

Noteworthy Cases

Serazio-Plant v Channing, 299 AD2d 969, 750 NYS2d 347 [App Div 3d Dept 2002], *lv denied* 100 NY2d 512 [NY 2003]

Held that matrimonial rules (22 NYCRR Part 1400) do not conflict with Judiciary Law § 474. Also held that arbitrators justifiably refunded client's \$13,000 retainer where attorney failed to provide written retainer agreement and itemized bills at least every 60 days and where arbitrators found attorney's testimony "inaccurate, false and misleading, and unreliable."

Riley v Coughtry, 13 AD3d 703, 786 NYS2d 588 [App Div 3d Dept, 2004]

Upheld arbitrator's reduction of matrimonial attorney's fee from \$6,800 to \$5,000 as an appropriate resolution proportionate to attorney's partial noncompliance with 22 NYCRR Part 1400 where attorney failed to render a bill every 60 days and to timely provide other correspondence. Also, the Court held that public policy did not prevent attorney from submitting an additional bill after client commenced fee dispute arbitration. "Whether [fees] are claimed before or after a demand for arbitration is simply one factor to be weighed by the arbitrator in arriving at a reasoned determination of the issues."

Paikin v Tsirelman, 266 AD2d 136, 699 NYS2d 32 [App Div 1st Dept 1999]

Outgoing counsel is required to provide client with 30-day notice of right to arbitrate—even in the absence of any explicit fee disagreement—or attorney will be precluded from recovering fee.

Scordio v Scordio, 270 AD2d 328, 705 NYS2d 58 [App Div 2d Dept 2000]

The Second Department declined to follow Paikin and held that the attorney could recover fees without participating in arbitration where the attorney did not send the 30-day notice of client's right to arbitrate because the client never explicitly disputed the fee.

Altamore v Friedman, 193 AD2d 240 [App Div 2d Dept 1993]

Client who sought full refund of fees paid to attorney filed a complaint with the Grievance Committee, which referred the matter to a local bar association's fee-dispute arbitration program. When client lost the fee arbitration, client sued attorney for malpractice. The Appellate Division upheld the lower court's determination that client was precluded from pursuing the malpractice action.

Feder, Goldstein, Tanenbaum & D'Errico v Ronan, 195 Misc2d 704, 761 NYS2d 463 [Nassau Dist Ct 2003]

Attorney was precluded from recovering legal fees where attorney failed to provide client with either written retainer agreement or written letter of engagement.

Rotker v Rotker, 195 Misc2d 768, 761 NYS2d 787 [Sup Ct, Westchester County 2003]

Attorney's failure to provide notice of client's right to arbitrate did not divest attorney of right to receive fee for services rendered. Also, client did not waive her right to arbitrate when she moved to compel her former attorney to deliver the case file to the client's new attorney without first disputing the fee or demanding that the fee dispute be arbitrated.

In the Matter of the Arbitration between McNamee, Lochner, Titus & Williams P.C. and Bethany M. Killeen, (235 AD2d 17, 663 NYS2d 356 [3d Dept 1997])

Court held that an arbitration panel convened pursuant to Part 136 exceeded its authority by making an imperfectly executed award; the award did not contain any rationale for the panel's decision, and since there was no record of the arbitration hearing, the reviewing court could find no support for the panel's decision to relieve the client from paying the fee.

In the Matter of the Arbitration between McNamee, Lochner, Titus & Williams P.C. and Bethany M. Killeen, (267 AD2d 919, 920, 700 NYS2d 525, 527 [3d Dept 1999])

"A panel [reviewing] a fee dispute is not required to recite or expressly refer to the guiding criteria or to list its findings of fact for a reviewing court to be able to perform meaningful review and to discern that there is a basis in the evidence for the panel's determination, although such references are undoubtedly helpful."

Migdal, Pollack & Rosencrantz v Coleman (2004 NY Slip Op 24423 [Sup Ct, NY County, Oct. 29, 2004])

Under Part 136 Program, in which arbitration of fee disputes is required for amounts up to \$100,000, the court held that arbitrability depends on the amount of the contested fee, not the attorney's total fee. Thus, where the attorney's total fee exceeded \$100,000 but the client disputed less than \$100,000 of the fee, the attorney was required to comply with Part 136.

An attorney who represents a client in a domestic relations matter must provide the client with a written retainer agreement which outlines the terms of compensation and the nature of services to be rendered (22 NYCRR 1400.3). This requirement is also codified in DR 2-106 of the Lawyer's Code of Professional Responsibility.¹

Since the "matrimonial rules" first took effect in 1994 the Second Department has consistently held that an attorney is precluded from recovering legal fees where he or she did not comply with the written retainer requirement. *Mulcahy v Mulcahy*, 285 AD2d 587 [2001]; *Kayden v Kayden*, 278 AD2d 202 [2000]; *Potruch v Berson*, 261 AD2d 494 [1999]. In *Julien v Machsen*,

The Rule provides in pertinent part:

- (b) A lawyer shall not enter into an agreement for, charge, or collect:
- (2) Any fee in a domestic relations matter:
 - (ii) Unless a written retainer agreement is signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement.

245 AD2d 122 [1997], the First Department held that the failure to comply with a number of matrimonial rules, including filing the written retainer, precluded recovery of legal fees. The Third Department, in *Serazio-Plant v Channing*, 299 AD2d 696 [2002], upheld a fee arbitration award finding that the attorney was not entitled to any fees based on several violations of the matrimonial rules, including providing a written retainer. Finally, the Fourth Department, in *Hunt v Hunt*, 273 AD2d 875 [2000], held that the attorney was precluded from recovering fees where he failed to provide the client with a written statement of client's rights and responsibilities and a written retainer agreement, both of which are required under the matrimonial rules. The court stated that "[s]trict compliance with those rules is required" (id. at 876).