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The Ins and Outs of Fee Arbitration in New Jersey

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Lawyers deserve to be paid for the services they render to their clients. Despite that fact, clients may contest or simply decline payment of the fees they owe to their attorney. In an effort to assist both litigants and lawyers in resolving these fee disputes without either side filing a lawsuit, the New Jersey Supreme Court instituted the concept of fee arbitration. This statewide program is composed of volunteer attorneys and laypeople who serve on local fee arbitration committees that screen and adjudicate fee disputes between an attorney and his or her client.

The Importance of the Fee Arbitration Process in New Jersey

The New Jersey Supreme Court has continuously reaffirmed the importance of the fee arbitration process in the state. Indeed, in 2011, in the case of *In re Saluti*, the New Jersey Supreme Court suspended an attorney from practicing law due to his failure to pay a fee arbitration award, despite the fact that the attorney had filed for bankruptcy protection.[1] In the *Saluti* decision, the Supreme Court stated, "Those who seek the privilege of membership in the legal profession are required to submit to fee arbitration committee proceedings."[2]

Since 1978, fee arbitration committees have been used to promote "public confidence in the bar and the judicial system."[3] Former Chief Justice Robert Wilentz observed:

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If it is true—and we believe it is—that public confidence in the judicial system is as important as the excellence of the system itself, and if it is also true—as we believe it is—that a substantial factor that erodes public confidence is fee disputes, then any equitable method of resolving those in a way that is clearly fair to the client should be adopted....The least we owe to the public is a swift, fair and inexpensive method of resolving fee disputes.[4]

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The *Saluti* Court echoed this sentiment, stating "the fee arbitration committee scheme is...important...because it facilitates the expedited resolution of fee disputes between attorneys and clients and fosters public confidence in the legal profession."[5]

In his or her pre-action notice advising a client on an intent to collect an outstanding fee, a lawyer must indicate that the fee arbitration program exists.[6] Notice of a client's right to fee arbitration in a retainer agreement is not a substitute for the 30-day letter advising a client of the fee arbitration process. If the client chooses fee arbitration, all litigation that has begun must cease.

Fee arbitration is a fast, inexpensive, and confidential way of resolving fee disputes. Every attorney should keep detailed time records from the inception of the representation in order to defend his or her fees at a hearing.[7] In family matters, attorneys must bill "no less frequently than once every 90 days."[8]

The Importance of (and Limits to) Retainer Agreements, and Full Written Disclosure

The most important document that *must* be signed by the attorney and the client in every matrimonial matter is the retainer agreement.[9] It is also one of the most important documents reviewed at a fee arbitration hearing. A retainer agreement is a contract between the attorney and the client that will be enforced, as long as its terms are not overreaching. Therefore, any terms that an attorney wants enforced regarding the representation must be included.

RPC 1.5(b) provides, "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation." In *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, the Appellate Division explained the burden each attorney has to present a retainer that sets forth clearly all charges for which a client will be billed.[10] "The written statement required by *RPC* 1.5(b) must disclose all charges for which the client will be financially responsible."[11] Full and complete disclosure of all charges that may be imposed upon the client is also necessitated by *RPC* 1.4(c), which reads, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Appellate Division questioned, "If the client does not know what charges and costs beyond the hourly rate he may be exposed to, how can the client be expected to make an informed decision regarding representation?"[12] This obligation regarding retainer agreements in family matters is more fully set out in Rule 5:3-5 (a)(1) through (10). For example, Rule 5:3-5(b) specifically disallows a non-refundable retainer because it could lead to fee overreaching.

Some retainer agreements may include a clause for the parties to arbitrate fee disputes under general arbitration principles. While an arbitration clause is not often seen in matrimonial retainer agreements, it is enforceable only if it clearly states the client nevertheless has an absolute right to fee arbitration and the retainer explains all of the consequences of an election to arbitrate.[13] Such a provision in a retainer agreement does not, however, meet the attorney's obligation to provide notice that a client may avail him or herself of fee arbitration procedure but, "agreements between attorneys and clients generally are enforceable as long as they are fair and reasonable."[14]

The enforceability of specific terms of retainer agreements was addressed in *Hrycak v. Kiernan*.[15] In *Hrycak*, the Appellate Division upheld a clause in a retainer agreement that provided the client would pay an additional attorney's fee if his attorney had to institute litigation to collect a fee that had already been awarded in fee arbitration.[16]

In stark contrast to the Appellate Division's *Hrycak* decision, a trial court held a retainer provision to be *unenforceable* that added one-third of the outstanding legal fees to the client's bill if the attorney was forced to file suit to collect fees.[17] In holding the provision unenforceable, the trial court reasoned that under such an agreement, there is the potential for an attorney to receive an unreasonable fee if little work was necessary to enforce the additional fee claim.[18]

Commencing the Fee Arbitration Process and the Jurisdiction of the Fee Arbitration Committee

To begin fee arbitration, a client must file a request with the secretary of the local fee committee in the county where the lawyer maintains an office and pay a $50 administrative filing fee. Critically, only a client can choose to pursue fee arbitration.[19] Upon receipt of the client's filed fee arbitration request, "A Fee Committee may, in its discretion, decline to arbitrate fee disputes in which persons who are not parties to the arbitration but have an interest that would be substantially affected by the arbitration," or "in which the primary issues in dispute raise substantial legal questions in addition to the basic fee dispute, or if the total fee charged exceeds $100,000."[20]

In the unpublished decision of *Wolkoff v. Larner*, the Appellate Division affirmed the decision of both the fee arbitration committee and the Disciplinary Review Board to decline to hear a fee dispute between a client and her attorney while the matrimonial matter regarding whether or not her spouse would have to contribute to her fees was pending.[21] The *Wolkoff* court stated, "A decision by the Law Division requiring appellant's ex-husband to pay some, or all, of her counsel fees could have mooted some or all of the fee dispute between appellant and [her attorney]....If any fee dispute remained, the Law Division's determination of the reasonableness of [the fee]...even if not binding...could have informed the hearing panel's determination, which similarly must 'be made in accordance with *RPC* 1.5,'...."[22]

Substantial legal questions (such as those involving attorney malpractice) can also appear in a fee arbitration claim, which may lead the fee arbitration committee to decline to hear the dispute. The committee does not have jurisdiction to decide claims for monetary damages resulting from legal malpractice, although it may consider the quality of services rendered in assessing the reasonableness of the fee pursuant to RPC 1.5.[23]

Fee arbitration committees can refuse to arbitrate fees that total in excess of $100,000; however, there are nuances to this rule. For example, if the attorney has asserted he or she is owed $101,000, arbitration will not be permitted. If the attorney's total fee is $110,000, but the client has paid $25,000, then the fee in dispute amounts to $85,000 and the fee arbitration committee has discretion to decide the dispute. Indeed, because the fee arbitration process is intended to help the parties resolve their fee dispute quickly, a case such as this might be docketed even though the total fee is in excess of $100,000.

There is a time limitation to using the fee arbitration process. The fee arbitration committee does not have jurisdiction to arbitrate a fee in which no attorney services have been rendered for more than six years from the last date services were rendered.[24]

Practical Lessons about Approaching Fee Arbitration

In reviewing these rules, two practical lessons emerge. First, an attorney must be ready to advocate why a large fee is reasonable in relation to the results obtained, even if the result was not favorable for his or her client. Frequently, family law litigants are upset about the result, and therefore choose not to pay the fee they owe their attorney. They take this position despite the fact that the result was not a reflection of the quality of services the lawyer performed.

Next, attorneys should send out their 30-day pre-action notice to the client shortly after services have been completed if it appears there is a dispute regarding the fee. An attorney should not wait until five years and 11 months has expired to serve a pre-action notice, which would then foreclose a client from pursuing fee arbitration, a process a client may well be hearing about for the first time in the pre-action notice.

The latter practice was addressed in the case of *Nieschmidt Law Office v. Leamann*.[25] In that case, the court noted it was the plaintiff/lawyer who delayed in filing its complaint for fees until the statute of limitations was about to expire, making it impossible for the lawyer to give the required 30-day pre-action notice within the period of time mandated by the rule. The court held that the "imminent" running of the statute of limitations did not excuse the attorney's failure to provide the required notice, and if the statute had run precluding a new notice and an amended complaint, the fee action would be barred.

The Manner in Which Fee Arbitration Occurs after Docketing

Once the fee arbitration secretary dockets the matter, an attorney fee response form is sent to the attorney requesting a response to the allegations, a copy of bills, any written retainer agreement, and any applicable time records. The attorney must serve a copy of the response on the client and pay a $50 administrative filing fee within 20 days after receiving the client's initial request for arbitration.

The attorney may join a third party, and any other "attorney or law firm that the original attorney claims is liable for all or part of the client's claim."[26]

If an attorney believes another attorney or another law firm is liable for all or part of the client's claim for fees, he or she must add the other attorney or law firm to the arbitration in the response. This issue arises when a lawyer changes firms and a client later files a fee arbitration request naming the lawyer at the *new* firm when the work performed and the money collected was with the lawyer's *prior* firm. If the prior law firm is not added, it can be problematic for the lawyer. For example, the fee arbitration panel could determine the lawyer must refund money to a client but the money that was paid for the disputed fees was collected not by the lawyer but by the prior law firm. A lawyer can avoid this problematic scenario by adding his or her prior law firm to the arbitration claim.

Once the client has filed the request and the lawyer has responded, a hearing is scheduled. Usually, one request for an adjournment is granted.

If the dispute involves fees of less than $3,000, the arbitration panel hearing the case may consist of a single member, as long as that member is an attorney. In cases involving fees of $3,000 or more, the matter is heard by a three-member panel, composed of two lawyers and one public member who is not an attorney.

There is no discovery explicitly provided for in the fee arbitration process and, therefore, it is important for lawyers to include as much information as practicable to support the claim for fees in response to the client's initial submission. It would also be beneficial for the attorney to take the file itself to the hearing in case a panel member does not believe a certain amount of work was done on a file. For example, attorneys who specialize in non-family law matters may be the arbitrators and may have no family law experience. In such a circumstance, the attorneys may not understand the amount of work that went into the representation, especially if there are complicated motions, orders to show cause, or appeals.

Lawyers and clients alike can subpoena witnesses to fee arbitration hearings. The committee secretary will issue a subpoena upon request; however, a party must show the information to be subpoenaed is relevant and material for the panel to determine the reasonableness of the fee.

At the hearing, the burden of proof is on the attorney to prove by a preponderance of evidence that the fee charged was reasonable. Therefore, the attorney is the first witness to testify and must be ready to present his or her case. It is important to study the bills that have been sent

to the client beforehand, so if an attorney finds a mistake or a duplication of fees it can be pointed out at the beginning of the hearing.

At the hearing, the lawyer may cross-examine the client and the client may cross-examine the lawyer. Each party has a right to be heard, as well as to cross-examine and present witnesses.

The fee arbitration hearing is confidential. Both parties have a right to be present at all times during the hearings with their attorneys. The rules of evidence need not be observed. All parties to the proceeding will be sworn in, despite the fact that no recording is made. Under special circumstances, the panel may accept testimony of a witness by phone or videoconference.[27]

After the hearing, the panel is required to prepare a written explanation of its determination within 30 days. Unfortunately, this may not always happen and, when it does not, both litigants and attorneys are disserved.

The Right to Appeal

Either party may appeal the determination of the committee within 21 days of the receipt of the decision to the Disciplinary Review Board.[28] There are three grounds for appeal: 1) failure of a member to be disqualified in accordance with Rule 1:12–1; 2) substantial failure of the committee to comply with procedural requirements of Rule 1:20-A, or other substantial procedural unfairness, that has led to an unjust result, or fraud on the part of any member of the committee; and 3) a palpable mistake of law by the fee committee that has led to an unjust result.

Most appeals are brought to the Disciplinary Review Board on two bases: 1) an allegation that the fee committee did not comply with procedural requirements, and 2) that there was a mistake of law that led to an unjust result. Frequently, the alleged procedural failure is that a party did not receive notice of the hearing, or that the panel did not permit each side to adequately present the case and cross-examine the other party. The arguments in support of a claim that the committee made a palpable mistake of law leading to an unjust result range from mathematical errors to assertions that the conclusions are not supported by the testimony or the documentary evidence submitted.

The Disciplinary Review Board meets 10 months of the year and reviews ethics grievance appeals, as well as fee arbitration appeals. The decision to grant or deny an appeal is made by the full Disciplinary Review Board, and the board's decision is final. The parties have no right to appeal the board's decision to the New Jersey Supreme Court.

Ethical Implications of a Fee Arbitration Determination

When a fee arbitration committee renders its decision, the determination is sent to the director of the Office of Attorney Ethics. The attorney and the client have 30 days from the receipt of fee arbitration committee's determination to comply if there has been no appeal. If an attorney does not pay a refund to a client within 30 days, the client typically notifies the fee arbitration secretary, who refers the matter to the Office of Attorney Ethics for enforcement, which results in an application to the Supreme Court to temporarily suspend the lawyer for failure to comply with a fee award. Usually, this motion spurs attorneys to comply and refund the money due to the client pursuant to the determination.

In certain circumstances, an attorney may ignore his or her obligation to refund money due to a client. In the *Saluti* decision, the New Jersey Supreme Court found it was necessary to suspend an attorney for failure to pay a fee award to "redress his blatant disregard of award

entered by the Committee in the exercise of it disciplinary authority as delegated by the Court."[29] This discipline is meant to "bolster the fee arbitration process and to retain public confidence in the committee's authority to resolve claim disputes."[30]

If the client owes money to the attorney and has not paid the sum within 30 days of receipt of the arbitration determination, the attorney may bring a summary action pursuant to Rule 4:67 to obtain judgment in the amount of the fee or refund. The trial court does not have jurisdiction to review the fee arbitration committee's fee determination. That review function is exclusively reserved for the Disciplinary Review Board under Rule 1:20A–15(l).[31]

Unfortunately, family law matters have generated 37 to 40 percent of all fee appeals each year. This represents a 300 percent increase over the next most frequently appealed determinations, which relate to criminal matters and account for 14 percent of all arbitrated matters.

If the client has filed an ethics grievance against the attorney with whom arbitration is sought, the secretary of the ethics committee may defer determination of the grievance if it is felt that the grievance contains aspects of a fee dispute, thereby permitting the fee arbitration committee to determine the reasonableness of the fee. Often after the fee controversy is decided, no ethics grievance follows.

Conversely, it is the duty of the fee arbitration committee to refer any matter that it concludes may involve ethical misconduct or raises a substantial question regarding an attorney's honesty, trustworthiness or fitness as a lawyer, including fee overreaching, to the Office of Attorney Ethics for investigation.[32]

Final Practice Tip

Having set forth of the fee arbitration process, as well as the ethical implications that arise out of it, the author wishes to provide the following final practice tip. It is recommended that the attorney send the 30-day letter to the client as soon as it is clear the client may not pay the bill. If this 30-day letter is sent promptly, the attorney can hope the client opts to utilize the fee arbitration process. As this process is designed to resolve disputes and foster public confidence in the legal profession, it provides an ideal setting for the resolution of a less-than-ideal situation.

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Endnotes

1. *In re Saluti*, 207 N.J. 509 (2010).
2. *Id.* at 515, *citing In Re LiVolsi*, 85 N.J. 576, 597-99 (1981).
3. *Saffer v. Willoughby*, 143 N.J. 256, 262 (1996).
4. *LiVolsi*, *supra*, 85 N.J. at 601-02.
5. *In re Saluti*, *supra*, 207 N.J. at 516.
6. R. 1:20A-6.
7. *Mayer v. Mayer*, 180 N.J. Super. 164, 167 (App. Div. 1981).
8. R. 5:3-5(a)(5).
9. R. 5:3-5(a).
10. *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510,530 (App. Div. 2009).
11. *Id.* at 531.

12. *Ibid.*
13. *Kamaratos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003).
14. *Cohen v. Radio Elecs. Officers Union*, 146 N.J. 140, 155 (1996). *See also Gruhin & Gruhin, P.A. v. Brown*, 338 N.J. Super. 276, 280 (App. Div. 2001).
15. *Hrycak v. Kiernan*, 367 N.J. Super. 237 (App. Div. 2004).
16. *Id.* at 241.
17. *See Gruber & Colabella, P.A. v. Erickson*, 345 N.J. Super. 248 (Law Div.
18. *Ibid.*
19. R. 1:20A-3(a)(1).
20. R. 1:20A-2(b)(1)(2).
21. *Wolkoff v. Larner*, 2014 N.J. Super. Unpub. LEXIS 2555,*6-7 (App. Div. Oct. 24, 2014),
22. *Ibid.* (Internal citations omitted.)
23. *See* R. 1:20A-2(c)(2).
24. R. 1:20A-2(c)(4).
25. *Nieschmidt Law Office v. Leamann*, 399 N.J. Super. 125 (App. Div. 2008).
26. R. 1:20A-3-(2).
27. R. 1:20A-3(b)(4).
28. R. 1:20A-3(c)(d).
29. *In re Saluti, supra*, 207 N.J. at 516.
30. *Ibid.*
31. *Linker v. Co. Car Corp.*, 281 N.J. Super. 579 (App. Div. 1995).
32. R. 1:20A-4.