

PART 137
ATTORNEY – CLIENT FEE DISPUTE RESOLUTION PROGRAM

ARBITRATOR TRAINING MANUAL

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Part One: PowerPoint Presentation Screenshots

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Orientation to the
Part 137
Attorney-Client Fee Dispute
Resolution Program

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Agenda

- **Goals & Structure of the Part 137 Program**
- **Case Management Mechanics**
 - How are cases filed?
 - What's in the case file?
 - How are arbitrators assigned?
 - How do arbitrators report awards & settlements?
- **Legal Issues**
- **Questions & Answers**

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Goals of the Part 137 Program

- Promote confidence among members of the public in:
 - The legal profession
 - Bar associations
 - The Judiciary
- Resolve disputes without the formality, time and expense of litigation

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**Structure of the Part 137 Program
The Board of Governors**

- 18 member Board of Governors
 - 12 attorneys
 - 6 non-attorneys
- Chaired by Hon. Guy J. Mangano
- The Board oversees the Part 137 Program
 - It approves, monitors & evaluates local programs
 - It ensures that services are available throughout the state

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**Structure of the Part 137 Program
Local Programs & Arbitral Bodies**

- Either local bar associations or Judicial District Administrative Offices.
- Each arbitral body establishes written instructions & procedures for the local program.
 - Arbitrator qualifications & assignment protocols
 - Fees
- Arbitral bodies maintain necessary files & documents, and they submit an annual report to the Board of Governors.

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Scope of the Part 137 Program

- Applies to cases where:
 - Representation begins after January 1, 2002
 - The amount in dispute is at least \$1,000 and does not exceed \$50,000.

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Scope of the Part 137 Program

- Does not apply to:
 - Representation in criminal matters
 - Claims involving substantial legal questions*
 - Claims against an attorney for damages or relief other than adjustment of the fee
 - Disputes where fee is determined by statute (e.g., personal injury), court rules, or court order
 - Disputes where the attorney has not rendered services for at least two years
 - Services rendered outside New York State
 - Request is filed by someone other than the client or client's representative.

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What is a Substantial Legal Question?

- Explicit claims of legal malpractice & attorney misconduct.
- Whether other allegations present a substantial legal question will be determined on a case-by-case basis.
- If the fee dispute can't be resolved without determining factual issues of a complex or protracted nature, the dispute is not appropriate for the Part 137 Program.

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Why Exclude Cases That Present Substantial Legal Questions?

- Ensures that program's jurisdiction is limited to issues and disputes that can be resolved in a timely and informal manner.
- Preserves the control of the Appellate Divisions over disciplining attorneys for misconduct.
- Don't want to overburden volunteer arbitrators.

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Venue

- Fee disputes are heard by the local program that handles disputes in the county where the majority of the legal services were performed.
- Disputes may be transferred from one local program to another upon a showing of good cause.

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Fees to Use the Program

- The Sixth Judicial District Administrative Office does not charge a fee to use the program.

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Voluntariness

- By default, arbitration of fee disputes is voluntary for clients.
 - Clients may request arbitration at the time a fee dispute arises.
- Arbitration will be mandatory for a client if:
 - The client consents to arbitrate fee disputes before a dispute actually arises; or
 - The Attorney and Client agree in advance submit their fee dispute to final and binding arbitration.

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Voluntariness

- Arbitration of fee disputes is mandatory for an attorney if requested by a client
 - If an attorney fails to participate, the attorney will be referred to the appropriate grievance committee of the Appellate Division.
 - An attorney who institutes an action to recover a fee must allege the following in the complaint:
 - The client received notice of his or her right to arbitrate and did not timely request it; or
 - The dispute is not covered by Part 137.

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Confidentiality

- All proceedings and hearings commenced and conducted pursuant to Part 137 are confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter.
 - This includes papers in the arbitration case file.

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Immunity

- Part 137 arbitrators enjoy the same immunity that attaches in judicial proceedings.
- Attorney General Opinion
 - Volunteers who serve as Part 137 neutrals in either bar association-sponsored local programs or Judicial District Office-sponsored local programs are eligible for defense and indemnification by the State.

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**Entry Into the Part 137 Program
Option # 1**

- When the attorney and client cannot agree as to the attorney's fee, the attorney must send the client notice of the client's right to arbitrate.
- The notice must be sent by certified mail or delivered by personal service.
- Absent an agreement to the contrary, the arbitrator's award is subject to *de novo* review.

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**Entry Into the Part 137 Program
Option # 2**

- The client may pursue arbitration on his or her own initiative.
 - The client may contact the arbitral body directly, which will send the client the appropriate paperwork.

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**Entry Into the Part 137 Program
Option # 3**

- The client may consent in advance to submit fee disputes to arbitration.
- The consent must:
 - Be in writing (such as a retainer agreement)
 - State that the client has read the official instructions and procedures for Part 137
 - Indicate that the client agrees to resolve fee disputes pursuant to the Part 137 program.
- Absent an agreement to the contrary, the arbitrator's award is subject to *de novo* review.

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**Entry Into the Part 137 Program
Option # 4**

- Attorneys and clients may agree in advance to submit any fee disputes to final and binding arbitration
 - The agreement must be in writing.

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**Entry Into the Part 137 Program
Option # 5**

- Attorneys and clients may agree in advance to submit a fee dispute to arbitration in a forum other than an arbitral body's local program.
- The consent must be in writing.
- The arbitration process will be conducted according to the rules of the arbitration provider, not Part 137.
- The arbitration must be final and binding.

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**Entry Into the Part 137 Program
Option # 6**

- Attorneys and clients may consent in advance to submit disputes to mediation (if the local program offers mediation).
- The Sixth Judicial District Administrative Office does not offer mediation at this time, although the Chair of the appointed arbitration panel may attempt to settle the matter prior to the scheduled arbitration.
 - Arbitrators should not facilitate settlement discussions; rather, an arbitrator may ascertain whether the attorney and client want to meet outside the presence of arbitrators to try to settle the dispute.

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Beginning The "Typical" Arbitration

- Begins when the client disputes the fee
 - Appellate Division, First Department: Attorney is precluded from recovering the fee until the attorney sends notice of the right to arbitrate, even if the client does not explicitly contest the fee. *Paikin v Tsirelman*, 266 AD2d 136 (1999).
 - Appellate Division, Second Department: If the client does not dispute the reasonableness of the fee, the attorney is not required to send the notice before initiating an action to recover the fee. *Scordio v Scordio*, 270 AD2d 328 (2000).

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Beginning The Typical Arbitration (cont'd)

- When the attorney and client cannot agree as to the attorney's fee, the attorney must send the client notice of the client's right to arbitrate. This notice must:
 - Contain a statement of the client's right to arbitrate
 - Advise the client that he or she has 30 days (from receipt of the notice) to elect arbitration
 - Include a copy of the local program's Rules and Procedures
 - Include a copy of the "Request for Arbitration" form
 - Explain how to commence an arbitration
- The notice must be sent by certified mail or delivered by personal service.

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Beginning The Typical Arbitration (cont'd)

- If the client DOES NOT file the "Request for Arbitration" form with the arbitral body within 30 days
 - The attorney may then commence an action to recover a fee.
- If the client DOES file the "Request for Arbitration" form within the 30-day limit
 - The arbitral body sends the attorney a copy of the client's "Request for Arbitration" form along with an "Attorney Fee Response" form.

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**Beginning The Typical Arbitration
(cont'd)**

- The attorney has 15 days to return the completed "Attorney Fee Response" to the arbitral body.
- The attorney must include a certification that a copy of the response was served on the client.

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What if the Attorney Fails to Respond?

- If the attorney without good cause fails to respond to a request for arbitration:
 - the arbitration proceeds as scheduled and
 - a decision is made based on the evidence presented.
- The attorney shall be referred to the appropriate grievance committee of the Appellate Division.

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The "Mailbox Rule" of Part 137

- The client may not withdraw from arbitration once the arbitral body receives the Attorney Fee Response.
- If the client seeks to withdraw after the arbitral body receives the Attorney Fee Response, the arbitration proceeds as scheduled and a decision is made on the evidence presented.

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**Beginning The Typical Case
(cont'd)**

- Once the arbitral body receives the fee response, it designates the arbitrator(s) and schedules the hearing.
 - Less than \$6,000.00: One attorney arbitrator is assigned
 - Greater than or equal to \$6,000.00: 3-member panel
 - Include at least one attorney arbitrator and one non-attorney arbitrator
 - Chair of the panel is an attorney arbitrator
 - All decisions are decided by majority rule.

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Assigning the Arbitrator

- In the Sixth Judicial District, arbitrators are grouped by the following areas of practice:
 - Matrimonials
 - Litigation
 - Real Estate
 - Business
 - Other
- If an arbitrator is chosen for a panel and the parties request the arbitrator's recusal, the arbitrator will remain at the top of his or her designated list and will be called for the next available case.

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Conflicts of Interest

- Either the attorney or client may request that an arbitrator be removed based upon the arbitrator's personal or professional relationship.
- Requests for removal must be made no later than five days before the schedule hearing date.

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**The Arbitration Hearing:
Arbitrator Powers**

- Arbitrators have the following powers:
 - Take and hear evidence
 - Administer oaths and affirmations
 - Subpoena power
 - Attendance of witnesses
 - Production of documents
- Arbitrators need not observe the rules of evidence

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**The Arbitration Hearing:
Parties' Rights**

- Parties may be represented by counsel.
- Parties may call witnesses.
- Parties may create stenographic record.
 - Other parties are entitled to a copy of any stenographic record once they pay for the cost of the copy.

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**The Arbitration Hearing:
Order of Proceedings**

- Arbitrator's opening statement
- Attorney presents evidence to justify bill.
- Client then presents his or her account of the services rendered and time expended.
- Client enjoys right of final reply.

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**The Arbitration Hearing:
The Award (Part I)**

- The award must be issued within 30 days of the hearing.
- The award must be in writing and specify the bases for the determination of the arbitrator(s).
- The arbitrator (or chairperson of a panel of arbitrators) mails the award.
 - The attorney and client each get an original copy of the award.
 - The District Office must be mailed a copy of the award.

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**The Arbitration Hearing:
The Award (Part II)**

- The award is deemed final and binding unless all of the following conditions are met:
 - The aggrieved party files an action in court within 30 days of the mailing of the award.
 - The aggrieved party participated in the hearing (or shows good cause why he or she failed to participate).
 - The parties waived their right to *de novo* review.

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**The Arbitration Hearing:
Burden of Proof**

- Burden of proof:
 - The Attorney must prove the reasonableness of the fee by a preponderance of the evidence.

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What Is A Reasonable Fee?

- DR 2-106: "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."

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What Is A Reasonable Fee?
Consider these factors:

- Time & labor required, as well as the novelty and difficulty of the questions involved.
- The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.

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What Is A Reasonable Fee?
Consider these factors:

- The time limitations imposed by the client or by circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation and ability of the lawyer(s) performing the services.
- Whether the fee is fixed or contingent.

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What Is A Reasonable Fee?

- Should arbitrators assess the quality of the representation when deciding whether a fee is reasonable?
- What should you do when the client claims that the attorney's performance was so substandard that it constitutes malpractice?
 - Explain that the panel cannot decide claims of malpractice.
 - Explain that the client might be precluded* from bringing a malpractice action if the arbitrators decide the case.
 - Ask the client what the client wants to do.

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Issue Preclusion

- Does a client waive the right to seek malpractice damages against an attorney by participating in a Part 137 arbitration?
- Altamore v Friedman (193 AD2d 240 [2d Dept 1993])

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De Novo Review

- Available unless parties have agreed in advance to waive *de novo* review.
- Will be unavailable to parties who fail to participate in the arbitration hearing without good cause.
- The action must be commenced within 30 days after the arbitration award has been mailed.
- Arbitrators cannot be called as witnesses.

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Legal Issues
Attorneys in Domestic Relations Cases
Attorneys must supply clients with:

- Statement of client rights & responsibilities (22 NYCRR § 1400.2)
- Written retainer agreement (22 NYCRR § 1400.3)
 - If the attorney will charge a "minimum fee" (a.k.a. "nonrefundable retainer fee"), it must be set forth in the retainer agreement
 - If the attorney will seek a security interest in the client's property to secure the attorney's fee, the retainer agreement must include language discussing the security interest.

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Legal Issues
Failure to Comply

- What happens if the attorney doesn't comply with court rules governing attorney conduct?
 - Arbitrators do not have to follow the law, but they cannot ignore it.

Part Two:
**Applicable Rules, Correspondence from the Board of Governors,
Local Program Guidelines & Forms, and
Noteworthy Cases**
Rules of the Chief Administrator of the Courts
Part 137 Fee Dispute Resolution Program

§137.0 **Scope of Program**

This Part establishes the New York State Fee Dispute Resolution Program, which provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged.

§137.1 **Application**

- (a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.
- (b) This Part shall not apply to any of the following:
 - (1) representation in criminal matters;
 - (2) amounts in dispute involving a sum of less than \$1000 or more than \$50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;
 - (3) claims involving substantial legal questions, including professional malpractice or misconduct;
 - (4) claims against an attorney for damages or affirmative relief other than adjustment of the fee;

- (5) disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;
- (6) disputes where no attorney's services have been rendered for more than two years;
- (7) disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;
- (8) disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

§137.2 General

- (a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.
- (b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for Part 137, and that the client agrees to resolve fee disputes under this Part.
- (c) The attorney and client may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to de novo review. Such consent shall be in writing in a form prescribed by the Board of Governors.
- (d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the Board of Governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part.

§137.3 Board of Governors

- (a) There shall be a Board of Governors of the New York State Fee Dispute Resolution Program.
- (b) The Board of Governors shall consist of 18 members, to be designated from the following: 12 members of the bar of the State of New York and six members of the public who are not lawyers. Members of the bar may include judges and justices of the New York State Unified Court System.
 - (1) The members from the bar shall be appointed as follows: four by the Chief Judge from the membership of statewide bar associations and two each by the Presiding Justices of the Appellate Divisions.
 - (2) The public members shall be appointed as follows: two by the Chief Judge and one each by the Presiding Justices of the Appellate Divisions.

Appointing officials shall give consideration to appointees who have some background in alternative dispute resolution.

- (c) The Chief Judge shall designate the chairperson.
- (d) Board members shall serve for terms of three years and shall be eligible for reappointment for one additional term. The initial terms of service shall be designated by the Chief Judge such that six members serve one-year terms, six members serve two-year terms, and six members serve three-year terms. A person appointed to fill a vacancy occurring other than by expiration of a term of office shall be appointed for the unexpired term of the member he or she succeeds.
- (e) Eleven members of the Board of Governors shall constitute a quorum. Decisions shall be made by a majority of the quorum.
- (f) Members of the Board of Governors shall serve without compensation but shall be reimbursed for their reasonable, actual and direct expenses incurred in furtherance of their official duties.
- (g) The Board of Governors, with the approval of the four Presiding Justices of the Appellate Divisions, shall adopt such guidelines and standards as may be necessary and appropriate for the operation of programs under this Part, including, but not limited to: accrediting arbitral bodies to provide fee dispute resolution services under this Part; prescribing

standards regarding the training and qualifications of arbitrators; monitoring the operation and performance of arbitration programs to insure their conformance with the guidelines and standards established by this Part and by the Board of Governors; and submission by arbitral bodies of annual reports in writing to the Board of Governors.

- (h) The Board of Governors shall submit to the Administrative Board of the Courts an annual report in such form as the Administrative Board shall require.

§137.4 Arbitral Bodies

- (a) A fee dispute resolution program recommended by the Board of Governors, and approved by the Presiding Justice of the Appellate Division in the judicial department where the program is established, shall be established and administered in each county or in a combination of counties. Each program shall be established and administered by a local bar association (the “arbitral body”) to the extent practicable. The New York State Bar Association, the Unified Court System through the District Administrative Judges, or such other entity as the Board of Governors may recommend also may be designated as an arbitral body in a fee dispute resolution program approved pursuant to this Part.
- (b) Each arbitral body shall:
 - (1) establish written instructions and procedures for administering the program, subject to the approval of the Board of Governors and consistent with this Part. The procedures shall include a process for selecting and assigning arbitrators to hear and determine the fee disputes covered by this Part. Arbitral bodies are strongly encouraged to include nonlawyer members of the public in any pool of arbitrators that will be used for the designation of multi-member arbitrator panels.
 - (2) require that arbitrators file a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them.
 - (3) be responsible for the daily administration of the arbitration program and maintain all necessary files, records, information and documentation required for purposes of the operation of the program, in accordance with directives and procedures established by the Board of Governors.

- (4) prepare an annual report for the Board of Governors containing a statistical synopsis of fee dispute resolution activity and such other data as the Board shall prescribe.
- (5) designate one or more persons to administer the program and serve as a liaison to the public, the bar, the Board of Governors and the grievance committees of the Appellate Division.

§137.5 Venue

A fee dispute shall be heard by the arbitral body handling disputes in the county in which the majority of the legal services were performed. For good cause shown, a dispute may be transferred from one arbitral body to another. The Board of Governors shall resolve any disputes between arbitral bodies over venue.

§137.6 Arbitration Procedure

- (a) (1) Except as set forth in paragraph (2), where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward a written notice to the client, entitled "Notice of Client's Right to Arbitrate," by certified mail or by personal service. The notice (i) shall be in a form approved by the Board of Governors; (ii) shall contain a statement of the client's right to arbitrate; (iii) shall advise that the client has 30 days from receipt of the notice in which to elect to resolve the dispute under this Part; (iv) shall be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding; and (v) shall be accompanied by a copy of the "request for arbitration" form necessary to commence the arbitration proceeding.
- (2) Where the client has consented in advance to submit fee disputes to arbitration as set forth in subdivisions (b) and (c) of section 137.2 of this Part, and where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward to the client, by certified mail or by personal service, a copy of the "request for arbitration" form necessary to commence the arbitration proceeding along with such notice and instructions as shall be required by the rules and guidelines of the

Board of Governors, and the provisions of subdivision (b) of this section shall not apply.

- (b) If the attorney forwards to the client by certified mail or personal service a notice of the client's right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction 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. An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under this Part of the client's right to pursue arbitration and did not file a timely request for arbitration or (ii) that the dispute is not otherwise covered by this Part.
- (c) In the event the client determines to pursue arbitration on the client's own initiative, the client may directly contact the arbitral body having jurisdiction over the fee dispute. Alternatively, the client may contact the attorney, who shall be under an obligation to refer the client to the arbitral body having jurisdiction over the dispute. The arbitral body then shall forward to the client the appropriate papers set forth in subdivision (a) necessary for commencement of the arbitration.
- (d) If the client elects to submit the dispute to arbitration, the client shall file the "request for arbitration form" with the appropriate arbitral body, and the arbitral body shall mail a copy of the "request for arbitration" to the named attorney together with an "attorney fee response" to be completed by the attorney and returned to the arbitral body within 15 days of mailing. The attorney shall include with the "attorney fee response" a certification that a copy of the response was served upon the client.
- (e) Upon receipt of the attorney's response, the arbitral body shall designate the arbitrator or arbitrators who will hear the dispute and shall expeditiously schedule a hearing. The parties must receive at least 15 days notice in writing of the time and place of the hearing and of the identity of the arbitrator or arbitrators.
- (f) Either party may request the removal of an arbitrator based upon the arbitrator's personal or professional relationship to a party or counsel. A request for removal must be made to

the arbitral body no later than five days prior to the scheduled date of the hearing. The arbitral body shall have the final decision concerning the removal of an arbitrator.

- (g) The client may not withdraw from the process after the arbitral body has received the “attorney fee response.” If the client seeks to withdraw at any time thereafter, the arbitration will proceed as scheduled whether or not the client appears, and a decision will be made on the basis of the evidence presented.
- (h) If the attorney without good cause fails to respond to a request for arbitration or otherwise does not participate in the arbitration, the arbitration will proceed as scheduled and a decision will be made on the basis of the evidence presented.
- (i) Any party may participate in the arbitration hearing without a personal appearance by submitting to the arbitrator testimony and exhibits by written declaration under penalty of perjury.

§137.7 Arbitration Hearing

- (a) Arbitrators shall have the power to:
 - (1) take and hear evidence pertaining to the proceeding;
 - (2) administer oaths and affirmations; and
 - (3) compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.
- (b) The rules of evidence need not be observed at the hearing.
- (c) Either party, at his or her own expense, may be represented by counsel.
- (d) The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to 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 by the parties. The client shall have the right of final reply.
- (e) Any party may provide for a stenographic or other record at the party’s expense. Any other party to the arbitration shall be entitled to a copy of said record upon written request and payment of the expense thereof.

- (f) The arbitration award shall be issued no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall specify the bases for the determination. Except as set forth in section 137.8, all arbitration awards shall be final and binding.
- (g) Should the arbitrator or arbitral body become aware of evidence of professional misconduct as a result of the fee dispute resolution process, that arbitrator or body shall refer such evidence to the appropriate grievance committee of the Appellate Division for appropriate action.
- (h) In any arbitration conducted under this Part, an arbitrator shall have the same immunity that attaches in judicial proceedings.

§137.8 De Novo Review

- (a) A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.
- (b) Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause for such failure to participate.
- (c) Arbitrators shall not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

§137.9 Filing Fees

Upon application to the Board of Governors, and approval by the Presiding Justice of the Appellate Division in the judicial department where the arbitral program is established, an arbitral body may require payment by the parties of a filing fee. The filing fee shall be reasonably related to the cost of providing the service and shall not be in such an amount as to discourage use of the program.

§137.10 Confidentiality

All proceedings and hearings commenced and conducted in accordance with this Part, including all papers in the arbitration case file, shall be confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter.

§137.11 Failure to Participate in Arbitration

All attorneys are required to participate in the arbitration program established by this Part upon the filing of a request for arbitration by a client in conformance with these rules. An attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.

§137.12 Mediation

- (a) Arbitral bodies are strongly encouraged to offer mediation services as part of a mediation program approved by the Board of Governors. The mediation program shall permit arbitration pursuant to this Part in the event the mediation does not resolve the fee dispute.
- (b) All mediation proceedings and all settlement discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration.

Correspondence from the Board of Governors

ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM

Standards and Guidelines of the Part 137 Program*

Pursuant to Part 137 of the Rules of the Chief Administrator, Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, the following Standards and Guidelines are promulgated by the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program ("Board") to implement the Attorney-Client Fee Dispute Resolution Program and Part 137.

SECTION I POLICY

It is the policy of the Appellate Divisions of the Supreme Court and the Board of Governors to encourage out-of-court resolution of fee disputes between attorneys and clients in fair, impartial and efficient programs established and administered by bar associations.

SECTION 2 DEFINITIONS

- A. "Client" means a person or entity who receives legal services or advice from a lawyer on a fee basis in the lawyer's professional capacity.
- B. "Board" means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator.
- C. "Program" means the Attorney-Client Fee Dispute Resolution Program established under Part 137 and these Standards and Guidelines.
- D. "Local program" means a bar association-sponsored fee dispute resolution program approved by the Board.
- E. "Neutral" means a person who serves as an arbitrator or mediator in a local program under Part 137 and these Standards and Guidelines.
- F. "Approval" by the Board of Governors means, where so required by Part 137, recommendation by the Board of Governors with the approval of the appropriate Presiding Justice of the Appellate Division.

* As amended June 29, 2004.

SECTION 3 ORGANIZATIONAL FRAMEWORK

- A. Arbitration and mediation of fee disputes between attorneys and clients in New York State pursuant to Part 137 shall, to the extent practicable, take place through local programs.
- B. Local programs may provide fee dispute resolution services under Part 137 only if they have been duly approved to do so by the Board.
- C. A local program may be approved by the Board to provide fee dispute resolution services in more than one county. One or more bar associations may combine to administer a joint local program in one or more counties.
- D. In a county where no local program exists, the office of the Administrative Judge of the Judicial District encompassing such county shall administer a program approved by the Board.

SECTION 4 APPROVAL PROCESS

- A. In order to receive approval from the Board, a prospective local program must complete an approval form adopted by the Board and provide for the Board's review a written statement of rules and procedures for the proposed local program.
- B. The local program's written rules and procedures shall comply with Part 137 and these Standards and Guidelines and shall provide for a fair, impartial and efficient process for the resolution of attorney-client fee disputes.
- C. The following information must be provided in the approval form and/or in the local program's proposed rules and procedures submitted to the Board:
 - 1. Whether the local program proposes to charge filing fees; the amount, if any, it proposes to charge; and the local program's fee waiver policy, if any;
 - 2. Procedures governing the selection and assignment of neutrals consistent with section 8 of these Standards and Guidelines;
 - 3. A description of the local program's proposal to recruit, train and maintain a sufficient qualified pool of neutrals;
 - 4. A contact person who will have responsibility for the administration of the local program, including the contact person's name, telephone and fax numbers, and business and e-mail addresses;
 - 5. Copies of materials, if any, to be provided to clients and/or attorneys explaining the local program;

6. Copies of manuals or materials, if any, to be used in training neutrals; and
7. The local program's mediation rules and procedures, if applicable.

SECTION 5 RESPONSIBILITIES OF LOCAL PROGRAMS

- A. Local programs shall be responsible for the day-to-day administration of the Program as set forth in section 137.4(b)(3) and these Standards and Guidelines. Each local program shall designate a contact person to serve as liaison to, among others, the disputants, the public, the members of the bar, the Board of Governors and attorney disciplinary authorities.
- B. Local programs shall be responsible for determining that the fee dispute falls within the Program's jurisdiction in accordance with screening guidelines or protocols developed by the Board. Any unresolved inquiries shall be referred promptly to the Board for final resolution.
- C. Local programs shall prepare a brief annual written report to the Board containing a statistical summary of fee dispute resolution activity and such other data as the Board may request. Local programs shall be responsible for maintaining a log of complaints made by members of the public, clients, attorneys or neutrals regarding the Program, local programs or their personnel, including neutrals. Local programs shall advise the Board of Governors of all complaints in a timely manner, and the complaint log shall be available for review by the Board of Governors upon request.
- D. Fee dispute resolution proceedings shall be conducted on neutral sites such as local program premises, Unified Court System facilities and neutrals' offices; they shall not take place in the office of any interested party unless all parties consent in writing.

SECTION 6 THE FEE DISPUTE RESOLUTION PROCESS

- A. Unless the client has previously consented in writing to submit fee disputes to the fee dispute resolution process established by Part 137, arbitration under this Program shall be voluntary for the client. Mediation under this Program shall be voluntary for the attorney and the client.
- B. Prior Written Agreements Between the Attorney and Client Under Section 137.2.
 1. Under section 137.2(b), the client may consent in advance to submit fee disputes to arbitration under Part 137. To be valid on the part of the client, such consent must be knowing and informed. The client's consent under section 137.2(b) shall be stated in a retainer agreement or other writing specifying that the client has read the official written instructions and procedures for Part 137, and the Board-approved written instructions and procedures for the local program designated to hear fee disputes

between the attorney and client, and that the client consents to resolve fee disputes under Part 137.

2. Under section 137.2(c), the attorney and client may consent in advance to submit to arbitration that is final and binding and not subject to a trial de novo. To be valid on the part of the client, such consent must be knowing and informed and obtained in the manner set forth in section 6(B)(1) of these Standards and Guidelines, except that the retainer agreement or other writing shall also state that the client understands that he or she is waiving the right to reject an arbitration award and subsequently commence a trial de novo in court.
3. Where an agreement to arbitrate exists between the attorney and client under either section 137.2(b) or (c), those provisions of section 137.6(a)(1) and (b) relating to the notice of client's right to arbitrate shall not apply and no further notice of the right to arbitrate shall be required. In this circumstance, section 137.6(a)(2) shall apply and either party may commence the dispute resolution process by filing a "request for arbitration" form with the local program designated to hear fee disputes between the attorney and client, together with a copy of the parties' agreement to arbitrate.
4. Under section 137.2(d), the attorney and client may consent in advance to final and binding arbitration in an arbitral forum other than one created under Part 137. To be valid on the part of the client, such consent must be knowing and informed and must be obtained in a retainer agreement or other writing. Arbitration in an arbitral forum outside Part 137 shall be governed by the rules and procedures of that forum. The Board may maintain information concerning other established arbitral programs and shall provide contact information for such programs upon request.
5. Fee disputes may be referred to local programs by means not specifically described in Part 137, including but not limited to, attorney disciplinary authorities, bar associations, and employees, officers or judges of the courts. In those situations, the local program contact person shall provide the client with information about the Program.

SECTION 7 BOARD OF GOVERNORS

- A. The Board shall have the power to interpret Part 137 and these Standards and Guidelines.
- B. The Board shall monitor the operation and performance of local programs to ensure their conformance with Part 137 and these Standards and Guidelines.

- C. The Board shall have the power to deny or revoke approval to local programs for failure to comply with Part 137 and these Standards and Guidelines or where the Board determines that the local program does not provide for a fair, impartial or efficient fee dispute resolution process.
The Board shall review and approve the appointment of neutrals for service in local programs under Part 137. The Board shall remove neutrals from such service where they have failed to meet the requirements of Part 137.
- D. The Board shall maintain a list of approved local programs under Part 137, including information concerning each local program's rules and procedures.
- E. The Board shall submit an annual report to the Administrative Board of the Courts regarding the Program and containing recommendations designed to improve it.
- F. The Board shall take appropriate steps to educate and inform the public about the Program.
- G. The Board shall have the power to perform acts necessary for the effective operation of the Program and the implementation of Part 137 and these Standards and Guidelines.

SECTION 8 SELECTION AND ASSIGNMENT OF NEUTRALS

- A. Each local program shall establish procedures governing the selection and assignment of neutrals subject to approval by the Board to ensure that they provide for a fair, impartial and efficient fee dispute resolution process. Each local program shall maintain a list or lists of Board approved neutrals, organized by area of practice, where appropriate. When selecting a neutral, the local program shall select the next available neutral with appropriate experience for the proceeding in question.
- B. Unless otherwise approved by the Board:
 - 1. Disputes involving a sum of less than \$6,000 shall be submitted to one attorney arbitrator;
 - 2. Disputes involving a sum of \$6,000 or more shall be submitted to a panel of three arbitrators, which shall include at least one nonlawyer member of the public.

SECTION 9 QUALIFICATIONS AND DUTIES OF ARBITRATORS

- A. Both lawyers and nonlawyers may serve as arbitrators.
- B. In recruiting arbitrators, local programs should make every effort to ensure that arbitrators represent a wide range of law practices and firm sizes, a diversity of nonlawyer professions within the community and a cross-section of the community.

- C. Prospective arbitrators shall submit a summary of credentials to the local program, copies of which the local program shall keep on record. Each local program shall forward to the Board of Governors a list of persons recommended for approval as arbitrators under Part 137 together with a summary of their credentials.
- D. Arbitrators shall be appointed by local programs pursuant to their rules and procedures, subject to approval by the Board of Governors to ensure that such arbitrators meet the requirements of Part 137.
- E. All arbitrators must sign a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them, which written oath or affirmation shall be kept on file by the local program.
- F. All arbitrators must conduct a conflict of interest check prior to accepting a case. A person who has any personal bias regarding a party or the subject matter of the dispute, a financial interest in the subject matter of the dispute, or a close personal relationship or financial relationship with a party to the dispute shall not serve as an arbitrator. An arbitrator shall disclose any information that he or she has reason to believe may provide a basis for recusal.
- G. Arbitrators shall serve as volunteers; provided, however, that local programs may provide for reimbursement of arbitrators' expenses.
- H. In making an award, arbitrators shall specify in a concise statement the amount of and basis for the award.
- I. Arbitrators have a duty to maintain the confidentiality of all proceedings, hearings and communications conducted in accordance with Part 137, including all papers in the arbitration case file, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Arbitrators should refer all requests for information concerning a fee dispute to the local program contact person. Arbitrators shall not be competent to testify in a subsequent proceeding or trial de novo.

SECTION 10 TRAINING OF ARBITRATORS

Arbitrators shall complete a minimum of six hours of fee dispute arbitration training approved by the Board. The Board may take previous arbitration training and experience under consideration in determining whether the foregoing training requirement has been met; provided, however, that all arbitrators must complete a short orientation program designed to introduce them to Part 137's practices and procedures. Arbitrators may be required to undergo periodic refresher courses.

SECTION 11 MEDIATION

- A. Local programs may mediate fee disputes with the written consent of the attorney and client.
- B. Participation in mediation does not waive the right to arbitration under Part 137, nor does it waive the right to a trial de novo.
- C. Both lawyers and nonlawyers may serve as mediators.
- D. In recruiting mediators, local programs should make every effort to ensure that mediators represent a wide range of law practices and firm sizes, a diversity of nonlawyer professions within the community and a cross-section of the community.
- E. Mediators shall submit a summary of credentials to the local program, which the local program shall keep on record.
- F. Mediators shall complete Board-approved mediation training. The Board may take previous mediation training and experience under consideration in determining whether the foregoing training requirement has been met; provided, however, that all mediators must complete a short orientation program designed to introduce them to Part 137's practices and procedures. Mediators may be required to undergo periodic refresher courses.
- G. The local program shall appoint mediators pursuant to its rules of procedure. The attorney or client may challenge a mediator for cause.
- H. All mediators must sign a written oath or affirmation to faithfully and fairly mediate all disputes that come before them, which written oath or affirmation shall be kept on file by the local program.
- I. All mediators must conduct a conflict of interest check prior to accepting a case. A person who has any personal bias regarding a party or the subject matter of the dispute, a financial interest in the subject matter of the dispute, or a close personal relationship or financial relationship with a party to the dispute shall not serve as a mediator. A mediator shall disclose any information that he or she has reason to believe may provide a basis for recusal.
- J. Mediators shall serve as volunteers; provided, however, that local programs may provide for reimbursement of mediators' expenses.
- K. A mediator may not serve as an arbitrator in a subsequent arbitration involving the parties to the mediation absent the parties' written consent.
- L. Mediators have a duty to maintain the confidentiality of the process, including all communications, documents and negotiations or settlement discussions between the parties

and the mediator, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Mediators should refer all requests for information concerning a fee dispute to the local program contact person. Mediators shall not be competent to testify in any civil or administrative proceeding, including any subsequent fee arbitration or trial de novo, as to any statement, condition, or decision that occurred at or in conjunction with the mediation.

- M. During the mediation, upon any agreement of the parties, in whole or in part, the parties shall reduce such agreement to writing. If no agreement is reached by the parties, the mediator shall, in a manner consistent with section 11(L), so inform the local program contact person in writing, and the dispute will be referred for arbitration.

SECTION 12 TRIAL DE NOVO

- A. A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court with jurisdiction over the amount in dispute within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.
- B. Each local program shall adopt procedures designed to ensure that a party provides notice to the local program when the party commences an action for de novo review.
- C. Any party who fails to participate in the arbitration hearing shall not be entitled to a trial de novo absent good cause for such failure to participate.
- D. Arbitrators shall not be called as witnesses, nor shall the arbitration award or record of the proceedings be admitted in evidence at the trial de novo.

SECTION 13 ENFORCEMENT

- A. In the event that an attorney does not comply with the arbitration award, the local program may appoint an attorney pro bono to assist the client with enforcement of the award. In such an event, the local program contact person shall first write to inform the client's attorney of the obligation to comply with the award and of the local program's policy, if any, of appointing an attorney to assist the client pro bono.

SECTION 14 FEE DISPUTE RESOLUTION FORMS

- A. The following forms are intended to assist in the timely processing of fee arbitration matters. The Board shall develop and disseminate these forms to local programs.
 - 1. Notice of Client's Right to Arbitrate

2. Request for Arbitration
3. Attorney Response
4. Written Instructions and Procedures for Part 137
5. Client Consent to Resolve Fee Disputes Under Part 137.2(b)
6. Consent to Waive Trial De Novo under Part 137.2(c)
7. Consent to Final and Binding Arbitration in an Arbitral Forum Outside Part 137 under Part 137.2(d)
8. Arbitration Award
9. Agreement to Mediate
10. Neutral's Oath

SECTION 15. CORRESPONDENCE

All written requests and correspondence to the Board may be sent to:

Board of Governors
Attorney-Client Fee Dispute Resolution Program
c/o UCS State ADR Office
25 Beaver Street, 8th Floor
New York, New York 10004

SIXTH JUDICIAL DISTRICT ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM

Rules and Procedures for the Local Program²

SECTION 1 - POLICY

It is the policy of the Sixth Judicial District (“district”) to encourage out-of-court resolution of fee disputes between attorneys and clients in a fair, impartial and efficient manner. The Administrative Judge of the Sixth Judicial District is designated as the Administrator of the Attorney-Client Fee Dispute Resolution program under these Rules and may delegate duties to such officers, committees, and employees as she may direct.

SECTION 2 - DEFINITIONS

- A. “Answer” (also referred to as “Response to Request for Fee Arbitration”) means the response to the “Request for Fee Arbitration” or “Petition”.
- B. “Arbitrator” means the person(s) designated by the Administrative Judge or her designee to hear the evidence presented by the parties and make a final determination.
- C. “Administrator” means the Administrative Judge (or designee) of the Sixth Judicial District who oversees the Program.
- D. “Approval” by the Board of Governors means, where so required by Part 137, recommendation by the Board of Governors with approval of the appropriate Presiding Justice of the Appellate Division.
- E. “Arbitration” means the settlement of disputes between parties by neutral third person(s) who hear both sides and render an award.
- F. “Board” means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator.
- G. “Client” means a person or entity who receives legal services or advice from an attorney on a fee basis in the attorney’s professional capacity.
- H. “District Office” means the Administrative Judges Office of the Sixth Judicial District.
- I. “Petition” means a “Request for Fee Arbitration” requested by either the client or the attorney.
- J. “Petitioner” means the party requesting the fee arbitration.

² Effective May 6, 2003

- K. “Program” means the Attorney-Client Fee Dispute Resolution Program established under Part 137 and administered and implemented by the Administrative Judges Office of the Sixth Judicial District pursuant to the Rules and Procedures set forth herein.
- L. “Respondent” means the party responding to the petition in opposition to the claim.
- M. “Service” means personal service or service by certified mail.
- N. “Written Instructions” means the Standard Instructions to Clients For the Resolution Of Fee Disputes Pursuant to Part 137 Of the Rules Of the Chief Administrator (Form UCS137-3 5/02) published by the Office of Court Administration.

SECTION 3 - THE PROGRAM AND JURISDICTION

- A. The jurisdiction of this program will include the counties of Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins.
- B. In the event of a fee dispute between an attorney and client, where the representation has commenced on or after January 1, 2002, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration pursuant to the Program.
- C. Arbitration under this Program shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as further described herein.
- D. Arbitration of fee disputes between attorneys and clients, shall take place through this Program. However, this Program shall not apply to any of the following:
 - 1. Representation in criminal matters;
 - 2. Amounts in dispute involving a sum of less that \$1000 or more than \$50,000, except that the district may hear disputes involving other amounts if the parties have consented;
 - 3. Claims involving substantial legal questions, including professional malpractice or misconduct;
 - 4. Claims against an attorney for damages or affirmative relief other than the adjustment of the fee;
 - 5. Disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;

6. Disputes where no attorney's services have been rendered for more than two years;
 7. Disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;
 8. Disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.
- E. Pursuant to a written request and subsequent approval by the District Administrative Judge, the Board of Governors and the Presiding Justice of the Appellate Division, Third Judicial Department, this Program may be administered by a local bar association in accordance with all the rules and procedures set forth herein.
- F. There shall be NO FEE charged to any of the parties who participate in the Attorney-Client Fee Dispute Resolution Program.
- G. In the event Service becomes necessary, after having unsuccessfully attempted service by certified mail where required under these Rules and Procedures, the Petitioner must pay, in advance by check or money order made payable to the entity delegated to make such personal service the cost of such service. At the discretion of the arbitrator(s), and to the extent authorized by law, these costs may be added to the arbitrator(s) award, if previously paid by the prevailing party.
- H. 1. Arbitration under this Program shall be voluntary for the client unless:
- (a) The client has previously consented in writing to submit fee disputes to the fee dispute resolution process by prior written agreement between the attorney and client wherein the client consented in advance to submit fee disputes to arbitration. To be valid on the part of the client, such consent must be knowing and informed. The clients consent shall be stated in a retainer agreement or other writing specifying that the client has read pursuant to Part 137, the district's approved Rules and Procedures and that the client consents to resolve fee disputes pursuant to the Program; or
 - (b) The attorney and client have consented in advance to submit fee disputes to arbitration that is final and binding and not subject to a trial *de novo*. To be valid on the part of the client, such consent must be knowing and informed and obtained in the same manner as set forth in the previous subsection of this section, except that the retainer agreement or other writing shall also state that the client understands that he/she is waiving the right to reject an arbitration award and subsequently commence a trial *de novo* in a court of competent jurisdiction.
2. Where an agreement to arbitrate exists between the attorney and client under either subsections H (1) (a) or (b) of this section, those provisions of Section

137.6(a) (1) and (b) of Part 137 relating to the notice of client's right to arbitrate shall not apply and no further notice of the right to arbitrate shall be required. In such circumstance, Section 137.6 (a)(2) of Part 137 shall apply and either party may commence the dispute resolution process by filing a Petition with the Administrative Judge, together with a copy of the parties' agreement to arbitrate.

3. The attorney and client may consent in advance to final and binding arbitration in an arbitral forum other than the one created under Part 137. To be valid on the part of the client, such consent must be knowing and informed and must be obtained in a retainer agreement or other writing. Arbitration in an arbitral forum outside Part 137 shall be governed by the rules and procedures of that forum. The Board may maintain information concerning other established arbitral programs and shall provide contact information for such programs upon request.
 4. Fee disputes may be referred to the District Administrative Judge by means not specifically described in Part 137, including but not limited to, attorney disciplinary authorities, bar associations, and employees, officers or judges of the courts. In those instances, the Administrative Office shall provide the client with information about the Program.
- I. Upon notice of appointment, the Chairperson may contact both parties to make an effort to settle the dispute, however, the Chairperson is not authorized to provide legal advice to any of the parties involved.

SECTION 4 - ARBITRATORS

The district shall establish and maintain a sufficient number of arbitrators in order to meet the Program's caseload. Attorneys and non-attorneys shall serve as arbitrators. In recruiting arbitrators, the district shall recruit arbitrators representing a wide range of law practices and a diversity of non-attorney professions and occupations representing a cross-section of the communities. The District Office shall seek the assistance of local Bar Associations in the recruitment of attorney arbitrators. Non-attorney arbitrators will be recruited by contacting established Alternative Dispute Resolution programs throughout the district as well as the Unified Court System, Office of Alternative Dispute Resolution Programs.

- A. Attorney arbitrators, approved by the Board, shall be appointed to provide as broad a spectrum of the Bar as possible. For an attorney to qualify for appointment as an arbitrator, the attorney must meet the following criteria:
1. be admitted to the New York Bar for at least five years, and
 2. been engaged in the practice of law for at least three years, and
 3. be qualified as an arbitrator under the American Arbitration Association rules, by the Office of Court Administration or by the United States District Court through any of their arbitration programs; or

4. have completed a district-approved arbitration training program or the equivalent.
- B. Non-Attorney Arbitrators, approved by the Board, shall be appointed by the District Administrative Judge of the Third Judicial District from as broad a spectrum of the general public as possible. For a non-attorney to qualify for appointment as an arbitrator, the non-attorney must meet the following requirements:
1. be a resident of the 6th Judicial District or work within the district.
 2. be fluent in speaking, reading and writing English; and
 3. have completed a district-approved arbitration training program or the equivalent.
- C. The number of arbitrators assigned to hear a fee dispute matter under this Program shall depend upon the amount in dispute as follows:
1. disputes involving a sum of less than \$6,000.00 shall be submitted to one attorney Arbitrator; and
 2. disputes involving a sum of \$6,000.00 or greater shall be submitted to a panel of three Arbitrators, which shall include at least one attorney and one non-attorney member of the public; the chairperson of all the panels shall be an attorney and all decisions on the merits shall be decided by majority rule.
- D. Lists of attorney Arbitrators may be maintained under the following headings: matrimonials, litigation, real estate, business and other. Attorney Arbitrators will self-identify themselves as being within one or more of these areas and where practical, matters will be assigned to Arbitrators in order of placement on the respective lists; should there be a conflict of interest pursuant to subsection G of this section requiring the Arbitrator to be recused, the Arbitrator will remain at the top of the list for appointment in the next matter to be assigned.
- E. Prospective arbitrators shall submit a summary of credentials to the District Administrative Judge which shall be kept on record.
- F. All arbitrators must sign a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them, which written oath or affirmation shall be kept on file by the district.
- G. All arbitrators must conduct a conflict of interest check within 3 business days of initial contact by the administrator prior to accepting a case. A person who has any personal bias regarding a party or the subject matter of a dispute, a financial interest in the subject matter of the dispute, or a close personal relationship or financial relationship with a party to the dispute shall not serve as an arbitrator. An arbitrator shall disclose any information that he or she has reason to believe may provide a basis for recusal.

- H. Arbitrators shall serve as volunteers. However, Continuing Legal Education (“CLE”) credits may be awarded for training and/or service as an arbitrator, subject to the rules and standards of the New York State Continuing Legal Education Board.
- I. In making an award, arbitrators shall specify in a concise statement, the amount of and basis for the award.
- J. Arbitrators have a duty to maintain the confidentiality of all proceedings, hearings and communications, including all papers pertaining to the arbitration conducted in accordance with Part 137 and these Rules and Procedures, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Arbitrators should refer all requests for information concerning a fee dispute to the District Office. Arbitrators shall not be competent to testify in a subsequent proceeding or trial *de novo*.
- K. Arbitrators shall complete a minimum of six hours of fee dispute arbitration training approved by the Board. However, the Board may take previous arbitration training and experience under consideration in determining whether the foregoing training requirement has been met. In any case, all Arbitrators must complete a short orientation program designed to introduce them to Part 137 and these Rules and Procedures. Arbitrators may be required to undergo periodic refresher courses.

SECTION 5 - THE FEE DISPUTE RESOLUTION PROCESS

- A. Where an attorney and client cannot agree as to the attorney’s fee and there has been no prior written consent to arbitration as described in Section 3H above, the attorney shall serve a written notice to the client, entitled “Notice of Clients Right to Arbitrate”, by certified mail or personal service. The notice shall:
 - 1. be in a form approved by the Board of Governors;
 - 2. contain a statement of the clients right to arbitrate;
 - 3. advise that the client has 30 days after the notice is received or served in which to elect to resolve the fee dispute;
 - 4. be accompanied by a copy of these Rules and Procedures;
 - 5. be accompanied by a copy of Written Instructions and
 - 6. be accompanied by a copy of the petition form necessary to commence the arbitration proceeding.
- B. If the attorney serves a Notice of the Clients Right to Arbitrate as described in subsection A of this section and the client does not file a Petition with the district within 30 days after the Notice was received or served, the attorney may commence an action in a court

of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to Part 137 with respect to the fee dispute at issue. NOTE: An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under Part 137 of the client's right to pursue arbitration and did not file a timely Request for Arbitration or (ii) that the dispute is not otherwise covered by Part 137.

- C. If, in the alternative event the client elects to pursue arbitration on his own initiative, the client may contact the Administrative Judges Office ("District Office") at (607)737-3560 or the attorney with whom the client has the dispute. In the case of the latter, the attorney shall be under an obligation to refer the client to the District Office. Upon request, the District Office shall forward the Petition to the client by mail.
- D. The Petitioner shall then file the Petition with the District Office.
1. Upon receipt of the Petition, the District Office shall assign a filing number to the matter.
 2. The District Office shall contact the Petitioner to review the facts and circumstances supporting the Petition to insure that this is a matter within the jurisdiction of the Program. If it is determined that this is a matter not within the jurisdiction of the Program, the District Office shall inform the Petitioner.
 3. If it is determined that this matter is a matter within the jurisdiction of the Program, the District Office shall mail, by certified mail, a copy of the Petition to the Respondent together with an answer form to be completed by the Respondent and returned to the District Office within 15 business days of mailing of the Petition. If service cannot be made by certified mail and personal service becomes necessary, the Petitioner will be so informed and the Petitioner will be required to pay the expense of such service in advance by cashiers check or money order, made payable to the entity making such service, as designated by the district. The cost for such personal service may be added to the Arbitrator(s) award, if previously paid by the prevailing party, at the discretion of the Arbitrators, to the extent authorized by law.
 4. The Respondent shall return its Answer to the District Office, together with a signed, written statement (certification) stating that a copy of the Answer was served upon the Petitioner.
 5. Once the Answer and certification have been received or, if 15 business days have elapsed since the service of the Petition and answer form without any response from the Respondent, the District Office shall designate the Arbitrator(s) who will hear the dispute and shall expeditiously schedule a hearing.
 6. At least 15 days prior to the date of the hearing, the District Office shall notify the parties in writing of the date, time and place of the hearing and of the identity of

the Arbitrator(s). Any subsequent rescheduling will be a matter between the parties and the Arbitrator(s) at the discretion of the Arbitrator(s).

7. Either party may request the removal of an Arbitrator based upon the Arbitrator's personal or professional relationship to a party or party's counsel. A request for removal must be made to the District Office no later than 5 days prior to the scheduled date of the hearing. The District Office shall have the final decision concerning the removal of an Arbitrator.
8. The Petitioner may not withdraw from the process once an Answer has been submitted. If the Petitioner seeks to withdraw at anytime thereafter, the arbitration will proceed as scheduled whether or not the Petitioner appears, and a decision will be made on the basis of the evidence presented.
9. If the Respondent, without good cause, fails to respond to a petition or otherwise does not participate in the arbitration, the arbitration will proceed as scheduled and a decision will be made on the basis of the evidence presented.
10. Any party may participate in the arbitration hearing without a personal appearance by submitting to the Arbitrator(s) testimony and exhibits by written declaration under penalty of perjury.
11. Arbitrators shall have the power to:
 - a. compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding;
 - b. administer oaths and affirmations; and
 - c. take and hear evidence pertaining to the proceeding.
12. The rules of evidence need not be observed at the hearing.
13. Either party, at its own expense, may be represented by counsel.
14. The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to 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 by the parties. The attorney shall have the right of reply. The client shall have the right of final reply.
15. Where there is more than one Arbitrator, any disputes arising among them shall be decided by the Chairperson, consistent with Part 137 of the Rules of the Chief Administrator and the minimum Standards and Guidelines of the Board of Governors.

16. Any party may provide for a stenographic or other record at the party's expense. The other party to the arbitration shall be entitled to a copy of said record upon written request and payment of the expense of duplication.
17. The arbitration award shall be issued by mail with a copy forwarded to the District Office no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall state the amount and basis for the award. If *de novo* review has been waived pursuant to Section 3H1(b) of these Rules and Procedures, then the arbitration award shall be final and binding.

SECTION 6 - DE NOVO REVIEW

If *de novo* review has not been previously waived in writing, either party may seek *de novo* review of the arbitration award by commencing an action on the merits in any court of competent jurisdiction within thirty (30) days after the Notice of Arbitration Award has been mailed. Notice of commencement of such an action shall be provided to the District Office. If no action is commenced within thirty (30) days of the mailing of the Notice of Arbitration Award, the award shall become final and binding. Any party who fails to participate in the hearing shall not be entitled to seek *de novo* review absent good cause shown for such failure to participate. Arbitrators may not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial *de novo*.

SECTION 7 - NOTICES

Except as otherwise stated herein, all notices, correspondence and papers necessary and proper for the arbitration proceeding under this Program and for the entry of judgement of any arbitration award may be served upon any party by regular mail addressed to that party at that party's last known addresses or to the party's counsel of record.

SECTION 8 - CORRESPONDENCE

Requests for further information and correspondence relating to this Program may be sent to the Office of the Administrative Judge of the 6th Judicial District at the following address:

District Administrative Judge's Office
Sixth Judicial District
c/o Christopher P. Baker, Esq.
203 Lake Street
Elmira, New York 14902
(607)737-3560

SECTION 9 - PERIODIC REVIEW

The functioning of this Program shall be reviewed periodically from the reports submitted by the District Office to the Board of Governors including any recommendations or suggested changes of the Program.

SECTION 10 - EFFECTIVE DATE

These Rules and Procedures shall take effect immediately upon approval of the Board of Governors. These Rules and Procedures and any amendments thereto shall apply in the form in effect at the time an arbitration is initiated.

Local Program Forms

**SIXTH JUDICIAL DISTRICT
ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM**

NOTICE OF CLIENT'S RIGHT TO ARBITRATE
A DISPUTE OVER ATTORNEYS FEES

The amount of \$ _____ is due and owing for the provision of legal services with respect to _____ . If you dispute that you owe this amount, you have the right to elect to resolve this dispute by arbitration under Part 137 of the Rules of the Chief Administrator of the Courts. To do so, you must file the attached Request for Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions. If you do not file a Request for Fee Arbitration within 30 days from the receipt of this Notice, you waive the right to resolve this dispute by arbitration under Part 137, and your attorney will be free to bring a lawsuit in court to seek payment of the fee.

Dated: _____

[Attorney's name and address]

NOTICE OF CLIENT'S RIGHT TO ARBITRATE
A DISPUTE OVER A REFUND OF ATTORNEYS FEES

You claim that you are entitled to a refund in connection with legal fees you have paid the undersigned in the matter of _____
_____. The undersigned disputes the refund that you are claiming.

You have the right to elect to resolve this fee dispute by arbitration under Part 137 of the Rules of the Chief Administrator of the Courts. To do so, you must file the attached Request for Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions.

If you do not file a Request for Fee Arbitration within 30 days from the receipt of this Notice, you waive the right to resolve this dispute by arbitration under Part 137.

Dated: _____

[Attorney's name and address]



STANDARD WRITTEN INSTRUCTIONS AND PROCEDURES
TO CLIENTS FOR THE RESOLUTION OF FEE DISPUTES PURSUANT
TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

Part 137 of the Rules of the Chief Administrator of the Courts provides a procedure for the arbitration (and in some cases mediation) of fee disputes between attorneys and clients in civil matters. Your attorney can provide you with a copy of Part 137 upon request or you can download a copy at www.nycourts.gov/admin/feedispute. Fee disputes may involve both fees that you have already paid to your attorney and fees that your attorney claims are owed by you. If you elect to resolve your dispute by arbitration, your attorney is required to participate. Furthermore, the arbitration will be final and binding on both your attorney and you, unless either of you seeks a trial *de novo* within 30 days, which means either of you reject the arbitrator's decision by commencing an action on the merits of the fee dispute in a court of law within 30 days after the arbitrator's decision has been mailed. Fee disputes which may not be resolved under this procedure are described in Part 137.1 of the Rules of Chief Administrator of the Courts: representation in criminal matters; amounts in dispute involving a sum of less than \$1000 or more than \$50,000 unless the parties consent; and claims involving substantial legal questions, including professional malpractice or misconduct. Please consult Part 137.1 for additional exclusions.

Your attorney may not bring an action in court to obtain payment of a fee unless he or she first has provided written notice to you of your right to elect to resolve the dispute by arbitration under Part 137. If your attorney provides you with this notice, he or she must provide you with a copy of the written instructions and procedures of the approved local bar association-sponsored fee dispute resolution program ("Local Program") having jurisdiction over your dispute. Your attorney

must also provide you with the “Request for Fee Arbitration” form and advise that you must file the Request for Fee Arbitration with the local program within 30 days of the receipt of the notice. If you do not file the Request within those 30 days, you will not be permitted to compel your attorney to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee.

In order to elect to resolve a fee dispute by arbitration, you must file the attached “Request for Fee Arbitration” with the approved local program. An updated list of local programs is available at www.nycourts.gov/admin/feedispute or by calling (212) 428-2862. Filing of the Request for Fee Arbitration must be made with the appropriate local program for the county in which the majority of legal services were performed. Once you file the Request for Fee Arbitration, the local program will mail a copy of the request to your attorney, who must provide a response within 15 days of the mailing. You will receive at least 15 days notice in writing of the time and place of the hearing and of the identity of the arbitrator(s). The arbitrator(s) decision will be issued no later than 30 days after the date of the hearing. You may represent yourself at the hearing, or you may appear with an attorney if you wish.

Some local programs may offer mediation services in addition to arbitration. Mediation is a process by which those who have a fee dispute meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for your attorney and you to discuss your concerns without relinquishing control over the outcome and of achieving a result satisfactory to both of you. Participation in mediation is voluntary for your attorney and you, and it does not waive any of your rights to arbitration under these rules. If you wish to attempt to resolve your dispute through mediation, you may indicate your wish on the Request for Fee Arbitration form.

More information, including an updated list of local programs, is available at:

<http://www.nycourts.gov/admin/feedispute> or by calling (212) 428-2862.

(Office Use Only)
Date Received: _____
Case Number: _____

CLIENT REQUEST FOR FEE ARBITRATION

1. Your name, address and telephone number:

Name:

Address:

Telephone Number:

2. Name, address and office telephone number of the law firm and/or attorney who handled your matter:

Name:

Address:

Telephone Number:

3. If your attorney filed a lawsuit on your behalf, in which county and court was the lawsuit filed?

Court: _____ County: _____

4. On what date did your attorney first agree to handle your case?

_____, 20__

5. Briefly describe the type of legal matter involved and what your attorney agreed to do in the course of representing you (attach a copy of the written retainer agreement, letter of engagement, or other papers describing the fee arrangement, if any):

6. In the space below, indicate the date, amount and purpose of each payment you made to your attorney. Attach additional sheets if necessary.

Date	Amount	Purpose (e.g., attorney's time, out-of-pocket expenses, filing fees, etc.)
_____	\$ _____	_____
_____	\$ _____	_____
_____	\$ _____	_____
_____	\$ _____	_____

7. How much of your attorney's fee is in dispute (attach a copy of your attorney's bill, if available):\$ _____
8. Have you received a "Notice of Client's Right to Arbitrate" from your attorney? _____.
If yes, please attach a copy.
9. Briefly describe why you believe your attorney is not entitled to the amount set forth in question 7 (use additional sheets if necessary):

10. Indicate whether you wish to attempt to resolve this fee dispute through mediation (Participation in mediation is voluntary for your attorney and you, and it does not waive your rights to arbitration under these rules in the event that mediation is unsuccessful or the attorney refuses to participate in mediation; note that the local program with jurisdiction over your fee dispute may not offer mediation)

Yes, I wish to attempt to resolve this fee dispute first through mediation. My election of arbitration pursuant to paragraph 11 below will apply if the mediation is unsuccessful.

No, I do not wish to attempt to resolve this fee dispute through mediation

11. I elect to resolve this fee dispute by arbitration, to be conducted pursuant to Part 137 of the Rules of the Chief Administrator [22 NYCRR] and the procedures of the LOCAL PROGRAM, copies of which I have received. I understand that the determination of the arbitrator(s) is binding upon both the lawyer and myself, unless either party rejects the arbitrator's award by commencing an action on the merits of the fee dispute (trial *de novo*) in a court of law within 30 days after the arbitrator's decision has been mailed.

Dated: _____

Signed: _____

IMPORTANT: You must file this Request for Fee Arbitration, along with a check for the filing fee in the amount of \$ _____, to:

Local Program Address

(Office Use Only)
Date Received: _____
Case Number: _____

ATTORNEY REQUEST FOR FEE ARBITRATION

1. Your name, address and telephone number:

Name:

Address:

Telephone Number:

2. Name, address and office telephone number of the Client whose matter you handled:

Name:

Address:

Telephone Number:

3. If you filed a lawsuit on your client's behalf, in which county and court was the lawsuit filed?

Court: _____ County: _____

4. On what date did you first agree to handle your client's case?

_____, 20__

5. Briefly describe the type of legal matter involved and what you agreed to do in the course of representing your client (attach a copy of the written retainer agreement, letter of engagement, or other papers describing the fee arrangement, if any):

6. In the space below, indicate the date, amount and purpose of each payment made to you by your client. Attach additional sheets if necessary.

Date	Amount	Purpose (e.g., attorney's time, out-of-pocket expenses, filing fees, etc.)
_____	\$ _____	_____
_____	\$ _____	_____
_____	\$ _____	_____
_____	\$ _____	_____

7. How much of your fee is in dispute (attach a copy of your bill, if available):\$ _____
8. Have you and your client previously agreed to arbitrate this fee dispute? _____. If yes, please attach a copy of the agreement to arbitrate.
9. Briefly describe why you believe you are entitled to the amount set forth in question 7 (use additional sheets if necessary):

10. Indicate whether you wish to attempt to resolve this fee dispute through mediation (Participation in mediation is voluntary for you and your client, and it does not preclude your client or you from pursuing arbitration under these rules in the event that mediation is unsuccessful; note that the local program with jurisdiction over your fee dispute may not offer mediation)

Yes, I wish to attempt to resolve this fee dispute first through mediation.

No, I do not wish to attempt to resolve this fee dispute through mediation.

Dated: _____

Signed: _____

IMPORTANT: You must file this Request for Fee Arbitration, along with a check for the filing fee in the amount of \$ _____, to:

Local Program Address

**In the Matter of Fee Dispute
Arbitration between**

(Office Use Only)
Case Number: _____

, Client

**ATTORNEY RESPONSE
TO REQUEST
FOR FEE ARBITRATION**

and

, Attorney

INSTRUCTIONS

Attached is a copy of a "Request for Fee Arbitration" by the above Client. Please complete this attorney response below and return it to the undersigned within 15 days of this mailing along with a certification that you have served the Client with the attorney response and indicating the manner of service:

1. Name, address, telephone number:

2. Set forth in narrative fashion your response to the request for fee arbitration, indicating those items in the request with which you disagree and providing a brief explanation of why you believe you are entitled to the amount of the fee that is in dispute (use additional pages if necessary):

3. I agree to attempt to resolve this fee dispute first through mediation [applicable only if client so indicates in item 10 of the request]

Dated: _____, 20__

Local Program Address

Signature

**In the Matter of Fee Dispute
Arbitration between**

(Office Use Only)

Case Number: _____

, Client

**CLIENT RESPONSE
TO REQUEST
FOR FEE ARBITRATION**

and

, Attorney

INSTRUCTIONS

Attached is a copy of a "Request for Fee Arbitration" by the above Attorney. Please complete this client response below and return it to the undersigned within 15 days of this mailing:

1. Name, address, telephone number:

2. Set forth in narrative fashion your response to the request for fee arbitration, indicating those items in the request with which you disagree and providing a brief explanation of why you believe your attorney is not entitled to the amount of the fee that is in dispute (use additional pages if necessary):

3. I agree to attempt to resolve this fee dispute first through mediation [applicable only if Attorney so indicates in item 10 of the request]

Dated: _____, 20__

Local Program Address

Signature

**In the Matter of Fee Dispute
Arbitration between**

, Client

and

, Attorney

(Office Use Only)

Case Number: _____

**NOTICE OF
ARBITRATION HEARING**

To:

PLEASE TAKE NOTICE, that an arbitration hearing to determine the fee dispute between the above parties will be held on _____, 200__, at _____ (a.m.) (p.m.), at _____.

The arbitrator(s) hearing the dispute will be:

You are required to bring to the hearing all evidence that you intend to introduce and to present any witnesses that you will call to testify on your behalf. If you wish a record to be made of the arbitration hearing, you may provide, at your own expense, a stenographer or other record. If you have any objection to a particular arbitrator who has been designated to hear this case, you must provide your objections to the undersigned within 5 days of your receipt of this Notice.

Dated: _____, 20__

Local Program Address

Signature

ARBITRATOR'S OATH OR AFFIRMATION

I, _____, hereby agree to serve as an arbitrator pursuant to Part 137 of the Rules of the Chief Administrator and I swear or affirm that I will arbitrate all matters coming before me faithfully and fairly.

Signed: _____

Affirmed before me this
____ day of _____, 200__.

(Notary Public)

MEDIATOR'S OATH OR AFFIRMATION

I, _____, hereby agree to serve as a mediator pursuant to Part 137 of the Rules of the Chief Administrator and I swear or affirm that I will mediate all matters coming before me faithfully and fairly.

Signed: _____

Affirmed before me this
____ day of _____, 200__.

(Notary Public)

**In the Matter of Fee Dispute
Arbitration between**

, Client

and

, Attorney

(Office Use Only)
Case Number: _____

**NOTICE OF
ARBITRATION AWARD**

Attached is the determination of the arbitrator(s) who heard the fee dispute between the above parties. This determination is final and binding on the parties, unless either party rejects the arbitrator(s) decision by commencing an action on the merits of the fee dispute (trial *de novo*) in a court of law within 30 days after the arbitrator(s) decision has been mailed.

Dated: _____, 20__

Local Program Address

**In the Matter of Fee Dispute
Arbitration between**

, Client

and

, Attorney

(Office Use Only)

Case Number: _____

**NOTICE OF FINAL AND BINDING
ARBITRATION AWARD**

Attached is the determination of the arbitrator(s) who heard the fee dispute between the above parties. This determination is final and binding on the parties. Article 75 of the Civil Practice Law and Rules permits review of arbitration awards on the narrow grounds set forth therein, and you are entitled to seek review of the award by the courts within 90 days of your receipt of this decision.

Dated: _____, 20__

Local Program Address

**In the Matter of Fee Dispute
Arbitration between**

, Client

(Office Use Only)
Case Number: _____

and

STIPULATION OF

SETTLEMENT

, Attorney

A request for fee arbitration having been made and the parties having come to an agreement as to the reasonable amount of the fee due in this matter, it is hereby stipulated and agreed:

1. The AMOUNT IN DISPUTE is: \$ _____
2. The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client): \$ _____
3. The AMOUNT of this total PREVIOUSLY PAID by the client is: \$ _____
4. (a) The BALANCE DUE by the client to the attorney is: \$ _____

-OR-

- (b) The AMOUNT TO BE REFUNDED by the attorney is: \$ _____

It is further agreed that the payment of the amount agreed shall be made within _____ days of the date of this stipulation.

(Please print names below signatures)

Dated: _____ [Give copy to each party]

(Office Use Only)

**In the Matter of Fee Dispute
Arbitration between**

, Client

and

, Attorney

**ARBITRATION
AWARD**

1. The AMOUNT IN DISPUTE is: \$ _____

2. The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client): \$ _____

3. The AMOUNT of this total PREVIOUSLY PAID by the client is: \$ _____

4. (a) The BALANCE DUE by the client to the attorney is: \$ _____

-OR-

(b) The AMOUNT TO BE REFUNDED by the attorney is: \$ _____

Statement of Reasons:

AFFIRMATION

The undersigned arbitrator(s), having been duly appointed pursuant to the Rules of _____ Local Program Name _____, and pursuant to any applicable Rule of the Chief Administrator, Title 22, of the Official Compilations of Codes, Rules and Regulations, or the Agreement of the parties to the dispute resolved by this award, and having duly taken the oath according to the law and having duly heard the proofs and allegations of the parties hereto, hereby affirm(s), pursuant to CPLR 7507, under the penalties of perjury, that the above award is a true, correct and complete statement of the award rendered in the above-captioned arbitration, duly executed by the undersigned.

(Signatures of Arbitrator(s); print name below signatures)

Dated: _____

[Mail copy to each party]

(Office Use Only)	
Date Received:	_____
Case Number:	_____

**CONSENT TO RESOLVE FEE DISPUTE BY ARBITRATION PURSUANT TO
PART 137.2 (b) OF THE RULES OF THE CHIEF ADMINISTRATOR**
[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ (“Client”),
and _____, Esq. (“Attorney”), agree that in the
event a dispute should arise as to the attorney’s fee for legal services, they will resolve the fee
dispute by arbitration pursuant to Part 137 of the Rules of the Chief Administrator of the Courts
(22 NYCRR), which provides for binding arbitration unless either party rejects the arbitration
award by commencing an action on the merits of the fee dispute in a court of law (trial *de novo*)
within 30 days after the arbitrator’s decision has been mailed.

By signing this agreement, attorney and client indicate that they have received and read the
official written instructions and procedures for both Part 137 and the Local Trial Court
_____. Attorney and Client understand that they are not required to sign this
agreement. Client understands that in the absence of this agreement, (s)he would have the right to
choose whether or not to participate in this program. This agreement does not foreclose the
parties’ attempting to resolve this fee dispute at any time through voluntary mediation.

ATTORNEY

CLIENT

(Please print names below signatures)

Dated: _____

(Office Use Only)
Date Received _____
Case Number: _____

**CONSENT TO SUBMIT FEE DISPUTE TO ARBITRATION PURSUANT TO
PART 137.2 (c) OF THE RULES OF THE CHIEF ADMINISTRATOR
AND TO WAIVE RIGHT TO TRIAL *DE NOVO***

[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ (“Client”),
and _____, Esq. (“Attorney”), agree that in the
event a dispute should arise as to the attorney’s fee for legal services, they will resolve the fee
dispute by arbitration conducted pursuant to Part 137 of the Rules of the Chief Administrator of
the Courts (22 NYCRR), except that they agree to be bound by the decision of the arbitrator(s)
and agree to waive their rights to reject the arbitrator(s) award by commencing an action on the
merits (trial *de novo*) in a court of law within 30 days after the arbitrator(s) decision has been
mailed.

By signing this agreement, attorney and client acknowledge that they have received and
read the official written instructions and procedures for Part 137 and the written instructions and
procedures for the _____
. Attorney and Client understand that they are not required to agree to waive their right to seek a
trial *de novo* under Part 137. This agreement does not foreclose the parties’ attempting to resolve
this fee dispute at any time through voluntary mediation.

ATTORNEY

CLIENT

(Please print names below signatures)

Dated: _____

(Office Use Only)	
Date Received	_____
Case Number:	_____

**CONSENT TO SUBMIT FEE DISPUTE TO MEDIATION PURSUANT TO
PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR**
[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ (“Client”),
and _____, Esq. (“Attorney”), agree to attempt
to resolve their fee dispute through mediation pursuant to Part 137 of the Rules of the Chief
Administrator of the Courts (22 NYCRR).

By signing this agreement, attorney and client acknowledge that they have received and
read the official written instructions and procedures for both Part 137 and the _____
_____. Attorney and Client understand that participation in
mediation does not waive any of their rights to arbitration under Part 137 in the event that
mediation does not result in a final settlement.

Attorney and Client further agree that all communications made during or in connection
with the mediation process are confidential and shall not be disclosed in any subsequent civil or
administrative proceeding, including any subsequent fee arbitration or trial de novo.

ATTORNEY

CLIENT

(Please print names below signatures)

Dated: _____

(Office Use Only)
Date Received: _____
Case Number: _____

**CONSENT TO FINAL AND BINDING ARBITRATION
IN AN ARBITRAL FORUM OUTSIDE PART 137
UNDER 137.2 (d) OF THE RULES OF THE CHIEF ADMINISTRATOR**
[The language below may be incorporated into a retainer agreement between the parties]

The parties to this agreement, _____ (“Client”), and _____, Esq. (“Attorney”), agree that in the event a dispute should arise as to the attorney’s fee for legal services, they will resolve the fee dispute by arbitration before an arbitral forum outside Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR), and that the arbitration shall be governed by the rules and procedures of that forum.

By signing this agreement, attorney and client acknowledge that they have received and read the official written instructions and procedures for both Part 137 and the _____, and the client has been advised: (1) that (s)he has the right to use the fee arbitration procedures of Part 137, and; (2) that (s)he is not required to agree to arbitrate this fee dispute in an arbitral forum outside Part 137. By signing this form, Attorney and Client agree to **waive their rights with regard to arbitration pursuant to Part 137, which includes the right to reject the arbitrator(s) award by commencing an action on the merits (trial de novo) in a court of law.**

ATTORNEY

CLIENT

(Please print names below signatures)

Dated: _____

Noteworthy Cases

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

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

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

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

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

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

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

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

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

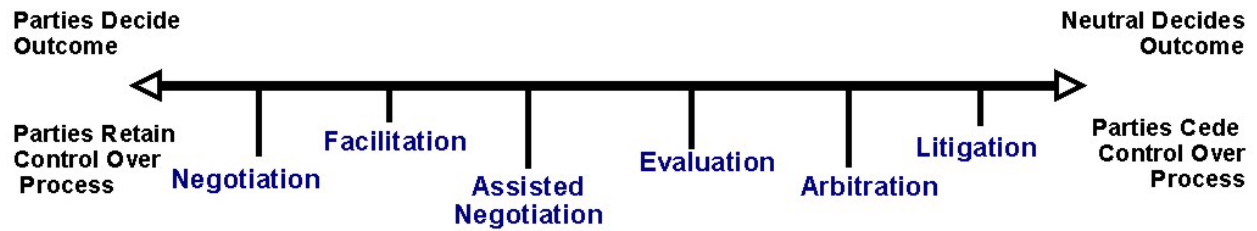
Attorney was precluded from recovering legal fees where attorney failed to provide client with either written retainer agreement or written letter of engagement.

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

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

Part Three: Introduction to the Arbitration Process

The Multi-Process Framework



What is Arbitration?

Arbitration is a private, adversarial dispute resolution process in which an impartial neutral (the arbitrator) or panel of arbitrators hears arguments, weighs evidence and issues a an award based on the merits after an expedited hearing. Arbitration can take any of the following forms:

- ▶ *Voluntary Arbitration*: A private adversarial dispute resolution process in which the disputing parties choose one or more arbitrators to hear their dispute in an expedited hearing and to render an award that is final and binding on the parties. Arbitration offers the benefits of briefer presentations, less formal procedures, and quicker dispositions than the parties would experience in litigation.
- ▶ *Compulsory Arbitration*: A non-binding, adversarial dispute resolution process that is identical to voluntary arbitration, except that the award is not binding on the parties may reject the award and pursue a trial *de novo*.
- ▶ *“Baseball” or “Final-Offer” Arbitration*: In this process, each party submits a proposed monetary award to the arbitrator, who chooses one of the proposed awards based on the merits of the presented case; the arbitrator does not modify the proposed award of the prevailing party. This technique limits the arbitrator’s discretion and encourages parties to propose reasonable awards.
- ▶ *“Night Baseball” Arbitration*: As with baseball arbitration, the parties propose monetary awards to the arbitrator; however, the arbitrator does not know the contents of the proposed awards. Rather, the arbitrator issues a separate monetary award and the proposed award that is closest to the amount in the arbitrator’s decision becomes binding on the parties.
- ▶ *“High-Low” Arbitration*: Prior to the arbitration hearing without informing the arbitrator, the parties establish a bounded range of awards. If the arbitrator’s award falls within that range, then the arbitrator’s award becomes binding on the parties; if the arbitrator’s award is outside the range, then the parties will be bound to whichever of their proposals is closest to the arbitrator’s award.

Characteristics of an Effective Arbitrator

- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____

Article 75 of the Civil Practice Law and Rules

ARBITRATION

- 7501. Effect of arbitration agreement.
- 7502. Applications to the court; venue; statutes of limitation; provisional remedies.
 - (a) Applications to the court; venue.
 - (b) Limitation of time.
 - (c) Provisional remedies.
- 7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate.
 - (a) Application to compel arbitration; stay of action.
 - (b) Application to stay arbitration.
 - (c) Notice of intention to arbitrate.
- 7504. Court appointment of arbitrator.
- 7505. Powers of arbitrator.
- 7506. Hearing.
 - (a) Oath of arbitrator.
 - (b) Time and place.
 - (c) Evidence.
 - (d) Representation by attorney.
 - (e) Determination by majority.
 - (f) Waiver.
- 7507. Award; form; time; delivery.
- 7508. Award by confession.
 - (a) When available.
 - (b) Time of award.
 - (c) Person or agency making award.
- 7509. Modification of award by arbitrator.
- 7510. Confirmation of award.
- 7511. Vacating or modifying award.
 - (a) When application made.
 - (b) Grounds for vacating.
 - (c) Grounds for modifying.
 - (d) Rehearing.
 - (e) Confirmation.
- 7512. Death or incompetency of a party.
- 7513. Fees and expenses.
- 7514. Judgment on an award.
 - (a) Entry.
 - (b) Judgment-roll.

S 7501. Effect of arbitration agreement. A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

S 7502. Applications to the court; venue; statutes of limitation; provisional remedies.

- (a) Applications to the court; venue. A special proceeding shall be

used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action.

(i) The proceeding shall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides or is doing business, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.

(ii) If there is no county in which the proceeding may be brought under paragraph (i) of this subdivision, the proceeding may be brought in any county.

(iii) Notwithstanding the entry of judgment, all subsequent applications shall be made by motion in the special proceeding or action in which the first application was made.

(iv) If an application to confirm an arbitration award made within the one year as provided by section seventy-five hundred ten of this article, or an application to vacate or modify an award made within the ninety days as provided by subdivision (a) of section seventy-five hundred eleven of this article, was denied or dismissed solely on the ground that it was made in the form of a motion captioned in an earlier special proceeding having reference to the arbitration instead of as a distinct special proceeding, the time in which to apply to confirm the award and the time in which to apply to vacate or modify the award may, notwithstanding that the applicable period of time has expired, be made at any time within ninety days after the effective date of this paragraph, and may be made in whatever form is appropriate (motion or special proceeding) pursuant to this subdivision.

(b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).

S 7503. Application to compel or stay arbitration; stay of action;

notice of intention to arbitrate. (a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period. Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void.

S 7504. Court appointment of arbitrator. If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.

S 7505. Powers of arbitrator. An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.

S 7506. Hearing. (a) Oath of arbitrator. Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy

faithfully and fairly by an officer authorized to administer an oath.

(b) Time and place. The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

(c) Evidence. The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.

(e) Determination by majority. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render an award.

(f) Waiver. Except as provided in subdivision (d), a requirement of this section may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection.

S 7507. Award; form; time; delivery. Except as provided in section 7508, the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him. The arbitrator shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested.

S 7508. Award by confession. (a) When available. An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement, verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.

(b) Time of award. The award may be made at any time within three months after the statement is verified.

(c) Person or agency making award. The award may be made by an arbitrator or by the agency or person named by the parties to designate the arbitrator.

S 7509. Modification of award by arbitrator. On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in

writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

S 7510. Confirmation of award. The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

S 7511. Vacating or modifying award. (a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

S 7512. Death or incompetency of a party. Where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

S 7513. Fees and expenses. Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

S 7514. Judgment on an award. (a) Entry. A judgment shall be entered upon the confirmation of an award.

(b) Judgment-roll. The judgment-roll consists of the original or a copy of the agreement and each written extension of time within which to make an award; the statement required by section 7508 where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections 7510 and 7511; and a copy of the judgment.

Part Four: Conducting the Arbitration Hearing

Pre-Hearing Review

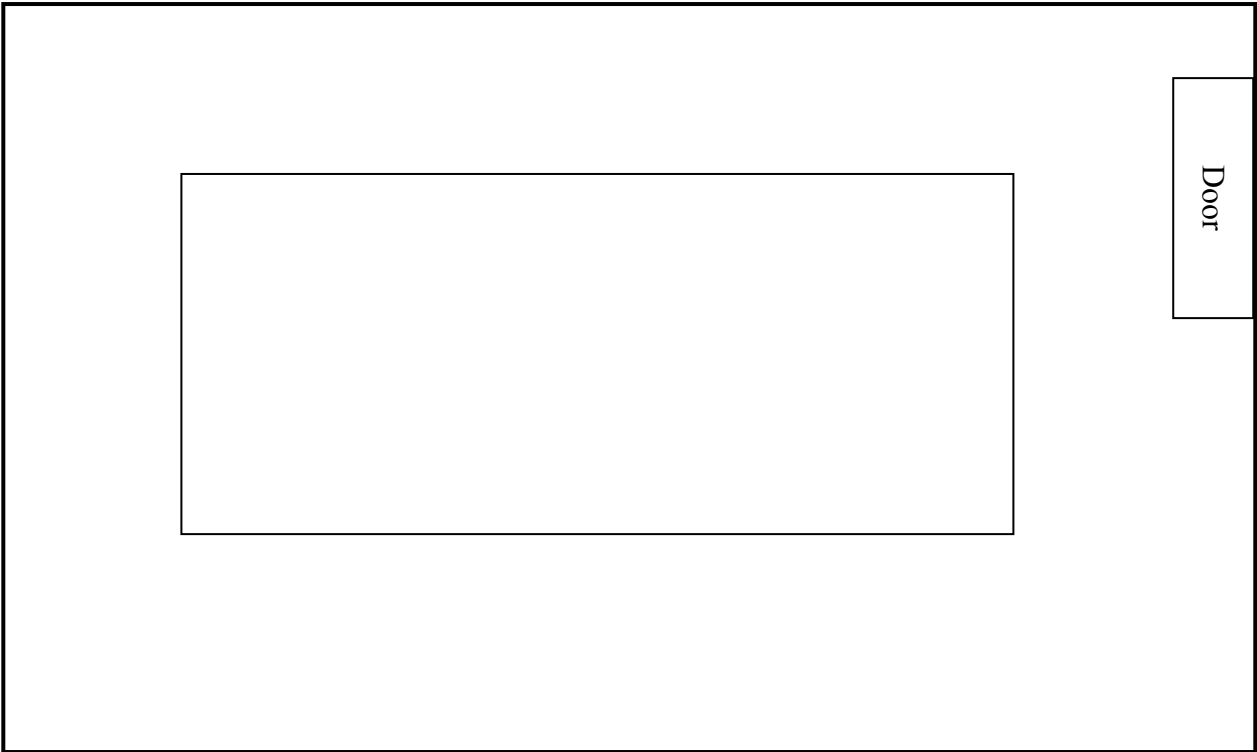
- Before the Hearing, review:
 - Part 137.7 (Arbitration Hearing)
 - Rules of the Local Program, as they relate to the arbitration hearing
 - Parties' Request for Arbitration and Response forms
 - Settlement and Award Templates
 - Part Four of this Manual (particularly, characteristics of an effective arbitrator)
 - Opening Statement

Housekeeping Issues

Hearing Room – Seating Arrangements

Where would you put the following participants in this conference room?

- Arbitrator(s)
- Attorney
- Client
- Client's spouse / partner
- Witness (Testifying)
- Witness (Not yet testifying)
- Stenographer
- Interpreter



Hearing Room – Meeting Parties’ Needs

Checklist of items parties might need

–Notepaper

–Pens / Pencils

–Access to Restrooms

–Water / Refreshments

–Calculator / Computer

–Telephone

Sequence of Arbitration Hearing

1. Arbitrator Opens the Session
2. Administer Oaths
3. Main Presentation by Attorney (to Justify Bill)
4. Client Questions Attorney on Attorney's Presentation
5. Main Presentation by Client
6. Attorney Questions Client on Client's Presentation
7. Attorney's Closing Remarks
8. Client's Closing Remarks
9. Conclude the Hearing & Thank Parties
10. Draft & Submit Award

Opening the Session

- Avoid *ex-parte* small-talk
 - Impropriety vs. the Appearance of Impropriety
- Introduce Arbitrator(s)
- Confirm Parties' Names
 - Are parties' names spelled correctly on forms?
- Discuss the Purpose of the Program
 - To encourage out-of-court resolution of fee disputes between attorneys and clients in fair, impartial and efficient programs established and administered by bar associations.
 - The program is not designed to resolve allegations of malpractice or professional misconduct.*
- Frame the Issue for the Arbitration: “The burden is on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history.”
 - There may be another, prerequisite issue that must be decided: the arbitrability of the fee dispute. For example, a client might claim that her attorney forged the client's signature on a Consent to Arbitrate form, in which case the arbitrator(s) must decide whether the dispute is properly in

* If the arbitrator becomes aware of evidence of professional misconduct, the arbitrator should notify the local program administrator, which will work with the arbitrator to notify the appropriate grievance committee of the Appellate Division.

arbitration.

- Offer Parties an Opportunity to Settle
 - The arbitrator(s) should not be present during any settlement discussions.
 - If the parties reach a settlement, the arbitrator may help the parties incorporate the terms of their settlement into a Stipulation of Settlement form.

- Advise Parties of Their Rights
 - Right to counsel
 - Right to call witnesses
 - Stenographic record
 - Right to subpoena documents and compel attendance of witnesses
 - Right to *de novo* review (unless waived)

- Discuss Evidence
 - Formal rules of evidence do not apply
 - Explain “preponderance of the evidence”

- Discuss Timelines for Issuing the Award
 - Award must be issued within 30 days after the date of the hearing.

Administering Oaths

- All witnesses—including the attorney and client—must swear or affirm that the evidence and testimony they present at the arbitration hearing is truthful.
- “Do you swear or affirm that the evidence and testimony you present in this hearing shall be the truth, the whole truth, and nothing but the truth?”
- What about the witness who refuses to swear or affirm?
 - If the witness refuses to swear or affirm because to do so would violate the tenets of his or her religion, the arbitration may proceed and the witness may offer testimony without taking an oath. A decision on this ground should not affect the arbitrator’s assessment of the witness’s credibility.
 - The arbitrator might want to advise the reluctant witness that the failure to offer evidence under oath could affect the arbitrator’s assessment of the credibility of the evidence.

Main Presentations

- Burden is on Attorney to prove that the fee is reasonable. There is no burden on Client to prove that fee was unreasonable.
- Attorney may use documentary evidence (e.g.,. billing statements, retainer agreement, letter of engagement correspondence to and from Client) and testimonial evidence (Attorney's verbal testimony or testimony of witnesses) to meet this burden.
- Client may use documentary evidence or testimonial evidence to challenge the reasonableness of the fee.
 - For example, after Attorney has presented billing statements showing that Client was charged \$125/hour for paralegal time, Client might introduce the retainer agreement, which shows that Attorney will bill Client at the rate of \$110/hour.

Questioning Following the Main Presentations

- Optional
- Either party may challenge the *relevance* or *reliability* of the other party's evidence
 - Questions of relevance will likely affect whether Attorney has introduced a sufficient amount of evidence to meet his or her burden:
 - “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
 - Questions of reliability will likely affect the Arbitrator's assessment of the credibility of the party whose evidence is challenged:
 - For example, if Attorney asserts that she properly billed Client for a phone conversation made to Client's office on a particular date, but Client then testifies that he could not have spoken with Attorney at that time on that date because Client was out-of-state on business and has receipts to prove it, the Arbitrator will likely deem the Attorney's evidence less credible as a result of Client's testimony.
- Arbitrator may—but need not—limit exclude questions that do not directly relate to documentary or testimonial evidence presented during the other party's main presentation.

Documentary Evidence

- Documents that will likely be introduced:
 - Letter of Engagement
 - Retainer Agreement (required for matrimonial actions)
 - Billing statements
 - Documents in support of billing statements, such as:
 - Phone logs
 - Travel receipts
 - Timesheets
 - Court filings, correspondence, and other documents prepared on behalf of Client
 - Transcripts of depositions or court proceedings
 - Correspondence challenging or confirming accuracy of billing statements
- Other documents that might appear
 - Affidavits from other attorneys that indicate:
 - The fee customarily charged in the locale for similar legal services
 - The experience, reputation and ability of the lawyer performing the services

- How documents and other exhibits are customarily offered into evidence
 - Proponent of the document or exhibit either:
 - presents it to a witness, who establishes what the document or exhibit is, or
 - explains to the arbitrator what evidence he or she is introducing
 - The other party is entitled to review the document or exhibit before it is accepted into evidence. Ideally, the proponent will have made a copy for the other party, or the other party will already have received a copy (e.g., billing statements).
 - Arbitrator addresses any raised objections (if any).
 - Arbitrator receives a copy of the evidence to review and mark with comments.
 - Proponent testifies about the document or exhibit.
 - Arbitrator should keep a list of all documents and exhibits admitted into evidence.
 - Practice tip: Use letters to denote one party's documents and numbers to denote the other party's documents.

Witnesses*

- Three types of Witnesses
 - Direct Witness
 - Offers relevant testimony
 - Testifies on the merits of the fee dispute
 - Character Witness
 - Testifies to “goodness” or “badness”
 - Seldom offers testimony on the merits of the fee dispute
 - Incompetent Witness
 - Fails to understand the consequences of not telling the truth
 - Fails to perceive issues in question
 - Unable to recollect incident / issues
 - Unable to communicate intelligently with Arbitrator or other parties
 - Incapacitated / under the influence
- Sequestering Witnesses
 - Not required / May be requested
 - Benefits
 - Won't hear prior testimony and attempt to tailor their testimony to conform or contradict what they heard

* Adapted from Stephen P. LaLonde, NYS GBL-198 Lemon Law Arbitration Program Training (2003).

- With fewer people in the room, the Arbitrator has greater control and can limit open debate, reactions, and potential confrontations.
 - Client's spouse or assisting family member should not be sequestered unless necessary.
- Characteristics that (Might) Affect a Witness's Credibility
 - Demeanor
 - Is the testimony credible/responsive/vague/clear?
 - Ability to communicate effectively on a topic
 - How much of an opportunity did the witness have to see/hear/know the point on which the witness testifies?
 - Is the testimony consistent/inconsistent with other evidence?
 - Extent (if any) of bias/prejudice/interest or other motive?
 - History/reputation for honesty (or lack thereof)
 - Existence/non-existence of a fact about which the witness testifies
 - Consistency or inconsistency during testimony
 - Attitude toward the case/process/or to giving testimony
 - Admission of untruthfulness
 - Memorized testimony
 - Lack of focus/rambling testimony
 - Use of histrionics

Burden of Proof

- Standards of Proof^{*}
 - A mere scintilla of evidence
 - Enough evidence to create a suspicion of the existence of a fact
 - Substantial evidence
 - More than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
 - Preponderance of the evidence
 - The trier of fact must believe that it is more probable that the fact is true or exists than it is that it is false or does not exist.
 - Clear and convincing evidence
 - The trier of fact must believe that it is highly probable that the facts are true or exist. It is not necessary to believe to the point of almost certainty, or beyond a reasonable doubt, or that the facts certainly are true or exist. However, it is insufficient to believe that it is merely more probable that the facts are true or exist than it is that they are false or do not exist.
 - Beyond a reasonable doubt
 - Proof beyond a reasonable doubt must be proof of such a convincing character that you would be

^{*} See <http://www.eli.pdx.edu/erc/handouts/proof.html>

willing to rely and act upon it unhesitatingly in the most important of your own affairs. A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the fact finder does not feel convinced to a moral certainty that a fact exists or is true.

- Burden of Proof in the Part 137 Program: Preponderance of the evidence. The Attorney must prove by a preponderance of the evidence that his or her fee is reasonable.
- DR 2-106: “A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with the definite and firm conviction that the fee is in excess of a reasonable fee.”
- Factors that affect reasonableness:
 - Time & labor required, as well as the novelty or difficulty of the issues involved in the representation
 - The likelihood that Attorney was precluded from other employment by agreeing to represent Client in the particular matter
 - The fee customarily charged in the locale for similar legal services
 - The amount involved and the results obtained
 - The time limitations imposed by Client or the circumstances
 - The nature and length of the professional relationship with Client
 - The experience, reputation and ability of the lawyer(s) performing the services

- Whether the fee is fixed or contingent
- The attorney/client relationship is both professional and contractual in nature. Arbitrators should be wary of adjusting an hourly fee or other agreed-upon fee—even when such a fee exceeds the average fee charged in the locale—where both Attorney and Client freely entered into an agreement for representation, unless the fee is so excessive that it is patently unreasonable or the client lacked capacity to freely enter into a binding agreement.
 - Arbitrators may adjust fees in light of other factors, such as inaccurate billing statements, failure to comply with certain disciplinary rules, etc.

Closing the Hearing

- Close the session after both parties have completed their presentations and each party has had an opportunity to challenge the other party's main presentation.
- Ask each party whether he or she has introduced all of the evidence and testimony that they wanted to in the case.
- Discuss the timeline for delivering the award.
 - The award must be issued no later than 30 days after the date of the hearing. The award will be in writing, and it will specify the reasons for the arbitrator's decision(s).
- Answer any questions parties might have about the finality of the award.
 - If parties waived the right to a trial *de novo*, the award is final and binding.
 - If parties did not waive the right to a trial *de novo*, the nonprevailing party may commence an action on the merits of the fee dispute in a court of competent jurisdiction (small claims or Supreme Court, depending on the amount) within 30 days after the award has been mailed. If the nonprevailing party does not commence an action within that timeframe, the arbitrator's award becomes final and binding.
- Post-Hearing Briefs or Post-Hearing Evidence
 - Two options:
 - Adjourn the hearing and reconvene at a later date to receive additional evidence

- Allow parties to submit post-hearing briefs and related evidence. (NB: copies of all briefs and supporting evidence should be served on both the arbitrator and other party).
 - Part 137 arbitrations should not generate
 - If parties request post-hearing briefs, and arbitrator allows for the submission of those briefs, the arbitrator should establish the procedures and timeline for submitting them.
 - The arbitrator should notify the local program administrator if there will be an additional hearing or if the parties will submit post-hearing briefs.

Deliberating

- Study and review:
 - Client's Request for Arbitration
 - Attorney's Response Form
 - Notes made during Attorney's and Client's presentations
 - Documents and/or exhibits admitted into evidence
 - The burden of proof

Preparing and Filing the Award

- Arbitration awards must be in writing, and they must specify the bases for the arbitration award.
 - *In the Matter of the Arbitration between McNamee, Lochner, Titus & Williams P.C. and Bethany M. Killeen*, (235 AD2d 17, 663 NYS2d 356 [3d Dept 1997]): Court held that an arbitration panel convened pursuant to Part 136 exceeded its authority by making an imperfectly executed award; the award did not contain any rationale for the panel's decision, and since there was no record of the arbitration hearing, the reviewing court could find no support for the panel's decision to relieve the client from paying the fee.
 - *In the Matter of the Arbitration between McNamee, Lochner, Titus & Williams P.C. and Bethany M. Killeen*, (267 AD2d 919, 920, 700 NYS2d 525, 527 [3d Dept 1999]): "A panel [reviewing] a fee dispute is not required to recite or expressly refer to the guiding criteria or to list its findings of fact for a reviewing court to be able to perform meaningful review and to discern that there is a basis in the evidence for the panel's determination, although such references are undoubtedly helpful."
- Arbitrators should follow local program rules regarding mailing the award.
 - In some programs, the arbitrator mails the award directly to the parties and sends a copy to the local program administrator.
 - In other programs, the arbitrator mails the award to the local program administrator, who sends copies of the award to the parties.

- General guidelines for stating reasons in an award:
 - When reciting reasons, the arbitrator(s) should:
 - Indicate whether Attorney met the burden based on the preponderance of the evidence and identify the reasons that support this conclusion; the arbitrator(s) should not indicate that Client failed to establish that the fee was unreasonable.
 - State that they have reviewed the parties’ testimony and documentary evidence.
 - Avoid pronouns.
- Try to have your statement of reasons fulfill these goals:
 - Keep it concise.
 - “Based upon my review of the evidence—including the attorney’s billing statements and the testimony of both the client and the attorney—I find that the attorney has proved by a preponderance of the evidence that the attorney’s fee of \$2,500.00 is reasonable.”
 - “Based upon my review of the evidence—including the client’s testimony and request for arbitration and the attorney’s written response to the request for arbitration—I find that the attorney has failed to prove by a preponderance of the evidence that the attorney’s fee is reasonable. Accordingly, the client is entitled to a refund of \$2,500.00”
 - “Based upon my review of the evidence—including the testimony of the attorney and the client as well as their retainer agreement—I find that the ambiguity in the

retainer agreement regarding the hourly fee for paralegal services should be construed against the drafter (*i.e.*, the attorney) and accordingly modify the attorney's fee from \$2,500.00 to \$2,250.00. Thus, the attorney has proved by a preponderance of the evidence that the modified fee of \$2,250.00 is reasonable.”

- If you modify the fee, explain the rationale that supports your calculation and show your calculation (e.g., “4 hours @ \$125 per hour = \$500.00”)

Part Five: Tips and Traps

Notes

- Arbitrators must find the appropriate balance between listening to the parties' cases and noting facts that the arbitrator will likely deem significant when deliberating and writing the award.
- If the parties agree to record the proceeding (stenographically or otherwise), the arbitrator(s) should still take notes (in case the record is destroyed).
- The arbitrator's notes are confidential and should not be disclosed to parties.
- Some arbitrators find it helpful to make an audio recording of the arbitration. This should be done with the express consent of all parties. Given the informal, brief nature of the fee-dispute resolution program, this is likely unnecessary.

Framing Questions

- Arbitrators may ask questions as needed. The questions should be used to clarify points raised by parties rather than explore possible terrain that the parties have not (yet) covered. It is often good practice for the arbitrator to postpone questions until a witness has concluded his or her testimony or until prior to the parties' summaries.
- Types of questions:
 - Open-ended (encourages free flow of information and often elicits longer, more complex answers)
 - “Why do you believe the billing statement is inaccurate?”
 - Narrow (encourages free flow of information but elicits more limited information that is confined to a more definite topic)
 - “What time did you call the client on the 14th?”
 - Closed (discourages free flow of information and often results in yes/no responses)
 - “Did you sign the retainer agreement?”
 - Leading (discourages free flow of information and suggests the answer that the questioner expects to receive)
 - “You mailed the client a letter of engagement, right?”
- Strategic use of questioning can serve several purposes:
 - Use of narrow, closed and leading questions can “cut off” a witness whose testimony is wandering, long-winded or repetitive.

- A combination of closed- and open-ended questions can help a reticent witness “find his or her voice.”
- Beware unintended consequences of questioning:
 - Overuse of leading questions can compromise the appearance of impartiality.
 - Reliance on open-ended questions can unnecessarily prolong the hearing.

Objections

- Arbitrators have authority to accept or reject offered evidence. Arbitrators need neither know nor follow formal rules of evidence. Nevertheless, parties might object to testimony or documentary evidence based on principles enshrined in formal rules of evidence.
- Process of objecting:
 - Attorney or Client (or Client’s attorney) states the objection
 - Arbitrator should immediately stop the witness from testifying
 - Objecting party states the basis for the objection.
 - Arbitrator should offer the non-objecting party an opportunity to respond to the objection.
 - The arbitrator should rule on the objection.
 - Sustain—Accept the objection and refuse to admit the testimony or document into evidence.
 - Overrule—Reject the objection and admit the testimony or document into evidence.
 - In response to repeated objections on the same point, arbitrator may say, “I’ve made my ruling, now it’s time to move on.”
- Types of Objections that might arise to exclude evidence* :
 - **Irrelevant evidence.** If the evidence has no probative value or weight, the arbitrator may exclude the evidence.

* Adapted from: http://www.adrinstitute.org/basics_2.htm#objections. Note that blanket statements of inadmissibility typically relate to formal rules of evidence and need not be followed in arbitration.

- **Privileged communication.** Privileged information consists of a communication between persons having a confidential relationship. A valid objection based on privilege bars the communication from being disclosed. Common privileges include: attorney/client, doctor/ patient, spousal communications, and trade/business secrets. Note that with the attorney/client privilege, the privilege “belongs to” the client and the client may waive that privilege. Also, note that under the Disciplinary Rules for Attorneys (DR 4-101 [C][4]), “A lawyer may reveal [c]onfidences or secrets necessary to establish or collect the lawyer’s fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.”
- **Lack of personal knowledge.** A witness should have personal, first-hand knowledge to be able to testify. This knowledge is usually based on what the witness saw, did or heard.
- **Improper opinions.** Lay witnesses may give opinions and conclusions if these statements are based on the perception of the witness and are helpful to a clear understanding of a fact in the case. An expert may give an opinion regarding a matter not of common knowledge if based on scientific, technical or specialized knowledge.
- **Lack of foundation for documents and other exhibits.** There must be sufficient evidence to support a conclusion that the document or exhibit is what the witness says it is. The amount of information necessary to lay a proper foundation depends on the exhibit.
- **Inaccurate or incomplete documents.** The original of a document or a duplicate original is usually preferred to prove the contents of that writing unless it is lost or unavailable. It is best for a party to introduce the original or an identical copy that is authentic to avoid any problems with the admissibility of the document.
- **Hearsay.** Hearsay occurs when a witness repeats a statement which was made prior to and outside of the hearing. Hearsay may or may not be reliable evidence. Hearsay which accurately and completely states what another party has said is usually reliable. Hearsay which is gossip is usually unreliable. The problem with hearsay and why it may be untrustworthy is because the person who made the statement is not testifying, or it may not be clear what that person meant, or it may not be possible to cross-examine the person who made the statement to determine what was said and what was meant.
- **DIRECT EXAMINATION OBJECTIONS.** Objections to direct examination questions might include:
 - **Leading.** Leading questions are questions that suggest the answer. The problem with a leading question is that the examiner is testifying instead of the witness. Usually a leading question is one that can be answered by a “yes” or “no” or a

specific one or two word answer contained in the question. Leading questions are permitted in some situations to assist the witness, and are permitted on cross-examination.

- **Non-responsive.** A witness who rambles or volunteers information may be prevented from testifying until the examiner asks a question regarding such information.
- **Cumulative.** The arbitrator has discretion to control the amount of evidence introduced and may preclude unnecessary, cumulative evidence.
- **CROSS-EXAMINATION OBJECTIONS.** Objections to cross-examination questions might include:
 - **Vague, ambiguous, misleading or confusing.** A question must be reasonable, clear, and specific so the witness knows what is being asked.
 - **Multiple or compound questions.** A witness may only be asked one question at a time.
 - **Repetitious questions.** If a question has been asked and answered, similar questions may be objected to as being repetitious and unnecessary.
 - **Argumentative.** A question that is essentially an argument is improper. A question may be argumentative if the cross-examiner tries to argue with the witness or if the tone or content of the question is harassing.

Settlement Discussions

- Arbitrators should offer parties an opportunity to discuss settlement *before* Attorney makes his or her main presentation.
 - Arbitrators should not coerce parties into settlement talks, but it is appropriate to advise parties of the uncertainty of having a neutral third party impose a solution upon them and the general preference for parties achieving their own resolution.
 - ALL settlement discussions should occur outside of the presence of the arbitrator(s).
 - If the parties achieve a settlement, the arbitrator may help the parties draw up the terms of their settlement on the Stipulation of Settlement form. Only those terms of settlement that relate to the attorney's fee should be included in the Stipulation of Settlement form.
- Once Client has exercised the right of final reply and the case has been submitted to the arbitrator(s), the arbitrator(s) must issue an award (in favor of either Attorney or Client).