(a).

2 Cases that cite this headnote

Attorneys and Law Firms

**435 Peter Ackerman, Esq., White Plains, for the Plaintiff.

Michael A. Deem, Esq., Mount Vernon, for the Defendant.

WILLIAM J. GIACOMO, J.

*809 ***Procedural Background***

Plaintiff commenced this **action** to recover sums for legal services rendered to defendant during her divorce proceedings.

In his complaint, plaintiff alleged that "Pursuant to Second Department case law, notice of right to **arbitrate** legal fees need **not** be provided to a client who never **disputes** the reasonableness of an attorney's legal fees ... Defendant never **disputed** the reasonableness of Plaintiff's fees." (Complaint at ¶¶ 6–7.)

In her answer[1], defendant denied the allegations of the complaint and plead thirteen affirmative defenses including that plaintiff was **not** entitled to an **attorney's fee** because of his: failure to provide defendant with notice of **arbitration** before commencement of the suit (Second Affirmative Defense); excessive fees (Fourth Affirmative Defense); charges for services after he was terminated (Fifth Affirmative Defense); charges for reviewing billing practices (Sixth Affirmative Defense); charges to review billing records (Seventh Affirmative Defense); double billings (Eighth Affirmative Defense) and; exorbitant time billings on routine matters (Nine Affirmative Defense).

At the pre-trial conference this Court inquired as to whether or **not** there was compliance with the Court rule relating to fee **dispute arbitration**. Plaintiff's counsel advised at that time that the rule was inapplicable and defendant's counsel did **not** raise any objection to that contention.

Thereafter, as the end of trial testimony was approaching, and despite the Court's stated concern prior to trial, defendant's counsel raised the issue of non-compliance with the requirements of the fee **dispute** resolution program plead in the answer and moved to dismiss this case accordingly *citing Herrick v. Lyon*, 7 A.D.3d 571, 777 N.Y.S.2d 141 (2nd Dept., 2004). In opposition, plaintiff conceded that no such notice was sent, but continued to allege, that the mandates of

the fee dispute resolution program are inapplicable because there is no "fee dispute", *citing, Scordio v. Scordio,* 270 A.D.2d 328, 705 N.Y.S.2d 58 (2nd Dept., 2000).

The Court reserved decision on the application and directed the parties to proceed to verdict. Following a jury verdict in plaintiff's favor, the defendant moved to set aside the verdict *810 pursuant to CPLR 4404. Now, after giving the parties the opportunity to fully brief the matter the Court rules as set forth below.

Discussion

Part 137 of the Rules of the Chief Administrator of the Courts provides for a **436 Fee Dispute Resolution Program. A mandatory Arbitration Procedure is set forth therein for all representations that commenced on or after January 1, 2002, and is applicable "to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter." 22 NYCRR 137.1.

Plaintiff argues that the mandatory arbitration provisions of Part 137 are inapplicable to the instant matter because, like in the *Scordio* matter, there was no disagreement as to the amount of attorney's fee due to plaintiff, and that defendant simply did not pay what was due. In *Scordio,* the Appellate Division, Second Department held that the mandatory arbitration notice provided for by then Court Rule 136.5 did not apply where the client did not dispute the reasonableness of the fees charged, and specifically declined "to follow the rule adopted by the Appellate Division, First Department, which obligates an attorney to send such a notice even in the absence of any fee disagreement with a client." *Scordio v. Scordio,* 270 A.D.2d at 329, 705 N.Y.S.2d at 59.

Court Rule 136.5, upon which *Scordio* was premised, was repealed in January 2002 and replaced with Court Rule 137.6. Former Rule 136, which was applicable only to domestic matters has been subsumed by the newer Part 137 which, with limited exceptions that are not alleged here, is applicable to all civil matters. Court Rule 137.6 is applied in the same manner as former Rule 136.5. *See, Abinanti v. Pascale,* 41 A.D.3d 395, 837 N.Y.S.2d 740 (2nd Dept., 2007); *Borah, Goldstein, Altschuler, Schwartz & Nahins, PC v. Lubnitzki,* 13 Misc.3d 823, 822 N.Y.S.2d 425 (N.Y.Civ.Ct., 2006).

Whether or not the *Scordio* holding is still valid under the new Part 137 Rules seems to be a source of debate.

Plaintiff argues that like its predecessor rule, the mandatory arbitration provisions under the current Part 137 of the Rules of the Chief Administrator of the Courts does not require the mailing of the notice under Rule 137 when there is no disagreement as to the reasonableness of the fees charged. Plaintiff claims that like its predecessor, an attorney is only obligated to forward a written notice to the client, entitled Notice of Client's *811 Right to Arbitrate, "*where the attorney and client cannot agree as to the attorney's fee*". 22 NYCRR 137.6(a)(1)(emphasis supplied).

This position is supported by some caselaw. *See, Helene Greenberg Law Offices v. Disanto,* 5 Misc.3d 130(A), 798 N.Y.S.2d 710, 2004 WL 2479984, *1 (N.Y.Sup.App.Term, 2004) *citing, Scordio v. Scordio,* ["It is noted that should the trial court determine that defendant did not actually dispute the reasonableness of the fees, notice of the right to arbitrate is not required."]; *Rotker v. Rotker,* 195 Misc.2d 768, 761 N.Y.S.2d 787 (N.Y.Sup., West.Cty., 2003)[Even under Part 137, the court held it must follow the precedent of *Scordio.*]

However, other Courts disagree. In *Wexler & Burkhart, LLP. v. Grant,* 12 Misc.3d 1162(A), 819 N.Y.S.2d 214, 2006 WL 1490406 (N.Y.Sup., Nassau Cty., 2006), Justice Daniel R. Palmieri of the Supreme Court, Nassau County, found the very interpretation propounded by the plaintiff here "untenable", specifically disagreeing with the holdings in the *Helene Greenberg Law Offices* and *Rotker* cases. As persuasively set forth by Justice Palmieri, plaintiff's interpretation, and the continued application of the *Scordio* holding "would effectively eviscerate Part 137 of the Rules, a comprehensive scheme 'for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation' (22 NYCRR § 137.0)." *Id.* Starting his analysis **437 with Court Rule 137.1, entitled "Application", the Court noted that Part 137 applied to all matters, *except for* eight specific instances/conditions [2], none of which excludes "compliance where a client does not object to the bill, but simply does not pay it", thus "[u]nder the *812 well-established statutory construction doctrine of *expressio unius est exclusio alterius,* where exceptions are created as to certain matters, inclusion of such exceptions should be considered to deny the existence of others not mentioned ..." *Id.* (Citations omitted.) Further, the Court in *Wexler,* in making its case to not follow *Scordio,* reasoned that while *Scordio* was determined under the older Rule Part

136, the newer Part 137 Rule "was clearly intended to cast a much wider net". *Id.*

This Court has undertaken a thorough review of the older Part 136 Rules and compared them with the provisions of the newer Part 137. This analysis supports the position taken by Justice Palmieri in *Wexler*. Indeed, the older Part 136 Rule lacks any language that could be construed similar to Part 137.1, which makes compliance with the rule applicable to all matters expect one of the eight delineated exclusions, none of which are applicable here.

While this Court may question whether the holding of *Scordio* is still applicable under the new Part 137, it need not base its decision on such conjecture.

Despite plaintiff's argument to the contrary, this Court finds that a review of the pleadings and the totality of the testimony adduced at trial discloses that there was a colorable claim to a dispute as to the "reasonableness of the fees" charged by the plaintiff to the defendant.

In support of his argument the defendant never disputed his fees, Plaintiff relies on testimony elicited at trial and at an examination before trial ("EBT"), read into the trial record, wherein defendant testified, in sum and substance, that she never complained to plaintiff regarding any problems she had with his billing statements on a "line by line" basis. Defendant also testified at trial, in response to the question whether or not she took up "any questions" with plaintiff about his bills, that they didn't verbally go over the bills "item by item, but we did discuss the bills often". (Defendant's Trial Testimony upon Cross– *813 Examination at p. 432, ll. 16–17.) Plaintiff takes the position that to establish that she was disputing his fees, defendant had to complain "line by line" to the individual items in each bill presented to her to establish that defendant objected to the billings. This position is rejected. It is clear to the Court from the pleadings and the **438 totality of the testimony that the defendant took issue with plaintiff's billings.

If this Court was to accept plaintiff's argument as to when he should be charged with the obligation to offer arbitration, taken to its logical conclusion, would permit an attorney to disregard the obligation except in certain limited situations.

A "fee dispute" (22 NYCRR § 137.2) or a disagreement as "to the attorney's fee" [22 NYCRR § 137.6(a)] is not only found when the former client complains as to time billings on a line by line basis. Under Part 137, arbitrators are entrusted to "determine the reasonableness of fees for professional services". 22 NYCRR § 137.0. Here the defendant "disputed the reasonableness of the fees" plaintiff was charging. *See, Scordio v. Scordio, supra,* 270 A.D.2d at 329, 705 N.Y.S.2d at 59. The "reasonableness" of the fee cannot be limited to disputes as to whether an attorney should have charge "1.0 hours of billing time" instead of "1.2 hours of billing time". If such were the case a simple audit of the bill would be all that was necessary. Instead, arbitrators are given authority to evaluate and make a subjective finding of reasonableness. For something to be reasonable it must be fair and proper under the circumstances. To hold otherwise would render the Rule impotent and unenforceable.

Notably, once plaintiff received defendant's answer denying his allegations of fees due and asserting that plaintiff charged excessive fees (Fourth Affirmative Defense), charged for services after he was terminated (Fifth Affirmative Defense), charged for reviewing his own billing practices (Sixth Affirmative Defense), charged to review billing records (Seventh Affirmative Defense), double billed (Eighth Affirmative Defense) and charged exorbitant time billings on routine matters (Nine Affirmative Defense) he should have been alerted that defendant disputed his fees and that compliance with the mandatory fee arbitration rules was required. Plaintiff should have erred on the side of caution and submitted the controversy to arbitration before continuing with litigation.

In this case, plaintiff's failure to notify the defendant of her right to seek arbitration in accordance with Court Rule 137.6, and *814 to plead such compliance divests this Court of subject matter jurisdiction and leaves it with no other recourse but to dismiss this case. *See, Kerner and Kerner v. Dunham,* 46 A.D.3d 372, 848 N.Y.S.2d 617 (1st Dept., 2007); *Lorin v. 501 Second Street LLC,* 2 Misc.3d 646, 769 N.Y.S.2d 361 (N.Y.City Civ.Ct., 2003); *Peter Axelrod & Associates, P.C. v. Berk,* 19 Misc.3d 1134(A), 2008 WL 2097569, *2 (N.Y.City Civ.Ct., 2008).

Accordingly defendant's motion to vacate the jury's verdict is granted. However, such motion is granted without prejudice to plaintiff's refiling of an action after compliance with the pleading and notice requirements of Part 137 of the Rules of the Chief Administrator of the Courts.

The foregoing is the Decision and Order of this Court.

All Citations

26 Misc.3d 808, 893 N.Y.S.2d 434, 2009 N.Y. Slip Op. 29501

Footnotes

1 Which was interposed in a *pro se* capacity. At trial, defendant was represented by counsel.

2 2 NYCRR 137.1 specifically states that the **Part** 137 **Arbitration** Procedure do **not apply** in eight (8) delineated instances:
(1) representation in criminal matters;
(2) amounts in **dispute** involving a sum of less than $1,000 or more than $50,000, except that an **arbitral** body may hear **disputes** involving other amounts if the parties have consented;
(3) claims involving substantial legal questions, including professional malpractice or misconduct;
(4) claims against an attorney for damages or affirmative relief other than adjustment of the fee;
(5) **disputes** where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;
(6) **disputes** where no attorney's services have been rendered for more than two years;
(7) **disputes** where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York; and
(8) **disputes** where the request for **arbitration** is made by a person who is **not** the client of the attorney or the legal representative of the client. 22 NYCRR 137.1(b)

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13 Misc.3d 823
Civil Court, City of New York,
New York County.

BORAH, GOLDSTEIN, ALTSCHULER, SCHWARTZ, & NAHINS, PC, Plaintiff pro se,
v.
Gayle LUBNITZKI a/k/
a Gayle Shaul, Defendant pro se.

Sept. 27, 2006.

Synopsis
Background: Law firm brought **action** against client to recover balance due for legal services rendered.

[Holding:] The Civil Court, City of New York, New York County, Barbara Jaffe, J., held that filing of amended complaint did **not** cure firm's failure to provide client with written notice of her right to **arbitrate dispute**.

Complaint dismissed.

West Headnotes (2)

[1] **Attorney and Client**
Conditions Precedent

Attorney's failure to notify client of right to **arbitrate fee dispute** requires dismissal of **action** to recover **fees**, even cause of **action** for account stated. N.Y.Ct.Rules, § 137.6(b).

3 Cases that cite this headnote

[2] **Attorney and Client**
Conditions Precedent

Law firm's amended complaint against client to recover balance due for legal services rendered related back to its original complaint for purposes of determining application of exemption from requirement that firm provide client with written notice of her right to **arbitrate dispute** if firm had **not** rendered legal services to client for more than two years, and thus dismissal of complaint for failure to provide notice was warranted, where original complaint was filed within two years of cessation of services. N.Y.Ct.Rules, § 137.1(b)(6).

1 Cases that cite this headnote

Attorneys and Law Firms

**425 David Rosenbaum, Esq., Craig M. Notte, Esq., New York, for plaintiff pro se.

Gayle Lubnitzki, for defendant pro se.

Opinion

BARBARA JAFFE, J.

*824 The New York State **Fee Dispute** Resolution Program was established as **Part 137** of the **Rules** of the Chief Administrator (22 NYCRR § **137** *et seq.*) in order to provide for "the informal and expeditious resolution of **fee disputes** between **attorneys** and clients through **arbitration** and mediation" (22 NYCRR § 137.0). The **Part** provides that absent an agreement at the outset of the **attorney**-client relationship, when an **attorney** and her client cannot agree on the **attorney's fee**, the **attorney** is required to forward to the client a written "Notice of Client's Right to **Arbitrate**." (22 NYCRR § 137.6[a][1]). The **Part** does **not apply**, *inter alia*, to **disputes** "where no **attorney's** services have been rendered for more than two years." (22 NYCRR § **137**.1[b][6]). Thus, an **attorney** must notify her client of the rights conferred by the **Part** unless more than two years have elapsed following the cessation of services.

[1] The **Part** also requires that an **attorney** who brings an **action** to recover a **fee** must allege in her complaint that the client received notice of her right to pursue **arbitration** and mediation and did **not** **426 file a timely request for either, or that the **dispute** is **not** otherwise covered by the **Part**. (22 NYCRR **137**.6[b]). The **attorney's** failure to notify the client requires dismissal of the **action**, even a cause of **action** for an account stated. (*Paikin v. Tsirelman*, 266 A.D.2d 136, 136–**137**, 699 N.Y.S.2d 32 [1st Dept. 1999]; *Wexler & Burkhart, LLP v. Grant*, 12 Misc.3d 1162(A), 2006 WL 1490406 [Sup. Ct., Nassau County 2006]; *Lorin v. 501 Second Street LLC*, 2 Misc.3d 646, 648, 769 N.Y.S.2d 361 [Civ. Ct., Kings County 2003]).

Presumably, nothing precludes an attorney from avoiding application of the Part by letting two years pass after the cessation of services before bringing an action to recover fees. The question presented here concerns the propriety of applying the Part's two-year exemption where, although no services have been rendered for more than two years, the attorney litigated the fee dispute in court during the two years.

A bench trial was held before me on August 23, 2006. Admitted in evidence were plaintiff's invoices for the services it rendered to defendant (Pl. Exh. 6), the email correspondence between the parties and others (Pl. Exhs. 7–18; Def. Exhs. A, B, E, F), and pleadings relating to the services rendered (Pl. Exhs. 1–5).

*825 *I. PROCEDURAL FACTS*

On August 20, 2004, plaintiff commenced the instant action against defendant in Supreme Court, New York County. By verified complaint, plaintiff sought from defendant $30,722.67 representing the balance due for legal services rendered from June 2003 through June 2004, alleging causes of action for breach of contract, an account stated, and quantum meruit. The complaint alleges neither compliance with the Part nor an exemption from complying with it.

On April 8, 2005, plaintiff obtained a default judgment against defendant which she successfully moved to vacate by order dated February 7, 2006. The action was thereafter transferred to the Civil Court pursuant to CPLR § 325(d).

In an answer filed on March 27, 2006, defendant alleged that plaintiff had failed to comply with the Part by not furnishing her with written notice of her right to elect to resolve the fee dispute by arbitration or a "Request for Fee Arbitration" form. Attached to the answer are copies of several emails, plaintiff's invoices dated August 31, 2003, November 30, 2003, December 31, 2003, and March 31, 2004, and plaintiff's statement of account dated December 31, 2004.

By leave of court granted on August 2, 2006, plaintiff amended the complaint to allege that Part 137 was inapplicable as it had not rendered legal services to defendant for more than two years. (Amended Verified Complaint, ¶ 27). In her Amended Verified Answer filed on August 21, 2006, defendant observed that as plaintiff had commenced the instant action on August 20, 2004, the exemption relied upon by plaintiff was inapplicable. She included in her answer requests for "compensation," for a refund of her overpayment, and for a return of her personal papers.

II. ANALYSIS

As there appears to be no officially stated rationale for the two-year exemption set forth in 22 NYCRR § 137.1(b)(6), it is reasonably inferred that it reflects an administrative preference for arbitrating and mediating fee disputes that have not become stale. Arbitrators and mediators should not have to struggle with factual issues as to which memories have become blurred and evidence has been lost. The **427 passage of a substantial period of time may also serve to separate fee disputes that ripen over time into actions requiring litigation in court with all of its attendant rights, from those where one or both parties retain the *826 hope of reestablishing the attorney-client relationship notwithstanding the fee dispute. In the latter case, discovery, motion practice, and trial are discouraged in favor of the informal and expeditious procedure afforded by the Part.

Given these worthy goals, those responsible for establishing the Part could not have intended that the mere passage of time warrants litigation in court, and thus, it ought not cure this plaintiff's initial failure to notify defendant of her right to arbitrate or mediate fee disputes. Rather, having actively litigated for its fees and obtained a default judgment against defendant well within the two-year period, plaintiff ought not be permitted to seek refuge from a dismissal despite the two years that passed before it amended its complaint solely to allege an exemption that was inapplicable when it first brought the action. To permit plaintiff the benefit of the exemption in these circumstances would give insufficient consideration to the Part's intent that clients be given notice of the availability of arbitration and mediation, something that was concededly not done here.

[2] I thus find that plaintiff's amended complaint must be deemed to relate back to the original complaint for purposes of determining the application of the Part. (*See* Joel R. Brandes and Carole L. Weidman, *More Changes to Calendar Control and Arbitration Rules*, N.Y.L.J., Sept. 27, 1994, at 3 col. 1 [observing that identical provision set forth in 22 NYCRR § 136.4(b) constituted "some sort of statute of limitations for mandatory arbitration ..."]; CPLR 203 [f] [claim asserted in amended pleading deemed to have been

interposed at time claims in original pleading interposed]). Consequently, having failed in its original complaint to satisfy the condition precedent of alleging compliance with the **Part** or claiming an exemption from it, plaintiff is precluded from relying on the exemption at trial. In light of plaintiff's failure to comply with the **Part**, the **action** is dismissed.

As defendant did **not** properly interpose a counterclaim to plaintiff's **action**, the requests for relief set forth in her amended answer are **not** considered.

III. CONCLUSION

Accordingly, the complaint is dismissed. This constitutes the decision and order of the court.

All Citations

13 Misc.3d 823, 822 N.Y.S.2d 425, 2006 N.Y. Slip Op. 26400

End of Document

13 Misc.3d 1086
Civil Court, City of New York,
Queens County.

David B. CALENDAR, P.C., Claimant
v.
Doundley EDWARDS, Defendant.

Sept. 22, 2006.

Synopsis
Background: Attorney initiated small claims action to recover legal fees from client that he had represented in matrimonial action and family court proceeding.

Holding: The Civil Court, City of New York, Queens County, Bernice D. Siegal, J., held that attorney failed to provide adequate notice pursuant to arbitration procedure of Fee Dispute Resolution Program.

Suit dismissed.

West Headnotes (1)

[1] **Attorney and Client**
Conditions Precedent

Attorney's letter to former client did not give client adequate notice of his right to elect to resolve fee dispute by arbitration, requiring dismissal of attorney's small claims action; attorney sought to circumvent explicit requirements for such notice by referring former client to a web site. 22 NYCRR § 137.6(a).

1 Cases that cite this headnote

Attorneys and Law Firms

****423** David B. Calendar, Esq., Pro se.

Doundley Edwards, Pro se.

Opinion

BERNICE D. SIEGAL, J.

***1086** The within small claims action to recover legal fees is dismissed as the court finds that, as fully set forth below, the claimant has failed to provide adequate notice pursuant to 22 NYCRR § 137.6, the arbitration procedure pursuant to the Fee Dispute Resolution Program.

***1087** The claimant commenced the within small claims actions to recover unpaid legal fees in which he was retained on January 5, 2004 to represent defendant for both a matrimonial action and a family court proceeding, pursuant to a fully executed retainer agreement with a copy of the "Statement of Client's Rights and Responsibilities" annexed thereto. Upon the failure of defendant to remit payment against several invoices and the October 6, 2004 letter discharging claimant as defendant's attorney and defendant's refusal to pay the outstanding legal fees, claimant mailed on November 8, 2004, by certified mail return receipt requested, a letter providing the following:

> Pursuant to your request for information regarding arbitration of your refusal to pay my fees, please be advised that the necessary procedures and forms are available to *http:www.nycourts. gov/admin/ feedisupte /1stjd.shtml.* Please contact undersigned if you have any questions.
>
> (Letter dated November 8, 2004 from David B. Calendar, P.C. [claimant] to Doundley Edwards [defendant])

It is settled law that "[W]here an attorney and client cannot agree as to the amount of the attorney's fee, the attorney is required to provide his or her client with 30 days' written notice of the client's right to elect to resolve the dispute by arbitration (see 22 NYCRR 136.5[a])" (*Herrick v. Lyon,* 7 A.D.3d 571, 572, 777 N.Y.S.2d 141 [2nd Dept.2004]; see also *Lorin v. 501 Second Street LLC,* 2 Misc.3d 646, 769 N.Y.S.2d 361 [Civil Court of the City of New York, Kings Co.2003]).

The court is mindful that § 136 et seq., referred to in *Herrick, supra,* (which decision concerned a retainer agreement executed in 1999) was repealed effective January 1, 2002 and replaced by Part 137. However, it has been noted that "compliance with the former part 136 ... (which covered domestic relations matters, an area now subsumed under part 137) was a condition precedent to maintaining an action to recover attorney's fees from a client [citing *Herrick*] ...

Because the former part 136 ... has been subsumed into the current part 137, which covers, with limited exceptions, any civil matter'... it is clear that the expanded provision is to be applied in the same manner as its more limited predecessor, and addresses substantially the same perceived abuses within its wider scope as were addressed by the former part 136 in domestic relations matters". **424 (*Hobson–Williams v. Jackson*, 10 Misc.3d 58, 809 N.Y.S.2d 771 [App. Term, 2nd & 11th Jud. Dists., 2005]). The need for such notice provisions, together with the New *1088 York State Fee Dispute Resolution Program of which they form a vital part, was enunciated by the State legislature in 22 NYCRR § 137.0 in part, as follows: "[the Program] ... provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged."

The form, content and service of such notice is governed by 22 NYCRR § 137.6(a) which provides, in relevant part, the following:

"(1) ... where the attorney and Client cannot agree as to the attorney's fee, 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. The notice:

(i) shall be in a form approved by the board of governor's;

(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".

Subdivision (b) provides, as is relevant hereto, that "[I]f the attorney forwards to the client by certified mail or personal service a notice of the client's right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee ...".

Much was made at trial about the various addresses of defendant (including a residence address in the Bronx, New York, a *1089 P.O. Box address—also in the Bronx, and a Georgia address) and his adamant protest that he failed to receive the purported notice to arbitrate or any invoice: the November 8, 2004 letter was returned for failure of defendant to retrieve after the third notice at his Georgia address and several invoices were likewise returned to claimant after the third notice at defendant's Bronx address. However, the court need not look to the delivery or non-delivery of the documents as the issue of service is not dispositive in this case. Even if there were no question as to service of the purported notice and receipt of same by the defendant, the November 8, 2004 letter utilized by the claimant as the notice is unquestionably defective. It is apparent that the claimant sought to circumvent the explicit notice requirements set forth in 22 NYCRR § 137.6(a) by his own short-cut, to wit, referring the defendant client to a web site (the court noting the absence of any evidence that defendant even had access to such web site). Clearly, the content of such "notice" letter falls woefully short of, and in no manner comports with, the above-mentioned statutory requirements. Therefore, the court finds that the claimant failed to establish that he fulfilled a statutory condition precedent to commence the within claim (see *Herrick v. Lyon, supra*).

**425 Accordingly, judgment is awarded to defendant and the claim is dismissed.

The foregoing constitutes the decision and order of the court.

All Citations

13 Misc.3d 1086, 822 N.Y.S.2d 422, 2006 N.Y. Slip Op. 26402

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12 Misc.3d 1162(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Nassau County, New York.

WEXLER & BURKHART, LLP., Plaintiff,
v.
Latrice GRANT, Defendant.

No. 010296/05.
|
May 25, 2006.

Attorneys and Law Firms

Burkhart Wexler Hirschberg, Garden City, Attorneys for Wexler & Burkhart, LLP.

Opinion

DANIEL R. PALMIERI, J.

*1 Upon the foregoing papers it is ordered that counsel's correspondence dated May 5, 2006 is treated as an application to reargue denial of his prior *ex parte* application for an order of inquest, which order was refused by hand-written endorsement on such order dated May 1, 2006, and is denied.

The undersigned refused to sign the default order/order of inquest presented by the law firm plaintiff because there was no indication of compliance with Uniform Rules regarding fee disputes between attorney and client prior to the commencement of suit (*see,* 22 NYCRR § 137.6(2)[b]). In response, the plaintiff's attorney asserts that the Uniform Rules do not apply because the defendant did not at any time dispute the amount stated on the bills, but rather simply did not pay them. Based on this state of facts, the attorney argues that this means there was no "fee dispute" that would be subject to this section.

This interpretation is untenable and would effectively eviscerate Part 137 of the Rules, a comprehensive scheme "for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation" (22 NYCRR § 137.0). Section 137 .1 is entitled "Application", and at subsection (a) recites that the Part shall apply to all attorneys admitted to practice in New York who undertake representation in any civil matter after January 1, 2002. Against this broad, inclusive statement, subsection (b) lists eight instances/conditions where the Part does not apply. Nowhere among those eight items is there a provision excluding compliance where a client does not object to the bill, but simply does not pay it. Under the well-established statutory construction doctrine of *expressio unius est exclusio alterius,* where exceptions are created as to certain matters, inclusion of such exceptions should be considered to deny the existence of others not mentioned (McKinney's Cons.Laws of NY, Book 1, Statutes § 240; *see Cavallaro v. Nassau County Bd. of Elections,* 2 Misc.3d 880 [2003], *affd as modified* 307 A.D.2d 1003 [2003]; *Sportsmen's Assn. For Firearms Educ. v. Kane,* 178 Misc.2d 185 [1998], *affd* 266 A.D.2d 396 [1999]). Moreover, the Rule itself provides that "An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under this Part of the client's right to pursue arbitration or (ii) that the dispute is not otherwise covered by this Part" (22 NYCRR § 137.6(2)[b]). The Court finds that subsection (ii) is a clear reference to the exclusionary list noted above, as well as being part of a mandatory pleading requirement that was not met in the present case.

Moreover, adopting the movant's position would mean that a client, unschooled in the law and unaware of the fee dispute resolution program established in the Uniform Rules, would lose any chance of arbitrating or mediating bills he or she felt were excessive by simply remaining silent when the bills arrived. It is difficult to imagine how such a result comports with the overall plan evidenced by Part 137.

*2 The Court notes that before Part 137 was promulgated the Appellate Division, Second Department, had held that the predecessor fee dispute arbitration Rule did not apply where the client did not dispute the reasonableness of the fees charged (*Scordio v. Scordio,* 270 A.D.2d 328 [2000]). However, that older Rule (22 NYCRR Part 136 [repealed, effective January 1, 2002]) was limited to domestic relations matters only. It was replaced by the current version that, in its scope and detail, was clearly intended to cast a much wider net and, more to the point here, added a provision placing the burden on the attorney who did not notify the client of the right to arbitrate to plead that the controversy was excepted from the operation of the Part.

The Court's own research has found two reported cases citing *Scordio* as a basis for bypassing Part 137's notice requirements; however, neither discusses the differences between the two versions of the Rule, especially the additional pleading requirement, and the Court declines to

follow them (*see, Rotker v. Rotker,* 195 Misc.2d 768 [2003]; *Helene Greenberg Law Offices v. Disanto,* 5 Misc.3d 130(A) [2004]).

It is of some interest that in a more recent decision dismissing a fee action under the older Part 136, the Appellate Division, Second Department cited with approval a decision of the Appellate Division, First Department, which had held that a client's failure to affirmatively object to the billings could not be used to avoid the notice and pleading requirements of this older Rule (*Herrick v.. Lyon,* 7 AD3d 571 [2004], *citing Paikin v. Tsirelman,* 266 A.D.2d 136 [1999]). In *Scordio,* the Second Department had specifically declined to follow *Paikin;* this indicates that *Scordio* may no longer be good law, even with regard to disputes considered under the older Part 136. As stated above, it was the holding in *Scordio* that the *Rotker* and *Helene Greenberg* courts cited in expressing their views concerning Part 137.

The plaintiff is granted leave to replead and to reapply for an order of inquest upon a demonstration that it has complied with Part 137 of the Uniform Rules, and all other rules applicable to defaults generally, should there be a default.

This shall constitute the Order of this Court.

All Citations

12 Misc.3d 1162(A), 819 N.Y.S.2d 214 (Table), 2006 WL 1490406, 2006 N.Y. Slip Op. 51005(U)

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11 Misc.3d 1072(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Civil Court, City of New York,
New York County.

Olga Berde MAHL, Esq., Plaintiff,
v.
Julia Ayzman RAND, Defendant.

No. 47978 CVN 2005.
|
March 30, 2006.

Attorneys and Law Firms

Brian J. Oberman, Esq., New York, (Stephanie J. Blumstein, Esq., of counsel) for plaintiff.

Julia Ayzman Rand, defendant pro se.

Opinion

DIANE A. LEBEDEFF, J.

*1 This litigation springs from an **attorney fee dispute arbitration** conducted under the Unified Court System's Attorney–Client Fee **Dispute** Resolution Program (22 N.Y.C.R.R. § 137.0, *et seq.*).[1] It places before the court the currently unresolved procedural issue of, where the **arbitration** award is in an amount within a lower court's limited monetary subject matter jurisdiction, what pleading is to be used by a party dissatisfied with the **arbitration** award to secure the trial *de novo* guaranteed by court **rule**.

The need to identify a cognizable pleading is the critical factor upon which this case turns. Although this decision sets forth no global solution, this court holds that, for the purposes of the New York City Civil Court, a petition to vacate the **arbitration** award as a matter of right which therein asserts entitlement to a trial *de novo* is a pleading which may be utilized by a party aggrieved by an **attorney fee dispute arbitration** award in a dollar amount within the court's monetary jurisdiction.

In this instance, the named parties (hereafter, respectively, "attorney" and "client") proceeded through the fee **dispute arbitration** program of a local bar association, which concluded with an **arbitrator's** award of approximately $4,000 in favor of the attorney. Shortly thereafter, the client repeatedly visited and communicated with various clerks in the Civil Court of New York City and attempted to commence a proceeding for a trial *de novo.* Each time, the client was told politely that the Civil Court had no known procedure for commencing an **action** with a demand for a trial *de novo* and the client was **not** advised of what course of **action** to pursue, as was confirmed by a supervising clerk on the record herein. Thereafter, the attorney commenced this **action** to request confirmation of the **arbitration** award (CPLR 7510).

As to the right to a trial *de novo,* a party who **arbitrates** a **disputed** legal fee under the court **rules** has an absolute right to have the matter litigated anew post-**arbitration,** so long as the request for review is timely (22 N.Y.C.R.R. § 137.8[a], "a party aggrieved by the **arbitration** award may commence an **action** in a court of competent jurisdiction within 30 days after the **arbitration** award has been mailed"; 22 N.Y.C.R.R. § 137.2[a], **arbitration** award is "final and binding unless *de novo* review is sought as provided in section 137.8"). As to the court forum to be utilized, the language of the court **rule** referencing a "court of competent jurisdiction" is expanded upon by a supplementary directive that the aggrieved party "may commence an **action** on the merits of the fee **dispute** *in a court with jurisdiction over the amount in dispute* within 30 days after the **arbitration** award has been mailed" (Standards and Guidelines promulgated by the Board of Governors of the New York State Attorney–Client Fee **Dispute** Resolution Program, section 12; emphasis added).

The specific issue raised here—how to secure a trial *de novo* in a court of limited jurisdiction following an **attorney fee dispute arbitration** award—has been met with varying responses. At least **one** City Court permits the filing of a simple demand for a trial *de novo,* which is seen as consistent with the **arbitration** program's goal of a creating a simple and easily accessible method of resolving **attorney fee disputes** (*Borgus v. Marianetti,* 7 Misc.3d 1003 [A], 2005 WL 742300, 2005 N.Y. Slip Op. 50420[U] [City Ct. Rochester 2005, Yacknin, J.], discussing policies underlying the program and referencing bar association support for a simplified review methodology). However, for the purposes of the Civil Court, months after this client's inquiries, clerks were advised that litigants in the position of this client should be referred to the Supreme Court to commence a declaratory judgment **action.**[2]

*2 On the unique facts present, this client has demonstrated timely concrete and confirmed efforts to obtain the judicial

trial *de novo* provided for in the **attorney fee dispute arbitration rules**, in specific compliance with the applicable **rules** directing that she proceed to seek relief in a court with monetary jurisdiction over the **arbitration** award, without receiving alternate directions sufficient to allow preservation of the otherwise unqualified right to a *de novo* review.[3] Because the response she received impeded her access to judicial relief, further relief is warranted.

A careful review of the available remedies leads the court to conclude it is appropriate to deem the client's showing to be a cross petition to vacate the **arbitration** award and, in light of the established facts, grant such cross petition and order that the legal fees claim of the attorney proceed as a plenary **action**. This result is consistent with precedent holding that a party with a right to a post-**arbitration** trial *de novo* may utilize a petition to vacate the award as a matter of right as its initial pleading to place the **dispute** to court.

A similar procedural situation was posed in *Greenberg v. Ryder Truck Rental, Inc.*, 110 A.D.2d 585 (1st Dept.1985), by a litigant who presented a petition to vacate a no-fault **arbitration** award as a matter of right and requested *de novo* review under Insurance Law Section 675(2), which provides that, on certain claims, "the insurer or the claimant may institute an **action** in a court of competent jurisdiction to adjudicate the **dispute** *de novo* " (*see also* 70A N.Y.Jur.2d Insurance § 1811, *Judicial Review De Novo of Master Arbitrator's Award* [2006]). Holding essentially that the petitioner utilized a permissible procedure, the appellate court in *Greenberg v. Ryder Truck Rental, Inc., supra,* concluded that the trial court should have granted the petition to vacate and permitted the matter to proceed to a trial *de novo* as a plenary **action**.[4]

The result reached was found mandated by CPLR 103(c), which states that "If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution." With strong language, the Appellate Division explained as follows:

> "The McLaughlin Practice Commentaries ... note that *dismissal of an action or special proceeding simply because it is brought in the wrong form is forbidden.'* Rather, once jurisdiction is acquired, the court will retain it and direct that the **action** or proceeding continue in its appropriate form. Accordingly, the CPLR, in favoring substance over form, provides for the conversion of **actions** or proceedings into their proper form. * * * * Therefore, the *court below erred in not converting the notice of petition and petition into a summons and complaint and in not reviewing the case on its merits.* " (110 A.D.2d at 586–587; citations omitted; emphasis added.)

*3 Additional support exists for this type of consolidated procedure, supporting vacating an **arbitration** award and then permitting the parties to move forward with plenary claims in the same **action**. CPLR 7502(a)(iii), added by chapter 226 of the Laws of 2000, now provides that "Notwithstanding the entry of judgment [on an application relating to an **arbitrable** controversy], all subsequent applications shall be made by motion in the special proceeding or **action** in which the first application was made." The Court of Appeals, in *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122 (2001), described this provision as "**mandatory**."

In light of the above authorities, the court is satisfied that the aggrieved client here was entitled to petition the Civil Court to vacate, as a matter of right, the legal fee **dispute arbitration** award as a predicate step to obtaining a *de novo* review. The Civil Court will have no difficulty dealing with the a demand for a trial *de novo* because, as an available procedure in the court's entirely distinct in-house program of **arbitration** of certain pending civil cases, demands for trials *de novo* have been interposed for decades on a daily basis (22 N.Y.C.R.R. **Part 28**, Alternative Method of **Dispute** Resolution by **Arbitration**; *see* 22 N.Y.C.R.R. § 28.12[a], as to demand for trial *de novo; see,* summarizing experience with program from its 1979 inception through 1991, Michael Bruno and Joseph L. Latwin, ***Mandatory Arbitration*** *of Civil Cases,* 18 Westchester B.J. 113 [1991]).

As to the exact relief granted herein, the deemed cross petition to vacate the **arbitration** award is granted and the request to confirm such award denied and, from this point forward, this matter—**not** pleaded as a special proceeding—shall continue as a plenary **action** (*Matter of Greenberg,* 70 N.Y.2d 573, 577 [1987], in a trial *de novo* under no-fault provisions, "the entire **dispute** is subject to a plenary judicial adjudication', [which is] something very different from judicial review of some other entity's determination"). The client has indicated agreement to proceed to a trial *de novo.*

Consistent with the court's treatment of the client's papers as seeking relief available in a special proceeding under CPLR

Article 4, the court directs that, should the attorney wish to proceed upon the claim for legal fees, the attorney shall supplement the record by serving and filing a copy of the legal fee bills at issue (*see* CPLR 409) and thereafter file a note of trial expeditiously in order that the triable issues of fact may be "tried forthwith" (CPLR 410). The court directs the filing of the claim for legal fees by the attorney in order to avoid placing upon a client the burden of pleading the opposing party's attorney fee claim, which accords with the principle that the burden of proof on the disputed legal fee is always borne by the attorney (22 N.Y.C.R.R. § 137.7[d], "the burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history"; *Borgus v. Marianetti, supra,* 2005 WL 742300 at *1). In future petitions to vacate fee dispute arbitration awards as a matter of right, it would produce procedural symmetry if any request for a legal fee were either (1) included in the petition, if the attorney is petitioner, or (2) raised in the attorney's answer, if the client is petitioner.

*4 The triable issue here will be "the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances" (22 N.Y.C.R.R. § 137.0). In the evaluation of the reasonableness of the legal fee, the court shall consider all the usual factors bearing upon attorney fees, including the nature and extent of the services, the actual time spent, the necessity therefore, the nature of the issues involved, the professional standing of the attorney and those providing services, and the results achieved (*Jordan v. Freeman,* 40 A.D.2d 656 [1st Dept.1972]; 7 N.Y.Jur.2d Attorneys at Law § 202, *Control by Court* [2006]).

In closing, the court observes that the Office of Alternative Dispute Resolution Programs is entirely correct that a declaratory judgment action may be utilized to obtain a trial *de novo* following a legal fee dispute arbitration award and emphasizes that such Office was not presented with the fact pattern present here, which would have brought to the fore consideration of a petition to vacate an arbitration award as a pleading mechanism available in either the Civil Court or District Courts. It is also noted that the result reached here is fully consistent with the directive of the Board of Governors of the New York State Attorney–Client Fee Dispute Resolution Program that such claims should be presented to the lower courts, from which it is assumed that their goal was to avoid placing upon litigants the difficulty of drafting a complex judgment pleading, to lessen the exposure of both sides to increased fees and complications, and to obviate the possibility of delays flowing from Supreme Court remands of this category of cases to lower courts with monetary jurisdiction over the disputed fee as permitted by Appellate Division rules authorizing such transfers pursuant to CPLR 325(d). It may well be that the Board of Governors will proceed to develop other specific directives or proposed court rules to create a uniform pleading which may be utilized in all lower courts. [5]

Either party may serve a copy of this order upon the appropriate clerk, who shall issue a judgment vacating the arbitration award upon the presentation of appropriate papers. The parties shall thereafter proceed as directed above.

This decision constitutes the order of the court.

All Citations

11 Misc.3d 1072(A), 816 N.Y.S.2d 697 (Table), 2006 WL 825117, 2006 N.Y. Slip Op. 50518(U)

Footnotes

1 The New York court system's program for arbitration of attorney-client fee disputes is applicable to almost all civil matter attorney fee disputes ranging between $1,000 and $50,000 (22 N.Y.C.R.R. Part 137, eff. Jan. 1, 2002), with an absolute right to a judicial trial *de novo* if timely demanded (22 N.Y.C.R.R. § 137 .8[a]). Attorneys are obligated to co-operate with the arbitration program (Disciplinary Rule 2–106[e] of the Code of Professional Responsibility, appearing at 22 N.Y.C.R.R. § 1200.11[e], requiring lawyers to resolve fee disputes by arbitration, and 22 N.Y.C.R.R. § 1215.1[b][3], written letters of engagement to include reference to fee dispute arbitration; *see also,* 22 N.Y.C.R.R. § 1400.1, *et seq.,* as to domestic relation cases and, generally, Norman B. Arnoff and Sue C. Jacobs, *Professional Liability: Mandatory Engagement Letter/ Retainer Pact, Fee–Dispute Arbitration,* N.Y.L.J. Feb. 20, 2002, p. 3, col. 1). The fee arbitration program first applied to certain domestic relation matters (22 N.Y.C.R.R. Part 136, repealed eff. Jan. 1, 2002, except as to then pending arbitrations), and those rules did not provide for vacature as a matter of right, but required a petition brought pursuant to CPLR 7511 (*see,* for example, *In re Serazio–Plant,* 299 A.D.2d 696 [3d Dept.2002], *lv app denied* 100 N.Y.2d 512 [2003], and *Riley v. Coughtry,* 13 AD3d 703 [3d Dept.2004]).

2 An informal memorandum was issued in February of 2006 by the Office of Alternative Dispute Resolution Programs, generally recommending that an aggrieved party should seek a the trial *de novo* by a declaratory judgment action to be commenced in Supreme Court (*see*, for an example of such a declaratory judgment action, *Wagner Davis P.C. v. Finkelstein*, N.Y.L.J., Jan. 25, 2006, p. 19, col. 1 [Sup.Ct. N.Y. Co., Lehner, J.]). If a declaratory judgment pleading were filed in the Civil Court, applicable law would require the action be transferred to the Supreme Court (*see*, collecting authorities, Sterling *National Bank v. Kings Manor, LLC*, 9 Misc.3d 1116[A], 2005 WL 2464167, *7–*9, 2005 N.Y. Slip Op 51604[U] [Civ.Ct. N.Y. Co.2005, Lebedeff, J.]).

3 To the extent that the attorney protests that the client's request for a *trial de novo* was not effectively commenced within the allotted time limits, if this protest sounds in laches, the attorney bears the burden of proof thereon and the attorney here has failed to establish the necessary cognizable prejudice (*Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 173 fn. 4 [2002], "a claim asserted following unreasonable delay may be barred by the equitable doctrine of laches. Laches must be pleaded and proved by one who urges it" [citations omitted]; *Matter of Sheerin v. New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 N.Y.2d 488, 495 [1979], "invocation of the equitable defense of laches ordinarily requires a showing of prejudice").

4 The Appellate Division, First Department, approved of the use of a petition to vacate an arbitration award notwithstanding that CPLR 7511(b), which defines the grounds upon which an arbitration award may be vacated, does not specifically refer to an award which may be vacated as a matter of right. In relation to an arbitration award, the Civil Court has subject matter jurisdiction to vacate, confirm or modify an arbitration award if the award is in an amount within the court's monetary subject matter jurisdiction (N.Y.C. Civ.Ct. A. § 206[b], "Where a controversy has been duly arbitrated and an award made therein is for relief which is within the court's jurisdiction, the court shall have jurisdiction of proceedings under CPLR ... 7510 through 7514"; *see*, same text, Uniform Dist. Ct. Act § 206[b]; *compare* Uniform City Ct. Act § 206 and Uniform Just. Ct. Act § 206; *see MBNA America Bank, N.A. v. Coe*, 2 Misc.3d 355 [City Ct. White Plains 2003, Friia, J.]).

5 This court would not encourage resort to the simplified procedure for court determination of disputes, which is the single form of action in which a contract dispute may be submitted to a court by either contracting party without consideration of pleading and proof burdens (CPLR 3031 through 3037; N.Y.C. Civ.Ct. Act § 910; Uniform City Ct. Act § 910; Uniform Dist. Ct. Act § 910; Uniform Just. Ct. Act § 910). This procedure is disfavored by litigants (Siegel, N.Y. Prac. § 609 [4th ed.], called "last ... in the affections of the New York bar"; *see also*, Jay C. Carlisle, *Simplified Procedure for Court Determination of Disputes under New York's Civil Practice Law and Rules*, 54 Brook. L.Rev. 95, 102 [1988], procedure "not often utilized"). This jurist's experience is that the simplified procedure confounds trial participants and increases uncertainty by reason of such statutory features as the dispensing with many rules of evidence (CPLR 3036[1]). Such procedure cannot be invoked here because the retainer agreement does not explicitly permit its use (CPLR 3033[1]).

End of Document

NICHOLAS A. GABRIELE, P.C.
191 Terry Road
Smithtown, NY 11787
(631) 265-9880
Ngabriele.Esq@gmail.com

Nicholas Gabriele is a 1974 graduate of Stony Brook University and a 1983 graduate of Hofstra Law School.

He has been practicing law for 33 years, and has maintained an office in Smithtown for the past 28 years.

He has a general law practice handling most types of matter, but has over the years, concentrated in matrimonial and family law matters.

He is a past volunteer with, and an officer of the Academy of Law.

His 2015 Second Department Appellate Term case on fee disputes, retainer agreements and finance charges is the first case that comes up on a WestLaw search concerning the same.

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I. Preparation for the Arbitration:

1. Review the client's complaint - **Attachment A**

   (A) Thirty day requirement of **§137.6(b)**
   (B) Determine if there is any merit to the client's complaint

2. Respond with specificity to client's complaint, attaching documentation - **Attachment B**

   (A) Statement of Client's Rights and Responsibilities (matrimonial or family law)
   (B) Retainer Agreement
   (C) Billing statements (in chronological order, with tabs to specific billing entries)
   (D) Other documentation to support billing statement entries
      (1) Time sheets
      (2) File notes
      (3) Copies of motion papers and other submissions to Court (without exhibits), and decisions
   (E) Correspondence exchanged with client regarding future services to be rendered and services actually rendered, as well as prior discussion of any billing or other issues

4. Explain any billing errors uncovered by a review of your billing statements and address any issues (such as delayed billing) - **Attachment C - JOHNNER v. MIMS**, 48 A.D.3d 1104, 850 N.Y.S.2d 786 (4th Dept. 2008); **GRANATO v. GRANATO**, 75 A.D.3d 434, 904 N.Y.S.2d 67 (1st Dept. 2010)

5. SPECIFICALLY INCLUDE any counterclaim for monies owed to you

6. Procedure for response: Serve complete copy of submission upon client, prepare Affidavit of Service and file requisite number of copies with the Suffolk County Bar Association. A timely response to client's request for fee dispute arbitration is critical, but extensions of time to respond can be obtained with a phone call to Tina O'Connor.

II. The Arbitration:

1. Attorney has the burden to prove his or her entitlement to the fee charged. **§137.7(d)**

2. Testify about the provision to the client of the Statements of Client's Rights and Responsibilities form (in matrimonial and family law matters) and your pre-execution discussion of the Retainer Agreement, as well as the particulars of the Retainer Agreement

such as hourly billing rate and other items of relevance to the client's complaint.

3. Specifically address/explain any errors, discrepancies or other issues raised

4. Judgment call to cross-examine client or simply respond to comments made by client

III. **Post-Arbitration Award Options:**

1. Accept award

   (A) Serve award on client and await payment (30 days)
   (B) Close file, if unsuccessful

2. File for a trial *de novo* **§137.9**

   (A) Small Claims Court Complaint - **Attachment D** (www.nycourts.gov/courts/10jd/suffolk/dist/pdf/DC-283web.pdf)

      (1) Pros

         (a) Simpler complaint
         (b) Inexpensive
         (c) Relatively quick - short return date - quick decision

      (2) Cons

         (a) Substantial justice, "substantive law must be adhered to, although procedural matters may be applied considerably more loosely" 28 New York Jurisprudence 2d, Courts and Judges Sect. 31 and 32 - **Attachment E - SCHIFFMAN v. DELUXE CATERERS OF SHELTER ROCK**, 100 A.D.2d 846, 474 N.Y.S.2d 87 (2d Dept., 1984)
         (b) Almost non-existent discovery
         (c) Limitations on nature and extent of trial and judicial patience - intolerance for protracted examination
         (d) More uncompensated time and aggravation

   (B) District Court

      (1) Pros

         (a) Formal complaint, allows for more extensive pleadings
         (b) Usual discovery mechanisms available
         (c) Generally more relaxed attitude toward testimony and exhibits

(2) Cons

(a) Usual expenses of litigation paid by you as the client!
(b) More uncompensated time and aggravation
(c) Uncertainty of results after trial

(C) Treat the Small Claims Court or District Court action as any other case you would handle for a client. In Small Claims Court, have all documents ready as marked exhibits. In District Court, make your complaint complete with all documents which support your claim. Make the record on appeal.

(D) Uncertainty of results after trial - **Attachment F**

(E) Appeal - **NICHOLAS A. GABRIELE, P.C. v. FAY**, 50 Misc.3d 73, 24 N.Y.S.3d 490, 2015 Slip Op. 25396 (2nd Dept. App Term, 2015) - **Attachment G**

IV. **Advice going forward:**

1. Do not have a client sign a Retainer Agreement at the initial consultation. If possible, e-mail the Retainer to the client as a pdf **prior to the initial consultation** to establish proof of pre-execution presentation for review and save the e-mail to the client. If not possible, then explain the Retainer Agreement form and give to the client to review and return at a subsequent time, with retainer fee.

2. Make sure that you have a solid Retainer Agreement (**Attachment H**) that details, among other things, every aspect of the terms of your representation of a client, the manner in which your fee is charged, your billing practices and the requirement that the client review your billing statements on a timely basis and contact you in writing with any questions or objections.

3. At the time of execution of the Retainer Agreement, spend the time necessary to ensure that the client understands all of its terms, especially what legal services will incur a charge and which will not, your hourly rate or other method of charging for services rendered, any administrative or "accounting and bookkeeping" charges for late payment and most important, the uncertainty of the costs of litigation, and your inability to state, with any degree of certainty, what the total cost of the matter will be.

4. Maintain a Client Activity Log or equivalent detailing all legal services rendered, time charged and notes about conversations and activities - **Attachment I**

5. Follow the 60 day rule for billing in matrimonial and family law matters. Ideal practice is to bill every 30 days to avoid surprises (and improve cash flow). If excessive activity, then bill more frequently.

6. Communicate frequently with the client about the services to be rendered, the different

options available and the cost and likelihood of success of each, in advance of rendering the service, whenever possible. Elicit the client's consent in an e-mail or text message and preserve.

7. Print all relevant e-mail communications as pdf's and store in the client's correspondence folder with specific titles for ease of identification - evidence for any future fee or other dispute.

8. Investigate applications to memorialize text messages between yourself and client (such as "Coolmuster Android Assistant" for Android phones). Text message discussions can be critical in proving your position or disproving client's position. Nothing comparable for iPhones, but messages can apparently be printed from the Cloud.

9. When Part 137 notice must be given to a client, mail it by Certified Mail, Return Receipt Requested (required) and First Class Mail (and obtain a Certificate of Mail from Post Office).

10. Do whatever you can to avoid a future fee dispute:

    (A) Solid Retainer Agreement
    (B) Fully explain the Retainer Agreement to the client before execution
    (C) Remind the client in each billing statement about the obligation to review billing statements and comment or question in writing and on a timely basis and effect of no objection (accepted and approved) - **Attachment J**
    (D) Bill regularly and do not allow balances to accrue
    (E) Make it routine to send client copies of all paperwork prepared or received so that client is aware of what is going on in his or her case. Cover letter to explain/elicit comment is helpful.
    (F) Seek to terminate representation once breakdown in attorney/client relations is irretrievable - 'stop the bleeding'
    (G) Cost-benefit analysis of making arbitration mandatory and final in Retainer Agreement
    (H) Cost-benefit analysis of whether to pursue trial *de novo*

11. Note the following cases of particular importance:

    (A) The retainer agreement is an enforceable contract - **SMITH v. GENERAL ACCIDENT INSURANCE CO.**, 91 N.Y.2d 648 (1998)

    (B) Substantial compliance with the provisions of 22 NYCRR § 1400.3 is sufficient and precludes disallowance of fees - **KOETH v. KOETH**, 2002 WL 523109 (2002); **JOHNNER v. MIMS**, 48 A.D.3d 1104, 850 N.Y.S.2d 786 (4th Dept. 2008) [even though 14 month delay in billing, legal fee was allowed]; **EDELMAN v. POSTER**, 72 A.D.3d 182, 894 N.Y.S.2d 398 (1st Dept. 2010); **FLANAGAN v. FLANAGAN**, 267 A.D.2d 80, 699 N.Y.S.2d 406 (1st Dept. 1999) [strict and letter perfect

compliance with the matrimonial rules is not the standard]

(C) "Utter failure to abide by these rules" vitiates the right to legal fees **KAPLOWITZ v. NEWMAN**, 185 Misc.2d 205, 713 N.Y.S.2d 115, 2000 N.Y. Slip Op. 20411 (2d Dept. 2000)

(D) No disgorgement of fees earned, even if non-compliance - **MARKAD v. MARKAD**, 263A.D.2d 470, 692 N.Y.S.2d 733 (2nd Dept. 1999)

(E) Do not render services outside of the scope of your Retainer Agreement with client - **MULCAHY v. MULCAHY**, 285 A.D.2d 587, 728 N.Y.S.2d 90 (2d Dept. 2001)

ATTACHMENT A

(For Office Use Only)
Case No. _____
Date Received:

REQUEST FOR FEE DISPUTE RESOLUTION
(Civil Cases)

1. Name, address and telephone number of client is:
Name: NANCY [redacted]
Address: [redacted]
PT. JEFF STA. N.Y. 11776
Telephone No.: 631- [redacted]

2. The name, address and telephone number of the lawyer or law firm is:
Name: NICHOLAS A. GABRIELE, P.C.
Address: 191 TERRY ROAD
SMITHTOWN, N.Y. 11787
Telephone No.: 631 265- 9880

3. Type of case involved (check all that are applicable):

☐Landlord-Tenant	☐Negligence/PI	☐Real Estate
☐General Civil Litigation	☐Corporate	☐Traffic
☐Malpractice/Medical	☐Family Court/Custody	☐Other_____
☐Family Court/Support	☐Judicial Appointment/FC	_____
☐Wills/Trusts/Estates	☐Appellate	_____
☐Commercial	☒Matrimonial	_____

4. Court in which the civil action was commenced, if applicable (include county): SUPREME Court SUFFOLK County

5. Set forth the date when the lawyer first agreed to handle case:
DECEMBER 28, 2010

6. Attach a copy of the written retainer agreement or letter of engagement between lawyer and client. Attach copies of any other letters or papers that discuss the fee agreement.

7. Describe briefly what was the fee arrangement:
PAID $5,000 RETAINER $350.00 PER HOUR
$275.00 PER HOUR - FIRM'S ASSOCIATE ATTORNEY
$100.00 PER HOUR - LEGAL ASSISTANT
2% ADDED TO EACH BILL - POSTAGE - LOCAL
TELEPHONE CALLS - C ALSO BILLED BY
ATTORNEY AND ASSISTANT....

8. State all amounts paid to the lawyer; provide dates of payment and what the payment was to cover, if applicable:
$5,000 - DECEMBER 21-2010- DISCOVER CARD
$886.30 DECEMBER 27, 2011- CHECK FROM MONEY FOR THE SALE OF MATRITAL PROPERTY: 36 BURNHAM PLACE NESCONSET, N.Y. 11767 CLOSED: DECEMBER 1, 2011.

9. State the total amount of moneys in dispute, including any amount the lawyer says you still owe and any amount you already paid but believe should be refunded (attach a copy of the lawyer's bill, if available):
$1,903.45 UNSURE OF EXACT AMOUNT. THERE ARE NUMEROUS ISSUES OF EXCESSIVE BILLING FOR STANDARD MATTERS: FORM DOCUMENTS REVISIONS MINISTERIAL TASKS OF LEAVING MESSAGES OR CANCELLING AN APPOINTMENT.

10. Have you received a "Notice of Client's Right to Arbitrate" from your attorney: YES (enter "yes" or "no" in space). If yes, please attach a copy.

11. Briefly explain why you disagree with the amount of money for legal services billed, paid, or demanded (use additional sheets, if necessary):

TIME SPENT AND FEE CHARGED WERE EXCESSIVE. THIS MATRIMONIAL MATTER IS RELATIVELY UNCOMPLICATED. NO MINOR CHILDREN. NO REAL SUPPORT DISPUTE. AND ONLY MINOR DISAGREEMENTS OF DISTRIBUTION OF ASSETS. WE NEVER STEPPED FOOT IN COURT. BUT MY BILLING IS IN EXCESS OF $7,000. BILLED IN MY MATRIMONIAL MATTER FOR REAL ESTATE ISSUES THAT SHOULD HAVE BEEN INCLUDED IN MY REAL ESTATE FLAT FEE.

I elect to resolve this fee dispute by arbitration, to be conducted pursuant to Part 137 of the Rules of the Chief Administrator [22 NYCRR] and the procedures of the Suffolk County Bar Association, copies of which I have received. I understand that the determination of the arbitrator(s) is binding upon both the lawyer and client, unless either party rejects the arbitrator's award by commencing an action on the merits of the fee dispute (trial *de novo*) in a court of law within 30 days after the arbitrator's decision has been mailed.

Dated: 9-27-12 Signed: Nancy [redacted]
NANCY
(Print name below signature)

☐ Will be represented by legal counsel
Name_____
Telephone Number_____

Important: Request for Fee Arbitration must be filed with the Suffolk County Bar Association, if the attorney is physically present in Suffolk County (has office in Suffolk) or if the majority of the legal services have been performed in Suffolk County. The Request must be filed within 30 days of the receipt from the lawyer of notice of the client's right to request arbitration. If the client does not file the Request for Fee Arbitration within those 30 days, the client will not be permitted to elect to resolve the fee dispute by arbitration pursuant to Part 137, unless the attorney elects to resolve this matter by arbitration and the written agreement provides for the same. The lawyer is required to provide the client with the address of the Suffolk County Bar Association upon request. A filing fee of $150.00 is required.

Method of Payment:

☒ Filing Fee of $150.00 paid by check is enclosed.*
☐ I Elect to make payment by credit card.
☐ Visa ☐ Master Card ☐American Express ☐Discover

Name on Credit Card: _____
Account #: _____
Expiration:___ / ___
I hereby authorize the Suffolk County Bar Association in assessing a $150.00 charge to the above credit card account.

X_____

☐ Request payment plan.
☐ I request a waiver of fee due to hardship (I understand that I must supply written verification of same).

* the filing fee of $150.00 should be remitted with this form unless a waiver is requested. Please Make check payable to "Suffolk County Bar Association".

Please remit this form with payment to: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY 11788-4357, Attention: Fee Dispute Resolution Coordinator.

ATTACHMENT B

(For Office Use Only)
Case No. _____
Date Received:

REQUEST FOR FEE DISPUTE RESOLUTION
(Civil Cases)

1. Name, address and telephone number of client is:
Name: NANCY [redacted]
Address: [redacted]
ST. JEFF. STA. N.Y. 11776
Telephone No.: 631- [redacted]

2. The name, address and telephone number of the lawyer or law firm is:
Name: NICHOLAS A. GABRIELE, P.C.
Address: 191 TERRY ROAD
SMITHTOWN, N.Y. 11787
Telephone No.: 631-265-9880

3. Type of case involved (check all that are applicable):

☐Landlord-Tenant	☐Negligence/PI	☒Real Estate
☐General Civil Litigation	☐Corporate	☐Traffic
☐Malpractice/Medical	☐Family Court/Custody	☐Other_____
☐Family Court/Support	☐Judicial Appointment/FC	_____
☐Wills/Trusts/Estates	☐Appellate	_____
☐Commercial	☐Matrimonial	_____

4. Court in which the civil action was commenced, if applicable (include county): NOT APPLICABLE Court SUFFOLK County

5. Set forth the date when the lawyer first agreed to handle case:
DO NOT HAVE SIGNED CONTRACT TO HANDLE REAL ESTATE CLOSING.

6. Attach a copy of the written retainer agreement or letter of engagement between lawyer and client. Attach copies of any other letters or papers that discuss the fee agreement.

7. Describe briefly what was the fee arrangement:

ATTACHED PLEASE FIND RETAINER AGREEMENT I DECLINED TO SIGN. HAD SEVERAL CONVERSATIONS WITH MR. GABRIELE NOT TO USE HIM FOR REAL ESTATE ISSUE. FELT IT WAS A CONFLICT OF INTREST. MY CONCERN WAS IGNORED. A FLAT FEE OF $1,365.00 PAID AT

CLOSING OF MATRITAL PROPERTY:
[redacted] NESCONSET, N.Y. 11767
DECEMBER 1, 2011.

8. State all amounts paid to the lawyer; provide dates of payment and what the payment was to cover, if applicable:
$1,365.00 AT CLOSING. SUBSEQUENTLY BILLED AN ADDITIONAL $1,606.50

9. State the total amount of moneys in dispute, including any amount the lawyer says you still owe and any amount you already paid but believe should be refunded (attach a copy of the lawyer's bill, if available):
$1,606.50 ADDITIONAL BILLING. REAL ESTATE MATTERS BILLED TO MY MATRIMONIAL ACCOUNT.

10. Have you received a "Notice of Client's Right to Arbitrate" from your attorney: YES (enter "yes" or "no" in space). If yes, please attach a copy.

11. Briefly explain why you disagree with the amount of money for legal services billed, paid, or demanded (use additional sheets, if necessary):

I WAS CHARGED MONIES OVER AND ABOVE THE $1,365.00 FLAT FEE. IN THE AMOUNT OF $1,606.50 I WAS ALSO BILLED ON MY MATRIMONIAL ACCOUNT. FOR MATTER THAT SHOULD HAVE BEEN INCLUDED IN MY FLAT FEE. ALTHOUGH I DID NOT AGREE TO PAY THE AMOUNT ABOVE MY FLAT FEE THESE AMOUNTS WERE

EXCESSIVE. IT IS ALSO MY FEELING THE AMOUNT CHARGED SHOULD BE BILLED TO MY SOON TO BE EX-HUSBAND THOMAS J. FAY AS HE IS ALSO RESPONSIBLE FOR ISSUES REGARDING MATRITAL PROPERTY: 36 BURNHAM PLACE, NESCONSET, N.Y. 1176

I elect to resolve this fee dispute by arbitration, to be conducted pursuant to Part 137 of the Rules of the Chief Administrator [22 NYCRR] and the procedures of the Suffolk County Bar Association, copies of which I have received. I understand that the determination of the arbitrator(s) is binding upon both, the lawyer and client, unless either party rejects the arbitrator's award by commencing an action on the merits of the fee dispute (trial *de novo*) in a court of law within 30 days after the arbitrator's decision has been mailed.

Dated: 9-27-12 Signed: Nancy [redacted]
NANCY
(Print name below signature)

☐ Will be represented by legal counsel
Name_____
Telephone Number_____

Important: Request for Fee Arbitration must be filed with the Suffolk County Bar Association, if the attorney is physically present in Suffolk County (has office in Suffolk) or if the majority of the legal services have been performed in Suffolk County. The Request must be filed within 30 days of the receipt from the lawyer of notice of the client's right to request arbitration. If the client does not file the Request for Fee Arbitration within those 30 days, the client will not be permitted to elect to resolve the fee dispute by arbitration pursuant to Part 137, unless the attorney elects to resolve this matter by arbitration and the written agreement provides for the same. The lawyer is required to provide the client with the address of the Suffolk County Bar Association upon request. A filing fee of $150.00 is required.

Method of Payment: I WAS INSTRUCTED BY TINA TO PAY ONE $150.00 FEE. AS I WOULD ONLY HAVE ONE COURT DATE TO ADDRESS BOTH ISSUES. THANK-YOU

☐ Filing Fee of $150.00 paid by check is enclosed.*
☐ I Elect to make payment by credit card.
☐ Visa ☐ Master Card ☐ American Express ☐ Discover

Name on Credit Card: _____
Account #: _____
Expiration: ___/___
I hereby authorize the Suffolk County Bar Association in assessing a $150.00 charge to the above credit card account.

X_____

☐ Request payment plan.
☐ I request a waiver of fee due to hardship (I understand that I must supply written verification of same).

* the filing fee of $150.00 should be remitted with this form unless a waiver is requested. Please Make check payable to "Suffolk County Bar Association".

Please remit this form with payment to: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY 11788-4357, Attention: Fee Dispute Resolution Coordinator.

SCBA Form 137-1

ATTACHMENT C

(For Office Use Only)
Date Received:

Case No. [redacted]

Matter of the Fee Arbitration between
NANCY [redacted]

Client,

-and-

NICHOLAS A. GABRIELE
Attorney.

RESPONSE TO REQUEST FOR FEE ARBITRATION TO BE FILED WITHIN 15 DAYS OF MAILING OF COMPLAINT

1. (a) Type of case: Divorce and Real Estate (Sale)
   (b) Date representation commenced: December 21, 2010
   (c) Court where case was filed, if applicable: Supreme Court Suffolk County

2. Attach a copy of the written retainer agreement or letter of engagement with the client and copies of any other letters or papers that discuss the fee arrangement.

3. Describe briefly what was the fee arrangement:
Initial retainer of $5,000.00, deposited into escrow account; All legal services billed at $350.00 per hour for attorney, $275.00 for Associate Attorney & $100.00 per hour for legal Assistant. All time expended in travel at on-half (1/2) the hourly billing rate.

4. Attach copies of all itemized bills or bills submitted to the client.

5. Attach copies of all time records maintained in this case.

6. Set forth monies received by attorney on the client's behalf:

Date Received	Amount
12/21/10	$5,000.00 *
12/01/11	$1,375.00 **
12/27/11	$ 886.30 *

7. State the amount of the fee, if any, that remains owing to attorney by the client, for which lawyer is asserting a counterclaim: _____

8. State attorney's response, if any, to the client's answer to Question 10 of

* Matrimonial file retainer fee payment
** Real estate legal fee payment
* Matrimonial fee payment

the Request for Fee Arbitration form, which explains why the client disagrees with the amount of money the attorney claims is owed by the client:

SEE ATTACHED RESPONSE

Certification

I hereby certify and affirm, under penalty of perjury, that all of the foregoing statements made by me are true, that all documents attached are true, and that I have, contemporaneously with filing this form with the Suffolk County Bar Association, mailed a copy by regular mail to the client.

Dated: 12-03-12

Signed: Nicholas A Gabriele

NICHOLAS A. GABRIELE
[Print name below signature]

IMPORTANT: The attorney must file the Response to Request for Fee Arbitration with the Suffolk County Bar Association within fifteen (15) days of mailing.

ADDENDUM

11. In brief, all of the time charges for the legal services rendered to Ms. Client during my representation of her in her matrimonial action, in connection with the sale of the former marital residence and in the resolution of the boundary line issues which arose out of the sale of the former marital residence, were all necessary, reasonable in terms of the amount of time involved and the dollar amount charged, and as a review of all of the billing statements issued to Ms. Client (and her husband with respect to the resolution of the post-closing boundary line issues will unequivocally reveal), understated in comparison to the actual time and charges involved in many services rendered to her or on her behalf. In other words, not only was Ms. Client not overcharged as she alleges, but she was actually undercharged as a result of the numerous discounts I afforded her throughout my representation of her.

Collectively annexed hereto as **Exhibit "A"** are copies of the all of the billing statements issued to Ms. Client (accompanied by copies of the escrow checks used to make payment and an escrow analysis showing the status of her 'account' with me after each payment). As a review of the same will indicate, I have afforded Ms. Client numerous discounts I the amounts billed to her for various legal services, either reducing the time billed (and therefore the amount charged) or eliminating a time charge altogether. In all, Ms. Client was billed a total of $7,700.50 ($210.00 of which was for the purchase of the Index Number for the action for divorce in September, 2011) for all legal services rendered, and her actual billing, if all of the time actually expended on her behalf had been billed to her, would have been at least $1,190.00 higher.

Ms. Client was also not charged a "flat fee" of $5,000.00 for the divorce. My Retainer Agreement, a copy of which (with a copy of the signed Statement of Client's Rights) is annexed hereto as **Exhibit "B"**, expressly states that the total amount of the legal fee to be incurred in the course of the matrimonial action is unknown, and could not be known for a number of reasons. The $5,000.00 is a "retainer" fee of which any unused portion would be refunded or any amounts charged in excess would be billed to the client.

In a letter to me dated August 7, 2012, almost five (5) months after she discharged me, she indicated that she was contesting the amounts charged to her for the balance of the matrimonial legal fee and the boundary line issue fee. A copy of her letter is annexed hereto as **Exhibit "C."** In my letter response to her dated August 30, 2012, a copy of which is collectively annexed hereto as part of **Exhibit "C"** and which accompanied the Notice of Client's Right to Arbitrate served upon Ms. Client, I requested that she provide me with her comments on my billing in an effort to amicably resolve whatever dispute she may have had

with, without having to go through this process. Ms. Client did not respond to my request.

With respect to Ms. Client's 'specific' response to the Request to Arbitrate, I offer the following:

Real Estate Transaction - Sale and Post-Closing Boundary Line Issues:

At the outset, insofar as the real estate transaction for the sale of the former marital residence is concerned, I do not have any recollection of Ms. Client expressing any concern of a 'conflict of interest' which she now claims to have had, nor do I have any records of any letter, e-mail or other written statement of such an objection. If she had voiced any concern or objection, then I would have discussed the same with her to allay her concern or objection, and if unsuccessful in doing so, then I would not have represented her in the sale. I do not 'force' my representation on any client, and Ms. Client would have been free to retain any other attorney of her choosing at any time during the transaction, both prior to finding a buyer and up until the day of closing.

Quite frankly, I would have wanted to be involved in the sale even if she had retained other counsel due to the particular facts and circumstances of the matrimonial action, so as to ensure that her interests were protected.

Because Ms. Client had initially listed the house for sale (with a realtor she had selected) at price much higher than it should have been listed, it took quite a while to find a buyer, and at that, the buyer only came into the picture once the listing price had been lowered. The final sale price was considerably lower than the original listing price.

As for the copy of the Real Estate Retainer Agreement provided by Ms. Client in her Request papers, I use a written Retainer to explain to clients the nature and extent of my representation in a real estate transaction, what legal services are involved and to clarify for clients what is and is not covered by the basic legal fee. Since she was an existing client, the fact that she did not sign the Retainer was an oversight on my part, but it is of no consequence because a Retainer is not required in a real estate matter of this type.

As a review of the Retainer Agreement will reveal, an ordinary real estate transaction involves between 10 and 15 hours of work from initial interview to closing. Since I regularly bill for legal services I render at the rate of $350.00 per hour, a real estate transaction, if billed at regular hourly billing rates, would cost a client significantly more than my usual and customary, flat rate real estate retainer fee of $1,500.000.

It is important to note also that my regular real estate retainer fee was discounted, as a courtesy to Ms. Client as an existing client, without a request by her for a discount, **from $1,500.00 to $1,350.00.**

The amount paid to me at the closing of title on December 1, 2012, as and for my legal fee (and reimbursement of expenses) was **$1,375.000, not $1,365.00** as Ms. Client has stated. The legal fee for my representation of Ms. Client in this real estate transaction was paid to me by the Purchaser's bank from the Purchaser's mortgage proceeds as part of the purchase price and adjustments at closing. Mr. Client's attorney, Richard W. Morrison, Esq., received the same amount at closing for representing Mr. Client as a seller. A copy of my paid real estate billing statement for this transaction is collectively annexed hereto as **Exhibit "D,"** along with copies of the bank attorney's check disbursement list from the December 1, 2011 closing and a copy of the bank check issued to me in payment of my fee.

As the attorney representing Ms. Client in connection with the sale of the former marital residence,

(A) I reviewed and modified the terms of the listing agreement with the realtor (Ms. Client had selected) so as to protect her as a seller (a copy of which is annexed hereto as **Exhibit "E"**);

(B) I modified the terms of the "Office Exclusive Certification" which the realtor had prepared, did not understand herself and which Ms. Client had signed not realizing that she was giving an exclusive listing to the realtor **and specifically directing that the house not be listed under a Multiple Listing Service arrangement**. This, if left uncorrected, would have severely limited the exposure and marketability of the house. A copy of the modified and limited Office Exclusive form is collectively annexed hereto as part of **Exhibit "E"**);

(C) I prepared the Contract of Sale and negotiated certain modifications, such as the abandonment of the oil tank;

(D) I was the 'Seller's attorney' who primarily dealt with the Purchaser's attorney, the title insurance company and the Clients' mortgagees;

(E) I prepared all of the documents (Bargain and Sale Deed with covenants, Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate and Certification of Exemption from the Payment of Estimated Personal Income Tax (TP-584) and Real Property Transfer Report (RP-5217) for the closing of title; and

(F) I dealt with the Purchaser's attorney and the Purchaser's title insurance company when the four (4) issues with the boundary lines of the Clients' property arose on the evening before the closing of title and threatened to cancel the closing (which would have cost the Clients an additional $8,000.00 per month in withdrawals from Mr. Client's retirement account for each month of a delayed closing). It was my offer, on the evening before the closing of title, to give an Undertaking at closing obligating myself to contact

each of the Clients' four (4) neighbors and resolve the boundary line issues that allowed the closing of title to proceed. A copy of the Undertaking is annexed hereto as **Exhibit "F"**.

It was my retention of the sum of $10,000.00 of the Sellers' net sale proceeds in escrow, as agreed to with the Purchaser's attorney, to ensure the timely resolution of the boundary line issues that facilitated the Purchaser's attorney's agreement to allowing the closing to take place on December 1, 2011 and the Undertaking.

It is also important to note that new attorneys which Ms. Client retained to represent her in the matrimonial and post-closing real estate matters did nothing for several months to address the issue of the potential forfeiture of $6,000.00 of the $10,000.00 held in escrow which would have occurred on June 1, 2012 if all of the boundary line issues had not been resolved by that date. As of the date of Ms. Client's discharge of me as her attorney, I had already resolved three (3) of the four (4) boundary line issues, and pursuant to the terms of the Undertaking, $6,000.00 of the monies held in escrow, would have had to have been paid over to the Purchaser if the fourth issue were not resolved by June 1, 2012. I repeatedly wrote to the attorneys to effectuate an extension of time to accomplish the resolution of the fourth boundary line issue, which was ultimately granted. Copies of my correspondence and the extension that was granted are collectively annexed hereto as **Exhibit "G."**

Ms. Client apparently paid to have the fence (which was at the heart of the fourth boundary line issue) moved, thereby resolving the same and allowing for the $10,000.00 in escrow to be released to and divided equally between her and her husband **after reimbursement to Ms. Client for the cost of moving the fence and after the payment of my legal fee.**

Insofar as the legal fee for the post-closing boundary line issue is concerned, it would appear that Ms. Client does not understand that the legal fee I charged for my services in trying to resolve the four (4) boundary lines (and actually resolving three (3) of the four (4) issues) is to be paid **as a joint expenses of her and husband** out of the $10,0000.00 escrow fund I maintained from the closing, prior to the distribution of the then-remaining balance to her and her husband. That is why the billing statement is addressed to both her husband and her. Therefore, the legal fee and disbursements **is already allocated between her and her husband as a shared expense, one-half (½) each, the full amount billed is not her expense alone.**

A review of the copy of the billing statement issued to both Mr. Client and Ms. Client annexed hereto as **Exhibit "H"** will reveal that none of the time charges enumerated therein are excessive. Furthermore, what is not reflected in the billing statement is the fact that almost all of the services rendered were rendered **after 5:00 P.M. (which is the usual end of the regular business day), so as to accommodate the work schedules of the neighbors**

whom I had to meet with to secure the execution of the Affidavits. Ms. Client was not charged extra charge for these 'after-hours' legal services which were necessary to accomplish the task for which the Undertaking had been given at the closing of title on December 1, 2011.

Matrimonial Legal Fee:

Instead of providing the Fee Dispute Committee and me with a detailed and specific written statement of her **previously undisclosed** objections to my billing in her matrimonial action, Ms. Client has chosen to mark comments on **some** of the billing statements issued to her during the course of my representation of her. Unfortunately, her comments are incomplete, imprecise, incorrect, in some instances, myopic and late, being made as much as a year after the same were billed to her.

In an attempt to respond to Ms. Client's notes, I offer the following chart to simplify the same:

Date of Statement	Time in Issue	Date of Entry	Ms. Client's Comment	Attorney Response
03/07/11	0.2	02/18/11	Boiler Plate	Ms. Client makes reference to the Multiple Listing Service Agreement she signed with the realtor, however, as a review of **Exhibit "E"** will reveal, I modified the Listing Agreement to afford Ms. Client certain protections. The services rendered to Ms. Client which I discounted from "1.0 hr." to "0.2 hr.", a $280.00 discount, is completely overlooked. In addition, I question the extent of Ms. Client's knowledge of 'Boiler Plate' language in Multiple Listing Service Agreements?

03/07/11	1.2	02/27/11 02/28/11 03/03/11 03/06/11	No comment given	While there is nothing for me to respond to, I do, however, note that this particular billing statement reflects a total of **1.6 hours of services rendered to Ms. Client for which no legal fee had been charged, a savings of $560.00 to Ms. Client**
03/07/11	0.4	02/08/11 03/01/11	No comment given	Again, there is nothing to which I can respond
10/31/11	0.2	08/25/11	What	A copy of the requested e–mail to which this entry refers is annexed as **Exhibit "I"; Please note that the copy also contains at least 8 brief e-mails sent to or received from the husband's attorney for which no time was billed to Ms. Client.**
10/31/11	0.2	09/06/11	Billing me to talk to Asst; Asst billing for same	The entry reflects billing for 3 items, the total time for which exceeded the "0.2 hrs" (7-12 minutes) billed; Assistant actually did the work of re-dating the Summons with Notice.
10/31/11	0.5	10/12/11	Should be separate	Why?
10/31/11	0.4	10/15/11	Part of R/E	The correspondence to the mortgagees were attempts to elicit leniency from the mortgagees for late payments and to advise of pending sale of former marital residence. **Exhibit "J"**

10/31/11	0.1	10/31/11	R/E	My communication with Chase Bank was in connection with the requests referred to in the 10/15/11 entry. It was not part of the real estate transaction.
10/31/11	0.3	09/06/11	Unknown	?
10/31/11	0.1	09/06/11	No atty did it	My Legal Assistant performed this work, and it expressly states so in the billing section. Her rate is $100.00 per hour, as compared with my rate of $350.00 per hour.

I believe that the foregoing chart, and a review of the comments made by Ms. Client on the copies of the billing statements which she attached to her Request for Arbitration, will confirm the absence of any justified complaint on Ms. Client's part.

Moreover, each billing statement issued to Ms. Client, was issued in a timely fashion and contained the following notice :

> "Kindly review the billing statement and promptly advise this office of any discrepancies or errors."

It is important to note that I did not receive any written objection to any of the entries made on any of the billing statements issued to Ms. Client, and I cannot recall even having had a discussion with Ms. Client about any billing statement. As there was no comment whatsoever from Ms. Client, let alone a complaint about a discrepancy or error, until just prior to her filing of her Request for Fee Arbitration on September 27, 2012. In fact, annexed hereto as **Exhibit "K"** is a copy of a hand-written note from Ms. Client, dated February 13, 2012 (slightly more than a month before she discharged me) and received by my office on February 15, 2012, saying "Much thanks and appreciation, Nancy."

I had no indication of any problems or dissatisfaction on the part of Ms. Client up until the moment of discharge.

While I understand Ms. Client's overall dissatisfaction with the tremendous disruption of her life caused by the need to divorce her husband and sell her house, I do not understand why she has directed her anger toward me in this fashion. I did everything possible to minimize her legal fees throughout my representation of her, and as she was the close friend of an old friend of mine, I did everything possible to minimize the stress associated with the divorce and the sale of the former marital residence. In fact, I even drove

her to the closing of title on December 1, 2011 (thinking it might be upsetting to her) and then we went to lunch afterwards to celebrate the sale of the house and moving one step closer to a global resolution of her difficulties.

In conclusion, the legal fees charged to Ms. Client in the matrimonial action, the real estate transaction for the sale of the former marital residence and the resolution of three (3) of the four (4) post-closing, boundary line issues were all very reasonable, justified and well-earned. I have corrected a small error in the final billing statements issued to Ms. Client and have issued amended billing statements for July, 2012, August, 2012 and October 2012, copies of which are collectively annexed hereto as **Exhibit "L."**. Currently, Ms. Client owes me the sum of $1,949.08, and it is this amount which I am seeking from her, plus a simple interest finance charge in accordance with the Retainer Agreement through the date of payment. While I am entitled to this amount on a *quantum meruit* basis, I will honor the courtesy discounts which I have afforded by reason of my friendship with the person who initially referred Ms. Client to me for the divorce.

Dated: Smithtown, New York
December 3, 2012

Respectfully submitted,

_____

NICHOLAS A. GABRIELE, P.C.
191 Terry Road
Smithtown, NY 11787
(631) 265-9880

48 A.D.3d 1104, 850 N.Y.S.2d
786, 2008 N.Y. Slip Op. 00849

****1** Catherine Johnner, Respondent
v
Percy D. Mims, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
06-03351, 211
February 1, 2008

CITE TITLE AS: Johnner v Mims

HEADNOTE

Husband and Wife and Other Domestic Relationships
Counsel Fees

Offermann, Cassano, Greco, Slisz & Adams, LLP, Buffalo (Joan Casilio Adams of counsel), for defendant-appellant.
Erickson Webb Scolton & Hajdu, Lakewood (Paul V. Webb, Jr., of counsel), for plaintiff-respondent.

Appeal from an order of the Supreme Court, Chautauqua County (Stephen W. Cass, A.J.), entered November 1, 2006 in a matrimonial action. The order awarded plaintiff counsel fees of $60,425.

It is hereby ordered that the order so appealed from is unanimously affirmed with costs.

Memorandum: Supreme Court did not abuse its discretion in granting in part plaintiff's application for counsel fees in this matrimonial action (*see* Domestic Relations Law § 237 [a]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *see also Matter of Grald v Grald*, 33 AD3d 922 [2006]). The award of counsel fees was based upon evidence presented at the hearing ***1105** on plaintiff's application for those fees, as well as upon evidence presented during the 26-day trial (*see Matter of Buono v Fantacone*, 252 AD2d 917, 919 [1998]; *see also McArthur v Bell* [appeal No. 2], 201 AD2d 974, 975 [1994], *lv dismissed* 83 NY2d 906 [1994], *lv denied* 85 NY2d 809 [1995]).

Defendant contends that the court erred in awarding plaintiff counsel fees because plaintiff's attorney failed to provide plaintiff with written, itemized bills at least every 60 days (*see* 22 NYCRR 1400.2, 1400.3). We reject that contention. "[Plaintiff's] attorney complied with 22 NYCRR part 1400 by providing [plaintiff] with the requisite statement of rights and responsibilities and by executing the requisite written retainer agreement with her" (*Matter of Winkelman v Furey*, 281 AD2d 908, 908 [2001], *affd* 97 NY2d 711 [2002]; *see also Mulcahy v Mulcahy*, 285 AD2d 587, 588 [2001], *lv denied* 97 NY2d 605 [2001]; *cf. Hunt v Hunt*, 273 AD2d 875, 876 [2000]). Although plaintiff's attorney waited until December 2005 to bill plaintiff for services rendered between August 2004 and December 2005, the right to be billed at least every 60 days is a right afforded to plaintiff, not defendant, and plaintiff waived that right by failing to object to the December 2005 bill (*see Winkelman*, 281 AD2d at 908; *Webbe v Webbe*, 267 AD2d 764, 765 [1999], *lv denied* 95 NY2d 753 [2000]). Denial of plaintiff's application on that ground would result in a windfall to defendant (*see Webbe*, 267 AD2d at 765).

We have considered defendant's remaining contention and conclude that it is without merit. Present—Hurlbutt, J.P., Smith, Fahey, Peradotto and Pine, JJ.

75 A.D.3d 434, 904 N.Y.S.2d
67, 2010 N.Y. Slip Op. 05884

**1 Barbara Granato, Plaintiff
v
Pasquale Fabio Granato, Respondent.
Diahn W. McGrath, Nonparty Appellant.

Supreme Court, Appellate Division,
First Department, New York
July 1, 2010

CITE TITLE AS: Granato v Granato

HEADNOTE

Attorney and Client
Compensation
Ratification of Unsigned Retainer Agreement

Diahn W. McGrath, New York, appellant pro se.
Eaton & Van Winkle LLP, New York (Robert N. Swetnick of counsel), for respondent.

Order, Supreme Court, New York County (Sue Ann Hoahng, Special Ref.), entered on or about May 11, 2009, which granted defendant's motion to dismiss his former attorney's motion for additional legal fees and ancillary relief, and denied attorney Diahn W. McGrath's motion for legal fees and ancillary relief, unanimously reversed, on the law, with costs, defendant's motion denied and McGrath's granted, and the matter remanded for determination of the amount of reasonable legal fees recoverable by McGrath.

Defendant opposes his former attorney's application for additional legal fees on the ground that she failed to comply with the rules governing matrimonial retainer agreements (22 NYCRR part 1400). We find that McGrath substantially complied with the rules and therefore is not precluded from recovering reasonable fees for services rendered (*see Flanagan v Flanagan*, 267 AD2d 80 [1999]). The record establishes that, although McGrath prepared and sent defendant a retainer agreement, defendant, who does not deny that he received the agreement, never signed and returned a copy of it to her. However, it also shows that defendant paid the retainer fee of $7,500 provided for in the agreement, and that, over the course of two years, McGrath rendered services to him, he received numerous billing statements from her and made extensive payments, and he never objected to any of the bills until after he discharged her in July 2008. Under these circumstances, we find that, notwithstanding that he never returned a signed copy to McGrath, defendant ratified the retainer agreement (*see Matter of Edelstein v Greisman*, 67 AD3d 796, 797 [2009]).

Defendant's contention that the retainer agreement did not adequately apprise him of his right to seek arbitration of any fee dispute is belied by the fact that the standardized statement of client's rights and responsibilities (reproduced from 22 NYCRR 1400.2), which expressly includes this right, was ap *435 pended to the agreement. His contention that McGrath failed to submit written statements at least every 60 days, as the retainer agreement provided for, is also unavailing, since by failing to object to any of her bills until after he discharged her in July 2008, he **2 waived his right to be billed at least every 60 days (*see Johnner v Mims*, 48 AD3d 1104 [2008]). Concur—Andrias, J.P., Friedman, McGuire, Acosta and DeGrasse, JJ.

ATTACHMENT D

COURT DATE

SUFFOLK COUNTY DISTRICT COURT
COMPLAINT FORM

INDEX NO

TIME & DISTRICT

DATE MAILED

TYPE OR PRINT IN BLACK INK

CHECK ONE TYPE OF CLAIM: ◯ SMALL CLAIM ◯ COMMERCIAL CLAIM ◯ CONSUMER TRANSACTION

CHECK ONE SESSION: ◯ DAY COURT ◯ NIGHT COURT

PLAINTIFF'S NAME AND ADDRESS *If plaintiff is a business you must enter your true business name.*	DEFENDANT'S NAME AND ADDRESS *If defendant is a business you must enter its true business name.*
Last Name, First Name or True Business Name	*Last Name, First Name or True Business Name*
Street Address (PO Box alone is not acceptable)	*Street Address (PO Box alone is not acceptable)*
City, State, ZIP	*City, State, ZIP*
Telephone Number:	Telephone Number:
◯ Additional Plaintiff ◯ Additional Defendant	◯ Additional Plaintiff ◯ Additional Defendant
Last Name, First Name or True Business Name	*Last Name, First Name or True Business Name*
Street Address (PO Box alone is not acceptable)	*Street Address (PO Box alone is not acceptable)*
City, State, ZIP	*City, State, ZIP*
Telephone Number:	Telephone Number:

If you need to list more than four parties, submit additional pages as needed, and check here: ☐

CHECK ONE CAUSE OF ACTION:

- ☐ (5) PERSONAL INJURIES
- ☐ (10) PROPERTY DAMAGE
- ☐ (15) LOSS OF PERSONAL PROPERTY
- ☐ (20) GOODS SOLD AND DELIVERED
- ☐ (25) BREACH OF CONTRACT OR WARRANTY
- ☐ (35) WORK, LABOR AND SERVICES
- ☐ (40) MONIES DUE
- ☐ (50) PAYMENT OF LOAN
- ☐ (70) REFUND ON DEFECTIVE MERCHANDISE
- ☐ (80) REFUND ON DEFENDANT'S DEFECTIVE WORK, LABOR AND/OR SERVICES
- ☐ (85) OTHER CAUSE OF ACTION

BRIEFLY STATE DETAILS OF YOUR CLAIM:

TOTAL AMOUNT OF DAMAGES: $

The undersigned acknowledges that he/she has been advised that **supporting witnesses, account books, receipts and other documents required to establish the claim herein must be produced at the hearing**. The undersigned further certifies to the best of his/her knowledge, the defendant is not in the military service.

If this is a complaint filed as a Commercial Claim (UDCA §1803-A), the undersigned hereby certifies that no more than five (5) actions or proceedings (including the instant action) pursuant to the commercial claims procedure have been initiated in the courts of this state during the present calendar month.

THIS FORM MUST BE SIGNED IN THE PRESENCE OF A COURT CLERK OR NOTARY

DATED: _____

_____
PLAINTIFF

_____
CLERK OR NOTARY

_____
AS AUTHORIZED AGENT OF PLAINTIFF

_____
AS PARENT AND NATURAL GUARDIAN

TRIAL

SUFFOLK COUNTY DISTRICT COURT
COMPLAINT FORM

COURT/DATE

ISSC -169/13
INDEX NO

TIME & DISTRICT

DATE MAILED

TYPE OR PRINT IN BLACK INK

CHECK ONE TYPE OF CLAIM: (•) SMALL CLAIM ( ) COMMERCIAL CLAIM ( ) CONSUMER TRANSACTION

CHECK ONE SESSION: ( ) DAY COURT ( ) NIGHT COURT

PLAINTIFF'S NAME AND ADDRESS *If plaintiff is a business you must enter your true business name.*	DEFENDANT'S NAME AND ADDRESS *If defendant is a business you must enter its true business name.*
NICHOLAS A. GABRIELE, P.C. *Last Name, First Name or True Business Name*	NANCY [redacted] *Last Name, First Name or True Business Name*
191 Terry Road *Street Address (PO Box alone is not acceptable)*	[redacted] *Street Address (PO Box alone is not acceptable)*
Smithtown, NY 11787 *City, State, ZIP*	Port Jefferson Sta., NY 11776 *City, State, ZIP*
Telephone Number: (631) 265-9880	Telephone Number (631) [redacted]
( ) Additional Plaintiff ( ) Additional Defendant	( ) Additional Plaintiff ( ) Additional Defendant
Last Name, First Name or True Business Name	*Last Name, First Name or True Business Name*
Street Address (PO Box alone is not acceptable)	*Street Address (PO Box alone is not acceptable)*
City, State, ZIP	*City, State, ZIP*
Telephone Number:	Telephone Number:

If you need to list more than four parties, submit additional pages as needed, and check here: ☐

CHECK ONE CAUSE OF ACTION:

- ☐ (5) PERSONAL INJURIES
- ☐ (10) PROPERTY DAMAGE
- ☐ (15) LOSS OF PERSONAL PROPERTY
- ☐ (20) GOODS SOLD AND DELIVERED
- ☐ (25) BREACH OF CONTRACT OR WARRANTY
- ☒ (35) WORK, LABOR AND SERVICES
- ☐ (40) MONIES DUE
- ☐ (50) PAYMENT OF LOAN
- ☐ (70) REFUND ON DEFECTIVE MERCHANDISE
- ☐ (80) REFUND ON DEFENDANT'S DEFECTIVE WORK, LABOR AND/OR SERVICES
- ☐ (85) OTHER CAUSE OF ACTION

BRIEFLY STATE DETAILS OF YOUR CLAIM:

Defendant retained Plaintiff to represent her in an action for divorce & the sale of her house. Boundary line issues arose in connection with the sale of the house. Plaintiff agreed to resolve the issues & resolved 3 of the 4 issues before Defendant retained another attorney. Defendant did not pay the balance of the legal fees due Plaintiff, though duly demanded.

TOTAL AMOUNT OF DAMAGES: $ $2,752.33

The undersigned acknowledges that he/she has been advised that supporting witnesses, account books, receipts and other documents required to establish the claim herein must be produced at the hearing. The undersigned further certifies to the best of his/her knowledge, the defendant is not in the military service.

If this is a complaint filed as a Commercial Claim (UDCA §1803-A), the undersigned hereby certifies that no more than five (5) actions or proceedings (including the instant action) pursuant to the commercial claims procedure have been initiated in the courts of this state during the present calendar month.

NICHOLAS A. GABRIELE PC

THIS FORM MUST BE SIGNED IN THE PRESENCE OF A COURT CLERK OR NOTARY

DATED: 3/4/13

Nicholas A. Gabriele, President
PLAINTIFF

Patricia Conroy
CLERK OR NOTARY

AS AUTHORIZED AGENT OF PLAINTIFF

Patricia Conroy
Notary Public, State of New York
No. 01CO6117542

AS PARENT AND NATURAL GUARDIAN

A FREE DISTRICT COURT FORM
http://nycourts.gov/suffolkdistrict

no fee [illegible] in this form

DC-283 (10/03)

ATTACHMENT E

100 A.D.2d 846, 474 N.Y.S.2d 87

Hilda Schiffman et al., Respondents,
v.
Deluxe Caterers of Shelter Rock,
Inc., Appellant. (Action No. 1.)
Deluxe Caterers of Shelter Rock, Inc., Appellant,
v.
Hilda Schiffman et al., Respondents. (Action No. 2.)

Supreme Court, Appellate Division,
Second Department, New York
2444 E
April 2, 1984

CITE TITLE AS: Schiffman v
Deluxe Caterers of Shelter Rock

In actions to recover a $500 deposit paid on a catering contract, and to recover damages for breach of that contract, Deluxe Caterers of Shelter Rock, Inc., appeals (by permission) from an order of the Appellate Term for the Ninth and Tenth Judicial Districts, dated April 8, 1982, which affirmed two judgments of the District Court, Nassau County, Third District, Great Neck Part (Mellan, J.), (1) the first of which was in favor of Hilda and Robert Schiffman in the principal sum of $500 (2) and the second of which dismissed the appellant's action.

HEADNOTE

COURTS
SMALL CLAIMS

([1]) Appellate review --- Pursuant to UDCA 1807, appellate review of small claims judgment is limited to determination that substantial justice has not been done between parties according to rules and principles of substantive law ---Accordingly small claims judgment may not be overturned simply because determination appealed from involves arguable point on which appellate court may differ; deviation from substantive law must be readily apparent and court's determination clearly erroneous --- Although appellant contends that it was entitled to keep deposit by virtue of liquidated damages clause in catering contract, since tendency in doubtful cases is to treat liquidated damages clause as unenforceable penalty irrespective of its characterization by parties, trial court's determination refunding deposit clearly meets 'substantial justice' standard --- With respect to appellant's claim for lost profits, appellant failed to show that it had lost potential customer for date in question.

Order affirmed, with costs.

Hilda and Robert Schiffman contracted with appellant for catering services in connection with the marriage of their daughter, giving appellant a $500 deposit. Twenty-eight days later, the daughter was admitted to a hospital and was subsequently operated on for a malignant melanoma. The Schiffmans advised appellant approximately three months before the scheduled event that it would be necessary to cancel. When appellant failed to honor its alleged commitment to return the deposit or credit it towards a future affair, the Schiffmans commenced a small claims action and appellant brought a separate action for loss of profits. Judgments dismissing appellant's claim and awarding the Schiffmans the principal sum of $500 damages, respectively, have been affirmed by the Appellate Term.

Turning first to the $500 judgment in the small claims action, pursuant to UDCA 1807, appellate review of a small claims judgment is limited to a determination "that substantial justice has not been done between the parties according to the rules and principles of substantive law" (see *Blair v Five Points Shopping Plaza*, 51 AD2d 167; *Levins v Bucholtz*, 2 AD2d 351). Accordingly, a smallclaims ***847** judgment may not be overturned simply because the determination appealed from involves an arguable point on which an appellate court may differ; the deviation from substantive law must be readily apparent and the court's determination clearly erroneous (*Blair v Five Points Shopping Plaza, supra*; cf. *Dmochowski v Rosati*, 96 AD2d 718; *Lee v Consolidated Edison Co.*, 98 Misc 2d 304).

Although appellant contends that it was entitled to keep the deposit by virtue of what it characterizes as a liquidated damages clause in the contract, since the tendency in doubtful cases is to treat a liquidated damages clause as an unenforceable penalty irrespective of its characterization by the parties (see, e.g., *City of New York v Brooklyn & Manhattan Ferry Co.*, 238 NY 52,

56; *Gitlin v Schneider*, 42 Misc 2d 230, 238 [Margett, J.]; Fuchsberg, 9 Encyclopedia of NY Law, Damages, § 82), the trial court's determination clearly meets the "substantial justice" standard.

With respect to appellant's claim for lost profits, appellant failed to show that it had lost a potential customer for the date in question by holding it for the Schiffmans. Without such testimony, there is no proof that it sustained any damages (see *Bogatz v Case Catering Corp.*, 86 Misc 2d 1052, 1055).

Titone, J. P., O'Connor, Brown and Eiber, JJ., concur.

End of Document

ATTACHMENT F

DC 86

SUFFOLK COUNTY DISTRICT COURT

Notification of: __X__ Small Claims Judgment

__Commercial Claims Judgment

__5th__ District held at __RONKONKOMA, N.Y.__ Index # __ISSC 169-13__

Plaintiff __NICHOLAS A. GABRIELE, P.C.__

vs.

Defendant __NANCY FAY__

The plaintiff commenced this small claims trial de novo against the defendant for legal services and the defendant counterclaimed that there was no valid real estate retainer. A trial de novo was held and decision was reserved after the bench trial.

Based upon a review of the testimony and evidence presented at the trial, the Court makes the following findings of fact and determination:

Plaintiff was retained by the defendant on 12/21/10 by the defendant to represent her in a divorce matter (Exhibit # 1) and seeks to recover fees due and owing to him for services he claimed to have performed pursuant to that retainer. The defendant counterclaims that he was never retained for a separate real estate which was part of the ongoing matrimonial action. At the outset the plaintiff reduced his claim to $2,617.45, waiving that portion of his billing for "finance charge". The Court notes billing dates for 7/20/12 to 10/29/12 with financial charges totaling $270.56, therefore, the claim must be further reduced to $2,481.77 (Exhibit # 3). The retainer agreement (Exhibit # 1) allowed for an "Administrative Fee" of 2% on each bill pursuant to paragraph 3 (e). This appears to the Court to be in conflict with paragraph 3 (f) which indicated that the client is "...only responsible to pay... for expenses actually incurred on [her] behalf." Pursuant to paragraph 3 (e) the attorney could bill for 10 hours of legal services charging the client the sum of $3,500 generating an "Administrative Fee" of $70 for expenses never incurred. Based upon the foregoing the Court disallows $141.85 in "Administrative Fees" already billed to the defendant. Pursuant to plaintiff's bill dated 12/1/11 "Statement of Professional Services" rendered in the sale of 36 Burnham Place, Nesconset, New York, (Exhibit #13), plaintiff was paid $1,375 for his service (Exhibit #B"). The aforementioned bill indicated that there would be N/C ("No Charge") to "Review and revision of Listing Agreements with relators, telephone conferences with relators; telephone conferences and correspondence with husband's attorney re: listing home for sale." Plaintiff's billing records (Exhibit # 3) for the dates 1/25/11, 3/7/11, 4/20/11, and 6/22/11 indicate.9 hours billed by plaintiff's "legal assistant" at a rate of $100/hour and 3 hours billed by the plaintiff for a total of $1,050 which the Court determines to be related to service for the same real estate transaction for a total of $1,140.

Although the defendant refused to sign a separate real estate agreement which the plaintiff sent to her on March 10, 2011 and, further, discharged plaintiff on March 28, 2012, plaintiff sent a bill dated July 12, 2012 for professional services rendered in connection with the sale of 36 Burnham Place, Nesconset, New York 11767 (Exhibit #10) in the amount of $1,606.73 to both defendant and her husband. He seeks an additional $803.25 from the defendant even though in plaintiff's correspondence dated March 26,

2013 (Exhibit # 6) with attached "Undertaking Release and Authorization Concerning Escrow Deposit of 12/01/13 (incorrect date) 36 Burnham Place, Nesconset, New York which was drafted by the plaintiff and executed by both Thomas Fay and Nancy Fay, paragraph "4" clearly indicated $803.25 be paid to the plaintiff on behalf of Thomas J. Fay only (Exhibit "6").

In addition, plaintiff's correspondence to the defendant dated March 10, 2011 (Exhibit #14) clearly indicates "... I hereby acknowledge receiving your personal check in the amount of $675 toward the foregoing retainer fee."

The defendant testified that plaintiff seemed to be more concerned with the real estate transaction than her divorce. She offered proof of several payments (Exhibit "A"); and, a check in the amount of $1,375 paid to plaintiff dated 12/1/11. (Exhibit "B"). No further expert testimony or documentary evidence was produced on behalf of the defendant. Plaintiff on his complaint seeks a total of $2,752.33 in damages.

Based upon the foregoing and the credible testimony and evidence adduced at trial, this amount must be reduced by $3,030.66 [representing the "finance charges" waived ($270.56)]; the 2% administrative charge disallowed by the Court ($141.85); amounts previously billed for services related to the real estate sale for which plaintiff indicated there would be "no charge (n/c) (Exhibit #13) which the Court determined to be ($1,140); the $803.25 that was to be billed "...on behalf of Thomas J. Fay only" (Exhibit #6); and the $675 plaintiff acknowledged receiving in his correspondence to defendant dated March 10, 2011 (Exhibit # 14).

Based upon the foregoing and the credible testimony and evidence adduced at trial the Court determines that the defendant does not owe the amount claimed by the plaintiff in his complaint, that the plaintiff has failed to sustain his burden of proving his prima facie case; and, finds in favor of the defendant dismissing his claim. Since Part 137 of the rule of the Chief Administrator does not apply to claims against an attorney for damages or affirmative relief other then adjustment of the fee, the defendant's counterclaim must also be dismissed (22 NYCRR §137.1 [6] [4]).

A. (X) Judgment in favor of:

_____

after (X) Trial ( ) Inquest

Amount of award $ 0

Interest computed $ _____
Interest from

Costs $ _____

Total Judgment $ _____

5/15/13
DATE

B. (X) Judgment in favor of Defendant dismissing the claim

C. ( ) Judgment entered by agreement or by stipulation.

D ( ) Judgment for Defendant on counterclaim.

E (X) Judgment for Plaintiff dismissing the counterclaim.

_____
J.H.C.
VINCENT J. MARTORANA

_____
CLERK

Judgment entered and Notice of Entry mailed on 6/12/13

MAILED

ATTACHMENT G

50 Misc.3d 73, 24 N.Y.S.3d
490, 2015 N.Y. Slip Op. 25396

**1 Nicholas A. Gabriele, P.C., Appellant
v
Nancy Fay, Respondent.

Supreme Court, Appellate Term, Second Department, 9th and 10th Judicial Districts
2014-263SC
November 30, 2015

CITE TITLE AS: Nicholas A. Gabriele, P.C. v Fay

SUMMARY

Appeal from a judgment of the District Court of Suffolk County, Fifth District (Vincent J. Martorana, J.), entered June 12, 2013. The judgment, insofar as appealed from, after a nonjury trial, dismissed the action.

HEADNOTE

Attorney and Client
Compensation
Domestic Relations Matter Retainer Agreement

District Court erred in disallowing the amount due to plaintiff for legal services rendered to defendant in a matrimonial matter and for work he performed in resolving boundary line issues after the closing of title on the sale of the marital residence, where defendant failed to show that the amount sought was not fair or reasonable, or that the retainer agreement was fraudulently or otherwise wrongfully procured. Defendant did not object to the provisions in the retainer agreement which clearly set forth plaintiff's policy in charging "finance charges" for late payment and "administrative charges" for plaintiff's disbursements. Plaintiff testified, and his billing statements demonstrated, that he had already waived the "finance charges," and the provision in the retainer agreement regarding "administrative charges" was set forth "in plain language" (22 NYCRR 1400.3) and was not susceptible to misunderstanding or confusion. Additionally, defendant ratified plaintiff's representation of her in the sale of the marital residence. She permitted plaintiff to continue as her attorney and paid plaintiff for the legal services rendered in that matter, and signed an escrow agreement regarding the resolution of the boundary line issues, indicating her awareness that, at the time of the closing, there were ongoing boundary line issues that had not been resolved and that additional legal services would necessarily be rendered by plaintiff in resolving those issues.

RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law §§ 248–250, 286, 288, 294, 300, 304, 305.

Carmody-Wait 2d, Officers of Court §§ 3:480, 3:487, 3:491, 3:492, 3:496, 3:510, 3:537.

NY Jur 2d, Attorneys at Law §§ 207–209, 213, 220, 222, 248.

ANNOTATION REFERENCE

See ALR Index under Attorneys' Fees.

*74 FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: fee /2 dispute & retainer /p finance /2 charge

APPEARANCES OF COUNSEL

Nicholas A. Gabriele, P.C., Smithtown (*Nicholas A. Gabriele* of counsel), for appellant.
Nancy Fay, respondent pro se.

OPINION OF THE COURT

Memorandum.

Ordered that the judgment, insofar as appealed from, is reversed, without costs, and the matter is remitted to the District Court for the entry of a judgment in favor of plaintiff in the principal sum of $2,617.45.

In December 2010, plaintiff and defendant entered into a retainer agreement pursuant to which plaintiff was to represent defendant in a matrimonial matter. During the course of that representation, plaintiff also represented defendant in the sale of the marital residence, without a retainer agreement, but for which plaintiff charged defendant, and was paid, a fixed sum of $1,375. Just

prior to the closing of title on the sale of the marital residence, certain boundary line issues were raised by the title company, which issues, unless resolved, would have prevented the closing from proceeding. Consequently, on December 1, 2011, the date of the closing, a written escrow agreement was entered into by the parties herein, among others in attendance at the closing, which provided for plaintiff's retention of $10,000 in an escrow account pending the resolution of the boundary line issues. From the time of the closing until March 2012, when defendant retained new counsel in the matrimonial matter, plaintiff resolved some of the boundary line issues. Subsequently, the parties had a fee dispute with respect to the amount due in the matrimonial matter and the boundary line matter, and arbitrated their fee dispute pursuant to the rules of the Suffolk County Bar Association's Fee Dispute Resolution Program. Following arbitration, plaintiff commenced this small claims action for de novo review of the merits of the dispute (*see* 22 NYCRR 137.8).

Plaintiff seeks to recover a total of $2,617.45, representing the amount allegedly remaining due for plaintiff's legal services rendered to defendant in the matrimonial matter *75 ($1,814.20) and the amount due for plaintiff's work involving the post-closing boundary line matter ($803.25). Defendant interposed a counterclaim. After a nonjury trial, the District Court, in a decision dated May 15, 2013, disallowed the sum of $3,030.66, which, the court believed, plaintiff was not entitled to recover, resulting in the dismissal of plaintiff's claim. A judgment was subsequently entered on June 12, 2013 dismissing both plaintiff's claim and defendant's counterclaim. Plaintiff appeals from so much of the judgment as dismissed its claim.

Upon a review of the record, we find that the judgment, insofar as appealed from, failed **2 to provide the parties with substantial justice according to the rules and principles of substantive law (*see* UDCA 1804, 1807; *Ross v Friedman*, 269 AD2d 584 [2000]; *Williams v Roper*, 269 AD2d 125, 126 [2000]).

Pursuant to Judiciary Law § 474, "[t]he compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law . . . ." It is not disputed that the parties entered into a retainer agreement in the matrimonial matter which complied with the requirements of 22 NYCRR 1400.3. With respect to the $1,814.20 claimed to be due plaintiff for the legal services rendered to defendant in the matrimonial matter until plaintiff's discharge, plaintiff's witness, Nicholas A. Gabriele, Esq., submitted into evidence itemized billing statements, regularly sent to defendant, which indicated the legal services he had rendered as well as the services that had been rendered by his legal assistant, and the amount of time that had been spent thereon. While it appears that, during the course of plaintiff's representation, defendant did not object in any way to the work that had been done or to the billing statements that followed, she testified that Gabriele had not moved quickly enough during his representation of her in the matrimonial matter and that he was more concerned with the sale of the marital residence than with proceeding with her divorce. Defendant now objects to the fact that plaintiff had paid itself from the matrimonial retainer for its services involving the sale of the marital residence, which services included the revision of the realtor's listing agreement, and communications with the realtor and plaintiff's ex-husband's attorney regarding that agreement.

Defendant did not object to the provisions in the retainer agreement which clearly set forth plaintiff's policy in charging "finance charges" for late payment and "administrative *76 charges" for plaintiff's disbursements. Nevertheless, the District Court, sua sponte, disallowed $270.56 in "finance charges" and $141.85 in "administrative charges." This was improper, as Gabriele had testified at trial that he had already waived the "finance charges" and his billing statements demonstrate that to be the case. Moreover, the provision in the retainer agreement regarding "administrative charges" was set forth "in plain language" (22 NYCRR 1400.3) and was not susceptible to misunderstanding or confusion. In the absence of a showing that these charges were not fair or reasonable, or that the retainer agreement was fraudulently or otherwise wrongfully procured, these charges, which defendant had already paid, should not have been disallowed (*see Matter of Sasson*, 231 App Div 524 [1931]; *see also Matter of Schanzer*, 7 AD2d 275 [1959]).

It was also inappropriate for the District Court to deny plaintiff recovery of the sum of $1,140, representing the amount the court found that plaintiff had charged defendant for working on the real estate issues (i.e., the revision of the listing agreement and contact with plaintiff's realtor and ex-husband's attorney) prior to

the closing on the sale of the marital residence. Since any brokerage commissions were ultimately to be paid by the sellers, it was entirely proper for plaintiff to be involved in securing an appropriate listing agreement for the property, particularly here, where the parties agree that the initial documents prepared by the realtor had not been correctly drafted. We cannot conclude, as the District Court apparently did, that the fact that plaintiff's separate bill for legal services rendered in representing defendant in selling the marital residence indicated that there was "no charge" for such services, meant that plaintiff was waiving its fee for such services. Rather, we interpret the "no charge" language as an indication that plaintiff was not going to charge defendant for those services in the context of the residential sale since, as the statements for professional services rendered in the matrimonial matter indicate, plaintiff had already billed defendant for those services, and payment had been made from the matrimonial retainer.

A written letter of engagement or retainer agreement is not required where the fee to be charged is expected to be less than $3,000 (*see* 22 NYCRR 1215.2 [a]), as it was in the real estate matter. Plaintiff, in March 2011, apparently drafted a retainer agreement with respect to its representation of defendant *77 in the real estate matter, which was not executed by defendant. While defendant, in her counterclaim, asserted that she did not "hire [plaintiff] or have a signed **3 real estate contract with plaintiff," implying that she therefore did not owe plaintiff for the services rendered in the real estate matter, she clearly ratified plaintiff's representation of her in the sale of the marital residence. She permitted plaintiff to continue as her attorney in that matter, and, on the date of the closing, she paid plaintiff $1,375 for the legal services rendered in that matter. Moreover, she personally signed the escrow agreement regarding the resolution of the boundary line issues, indicating her awareness that, at the time of the closing, there were ongoing boundary line issues that had not been resolved and that additional legal services would necessarily be rendered by plaintiff in resolving those issues. Indeed, defendant even procured for plaintiff some of the information which was necessary for the resolution of those issues. Plaintiff, which does not seek to recover for the services rendered up to the time of closing, submitted to the court a billing statement for the services rendered in resolving three of the four boundary line issues, as well as documentation evidencing the work that had been done prior to plaintiff's discharge. Defendant did not deny that plaintiff had done the work in resolving those issues, although she questioned whether the charges for such services were excessive. A review of plaintiff's statement for the legal work done on the post-closing boundary line issues, as well as the accompanying documentation, demonstrates that the amount sought by plaintiff is not excessive or unreasonable. Consequently, the District Court improperly disallowed $803.25 for the services rendered in the post-closing boundary line matter.

Finally, although the retainer agreement for representing defendant in the sale of the marital residence was not executed by defendant, it was executed by Gabriele and contained a paragraph in which he acknowledged having received defendant's personal check in the sum of $675, representing one half of plaintiff's fee (which was $1,350 plus $25 in disbursements). Both parties testified that plaintiff was paid the total sum of $1,375 at the closing, the full amount of plaintiff's fee therefor, and documents in the record confirm that to be the case. Since the alleged $675 payment was, in any event, made towards plaintiff's fee in representing defendant in the sale of the marital residence, which fee was not part of the amount sought by plaintiff in this case for its representation of defendant in *78 the matrimonial matter and the post-closing boundary line matter, it was improper for the District Court to have reduced plaintiff's claim by that amount.

Accordingly, as none of the deductions made by the District Court were warranted, the judgment, insofar as appealed from, is reversed and the matter is remitted to the District Court for the entry of a judgment in favor of plaintiff in the principal sum of $2,617.45.

We note that we do not consider the factual assertions made or exhibits submitted by defendant in her brief to this court which are dehors the record (*see Chimarios v Duhl*, 152 AD2d 508 [1989]).

Marano, P.J., Garguilo and Connolly, JJ., concur.

End of Document

ATTACHMENT H

RETAINER AGREEMENT
Re: NANCY FAY with THOMAS J. FAY

AGREEMENT, made the 21st day of December, 2010, by and between the law firm of **NICHOLAS A. GABRIELE, P.C.**, 191 Terry Road, Smithtown, New York (hereinafter referred to as the "Law Firm" or "Firm") and **NANCY** [redacted], residing at [redacted], Nesconset, New York 11767, concerning the terms of engagement for legal representation in the above-referenced matrimonial matter.

1. NATURE OF SERVICES TO BE RENDERED:

(a) This Retainer Agreement confirms that you have retained this Law Firm to serve as your attorney and to represent you in the above-referenced matter. In particular, this Law Firm will represent you in:

[ ] The negotiation, preparation and execution of a Separation Agreement or other marital settlement agreement resolving your current marital difficulties, and establishing the rights and obligations of the parties with respect to the infant child, the marital residence and other marital and separate property.

[X] The negotiation of an uncontested action for divorce in the Supreme Court of the State of New York, County of Suffolk, including the preparation, execution and filing with the Court of all documents, including, if possible, a written settlement agreement resolving the issues arising out of your marriage.

[ ] The defense of a contested action for divorce in the Supreme Court of Suffolk County, New York, including, if necessary, a trial on the merits of the action and/or the equitable distribution of all marital assets.

(b) The laws pertinent to your situation will be explained to you, as well as the available course(s) of action and the attendant risks.

(c) It is understood and agreed that the legal services to be rendered pursuant to this Agreement do not include representation in connection with the prosecution or defense of a contested matrimonial action or the appeal of any judgment or order rendered by a court concerning this matter, the enforcement or modification of any judgment or order or representation in any other court or matter, including the preparation and/or processing of any Domestic Relations Orders, unless specifically agreed to in a subsequent written Retainer Agreement.

(d) The Law Firm's representation of you will commence with the payment of the Retainer Fee described in paragraph "2" below, and will terminate either upon the entry of final judgment or as otherwise set forth in paragraph "6" below.

(e) The undersigned will be the primary attorney handling this matter on your behalf and rendering legal services to you. In the event that another member of the Law Firm performs services on your behalf, then that member shall be under the undersigned's personal supervision and direction. It is understood and agreed that you will extend all members of this Firm and its staff, your full cooperation and courtesy at all times.

2. **RETAINER FEE**:

(a) An advance Retainer Fee in the amount of $5,000.00, is required before work on this matter can commence. By signing this Retainer Agreement, you have agreed to promptly pay and this Firm has agreed to accept this amount as the Retainer to commence work on your behalf. Responsibility to provide legal services will be accepted and work will commence upon receipt of payment of the Retainer Fee, together with this signed Retainer Agreement.

(b) All payments will be credited to your account, and all billing for services rendered and expenses incurred on your behalf will be charged against these payments.

(c) **The initial retainer payment will be deposited into an escrow account. Withdrawals will be made from this account simultaneously with the issuance to you of a billing statement. Your signature on this Retainer Agreement agreeing to the terms of this representation shall also serve as an ongoing authorization to release payments from the escrow account in accordance with the billing statement, without additional written authorizations for each amount released from escrow.**

3. **RATE OF COMPENSATION AND BILLING STATEMENTS**:

(a) It is understood and agreed that you will be billed for all legal services rendered at the Firm's regular billing rate of **$350.00** per hour. In the event that the Firm's Associate Attorney or Legal Assistant renders services on your behalf, then the services rendered will be billed at the rate of $275.00 per hour for the Firm's Associate Attorney and $100.00 per hour for the Firm's Legal Assistant. All expenses incurred in this matter will either be billed to you directly or if advanced by the Firm, then reimbursed to the Firm upon request.

(b) It is further understood and agreed that the hourly rates stated above apply to all time expended in connection with the above-referenced matter, including, but not limited to: office meetings and conferences; telephone calls and conferences (whether initiated by you or by this Law Firm) or otherwise made or had on your behalf or related to this matter; the preparation, review and revision of correspondence, pleadings, motion papers, disclosure demands and responses, affidavits and affirmations and/or any other documents, memoranda or papers relative to the above-referenced matter; legal research; court appearances; conferences; file review; preparation time; travel time; and any other time expended on behalf of or in connection with this matter.

(c) Billable rates as set forth in this Agreement may increase during the period of this Firm's representation of you in connection with the above-referenced matter, if there is a general increase in the Firm's hourly billing rate, however, you will be afforded at least sixty (60) days advance notice of any such change.

(d) Statements of your account will be mailed to you on a regular basis, of at least once every 60 days. The billing statements will reflect the nature of the service(s) rendered (e.g., "Telephone conference with client") and the amount of time spent rendering said service(s), measured in tenths (0.1) of an hour or 6-minute time blocks. There are no standard minimum charges for services rendered (e.g., 1.0 hr. for a letter, regardless of the length of the letter). You are requested to promptly review any billing statement you receive for accuracy. You have the right to contact this office to discuss the status of your account and any questions you may have about any billing statement. You will not be billed for time spent in discussion of your bill. Any billing statement not questioned in a timely fashion will be deemed to be correct.

(e) It is understood that this Retainer Fee payment does not necessarily represent the amount of the total fee which you may incur by reason of the legal services to be rendered to you and on your behalf in this matter. The amount of the total fee is something that can not be calculated with accuracy, due, in large part to the absence of any information as to the amount or lack of cooperation to be encountered in dealing with your spouse and your spouse's attorney. Accordingly, the total fee will be based upon the regular schedule of established hourly time charges, together with any out-of-pocket disbursements (such as court costs, messenger services, long-distance telephone calls, bulk facsimile transmissions, process service fees, mileage, deposition and court transcripts, bulk photocopies and excess postage) which are incurred on your behalf from the date of this Agreement through the completion of this matter. In addition, either the actual expenses incurred or a flat charge of two (2%) per cent of each amount billed will be added to each monthly billing statement to cover the cost of ordinary postage, local telephone calls, photocopies and local facsimile charges.

(f) It is also understood that you will only be responsible to pay for services actually rendered and to reimburse the Firm for expenses actually incurred on your behalf.

(1) In the event that this matter is resolved prior to the exhaustion of the Retainer Fee paid, **then the unused portion of the Retainer Fee, if any, will be refunded,** it being expressly understood and agreed that **there is no minimum, non-refundable fee** in connection with this Law Firm's representation of you in this matter.

(2) In the event that this Law Firm ceases to represent you prior to the final resolution of this matter, whether by court order, by agreement of the parties to this Agreement or by reason of the action of either party to this Retainer Agreement, then the unused portion of the fee, if any, will be refunded.

4. **PAYMENTS**:

(a) In the event that the legal services rendered exceed the amount of the initial Retainer Fee payment set forth above in paragraph "2(d)", then an additional payment or payments may be required. The amount of said additional payment or payments shall be based upon an estimation, at that time, of the amount of work remaining to bring this matter to resolution. If the services remaining to be rendered include a trial or hearing, then the minimum additional payment to be requested and paid prior to the commencement of the trial or hearing shall be $2,500.00.

(b) Economic considerations and conditions inherent in the successful operation of a law office require that fees for legal services be paid within a reasonable period of time after a billing statement has been issued. Non-payment of fees might make it impossible for this Law Firm to continue to render effective representation not only to you, but also to other clients of this Firm as well. Acceptance of the terms of this Retainer Agreement entails an acknowledgment that you are fully prepared and able to pay for the legal services to be rendered and the expenses to be incurred during the course of this Firm's representation of you, as well as an acknowledgment that prompt payment will be made in connection with billing statements issued to you.

(c) It is the policy of the Law Firm not to seek a security interest (i.e., mortgage, confession of judgment, etc.) from a client to secure the payment of legal fees or the reimbursement of expenses for seeking or obtaining such a security interest has the potential for creating a conflict of interest between you as the client and this Law Firm.

(1) If, however, as a result of unanticipated circumstances, such a security interest were to become necessary, the same would only be obtained upon Court approval after submission to the Court of an application for counsel fees, on due notice to you and your spouse. It is expressly understood and agreed that your execution of this Retainer Agreement shall represent and evidence your agreement with the granting of a security interest (such as a confession of judgment) to secure the payment of any unpaid balance due this office for legal fees and/or expenses incurred on your behalf.

(2) If a mortgage has been consented to for the purpose of securing the ultimate payment of a fee due this Firm, then this Firm represents that it will not foreclose upon any mortgage placed upon the marital residence while the spouse who consented to the mortgage remains a titleholder and remains in the residence.

(d) In the event that any payment is made by check and said check is dishonored by the Law Firm's bank, for any reason, then there will be a fee of $35.00 imposed for the Law Firm's administrative expenses associated with processing the dishonored check, which amount shall be in addition to any service charge imposed by the Law Firm's bank. Furthermore, the dishonored check and the bank's service charge must be replaced within five

(5) days with a money order, bank check or cash. Moreover, if more than one (1) check received by the Law Firm is dishonored by the Law Firm's bank, then the Law Firm shall retain the right to have any and all future payments paid by money order, bank check or in cash, or to terminate the attorney/client relationship.

(e) If any amount due the Firm is not paid within thirty (30) days after a billing statement setting forth the amount due has been issued to you, then a finance charge at the rate of fifteen (15%) per cent per year, simple interest (or 0.0410958% per day) shall be added to the unpaid balance.

(1) Moreover, you agree that this Firm shall have the right to withdraw from its representation of you, at the option of the Firm. If an action is pending, then absent your consent, an application shall be made to the Court within which such action is pending for such withdrawal and upon Court approval, your case file will be returned to you within thirty (30) days of the Firm's withdrawal from the case.

(2) The Firm shall also have the right to seek a "charging lien" from the Court, against you for the amount of the unpaid fees and unreimbursed expenses outstanding at the time of withdrawal. A charging lien entitles the Law Firm to payment of its outstanding fee out of the proceeds of any final order or judgment. No such lien may be attached to maintenance or child support payments.

(f) As part of this Firm's representation of you, efforts may be made to obtain reimbursement from your spouse for all or a substantial portion of the legal fees and expenses incurred by you in connection with the above-referenced matter. If such efforts prove successful, whether by agreement between you and your spouse or by Court order or judgment, any monies so received will be first applied in satisfaction of any outstanding balance of legal fees and/or disbursements due the Firm, and any excess monies will then be refunded to you.

5. OTHER PROFESSIONAL SERVICES:

There is the possibility that the services of other professional (such as accountants, business evaluators, real estate appraisers, psychiatrists, psychologists, etc.) will be required for the proper preparation and/or trial of your case. The fees and costs due and payable for the services of these other professionals will be billed to you directly by the individual whose services are employed, however, no such expenses will be incurred without your prior approval.

6. TERMINATION OF REPRESENTATION:

(a) You have the absolute right to terminate the attorney/client relationship contemplated by the within Retainer Agreement for any reason or for no reason at all. Should you exercise the right to terminate our relationship, then written notice of such termination must be promptly given to this Law Firm, and this Law Firm's representation of you will terminate as

of its receipt of the written notice. As indicated above, you will be charged, at the hourly rates set forth above, only for the actual services rendered and expenses incurred on your behalf. The unused balance of the Retainer Fee, if any, will be promptly refunded to you.

(b) Notwithstanding the above, if the attorney-client relationship is terminated prior to the conclusion of the matter for which this office has been retained (e.g., if you and your spouse reconcile and this action were discontinued; you discharged this firm and retained other counsel; or if this firm withdraws from its representation of you), a fair and reasonable fee would be determined in accordance with legally accepted standards. Presently, the legally recognized elements of a "reasonable fee", as set forth in the Code of Professional Responsibility which governs the conduct of attorneys, are as follows:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill required to perform the legal services properly;
(2) The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the Law Firm. (In being retained by you, this Firm is specifically precluded from representing the opposing party, as well as anyone closely associated with the opposing party);
(3) The fee customarily charged in the locality for similar legal services;
(4) The quantity, quality and nature of assets and liabilities involved and the results obtained;
(5) The time limitations imposed by the client or by circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation and ability of the lawyer or lawyers performing the services;
(8) Whether the fee is fixed or contingent. (Be advised that the attorneys' Code of Professional Responsibility provides, in pertinent part, that: "A lawyer shall not enter into an arrangement for, charge or collect ... [any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of maintenance, support, equitable distribution, or property settlement ....]" obtained.)

7. **STATUS OF CASE**:

(a) You have the absolute right to be kept apprised of the status of your case and the progress being made, and to receive true and complete copies of all correspondence, pleadings and other documents received and/or prepared in connection with the Law Firm's representation of you in this matter. You will be promptly notified of any and all developments in your case, including advance notice of all Court appearances.

(b) We will be available for meetings and telephone conferences with you at mutually

convenient times, however, we do insist that appointments be made for personal visits to our Office, except in emergency situations.

8. **ARBITRATION**:

In the event that a dispute arises between you and the Law Firm concerning the payment of any outstanding legal fee due this Firm, then you have the right to seek arbitration of that dispute, which will be binding upon both the Law Firm and client. This Firm will provide you with information concerning fee arbitration in the event of such dispute or upon your request.

9. **NO OTHER REPRESENTATIONS**:

You specifically acknowledge that this Law Firm has made no representations to you, either express or implied, concerning the ultimate outcome of the litigation presently pending or hereafter to be commenced between you and your spouse. You further acknowledge that this Firm has not guaranteed, and cannot guarantee, the success of any action taken by the Law Firm on your behalf during such litigation with respect to any matter, including, without limitation, issues of spousal and/or child support, child custody and/or visitation, exclusive occupancy of the marital residence, equitable distribution of marital assets, the declaration of separate property, an award of counsel fees and/or a trial.

10. **CLIENT'S UNDERSTANDING, AGREEMENT AND REPRESENTATIONS**:

(a) By signing this Retainer Agreement, you acknowledge and represent that

(1) you have read this Retainer Agreement in its entirety;
(2) you have had sufficient opportunity to consider its terms and the effect of each term upon you;
(3) you have had full and satisfactory explanation of the same, if requested; and
(4) you fully understand each and every term contained herein and agrees to such terms.

(b) Moreover, by signing this Retainer Agreement, you also acknowledge and represent that you have received, reviewed and signed a Statement of Client's Rights and Responsibilities as required by Court rules, and fully understand the same.

(c) **CERTIFICATIONS:** As discussed in the initial interview, pursuant to Court rule, I am required, as your attorney, to certify any and all Court papers submitted by you which contain statements of fact, and specifically, to certify that I have no knowledge that the substance of the submission is false or that if any information has been omitted.

(1) Accordingly, you, as the client agree to provide me with complete and

accurate information when requested, which information shall serve as the basis of the Court papers prepared on your behalf for submission to the Court.

(2) Moreover, you will agree to certify in writing to me, prior to the time the papers are actually submitted to the Court, the accuracy of said papers, after you have reviewed and signed the same.

(3) It is further understood and agreed that your inability or refusal to make said certifications to this Firm will adversely affect the Firm's ability to properly represent you in this matter.

(d) Any attorney/client relationship naturally entails a tremendous amount of communication and cooperation between the attorney and the client. This Firm shall have the right, under the terms of this Retainer Agreement, to terminate the attorney/client relationship in the event of a breakdown in communication between the attorney and the client, the lack of cooperation from the client or for the non-payment of any outstanding fee or expense.

(e) It is further understood and agreed that under no circumstances may this Firm commence representation of you as your attorneys or take any action on your behalf, until this Retainer Agreement has been signed and dated by you and returned to this Firm, together with the Retainer Fee payment discussed above.

If you have any questions regarding the above, feel free to contact the undersigned to discuss the same. Otherwise, kindly sign the original of the within Retainer Agreement and return the same to this office. The signed copy of this Retainer Agreement is for your records. The Firm looks forward to being of service to you in connection with this matter.

Very truly yours,

NICHOLAS A. GABRIELE, P.C

NICHOLAS A. GABRIELE

Accepted and agreed to this 28 day of December, 2010.

Nancy [redacted]
NANCY [redacted]

ATTACHMENT I

CLIENT ACTIVITY LOG (Divorce - File No.)						
INT.	**DATE**	**ACTIVITY**	**TIME (BILLABLE YES**	**NO**	**DISB.**	**FILE NOTES**

ATTACHMENT J

Kindly review this billing statement and promptly advise this office, in writing, of any error(s), discrepancy(ies), omission(s) or other problem(s) with the statement. In the absence of any written objection from you, this statement will be deemed to be approved and accepted by you.

For your convenience in paying your outstanding balance, we accept most major credit cards.

NOTE: In that you have not previously given notice of any errors or discrepancies in the prior billing statements issued to you, the above-stated balance shall be deemed to be correct, and this statement shall be deemed to be an **ACCOUNT STATED**. Kindly remit payment of the outstanding balance so that I may close the file in this matter and avoid having to refer this nominal balance into collection, which could adversely affect your credit. Thank you.