LAW AND THE FAMILY

"Fee Dispute Arbitration"

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THE ODDS ARE that anyone who practices family law will eventually have a fee dispute with a client. Fee disputes are such a frequent occurrence that matrimonial lawyers are mandated by the court and the Disciplinary rules to submit to binding arbitration of fee disputes, at the option of the client. [FN1]

Statement of Clients' Rights

22 NYCRR 1400.2 and (Disciplinary Rule) 22 NYCRR 1200.10-a require that a statement of client's rights be provided to a prospective client in "domestic relations matters." The form of the statement is prescribed in the rule. It is intended to tell the prospective client what he or she is entitled to, as a client, "by law or by written retainer agreement." It must be provided at the initial consultation and must be signed by the attorney and the client.

22 NYCRR 1400.3 provides in its first sentence that an attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client, must execute a written agreement with the client, setting forth in plain language the terms of compensation and the nature of the services to be rendered. In addition, the agreement, and any amendment to it, must be signed by the attorney and the client. In actions in the Supreme Court, the signed agreement must be filed with the court, with the statement of net worth. A duplicate copy of the filed agreement and any amendment must be provided to the

client. The rule sets forth what the written retainer agreement must contain.

22 NYCRR 1400.1 limits the application of these rules to "all attorneys who, on or after Nov. 30, 1993, undertake to represent a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings. The rules do not apply to attorneys representing clients without compensation paid by the client, except that where the client is other than a minor, 1400.2 applies to the extent it is not applicable to compensation. The rules apply only to domestic relations matters to which Part 1400 of the joint rules of the appellate division are applicable. Actions for equitable distribution following a foreign judgment of divorce, and actions to declare the validity or nullity of a foreign divorce or of a foreign marriage are not within the ambit of 1400.1 and 1400.7.

22 NYCRR 1200.11, Copr.(2)(B), Copr.(2) Copr., and (e) of the Disciplinary Rules, make it a violation for an attorney to fail to comply with 1400.4, (which prohibits a nonrefundable retainer fee), 1400.5 (which allows an attorney to obtain a confession of judgment or promissory note or lien on real property, or obtain a security interest to secure payment of his or her fee, only where the retainer agreement provides that a security interest may be sought, notice of an application for the security interest is given to the adversary spouse and the court approves of the security interest; and which limits mortgage foreclosure) and 1400.7 (fee arbitration) and the first part of 1400.3 (which requires that there be a written retainer agreement setting forth the nature of the relationship and details of the fee arrangement).

These rules limit the rights of attorneys to contract with their clients and because they are substantive in nature do not appear to be properly promulgated under the Appellate Division's rule making authority. [FN2]

Fee Arbitration Rules

22 NYCRR 1400.7 and the fee arbitration rules [FN3] provide that in the event of a "fee dispute" between attorney and client, the client may seek to resolve the dispute by arbitration which is binding on both the attorney and client and subject to review under CPLR Article 75. [FN4] All attorneys

are required to participate in the arbitration process upon the filing of the request for arbitration by a client. An attorney who refuses to submit to the arbitration process must be referred to the local grievance committee of the Appellate Division for disciplinary action. [FN5]

The arbitration program may not hear any fee dispute in which the disputed amount is in excess of $100,000, including disbursements. [FN6]

Where the attorney and client cannot agree as to the attorney's fee, the attorney must inform the client in writing by certified mail or by personal service that he or she has 30 days from receipt of the notice in which to elect to resolve the dispute by arbitration, the result of which is binding upon both attorney and client. The attorney must include standard instructions developed by the Chief Administrator regarding the arbitration procedure, and a copy of a request for arbitration. If the client does not file the request for arbitration within the 30-day period, the attorney may commence an action to recover the fee and the client no longer has the right to request arbitration with respect to the fee dispute at issue. [FN7]

The Supreme Court, Broome County, has held that the Code of Professional Responsibility precludes an attorney from collecting any fee where there is no written retainer in any case where one is required under the matrimonial rules. [FN8]

The First Department has held that it was proper to dismiss a complaint to recover attorney's fees, with prejudice, where the attorney failed to file a copy of the written retainer agreement with the court with a statement of net worth, failed to file a copy of the closing statement with the clerk of the court within 15 days of terminating the retainer agreement, [FN9] failed to provide the client with written, itemized bills at least every 60 days, and failed to provide the client with notice of her right to arbitrate any fee dispute prior to institution of the action. It held that his utter failure to abide by these rules would result in preclusion from recovering legal fees. [FN10]

A More Liberal Second Department

In contrast to the First Department, the Second Department has adopted a more liberal approach, holding that where a retainer agreement fails to comply with the provisions of the matrimonial rules, the court need not return fees properly earned by an attorney. Where the discharge is by consent and is not for cause, the court may determine the value of the attorney's services on a quantum meruit basis. It distinguished cases involving attorneys seeking to compel clients to pay for services rendered

but not paid for from cases involving retainer fees already paid. It held that where the former client does not seek arbitration to determine the value of the attorney's services, it is error to direct the parties to proceed to arbitration. The court should determine, after a hearing, the value of those services and the portion, if any, of the retainer fee to be returned to the plaintiff. [FN11]

Receipt of Notice

It has been held that the complaint in an action for legal fees must allege the client's receipt of a notice of right to arbitration and a failure to timely request arbitration. [FN12]

The First Department recently held that a lawyer must always send the client a notice to arbitrate before suing her client for legal fees. In Paikin v. Tsirelman, [FN13] an action for unpaid attorney's fees in a matrimonial action, the court held that plaintiff's failure to provide his client with 30 days' written notice of his right to arbitrate any fee dispute, and his failure to allege in his complaint that the client received such notice and did not file a timely request for arbitration, required dismissal of the complaint. It rejected plaintiff's claim that the notice requirement was never triggered because of his client's failure to object to his billings and that, therefore, he was entitled to recover on the basis of an account stated.

This rule was specifically rejected by the Second Department in Scordio v. Scordio, [FN14] an action for a divorce, where the Appellate Division affirmed an order granting the former attorney leave to enter a charging lien against the former client and denied the client's cross motion to require the attorney to repay all fees previously paid to him and to turn over her file. It held that the Supreme Court properly determined that the former attorney was entitled to the fees which were awarded to him by a prior order of the same court. As the Supreme Court properly determined that his discharge was without cause, a hearing was required to determine, on a quantum meruit basis, the remaining amount of fees due.

The Second Department held that because the defendant never disputed the reasonableness of the fees charged by the attorney, he was not required to send her a notice informing her of her right to elect arbitration of any fee dispute.

The court 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."

It has been held by a lower court that the failure to comply with the rules relating to the retainer agreement and with the requirement to notify the defendant of her right to request arbitration of a fee dispute precludes resort to the court for the determination of the amount of a charging lien, and failure to comply with these rules, at a minimum, is a bar to the enforcement or collection of attorney's fees. [FN15]

It was held by another court that providing the statement of client's rights to the client's brother was not strict compliance with the mandated procedure and the outgoing attorney's application for a charging lien was held to be deficient for failure to provide the statement to the client. [FN16] Another court held that an attorney's obligation to follow the fee arbitration rules is an ethical responsibility that requires strict adherence before an attorney may assert a retaining lien.

Counsel must inform the client of the right to choose arbitration, and the client must have the opportunity to exercise that choice. It held that where a fee dispute arises, an attorney cannot seek to enforce a retaining lien without first complying with the fee arbitration notification provisions of the Matrimonial Rules. If the client elects arbitration, the amount of the retaining lien will be the amount of the arbitration award. If the client chooses not to proceed to arbitration, then counsel can apply to the Court for a hearing to fix the value of the retaining lien or to pursue action a plenary action. [FN17]

Right to Charging Lien

These decisions appear to be misplaced since an attorney's right to a charging lien is protected by 475 of the judiciary law and may not be abrogated by court rule. Moreover, the Administrative Board specifically rejected enacting rules abrogating the retaining lien in matrimonial matters. [FN18] Moreover, a retaining lien may only be fixed upon an application by the client for the turnover of his file. The amount of the lien is based upon quantum meruit, whereas the amount of the fee in a plenary is based upon contract. [FN19]

The First Department has held that failure to comply with 22 NYCRR 1400.2 and 1400.3 does not preclude the right to make application,

pursuant to DRL 237, for an award of counsel fees from the other spouse in a case where there was "substantial compliance" with those requirements, the client waived her right to arbitration of the attorney's fee dispute, and counsel rendered substantial services and achieved reasonably favorable results. [FN20]

FN(1) See 22 NYCRR 1400.1 and 22 NYCRR 1400.7

FN(2) , See Gair v. Peck, 6 NY2d 97. In Corletta v. Corletta, 169 Misc.2d 1, 641 N.Y.S.2d 498 (Sup. Ct, Monroe County 1996), the court found that the requirement of a written retainer agreement in 22 NYCRR 1400.3 was unconstitutional.

FN(3) 22 NYCRR 136.2

FN(4) 22 NYCRR 136.8

FN(5) 22 NYCRR 136.10

FN(6) 22 NYCRR 136.4

FN(7) 22 NYCRR 136.5

FN(8) McMahon v. Evans, _____ Misc.2d _____, 645 N.Y.S.2d 753 (Sup. Ct. Broome Cty., 1996)

FN(9) This rule has been repealed.

FN(10) Julien v. Machson, 245 A.D.2d 122, 666 N.Y.S.2d 147(1st Dept, 1997)

FN(11) Markard v. Markard ,692 N.Y.S.2d 733, 1999 N.Y. Slip Op. 06609 (2d Dept,1999)

FN(12) L.H. v. V.W, 171 Misc.2d 120, 653 N.Y.S.2d 477(Civil Court, Bronx County, 1996)

FN(13) 699 NYS2d 32 (AD 1st Dept., 1999)

FN(14) 2000 WL 277297 (NYAD2d Dept., 2000)

FN(15) K.E.C. v. C.A.C., 173 Misc.2d 592, 661 N.Y.S.2d 715.

FN(16) Philips v. Philips, 178 Misc.2d 159, 678 N.Y.S.2d 244, (Sup.,Ct., 1998)

FN(17) Moraitis v. Moraitis., 694 N.Y.S.2d 588,Slip Op. 99367(Sup.Ct.,1999).

FN(18) See "Matrimonial Lawyer's Rule Modified a Bit," NYLJ, 11-3-93.

FN(19) See Freed, Brandes and Weidman, Attorneys' Liens, NYLJ, June 25, 1991, at 3, col 1.

FN(20) FLANAGAN V. FLANAGAN, AD2D , NYS2D (1ST DEPT,1999).

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