

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. 1147

Amending Alaska Bar Rules 34,
37(i), 39, and 40 pertaining to
attorney fee dispute
resolution.

IT IS ORDERED:

1. New paragraph (h) is added to Bar Rule 34 to provide:

(h) Complex Arbitration.

(1) Upon recommendation by bar counsel or a panel chair, the executive committee may determine that a dispute constitutes a complex arbitration based on any of the following factors:

(A) complex legal or factual issues are presented;

(B) the hearing is reasonably expected to or does exceed eight (8) hours; or

(C) the amount in dispute exceeds \$50,000.00.

Such determination may be made at any time after the filing of a petition but before a decision in the matter is final. If the determination is made after the hearing commences, a continuance of the hearing for at least fifteen (15) days shall be granted upon the request of a party.

(2) When a case is determined to be complex prior to hearing, the executive committee may require payment by one or both

parties for reasonable costs of administration and arbitration. The parties will be notified of the estimated costs (fifteen) 15 days prior to hearing.

2. Bar Rule 37(i) is amended to provide:

(i) **Powers and Duties of Arbitrators.** In the conduct of arbitrations under these rules, arbitrators, sitting as a panel or a single arbitrator, will have the powers and duties to:

(1) take and hear evidence pertaining to the proceeding;

(2) swear witnesses, who will be examined under oath or affirmation on the request of any party to the dispute or by an arbitrator;

(3) compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding, and consider challenges to the validity of subpoenas;

(4) approve written requests for prehearing discovery upon a showing of good cause;

(5) [(4)] submit a written decision to Bar Counsel, in accordance with Rule 40; and

(6) [(5)] interpret and apply these rules insofar as they relate to their powers and duties. When a difference arises among panel members concerning the meaning or application of any rule, the matter will be decided by a majority vote. If that is unobtainable, the matter in question will be referred to the executive committee.

3. Bar Rule 39 is amended to provide:

Rule 39. Notice of Right to Arbitration; Stay of Proceedings; Waiver by Client.

(a) **Notice Requirement by Attorney to Client.** At the time of service of a summons in a civil action against his or her client for the recovery of fees for professional services rendered, an attorney will serve upon the client a written "notice of client's right to arbitrate," which will state:

You are notified that you have a right to file a Petition for Arbitration of Fee Dispute and stay this civil action. Forms and instructions for filing a Petition for Arbitration of Fee Dispute and a motion for stay are available from the Alaska Bar Association, 510 L [310 K] Street, Suite 602, Anchorage, AK 99501-1958[2056], (907) 272-7469. If you do not file the Petition for Arbitration of Fee Dispute within twenty (20) [30] days after your receipt of this notice, you will waive your right to arbitration.

Failure to give this notice will be grounds for dismissal of the civil action.

(b) **Stay of Civil Proceedings.** If an attorney, or the attorney's assignee, commences a fee collection action in any court, the client may stay the action by filing notice with the court that the client has requested arbitration of the fee dispute by the Bar within twenty (20) [~~THIRTY~~] days of receiving the notice of the client's right to arbitration. This notice will include proof of service on the attorney or the attorney's assignee. If a civil action has been filed, the Alaska Bar Association must receive an order of stay prior to commencing arbitration.

(c) **Stay of Non-Judicial Collection Actions.** After a client files a petition, the attorney will stay any non-judicial collection actions related to the fee in dispute pending the outcome of the arbitration.

(d) **Waiver of Right to Request or Maintain Arbitration.** A client's right to request or maintain an arbitration is waived if:

(1) the attorney files a civil action relating to the fee dispute, and the client does not file a petition for arbitration of a fee dispute within twenty (20) [~~30~~] days of receiving the "client's notice of right to arbitrate" pursuant to paragraph [~~SECTION~~] (a) of this rule; or

(2) after the client received notice of the fee dispute resolution program, the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute, except an action to compel fee arbitration, or seeking affirmative relief against the attorney for damages based upon alleged malpractice or professional misconduct.

4. Bar Rule 40(f) is amended to provide:

(f) **Notice of Arbitration Hearing.** Bar Counsel will, at the time the arbitrator or arbitration panel is assigned, and at least twenty days in advance of the arbitration hearing, mail written notice of the time and place of the hearing to the petitioner and respondent. The notice of arbitration hearing will indicate the name(s) of the arbitrator or panelists assigned to hear the matter and will advise the petitioner and respondent that they are entitled to:

(1) be represented by counsel, at his or her expense;

(2) present and examine witnesses;

(3) cross-examine opposing witnesses, including examination on a matter relevant to the dispute even though that matter was not covered in the direct examination;

(4) impeach a witness, regardless of which party first called the witness to testify;

(5) present documentary evidence in his or her own behalf;

(6) rebut the evidence presented against him or her;

(7) testify on his or her own behalf, although even if a party does not testify on his or her own behalf, (s)he may be called and examined as if under cross-examination;

(8) upon written request to the arbitrator or chair of the panel, and for good cause shown, have subpoenas issued in his or her behalf, as provided in Rule 37(i)(3);

(9) upon written request to the arbitrator or chair of the panel, and for good cause shown, request prehearing discovery;

(10) challenge peremptorily and for cause any arbitrator assigned, as provided in Rule 37(g) and (h); and

(11) [(10)] have the hearing recorded on tape.

5. Bar Rule 40 (p) is amended to provide:

(p) Subpoenas and Discovery; Costs. In accordance with Rule 37(i)(3) and subparagraph

[SECTION] (f)(8) of this rule, an arbitrator will, for good cause shown, issue subpoenas and/or subpoenas duces tecum (hereinafter "subpoenas") or authorize prehearing discovery at the written request of a party. The cost of the service of the subpoena and the transportation of the witness shall be borne by the party requesting the subpoena to be issued. Any person subpoenaed by an arbitrator or the chair of a panel or ordered to appear or produce writings or respond to discovery who refuses to appear, give testimony, or produce the matter(s) subpoenaed or requested is in contempt of the arbitrator or arbitration panel. The arbitrator or panel chair may report such contempt to the superior court for the judicial district in which the proceeding is being conducted. The court shall treat this in the same manner as any other contempt. The refusal or neglect of a party to respond to a subpoena shall constitute cause for a determination of all issues to which the subpoenaed testimony or the matter is material in favor of the non-offending party, and a final decision of the arbitrator or panel may be based upon such determination of issues.

6. Bar Rule 40(q) is amended to provide:

(q) **Decision of the Arbitrator or Arbitration Panel.** The arbitrator or arbitration panel will issue [MAKE] its decision within thirty (30) days of the close of the arbitration hearing. If the matter is

determined to be a "complex arbitration" under Alaska Bar Rule 34(h), the decision will be issued within ninety (90) days. If a delay is expected, the panel chair or single arbitrator will submit to bar counsel a written explanation of the delay, before expiration of the time allowed for decision. Bar counsel will forward the explanation to the parties. The decision will be based upon the standards set forth in these rules and the Alaska Rules of Professional Conduct [ALASKA CODE OF PROFESSIONAL RESPONSIBILITY]. The decision will be in writing and need not be in any particular form, unless a form is approved by the executive committee; however, the decision will include:

(1) a preliminary statement reciting the jurisdictional facts, including that a hearing was held upon proper notice to all parties and that the parties were given the opportunity to testify, cross-examine witnesses, and present evidence;

(2) a brief statement of the dispute;

(3) the findings of the arbitrator or panel on all issues and questions submitted which are necessary to resolve the dispute;

(4) a specific finding as to whether the matter should be referred to b[B]ar c[C]ounsel for appropriate disciplinary proceedings; and

(5) the award, if any.

The original of the decision shall be signed by the arbitrator or members of the arbitration panel concurring in the decision. A separate dissent may be filed. The award may provide for payment in installments. Pre-judgment interest may be awarded. Attorney's fees for arbitration may not be awarded. The arbitrator or the panel chair will forward the decision, together with the file and the record, to b[B]ar c[C]ounsel who will then serve a copy of the signed decision on each party to the arbitration.

7. Bar Rule 40(s) is amended to provide:

(s) Modification of Decision by the Arbitrator or Panel. On application to the arbitrator or panel by a party to a fee dispute, the arbitrator or panel may modify or correct a decision if:

(1) there was an error in the computation of figures or a mistake in the description of a person, thing, or property referred to in the decision;

(2) the decision is imperfect in a matter of form not affecting the merits of the proceeding; or

(3) the decision needs clarification.

An application for modification shall be filed with b[B]ar c[C]ounsel within twenty days after delivery of the decision to the

parties. Written notice of the application for modification will be served promptly on the opposing party, stating that objection to the application must be served within ten days from the receipt of the notice of the application for modification. A decision on an application for modification will be issued within thirty (30) days after the time for filing an objection.

8. Bar Rule 49(u) is amended to provide:

(u) **Appeal.** Should either party appeal the decision of an arbitrator or panel to the superior court under the provisions of AS 09.43.120 through AS 09.43.180, the appeal shall be filed with the clerk of the superior court in accordance with Appellate Rules 601 through 609, and notice of such appeal will be filed with Bar Counsel. If a matter on appeal is remanded to the arbitrator or panel, a decision on remand will be issued within thirty (30) days after remand or further hearing.

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Effective Date: July 15, 1994

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DATED: September 9, 1993

EFFECTIVE DATE: July 15, 1994

Chief Justice Moore

Justice Rabinowitz

Justice Burke

Justice Matthews

Justice Compton