LAW AND THE FAMILY

"More Changes to Calendar Control and Arbitration Rules"

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JUST WHEN WE THOUGHT it was safe to go back in the courthouse, they did it again - rewriting, redrafting, renumbering, re-ruling. In late 1993, following the adoption of special rules for attorneys in matrimonial matters [FN1] the "Uniform Civil Rules for the Supreme Court and the County Court in relation to matrimonial matters" was amended by the Appellate Division. [FN2] The rules were further amended on June 22 and Aug. 19, by administrative orders of the Chief Administrative Judge of the Courts. [FN3]

As originally enacted, 22 NYCRR 202.16(c)(1) provided that a signed copy of the attorney's retainer agreement with the client must accompany the statement of net worth filed with the court. A further direction was given to the court requiring them to examine the agreement to assure that it conforms to Appellate Division attorney conduct and disciplinary rules.

Nine months after the rule has gone into effect, it appears many lawyers are neglecting to file the retainers and, likewise, most courts are not reviewing the retainer agreement unless a motion for support or counsel fees is made. It would seem the failure is attributable, in some measure, to a practical obstacle. The net worth statement, if filed, is filed in the County Clerk's office, while the case file is with the IAS judge. This makes it practically impossible to review unless the County Clerk's file is transmitted to the IAS Judge's chambers. Moreover, absent an application for pendente lite support or counsel fee, net worth statements are infrequently filed with the court before trial.

Effective June 22, s(c) (1) was amended to partially solve the problem, at least where new counsel is retained after the net worth statement is filed. The rule now provides that "[w]here substitution of counsel occurs after

the filing of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution."

Pendente Lite Fees

Old 22 NYCRR 202.16(g) entitled "Motions for Alimony, Maintenance, Counsel Fees Pendente Lite and Child Support (Other Than Under s237[c] or s238 of the Domestic Relations Law)" was renumbered in the new rule as subdivision (k). It contained six subdivisions. Effective June 22, it was amended to add a new subdivision 7, which is intended to encourage pendente lite counsel fee and expert fee awards and to make appellate review of such awards easier. It provides that "[u]pon any application for an award of counsel fees or appraisal/accounting fees made prior to the conclusion of the trial of the action, the court shall set forth in specific detail, in writing on the record, the factors it considered and the reasons for its decision."

The rules are now expanded to cover additional matters. In 1993 the Appellate Divisions added a new Part 1400 to Title 22 of the Official Compilation of Codes Rules and Regulations of the State of New York (22 NYCRR) effective Nov. 30, 1993, titled "Procedure for Attorneys in Domestic Relations Matters." It requires attorneys representing clients in certain matrimonial matters to provide prospective clients with a statement of Clients Rights and Responsibilities [FN4]; requires retainer agreements for such matters to be in writing and prescribes their contents [FN5]; prohibits attorneys from taking non-refundable retainer fees from such clients [FN6]; limits those circumstances in such cases in which the attorney may obtain security to insure payment of his or her fee [FN7]; requires the filing of a closing statement with the clerk of the court at the conclusion of the attorney's representation of the client, [FN8] and gives the client the right to compel the attorney to submit to binding arbitration of fee disputes. [FN9]

On June 16, 22 NYCRR 1200.11 and 1200.10-a (Disciplinary Rules) and 22 NYCRR 1400.1 and 1400.3 of new Part 1400 were amended to clarify and expand those situations to which they apply. [FN10]

Before its amendment s1400.1 limited the application of the rules by providing that

This section shall apply to all attorneys who, on or after Nov. 30, 1993, undertake to represent a client in a claim, action or proceeding, in either Supreme Court or Family Court, 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.

As originally enacted this section applied only to attorneys who represented clients in certain types of actions or proceedings in the Supreme Court or Family Court. The specific limitation that the representation of a client be in "a claim, action or proceeding, in either Supreme Court or Family Court," coupled with the requirement of the filing of the retainer agreement [FN11] and closing statement [FN12] with the Supreme Court appeared to exclude representation of a client in the negotiation and execution of a pre-nuptial agreement, "opting-out" agreement and separation agreement.

Section 1400.1 was amended effective June 16, to change the word "section" to "Part" and to make it clear that the entire Part 1400 applies in cases that come within the ambit of the rule and expands its coverage to representation of a client preliminary to the commencement of a claim, action or proceeding designated in the rule and representation in any court of appellate jurisdiction.

Mandatory Fee Arbitration

Simultaneously with the addition of Part 1400 the Presiding Justices of the Appellate Divisions amended the Disciplinary Rules of the Lawyers Code of Professional Responsibility, and the Chief Administrative Judge of the Courts adopted a New Part 136 of the Rules of the Chief Administrator, relating to mandatory [FN13] "Fee Arbitration In Matrimonial cases."

The arbitration rules, as originally enacted, only applied in those cases where representation commenced on or after Nov. 30, 1993, and like Part 1400, applied only to "... attorneys who undertake to represent a client in a claim, action or proceeding, in either Supreme Court or Family Court, for divorce, separation, annulment, custody, visitation, maintenance, child support, alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings."

Effective June 22, Part 136 was amended to rename it "Fee Arbitration in Matrimonial Cases." In addition, s136.1 was amended to conform it to the June 16 amendment to s1400.1, to change the word "section" to "Part" to make it clear that the entire Part 136 applies in cases that come within the ambit of the rule and to expand its coverage to representation of a client preliminary to the commencement of a claim, action or proceeding designated in the rule and in any court of appellate jurisdiction.

At the same time, a new s136.9 was added to make the arbitration proceedings confidential. It provides that "[a]ll proceedings commenced

and conducted in accordance with this Part shall be confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter." Former ss136.9 and 136.10 were renumbered 136.10 and 136.11 respectively. Subdivision 136.7(b) was also amended at the time to require the arbitration panel to transmit a copy of its determination to the Administrative Judge when it serves the parties with a copy of its written determination.

Section 136.4 (b), provides that "[t]he Administrative Judge may decline to accept or continue to arbitrate a dispute in which substantial legal questions are raised in addition to the basic fee dispute." In an effort to create some sort of statute of limitations for mandatory arbitration this section was amended to add, after "dispute," the words "or with respect to which no attorney's services have been rendered for at least two years." This two-year limitation period is purely discretionary with the Administrative Judge of each judicial district.

Section 136.2 originally provided that "In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration, which shall be binding upon both attorney and client." It was believed by many attorneys that this rule should have been made prospective in its application and that attorneys should not be required to submit to arbitration with regard to fees previously earned and received. Some have speculated that without such a limitation the rules invited certain ill-motivated clients to request a refund after his/her case was concluded, since it seemed the client had nothing to lose to demand arbitration of the dispute. Rather than limit arbitration, effective Aug. 19, the section was further amended to encourage arbitration of fees already paid and require attorneys to arbitrate fee disputes with respect to fees already received. Section 136.2 now provides that:

In the event of a fee dispute between attorney and client, whether or not the attorney already received the fee in dispute, the client may seek to resolve the dispute by arbitration, which shall be binding upon both attorney and client. A client may request arbitration pursuant to s136.5(e) of this Part either in response to notice from the attorney pursuant to s136.5(a), upon consent pursuant to s136.5(d), or upon the client's own initiative. [FN14]

As a consequence of the amendments matrimonial lawyers should be cautioned - prepare to refund all or any part of the fees paid to you for at least two years after you have completed the case.

The arbitration rules originally provided that disputes involving a sum less than $2,000 shall be submitted to one attorney arbitrator, and disputes involving a sum of $2,000 or more shall be submitted to a panel of three

arbitrators. [FN15] This threshold amount was increased to $3,000 on Aug. 19. In addition, s136.3(b) was amended to clarify that the 30-day period to file a request for arbitration is jurisdictional, making the failure to make the demand on a timely basis a fatal defect. It now provides: "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 shall no longer have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue."

FN1. See NYCRR Part 1400.

FN2. See Administrative Order dated Oct. 29, 1993, amending 22 NYCRR 202.16 effective Nov. 30, 1993. The rules, as amended apply only to actions and proceedings commenced on or after Nov. 30, 1993. The pre-Nov. 30, 1993, rules continue to apply to all actions and proceedings commenced on or before Nov. 29, 1993.

FN3. See Brandes and Weidman, "Regulation of the Conduct of Divorce Lawyers," New York Law Journal, March 12, 1994, P.3, Col 3. Brandes and Weidman and "The New Rules on Disclosure," NYLJ, April 26, 1994, p. 3, col. 3.

FN4. See 22 NYCRR 1400.2.

FN5. See 22 NYCRR 1400.3.

FN6. See 22 NYCRR 1400.4.

FN7. See 22 NYCRR 1400.5.

FN8. See 22 NYCRR 1400.6.

FN9. See 22 NYCRR 1400.7.

FN10. See Brandes and Weidman, "Amendment to Rules on Divorce Lawyers Conduct," NYLJ, Aug. 23, 1994, p.3., col.1.

FN11. 22 NYCRR 1400.3 requires that "in actions in the Supreme Court a copy of the signed retainer agreement shall be filed with the statement of net worth."

FN12. 22 NYCRR 1400.7.

FN13. s136.9 provides: "Refusal to participate in arbitration All attorneys are required to participate in the arbitration process upon the filing of the request for arbitration by a client in conformance with these rules. An

attorney who refuses to submit to the arbitration process shall be referred to the local grievance committee of the Appellate Division for disciplinary action."

FN14. The procedure is set forth in s136.5, which provides, in part: Arbitration procedure.

"(a) Where the attorney and client cannot agree as to the attorney's fee, the attorney shall 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. ***

"(b) A client also may consent to the attorney's request to submit the dispute to arbitration. Such consent must be obtained in writing prior to the initiation of the proceeding. The request for or consent to arbitration shall specify that the client has received and read the standard instructions developed by the Chief Administrator regarding the arbitration procedure, and that the client waives his or her right to otherwise pursue the claim and agrees to be bound by the determination of the arbitration panel.

"(c) If the client elects to submit the dispute to arbitration, the client shall file the request for arbitration with the Administrative Judge in the judicial district which has or would have jurisdiction over the martial dispute, unless another is designated by the Chief Administrator. Upon receipt of the request for arbitration, the Administrative Judge shall serve a copy of the request upon the named attorney and forward an 'attorney fee response' to be completed by the attorney and returned to the Administrative Judge within 20 days. The attorney shall include with the response a certification that a copy of the response was served upon the client."

FN15. See s136.3 (c) and (d).

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