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# Mandatory Fee Arbitration Under New York's Matrimonial Rules

*By Professor Lester Brickman\**

## I. INTRODUCTION

In recent decades, public dissatisfaction with lawyers has mounted ceaselessly. A significant portion of that dissatisfaction is attributable to concerns about lawyers' integrity and fees.<sup>[1]</sup> Indeed, "[n]o single issue between lawyer and client arises more frequently or generates more public resentment than fee problems."<sup>[2]</sup> Despite the near ubiquity of fee disputes, client complaints to disciplinary agencies about excessive fees are almost always rejected because most disciplinary boards do not accept jurisdiction over claims of excessive fees.<sup>[3]</sup>

To deal with this failure of the disciplinary system<sup>[4]</sup> and mounting public criticism of the bar, many states have instituted fee arbitration programs;<sup>[5]</sup> twelve states, including New York in the area of matrimonial law,<sup>[6]</sup> have instituted mandatory fee arbitration programs<sup>[7]</sup>empowering clients (and sometimes lawyers as well) to compel their attorneys to arbitrate fee disputes.

In July 1992, the Administrative Board of New York State, in reaction to the public outcry generated by a report issued by the New York City Department of Consumer Affairs detailing severe lawyer abuse of matrimonial clients, especially the non-monied spouse in matrimonial cases,<sup>[8]</sup> established a Committee to Examine Lawyer Conduct in Matrimonial Action. This Committee set out to study the role of attorneys in matrimonial actions in order to "lead to recommendations that will have a significant impact on the ultimate ability of the court system to improve the providing of a fair and effective tribunal for the hearing of matrimonial actions. . . ."<sup>[9]</sup> One of the Committee's recommendations was to give clients the right to elect to arbitrate attorney fee disputes in domestic relations cases. This recommendation was premised on the findings that: (1) fee arbitration resulted in the "expeditious and cost-effective resolution of a potentially protracted dispute, and is, therefore, generally favored by litigants and attorneys;" and (2) "[a]ttorneys who successfully participate in mandatory fee arbitration have established a practice of frequent billing, detailed fee statements, and better communication with their client."<sup>[10]</sup> In 1993, the Appellate Divisions of the New York State Supreme Court adopted new rules for attorney conduct in domestic relations matters in response to the Committee's proposals. Among those rules was a directive to the Chief Administrative Judge of the Courts to establish and operate a fee arbitration program for attorney-client fee disputes in domestic relations matters.<sup>[11]</sup>

Since the inception of New York's program, there have been several reports issued on its operation. In 1995, a committee formed by the courts conducted a survey of the Bar and issued a report.<sup>[12]</sup> Later that year, an article was published surveying matrimonial fee arbitration in Suffolk County, New York.<sup>[13]</sup> In 1996, an extensive report was published surveying the results of the fee arbitration program and finding that usage of the program in 1996 had increased

substantially.<sup>[14]</sup> Substantively, the report indicated that clients had won reductions in 70% of the cases arbitrated and that attorneys received, on average, 72% of the total amount in dispute.<sup>[15]</sup> Finally, the report noted that the processes of selection and training of arbitrators required improvement.<sup>[16]</sup>

## II. NEW YORK'S MANDATORY FEE ARBITRATION PROGRAM

All attorneys who undertake to represent a client in New York in a matrimonial matter, that is, one involving divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with such matters, are governed by special rules of court.<sup>[17]</sup> This article will discuss several of these rules as well as principles to guide arbitrators engaged in arbitration of matrimonial fee disputes.

### A. What Documents Must a Matrimonial Attorney Provide to a Client Prior to Representation?

Section 1400.3 of the court rules, setting forth the "Procedure For Attorneys in Domestic Relations Matters," (see Appendix C) requires that an attorney "who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered . . . signed by both client and attorney. . ." <sup>[18]</sup> Additionally, § 1400.2 requires that a prospective client be furnished with a Statement of Client's Rights and Responsibilities (see Appendix B) at the initial conference or first consultation and prior to the signing of a written retainer agreement.<sup>[19]</sup>

### B. Statement of Client's Rights and Responsibilities

At the initial meeting between the lawyer and the prospective matrimonial client, and prior to the signing of a written agreement, the attorney must provide the prospective client with a Statement of Client's Rights and Responsibilities, as prescribed by the Appellate Divisions of the Supreme Court,<sup>[20]</sup> and obtain a signed acknowledgment or receipt from the prospective or actual client. If the attorney has failed to provide the requisite statement at the initial conference or first consultation and prior to the signing of a written retainer agreement, then the attorney is not entitled to any fee, irrespective of any work done or results obtained.<sup>[21]</sup> Similarly, if the client has already paid a fee and the attorney has failed to provide the requisite statements, and this failure would have precluded the attorney from seeking a fee, the client should be able to recoup any fees paid.<sup>[22]</sup>

Even if the initial meeting between a matrimonial attorney and the prospective or actual client is solely for the purpose of a consultation and not to represent the client in a matrimonial matter, the attorney is nonetheless required to give that prospective or actual client a copy of the Statement of Client's Rights and Responsibilities.<sup>[23]</sup>

### C. The Written Retainer Agreement

A lawyer who agrees to be hired in a matrimonial matter must enter into a written retainer agreement, signed by both the lawyer and the client, which sets forth in plain language the

purpose of the representation and the details of the fee arrangement.<sup>[24]</sup> If there is an action filed in the Supreme Court, then a copy of the signed retainer agreement must be filed with the court (along with the statement of net worth).<sup>[25]</sup> In the event the attorney has not timely filed a copy of the signed retainer agreement with the court, as required, along with the statement of his or her client's net worth, then the attorney is not entitled to a fee.<sup>[26]</sup>

The required contents of the written retainer agreement are set forth in detail in §1400.3 and are included in Appendix A. If an attorney fails to enter into a written retainer agreement with a client, then irrespective of the amount of work the attorney has performed or the results obtained, the attorney is not entitled to a fee.<sup>[27]</sup> However, if there was a written and signed retainer agreement, which did not meet the precise requirements of §1400.3, as set out in Appendix A, the attorney may nonetheless may be entitled to a fee, provided she substantially complied with the Matrimonial Rules requirements and the client waived his right to arbitration of the fee dispute.<sup>[28]</sup>

If the client has already paid a fee, then the attorney's failure to provide the requisite statements should entitle the client to recoupment.<sup>[29]</sup> However, at least one court<sup>[30]</sup> has held 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" and that the cases holding that failure to comply with the requirements of the Matrimonial Rules precluding a lawyer from collecting fees, are not authority for the proposition that the client in such a case may obtain disgorgement of any fees already paid.<sup>[31]</sup> *Markard v. Markard* is properly limited to its facts: namely, that the violation of the Matrimonial Rules (a provision in the retainer agreement waiving itemized billing in contravention of the required terms of the retainer agreement, see Appendix A, ¶ 9, and of the Statement of Client's Rights and Responsibilities) was not of sufficient magnitude as to invoke the forfeiture outcome; that the client discharged the lawyer without legal cause and therefore was obligated to pay the lawyer quantum meruit for the work done up to discharge (which was determined to be the substantial portion of the \$10,000 retainer fee); and that had the client sought arbitration of the fee instead of simply demanding the disgorgement of the fee already paid, then the amount of the fee already paid would have been a proper subject of the arbitration. To the extent that *Markard* is to be read as distinguishing between fees already paid and fees to be paid for purposes of protecting client's correlative rights under the Matrimonial Rules, it should be rejected as inconsistent with the public policy articulated by the New York Court of Appeals in *In re Cooperman*.<sup>[32]</sup> In that case, the Court of Appeals declared that the policy articulated in *Martin v. Camp*,<sup>[33]</sup> that a client could discharge an attorney at any time without cause and without penalty, would apply both to fees yet to be collected as well as to fees already collected and denominated as nonrefundable.<sup>[34]</sup>

It is incumbent on the arbitrator to make certain that these court rules are adhered to – whether or not the client seeking arbitration has raised the issue.

If a prospective client hires a matrimonial attorney prior to the filing of a matrimonial claim, action, or proceeding, then the attorney must comply with the Matrimonial Rules.<sup>[35]</sup> However, if the retention is for the sole purpose of consulting with that attorney and not for the purpose – at that time – of hiring the attorney to represent the client in a matrimonial matter, then the charging of a consultation fee alone does not trigger the requirement that a signed retainer

agreement must have been first obtained.<sup>[36]</sup> Even though there is no requirement that the fee agreement for the consultation be in writing, it is the better practice for the attorney to enter into a written retainer agreement even if the sole purpose of the meeting is for consultation. Moreover, in the event that there is a fee dispute regarding such a consultation and that dispute is included in the issues presented in a matrimonial arbitration, the attorney would have the burden of establishing that an agreement was entered into for a consultation as well as for the amount of the fee claimed. If the client claims, and the attorney denies, that the attorney agreed to provide a consultation without fee and there is neither conclusive documentary evidence nor persuasive demeanor evidence, then the failure of the attorney to meet the requisite burden of proof may be a basis for denial of the attorney's claim for a consultation fee.

If the initial meeting(s) are for consultation only, but the relationship changes to one of representation, then the attorney must enter a written retainer agreement with the client as soon as the change occurs.

#### D. Notice of Right to Fee Arbitration

In the event of a fee dispute between a matrimonial attorney and client, the client has the right to seek binding arbitration of the dispute provided that the amount in dispute – whether or not the attorney has already been paid – is not in excess of \$100,000.<sup>[37]</sup> It is the attorney's duty to provide the client with written notice that the client may submit the dispute to arbitration.<sup>[38]</sup> If an attorney fails to give the client such notice, the client is entitled to dismissal of an action brought by the attorney to recover a fee.<sup>[39]</sup> Denial of fees sought in a suit against the client for nonpayment on the basis of failure to give notice of the right to arbitrate, is consistent with the intent of the Matrimonial Rules to empower clients to seek fee arbitration.<sup>[40]</sup> If the dispute is about fees already paid and the attorney did not give the client notice of the right to arbitrate, then it does not follow – as it does in the cases where the attorney has failed to provide the client with a copy of a Statement of Client's Rights and Responsibilities or of the retainer agreement<sup>[41]</sup> – that the attorney should have to disgorge the fee. Since there (presumably) was no fee dispute when the advance fee payment was made, the client's rights under the Matrimonial Rules have not been violated. However, once the client disputes the attorney's fee as to fees already paid, the attorney at that point should be required to notify the client of the right to arbitrate the dispute. It is unclear whether failure to notify the client at that point of his right to arbitrate should result in per se disgorgement. However, it is reasonably clear under the Matrimonial Rules that if some or all of the fee is paid in advance and, after services are rendered, the charges against that advance fee are disputed, then the fee dispute is subject to arbitration under the Matrimonial Rules.<sup>[42]</sup>

Upon receipt of notice of the right to seek fee arbitration, the client then has 30 days to file the request for arbitration; if the request is not filed 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 fee arbitration.<sup>[43]</sup> The lawyer, upon written consent from the client to submit the dispute to arbitration, may also initiate arbitration.<sup>[44]</sup>

While the consequences of failure to abide by the Matrimonial Rules by providing a client with: (1) a Statement of Client's Rights and Responsibilities; (2) a written retainer agreement; or (3) a

notice of the right to fee arbitration, have been discussed and spelled out, the Rules are silent about how these requirements mesh with lawyers' rights to assert retaining and charging liens.

#### E. Retaining and Charging Liens<sup>[45]</sup>

At common law, two kinds of liens are available to an attorney to aid in collection of his fee. First, a general possessory lien, also known as a retaining lien or a general lien, functions as a form of security for an attorney's fees and affords an attorney the right to retain client papers and property in the attorney's possession until the client has satisfied all balances owed to the attorney.<sup>[46]</sup> Second, a charging lien can be imposed by an attorney upon the proceeds of a judgment realized by a client through the efforts of such attorney.<sup>[47]</sup> While the legislature has codified and expanded the charging lien under Sections 475 and 475-a of the Judiciary Law,<sup>[48]</sup> the retaining lien is still governed by common law rules.<sup>[49]</sup>

Generally, an attorney has a common law retaining lien upon papers, money,<sup>[50]</sup> and other client property that comes into the attorney's hands during the course of his professional employment.<sup>[51]</sup> The attorney may withhold the property until the lien is satisfied or adequately secured.<sup>[52]</sup> If the client seeks the attached property and does not agree with the attorney's valuation of the lien, the client may petition the court for an order to turn over the property, at which time the attorney is entitled to a summary determination fixing the value of his services.<sup>[53]</sup>

New York courts, in the exercise of their authority to define and effectuate the fiduciary obligation owed by an attorney to a client, have declined to allow an attorney to enforce a retaining lien when a client would be unfairly prejudiced by the attorney's continued retention of client property.<sup>[54]</sup> In matrimonial decisions involving exigent circumstances (usually client indigence and necessity of papers to preparation or continuation of the representation), the courts have declined to enforce retaining liens in appropriate circumstances.<sup>[55]</sup>

Retaining and charging liens are not directly germane to fee arbitration under the Matrimonial Rules; arbitrators have no authority to rule on the validity of either lien – the issue is one reserved to the courts. However, several of the judicial decisions on the liens' validity in particular cases directly address the scope and purposes of the Matrimonial Rules, and are therefore of interest to matrimonial fee arbitrators. In particular, a series of contradictory rulings address whether a matrimonial attorney can invoke a common law retaining lien if the attorney has failed to provide the client with written notice of the right to arbitrate the fee. Several courts have held that DR2-106(e) of New York Code of Professional Responsibility, which states that in domestic relations matters, "a lawyer shall resolve fee disputes by arbitration at the election of the client,"<sup>[56]</sup> is to be interpreted to abrogate the attorney's right to impose a retaining or charging lien if she failed to provide the client with written notice of the right to arbitrate the fee.<sup>[57]</sup> However, other courts focusing on the fact that the Matrimonial Rules, as initially drafted, contained a provision abrogating the common law retaining lien, but noting that that provision was deleted from the Rules due to opposition from the matrimonial bar, have held that there is no basis for concluding that the Rules abrogate the retaining lien by implication.<sup>[58]</sup>

Both sets of rulings are based upon sound reasoning. Ultimately, the New York Court of Appeals will have to resolve the issues of (1) whether an attorney can be granted a charging lien if the attorney has failed to comply with provisions of the Matrimonial Rules;[\[59\]](#) and (2) whether an attorney can invoke a common law retaining lien so as to effectively compel a client who has retained a new attorney, and who requires immediate access to his file in order to proceed, to pay the discharged attorney's fee, and thereby, essentially invalidate the client's right to invoke the arbitration procedures created by the Matrimonial Rules.[\[60\]](#)

#### F. Rules Regulating Types of Fees and Security Interests in Matrimonial Cases

Lawyers are prohibited from charging a contingent fee in matrimonial matters, that is, a fee which is a percentage of, or otherwise determined by, the amount of maintenance, support, equitable distribution, or property awarded.[\[61\]](#)

All lawyers, but in particular, matrimonial lawyers, are prohibited from charging nonrefundable retainers. Nonrefundable retainers are fees paid in advance to secure a lawyer's commitment to provide matrimonial services or for specific matrimonial services to be rendered, which the lawyer is to keep even if the client thereafter terminates the lawyer's services before the fee has been fully earned.[\[62\]](#) A client may terminate a lawyer for any reason – what is known in the law as “without cause”[\[63\]](#) – at any time during the representation. If the client does so, he is obligated to pay the lawyer the reasonable value of the services rendered to that point. However, the client is not required to pay the lawyer any damages for breach of contract or for fees that the lawyer expected to earn but which were denied to the lawyer because of the termination.[\[64\]](#)

A matrimonial lawyer may not obtain a confession of judgment or promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee unless: (1) the retainer agreement provides that a security interest may be sought; (2) notice of an application for a security interest has been given to the other spouse; and (3) the court grants approval for the security interest after submission of an application for counsel fees.[\[65\]](#)

### III. CONDUCT OF THE ARBITRATION

#### A. Conduct of a Matrimonial Fee Arbitration

After the attorney, who has the burden of proof,[\[66\]](#) has presented his case, then the client can present his or her views about the services rendered and the time that the attorney claimed to have devoted to the matter.[\[67\]](#) Each side may call witnesses in support of their presentation,[\[68\]](#) who are subject to cross-examination.[\[69\]](#) The client has the right to present the final argument.[\[70\]](#) Arbitrators are not required to apply formal rules of evidence and have the right to issue subpoenas and administer oaths.[\[71\]](#)

#### B. Burden of Proof

It is a general proposition of law that “[a]n attorney has the burden of showing that a fee contract is fair, reasonable and fully known and understood by the client.”[\[72\]](#) “Even in the absence of fraud or undue influence, an agreement to pay a legal fee may be invalid if it appears

that the attorney got the better of the bargain, unless [the attorney] can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence by the attorney."<sup>[73]</sup> The rules for conduct of matrimonial fee arbitration expressly state that the attorney has the burden to prove by a preponderance of the evidence<sup>[74]</sup> that the fee is reasonable.<sup>[75]</sup> In order to meet this burden, the attorney must present documentation of the work performed and the billing history.<sup>[76]</sup>

Simply conforming to the matrimonial rule requirements, so that the fee arrangement is detailed in plain language and does not contain a nonrefundable fee clause, does not establish that the fee is reasonable.<sup>[77]</sup> If the lawyer meets his or her initial burden of proof with respect to the unpaid fee by presenting documentation establishing: (1) the number of hours devoted to the representation; (2) that the written retainer agreement sets forth an hourly rate; and (3) further demonstrates that she has conformed to the requirements of the Matrimonial Rules,<sup>[78]</sup> then the burden shifts to the client. He can then seek to demonstrate that either the hourly rate or the number of hours listed was excessive or that other reasons exist for denying part or all of the fee claim, such as a breach of the standards of care or conduct, or of the ethics code. If the arbitrator concludes that the evidence is evenly balanced on both sides, then the attorney has not established by a preponderance of the evidence that the fee is reasonable.

### C. Effect of Account Stated

Frequently, when seeking payment for legal services, lawyers will assert the legal rule of an "account stated" in support of the right to a fee that has been evidenced by sending bills for those fees to the client. The general rule for enforcement of accounts stated is that where the client has not objected to the bills sent by the lawyer, i.e., to the "account," then the client has no defense to the action of the attorney to collect the outstanding fee.<sup>[79]</sup> The thrust of the "account stated" argument in support of a claim for legal services is mitigated in judicial proceedings by a competing principle, namely that courts carefully scrutinize lawyer-client fee agreements.<sup>[80]</sup> Moreover, a claim of fraud, mistake, or other equitable consideration, is recognized as posing an exception to the account stated rule.<sup>[81]</sup>

Since arbitration is by its very nature an equitable proceeding, the assertion by the lawyer of an "account stated" is not accorded the same legal status as it would if brought in a court of law. Indeed, the matrimonial fee arbitration rules displace the "account stated" rule with regard to matrimonial fee arbitration.<sup>[82]</sup> To hold otherwise would effectively negate the remedial purpose that underlies the fee arbitration rules governing domestic relation matters. The fact that the lawyer periodically submitted bills for legal services to the client, and the client raised no objection to them at the time of receipt, may be taken into account by the arbitrator in assessing the validity of the client's claims that the fee is excessive; but the function of the arbitrator is to come to a fair and reasonable determination. It may be that the effect of arguing an "account stated" by the attorney in matrimonial fee arbitration is to sustain the lawyer's initial burden of proof; even so, that does not preclude the client from countering with evidence of the unreasonableness of the fee.<sup>[83]</sup>

### D. Reason for Arbitrator's Decision



Whether an arbitrator decides to reduce a disputed legal bill or disbursement, or award the attorney the full fee claimed, the arbitrator should include the reasons for doing so in the decision. Failure to refer to evidence or other basis in reason for the reduction of a fee or disbursement is grounds for overturning the arbitrator's decision on appeal.<sup>[84]</sup> The arbitral decision will be upheld, however, if the award has evidentiary support and is neither arbitrary nor capricious.<sup>[85]</sup> Accordingly, while recognizing that many matrimonial fee arbitrations under the New York rules do not involve large sums,<sup>[86]</sup> but also recognizing the applicable decisional law, the arbitrator should include at least a few sentences in the report setting forth the reasons for the decision.

#### E. Confidentiality

All proceedings under the fee arbitration program are confidential except to the extent necessary to take ancillary legal action with respect to a fee matter.<sup>[87]</sup> If during the course of arbitration, an arbitrator who is an attorney hears information leading him to believe that the attorney seeking a fee has violated the Code of Professional Responsibility, under DR 1-103(a) of the Code,<sup>[88]</sup> the arbitrator-lawyer may then have a duty to report that violation to a court or disciplinary agency.<sup>[89]</sup> Doing so, however, would create a conflict between the confidentiality requirement in the Matrimonial Rules and the Code requirement. While it would be best for this conflict to be resolved anticipatorily by a ruling from the Appellate Division, until such time, the attorney-arbitrator is best advised to seek the advice of the Administrative Judge.<sup>[90]</sup>

### IV. THE ARBITRATOR'S SUBSTANTIVE TASK

In fee arbitration, the beginning point for the arbitrator – after the ground rules have been established – is the retainer agreement. Assuming all of the procedural requirements have been met and the attorney is seeking a fee that is in accord with the terms of the retainer agreement, is there more for the arbitrator to consider? In a word, yes.

To be sure, an arbitrator may reasonably presume that if there has been a knowing and voluntary acceptance of the retainer agreement terms by an informed client, then that establishes the presumptive validity of the fee being sought. This presumption, however, is a beginning point for further inquiry. Attorney fees are treated differently from prices negotiated in a commercial context between a buyer and seller. Attorneys are fiduciaries for their clients, and their fees are always subject to the imposition of a reasonableness requirement by courts. To be sure, courts will enforce fee agreements to which the client has given informed consent, and the more sophisticated the client, the more likely it is a court will find the contract enforceable as written. Nonetheless, there are thousands of examples in the judicial literature of courts voiding fee agreements for a variety of reasons – mostly based on the attorney's fiduciary status.

In the paragraphs that follow, I will attempt to set forth some guiding principles that highlight the types of circumstances that have precipitated judicial invalidation of fee agreements or the fees generated by those agreements. In doing so, I am not suggesting that arbitrators should start with a bias against the enforceability of matrimonial fees. I do, however, seek to point out instances in which it is appropriate for arbitrators to carefully examine and, in some instances, look critically if not skeptically, at certain matrimonial fees.

A beginning point for such an approach is to consider what other fee arbitrators have done. Unfortunately, little is known about the results of fee arbitration programs – including New York’s.<sup>[91]</sup> What little data we have indicates that matrimonial fee arbitrators have reduced fees sought in approximately two thirds of the matters submitted to arbitration and that the average award approximates 75 percent of what the attorney was seeking.<sup>[92]</sup> At best, however, while this provides some limited perspective with which to approach the arbitration process,<sup>[93]</sup> each arbitration presents a set of facts that must be evaluated on its own merits.

#### A. The Context of the Fee Dispute

Some perspective in approaching the arbitrator’s task is important, especially for arbitrators without prior experience in matrimonial matters. It is probably often the case that client complaints about fees are motivated at least in part by emotional reactions to the break up of the marriage and by the litigation process itself. Even a successful outcome from the perspective of one of the spouses results in the termination of a marriage and consequent feelings of guilt and anger.<sup>[94]</sup> The propensity of a client caught up in a divorce proceeding may be to use the process to inflict harm on the other spouse. One clear effect of such efforts is an increased contentiousness in the litigation process that, in turn, yields higher legal fees. Most experienced divorce practitioners seek to minimize these propensities.<sup>[95]</sup> Some however, whether from inexperience or indifference, allow these propensities to manifest in the form of protracted litigation. Still, others may actively foment this propensity, using dilatory tactics and overlawyering, for self-interested purposes. Moreover, it may be hard to distinguish such motivation from “hardball” litigation tactics designed to attain a tactical advantage.

The arbitrator’s impression of how the lawyer resolved the ubiquitous conflict of interest, between the lawyer’s self-interest in generating higher fees and professionally responsible behavior that is self-disinterested and fully determined by the client’s needs, will necessarily color her determination of whether the fee claimed is reasonable.

It is also important for the inexperienced arbitrator to have some appreciation of the practitioner’s view of the financial realities of divorce representation, where one of the spouses earns the bulk of the family’s income. The attorney for the moneyed spouse is usually paid monthly or bi-monthly. If a fee dispute arises, then it is either in the context of the aftermath of the termination of that lawyer’s services or is limited to the final bill in the representation. In either of these scenarios, the amount of the fee in dispute will usually be only a small percentage of the total fees billed.

However, while an attorney representing the non-moneyed spouse<sup>[96]</sup> will usually require a retainer payment to take the case,<sup>[97]</sup> often the bulk of that attorney’s fee will not be available until the conclusion of the case, when the division of the marital property has been settled, or ordered, and the property actually distributed.<sup>[98]</sup> In that circumstance, it was undoubtedly the expectation of both lawyer and client that all, or a large portion of the fee, would be paid out of the marital proceeds transferred to the non-moneyed spouse.

Thus, while the attorney for the non-moneyed spouse is sending periodic billing statements,<sup>[99]</sup> there is no expectation of current payment. Indeed, in some realistic sense,

payment is contingent upon a successful outcome.<sup>[100]</sup> This may encourage the client to demand that no expense be spared in obtaining the fullest possible share of the marital proceeds. An attorney who does so may then find that at the conclusion of the representation, the client has a more jaundiced view of the value of the attorney's efforts.

From the client's perspective, objecting to a periodic fee statement may be seen to place in jeopardy the zealotry of the lawyer's efforts and may even lead to a termination of services, which could adversely affect the client's strategic position in the litigation. Thus, the muting of any fee issues may not reflect acquiescence, let alone consent.

From the attorney's perspective, however, after having rendered faithful service for long periods of time, often years, in reliance on the client's silence as constituting assent to the periodic billings, the implicit content of the demand for arbitration of the fee – that the fee is unreasonably high – is seen as an unfair act. But for the existence of the matrimonial fee arbitration program, if the client failed to pay the fee, the attorney could sue, and likely prevail, by showing that she had sent periodic bills to the client and the client had not objected.<sup>[101]</sup>

The arbitrator must mold these contradictory perspectives into an approach that neither penalizes the attorney because she represents the non-monied spouse nor fails to effectuate the objectives of the matrimonial fee arbitration program.

## B. Guiding Principles

“[A]ttorney-client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts.”<sup>[102]</sup> Although courts thus arrogate to themselves considerable discretion in the determination of disputed attorney fees, arbitrators may be thought to have an even greater range of discretion and are not bound to act as would a court when faced with the same competing claims. In exercising such discretion, arbitrators and, in particular, fee arbitrators, should resolve fee disputes according to principles of justice and equity.<sup>[103]</sup>

Moreover, matrimonial fee arbitration is a consumer protection remedy. Accordingly, the arbitrator should approach the fee issue from the perspective of what is reasonable. In determining how to respond to a client's claim that the fee is too high, the arbitrator should understand that he or she is not necessarily deciding whether the lawyer's conduct is unethical, but whether it has resulted in such an enrichment of the lawyer, at the expense of the client, that it offends the decision maker's sense of fairness and equity.<sup>[104]</sup> If there is an ethical violation or breach of a lawyer's fiduciary obligation, then that is also to be taken into account by the arbitrator in determining a reasonable fee.<sup>[105]</sup>

## V. DETERMINATION OF REASONABLENESS OF FEE

A fee shall be considered excessive when “after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.”<sup>[106]</sup> What constitutes a reasonable fee will vary from one set of facts to another because there is no precise measure of reasonableness.<sup>[107]</sup> Factors to be considered in

determining the reasonableness of a fee include (but are not limited to): (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.[\[108\]](#)

If the arbitrator determines that the fee the lawyer is seeking to collect according to the terms of the retainer agreement is excessive, then it will be necessary to determine a reasonable fee. This calculation may involve: the denial of some of the attorney's billing; the denial of some expenses claimed; a more fundamental determination of a reasonable fee in light of the factors listed above;[\[109\]](#) or an essentially identical list of relevant factors set forth in a leading case, as follows: Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.[\[110\]](#)

#### A. Excessiveness of the Fee: The Hourly Rate

It will usually be the case that the hourly rate fee set forth in the retainer agreement will be accepted by the arbitrator because it is the product of a voluntary agreement between the lawyer and client. However, the arbitrator can determine that the hourly rate quoted was unreasonable even though the client agreed to it when he or she signed the retainer agreement. For example, it would be plausible to find that a substantial hourly rate, e.g., \$300-\$500, which some lawyers may reasonably charge a wealthy client, would be unreasonable if charged to someone of modest means, especially where it would yield an amount equal to a substantial portion of that spouse's reasonable expectation of the amount of marital assets to be awarded.[\[111\]](#) Moreover, even though the client necessarily agreed to the hourly rate by signing the retainer agreement, if the client was sufficiently unsophisticated and did not realize that they were agreeing to pay top dollar and the lawyer did not explain to them that this was so, that may also be a basis for a reduction of the hourly rate.[\[112\]](#)

Finally, if the law firm has differential hourly rates for senior partners, junior partners, associates, or contract lawyers, then the arbitrator should examine whether, for example, specific services performed by a partner were sufficiently routine or uncomplicated that they could have been performed by an associate at a lower hourly billing rate. In that case, the hourly rate fee should be reduced to the associate level.[\[113\]](#)

#### B. Excessiveness of the Fee: Number of Hours Billed

In the typical fee dispute, the number of hours expended is frequently at the core of the dispute. The client will typically complain that the amount of time being billed is excessive.

In addressing this contention, the arbitrator should attempt to obtain an overall assessment of the degree of protraction of the litigation. For example, did the opposing party use dilatory tactics or otherwise engage in obstructionist behavior?<sup>[114]</sup> Was the case unduly litigated and, if so, did the attorney actively engage in that protraction or were her efforts essentially responsive? If the attorney was the aggressor in unduly protracting the litigation, was that sought by the client? If so was the client informed of the effect of such a litigation strategy on the attorney's fee?

In addition, the arbitrator should seek to determine how much time was billed for communicating with the client. Did the client have emotional needs that required the attorney to properly devote significant amounts of time to meetings and telephone calls with the client? Did the attorney make the client aware that such activities would be reflected in the attorney's billings and that therefore the client needed to balance his needs for information and perhaps "hand-holding" against his budgetary constraints?

After gaining some overall sense of whether the time spent was commensurate with the complexity of the litigation, and appropriately attended to the client's personal needs, the arbitrator should then focus on the accuracy of the attorney's time records. If the attorney has failed to maintain adequate time and billing records, that may require the arbitrator to disallow some of the claimed charges based upon the inadequacy of the evidence supporting them.<sup>[115]</sup> The fact that the attorney actually expended the time is not necessarily dispositive of the fee dispute. If the lawyer is inexperienced and bills for time that most lawyers would not have needed to expend because of their basic familiarity with matrimonial law, then it would be appropriate to reduce the number of hours for purposes of calculating a reasonable fee.<sup>[116]</sup> Thus, it is necessary to determine whether the time spent was reasonable under the circumstances.<sup>[117]</sup> If a portion of the time was improperly spent, as for example, in the bringing of a frivolous motion, then it should be disallowed.<sup>[118]</sup> While a matrimonial attorney's fee is not dependent upon attainment of a successful outcome for the client, the arbitrator should consider the benefit to the client as a result of the services;<sup>[119]</sup> that is, the hours spent must be of value to the client.<sup>[120]</sup> For example, if a lawyer misses a court appearance and, as a consequence, has to appear at a "show cause" hearing necessitated by the missed appearance, the time spent doing so does not confer value on the client and should not be counted towards the lawyer's fee. Indeed, by the same reasoning, any time expended by the lawyer that would not have had to be expended but for the lawyer's failure to meet a time deadline, file a pleading, etc., is not properly chargeable to the client.

If the attorney prepared a legal document that was not timely filed or otherwise used on the client's behalf, that raises serious doubt that the client has received the value of that service; fees may then be adjusted to be commensurate with the actual value of the services to the client.

An attorney may bill for travel time, for example, the time required to travel to and from his office to a court or deposition provided that there is a "portal to portal" provision in the retainer agreement. The absence of such a provision should not necessarily disable the lawyer from charging for travel time, but would then be a factor in determining the reasonableness of the

charges. Even if there is a provision in the retainer agreement providing for billing for travel time at the full hourly rate fee set forth, and extensive travel time is involved, e.g., air or train travel or extensive driving time, in the event these charges are contested, then the reasonableness of charging the full hourly rate for such travel time is appropriately considered. The customary practice of lawyers in the community may be considered,[\[121\]](#) but customary practice is “not always reasonable.”[\[122\]](#)

If the lawyer is part of a firm and confers with other lawyers in the firm regarding the subject matter of the client’s representation, then it is appropriate to bill for that time. It may or may not be appropriate, however, to bill for the time of the other lawyer or lawyers in the firm who were consulted. If they have not been working on that matter, and are asked to prepare a document, such time is appropriately billed. It is a much closer question, however, if the conference is for the purpose of seeking advice or discussing strategy. Billing for such time can easily be an abusive practice and any such billings should be carefully scrutinized.

If the lawyer appears in court at a scheduled time for a hearing but the hearing is delayed, the lawyer is entitled to charge for the time spent waiting in court. If during that time, the lawyer calls his or her office to check on phone messages or to give instructions regarding scheduling other matters, that time, if it is *de minimus*, can be included as part of “waiting time” and is properly chargeable to the client. If, however, the lawyer works on or transacts other clients’ business while waiting for the judge, whether by phone or by reading documents, that time is not properly chargeable to the matrimonial client (though it may, and probably will, be charged to the client on whose behalf that work was done). Charging both the matrimonial client for the time spent waiting, and another client for some of that time productively expended for the latter, constitutes unethical double billing.[\[123\]](#)

If the client simply asserts that the lawyer’s total fee is too high and points out, for example, that the spouse’s lawyer’s fee was 30 or 50 percent less than his or her own lawyer’s fee and that the differential is not mostly accounted for by a difference in the hourly rates, such evidence is not dispositive of the claim that the fee is unreasonable; it would, however, be a basis for questioning the lawyer as to why his or her total number of hours was substantially greater than that expended by opposing counsel and inquiring further into whether the time was spent in ways which were productive and valuable to the client. It may be the case, for example, that the attorney for the non-monied spouse properly devoted considerable time to the effort of identifying the monied spouse’s assets, thereby accounting for a significant differential in the amount of hours billed.[\[124\]](#)

Essentially, the task of the arbitrator is to determine whether the number of hours billed to the client was time reasonably spent on behalf of the client or was reasonably necessary to attain the client’s objectives and provided the client with commensurate value. Hours that are “excessive, redundant, or otherwise unnecessary” should not be compensated.[\[125\]](#)

### C. Excessiveness of the Fee: Disproportionateness to the Financial Resources of the Client or to the Relief Sought

If the combination of the hourly rate and the number of hours actually expended yields a fee that is grossly disproportionate to the limited financial resources of the matrimonial litigants or to the value of the services, then the fee may be deemed excessive. It may then be reduced to a reasonable amount in light of the complexity of the matter and the amount of the marital assets.<sup>[126]</sup> However, the fact that the client complained of a “lack of progress” in the matrimonial action is not, in and of itself, a basis for reducing the fee.<sup>[127]</sup> The obligation of a client to pay the attorney is not conditioned on the success of the lawyer’s efforts.<sup>[128]</sup>

#### D. Bill Padding

If an attorney is highly competent and expends five hours of effort to accomplish what most other attorneys would require ten hours to do, and the attorney then bills for ten hours of time to reflect the proper value of the work done, that would be illegal, unethical, and a breach of the lawyer’s fiduciary obligation.<sup>[129]</sup> The appropriate way for the attorney to obtain payment commensurate with his value is to reflect that value in a higher hourly rate or fixed fee. If an attorney has misstated his hours, then the arbitrator should, at a minimum, disallow the padded hours.

If the bill padding was found to be egregious, then the arbitrator should not only eliminate the padded hours from the fee but may also diminish the fee by an amount to reflect the egregiousness of violating both the lawyer’s standard of care<sup>[130]</sup> and the fiduciary obligation to the client.<sup>[131]</sup>

If the arbitrator concludes that the attorney has billed for more hours than should have been required to perform the work, then the additional hours being charged may be disallowed<sup>[132]</sup> and quantum meruit (the reasonable value of the services) would then be the appropriate measure of recovery under such circumstances.<sup>[133]</sup>

#### E. Expenses and Disbursements

It is not uncommon for lawyers to bill clients for certain expenses that they incur on behalf of the client. These expenses may include secretarial, travel, long distance telephone calls, messenger, investigative, postage, overnight mail, copying, computerized legal research, meals, and others. Some are permissible expenses to be charged to the client and some are not.<sup>[134]</sup>

The beginning point of the “expense” issue is the retainer agreement. The lawyer must list with clarity in the retainer agreement the expense items that will be billed to the client. If the retainer agreement confers authority on the lawyer to hire an expert witness at the client’s expense, then if the fee of the expert is unusually high or high in relation to the value of the marital estate, the attorney may be held to have nonetheless had an obligation to notify the client in advance of the expert’s fee and obtain consent.

If a lawyer fails to identify costs that are to be paid by the client in the retainer agreement, then it may be proper to deny reimbursement to the lawyer for office costs such as long distance copying, faxing, and messengers. However, the client must remain responsible for litigation costs such as filing fees, expert witness fees (to which the client has consented), and court reporter

costs. Even if the lawyer is still allowed to charge the client certain direct office-type costs despite not listing them in the retainer agreement, e.g., copying, long distance, outgoing faxes, it is not appropriate to mark up these items by adding a profit margin on top of actual costs.<sup>[135]</sup> If copying costs are listed in the retainer statement as being billed at 25¢ a page and faxes at \$2.00 per page, then it is likely that the lawyer is marking up these items by adding a profit margin.<sup>[136]</sup> It is debatable whether these mark-ups are permissible.<sup>[137]</sup> If these costs add up to substantial amounts, the arbitrator may determine that such mark-ups are unreasonable.

Even if certain expenses are listed in the retainer agreement as being the responsibility of the client, that is not necessarily dispositive of the issue. For example, it is traditionally understood that secretarial services, library costs, rent, telephone, and utilities are a part of the lawyer's overhead – which the attorney's hourly or fixed rate must cover – and therefore are not properly billable to the client.

Some courts disallow separate billing for computerized legal research services such as LEXIS and WESTLAW – even at cost – because they see such research costs as part of a firm's overhead.<sup>[138]</sup> They compare such research costs to library costs that are not properly passed on to a client directly but rather are absorbed by the firm and paid for from hourly fee revenues. The trend, however, is to allow such separate billing of at least some part of these expenses,<sup>[139]</sup> provided that this is so stated in the retainer agreement. It is doubtful, however, that firms can mark up those services by adding a profit percentage.<sup>[140]</sup> If the retainer agreement does not indicate that a profit margin will be added to the computerized legal research service costs, then the mark-up should be disallowed.<sup>[141]</sup> If the lawyer has indicated a use rate in the retainer agreement which reflects a mark-up, but the existence of a mark-up is not specifically noted and the lawyer has not told the client that the costs will be marked up by the addition of a profit margin, then the mark-up may be disallowed.<sup>[142]</sup>

Many law firms today employ paralegals to assist in the practice of law and separately bill for paralegal time just as they do for lawyer time. While it is arguable that a “reasonable attorney's fee” means “a fee for services rendered by an individual who has been licensed to practice law,” the prevailing practice today is to allow such charges to be separately billed. That said, it is important to consider what work it is that the paralegal did. The mere fact that work has been done by a paralegal is not dispositive of the issue of whether that work was of a paralegal level for billing purposes. If the work involves delivering documents to the court house for filing, filing of documents in the office, obtaining a signature on a document, or typing a form document by filling in information elicited by the attorney from the client, the aforementioned are more properly characterized as secretarial work, and hourly billings for such work may be rejected because they are part of the lawyer's overhead.<sup>[143]</sup> If the work being billed for involves legal research or investigative work, or the construction of legal documents where a more complex task is involved than merely filling in the blanks, that work, when done by a paralegal, may properly be separately billed for at the rate set forth in the retainer agreement.

## VI. TERMINATION BY THE CLIENT

Under New York law, a client has an absolute right to discharge an attorney at any time during the course of the representation, irrespective of whether there is legal cause to do



so.<sup>[144]</sup> “If the discharge is without cause and before the completion of [the lawyer’s] services, then the amount of the attorney’s compensation must be determined on a quantum meruit basis.”<sup>[145]</sup> Quantum meruit is generally defined to mean the reasonable value of the service rendered. This rule, initially formulated to apply to attorneys hired on a contingency fee basis, has been extended to apply to hourly rate attorneys as well.<sup>[146]</sup>

Accordingly, if a matrimonial lawyer was hired to represent a party in a divorce proceeding on an hourly rate basis and is discharged by the client prior to the completion of the task, then the attorney is not entitled to the hourly rate fee agreed upon but rather to quantum meruit – the reasonable value of the lawyer’s services. It is commonly supposed that quantum meruit in the matrimonial context is the product of a reasonable hourly rate and the number of hours reasonably expended by the attorney, and therefore, the fee agreement may be looked to for a determination of a reasonable hourly rate. However, the factors set forth above, to determine the reasonableness of a fee are also the factors to be used in the calculation of quantum meruit.<sup>[147]</sup> Therefore, a quantum meruit calculation can yield a fee that could be more or less than the fee set in the retainer agreement.<sup>[148]</sup> Nonetheless, it would be inconsistent with the consumer protection purposes that underlay the establishing of the matrimonial fee arbitration process – except in the most unusual of circumstances – for an arbitrator to award a matrimonial attorney more than the fee established in the retainer agreement. This position is accentuated by the fact that a client may well have discharged the lawyer for valid reason, but even if that can be reasonably described as “good cause,” that usually falls short of the “legal cause” that would entitle the client to offset some or all of the fee claims.<sup>[149]</sup>

In conducting matrimonial fee arbitration where the attorney has been discharged prior to the completion of services, the arbitrator should be guided by the same principles of justice, equity, and reasonableness as would apply if the attorney had completed the services which were the subject of a fee dispute.

## VII. STANDARD OF CARE, FIDUCIARY AND ETHICAL ISSUES

### A. Claims of Malpractice

Clients contesting lawyers’ fees often assert by way of defense that the attorney violated the standard of care owed to the client, i.e., committed the tort of malpractice.<sup>[150]</sup> When such a claim is raised in a matrimonial fee arbitration proceeding, it is incumbent on the arbitrator, for the reasons set out herein, to give full consideration to the client’s claim.

If a client claims that the fee is excessive because, *inter alia*, the attorney neglected the client’s case, lacked adequate skills and knowledge, or did a poor job in representing the client (incompetence) or failed to: prepare adequately for hearings, investigate properly the facts or the other spouse’s financial circumstances, or retain necessary experts such as a child psychologist or forensic accountant, the client is also raising claims that sound in malpractice. These assertions, which are both arguments that the fee is excessive and that malpractice has been committed, are for all practical purposes identical in this context and amount to a claim that the way the case was handled adversely affected the value of the lawyer’s services to the client, and should therefore result in a fee reduction or elimination.<sup>[151]</sup>

Under New York law, where a client raises issues of malpractice in a court action involving the value of professional services or in fee arbitration, the outcomes of both the court action and the arbitration are usually preclusive of the malpractice claim. Stated simply, the client cannot thereafter sue the attorney for malpractice.<sup>[152]</sup> This is because the quality of the lawyer's work is necessarily taken into account by the judge or the arbitrator in determining the amount of the fee to which the attorney is entitled.<sup>[153]</sup> Accordingly, failure of the arbitrator to take the client's claims of malpractice into account may well result in the forfeiture of all client rights to assert a claim of malpractice against the attorney.

Quite apart from its preclusive effect on any subsequent action for malpractice, the policy issues promoting fee arbitration should lead the arbitrator to give full consideration to a client's claim of malpractice. As noted above, fee issues and malpractice claims are often intertwined;<sup>[154]</sup> forcing the client to bring a separate malpractice action to protect his interests is likely to undermine the purposes of fee arbitration by substantially inflating the cost of seeking an equitable disposition of a dispute between client and lawyer.

Even if the client does not specifically, or knowingly, raise issues of malpractice, it is not unlikely that if the client thereafter seeks to sue the lawyer for malpractice, a court will find that the issue of the lawyer's competence "was reasonably and plainly comprehended to be within the scope of the [fee] dispute submitted to arbitration."<sup>[155]</sup> Nonetheless, the arbitration program created by the Matrimonial Rules is not intended to be a forum for the adjudication of significant malpractice claims.<sup>[156]</sup> Moreover, quite apart from this intent, fee arbitrations of the type that take place under the Matrimonial Rules are simply not an appropriate forum for the adjudication of malpractice issues. Generally, clients in matrimonial fee disputes invoking fee arbitration will be ill-informed about the legal technicalities of breach of the standard of care. Moreover, there are usually no witnesses testifying on the issue and often little more will be available to the arbitrator besides the competing claims of the lawyer and client.

Therefore, even apart from general criticisms of the preclusion policy,<sup>[157]</sup> the policy of preclusion is especially ill-suited for application to matrimonial fee arbitration as provided for in New York. However, until such time as the preclusion issue is held inapplicable, then for the reasons stated, arbitrators must accept and consider evidence relating to claims of malpractice, but only to the extent that such claims affect the fees to which the attorney is entitled. In deciding the appropriate level of fees to be awarded, the arbitrator should evaluate whether the alleged malpractice affected the value of the services provided to the client in the disputed matter. If the attorney's actions reduced the value of the services, the arbitrator should reduce the fee to account for the decreased value. However, while the matrimonial fee arbitrator may award a refund of unearned fees and/or costs that were previously paid to the attorneys, the arbitrator may not affirmatively award damages to the client. In other words, the matrimonial fee arbitrator who finds that the attorney committed malpractice can deny the attorney's fee claim and order disgorgement of fees previously paid, but may not award any amounts beyond that to the client.

If a client asserts claims of malpractice, or which sound in malpractice, and it appears that the client has a viable claim for damages substantially in excess of the amount of the fees paid or claimed, then the arbitrator may wish to interrupt the proceedings and notify the Administrative Judge of the judicial district so that the latter can determine whether to discontinue the

arbitration.<sup>[158]</sup> If the Administrative Judge decides to proceed with the arbitration, then the arbitrator may inform the client of the likelihood that he or she is foregoing the right to bring a subsequent malpractice claim in a court so that the client can consider whether to proceed with the arbitration.

### B. Breach of Fiduciary Obligation

While malpractice concerns a lawyer's standard of care, a breach of fiduciary conduct is said to involve the lawyer's standard of conduct.<sup>[159]</sup> The attorney-client relationship is fiduciary in nature and is governed by a series of special obligations imposed on the lawyer for the client's benefit. The fiduciary obligations of the lawyer include: maintaining confidentiality; acting with undivided loyalty; avoiding conflicts of interest; operating competently; presenting information and advice honestly and freely; acting fairly; and safeguarding client property.<sup>[160]</sup> In some instances, malpractice and fiduciary obligation overlap. But claims, for example, that the lawyer disclosed confidential information, had a conflict of interest, did not secure the client's informed consent to the fee agreement or the settlement, or engaged in self-interested behavior at the client's expense, constitute claims of breach of fiduciary obligation. Unlike malpractice, however, establishing a violation of a lawyer's fiduciary obligation does not require proof of causation of specific injury or actual damages.<sup>[161]</sup> The theory is that the lawyer, as fiduciary, is in a position of trust and has agreed to perform compensable services. If he breaches that trust, then he is not entitled to a full measure of compensation. Denying some, or the entire fee, minimizes the incentive for the fiduciary to breach his duty of loyalty.

The prevailing rule is that a lawyer engaging in a clear and serious violation of duty to the client can be required to forfeit some, or all, of the lawyer's fee – whether or not it has already been paid.<sup>[162]</sup> Accordingly, ignoring such breaches in the course of fee arbitration – that is, allowing a lawyer to obtain a fee that fiduciary law would limit or disallow – violates a client's correlative fiduciary rights.<sup>[163]</sup>

It is not clear that New York courts regard claims of breach of fiduciary obligation as precluded by a fee arbitration proceeding, as they do with regard to claims of legal malpractice. Nonetheless, it is at least not unlikely that courts would so conclude. Therefore, and for independent policy reasons, arbitrators may take into account whether an attorney has breached a fiduciary obligation to the matrimonial client and, if so, the seriousness of the violation, which in turn determines the degree to which fees should be forfeited or disgorged.<sup>[164]</sup>

### C. Effect of Violation of the Code of Professional Responsibility on Fees

Many fiduciary obligations of the lawyer are codified in New York's ethical code, titled Disciplinary Rules of the Code of Professional Responsibility, and promulgated as joint rules of the Appellate Division of the Supreme Court.<sup>[165]</sup> Indeed, much of the law of professional responsibility is a codification of fiduciary doctrine; therefore, an attorney breaching a fiduciary standard often violates a specific ethical admonition as well.<sup>[166]</sup> Ethical rules are a source of protection granted to clients apart from the rights accruing to them under fiduciary law. Violations of the ethical rules can result in disciplinary sanctions including a letter of caution, an admonition, a reprimand, suspension of the license to practice law, and disbarment.<sup>[167]</sup> In

addition, a lawyer who commits serious ethical violation can be barred from receiving any fee.[\[168\]](#)

The Appellate Division, under authority conferred by statute,[\[169\]](#) has created the mechanism for enforcement of the Code of Professional Responsibility.[\[170\]](#) Whereas enforcement of the Code is not a function of fee arbitration, arbitrators should not be indifferent to clear violations of the Code of Professional Responsibility that damage the client's interests. As a leading ethics scholar has stated, "a lawyer may forfeit the right to a fee if the lawyer committed a breach of a statute or lawyer code that violated the lawyer's duty toward his or her client during the course of the representation."[\[171\]](#)

## VIII. CONCLUSION

In the final analysis, the arbitrator's task is not quantifiable. If the procedural requirements of the matrimonial rules have been met, then the fee may be presumed valid, but it is still subject to a requirement of reasonableness. As these materials have made clear, the concept of reasonableness is highly elastic and there is no formulaic template that can be applied to determine when a fee is excessive.[\[172\]](#) Despite the ubiquity of attorney-client fee arbitration in the United States, there has apparently been no attempt to publish a substantive manual on fee arbitration or guide for fee arbitrators. This effort – which should be regarded as a work in progress – is an attempt to fill that void. Much work, however, remains to be done including empirical analysis of what matrimonial fee arbitrators are actually doing.[\[173\]](#)

## APPENDIX A

### Retainer Agreement

1. Names and addresses of the parties entering into the agreement;
2. Nature of the services to be rendered;
3. Amount of the advance retainer, if any, and what it is intended to cover;
4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer, the written retainer agreement shall provide how the attorney's fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client;
5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;

6. How the attorney will be paid through the conclusion of the case after the retainer is depleted; whether the client may be asked to pay another lump sum;
7. Hourly rate of each person whose time may be charged to the client; any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect;
8. Any clause providing for a fee in addition to the agreed-upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated;
9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received;
10. Client's right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case;
11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary;
12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court;
13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

## APPENDIX B

### Statement of Client's Rights and Responsibilities

- Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and your attorney please read this document carefully.
- If you ever have any questions about these rights, or about the way your case is being handled, do not hesitate to ask your attorney. He or she should be readily available to represent your best interests and keep you informed about your case.
- An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

- You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that are revealed in the course of the relationship.
- You are entitled to a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.
- You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract.
- You may refuse to enter into any fee arrangement that you find unsatisfactory.
- Your attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained.
- Your attorney may not request a retainer fee that is nonrefundable. That is, should you discharge your attorney, or should your attorney withdraw from the case, before the retainer is used up, he or she is entitled to be paid commensurate with the work performed on your case and any expenses, but must return the balance of the retainer to you. However, your attorney may enter into a minimum fee arrangement with you that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.
- You are entitled to know the approximate number of attorneys and other legal staff members who will be working on your case at any given time and what you will be charged for the services of each.
- You are entitled to know in advance how you will be asked to pay legal fees and expenses, and how the retainer, if any, will be spent.
- At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case, which estimate shall be made in good faith but may be subject to change due to facts and circumstances affecting the case.
- You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.
- You are expected to review the itemized bills sent by counsel, and to raise any objections or errors in a timely manner. Time spent in discussion or explanation of bills will not be charged to you.
- You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

- You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.
- You have the right to be present in court at the time that conferences are held.
- You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.
- Your attorney’s written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. If an action or proceeding is pending, the court may give your attorney a “charging lien,” which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment.
- You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to cover legal fees. Your attorney’s written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney’s security interest in the marital residence cannot be foreclosed against you.
- You are entitled to have your attorney’s best efforts exerted on your behalf, but no particular results can be guaranteed.
- If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.
- In the event of a fee dispute, you may have the right to seek arbitration. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:

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Attorney’s signature

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Client’s signature

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Date

## APPENDIX C

### Part 1400. Procedure For Attorneys In Domestic Relations Matters

#### § 1400.1 Application

This Part shall apply to all attorneys who, on or after November 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. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where the client is other than a minor, the provisions of section 1400.2 shall apply to the extent they are not applicable to compensation.

#### § 1400.2 Statement Of Client's Rights And Responsibilities

An attorney shall provide a prospective client with a Statement Of Client's Rights And Responsibilities, in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement. If the attorney is not being paid a fee from the client for the work to be performed on the particular case, the attorney may delete from the statement those provisions dealing with fees. The attorney shall obtain a signed acknowledgment of receipt from the client.

#### § 1400.3 Written Retainer Agreement

An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth. Where 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. A copy of a signed amendment shall be filed within 15 days of signing. A duplicate copy of the filed agreement and any amendment shall be provided to the client. The agreement shall be subject to the provisions governing confidentiality contained in Domestic Relations Law, section 235(1).

#### § 1400.4 Nonrefundable Retainer Fee

An attorney shall not enter into an arrangement for, charge or collect a nonrefundable retainer fee from a client. An attorney may enter into a "minimum fee" arrangement with a client that



provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

#### § 1400.5 Security Interests

(a) An attorney may obtain a confession of judgment or promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee only where:

- (1) the retainer agreement provides that a security interest may be sought;
- (2) notice of an application for a security interest has been given to the other spouse; and,
- (3) the court grants approval for the security interest after submission of an application for counsel fees.

(b) Notwithstanding the provisions of subdivision (a) of this section, an attorney shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

#### § 1400.6 [Deleted]

#### § 1400.7 Fee Arbitration

In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration, pursuant to a fee arbitration program established and operated by the Chief Administrator of the Courts and subject to the approval of the justices of the Appellate Divisions.

## APPENDIX D

### Part 136. Fee Arbitration In Domestic Relations Matters

#### § 136.1 Application

This Part shall apply where representation has commenced on or after November 30, 1993, to all attorneys who 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, alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings.

#### § 136.2 General

In the event of a fee dispute between attorney and client, whether or not the attorney already has 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 section 136.5(e) of this Part either in response to notice from the attorney pursuant to section 136.5(a), upon consent pursuant to section 136.5(d), or upon the client's own initiative.

### § 136.3 Organization and Appointment

(a) The Administrative Judge of each judicial district shall organize and administer a fee arbitration program in each judicial district pursuant to the rules contained in this Part. For purposes of this Part, Nassau and Suffolk Counties shall each be designated a judicial district.

(b) The Administrative Judge shall appoint attorneys and laypersons to participate in the program, who shall serve at the pleasure of the Administrative Judge and without compensation. Attorneys must reside or maintain an office in, and laypersons must work or reside in, the judicial district for which the program is established. The Administrative Judge shall consult with local bar associations with respect to the appointments made in each geographic area. Each person appointed as an arbitrator shall file with the Administrative Judge an oath or affirmation to faithfully and fairly try all actions that come before him or her.

(c) Disputes involving a sum less than \$3000 shall be submitted to one attorney arbitrator. For purposes of this Part, the term "panel" shall include a single arbitrator unless the context requires otherwise.

(d) Disputes involving a sum of \$3000 or more shall be submitted to a panel of three arbitrators, consisting of one attorney, one layperson, and a third panel member who shall be selected at random from a pool of arbitrators comprised of both attorneys and laypersons. The chair shall be an attorney, who shall be selected by the panel members if more than one attorney is on the panel.

(e) The Administrative Judge shall be responsible for the administration of the arbitration program and shall distribute and maintain all necessary documentation required for purposes of the operation of the program. All papers required to be filed in connection with the arbitration proceeding shall be delivered to the Administrative Judge. The Administrative Judge may designate such persons as may be necessary to assist in the administration of the program.

### § 136.4 Jurisdiction

(a) The arbitration program may not hear any fee dispute in which the amount in dispute is in excess of \$100,000, including disbursements.

(b) The 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 or with respect to which no attorney's services have been rendered for at least two years.

### § 136.5 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) 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 shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue.

(c) An attorney who institutes an action to recover a fee must allege in the complaint that the client received notice under this rule of his or her right to pursue arbitration and did not file a timely request for arbitration.

(d) 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.

(e) 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 marital 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.

(f) Upon receipt of the attorney's response, the Administrative Judge shall designate the arbitrator or arbitrators who will hear the dispute and shall schedule a hearing. The parties must receive at least 10 days notice in writing of the time and place of the hearing.

(g) The client has 30 days following the filing of the request for arbitration within which to withdraw from the process, but in no event may the client withdraw after the arbitration has commenced. Withdrawal shall be by notice to the Administrative Judge.

(h) The hearing shall be held within 60 days of the receipt by the Administrative Judge of the request for arbitration.

#### § 136.6 Arbitration Hearing

(a) The rules of evidence need not be observed at the hearing, and a stenographic or other record may be made. Arbitrators shall have the power to issue subpoenas and to administer oaths. Parties shall have the right to present evidence and to cross-examine witnesses.

(b) The burden of proof shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence. The attorney shall present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and time expended. Witnesses may be called, and the client shall have the right of final reply.

#### § 136.7 Determination of the Panel

(a) The determination shall be signed by the panel of arbitrators or by at least a majority of them.

(b) Within 30 days following the hearing, the panel shall serve upon both parties by certified mail a copy of its written determination, and also shall transmit the original of the determination to the Administrative Judge.

#### § 136.8 Review

The client or attorney may seek review of the arbitration award pursuant to Article 75 of the Civil Practice Law and Rules.

#### § 136.9 Confidentiality

All 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.

#### § 136.10 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.

#### § 136.11 Records of Arbitration Determinations

The determination of the arbitration panel shall be retained by the arbitration program.

## APPENDIX E

### 22 NYCRR Part 1200, § 1200.11 Fee For Legal Services [DR 2-106]

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee.

(b) A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee may include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) . . . .

(2) Any fee in a domestic relations matter:

(i) the payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(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. A lawyer shall not include in the written retainer agreement a nonrefundable fee clause; or

(iii) based upon a security interest, confession of judgment or other lien, without prior notice to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(3) A fee proscribed by law or rule of court.

(d) . . . .

(e) In domestic relations matters, a lawyer shall resolve fee disputes by arbitration at the election of the client.

(f) In domestic relations matters, a lawyer shall provide a prospective client with a Statement Of Client's Rights And Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

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\* Professor of Law, Benjamin N. Cardozo School of Law of Yeshiva University. This article is an expanded version of a guide that I prepared for arbitrators participating in New York's mandatory attorney-client matrimonial fee arbitration program in response to a request by a colleague, Professor Lela Love, a nationally recognized ADR expert who conducts training programs for the New York State Unified Court System. After demurring at first, I finally succumbed to a persistent appeal based in part upon obligations devolving from my having written extensively in the area of attorney fees and the artfully posed challenge to actually engage the issue of unreasonable fees in a practical context. My task – to deal with the substantive issues raised by arbitration – could be encapsulated in a single query: how does an arbitrator determine whether a fee is reasonable?

I began by doing the obvious: contacting other mandatory fee arbitration programs around the country to obtain the substantive training guides that they had prepared. After extensive investigation, I learned, much to my chagrin, that no program, mandatory or otherwise, has prepared such a guide; indeed, none exists. To do the training properly, I concluded that I would have to fill that void.

Identifying the specific components that an arbitrator should take into account in determining whether the fee sought is reasonable, and if not, how to determine what is a reasonable fee, is a formidable task. It will not do to say, with apologies to Mr. Justice Potter Stewart, "I know a reasonable fee when I see it." Nor will it do to merely recite the eight factors set forth in Rule 1.5 of the Model Rules of Professional Conduct and DR 2-106 of the Model Code of Professional Responsibility. That simply fails to capture the essential task of the arbitrator. Moreover, the task is perhaps complicated by the fact that in New York, when the fee dispute is at least \$3000, a panel of three arbitrators is appointed, one of whom must be a layperson. *See infra* Appendix D § 136.3.

Since 46 jurisdictions now have attorney-client fee arbitration programs, including 12 states with mandatory fee arbitration programs, the need for some kind of guide is manifest. By preparing the first such guide, one that reflects a scholarly approach, it is my intent both to stimulate publication activity focusing on other fee arbitration programs and jump start a national colloquy with respect to a number of the substantive "reasonable fee" issues that I have addressed. Arbitration and especially fee arbitration is a low-visibility but yet high volume enterprise. Little is known about the principles of decision that prevail. This article may be seen as an attempt to illuminate a part of the on-going fee arbitration process.

I am indebted to Deborah Kahn and Jay Butterman of the New York matrimonial firm Butterman, Kahn & Gardner, LLP, who have provided me with invaluable assistance, including

insight into the practical aspects of matrimonial law practice and a well reasoned critique, from the perspective of practicing lawyers, of several of the conclusions I reached. I am also indebted to Professors Vivian Berger and Lela Love who critiqued drafts of the article. In the course of compiling information about other fee arbitration programs, I have received assistance from James Towery, Chairman of the ABA Committee on Client Protection; Jerry Larkin of the Illinois Attorney Disciplinary Commission; David Johnson, Director – Attorney Ethics of the New Jersey Administrative Office of the Courts; and Jill Sperber, Director of the Mandatory Fee Arbitration Program of the State Bar of California. Finally, I wish to thank my research assistant, Kevin Heller for his assistance in carrying out this project.

[1] According to a recent poll, 69 percent of Americans believe lawyers are only sometimes honest or not usually honest and 56 percent say lawyers use the system to protect the powerful and enrich themselves. Stephen Budiansky, *How Lawyers Abuse the Law*, U.S. News & World Report, Jan. 30, 1995 at 50, 51. A National Law Journal survey, reflecting findings of a national poll conducted in mid-July 1993, found lawyers less well respected than any occupational group except politicians, and reported the following changes from an earlier poll conducted in 1986: an increase in the regard of lawyers as “less honest” than most people from 17% to 31%; and an increase in the belief that lawyers charge too much from 23% to 43%. See Wall St. J., Aug. 2, 1993, at B3. See also Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, A.B.A.J., Sept. 1993, at 60. (a large percentage of Americans view attorneys as unethical, uncompassionate and greedy) (hereinafter ABA Poll).

[2] Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 Utah L. Rev. 277 (citing Report of Commission on Professionalism to the Bd. of Governors and House of Delegates of the ABA, 112 FRD 243, (1986)); see also Special Commission on Resolution of Disputes of ABA Section of the Bar, *The Resolution of Fee Disputes: A Report and Model By-Laws*, 1974 [“Disputes concerning fees are universally recognized as constituting the most serious problem in the relationship between the Bar and the public.”]; ABA Poll, *id.* (complaints concerning fee disputes are the most common grievance claimed by the public).

[3] Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. 1339, 1354, 1369 (1996). According to the Committee of Professional Discipline of the Association of the Bar of the City of New York, “[e]ach year, disciplinary authorities in the State of New York receive a substantial number of complaints alleging that lawyers’ services were overpriced or incompetent. Pure fee disputes or mixed disputes (that is, disputes involving both fees and charges of minor neglect or incompetence) can consume a significant percentage of the scarce resources of disciplinary systems. Ultimately, the authorities dismiss the great majority of these complaints because they do not involve violations of disciplinary rules.” *Helping Lawyers and Clients to Resolve Fee Disputes: A Proposal for a Pilot Program*, 49 The Record of the Bar of the City of New York 279.

[4] “The existing system of regulating the profession is narrowly focused on violations of professional ethics. It provides no mechanism to handle other types of clients’ complaints. The system does not usually address complaints that the lawyer’s service was overpriced or unreasonably slow. The system does not usually address complaints of incompetence or

negligence except where the conduct was egregious or repeated.” *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement at the American Bar Association* (the “McKay Commission”) (1991), at xv.

[5] See Survey of Fee Arbitration Programs, ABA Standing Committee on Client Protection (2000); *see also* ABA Model Rules for Fee Arbitration, adopted Feb. 23, 1995.

[6] New York has recently adopted a statewide fee dispute arbitration program that will apply to all attorney-client relationships formed after June 1, 2001, not just matrimonial fee disputes. Effective January 1, 2002, N.Y. Comp. Codes R. & Regs. 22, § 136 will no longer be binding and will be replaced by the broader provisions of N.Y. Comp. Codes R. & Regs. 22, § 137 entitled Part 137 Fee Dispute Resolution Program. N.Y. Comp. Codes R. & Regs. 22, § 137, Part 137 Fee Dispute Resolution Program (2002). *See also* John Caher, *Arbitration Required For Most Fee Disputes*, N.Y.L.J., Jan. 29, 2001, at 1, col. 4.

[7] The McKay Commission found that the thousands of complaints being dismissed every year symbolized a significant gap between client expectations and the existing system of attorney regulation. Accordingly, the Commission recommended the establishment of mandatory fee arbitration programs in all jurisdictions. *Id.* At the time of the McKay Commission’s recommendation, six jurisdictions had mandatory fee arbitration programs: Alaska, California, Maine, New Jersey, South Carolina, and Wyoming. Most other states had enacted statutes offering voluntary fee arbitration on a statewide basis. A few jurisdictions, including New York, offered no statewide system of fee arbitration. Today there are ten jurisdictions where fee arbitration is mandatory if requested by the client: the six listed above and New York, North Carolina, Ohio, and the District of Columbia. In addition, there are six states where if the client requests fee arbitration, and the attorney chooses not to participate, the matter proceeds *ex parte* and the attorney will be nonetheless bound unless he institutes a suit to recover the contested fee within a certain amount of time prescribed by statute. The six states with this type of statute are: Georgia, Idaho, Maryland, Missouri, Montana, and Nevada. Finally, in Wisconsin, if the client requests fee arbitration, and the attorney refuses to participate, the client may request an advisory opinion. *See* Bruce R Meckler, Mari Henry Leigh, and Robert J. Ambrose, *Survey of State Arbitration Provisions*, 3 Mealey’s Attorney Fees 27 (July 2001).

[8] *Woman in Divorce: Lawyers, Ethics, Fees and Fairness*, New York City Department of Consumer Affairs, March 1992.

[9] *See* Report of the Committee to Examine Lawyer Conduct in Matrimonial Actions, May 4, 1993.

[10] *Id.* at 24. The Committee’s proposal for a fee arbitration program in matrimonial cases was made after an examination of fee arbitration programs in New Jersey, California, and Erie County, New York.

[11] N.Y. Comp. Codes R. & Regs. 22, § 1400, entitled “Procedure for Attorneys in Domestic Relations Matter,” took effect on November 30, 1993. N.Y. Comp. Codes R. & Regs. 22, § 1400.7 (2001) states:



In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration, pursuant to a fee arbitration program established and operated by the Chief Administrator of the Courts and subject to the approval of the Justices of the Appellate Divisions.

[12] Status Report of the Committee to Track the New Matrimonial Rules to the Chief Judge and Chief Administrative Judge, February 1995. The Committee reported that the comments received from the attorneys who responded to the survey were mixed. Several commentators expressed frustration with the fee arbitration program, while others were enthusiastic and considered it a positive aspect of the new matrimonial rules.

[13] *Divorce Lawyers Win Most Fee Disputes*, *N.Y.L.J.*, Dec. 14, 1995. Suffolk County had received more fee arbitration requests than any other county in the State at the time. The Law Journal reported that “[i]n 80 percent of the 30 cases in Suffolk that were decided by arbitration, attorneys were found entitled to more than half the amount in dispute.” According to the Law Journal, the Suffolk County statistics were consistent with reports received from lawyers elsewhere in the State who felt that they were getting “a fair shake” from the domestic relations fee arbitration program.

[14] *The Domestic Relations Fee Arbitration Program: A Report to the Chief Judge and Chief Administrative Judge* (of New York), November 1996 (hereinafter *Report*). According to the *Report*, program usage had increased steadily since the program’s inception. 1996 requests were projected to exceed 1995 requests by more than 50%. Approximately two-thirds (65%) of the requests for arbitration proceeded to an arbitration hearing, whereas 35% of requests resulted in no hearing or settlement. Of the requests that resulted in no hearing or settlement, approximately 60% were recent applications for which no hearing had yet been held. The remaining 40% included cases that were withdrawn, not pursued by the client, or dismissed for lack of jurisdiction. The overall percentage of arbitration requests that resulted in a settlement by the parties was approximately 13%. *Id.* at 10.

[15] *Id.* at 42. If an attorney bills \$10,000, and the client disputes only \$2000 of that fee, then for purposes of the statistic, only \$2000 is in dispute.

A review of the awards reveals little basis for dissatisfaction on the part of attorneys; they are winning most fee disputes. That is, in most cases the attorney was found entitled to the majority of the amount in dispute, with the average award amounting to nearly three-quarters of the amount in dispute. To be sure, the attorney’s fee was reduced in most cases; but fee arbitration also saves the attorney the time, effort and expense he or she would have incurred in litigation. Moreover, fee arbitration is one way to avoid the almost inevitable counterclaim for malpractice that arises in litigation of fee disputes. *Id.* at 41-42. The Report went on to note:

Statistics on fee arbitration outcomes are difficult to come by. Most states do not keep them or will

not make them public for fear they will have a chilling effect on program participation. What few

statistics are available indicate that clients win fee reductions in the majority of cases, although the

amount of the reduction is not disclosed. A 1991 National Law Journal article surveyed 8 bar-run programs and found that clients won fee reductions, whether large or small, in 402 of the 622 cases reported. The Joint Committee on Fee Disputes and Conciliation, which is made up of the New York County Lawyers Association, the Association of the Bar of the City of New York and the Bronx County Bar Association, sponsors a voluntary fee dispute resolution program. The program reported that in 1991 clients won reductions 64% of the time.

*Id.*

[16] This report does not suggest that a central administrative entity should pass on the qualifications and competency of arbitrators or dictate policy and practice independently of local administrators. This report does suggest that the present level of support provided to local administrators of the fee arbitration program requires enhancement. It is beyond dispute, for instance, that the integrity and success of the fee arbitration program is greatly dependent on the court system's utilization of arbitrators who are demonstrably fair and competent and who possess appropriate backgrounds and qualifications; yet, to date, the court system has not adopted any uniform guidelines or standards for screening prospective arbitrators, monitoring their competency and performance, or defining the relationship and obligations of arbitrators and program administrators to the attorney disciplinary process. Furthermore, the fee arbitration program should prepare and distribute informational brochures and instructional manuals for the benefit of disputants and arbitrators; prepare and revise standard forms; perform ongoing surveys of arbitration participants; prepare annual reports; and formulate and implement policies in collaboration with local administrators. In order for the program to meet these demands and achieve its full potential, the court system will have to devote resources and staff commensurate with the program's growing size and importance. *Id.* at 26-27.

[17] N.Y. Comp. Codes R. & Regs. 22, § 136, Part 136 Rules of the Chief Administrator of the Courts (1999). For purposes of this guide, the term "matrimonial lawyer" means an attorney in a matrimonial action, as defined in N.Y. Comp. Codes R. & Regs. 22, §136.

[18] N.Y. Comp. Codes R. & Regs. 22, § 1400.3 (2001); *see infra* Appendix A for the required contents of the written retainer agreement.

[19] N.Y. Comp. Codes R. & Regs. 22, § 1400.2 (2001). *See also* N.Y. Comp. Codes R. & Regs. 22, § 1200.11(f) (2001); Bar Association Ethical Opinions 1997 WL 1068488 (Op. 685, N.Y. St. Bar. Assn. Comm. Prof. Eth. 1997) (prospective clients in matrimonial matters must be provided with the Statement of Client's Rights and Responsibilities at consultations that occur before the attorney has agreed to undertake the representation).

[20] N.Y. Comp. Codes R. & Regs. 22 § 1400.2 (2001). The complete Statement of Client's Rights and Responsibilities that must be given to the prospective client is set forth in Appendix B, *infra*.

[21] Philips v. Philips, 178 Misc. 2d 159, 678 N.Y.S.2d 244 (Sup. Ct. Nass. County 1998) (attorney was precluded from recovering fees where he failed to present retainer agreement and statement of client's rights directly to client, and presentation to brother was insufficient notwithstanding brother had power of attorney for client); Rabinowitz v. Cousins, 219 A.D.2d 487 (1st Dep't 1995) (complaint dismissed for failure to file retainer statement); Marshall v. Chitayat, N.Y.L.J., Oct. 6, 2000 at 27, col. 6; K.E.C. v. C.A.C., 173 Misc. 2d 592, 661 N.Y.S.2d 715 (Sup. Ct. Kings County 1997) (attorneys were precluded from obtaining payment of their fees out of money paid by husband to wife where attorneys did not notify wife of her right to request arbitration of fee dispute (N.Y. Comp. Codes R. & Regs. 22, § 136.5), did not prove existence of retainer agreement signed by wife (CLS Code of Prof. Resp. DR 2-106(C)(2)(B); N.Y. Comp. Codes R. & Regs. 22, § 1200.11(c)(2)(ii) (2001)) and did not show that wife ever received Statement of Client's Rights and Responsibilities (N.Y. Comp. Codes R. & Regs. 22, § 1400.2, 1200.47 (2001))).

[22] *Cf.* Mueller v. Pacicca, 179 Misc. 2d 392, 684 N.Y.S.2d 753 (City Ct. White Plains, 1998) (where client never signed retainer agreement, attorney was not entitled to recover any legal fees and had to refund fees previously collected); Bill Alden, *Failure to Follow Matrimonial Rules Costs Lawyer Her Fee*, N.Y.L.J., Oct. 29, 1998 (commenting on Mueller v. Pacicca). *But cf.* Markard v. Markard, *infra* note 30 and text at *infra* notes 29-34.

[23] N.Y. State Bar. Ass'n. Comm. Prof. Ethics, *supra* note 19 (hereinafter N.Y. 685).

[24] N.Y. Comp. Codes R. & Regs. 22, § 1200.11(c)(2)(ii) (2001); N.Y. Comp. Codes R. & Regs. 22, § 1400.3 (2001).

[25] N.Y. Comp. Codes R. & Regs. 22, § 1400.3 (2001).

[26] Philips v. Philips, 178 Misc. 2d 159 at 161, 678 N.Y.S.2d 244 at 245 (Sup. Ct. Nass. County 1998) (failure to timely file the retainer agreement precludes right to collect fee).

[27] "The Code [of Professional Responsibility] effectively precludes an attorney from collecting any fee where there is no written retainer in any case where one is required under the matrimonial rules, and certainly, such a fee could not be reasonable if it were one expressly precluded by court rule" McMahon v. Evans, 169 Misc. 2d 509, 515, 645 N.Y.S.2d 753, 758 (Sup. Ct. Broome County 1996); Julien v. Machson, 245 A.D.2d 122, 666 N.Y.S.2d 147, 148 (1st Dep't 1997) (failure of attorney to file a copy of written retainer agreement with the court, along with other failures to comply with the matrimonial rules precluded attorney from recovering any fee); *see also*, Forbes v. Forbes, N.Y.L.J., Feb. 26, 1997 at 26, col. 1 (Sup. Ct. N.Y. County 1997); Mueller v. Pacicca, 179 Misc. 2d 392, 684 N.Y.S.2d 753 (City Ct. White Plains, 1998); CPLR § 237, Supp. Practice Commentaries, at 375.

[28] *Flanagan v. Flanagan*, 175 Misc. 2d 160, 668 N.Y.S.2d 302 (Sup. Ct. NY County 1997) N.Y. Comp. Codes R. & Regs. 22, §1200.11(c)(2)(ii) (2001) and N.Y. Comp. Codes R. & Regs. 22, § 1400.3 (2001), were designed to eliminate long-standing abuses pertaining to the retention of counsel in matrimonial cases, and their purpose supports the conclusion that they must be read to prevent collection of fees in matrimonial actions where there has been a failure to fully comply with § 1400.3 (which regulates the contents of a retainer agreement; reargued and reversed, order of May 13, 1998 which granted attorney's fee request; modified, 267 A.D.2d 80, 699 N.Y.S.2d 406 (1st Dep't 1999) (although the respondent-attorney did not fully comply with the mandates of N.Y. Comp. Codes R. & Regs. 22, § 1400.2 (2001) and § 1400.3, which, respectively, require that counsel provide prospective clients with information as to their rights and responsibilities before entering into a retainer agreement and that specified provisions be included in retainer agreements, there was substantial compliance with those requirements and defendant waived her right to arbitration of the attorneys' fees dispute; this, along with the fact that counsel rendered substantial services and achieved reasonably favorable results, entitled attorney to a reasonable fee; attorney had previously been awarded \$41,000 in interim fees and an additional \$29,655.30 upon reargument; modified and reduced to \$11,905.30 because attorney failed to keep sufficiently detailed billing records and brought a frivolous motion which was included in his fee statement but for which he was not entitled to a fee)).

[29] *Mueller v. Pacicca*, 179 Misc. 2d 392, 684 N.Y.S.2d 753 (City Ct. White Plains, 1998) (where client never signed retainer agreement, attorney was not entitled to recover legal fees at all, and had to refund fees previously collected); Brenda S. Levinson, *Courts Put Teeth Into Matrimonial Rules – Avoid Getting Bitten*, unpublished report on file with author, circa 2000 (relating experience as one of a panel of three matrimonial fee arbitrators which held that in a case where the attorney had failed to provide client with a signed written retainer agreement at the outset of the representation, even though attorney did extensive work in an expedient and commendable manner and the client agreed that the hours charged had been expended on the client's behalf and the work stated to have been performed was performed, the attorney was not entitled to collect any fee and had to refund fees already collected).

[30] *Markard v. Markard*, 263 A.D.2d 470, 692 N.Y.S.2d 733 (2d Dep't 1999) (client discharged attorney after paying a \$10,000 retainer fee and though attorney agreed to refund the minimal unused portion thereof, client sought return of entire fee paid claiming that a provision in the retainer agreement waiving itemized billing contravened the strict requirements of the matrimonial rules [N.Y. Comp. Codes R. & Regs. 22, § 1400.3 (2001)]; denial of request for refund of all of the retainer fee upheld because discharge was by consent, not for just cause, and the cases holding that the matrimonial rules preclude the collection of fees where the retainer provisions are not complied with are distinguishable because they concern attorneys seeking to compel clients to pay for services rendered but not paid for and not for retainer fees already paid).

[31] *Id.* at 734.

[32] *See infra* note 62.

[33] *See infra* note 64.

[34] For a discussion of the client discharge rule, *see generally*, Lester Brickman and Lawrence Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 Fordham L. Rev. 149, 149 (1988) (hereinafter *Nonrefundable Retainers*); Lester Brickman and Lawrence Cunningham, *Nonrefundable Retainers Revisited*, 72 North Carolina L. Rev 1 (1993) (hereinafter *Nonrefundable Retainers Revisited*).

[35] N.Y. Comp. Codes R. & Regs. 22, § 136.1.

[36] N.Y. 685, *supra* note 19.

[37] N.Y. Comp. Codes R. & Regs. 22, § 136.4(a). Disputes involving a sum less than \$3,000 shall be submitted to one attorney arbitrator. § 136.3(c). Disputes involving a sum of \$3,000 or more shall be submitted to a panel of three arbitrators, consisting of one attorney, one layperson, and a third panel member, selected at random, who is either an attorney or layperson. The chair shall be an attorney, who shall be selected by the panel members if more than one attorney is on the panel. § 136.3(d).

[38] *See infra* Appendix D, N.Y. Comp. Codes R. & Regs. 22, § 136.5(a). A client may also consent to an attorney's request to submit the fee dispute to arbitration. *Id.* at §136.5(d). Additionally, an attorney's refusal or failure to submit to the arbitration process shall subject him to disciplinary action. *Id.* at § 136.10.

[39] *Julien v. Machson*, 245 A.D.2d 122, 666 N.Y.S.2d 147 (1st Dep't. 1997) (failure of counsel to provide client with notice of right to arbitrate fee dispute as well as failure to meet other requirements of the Matrimonial Rules precluded recovery of legal fees); *L.H. v. V.W.*, 171 Misc. 2d 120, 653 N.Y.S.2d 477 (Civ. Ct. Bronx County 1996) (same); *Lewis & Merritt, L.L.P. v. Smith*, 170 Misc. 2d 192, 650 N.Y.S.2d 921 (Sup. Ct. 1996) (matrimonial client's silence and failure to object to billings sent by attorney for services rendered could not be construed as implied assent where it equally suggested lack of assent, and thus client was entitled to dismissal of complaint in action to recover attorney's fee where he was not given requisite notice of his right to arbitration under CLS Sup. Ct. R. § 136.5); *see also, infranote 82*; *Marshall v. Chitayat*, N.Y.L.J., Oct. 6, 2000, at 27, col. 6 (failure to notify client of right to elect arbitration to resolve a fee dispute as well as failure to comply with other provisions of the Matrimonial Rules including failure to file an appropriate retainer agreement with the court, failure to provide client with written itemized bills every 60 days, and once the retainer fee was earned, every 30 days, warrants dismissal of action filed by attorney for fees, with prejudice); *Moraitis v. Moraitis*, *infra* note 57

[40] *Miller v. Corbett*, 177 Misc. 2d 266, 676 N.Y.S.2d 770 (City Ct. Yonkers, 1998) (“[b]ecause of the salutary and remedial nature of the fee arbitration rule, it must be interpreted expansively,” *id.* at 773); *Paikin v. Tsirelman*, 266 A.D.2d 136, 699 N.Y.S.2d 32 (1st Dep't 1999) (failure of client to object to fees billed by matrimonial lawyer does not excuse lawyer from having to provide notice of the right to arbitration before bringing suit for unpaid fees; to hold otherwise would allow circumventing the notice and pleading requirements of N.Y. Comp. Codes R. & Regs. 22, § 136.5 and would “effectively eviscerate the fee arbitration rules governing domestic relations matters.”). *But see Scordio v. Scordio*, 270 A.D.2d 328, 705

N.Y.S.2d 58 (2d Dep't 2000) (discharged attorney sought charging lien against wife and wife sought repayment of all fees previously paid to that attorney; held, attorney entitled to quantum meruit and because former client had not disputed the reasonableness of the fees charged, the attorney was not required to send her a notice informing her of her right to subject the fees to arbitration. "We decline to follow the rule adopted by the Appellate Division, First Department, [in Paikin v. Tsirelmen] which obligates an attorney to send such a notice even in the absence of any fee disagreement with a client. . . ." *id.* at 59).

[41] *See supra* notes 21 and 26.

[42] K.E.C. v. C.A.C., 173 Misc. 2d 592, 661 N.Y.S.2d 715 (Sup. Ct. Kings County 1997).

[43] N.Y. Comp. Codes R. & Regs. 22, § 136.5(b).

[44] *Id.* at § 136.5(d).

[45] *See generally* 1 WARREN'S WEED N.Y. REAL PROPERTY "ATTORNEYS AT LAW" § 6 (1992).

[46] *In re* Weitling, 266 N.Y. 184, 194 N.E. 401 (1935) (attorney cannot be compelled to surrender papers in his possession before payment or adequate provision for compensation); *Artim v. Artim*, 109 A.D.2d 811, 486 N.Y.S.2d 328 (2d Dep't 1985) (client must satisfy or adequately secure lien before turnover of client papers will be ordered); *Tri-Ex Enters. v. Morgan Guaranty Trust Co.*, 583 F.Supp. 1116 (S.D.N.Y. 1984) (retaining lien's purpose is to prevent client from refusing to pay charges justly due); *Petrillo v. Petrillo*, 87 A.D.2d 607, 448 N.Y.S.2d 404 (2d Dep't 1985) (reversing order to deliver papers and ordering hearing to ensure that payments received by attorney amount to value of legal services rendered). *See generally* Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 Colum. L. Rev. 296 (1965).

[47] *People v. Keefe*, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 405 N.E.2d 1012 (1980) (at common law, a lien attached to the judgment and the proceeds of the judgment); *In re* Estate of Gutchess, 90 A.D.2d 663, 456 N.Y.S.2d 949 (3d Dep't 1982); *In re* County of Nassau, 80 A.D.2d 613, 436 N.Y.S.2d 55 (2d Dep't 1981) (award fixing charging lien reduced because original award included fees for services rendered in other proceedings); *Kaplan v. Reuss*, 113 A.D.2d 184, 495 N.Y.S.2d 404 (2d Dep't 1985) (where firm commenced action for client and client ultimately negotiated settlement, firm had charging lien on proceeds of settlement), *aff'd*, 68 N.Y.2d 693, 506 N.Y.S.2d 304, 497 N.E.2d 671 (1986). The two liens are distinct. *White v. White*, 107 Misc. 2d 551, 435 N.Y.S.2d 535 (Sup. Ct. Nassau County 1981) (citing *In re* Heinsheimer, 214 N.Y. 361, 108 N.E. 636 (1915)). For example, an attorney who has instituted an action on behalf of a plaintiff and who is discharged without cause may impose a common law retaining lien on papers in the attorney's possession and a statutory charging lien on the cause of action.

[48] N.Y. Jud. Law §§ 475, 475-a (2001). Although the common law charging lien continues to exist, attorneys virtually always rely on the expanded statutory charging lien. *In re* Sebring, 238

A.D.281, 264 N.Y.S. 379 (4th Dep't 1933) (acknowledging that the statutory lien had virtually taken the place of the common law charging lien).

[49] Artim, 109 A.D.2d 811.

[50] Black letter law has generally regarded the retaining lien as authorizing attorneys to retain client money to compel payment of outstanding fees. *See, e.g.,* People v. Keeffe, 50 N.Y.2d 149, 155, 428 N.Y.S.2d 446, 449, 405 N.E.2d 1012, 1015 (1980) (the retaining lien entitles attorney to withhold all papers, securities or money belonging to client until amount of fee is fixed and paid). But courts, in some instances, have exhibited such reluctance to allow attorneys to assert retaining liens when money is involved, that it has become the virtual equivalent of all-encompassing exceptions to the general rule. Most notably, funds taken for a special purpose or as trustee are not subject to the attorney's retaining lien. *See, e.g.,* Marsano v. State Bank of Albany, 27 A.D.2d 411, 279 N.Y.S.2d 817 (3d Dep't 1967), *appeal dismissed*, 23 N.Y.2d 1018, 299 N.Y.S.2d 458, 247 N.E.2d 286 (1969). However, in at least one contemporary case, the court, appearing somewhat disdainful of the client's plea of hardship, has upheld an attorney's retaining lien on client funds. *In re* Estate of Dinger, 118 Misc. 2d 781, 461 N.Y.S.2d 713 (Sur. Ct. Richmond County 1983) (surrogate sustained attorney's retaining lien on \$158,000 tax certiorari check, representing only part of the refund payable to executrix).

[51] Bowling Green Savs. Bank v. Todd, 52 N.Y. 489 (1873); *see also* Chlost v. Chlost, 75 A.D.2d 527, 426 N.Y.S.2d 772 (1st Dep't 1980) (attorney had retaining lien on client files if client owes any sum for services or disbursements); *cf. supra* note 50.

[52] Manfred & Sons, Inc. v. Mortillaro, 69 A.D.2d 1019, 416 N.Y.S.2d 156 (4th Dep't 1979).

[53] Yaron v. Yaron, 58 A.D.2d 752, 396 N.Y.S.2d 225 (1st Dep't 1977) (ordering summary determination of lien and conditioning turnover upon payment or posting of security). The lien secures the balance due for all prior legal services rendered for which the attorney has not yet been compensated, whether pertaining to the attached property or not. First Nat'l Bank & Trust Co. v. Hyman Novic Realty Corp., 72 A.D.2d 858, 421 N.Y.S.2d 733 (3d Dep't 1979) (common-law retaining lien is lien for entire balance of account). Thus, an attorney may withhold papers or money unrelated to matters giving rise to the general balance due. Kaplan v. Reuss, 113 A.D.2d 184, 495 N.Y.S.2d 404 (2d Dep't 1985) (a retaining lien may be used to satisfy any amount due the attorney for legal services rendered with respect to any matter), *aff'd*, 68 N.Y.2d 693, 506 N.Y.S.2d 304, 497 N.E.2d 671 (1986).

[54] *In re* Makames, 238 A.D. 534, 537, 265 N.Y.S. 515, 519 (4th Dep't 1933) (“[w]here pressing necessity exists” the court’s “power to substitute adequate security for a retaining lien is derived from the inherent right which the court has. . . to compel an attorney to act fairly and to deal equitably with his client.”) New York courts have also compelled an attorney to turn over client property with other security being substituted. Manfred & Sons, Inc. v. Mortillaro, 69 A.D.2d 1019, 416 N.Y.S.2d 156 (4th Dep't 1979) (affirming order to turn over documents to client but remanding for purpose of fixing appropriate security).

[55] *Katsaros v. Katsaros*, 152 A.D.2d 539, 543 N.Y.S.2d 478 (2d Dep't 1989); *Pekoe v. Pekoe*, 101 A.D.2d 813, 475 N.Y.S.2d 144 (2d Dep't 1984) (in light of defendant's allegations of indigence, it would be inequitable to permit attorney to retain file pending payment; attorney may have hearing to determine compensation presently, but payment is deferred until conclusion of action); *Rosen v. Rosen*, 97 A.D.2d 837, 468 N.Y.S.2d 723 (2d Dep't 1983) (granting former counsel a charging lien on any proceeds to be received upon resolution of the action, based on substituted counsels' needs of papers to prepare case for trial and uncontroverted allegations of indigence); *cf. Pileggi v. Pileggi*, 127 A.D.2d 751, 512 N.Y.S.2d 143 (2d Dep't 1987) (reversing lower court's denial of a retaining lien where there were allegations that incoming attorney had been paid retainer and client did not submit an affidavit of indigence).

[56] N.Y. Comp. Codes R. & Regs. 22, § 1200.11(e) (2001).

[57] *Moraitis v. Moraitis*, 181 Misc. 2d 510, 694 N.Y.S.2d 588 (Sup. Ct. Nassau County 1999) (where spouse's attorney in a matrimonial action withdraws with court's approval because of nonpayment of fee and client's new attorney seeks the file, counsel may not invoke a common law retaining lien if counsel has failed to provide client with written notice of the right to arbitrate the fee; although the Matrimonial Rules do not specifically abrogate an attorney's claim for a retaining or charging lien, that result is called for by Model Code of Prof'l Responsibility DR2-106(E), N.Y. Comp. Codes R. & Regs. 22, § 1200.11 (e) (2001)); *see also Philips v. Philips*, 178 Misc. 2d 159, 678 N.Y.S.2d 244 (Sup. Ct. Nassau County 1998); *K.E.C. v. C.A.C.*, 173 Misc. 2d 592, 661 N.Y.S.2d 715 (Sup. Ct. Kings County 1997) (discharged attorney denied a charging lien because of his failure to comply with the matrimonial rules).

[58] *Mehler v. Mehler*, N.Y.L.J., Mar. 8, 1999, at 28, col. 5; *Stellato v. Stellato*, N.Y.L.J., Jan. 30 1996, at 29, col. 4 (noncompliance with Part 1400 of the Matrimonial Rules does not abrogate counsel's common-law retaining lien; though the original Matrimonial Rules contained a provision abrogating the retaining lien in matrimonial matters, following a comment period, the proposed provision was withdrawn and not included in the final version of Part 1400. Against this background, there is no basis for concluding that Part 1400 as adopted abrogated the retaining lien by implication). *See also, Scordio v. Scordio*, 270 A.D.2d 328, 705 N.Y.S.2d 58 (2d Dep't 2000).

[59] The Statement of Clients Rights and Responsibilities provides that the written retainer agreement "must specify under what circumstances . . . [the] attorney [can withdraw] for nonpayment of legal fees. If an action or proceeding is pending, the Court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order on judgment." Appendix B. As drafted, however, it is unclear how the provision allowing for a charging lien meshes with the right to seek arbitration. Moreover, it has been suggested that since the charging lien has been created by statute, *supra* note 48, then it may not be abrogated by court rule. *See Joel R. Brandes, Fee Dispute Arbitration*, N.Y.L.J., July 25, 2000, at 3, col. 3.

[60] It is conceivable, even following the *Mehler* and *Stellato* courts' rulings, that the client's right to such arbitration under the Matrimonial Rules can still be preserved. Thus, if the client pays the fee of the discharged attorney in order to obtain his files, the client can then seek



arbitration with regard to the fee paid. *See text, supra* accompanying notes 40-42. However, this seems an arduous route and inconsistent with the intent of the Matrimonial Rules.

[61] N.Y. Comp. Codes R. & Regs. 22, §1200.11(c)(2)(i) (2001); *Weinstein v. Barnett*, 219 A.D.2d 77, 640 N.Y. S.2d 103 (1st Dep't 1996). "It should be noted that prior to the codification of N.Y. Comp. Codes R. & Regs. 22, §1400 (2001) et. seq., bar associations viewed it as ethically improper for an attorney to enter into any form of contingent fee arrangement in any aspect of a matrimonial matter, except where the representation was to collect alimony or child support payments already due and owing the party." Daniel Buoniconti, Deborah B. Kahn & Stephanie E. Kupferman, *Legal Malpractice: Techniques to Avoid Liability Escaping Ethical Enigmas and Fleeing Family Law Foibles: Malpractice Avoidance for the Matrimonial Practitioner*, 608 Prac. L. Inst. 633 (1999). As N.Y. Comp. Codes R. & Regs. 22, §1200.11(c)(2)(i) [DR2-106 (c)(2)(i)] is drafted, the exception for past due alimony or child support does not appear preserved. It is likely, however, that courts will still continue to allow the exception for the same reason that the exception was created.

[62] N.Y. Comp. Codes R. & Regs. 22, §1200.11(c)(2)(ii) (2001); *In re Cooperman*, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (1994) (holding that nonrefundable fee retainer agreement is a per se violation of public policy and an attorney's obligations under the Code of Professional Responsibility and that an attorney must refund unearned fees upon his or her discharge). *See generally, Nonrefundable Retainers, supra* note 34; *Nonrefundable Retainers Revisited, supra* note 34. However, § 1400.4 allows an attorney to enter into a "minimum fee" arrangement with a client that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion. For a minimum fee to be valid, however, the work contracted for must have been completed. If the lawyer is terminated before completion, then any minimum fee set in the contract is unenforceable because otherwise it would amount to a nonrefundable retainer and the attorney is instead entitled to the reasonable value of her services. *See* Letter from Lester Brickman and Lawrence A. Cunningham to Michael Colodner, Office of Court Administration, Sept. 8, 1993, and accompanying Memorandum of same date, commending the Proposed Matrimonial Rules' prohibition of nonrefundable retainers but pointing out that allowing the use of a "minimum fee" defined as "a specific amount the client agrees to pay counsel if the latter is able to obtain a settlement in substantial accord with specified terms within a specified time period" [Report, *supra* note 9, at 18, note 39], would have the effect of "gut[t]ing] the nonrefundable retainer prohibition." Letter, *id.* at 2. In response thereto, the proposed rules were changed to define a minimum fee as a fee "that provides for the payment of a specific amount below which the fee will not fall based upon handling of the case to its conclusion." N.Y. Comp. Codes R. & Regs. 22, § 1400.4 (2001).

[63] For a discussion of "without cause," *see* Lester Brickman, *Setting The Fee When The Client Discharges a Contingent Fee Attorney*, 41 Emory L. Rev. 367, 393-97 (1992).

[64] *Martin v. Camp*, 161 A.D. 610, 146 N.Y.S. 1041, 1914 N.Y. App. Div. LEXIS 5456 (1914). *See infra* Parts V and VI, for further discussion of quantum meruit.

[65] N.Y. Comp. Codes R. & Regs. 22, § 1400.5 (2001); *Id.* at § 1200.11.

[66] *See infra* Part III.B.

[67] N.Y. Comp. Codes R. & Regs. 22, § 136.6 (b).

[68] *Id.*

[69] *Id.* at §136.6(a).

[70] *Id.* at §136.6(b).

[71] *Id.*

[72] *Jacobson v. Sassower*, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 489 N.E.2d 1283 (1985).

[73] *Id.* at 993, quoting from *Smitas v. Rickett*, 102 A.D.2d 928, 929, 477, N.Y.S.2d 752 (1984).

[74] “By preponderance of evidence is meant that the superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other.” *Black’s Law Dictionary* 1201 (7th ed. 1999).

[75] N.Y. Comp. Codes R. & Regs. 22, §136.6(b).

[76] *Id.*

[77] *See Matter of McNamee, Lochner, Titus & Williams*, 700 N.Y.S.2d 525, 527 n.1 (3d Dep’t 1999).

[78] *See supra* Part II.

[79] *See Rosenman*, 93 A.D.2d 745 (1983); *Glazer v. Falberg*, 85 A.D.2d 502 (1st Dep’t 1981).

[80] *Shaw v. Manufacturers Hanover Trust*, 68 N.Y.2d 172 (1986); *see also Jacobson v. Sassower*, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 489 N.E.2d 1283 (1985) (“courts pay particular attention to fee arrangements between attorneys and their clients.”).

[81] *See Rosenman Colin Freund Lewis & Cohen v. Neuman*, 93 A.D.2d 745 (1st Dep’t 1983). In this case, where the matrimonial lawyer sought summary judgment in an action for almost \$9000, the balance due of attorney fees after almost \$12,000 had previously been paid, on the basis of an account stated and for work, labor, and services. The client had meager income, and claimed that he had not agreed to pay \$40 per hour for paralegal charges, and complained that the law firm’s expenses were in the runaway stage. The court recognized an exception to the account stated rule, finding that the fee arrangement between plaintiff and defendant required special scrutiny; hence summary judgment would be denied. *Levitz Trossman Mayerson & Zorn v. Davis*, N.Y.L.J., Nov. 30, 1992, at 27, col. 7 (Civil Ct. N.Y.). *See generally* *Barney Butler*,

Recovering Fees from a Client: Clients' Defenses to Account Stated Actions, 25 J. Legal Prof. 27 (2001).

[82] Lewis & Merritt v. Smith, 170 Misc. 2d 192, 650 N.Y.S.2d 921 (Sup. Ct. Nassau County. 1996).

[P]laintiff [attorney] would have this court interpret the common-law principles of account stated to mean that a matrimonial client's failure to affirmatively object to any of the invoices is the equivalent of an implied agreement as to the amounts contained therein. To do so in this court's opinion would effectively emasculate the fee arbitration rules governing domestic relations matters. In matrimonial actions attorneys are obligated to send invoices to their clients at least once every 60 days (N.Y. Comp. Codes R. & Regs. 22, § 1400.3 (2001)). A client would have to repeatedly voice objection to each invoice when sent, or risk losing the opportunity to arbitrate the charges set forth in the invoice. It is impractical, and undesirable, to expect that to occur as it would undermine and chill the attorney/client relationship in an area of practice inherently fraught with tension and stress.

The enactment of the 60-day billing and matrimonial fee arbitration rules clearly was remedial in nature. This court finds that the rules have impacted upon the common-law principle of an account stated where, as here, that principle is utilized to imply agreement on billings in a matrimonial matter so as to defeat application of N.Y. Comp. Codes R. & Regs. 22, § 136.5. [Client's]. . . mere silence and failure to object to the billings cannot be construed as an implied assent when it equally suggests lack of assent. It is the determination of this court that silence and failure to object is sufficient to trigger application of section 136.5 requiring plaintiff to serve a notice of matrimonial client's right to arbitration and further requiring plaintiff to allege having done so as part of its complaint.) *Id.* at 194. *See also* Paikin v. Tsirelman, 266 A.D.2d 136, 699 N.Y.S.2d 32 (1st Dep't 1999) ("Plaintiff's claim that. . . [his failures to provide his client within 30 days written notice of his right to arbitrate any fee dispute, and to allege in his complaint that the client received such notice] were never triggered because of his client's failure to object to his billings and that, therefore, he is entitled to recover on the basis of an account stated is without merit. As found by the court in Lewis. . . to interpret the common-law principles of an account stated, so as to find that a matrimonial client's failure to affirmatively object to his or her attorney's billings may provide a basis for circumventing the notice and pleading requirements of N.Y. Comp. Codes R. & Regs. 22, § 136.5, would effectively eviscerate the fee arbitration rules governing domestic relations matters."). *Id.*

[83] Lewis & Merritt v. Smith, 170 Misc. 2d 192, 650 N.Y.S.2d 921 (Sup. Ct. Nassau County 1996); Paikin v. Tsirelman, 266 A.D.2d 136, 699 N.Y.S.2d 32 (1st Dep't 1999).

[84] *See* Matter of McNamee, Lochne, Titus & Williams, 235 A.D.2d 17, 18, 663 N.Y.S.2d 356, 357 (3d Dep't 1997).

[85] *See* Matter of McNamee, Lochne, Titus & Williams, 700 N.Y.S.2d 525 (3d Dep't 1999).

[86] While the Rules apply to fee disputes up to \$100,000, N.Y. Comp. Codes R. & Regs. 22, § 136.4 (a), there is some suggestion that the bulk of the fees being arbitrated are in the lower end of that range. *See Report, supra* note 14, at 53 (recommending that the monetary threshold for use of three member arbitration panels be raised from \$3,000 to \$5,000 or \$7,500 in order to reduce depletion of the pool of volunteer attorney arbitrators). *See also*, Jonathan Lippman (Chief Administrative Judge of the New York State Unified Court System), *Welcome Fee Dispute Arbitration Program*, N.Y.L.J., Jan. 22, 2001 (“the typical fee dispute ranges between \$3,000 and \$5,000”).

[87] N.Y. Comp. Codes R. & Regs. 22, § 136.9.

[88] Model Code of Professional Responsibility DR 1-103(a) provides: “A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer’s capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of section 1200.3 of this Part that raises a substantial question as to another lawyer’s honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”

[89] This may be one of the few occasions in which New York’s Model Code of Professional Responsibility DR 1-103(a) has any applicability. In virtually all other circumstances in which a lawyer representing a client learns information about another lawyer that invokes DR 1-103(a), there is no duty to report such conduct. This toothlessness is intended, and was accomplished, by the amendment of DR 1-103(a), which added the words, “not protected as a confidence or secret.” Most information that a lawyer acquires about another lawyer that comes within the ambit of DR 1-103(a) is protected as confidence or secret. Even in jurisdictions that have not added New York’s amendment, there is little or no enforcement of this ethics rule. *See* Charles W. Wolfram, *Modern Legal Ethics* 683 (1986) (“probably no other professional requirement is as widely ignored by lawyers subject to it” as the duty to report).

[90] *Cf.* § 136.4 (b).

[91] *See supra* note 15; *see also* James Peterson, *Fee Arbitration: An Effective Alternative to Litigation*, *The Wis. Law.* 67 (8), 16, 58 (Aug. 1994) (“Reliable statistics about the outcomes of fee arbitration are impossible to gather, because many programs don’t keep records of outcomes – or don’t release the information if they do. Some programs, particularly newer ones such as Louisiana’s, are so modestly funded that they can’t afford to maintain extensive records. But often, outcome statistics aren’t released because releasing them is a no-win proposition. If the record shows that clients usually win fee reductions, it may have a chilling effect on attorney participation in the program. If attorneys usually win, then clients may become disillusioned. So most programs take Wisconsin’s approach and don’t keep a tally of the outcomes.”).

[92] *See supra* notes 14-15. In Los Angeles’s semi-compulsory program, clients won 67% of the time. In Washington D.C.’s program that tries to find for one party or another rather than set a reasonable fee, attorney’s fees were found to be justified 58% of the time. Peterson, *supra* note 91.

[93] There seems to be little if any value that can be learned about the fee arbitration process by looking at the actual results of arbitrations in existing programs: Many bar programs, indeed, choose not to disseminate or even to compile information concerning the frequency or the extent of client victories in arbitration. The available figures hardly demonstrate the existence of any systematic bias in favor of either clients or attorneys. One quite common criticism of arbitration focuses, not on the risks of favoritism towards one party or the other, but on the supposed tendency of arbitrators to engage in compromise – “splitting the baby” rather than straining for a principled decision “on the merits.” However, the results from existing programs are necessarily inconclusive on this point: It would, for example, be a meaningless exercise to look at the amounts or the percentages by which nominally disputed fees are reduced in arbitration; officials of bar arbitration programs often note that clients will for tactical purposes typically place the attorney’s entire fee in “controversy,” even though some of the fee was clearly earned and only a portion could plausibly be claimed to be “excessive.” Rau, ADR, *infra* note 157, at 2057-58.

[94] As a notable practitioner has observed:

It must be remembered that even the most successful resolution in matrimonial litigation results in

the destruction of a marriage. The typical matrimonial litigant is now doing battle with someone

that they previously loved, subject to a loss of their privacy in the proceedings and discovery

process, seeing their children far less than they feel is proper, paying more than they feel they can

afford, receiving less than they believe they can live on and subject to the myriad slings and

arrows which are the lot of a marriage in dissolution. . . . Often the emotional scars are not healed

by settlement or judgment; they linger, and oft times become redirected at others, including

family, children, and, of course, the attorney. Indeed a form of transference often occurs between

the professional and the client similar to the experience of psychotherapy, with the client visiting

feelings on the attorney in substitution for the spouse, or a parent. Accordingly, even the best

result leaves a litigant unhappy and dissatisfied; those feelings often are redirected against the

attorney.

Letter from Jay R. Buttermann to the author, December 25, 2000 (on file with the author) (hereinafter Letter).

[95] See James Kochalka, *Coping With Client Expectations in Divorce*, Fla. B.J., February 1998, at 55. Kochalka describes a five-stage model developed to understand the range of emotions a client may travel through during divorce: the client who does not take seriously the fact of divorce, the client who vacillates about divorce, the angry client, the depressed client, and finally, the client who is rationally prepared to deal with divorce. The clients in the angry phase “are often their own worst enemies since they will often demand actions that simply shed more heat than light on the settlement of the case. It is especially important for the attorney to assess satisfaction of these clients on a regular basis as a way to help clarify misconceptions and to allow the client to vent frustrations about the predictably less-than-satisfactory outcome that is at hand.”

[96] Former Justice Kristin Glen, now dean of the CUNY Law School, uses the terms “titled spouse” and “nontitled spouse” to express the same distinction. See *Match v. Match*, 146 Misc. 2d 986; 553 N.Y.S.2d 626 (Sup. Ct. N.Y. County 1990), reversed, 168 A.D.2d and 226, 562 N.Y.S.2d 115 (1st Dep’t 1990).

[97] It was the practice of the New York matrimonial bar to obtain a retainer payment that was denominated as “non-refundable” and which was therefore forfeited if the client decided not to go forward with the divorce. In the early 1990’s, some leading matrimonial practitioners required a \$10,000 retainer payment. While attorneys can still require that the client pay a fee in advance for services to be rendered before agreeing to represent the client, no part of the fee that is not earned by actual service can now be nonrefundable. See *supra* text accompanying notes 62-64.

[98] I am indebted to Jay Buttermann for pointing out the significance of this financial arrangement. See Letter, *supra* note 94.

[99] Under the Matrimonial Rules, the lawyer must provide a written, itemized bill on a regular basis but at least every 60 days. Retainer Agreement, ¶9, (Appendix A); Statement of Clients Rights and Responsibilities, (Appendix B). The New York Supreme Court of New York County has held that “[a]s a matter of public policy, a client’s right to bimonthly billing is nonwaivable in matrimonial matters.” *Gordon Marshall, P.C. v. Chitayat*, N.Y.L.J., Apr. 6, 2001, at 18, col. 5.

[100] Despite the existence of Domestic Relations Law section 237 and its provision for interim fees, both Judges and practitioners know that in most cases a matrimonial lawyer taking on representation of a non-titled spouse with limited or no resources is buying an “account receivable” which may be discounted, collected late, or never collected at all. The disincentive for engaging in such representation is great, and non-titled spouses frequently find it almost impossible to obtain counsel without a very substantial retainer. The situation is even further exacerbated where the titled spouse has made it known that the case will be vigorously litigated. The potential consequences for the non-titled spouse are obvious and well known. *Match v. Match*, 146 Misc. 2d 986, 553 N.Y.S.2d 626 (Sup. Ct. N.Y. County 1990), *rev’d* on other grounds, 168 A.D.2d 226, 562 N.Y.S.2d 115 (1st Dep’t 1990).

[101] This is the “account stated,” which is discussed in Effect of Account Stated. See *supra* Part III.C.

[102] *In re Cooperman*, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069, 1072 (1994) (citations omitted). See also *Cohen v. Ryan*, 34 A.D.2d 789, 790, 311 N.Y.S.2d 644 (2d Dep't 1970).

[103] *Moncharsh v. Heily & Blase*, 832 P.2d 899, 909 (1992) (“Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. [Citations omitted.] As early as 1852, this court recognized that, ‘arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award ex aequo et bono [according to what is just and good].”).

[104] *McKenzie Constr. Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985).

[105] See *infra* Part VII.A-C.

[106] N.Y. Comp. Codes R. & Regs. 22, § 1200.11(b) (2001); Model Code of Prof'l Responsibility DR 2-106 (A).

[107] See Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 213 (2000).

[108] N.Y. Comp. Codes R. & Regs. 22, § 1200.11 (2001)); Model Code of Prof'l Responsibility DR 2-106 (B). As noted, matrimonial attorneys may not charge contingent fees. See *supra* text accompanying note 61.

[109] The definition of “excessive” and the factors listed for determining the reasonableness of a fee presented above are set forth in the Code of Professional Responsibility and are therefore determinative of whether an ethical violation has occurred. The arbitrator may consider these factors as well as others in determining whether, as a matter of fairness and equity, the lawyer’s fee is excessive. While the standard of proof (preponderance of the evidence) that the attorney must meet to prove that his fee is reasonable is the same articulated standard as that which applies to disciplinary proceedings, in reality, the disciplinary standard is a more rigorous one. Thus, determination by an arbitrator that a claimed fee is excessive is not the equivalent of a determination that there has been an ethical violation.

[110] *Matter of Freeman*, 311 N.E.2d 480, 484 (1974) (citations omitted).

[111] Cf. *Stern v. Stern*, N.Y.L.J. (Sup. Ct. Nassau County) (where \$32,000 had been paid to attorney by the client’s mother, \$14,450 was paid by client to experts, and the attorney sought an additional \$17,000 in legal fees, and the total value of the marital property was \$174,450, the amount remaining owed would be reduced by almost 60% to \$7,000. “We must recognize that an attorney, especially one of recognized expertise at the matrimonial bar, has the greater ability to evaluate the intangibles, considered [sic] property, under the state’s equitable distribution law and the greater knowledge of the law likely to effect [sic] the competing claims of the parties. This standing requires positive and definitive advice by counsel as to the probable outcome of

the proceedings and the cost of attaining satisfactory results. The client on the other hand is very often affected by the emotional impact caused by the very nature of these proceedings, which diminishes judgment, and all too often unleashes wrath. It is these circumstances that give rise to the attorney's fiduciary duty; and this is especially so when the client's resources are either in short supply, or funded by a collateral source when there is no accountability.

In the present perspective it has become clear that The Firm's reliance on the retainer agreement with its client who had few resources and little expectation of acquiring more from the matrimonial estate, was not a realistic expectancy. The reliance was rather on a collateral source of funding by a third party from which The Firm became a beneficiary and to which it had no accountability. Under these circumstances, the retainer agreement between The Firm and the plaintiff will not be enforced according to its terms." *Id.*

[112] *Id.*

[113] See *In re Richard C. Blowers, In re George W. Blowers & Son, Inc* 00-10495, 00-10494, U.S. Bankruptcy Ct, N.D.N.Y. (2000).

[114] *Match v. Match*, 553 N.Y.S.2d at 631, *rev'd* on other grounds. *Id.*; See also *Mulligan v. Mulligan*, 425 N.E.2d 890 (1981), *aff'd*, 79 A.D.2d 721, 434 N.Y.S.2d 737 (3d Dep't 1980); *Rados v. Rados*, 133 A.D.2d 536, 519 N.Y.S.2d 906 (4th Dep't 1987) (award of counsel fees justified in matrimonial action in view of defendant's obstructionist and dilatory tactics), *Schussler v. Schussler*, 109 A.D.2d 875, 487 N.Y.S.2d 67 (2d Dep't 1985).

[115] *Match v. Match*, 168 A.D.2d 226, 562 N.Y.S.2d 115 (1st Dep't 1990), reversing 146 Misc. 2d 986, 553 N.Y.S.2d 626, at 631-32 (Sup. Ct. N.Y. County 1990) (referee's determination that attorney's time records were in a deplorable state may not be overcome by allowing the attorney to utilize opposing counsel's time records in order to assist in determining whether the attorney's fee was reasonable); *Flanagan v. Flanagan*, 175 Misc. 2d 160, 668 N.Y.S.2d 302 (Sup. Ct. NY County 1997) (failure to keep sufficiently detailed billing records is a basis for denying fees sought). See also Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 230 (2000) ("Absent contrary agreement with the client, a proper time entry should include the date the services were rendered, the identity of the billing attorney, a detailed description of the services rendered and the time actually expended."); *In re Green*, 11 P.3d 1078, 1088-1089 (Colo. 2000) (holding that either the fee charged was excessive as a matter of law because of inefficiency on the part of the attorney, or it was "so vague that it fail[ed] reasonably to identify the nature of the services performed.").

[116] *Wheeler v. Scott*, 777 P.2d 394 (Ok. 1989) ("If a lawyer takes on a case in an area in which he or she is totally unfamiliar or inexperienced, the client should not have to pay for every minute charged . . . a reasonable attorney's fee in a given case does not necessarily result from simple multiplication of the hours spent times a fixed hourly rate."). *Id.* at 396 (citation omitted).

[117] *Id.* at 398 ("Here, it is obvious that much of the time expended was unnecessary by any reasonable standard."). See also *In re Green*, 11 P.3d 1078, 1088 (Colo. 2000) (where the court found that an entry for faxing and "reviewing" a twelve page decision, which the attorney



represented as having taken six hours, and for which he charged \$990 was unreasonable as a matter of law. The Court explained that “the determination of what fees are reasonable involves more than simply multiplying the number of hours spent on a given case times a specific rate. An attorney must use judgment and discretion in rendering a bill.”).

[118] *Flanagan v. Flanagan*, 175 Misc. 2d 160, 668 N.Y.S.2d 302 (Sup. Ct. NY County 1997) (time improperly spent on a frivolous motion should be excluded from any fee awarded).

[119] *Wheeler v. Scott*, 777 P.2d 394 (Ok. 1984) (“while the court should consider all the guidelines [re determining whether a fee is reasonable], it must also contemplate the benefit to the client as a result of the services.”). *Id.* at 398.

[120] *See Copeland v. Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880, 891 (D.C. Cir. 1980) (“no compensation is due for nonproductive time.”). *Wheeler v. Scott*, 777 P.2d 394, 396 (Ok. 1984) (the “intricacy and difficulty of the questions involved and not necessarily the amount of manual legal work exhibited by the numbers of papers in the file of the case must control.”).

[121] *See In re Raytech*, 1999 U.S. Dist. LEXIS 18949 (D.Conn. 1999) (vacating an award of full hourly attorney fees for nonproductive travel time and remanding for a finding of fact of whether it is customary in the relevant market to be fully compensated for nonproductive travel time). *See also Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990).

[122] *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990).

[123] ABA Comm’n. on Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993).

[124] In cases involving substantial discovery, the non-monied spouse’s counsel’s hours almost inevitably exceed those of the monied spouse, since there is enormous work involved in identifying assets by the non-monied spouse’s attorney which would not be expended by the monied spouse’s counsel.” *See Letter, supra* note 94.

[125] *Hensley v. Eckerhart*, 461 U.S. 424, 434, 76 L. Ed. 2d 40, 103 Sup. Ct. 1933 (1983).

[126] *Stern, supra* note 111; *In re Keiser*, 263 A.D.2d 609, 694 N.Y.S.2d 189, 190 (3d Dep’t 1999) (respondent’s \$22,000 fee in this “fairly simple” matrimonial action was clearly excessive where the “subject divorce raised no compelling legal issues ... parties’ marriage was of short duration (less than three years) and produced no children; ... [there were] no custody, visitation or child support issues ... neither spouse was claiming spousal maintenance ... [and there was] virtually no marital property to be distributed.”). *Theroux v. Theroux*, 145 A.D.2d 625, 536 N.Y.S.2d 151, 154 (2d Dep’t 1988) (quantum meruit award of less than the amount sought by the attorney was appropriate “particularly in view of the results obtained, the time required, the work performed, the simplicity of the case, and the limited financial resources of the matrimonial litigants.”).

[127] *Matter of McNamee, Lochner, Titus & Williams and Killeen*, 235 A.D.2d 17, 663 N.Y.S.2d 356, 358 (3d Dep’t 1997).

[128] *Id.* at 357-58 (“by signing the retainer agreement, respondent agreed to pay an hourly fee for legal services rendered on her behalf . . . . This obligation to pay was not conditioned on nor linked to the progress, outcome, or result of the matrimonial proceedings.”).

[129] ABA Comm’n on Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993).

[130] *Coughlin v. SeRine*, 507 N.E.2d 505, 509 (Ill. App. Ct. 1987) (“An attorney obviously owes his client a duty not to overcharge. . . .”). *See also* *Rodriguez v. Horton*, 622 P.2d. 261, 265 (N.M. Ct. App. 1982). *But Cf.* *Davis v. Findley*, 422 S.E.2d 859 (Ga. 1992) (a claim that the attorney charged excessive fees in violation of the code of ethics is not sufficient, standing alone, to sustain a claim for legal malpractice).

[131] *See infra* Part VII.A-B.

[132] *See In re Jacobs*, 188 A.D.2d 228, 229, 594 N.Y.S.2d 794 (N.Y. App. Div. 2d Dep’t 1993) (pre-Part 136) (held that the respondent has charged a client a clearly excessive fee, in violation of DR 2-106 of the Code of Professional Responsibility, in a matrimonial matter where the attorney charged \$12,000 worth of legal services, at a rate of \$150 per hour, (80 hours), but “actually performed no more than 34 ½ hours of legal services . . . therefore, entitling him to no more than \$5,175 pursuant to the retainer agreement.”).

[133] *See Perez v. Perez*, 154 A.D.2d 359, 545 N.Y.S.2d 836 (2d Dep’t 1989); *Wald v. Wald*, 170 A.D.2d 669, 567 N.Y.S.2d 89 (2d Dep’t 1991); *Jacobson v. Sassower*, 107 A.D.2d 603, 483 N.Y.S.2d 711 (1st Dep’t 1985) *aff’d* 489 N.E.2d 1283. The factors to be taken into account in determining the reasonable value of the services are set forth in the text at note 106.

[134] A peculiar artifact of New York law is that it precludes reimbursement of expenses incurred for investigative services, *In re Lessig*, 1 N.Y.S.2d 566 (N.Y. Sur. Ct. 1937), because these services are “as much a necessary part of the duties which the attorney agreed to perform as are the typewriting of pleadings.” *Id.* at 568. Investigative costs are only properly reimbursable when the investigator delivers subpoenas. *Levy v. State*, 420 N.Y.S.2d 154 (N.Y.Ct. Cl. 1979).

[135] ABA Comm’n On Ethics & Prof’l Responsibility, Formal Op. 93-379 (1993).

[136] Small firms sometimes rent office space in a suite sharing arrangement where the landlord provides copying services and bills the attorney for usage. While these charges reflect a profit component for the landlord and are therefore likely to be higher than those incurred by firms that control their own copying facilities, if the list of charges are set forth in the retainer agreement, the charges are proper.

[137] For example, the treatment of fee markups for contract lawyers (lawyers who are not permanently employed by the billing lawyer or law firm) is binary. If the contract lawyer’s fees are billed as an expense (something not included in the legal fee), then the client must be billed the actual cost of the contract lawyer to the billing lawyer, unless there is an agreement with the client that provides differently. However, if the contract lawyer’s fees are billed as part of the

legal fee, then the billing lawyer may mark up the fees subject only to the general constraint on legal fees: the sum of the fee and the mark-up must be reasonable. *See* ABA Comm'n On Ethics & Prof'l Responsibility, Formal Op. 00-420 (2000).

[138] *See, e.g.*, *Evergreen Pipeline Construction Co. v. Merritt Meridan Construction Corp.*, 95 F.3d 153 (2d Cir. 1996); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 695 (8th Cir. 1983); *Standley v. Chilhowee R-IV School Dist.*, 5 F.3d 319, 325 (8th Cir. 1993); *Ortega v. City of Kansas City*, 659 F.Supp. 1201, 1218 (D. Kan. 1987) (all three cited in *In Re-Media Vision*, 913 F.Supp. 1362 at 1370 (N.D. Ca. 1995) (granting computerized legal expense in full)); *Auburn Police Union v. Tierney*, 756 F.Supp. 610 (D. Me. 1991); *Weinberger v. Great Northern Nekoosa Corp.*, 801 F.Supp. 804, 827 (D. Me. 1992).

[139] *Cairns v. Franklin Mint*, 115 F.Supp. 2d 1185 (C.D. Cal. 2000).

Plaintiffs contend that defendants cannot recover Westlaw fees. Courts are split over whether computer research fees are recoverable. *See In re Media Vision Technology Securities Litigation*, 913 F. Supp. 1362, 1370 (N.D. Cal. 1996). The Ninth Circuit has not weighed in on the debate. *See id.* Some courts take the view that computerized legal research is a component that must be included in an attorney's hourly rate as overhead. *See id.* (citing *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 695 (8th Cir. 1983)). Others view computer research fees as attorneys' fees because the computer research reduces the number of hours spent researching. The added cost of computerized research is normally matched with a corresponding reduction in the amount of time an attorney must spend researching. Therefore, we see no difference between a situation where an attorney researches manually and bills only the time spent and a situation where the attorney does the research on a computer and bills for both the time and the computer fee. *Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago*, 38 F.3d 1429, 1440-41 (7th Cir. 1994).

The court agrees with the Seventh Circuit's view and finds that, in general, attorney research time is greatly reduced by the use of computer research. However, Westlaw charges are not an exact substitute for an attorney's hourly rate. Moreover, some part of Westlaw's charges must be considered overhead, if for no other reason than the fact that law firms do not charge clients for law books. Accordingly, to reflect these considerations, the court finds that the computer research fees must be reduced by 25 percent.

*Id.* at 1189 (footnote omitted).

[140] *See Berchin v. General Dynamics Corp.*, 1996 U.S. Dist. LEXIS 11777 (S.D.N.Y. Aug. 14, 1996).

[141] A.B.A. Comm. on Ethics and Prof'l Resp., Formal Op. 93-379 (1993).

[142] *Id.*

[143] *See In re Green*, 11 P.3d 1078, 1088 (Colo. 2000) ("[T]here are multiple entries reflecting the faxing of documents to the client and opposing counsel, entries for calls made to the court of

appeals clerk's office, the delivery of documents to opposing counsel, . . . and charging an attorney's hourly rate for clerical services that are generally performed by a non-lawyer, and thus for which an attorney's professional skill and knowledge add no value to the service, is unreasonable as a matter of law.").

[144] *Martin v. Camp*, 161 A.D. 610, 146 N.Y.S. 1041 (1914).

[145] *Teichner v. W & J Holsteins*, 64 N.Y.2d 977, 979, 489 N.Y.S.2d 36, 478 N.E.2d 177 (1985).

[146] *Ventola v. Ventola*, 112 A.D.2d 291, 491 N.Y.S.2d 736, 738 (2d Dep't 1985). The extension of the quantum meruit rule from the terminated contingency fee contract to the hourly rate contract misapplies *Martin v. Camp*, and is unsustainable on grounds of policy or logic. See Lester Brickman, *Setting The Fee When The Client Discharges A Contingency Fee Attorney*, 41 Emory L. Rev. 367 (1992).

[147] See *supra* Part V.

[148] See *Finkelstein v. Kins*, 124 A.D.2d 92, 511 N.Y.S.2d 285, 286 (1st Dep't 1987) (where the attorney is discharged without cause, the retainer agreement is relevant in determining the fee to which the attorney is entitled but it is not dispositive); *Wald v. Wald*, 170 A.D.2d 669, 567 N.Y.S.2d 89 (2d Dep't 1991).

[149] Brickman, *supra* note 146, at 393-397.

[150] To help avoid potential malpractice claims, attorneys should seek to educate the client on divorce procedures. See Kochalka, *supra* note 95. "Clients often will complain that "nothing is happening" with their case, with the implication that their attorney is negligent. This criticism often is the result of not understanding the process. . . . Expectations regarding fee arrangements, despite retainers and retainer agreements, are still sometimes unclear, with the lack of client understanding resulting in potential administrative and malpractice complaints."

[151] R. Mallen & J. Smith, *Legal Malpractice* § 1.1 (4th ed. 1996) (an attorney's negligence will naturally "reduce the value of the services, and consequently the amount of compensation to be awarded.").

[152] See *Koppelman v. Liddle*, 246 A.D.2d 365, 668 N.Y.S.2d 29 (1st Dep't 1998) (as a general rule, when a client does not prevail in an action with counsel for the value of professional services, a subsequent action for malpractice is barred); *Altamore v. Friedman*, 193 A.D.2d 240, 245, 602 N.Y.S.2d 894, 897 (App. Div. 1993)(citations omitted)("The question of whether to accord preclusive effect to a prior determination depends generally on a number of factors that we shall consider, including the identity of issues, the fullness and fairness of the parties' opportunity to litigate the issue at bar, the realities of the arbitral proceedings, including the incentive to proceed to arbitration, and actual scope of the arbitration, as well as the presence and participation of counsel, the foreseeability of future litigation, the extent to which a matter was necessarily or implicitly decided in the arbitral forum (even if not actually litigated), the

likelihood of inconsistent results, and the opportunity to present evidence and cross-examine witnesses.” There are contrary decisions in other states. *See, e.g., Weisman v. Schiller, Ducanto & Fleck*, 733 N.E.2d 818 (Ill. App. Ct. 2000) (even though the client raised malpractice as an affirmative defense in a fee petition hearing, she was not later barred from bringing an action for damages arising from that malpractice because the fee petition proceeding does not afford the client an opportunity to recover damages in excess of the fees sought and extinguishes her right to a trial by jury.).

[153] *Altamore*, 193 A.D.2d at 245-46, 602 N.Y.S.2d at 897; *Iannochino v. Rodolakis*, 242 F.3d 36, 47 (1st Cir. 2001) (holding a subsequent malpractice suit was barred by res judicata from a fee claim arising in bankruptcy proceedings; the court explained, “[a] bankruptcy court therefore makes an implied ‘finding of quality and value’ in the professional services provided to the [clients] during the bankruptcy. Likewise, the [clients’] malpractice claim entails the same concern, as their allegations of malpractice arise from the defendants’ legal advice relating to the bankruptcy.” [Citations omitted]). *See also Siegel v. Werner & Zaroff, P.C.*, 704 N.Y.S.2d 570 (App. Div. 2000) (client, who discharged her original attorneys, was barred from bringing a malpractice suit to extinguish the charging lien against her personal injury judgment because in dividing the judgment between the original attorneys and the subsequent attorneys, the court had impliedly decided the issue of malpractice).

[154] *Altamore*, 193 A.D.2d at 247, 602 N.Y.S.2d at 898.

[155] *Id.* (citations omitted); *cf. Simao v. Green & Seifter*, 213 A.D.2d 1018, 625 N.Y.S.2d 975 (4th Dep’t 1995) (the entry of a judgment in favor of attorney against the client in a prior action to recover fees for legal services bars a malpractice action regarding those same legal services).

[156] The jurisdictional scope of the domestic relations fee arbitration program is unclear. Under Part 136, the Administrative Judge has discretion to “decline to accept or continue to arbitrate a dispute in which substantial legal questions are raised in addition to the basic fee dispute.” N.Y. Comp. Codes R. & Regs. 22, § 136.4(b) (emphasis added). Elsewhere, the rules provide that the “burden of proof shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence.” *See id.* at § 136.6(b). Part 136 does not set forth any standards or guidance for ascertaining what is a substantial legal question or assessing the reasonableness of attorney’s fees.

Arbitrators in the program are instructed during training that they are to disregard quality of representation issues in assessing the reasonableness of the fee. However, it is extremely difficult in practice to achieve a clear dichotomy between pure fee disputes, such as “bill padding,” and fee disputes that involve claims of attorney incompetence, neglect, delay, including charges that the fee was simply excessive in view of the result obtained. Statistical data compiled as part of this study reveals that in 70% of arbitrations the attorney’s fee was reduced, a possible indication that arbitrators are in fact considering the quality of representation when making their awards. Some arbitrators who responded to our survey stated that the clients were operating under the misapprehension that fee arbitration is a forum for evaluating attorney competence and ethical standards, but other arbitrators subscribe to another school of thought: “I don’t measure hours [times] rate alone, while I note that some arbitrators do. The dispute is often something other

than the actual hours expended, but rather why the hours were spent and what was accomplished or arguably attempted.” The more typical observation from arbitrators was that “[t]he client did not understand that the proceeding was limited to the fee dispute. He wanted a ruling on the ‘quality’ of representation he received and a reduction of the fee based on his perception that the attorney should have done more or better for him. It must be made clear to the client what the proceeding can and cannot accomplish.” Indeed, the written commentary from clients demonstrates that the jurisdictional scope of the fee arbitration scope is unclear: “I felt my attorney had been negligent, incompetent and unethical but those issues were not addressed. I was told the arbitrators were not there to determine if [my attorney] ‘did the work competently,’ just that ‘she did the work.’ Incredible! Horrible process, would not recommend it to anyone!” Clients should receive enough information to permit them to make an informed decision on whether to resolve their fee dispute through arbitration or the judicial process. The court system can assist clients in making informed decisions, without offering legal advice, by simply disclosing that arbitrators are not necessarily required to consider allegations of attorney incompetence, neglect, or misconduct. It is suggested that an expanded fee arbitration brochure, designed specifically for distribution to clients, include such a disclaimer as well as discussion of the program’s jurisdiction and the types of disputes that are both proper and improper for fee arbitration. Unless the court system informs clients at the outset of the program’s inability to hear certain types of fee disputes, the danger exists that clients will opt for fee arbitration when they would be better served by judicial proceedings wherein they could rely on their ability to invoke the protections afforded by applicable ethical rules and fiduciary law.

As to what constitutes a substantial legal question, the court system should consider whether to adopt a more definitive policy concerning the program’s jurisdictional scope. At the present time, the critical determination whether to accept or continue to arbitrate a fee dispute is made by the Administrative Judges on a district by district basis and by the arbitrators during the arbitration hearing when such issues arise. As a result, there is no guarantee of statewide consistency. Other jurisdictions have recognized that fee disputes take on a multiplicity of variations and that it is difficult to arbitrate “pure” fee disputes only, while still addressing the needs and expectations of clients as consumers. The California arbitration statute, for instance, provides that arbitrators must consider claims of malpractice, but only as they relate to the value of services received, and New Jersey authorizes arbitrators to consider the quality of legal services when judging the reasonableness of the fee. Report, *supra* note 14, at 27-30 (footnote omitted).

[157] See, e.g., Alan S. Rau, *Resolving Disputes Over Attorneys’ Fees: The Role of ADR*, 46 SMU L. Rev. 2005, 2049 (1993) (hereinafter Rau, *ADR*) (it would be “unrealistic to treat a client’s decision to seek fee relief in arbitration as somehow amounting to a ‘waiver’ or ‘abandonment’ of the right to bring a malpractice action – and abusive to subject even an informed client, acting in full understanding of the consequences, to an irrevocable choice between the advantages of fee arbitration and the ability to press a malpractice claim.”).

[158] N.Y. Comp. Codes R. & Regs. 22, § 136.4 (b) (“The Administrative Judge may decline to accept or continue to arbitrate a dispute if which substantial legal questions are raised in addition to the basic fee dispute. . .”).

[159] 2 R. Mallen & J. Smith, *Legal Malpractice* § 14.1 at 229 (4th ed. 1995).

[160] L. Brickman and L. Cunningham, *Nonrefundable Retainers Revisited*, *supra* note 34, at 6 n. 21 (1993); *see also In re Cooperman*, 83 N.Y.2d 465, 472, 611 N.Y.S.2d 465, 467, 633 N.E.2d 1069, 1071 (1994) (“The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the client’s interests over the lawyer’s.”).

[161] 1 G. Hazard, Jr. & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.5: 108 (2d ed. Supp. 1998); *see also Hendry v. Pelland*, 73 F.3d 397, 401 (D.C. Cir. 1996); *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

[162] Restatement (Third) Of The Law Governing Lawyers § 49 (Proposed Final Draft 1996).

[163] *See generally* L. Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 Utah L. Rev. 277 (1990); *see also* Rau, *supra* note 157.

[164] The Restatement (Third) of the Law Governing Lawyers § 49 (Proposed Final Draft, 1996) provides that to subject the attorney to fee forfeiture, the lawyer’s conduct must be both a “clear” and a “serious” violation of a duty. A clear violation is described as conduct that “a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known [to be] wrongful.” The Restatement further provides:

[in] determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, and the adequacy of other remedies.

*Id.*

[165] These are set forth in Part 1200 of N.Y. Comp. Codes R. & Regs. 22, §1200 (2001).

[166] For an analysis of the interrelatedness of fiduciary obligation and ethical rules, *see* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without The Prince of Denmark?*, 37 UCLA L. Rev. 29, 44-45 note 65 (1989).

[167] N.Y. Comp. Codes R. & Regs. 22, § 691.6.

[168] *Condren v. Grace*, 783 F. Supp. 178, 185-86 (S.D.N.Y. 1992).

[169] N.Y. Jud. Law § 90 (2) (McKinney 1983).

[170] Each Appellate Division of the New York Supreme Court has enacted rules creating Departmental Disciplinary Committees that investigate and prosecute complaints of professional

misconduct. *See, e.g.*, N.Y. Comp. Codes R. & Regs. 22, § 603.4, 691.4 (these are the rules of the First and Second Appellate Divisions, respectively). *See also* D. Appel, *Attorney Disbarment Proceedings and The Standard of Proof*, 24 Hofstra L. Rev. 275 (1995).

[171] C. Wolfram, *Modern Legal Ethics* § 9.6, at 555. *See also* Rau, *ADR*, *supra* note 157, at 2043-44.

For example, many disputes between attorneys and clients nominally arise because a client is demanding the return of a fee paid. On this basis, a grievance committee saddled with an excessive caseload may be eager to shunt the dispute to the Bar's fee arbitration committee as a fee dispute – even though it may also appear that the representation of the client had been less than devoted because of a conflict of interest, that the attorney is refusing to account for trust funds that he is holding on the client's behalf, that the attorney had promised services that he did not in fact perform, or that his past conduct reveals many similar instances of client overreaching or billing abuse. In a significant category of cases, then, a contractual dispute over the fee may be only the tip of the iceberg, with other issues of vital public concern lurking just beneath the surface. There are a number of related points here: The resolution of "fee disputes" by arbitration may fail to address the public interest in law enforcement, by failing even to address related issues of professional misconduct. When individual disputes are resolved at different times by different panels of arbitrators, recurrent patterns of abuse may not be detected or sanctioned. And if the diversion of fee disputes to alternative processes allows attorneys to avoid costs (such as adverse publicity and the stigma of disciplinary proceedings) that they would otherwise incur in an official forum, the resulting level of deterrence of misconduct may well be inadequate.

Any scheme for the mandatory arbitration of fee disputes should then at the very least be part of an overall system – a system in which the resolution of a particular attorney-client dispute is connected with the disciplinary process through which professional conduct is scrutinized for ethical violations. "Loops" between the two can be designed to ensure that the law enforcement functions served by attorney discipline are not swept under the rug in the drive toward private settlement. *Id.*

[172] *Wheeler v. Scott*, 777 P. 2d 394 (Okla. 1989) ("the proper determination of reasonable attorney fees requires a balancing and thorough consideration of the . . . [reasonable fee] factors. . . . Setting attorney fees would be a simple matter if numbers could be inserted mechanically into a universally valid formula. Unfortunately, this is not the case."). *Id.* at 398.

[173] *See supra* note 14. In order to be able to assess the operation of the program, it is essential that the kinds of analyses contained in the *Report*, including the actual results of fee arbitrations, be undertaken on a regular basis. The process would be facilitated by the development of a uniform reporting form that fee arbitrators would be asked to fill out that would include such information as the attorney's hourly rate, the amount of time billed, the total fee, the amount in dispute, the result of the arbitration, the percentage denial of the fee (if any), the reason(s) for the denial (with a list of ten or so reasons and a check-off box for each reason), perhaps an allocation by percentage of the amount of any fee denied among the reasons set out for denial, whether the arbitrant is the monied or non-monied spouse (or whether both are monied), the amount of



marital assets, and whether there was any issue of malpractice raised or breach of fiduciary obligation.