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Part 137: The Attorney-Client Fee-Dispute Program

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PART 137: THE ATTORNEY-CLIENT FEE-DISPUTE PROGRAM

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This article discusses the rights and obligations of Richmond County attorneys and clients regarding fee disputes they might have with one another.

One great source of conflict between attorneys and their clients concerns attorney billing. To provide a quick and inexpensive way to resolve fee disputes, New York State decided to remove fee-dispute cases from court adjudication as much as possible and, instead, to place them into the hands of bar-association neutrals. On May 18, 2001, then-Chief Administrative Judge Jonathan Lippman and the Administrative Board of the Courts enacted the statewide Fee Dispute Resolution Program, codified as Part 137, Title 22, of the New York Codes, Rules and Regulations (Part 137).[1] The Part 137 program is based on the First Judicial Department's long-standing, successful, and formerly voluntary fee-dispute arbitration and mediation program — the Joint Committee on Fee Disputes and Conciliation — which is run by the New York City Bar Association, the New York County Lawyers' Association, and the Bronx County Bar Association. Part 137 established a state-wide program that "provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation."[2]

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Part 137 applies to all attorneys admitted in New York representing a client in a civil (i.e., not criminal) matter beginning on or after January 1, 2002.[3] The rules limit arbitration to fee disputes (i.e., not malpractice or misconduct claims) with a disputed amount of $1000 to $50,000, although the parties may consent to arbitrate disputes of other amounts.[4] Also excluded from Part 137 arbitration are disputes over a legal fee set by a court; disputes in which no legal services have been rendered for more than two years; disputes with out-of-state attorneys who either have no office in New York or did not render any material portion of the services in New York; and disputes in which the person requesting arbitration is neither the client nor the client's legal representative.

Part 137 gives clients an opportunity to have an arbitrator "determine the reasonableness of [attorney] fees for professional services, including costs, taking into account all relevant facts and circumstances" rather than require either side to commence a lawsuit.[5] It compels attorneys to notify clients of the option to arbitrate fee disputes.[6] Notifying a client involved in a fee dispute of the arbitration option is a prerequisite to an attorney's lawsuit to recover a legal fee.[7] To avoid dismissal in court, an attorney's complaint must allege that the attorney notified the client of the arbitration option and that the client failed to file for arbitration or, alternatively, that Part 137 does not apply to the controversy.[8]

Part 137 authorizes local bar associations to establish and administer fee-dispute programs that complies with Part 137.[9] Under this authority, the Richmond County Bar Association (RCBA) adopted and instituted Part 137 as its local Fee Dispute Arbitration Program (the Program).[10] The New York State Dispute Resolution Plan's Board of Governors approved the RCBA's governance and program administration. A copy of the RCBA's Program Rules is available at the RCBA Office at 152 Stuyvesant Place, Staten Island, New York 10301, or at the New York State Unified Court System's Web site.[11] The RCBA Program is designed to administer Part 137 "where the majority of legal services" occurred in Richmond County.[12] Although the RCBA's efficient and cost-effective Program mirrors Part 137, Part 137 is given deference in the event of any conflict.

I. Ensuring Arbitration of Fee Disputes

Attorneys should prepare for the possibility of a fee dispute and act to ensure the parties can adjudicate the dispute in arbitration at the start of the attorney-client relationship. Although fee-dispute arbitration is mandatory for attor-

neys, "unless the client has previously consented in writing to submit fee disputes to the fee dispute resolution process established by Part 137, arbitration shall be voluntary for the client."[13] Attorneys should discuss arbitration with their client and, if possible, have them agree in writing to submit a possible fee dispute to arbitration.

The RCBA Program, like Part 137, provides that "[t]he client may consent in advance to submit fee disputes to arbitration."[14] The Program directs that "such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the [Program's] official written instructions and procedures, and that the client agrees to resolve fee disputes under this program."[15] The Program, however, allows participants to have the fee dispute adjudicated on the merits in court after the arbitration regardless who wins the arbitration, a process called de novo review.[16] Clients can waive that de novo review right in advance and instead consent in advance to "final and binding" arbitration "not subject to de novo review."[17] The client's waiver of a de novo review must be in writing "in the form prescribed by the [State] Board of Governors."[18] A copy of the Board of Governors' form is available on the New York State Unified Court System's Web site.[19]

Effective March 4, 2002, with limited exceptions, the New York Code of Professional Responsibility (Code) requires "an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client" to "provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter."[20] The Code further requires the letter of engagement to (1) explain "the scope of legal services to be provided"; (2) explain "the attorney's fees to be charged, expenses and billing practices; and (3) where applicable, [to] provide that the client may have the right to arbitrate fee disputes under Part 137 . . . ."[21] A signed retainer agreement stating this information satisfies the Code's requirement of a letter of engagement.[22] The new Code of Professional Responsibility, approved by the courts on December 16, 2008, and effective April 1, 2009, similarly requires lawyers to "communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible."[23] The new Code requires attorneys to provide this information "in writing where required by statute or court rule."[24] The newly adopted Code instructs that "where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of Courts."[25] Prudent practice is to incorporate the fee-dispute arbitration parameters in the letter of engagement or retainer agreement that the applicable Code requires. Regardless of whether the applicable Code requires a letter of engagement or retainer agreement, a written agreement to arbitrate fee disputes helps inform clients of their rights regarding a potential fee dispute and permits the attorney to initiate arbitration if a dispute arises.[26]

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II. Commencing Fee-Dispute Arbitration

Either the attorney or the client may initiate the RCBA's Program. On realizing that a fee dispute exists with a client, an attorney can seek arbitration or mediation by sending the client a Notice of Client's Right to Arbitrate A Dispute Over Attorneys Fees; a copy of the Part 137 Standard Written Instructions and Procedures; a copy of the RCBA's Program Rules; and a Client Request for Fee Arbitration (collectively, the "Notice Package").[27] Copies of all the documents in the Notice Package are available at the RCBA office, by calling the RCBA at (718) 442-4500, or by downloading them from the New York State Unified Court System's Web site.[28] A client then has 30 days from receipt of the Notice Package to file for RCBA fee-dispute arbitration.[29] If a client files for arbitration, arbitration is mandatory for the attorney.[30] If a client fails to file for arbitration timely, the attorney may commence a lawsuit to collect the disputed fee.[31] The attorney's complaint must allege either "(i) that the client received notice under [Part 137] 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 [Part 137]."[32] Alternatively, if the client consented in advance to arbitrate a fee dispute, the RCBA Program permits attorneys to file a request for arbitration with the RCBA and serve it on the client by certified mail.[33] Thus, a client's advance consent to arbitrate fee disputes permits an attorney to compel the client to arbitrate the dispute and permit the attorney to initiate the arbitration.

Clients can also initiate the Program. They can file the request for arbitration that the attorney provided in the Notice Package within 30 days of receiving it[34] or, on their own initiative, they can contact the RCBA to obtain, complete, and file the request-for-arbitration form.[35] If the client contacts the attorney involved in the dispute, Part 137 obligates the attorney "to refer the client to the arbitral body," here the RCBA, "having jurisdiction over the dispute."[36] The initiating party, whether the attorney or client, must pay a $100.00 filing fee by check payable to the Richmond County Bar Association upon filing the request for arbitration.[37]

Once the RCBA receives a request for arbitration from the attorney or client, the RCBA mails a copy of the request and a response form to the other party, called the respondent.[38] The respondent must complete and return the response form to the

RCBA within 15 days of receiving it, along with a certification that the respondent served a copy of it on the initiating party.[39] Neither the attorney nor the client may withdraw from the Program once the RCBA receives the response.[40]

After receiving the response form, or if the RCBA does not receive the respondent's response within 15 days, the RCBA appoints an arbitrator or a panel of arbitrators.[41] The RCBA Program's administrator, currently Richard A. LaRosa, Esq., assigns arbitrators to filed requests for arbitration from a list of qualified arbitrators. The administrator appoints arbitrators according to their availability and after considering possible conflicts. Potential arbitrators are lawyers who practice in Richmond County and nonlawyers, usually established professionals, who reside or do business in Richmond County. Attorney arbitrators must be members of the bar for at least five years and have successfully completed mandatory arbitration and mediation training under the Part 137 guidelines.[42] Nonlawyer arbitrators must also successfully complete the arbitration and mediation training.[43] The RCBA is currently recruiting additional lawyer and nonlawyer arbitrators. If there is sufficient interest, the RCBA will likely schedule an arbitration and mediation training in February 2009 on Staten Island. Those interested in becoming a Program arbitrator should send their résumé to the RCBA Office, attention Ms. Elisa Lefkowitz. Arbitrators are pro bono volunteers.

The Program provides for the appointment of one attorney arbitrator for disputes involving a fee of less than $6000 and three arbitrators for disputes involving a fee of at least $6000.[44] In cases requiring a three-arbitrator panel, the Program mandates that one arbitrator to be a nonlawyer.[45] The RCBA notifies each party of the names of appointed arbitrator(s) and provides a brief biographical sketch.[46] Arbitrators and parties must disclose any personal, professional, or business contacts to the participants.[47] The parties may request the removal of an arbitrator no later than five days before the hearing date.[48] The arbitrator(s) notify the parties of the hearing's date, time, place, and location, providing at least 20 days' notice.[49] The hearing's location is on Staten Island, at an arbitrator's office or at the RCBA's office.[50]

III. The Arbitration Award and De Novo Review Opportunity

The Program requires the arbitrator(s) to render a written award within 30 days after the hearing ends.[51] The award must "specify the basis for the determination."[52] As in most arbitration processes, "an arbitrator is not bound by principles of substantive law or by rules of evidence."[53] Rather, an arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement."[54] In cases of a three-arbitrator panel, a majority is required to render an award.[55] Regardless of who initiated the fee-dispute arbitration, the attorney must "prove the reasonableness of the fee by a preponderance of the evidence" and must "present documentation of the work performed and the billing history."[56]

Absent an express written waiver, the RCBA Program, consistent with Part 137, allows an aggrieved party to reject the arbitration award and begin a lawsuit on the merits of the fee dispute in a court of competent jurisdiction.[57] The aggrieved party must

exercise this right of de novo review within 30 days of the arbitrators' mailing the award.[58] The arbitration award ripens into a final and binding award if the party fails to commence the de novo action within 30 days after the arbitrators mail the award.[59] If a party timely begins a de novo action, the arbitration award is inadmissible in that action.[60] Parties that fail to participate in the arbitration proceeding may not commence a de novo action unless they show good cause for the non-participation.[61] The Program permits participation "in the arbitration proceeding without a personal appearance by submitting to the arbitrator(s) testimony and exhibits by written declaration under penalty of perjury."[62] Parties participating only by written submission should consider the arbitrators' substantial discretion to receive and consider this evidence.[63] To preserve their right to a de novo review if the arbitrator(s) render an unfavorable award and to advocate for the admissibility and impact of evidence, therefore, attorneys are smart to participate by personal appearance at the hearing rather than on submission.

Part 137, and therefore the RCBA Program's Rules, is silent about enforcing arbitration award.[64] Part 137 and the RCBA Program provide that a nonprevailing party must challenge an unfavorable arbitration award by commencing a de novo review within 30 days of the award's mailing.[65] CPLR 7510, however, directs that courts "shall confirm an award upon application of a party made within one year after delivery to him, unless the award is vacated or modified."[66] Thus, "[a]lthough "Part 137 lacks any directive regarding enforcement of the arbitrators' award, unless the successful party is permitted to utilize [CPLR] Article 75 to confirm the award and reduce it to a judgment, the arbitrators' award is ineffective, except if it is voluntarily satisfied by the losing party."[67] It is beneficial for a prevailing party to commence a special proceeding under CPLR 7510 to confirm the arbitration award after the nonprevailing party's time to seek de novo review expires because "'once the award is confirmed into a judgment, all of the enforcement of judgment remedies become available for it.'"[68] Although Part 137 does not provide express enforcement provisions, the CPLR's arbitration provisions protect a prevailing party's power to enforce the favorable arbitration award.

IV. Conclusion

The RCBA operates a Fee Dispute Arbitration Program that satisfies Part 137's mandates that attorneys inform their clients of the fee-dispute arbitration options and that attorneys try to arbitrate or mediate their fee disputes. In addition to satisfying attorneys' Part 137 obligations, the Program gives attorneys and their clients a fair, inexpensive, efficient, and, often, amicable way to resolve the distressing experience of a fee dispute. The Program advances the profession's tenets to self-regulate, guard clients' interests, and promote justice.

Endnotes:

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1. *See* 22 N.Y.C.R.R. 137 *et seq.*
2. 22 N.Y.C.R.R. 137.00.
3. *See* 22 N.Y.C.R.R. 137.1(a).
4. *See* 22 N.Y.C.R.R. 137.1(b)(2).
5. *Id.; see also* 22 N.Y.C.R.R. 137.2(a).
6. *See* 22 N.Y.C.R.R. 137.6(a)(1).

7. *See* 22 N.Y.C.R.R. 137.6(b); *see also Ostrolenk Faber Gerb & Soffen LLP v. Christopher*, N.Y.L.J., Aug. 29, 2007, at 29, col. 1, 2007 N.Y. Misc. LEXIS 6361 (Civ. Ct. Richmond County 2007) (noting that "unless the basis of the attorney's representation for the client is one of the exceptions listed in 22 N.Y.C.R.R. 137.1(b), a pre-condition to an attorney seeking to recover legal fees is to offer fee dispute resolution to the client").
8. *See* 22 N.Y.C.R.R. 137.6(b)(i),(ii); *see also Ostrolenk*, 2007 Misc. LEXIS 6361 (dismissing attorney's compliant for failure to provide client with arbitration notice); *Kerner & Kerner v. Dunham*, 46 A.D.3d 372, 848 N.Y.S.2d 617, 618 (1st Dep't 2007) (affirming court's dismissal of attorney's complaint for failure to allege that Part 137 was inapplicable).

9. *See* 22 N.Y.C.R.R. 137.4(a).

10. *Compare* 22 N.Y.C.R.R. 137 *et seq.* with RCBA Program Rules.

11. *See* www.courts.state.ny.us/admin/feedispute/2ndjd.shtml (last visited Dec. 29, 2008).

12. RCBA Program Rules § 3(i).

13.www.courts.state.ny.us/admin/feedispute/2ndjd.shtml; Standards and Guidelines of the Part 137 Program §6(A) (last visited Dec. 29, 2008).

14. 22 N.Y.C.R.R. 137.2(b); *see also* RCBA Program Rules, § 4(B).

15. RCBA Program Rules § 4(B); *see also* 22 N.Y.C.R.R. 137.2(b).

16. *See* RCBA Program Rules § 8, ¶ 1.
17. RCBA Program Rules § 4(C); *see also* 22 N.Y.C.R.R. 137.2(c).

18. *Id.; see also Morelli & Gold, LLP v. Altman*, N.Y.L.J., July

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17, 2008, at 26, col. 1, 2008 N.Y. Misc. LEXIS 4571 (Sup. Ct. N.Y. County 2008) (finding that apparent attempt in retainer agreement to be bound by arbitration decision ineffective to waive right of de novo review).

19. *See* www.courts.state.ny.us/admin/feedispute/otherRelated_forms.shtml (form 137-14) (last visited Dec. 29, 2008).

20. 22 N.Y.C.R.R. 1215.1(a); *see also* 22 N.Y.C.R.R. 1215.2 (enumerating four exceptions to letter-of-engagement or retainer-agreement requirement: (1) representation of a client if the fee is expected to be less than $3000; (2) representations where the attorney's services are of the same general kind as previously rendered to and paid for by the client; (3) representation in domestic-relations matters subject to 22 N.Y.C.R.R. Part 1400; or (4) representation 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 are to be rendered in New York).

21. 22 N.Y.C.R.R. 1215.1(b)(3).
22. *See* 22 N.Y.C.R.R. 1215(c).

23. www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf (last visited Dec. 29, 2008); Proposed Rule 1.5(b).

24. *See id.*

25. www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf (last visited Dec. 29, 2008); Proposed Rule 1.5(f).

26. *See* RCBA Program Rules § 6, ¶ 2.
27. *See id.; see also* 22 N.Y.C.R.R. 137.6(a)(1).
28. *See* www.courts.state.ny.us/admin/feedispute/2ndjd.shtml (last visited Dec. 29, 2008).

29. *See* 22 N.Y.C.R.R. 137,6(a)(1); *see also* Notice of Arbitration, Standard Instructions at 2.

30. *See* RCBA Program Rules § 4(A).
31. *See* 22 N.Y.C.R.R. 137.6(b).
32. 22 N.Y.C.R.R. 137.6(b)(i),(ii).
33. *See* RCBA Program Rules § 6, ¶ 2; *see also* 22 N.Y.C.R.R. 137.6(a)(2).
34. *See* 22 N.Y.C.R.R. 137.6(d).
35. *See* 22 N.Y.C.R.R. 137.6(c).
36. *Id.*
37. *See* RCBA Program Rules § 6, ¶ 1.
38. *See* RCBA Program Rules § 6, ¶ 4.
39. *See id.*
40. *See* RCBA Program Rules § 6, ¶ 8.
41. *See* RCBA Program Rules § 6, ¶ 5.
42. *See* RCBA Program Rules § 5(a), (b), (j).
43. *See* RCBA Program Rules § 5, ¶ 2.
44. *See* RCBA Program Rules § 6, ¶ 5.
45. *See* id.
46. *See* RCBA Program Rules § 6, ¶ 6.
47. *See* id.
48. See id.
49. *See* RCBA Program Rules § 6, ¶ 7.
50. *See id.*
51. See RCBA Program Rules § 7, ¶ 3.
52. *Id.*

53. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308, 473 N.Y.S.2d 774, 779 (1984); *see also* RCBA Program Rules, § 7(c).

54. *Silverman*, 61 N.Y.2d at 308, 473 N.Y.S.2d at 779; *see also* RCBA Program Rules § 7; 22 N.Y.C.R.R. 137.7(a), (b).

55. *See* RCBA Program Rules § 7, ¶ 6.
56. RCBA Program Rules § 7, ¶ 2.
57. *See* RCBA Program Rules § 8, ¶ 1; *see also* 22 N.Y.C.R.R. 137.8
58. *See id.; see also* 22 N.Y.C.R.R. 137.8(a).
59. *See* RCBA Program Rules § 8, ¶ 1; *see also id.*
60. *See* RCBA Program Rules § 8, ¶ 2; *see also* 22 N.Y.C.R.R. 137(c); *Landa v. Dratch*, 45 A.D.3d 646, 647, 846 N.Y.S.2d 256, 257 (2d Dep't 2007).

61. *See* RCBA Program Rules § 8, ¶ 1.
62. RCBA Program Rules § 14.
63. *See* id.
64. *See* 22 N.Y.C.R.R. 137 et seq.; *see also* RCBA Program Rules § 1, et seq..

65. *See* 22 N.Y.C.R.R. 137.8(a); *see also* RCBA Program Rules § 8, ¶ 1.

66. N.Y. C.P.L.R. § 7510 (Lexis 2008).

67. *DeFilippo v. Gerbino*, 12 Misc. 3d 1153(A), 2005 N.Y. Slip Op. 52297(U) (Civ. Ct. Richmond County 2005).

68. *Id*., (*quoting* David D. Siegel, N.Y. Practice § 601, at 1061-62).