Part 137
Attorney – Client Fee Dispute Resolution Program

Arbitrator Training Manual

Part One: PowerPoint Presentation Screenshots 1

Part Two: Introduction to the Arbitration Process 17

What is Arbitration? 18

Characteristics of an Effective Arbitrator 19

Article 75 of the Civil Practice Law and Rules 20

Part Three: Conducting the Arbitration Hearing 27

Pre-Hearing Review 27

Housekeeping Issues 28

Sequence of Arbitration Hearing 30

Opening the Session 31

Administering Oaths 33

Main Presentations 34

Questioning by Parties Following the Main Presentations 35

Documentary Evidence 36

Witnesses 38

Burden of Proof 40

Closing the Hearing 43

Deliberating 45

Preparing and Filing the Award 56

Part Four: Tips and Traps 59

Notes 59

Framing Questions 60

Objections 62

Settlement Discussions 65

Appendices: Applicable Rules, Correspondence from the Board of Governors, Local Program Guidelines & Forms, and Noteworthy Cases 67

Rules of the Chief Administrator of the Courts Part 137 Fee Dispute Resolution Program 67

Correspondence from the Board of Governors 76

Standards and Guidelines of the Part 137 Program 79

Noteworthy Cases 89

Letters of Engagement 92

Procedures for Attorneys in Domestic Relations Matters 93

Attorney Grievance Committees 101

Rules and Procedures of the Local Program 103

Model Forms 114

Part One: PowerPoint Presentation Screenshots

Slide 1

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

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Slide 2

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**

Slide 3

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

Slide 4

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

Slide 5

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.

Slide 6

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.

Slide 7

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.

Slide 8

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.

Slide 9

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.

Slide 10

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.

Slide 11

Fees to Use the Program

- The Suffolk County Bar Association charges the filing party a $150 fee to use the program.

Slide 12

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 to submit their fee dispute to final and binding arbitration.

Slide 13

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.

Slide 14

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.

Slide 15

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.

Slide 16

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.

Slide 17

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.

Slide 18

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.

Slide 19

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.

Slide 20

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.

Slide 21

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 Eleventh Judicial District Administrative Judge's Office does not offer mediation at this time.
  - 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.

Slide 22

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).

Slide 23

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.

Slide 24

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.

Slide 25

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.

Slide 26

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.

Slide 27

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.

Slide 28

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.

Slide 29

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.

Slide 30

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

Slide 31

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.

Slide 32

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.

Slide 33

The Arbitration Hearing: The Award

- 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.

Slide 34

The Arbitration Hearing: Burden of Proof

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

Slide 35

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."

Slide 36

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.

Slide 37

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.

Slide 38

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.

Slide 39

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])

Slide 40

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.

Slide 41

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.

Slide 42

Legal Issues
Failure to Comply

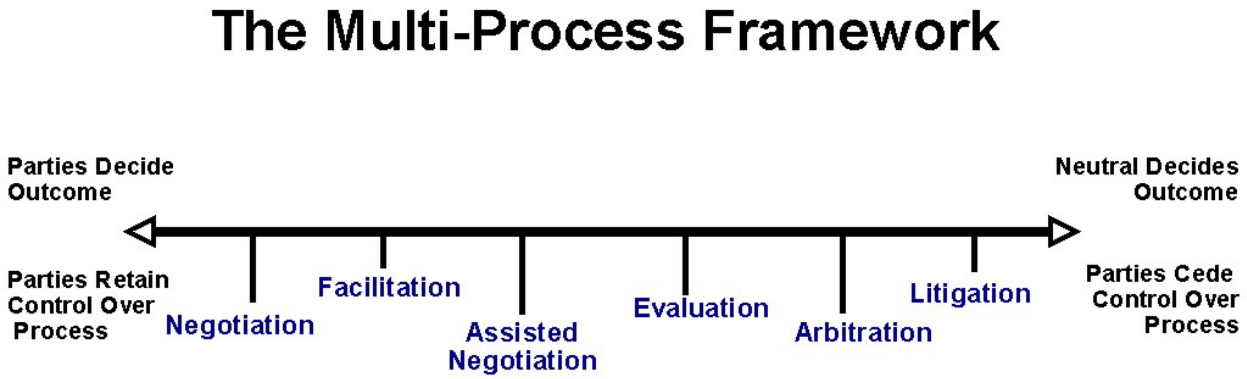
- What happens if the attorney doesn't comply with court rules governing attorney conduct?
  - Arbitrators do not have to follow the law, but they cannot ignore it.

Slide 43

Part 137 Program

- Website: www.nycourts.gov/admin/feedispute
- Telephone: 1-877-FEES-137
- E-mail: feedispute@courts.state.ny.us

Part Two: Introduction to the Arbitration Process



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 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, who 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

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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.

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Part Three: Conducting the Arbitration Hearing

Pre-Hearing Review

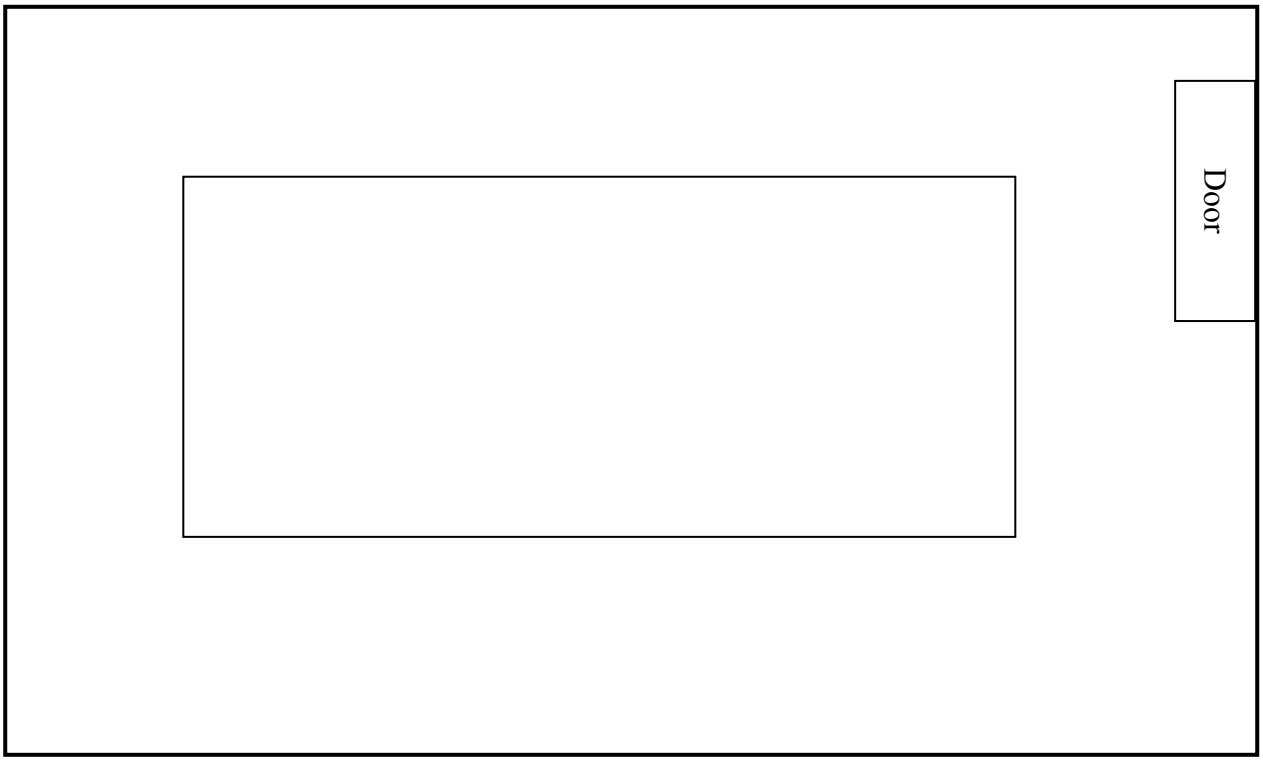
- Before the Hearing, review:
    - Part 137.7 (Arbitration Hearing) [p. 73]
    - Rules of the Local Program, as they relate to the arbitration hearing [p 102]
    - Parties' Request for Arbitration and Response forms [pp 121 - 124]
    - Settlement and Award Templates [pp 130-131]
    - Part Two of this Manual (particularly, characteristics of an effective arbitrator)
    - Opening Statement [p 31]

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

<u>Checklist of items parties might need</u>

- *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 and local offices of the Office of Court Administration.
    - 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.
- CPLR § 2309(b): An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs.
- "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 by Parties 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 or 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 <u>after the award has been mailed</u>. 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 post-hearing briefs.

- 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

From:

Arbitration in Practice (Arnold M. Zack, ed., ILR Press, 1984)

11
Weighing the Decision

Arnold M. Zack

THE DECISION-MAKING process is a very personal one, and this is an analysis of how *I* decide cases. But I suspect that arbitrators all go through a similar process in reaching the bottom line in a case. Decision making is much like a continuum, paralleling your participation in the case from the time you are first appointed as arbitrator until you complete the writing of the decision.

The first knowledge most of us have of a case comes at the start of the hearing. We may get a demand for arbitration, which briefly states the issue, or a letter from either or both of the parties listing a grievance number or the title of the case, or a telephone call from one of the parties informing us that they want us to hear a case. One of the reassuring traditions in this business is that clients purposely avoid giving arbitrators more than the minimum amount of information. They respect the practice of avoiding ex parte exchanges and recognize that the arbitrator might become uncomfortable or seek to be excused from the case for allowing too much input from one side.

As a result, you have very little information about a case before the hearing. But at that time, information comes at you fast and furious: each little bit of information becomes a prejudice that may be quickly supplanted by a new piece of information as the case proceeds. Let me give you a few examples.

You walk into the hearing room and observe counsel for one side sitting with a stack of law books in front of him and

two people at his side, while the other party has a large group of workers present and little or no paraphernalia. This may send a message that the company is weak on the facts and strong on the law; or that its case, based on the contract, is weak and it is going to try and rely on external law; or that the workers are solidly behind the grievant and will testify to back up his or her version of what has occurred.

Suppose you find the grievant alone with his or her own attorney, without the usual coterie of union officers who traditionally attend arbitration hearings. Does that convey a subtle message that the union is permitting the case to proceed only because the grievant insists on it or threatens to sue if the case is not processed? Does it mean that the union would rather have no part of this case or that it may in fact be a weak case?

What does it mean if you find the two presenters out in the hall, walking back and forth between the two camps? Does that mean a settlement is imminent? Or that the employer is willing to resolve the case because its position is weaker? Or that the union is trying to salvage what it can of its demand to avoid having the grievant lose the case and get nothing?

First impressions may well be misleading, but they tend to create a mind-set on the part of the arbitrator, which, while it may be overcome by subsequent events, creates a threshold of expectation.

Evaluating Testimony

Unless the parties have agreed in advance on the issue to be arbitrated, the first real exchange with the parties is probably in the discussion surrounding framing of the issue. While arbitrators are supposed to decide cases based on testimony presented at the hearing, on the evidence, and on the arguments of the presenters, I suspect we are all influenced by a visceral reaction to the parties' first presentation of the issue in dispute. If the issue is proposed as, Was Jones properly terminated for coming to work five minutes late?, then the company had better show why it took such drastic action for tardiness. But if the issue is proposed as, Was Jones properly terminated for stealing three hundred pounds of copper tubing?, the prejudice might lie the other way. I will be waiting to see how the grievant is going to get out of this one.

Even in a contractual interpretation case, the framing of the issue may instill some initial prejudice in the arbitrator. The question, Did the company violate the parties' agreement by subcontracting the building of its new warehouse? leads me in a different direction if the company is small than if it is a large construction firm. I suspect we are all vulnerable to a ripple of prejudice in reaction to the framing of the issue.

The response to the proposed issue also raises some problems. Rapid agreement to a routinely or fairly phrased issue creates no problems. But, if the question is loaded—Was the three-week suspension, for just cause in light of the grievant's insubordinate behavior?—and both sides rapidly agree to it, then I must ask myself whether this is some kind of a setup. The answer to that may lie in the experience of the spokespersons. Are they knowledgeable and sophisticated, or is one side particularly naïve? If so, should I intervene or stay out of the matter? These responses may reveal some paranoia on my part. But the mind does have reactions to such stimuli, and our thinking may be affected until later in the presentation.

Indeed, all these concerns may be wiped out by the next step in the proceedings, the opening statements of the spokespersons. Obviously, the spokespersons want to make the best possible impression on the arbitrator by presenting the most favorable facts and perhaps omitting others that are less favorable. This tilt can also be accomplished by the use of carefully selected language. One party might tell you, "The grievant then entered the room and threatened his supervisor by starting to jab at his face," while the other side reports, "The grievant then answered the foreman's demand that he come into the room and raised his finger to emphasize that he thought the foreman should not harass him." Which one is lying? Which one is telling the truth? Or does the real truth lie somewhere in between? With these initial recitations, however, you do recognize that the parties know that examination and cross-examination of the witnesses will provide a more exact description of what happened. In some cases, however, where the dispute occurred without outside witnesses, you also recognize that the case must be resolved on the basis of credibility of the two participants.

Likewise, in the recitation of relevant contract provisions in

the opening statements, the employer points out that its contracting out of the disputed work is authorized by the management rights clause. You read that section and find that it supports the employer's position. So, you say to yourself, "What will the union come up with to overcome that?" Then the union calls your attention to language from another contract provision that specifically prohibits subcontracting certain work, which sounds like the work in dispute. Then you think, "Aha! the company obviously knew about that clause, so this work must be of a differnet type—or there is a contrary past practice."

So it goes, throughout the framing of the issue and the presentation of opening statements. Indeed, this skepticism continues through the actual presentation of witnesses and evidence and on into the final arguments. You have to keep up a subliminal guard to defend against accepting any position too quickly. Eventually, this may blossom into cynicism about what the parties are trying to present to you. Remember, though, that the biased presentations are part of the spokespersons' obligation as partisans and advocates. You have the superior responsibility to be critical enough about such presentations that you are ultimately convinced that one side should prevail and that the argument of the other side, although its view was presented equally well or perhaps even better, is not of equal merit or not as persuasive or not in conformity with the requirements of the parties' contract.

Questioning by the Arbitrator

In trying to fulfill this responsibility, you may be tempted to plunge into the parties' exchange to raise certain questions that have not been asked, to extract information that has been omitted or avoided, and to place the need for knowing the truth above and beyond the parties' responsibilities in presenting their cases. Such intervention not only disrupts the parties' priorities in presenting their cases, it may reveal skeletons that both wished to keep closeted. Or, one side might view your participation as being too active, believing that the other party and not the arbitrator should cross-examine witnesses.

The arbitrator should not, however, play dead. He or she

will naturally have questions, perhaps even vital questions that might turn the case around. But you should sit on these questions, making notes, until the parties have finished their examination and cross-examination of a witness. Many of the questions you have noted will be answered by the time the parties have finished. At the end of the questioning, review any remaining questions and ask yourself, "Why wasn't that question asked? What would happen if I asked it now?" If you believe you really need the answer, you should ask the question, for the arbitrator must be satisfied that he or she has all the information necessary to make the determination of the case.

Other questions that do not deal with the testimony of the present witness arise. The arbitrator should also sit on these, even until the end of the hearing. By then, some of your questions about contract language, about the testimony of witnesses, may be irrelevant. They may look very naïve, in which case you will be glad you did not ask them earlier.

Arbitrators are always concerned about whether they should ask questions. Maybe the questions should have been asked by opposing counsel. Maybe asking them at the end of the hearing will appear to be helping the weaker side or embarrass one advocate in front of his or her clients. There will certainly be fewer loose strands if the parties are represented by accomplished spokespersons. But there may still be issues that the arbitrator believes need to be clarified in order to fulfill his or her obligation to the parties. It does get tricky trying to decide what questions should be asked and what issues the parties are trying to avoid, such as, What happened to the other employee who was caught falsifying his time card along with the grievant?

The most dramatic of situations in which the neutral must decide whether to intervene is in the case of the nonlawyer who is up against a sophisticated attorney and who is being effectively railroaded. The parties are obviously obligated to defend their own cases, and their choices of spokespersons are part of their strategies. So here too, the arbitrator should ask only those questions necessary for the opinion and be careful not to rattle skeletons in either party's closet.

Throughout the questioning of witnesses, the most useful question to ask yourself is whether a response was reasonable.

What would you have done in that situation? Does what transpired make sense? Could it, in fact, have occurred? Certainly, some implausible situations come to light in arbitrations, but the standard of reasonableness usually prevails and helps resolve conflicts of testimony and fact.

Caveats for Discipline Cases

In discipline cases, you may be presented with the grievant's prior record. Although guilt in prior instances does not constitute guilt in the offense before you, arbitrators may tend to view a grievant with a prior history of insubordination as less credible in the instant case. But there is also the possibility that the supervisor is contriving an incident that, because of the past record, will be more readily believed than it would with the grievant who had a clear past record. It is also possible that higher level management is trying hard to rid itself of the person, even if the facts of a particular case do not clearly indicate that there was insubordination. You must be on your guard in such cases, even against the union who wants to get rid of a bad apple because of problems caused them in the past.

Even though both parties and the arbitrator adhere to the precepts of progressive discipline, the problem of deciding the case may also be exacerbated when the final offense follows a long period of good behavior or when the grievant is a long service employee. There is little difficulty in reaching a decision when the grievant is a two-year employee and has four or five instances of insubordination within that time. But what if the grievant is a twenty-year employee who had a clear record until his wife died and then amassed four instances of insubordination within eight months? Or, what if the employee is a ten-year employee who had four instances of insubordination in the first two years and who was warned that he would be fired if it happened again, and the next insubordination occurred ten years later?

The problem in deciding such cases goes beyond the question of guilt or innocence in the incident leading to the arbitration. The question is the appropriate penalty for such infractions in light of the grievant's record. You react differently to the size of the penalty. Even aside from such capital offenses as

theft, punching a foreman while at work, and smoking in a dynamite factory, you will still question the appropriateness of the penalty for the offense. Does it conform to progressive discipline? Will it impress upon the employee his or her need to reform behavior? Is the grievant indeed incorrigible? What effect will it have on other employees in a similar situation? What will it do to the company's system of discipline in the plant?

Arbitrators are influenced by the grievant's appearance. I remember a case in which the witness, accused of theft in a factory, was wearing a gold Rolex watch at the hearing. This glaring inconsistency with his position as a factory worker was so subject to an incorrect interpretation that I found myself fantasizing scenarios by which he might have obtained such a watch legitimately. I even asked him what time it was, so I could get a better look and make sure it was a Rolex.

Similarly, we tend to judge on the basis of facial expressions or manner. In one case, a second grade teacher was described by her spokesperson as having been intimidated by her supervisor and as having broken down in tears at a conference about an adverse evaluation. I developed a mental image of this person as a shy wallflower. Yet she was one of the most belligerent witnesses I have ever heard, arguing with her spokesperson, the other side's spokesperson, and even with the arbitrator. She really changed my perception.

The same problem may arise when a grievant does not testify, such as in a theft case. The arbitrator wonders why he was not called, what he would say if he did testify, whether he was not called because he was such a bungler, or whether he would be so strident that he would belie all the wonderful things his union had said about him. Arbitrators are probably prejudiced against grievants who fail to take the stand in their own defense, since it would be reasonable to have such persons testify and there is bound to be some question as to why they did not.

Final Presentations

After the parties have completed their presentations of evidence and witnesses and the hearing has been closed, the arbi-

trator is left to wrestle with the decision. If he or she is anything like me, the arbitrator had started to lean one way, then the production of a particular document changed that view, then the production of a rebuttal document changed it back, and so on. This pendulum swings throughout the hearing until the parties conclude the presentation of their cases. By that time, the arbitrator often has a pretty good idea of the outcome of the case and the reasoning process that will lead to it. I would suggest that in 60 or 70 percent of cases, the arbitrator has made up his or her mind by the time the last witness testifies. As a result, the arbitrator may feel little need for the oral arguments or written briefs the parties often provide. Nonetheless, he or she should not bypass the arguments, but take advantage of this additional opportunity to reinforce the parties' positions and his or her reasoning. It is also important to review the arguments raised by the party who seems to be losing the case.

In the remaining 30 or 40 percent of cases, the arbitrator's mind may not be made up. In such cases, the closing arguments or briefs are essential. There is a tendency for the spokespersons who have presented the case to welcome the respite (or perhaps the fee building) that comes with the opportunity to file a posthearing brief a few weeks later, after they have reviewed their notes or the transcript of the hearing and have developed a logical recitation of why their side should win the case.

I prefer oral final argument for several reasons. First, I want to review the argument of counsel while it is fresh in my mind and I can readily recall the testimony. Second, it is possible that such a review may reveal that I missed some crucial evidence during the hearing itself, or that there are additional questions I would like to ask. Perhaps some element of the case that I thought insignificant is now being relied on as crucial to the case. Third, I want to be sure that the parties have been exposed to and had an opportunity to respond to the arguments raised by the other side. Frequently, when the briefs are filed simultaneously with no provision for reply briefs, there is inadequate rejoinder to the argument anticipated from the other side. I seek to avoid the situation of the company relying on article 2 of the contract and the union relying on article 3 in

their briefs and neither anticipating the argument of the other. If this confrontation occurred during oral argument, it could be dealt with easily. Finally, I believe the process of oral argument facilitates the arbitrator's earlier writing and issuing of a decision without the additional delays and costs caused by the filing of briefs and the arbitrator's need to refresh the memory of a case heard long ago.

I do not preclude briefs if either party really wants to file them, nor do I preclude the raising of additional arguments in their briefs; nor do I insist on oral argument if neither party wants to provide it. In a recent case, after the company made its closing argument, the union spokesperson leaned forward and said, "That is very persuasive. I believe your interpretation is correct. We drop that portion of our claim." There are also cases where the parties agree, after closing argument, to settle the matter, which, after all is the goal of the process. Oral arguments often lead to a joint conclusion not to file briefs, since both sides believe that they have summarized their cases effectively and that the arbitrator understands the issue.

What happens next?

The natural response after the hearing is, "Thank goodness this day is over! I have all the information I need and I will write the opinion." But then, due to the press of personal matters or other business or to laziness, the case is put at the bottom of the pile. Naturally, if briefs are to be filed or you are waiting for a transcript, there is added incentive to tell yourself, "Well, there is nothing I can do now." But even when the awaited materials come in, it is still tempting to put off writing the decision. Perhaps the intervening time has dulled your recollection of the case. That can make the task of writing the decision even more onerous than it seemed at the end of the hearing. But the most insidious effect of delays in cases in which briefs are filed is that the arbitrator tends to rely upon the biased statements of the facts related in the parties' briefs.

The preferable route, and the one which requires the most discipline, is the immediate writing of the opinion on the evening of the hearing or the next day, before the curve of memory loss has taken its toll. The facts, the testimony, the nonverbal responses of the witnesses are fresh in mind, and you are still wrestling with the arguments raised by the parties. The

greatest benefit from immediate writing of the opinion is the economy of time; it is more efficient to write up something while it is fresh in your mind, before your notes become stale and without meaning and you forget some unnoted matter that occurred at the hearing.

I do not recommend sending out the decision immediately after writing it. A subsequent objective review of the decision may disclose another opinion, or part of the opinion may not be phrased exactly the way you would like it to be. If there are no briefs coming, write up the whole case subject to further editing. If briefs are to be filed, write up the facts and an outline of the parties' arguments. Once that is done, you can write an outline of your opinion in a very short time. When the briefs come in, the overwhelming arguments of counsel may change your opinion, but the likelihood is that your initial judgment will not be changed. It is thus advisable to write up your own view of the case before you have forgotten it. You can always change what you have written, but you cannot recapture the alertness of response and thought that you have immediately after the hearing.

If you have to rely on a transcript, it is not much different from writing up someone else's arbitration hearing. As for those few cases where your mind is not made up by the conclusion of the hearing, the writing itself may be a stimulus toward reaching your decision in the case.

Weighing the Choices

What I have described is largely what I do. But two articles on the decision process seem particularly apt, probably because they support my prejudices. The first is the fourth lecture by Benjamin Cardozo on the nature of the legal process, delivered at Yale Law School in 1921, in which he observes, "Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotion and habits and convictions which make the man, whether he be litigant or judge" (1921, p. 67). I strongly recommend the volume because it underscores the fact that the judge is really very little different from any reasonable man in reaching conclusions on the evidence presented to him.

A similar view is presented by a former teacher at Yale Law School, Jerome Frank, in his book *Law and the Modern Mind.*

> The process of judging, so the psychologists tell us, seldom begins with a premise from which a solution is subsequently worked out. Judging rather begins the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot to his satisfaction find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary, or mad, reject the conclusion and seek another. . . . Judicial judgments, like other judgments, doubtless in most cases are worked out backwards from conclusions tentatively formed. . . . The vital motivating impulse for the decision is an intuitive sense of what is right and what is wrong in a particular case (1949, pp. 100–101).

Thus, when you are deciding a case, intuition comes first and will prevail if borne out by the evidence and the testimony. But there are times when this visceral reaction is outweighed by reality, for instance, by a specific contract provision. Perhaps the parties have negotiated something that you know without thinking is wrong, unfair, nonsensical, not what you would have ordained in the absence of a contract. But arbitrators are creatures of the contract and are bound by it. If the parties have negotiated a clause covering the situation, then the arbitrator must support it.

There are cases where the arbitrator is faced with a choice between adhering to that strict construction or doing what he or she thinks is better for the parties. Obviously, there are cases that fall on the razor's edge, where the contract language is clear but there is a contrary past practice. There, the arbitrator may feel compelled to bring the parties back into compliance with the agreement or may believe that equity dictates a different result and rely on the past practice.

Arbitrators have an obligation to adhere to the terms of the parties' agreement. They negotiated it expecting to comply with it, and it is only right that if they are expected to live up to its terms for the length of the contract, any disputes resolved by an outside arbitrator should be decided in the manner that does the least violence to their agreement and their expectancies. To do otherwise places a premium on grieving and resort to arbitration to secure a result other than that which was negotiated.

Having said that, let us turn to the situation where there is no clear contract language, such as in discipline and discharge cases, to guide the arbitrator. The universal standard is just cause, but there is little guidance in interpreting precisely what just cause is. Other cases within the enterprise, other arbitrators' awards, and the standard of progressive discipline may aid you in reaching your final determination of whether the offense in a particular case was deserving of penalty, and, if so, how much. Your subjective lending of credibility to the employer's disciplinary standards must be weighed against justice for the individual and the chance to rehabilitate. These are troublesome cases, the just resolutions to which continue to be evasive.

Elements of the Opinion

Several problems arise in thinking out the opinion and decision: arbitrability, contract interpretation, precedents, and legal constraints and remedy.

On the issue of arbitrability, I should emphasize that arbitrators prefer to decide cases on their merits because a problem exists, and it should be resolved and the substantive issue put to rest. Arbitrability issues are impediments to such issues being resolved on their merits. Yet, we are limited to the contract terms the parties have negotiated. We are bound by the procedural limitations as well as by the substantive limitations they have imposed on each other. We cannot and should not ignore the rights of the party that invokes arbitrability. To do so erodes the parties' regard, not only for the negotiating process, but for the arbitration process as well. The preference for hearing cases on their merits is what has placed the burden of proving that a case is *not* arbitrable on the challenging party, usually the employer.

Arbitrators are faced with two types of arbitrability challenges, those involving substantive authority (the jurisdiction to continue arbitrating) and those involving procedural arbitrability (conformity to the negotiated procedures in the contract for taking cases to arbitration).

On substantive issues of arbitrability, the arbitrator has no right to decide a case if the contract does not give him or her

jurisdiction to do so. If the contract says that the arbitrator shall not decide the issue that is the subject of the grievance, that should bar the arbitration. The party challenging substantive arbitrability may do so at any time. In disputes over whether the contract permits arbitration of an issue the parties may agree to give the arbitrator jurisdiction to decide that subject, but unless they have ceded to an arbitrator jurisdiction in substantive arbitrability, they may go to court to overturn the arbitrator who asserts jurisdiction where the contract denies it. As arbitrator Harry Shulman stated in his famous Holmes Lectures at Harvard Law School, "An arbitrator worthy of appointment in the first place, must conscientiously respect the limits imposed on his jurisdiction, for otherwise, he will not only betray his trust, but also undermine his own future usefulness, and therefore endanger the very system of self-government in which he works" (1956, p. 180).

Procedural arbitrability does not challenge the arbitrator's right to hear a particular case. Rather, it challenges whether the contract provisions have been adhered to in the steps leading to arbitration. The arbitrator is the final authority in deciding matters of procedural arbitrability. Although the arbitrator will be careful not to assume jurisdiction where the contract bars the hearing of a particular kind of case, as in substantive arbitrability cases, he or she will probably try to find a case arbitrable on procedural grounds unless the parties have been strict in their adherence to procedural restrictions in processing cases. Thus, the arbitrator may rely on the parties' casual adherence to time limits to find that a one- or two-day delay in processing a particular case does not make it nonarbitrable. Or if certain requirements, such as signatures or contract citations, have not been strictly relied on in the past, the arbitrator may excuse such an omission in the instant case. Strict adherence to time limits and signatures and citing contract clauses in the past, however, may mandate adherence in the instant case, and the arbitrator may conclude that the case is not arbitrable. The arbitrator must require adherence to *all* contract provisions, not merely those he or she finds convenient or appealing.

The issue of compliance with the parties' contract constitutes the thrust of most contract interpretation issues. There are frequently conflicting or fuzzy contract terms on which the

parties disagree as to the interpretation or application. The arbitrator may have to weigh the arguments about which language applies or resolve ambiguities in the language. What was the intent of the parties? Was there a mutual desire to achieve a particular end? Does their negotiating history show any meeting of the minds? Sometimes there is no credible negotiating history, and you may have to resolve ambiguity by reference only to the agreement. Even here, there are standards to assist you, such as controlling language adopted in a later contract, or specific terms controlling over general terms, or the list of a number of items that presumes deliberate exclusion of any others (inclusio unis, exclusio alterius).

The arbitrator faced with these choices will make the determination he or she believes most appropriate to the situation, an equitable result, and the one that conforms most closely to what the parties would have negotiated had they anticipated this problem. As Justice Douglas in the U.S. Supreme Court decision in *Warrior & Gulf,* said of arbitrators, "The parties expect that his judgment of a particular grievance will reflect not only what the contract says, but insofar as the agreement permits, such factors as the effect on productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished," 363 U.S. 574 (1960).

I suspect that one of the reasons the parties opt for the more senior arbitrators, those who have more experience in the field of labor relations, is that such arbitrators understand what happens in the late hours of negotiating sessions. They are familiar with how words get put into a contract, and they know what weight is to be given to what is agreed upon and how the parties expect reliance on those standards in later cases. As Shulman noted, "No matter how much time is allowed for the negotiation there is never time enough to think every issue through in all its possible applications, and never ingenuity enough to anticipate all that does later show up. Since the parties earnestly strive to complete an agreement, there is almost irresistible pressure to find a verbal formula which is acceptable, even though its meaning to the two sides may in fact differ" (1956, p. 175). Shulman believed that all parts of the agreement do not necessarily make a consistent pattern, but the

interpretation that is most compatible with the agreement as a whole is to be preferred over one that creates an anomaly.

When there is little guidance from the negotiating history or from the agreement, the guidance may come from the opinions of other arbitrators. While the decisions of other arbitrators dealing with other parties are not binding on your case, they may provide some guidance as to how other arbitrators have decided similar cases. Because no arbitration case is identical to one coming before it in another installation and under another collective bargaining agreement, you have to be careful not to buy the argument of counsel that another case involving two other parties is determinative of the case before you—it is not. It is *your* decision that will be determinative. Although it is worthwhile to read such cited decisions to learn how other arbitrators have approached such a problem, remember that only a fraction of all awards issued are published, and an unusual one is more likely to be published than a routine decision that lacks pizazz. If you seek guidance, I suggest looking into the earlier volumes of the publishing services (before 1960), which will reveal the reasoning of the giants of the field, rather than reading decisions by less experienced arbitrators. One of the ways to achieve standing is to decide cases by your own reasoning, rather than to borrow from someone else who may have done a less-than-accurate survey of published precedents in the field.

A different rule of thumb applies to prior arbitration decisions issued under the same agreement under which you are working. Such precedents are not necessarily binding on you, but if the parties have submitted the issue to another arbitrator, it makes sense to concur with that decision if it is one you can live with. The consequence of issuing a different award is that the parties will seek a third case to test before a third arbitrator, which will reinforce either your decision or the earlier one, and so on. I recommend endorsement of the previous decision, which leaves it to the parties to negotiate any changes in their next collective bargaining negotiations. Try to deter them from arbitrator shopping and make a small contribution to the stability of the parties' relationship.

The awards must necessarily set precedents for recurring cases and the opinions must necessarily provide guidance for the future in

relating decision to reason and to more or less mutually accepted principle. Consistency is not a lawyer's creation. It is a normal urge and a normal expectation. It is part of the ideal of equality of treatment. The lawyer's contribution, indeed, is his differentiation of rational, civilized consistency from apparent consistency. Let me give you an example. In many appeals from disciplinary penalties imposed by the employer, I heard the union argue earnestly that the penalty should be reduced because of the employee's long service record. I was persuaded and held that the employee's seniority should be considered in fixing the size of the penalty. Then came a case in which two employees committed the same offense at the same time and one was given a larger penalty than the other. The union protested the larger penalty as being an obvious impairment of the principles of equality. This was not necessarily conscious opportunism, although there is always a good deal of that. A period of education was required to effect the realization, not only by the advocates, but by the rank and file that the equality for which they themselves contended in the area of discipline necessitated different penalties for the same offense whenever factors other than the offense itself were considered" (Shulman 1956, p. 195).

A word should be said here about the issue of legal restraints on the arbitrator. For many years arbitrators basked in the light of the Steelworkers Trilogy, with little concern about what the courts might do to their awards. Certainly there were some reversals, in cases where the arbitrator exceeded jurisdiction or did not draw the essence of a decision from the terms of the parties' contract. It was a golden era. That lasted until the courts, in fulfilling their obligation to protect individual statutory rights, such as those under the Civil Rights Act of 1964 or ERISA or OSHA or FLSA, held that arbitration awards rendered as part of a collective scheme of negotiations cannot deprive individuals of any statutory rights they might have, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). Since that time, there has continued to be little interference with arbitrators' awards, but there is growing concern that the arbitration award is less likely to be final and binding than contemplated by unions and management.

Some arbitrators, more concerned about this prospect than others, seek to forestall reversal by incorporating into their opinions consideration of the statutory issues that may arise. My personal view is that watching over your shoulder is a futility; that the arbitrator seldom, if ever, gets full information from counsel as to what the law requires; that the courts still

retain the right of review of an arbitrator's opinion; and that in so doing, the arbitrator may be unnecessarily sacrificing what he or she believes to be the correct decision under the parties' contract. My practice has been to confine myself to the interpretation and application of the contract, noting that if my decision is not in conformity with the existing law, that is a concern for a different forum. The alternative is that the arbitrator may deny a grievance based on an improper interpretation of the law, only to have the court say subsequently that while the arbitrator may have been wrong, the parties had agreed that the decision would be final and binding, and thus dismiss the appeal.

The final consideration is remedy. What if the grievance is sustained in whole or in part? What should the remedy be? The arbitrator is usually deprived of any influence on this subject by the employer, who fears that discussion of any possibility of remedy will be viewed as an acknowledgment that it does not believe its case to be very strong on the merits. Thus, the arbitrator is in the dark as to how to fashion the remedy. Some arbitrators retain jurisdiction on the issue of remedy, postponing any decision and leaving it up to the parties to decide. I feel uncomfortable doing that, forcing the losing party back before the same arbitrator. My practice is to formulate the general standards of a remedy I believe is appropriate and then to sign the decision without retaining jurisdiction. That way the parties are free to come back to me if they wish, which happens on occasion, or they may go to another arbitrator with what is, in effect, a new dispute.

Arbitrators do not have the authority to create remedies not called for in the agreement or the right to impose punitive damages. In this area, too, the arbitrator may temper his decision according to what he heard at the hearing, what he has determined concerning culpability and the potential for rehabilitation, and what he believes to be an equitable result. The standard I follow in fabricating a remedy is to try to place the individual in the position he or she would have been in had the employer not violated the parties' agreement.

Many of these issues involved in thinking out the opinion do not surface until the actual writing is in progress. Because it is the act of writing that helps many arbitrators to assemble

their facts and work out the logic of their opinions, the writing itself is not always easy or quick. It may make painfully obvious one's errors in thinking and may even cause a complete revision of the opinion with an opposite conclusion. But write we must, and as Shulman warns, "... the greater danger to be guarded against is that too much will be said rather than too little" (1956, p. 195).

12

Past Practice and the Administration of Collective Bargaining Agreements

Richard Mittenthal

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ARCHIBALD COX has suggested that before "a rationale of grievance arbitration can be developed, more work must be done in identifying and analyzing the standards that shape arbitral opinions" (1959, p. 46). This chapter is a product of Cox's suggestion. It examines in depth one of the more important standards upon which so many of our decisions are based—past practice.

Custom and practice profoundly influence every area of human activity. Protocol guides the relations among states; etiquette affects an individual's social behavior; habit governs most of our daily actions; and mores help to determine our laws. It is hardly surprising, therefore, to find that past practice in an industrial plant plays a significant role in the administration of the collective agreement. Justice Douglas of the United States Supreme Court stated that "the labor arbitrator's source

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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 Four: 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. Te 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 the 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. O**bjections 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).

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Appendices:
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.

New York State
Attorney - Client Fee Dispute Resolution Program
Board of Governors

25 Beaver Street, 8th Floor ● New York, NY 10004 ● Tel (212) 428-2863
http://www.nycourts.gov/admin/feedispute ● dweitz@courts.state.ny.us ● Fax (212) 428-2696

March 10, 2004

TO: Local Program Administrators

FROM: Board of Governors

SUBJECT: Use of Court Attorneys and Court Staff as Arbitrators and Mediators

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Court attorneys, court officers and other court staff have repeatedly expressed interest in serving as Part 137 arbitrators and mediators. The Board of Governors has concluded that there is no blanket legal or ethical bar against court employees serving in that capacity.

However, because of the possibility of case-by-case ethical concerns, it is important that court employees conduct a conflict of interest check upon being assigned to serve as arbitrators or mediators. For example, there may be appearances of conflict if a trial de novo or Article 75 proceeding is likely to be commenced in the same court in which the court employee is employed, giving the appearance that the arbitrator's award may receive greater weight than it normally would receive. (There also may be questions of fairness if court employees are designated to be arbitrators in areas where there is a ready pool of attorneys willing to serve.)

Thus, as a general presumption, court employees may serve as Part 137 arbitrators and mediators, unless such service would carry an appearance of or an actual conflict of interest or impropriety, including the possibility that a trial de novo or Article 75 proceeding is likely to come before a judge to whom the employee reports, the existence of a personal bias regarding a party or the subject matter of the dispute, a financial interest in the subject matter of the dispute, or a personal or financial relationship with a party to the dispute. Finally, service as a Part 137 neutral should be performed on the employee's own time.

cc: District Administrative Judges
Bar Association Presidents
Bar Association Executive Directors
Michael Colodner, Esq.

New York State
Attorney - Client Fee Dispute Resolution Program
Board of Governors

25 Beaver Street, 8th Floor ● New York, NY 10004 ● Tel (212) 428-2863
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June 29, 2004

To: LOCAL PROGRAM ADMINISTRATORS

From: GUY JAMES MANGANO
CHAIR, BOARD OF GOVERNORS
NEW YORK STATE ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM

Subject: ARBITRATION OF DOMESTIC RELATIONS FEE DISPUTES WHERE THERE IS NO WRITTEN RETAINER AGREEMENT

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

The Board of Governors has received inquiries as to whether local Part 137 programs should reject or accept for arbitration fee disputes in domestic relations matters in which the attorney did not provide the client with a written retainer agreement as required by the matrimonial rules. Upon consultation with the Administrative Board of the Courts, the Board of Governors has concluded that local programs should exercise jurisdiction over these fee disputes. However, it is important that arbitrators be made aware of the case law in their department as it relates to the attorney's right to recover legal fees where the attorney has failed to provide a written retainer agreement as required in domestic relations matters.

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

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

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

Local programs should ensure that arbitrators are aware of the case law in their Department by providing them with a copy of this memorandum. Likewise, local programs should also ensure that arbitrators are aware of their obligation to report noncompliance with DR 2-106 of the Lawyer's Code of Professional Responsibility to attorney disciplinary authorities.

Please do not hesitate to contact the Board of Governors at (212) 428-2863 should you have any questions regarding this issue.

cc: District Administrative Judges
Bar Association Executive Directors
Michael Colodner, Esq.

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

Noteworthy Cases

Bartning v Bartning, **:** 16 A.D.3d 249, 791 N.Y.S.2d 541 [App Div 1st Dept 2005]

The Appellate Division applied the rule that an account stated exists where a party to a contract receives bills or invoices and does not protest them within a reasonable time. The Appellate Division held that the trial court should have granted the attorney's request to fix his fee and impose a lien, and that lower court should also have refrained from imposing its own determination of the reasonable value of the attorney's services in lieu of the amount actually billed, to which the client failed to object in a timely manner.

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

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

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

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

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

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

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

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

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

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

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."

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.

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

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

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.

Borgus v Marianetti, 7 Misc.3d 1003(A), 801 N.Y.S.2d 230 [Rochester City Ct 2005] (Unpublished)

The City Court Judge held that it is not jurisdictionally fatal for a party who is aggrieved by a Part 137 arbitration decision to initiate de novo judicial review merely by filing a document titled, "Demand for a Trial De Novo," even where neither party files a Summons, a Complaint, an Answer, a Note of Issue, or a Certificate of Readiness.

Mahl v Rand, 11 Misc.3d 1072(A), 2006 N.Y. Slip Op. 50518(U) [NYC Civ. Ct., NY County, 2006] (Unpublished)

> *Within 30 days of receiving the arbitrator's award following a Part 137 arbitration, the client unsuccessfully sought to commence a trial de novo in the New York City Civil Court. After the 30-day period ran, the attorney commenced an action to confirm the arbitrator's award, which the client opposed. The court found that the client "demonstrated timely concrete and confirmed efforts to obtain the judicial trial de novo" but received inadequate guidance from the courts on how to commence a trial de novo. Accordingly, the court denied the request to confirm the arbitrator's award, deemed the client's opposition to confirmation a cross-petition to vacate the arbitrator's award, which the court granted, and—with the client's permission—allowed the action to continue as a trial de novo.*

Newkirk v Fourmen Construction Inc., 11 Misc.3d 1082(A), 2006 N.Y. Slip Op. 50655(U) [Sup. Ct., Westchester County, 2006] (Unpublished)

> *Attorney is not entitled to recover legal fees from the client for costs associated with enforcing a charging lien or seeking to recover fees.*

Letters of Engagement

Joint Order Of The Appellate Divisions

The Appellate Divisions of the Supreme Court, pursuant to the authority invested in them, do hereby add, effective March 4, 2002, Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," as follows:

Part 1215 Written Letter of Engagement
§1215.1 Requirements

1. Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.
2. The letter of engagement shall address the following matters:
    1. Explanation of the scope of the legal services to be provided;
    2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.
3. Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§1215.2 Exceptions
This section shall not apply to:

1. representation of a client where the fee to be charged is expected to be less than $3000,
2. representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or
3. representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR), or
4. representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

Procedures for Attorneys in Domestic Relations Matters

22 NYCRR Part 1400

Table of Sections

Sec.

1400.1 Application
1400.2 Statement of Client's Rights and Responsibilities
1400.3 Written Retainer Agreement
1400.4 Nonrefundable Retainer Fee.
1400.5 Security Interests.
1400.6 [Deleted].
1400.7 Fee Arbitration.

Appendix A. Statement of Client's Rights and Responsibilities
Appendix B. Statement of Client's Rights and Responsibilities
[To Be Used Only When Representation is Without Fee]

§ 1400.1 Application

This Part shall apply to all attorneys who, on or after November 30, 1993, undertake to represent a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where the client is other than a minor, the provisions of section 1400.2 shall apply to the extent they are not applicable to compensation.

§ 1400.2 Statement of Client's Rights and Responsibilities

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

Statement of Client's Rights and Responsibilities

Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or custom. To help prevent any misunderstanding between you and your attorney, please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled, do not hesitate to ask your attorney. He or she should be readily available to represent your best interests and keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that are revealed in the course of the relationship.

You are entitled to a written retainer statement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract.

You may refuse to enter into any fee arrangement that you find unsatisfactory.

Your attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained.

Your attorney may not request a retainer fee that is nonrefundable. That is, should you discharge your attorney, or should your attorney withdraw from the case, before the retainer is used up, he or she is entitled to paid commensurate with the work performed on your case and any expenses, but must return the balance of the retainer to you. However, your attorney may enter into a minimum fee arrangement with you that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

You are entitled to know the approximate number of attorneys and other legal staff members who will be working on your case at any given time and what you will be charged for the services of each.

At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case, which estimate shall be made in good faith but may be subject to change due to facts and circumstances affecting the case.

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

You are expected to review the itemized bills sent by counsel, and to raise any objections or errors in a timely manner. Time spent in discussion or explanation of bills will not be charged to you.

You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

You have the right to be present in court at the time that conferences are held.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

Your attorney's written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. If an action or proceeding is pending, the court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment.

You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to cover legal fees. Your attorney's written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney's security interest in the marital residence cannot be foreclosed against you.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

In the event of a fee dispute, you may have the right to seek arbitration. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:

Attorney's signature

Client's signature

Date

§ 1400.3 Written Retainer Agreement

An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth. Where substitution of counsel occurs after the filing of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution. A copy of a signed amendment shall be filed within 15 days of signing. The agreement shall be subject to the provisions governing confidentiality contained in Domestic Relations Law, section 235(1). The agreement shall contain the following information:

Retainer Agreement

1. Names and addresses of the parties entering into the agreement;

2. Nature of the services to be rendered;

3. Amount of the advance retainer, if any, and what it is intended to cover;

4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer, the written retainer agreement shall provide how the attorney fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client;

5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;

6. How the attorney will be paid through the conclusion of the case after the retainer is depleted; whether the client may be asked to pay another lump sum;

7. Hourly rate of each person whose time may be charged to the client; any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original statement, which must be signed by the client before it may take effect.

8. Any clause providing for a fee in addition to the agreed-upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.

9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received;

10. Client's right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case.

11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary.

12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court.

13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration, which is binding upon both attorney and client; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

§ 1400.4 Nonrefundable Retainer Fee

An attorney shall not enter into an agreement for, charge or collect a nonrefundable retainer fee from a client. An attorney may enter into a "minimum fee" arrangement with a client that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

§ 1400.5 Security Interests

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

(1) the retainer agreement provides that a security interest may be sought;

(2) notice of an application for the a security interest has been given to the other spouse; and

(3) the court grants approval for the security interest after submission of an application for counsel fees.

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

§ 1400.6 [Deleted]

§ 1400.7 Fee Arbitration

In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration, which shall be binding upon both attorney and client and subject to review under CPLR Article 75, pursuant to a fee arbitration program established and operated by the Chief Administrator of the Courts and subject to the approval of the justices of the Appellate Divisions.

Appendix A. Statement of Client's Rights and Responsibilities

Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or custom. To help prevent any misunderstanding between you and your attorney, please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled, do not hesitate to ask your attorney. He or she should be readily available to represent your best interests and keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that are revealed in the course of the relationship.

You are entitled to a written retainer statement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract.

You may refuse to enter into any fee arrangement that you find unsatisfactory.

Your attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained.

Your attorney may not request a retainer fee that is nonrefundable. That is, should you discharge your attorney, or should your attorney withdraw from the case, before the retainer is used up, he or she is entitled to paid commensurate with the work performed on your case and any expenses, but must return the balance of the retainer to you. However, your attorney may enter into a minimum fee arrangement with you that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

You are entitled to know the approximate number of attorneys and other legal staff members who will be working on your case at any given time and what you will be charged for the services of each.

You are entitled to know in advance how you will be asked to pay legal fees and expenses, and how the retainer, if any, will be spent.

At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case, which estimate shall be made in good faith but may be subject to change due to facts and circumstances affecting the case.

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

You are expected to review the itemized bills sent by counsel, and to raise any objections or errors in a timely manner. Time spent in discussion or explanation of bills will not be charged to you.

You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

You have the right to be present in court at the time that conferences are held.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

Your attorney's written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. If an action or proceeding is pending, the court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment.

You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to cover legal fees. Your attorney's written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney's security interest in the marital residence cannot be foreclosed against you.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

In the event of a fee dispute, you may have the right to seek arbitration. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:

Attorney's signature Client's signature

Date

Appendix B. Statement of Client's Rights and Responsibilities
[To Be Used Only When Representation is Without Fee]

Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or custom. To help prevent any misunderstanding between you and your attorney, please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled, do not hesitate to ask your attorney. He or she should be readily available to represent your best interests and keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that are revealed in the course of the relationship.

You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

You have the right to be present in court at the time that conferences are held.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

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If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

Receipt Acknowledged:

Attorney’s signature Client’s signature

Date

Attorney Grievance Committees[6]

If you have a complaint against an attorney, you may contact the Attorney Disciplinary / Grievance Committee. The place you contact depends upon the location of your lawyer's office. Please note that the New York State Unified Court System **does not** have jurisdiction to investigate complaints concerning representation by attorneys.

Area of Practice:

- **First Department Disciplinary Committee**
  - New York & Bronx Counties
    Departmental Disciplinary Committee for the First Department
    61 Broadway, 2nd Floor
    New York, NY 10006
    (212) 401-0800

- **Second Department Grievance Committees**
  - Kings, Queens & Richmond Counties
    Grievance Committee for the Second and Eleventh Judicial Districts
    Renaissance Plaza
    335 Adams Street, Suite 2400
    Brooklyn, NY 11201-3745
    (718) 923-6300

  - Dutchess, Orange, Putnam, Rockland & Westchester Counties
    Grievance Committee for the Ninth Judicial District
    399 Knollwood Road, Suite 200
    White Plains, NY 10603
    (914) 949-4540

  - Nassau & Suffolk Counties
    Grievance Committee for the Tenth Judicial District
    150 Motor Parkway, Suite 102
    Hauppauge, NY 11788
    (631) 231-3775

- **3rd Department Committee on Professional Standards**
  - Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren & Washington Counties
    Committee on Professional Standards
    40 Steuben Street
    Albany, NY 12207
    (518) 474-8816

[6] Reprinted from www.nycourts.gov/ip/attorneygrievance/complaints.shtml

- **Fourth Department Disciplinary Committees**
  - Herkimer, Jefferson, Lewis, Oneida, Onondaga & Oswego Counties
    Grievance Committee for the Fifth Judicial District
    Syracuse Square
    224 Harrison Street, Suite 408
    Syracuse, NY 13202-3066

    (315) 471-1835

  - Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne & Yates Counties
    Grievance Committee for the Seventh Judicial District
    Attorney Grievance Committee
    50 East Avenue, Suite 404
    Rochester, NY 14604-2206
    (585) 530-3180
    Fax: (585) 530-3191

  - Allegany, Cattaraugus, Chautauqua, Erie, Genessee, Niagara, Orleans & Wyoming Counties
    Grievance Committee for the Eighth Judicial District
    Ellicott Square Building
    295 Main Street, Suite 1036
    Buffalo, NY 14203-2560
    (716) 858-1190

Suffolk County Bar Association

Dispute Resolution Program Rules

Suffolk County Bar Association
560 Wheeler Road
Hauppauge, New York 11788-4357
(631) 234-5511

Section 1 Establishment of Program

This program is established 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 and the Standards and Guidelines approved as of October 3rd, 2001.

Section 2 Definitions

The following definitions will apply throughout these rules, except as otherwise provided:

A. "Program" means the Suffolk County Bar Association Dispute Resolution Program established pursuant to Part 137 of the Rules of the Chief Administrator

B. "Client" means a person or entity receiving legal services or advice from a lawyer on a fee basis in the lawyer's professional capacity

C. "Administrator" means the person primarily responsible for administration of the Program as designated by the Suffolk County Bar Association

D. "SCBA" means the Suffolk County Bar Association

E. "Arbitrator" means a person who serves as an arbitrator under the Program

F. "Case" means any case or controversy cognizable under the Program where the amount in dispute is at least in the sum of $1,000.00

G. "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

H. "Fee Dispute" means the committee appointed by the Suffolk County Bar Association Board of Directors which oversees the Dispute Resolution Program and make decisions concerning administration of the Program.

Section 3 Application

These rules 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 a civil matter, where the majority of legal services are performed in Suffolk County or where the attorney maintains an office for the practice of law in Suffolk County.

These rules shall not apply to any of the following:

1. representation in criminal matters;

2. amounts in dispute involving a sum of less than $1,000.00 or more than $50,000.00, except that an arbitral body may hear disputes involving other amounts if the parties have consented in writing;

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; and

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.

Section 4 **Arbitrators**

Applicants for membership as an Attorney Arbitrator must meet or exceed the following requirements:

A. Minimum of five (5) years of admission to the Bar

B. Member in good standing of the Suffolk County Bar Association or other recognized bar groups

C. Ability to evaluate and apply legal principles

D. Ability to manage the hearing process

E. Minimum of six (6) hours of fee dispute resolution training or comparable training and experience in arbitration and/or other forms of dispute resolution

F. Other relevant experience or accomplishments

G. Freedom from bias and prejudice

H. Thorough and impartial evaluation of testimony and other evidence

I. Willingness to devote time and effort when selected to serve

J. Willingness to successfully complete training under the guidelines of the Program

Applicants for membership as a Non-Attorney Arbitrator must meet or exceed requirements E through J above.

All training of arbitrators will be provided by the New York State Office of Court Administration at its sole cost and expense, or by the Suffolk County

Bar Association, or other recognized dispute resolution programs approved by the board.

Arbitrators will serve on a voluntary basis, without financial compensation.

Section 5 Initiating the Arbitration

The Submission Process

Client:
A client with a fee dispute starts the process by filing a request for dispute resolution with the Administrator of the Program together with the required filing fee of $150.00 *see Financial Hardship Policy. Forms can be obtained by calling the Administrator at 631/234-5511, extension 222, by obtaining the form in person at the Suffolk County Bar Association, located at 560 Wheeler Road, Hauppauge, New York 11788-4357 or by requesting said form by facsimile transmission to the administrator (631/234-5899) or by e-mail to the administrator at www.SCBA@SCBA.ORG between the hours of 9:00 a.m. and 5:00 p.m., Monday to Friday.

Attorney:
An attorney starts the process by sending a Notice of Right to Arbitrate and required forms to the client. If there is a prior written agreement to arbitrate, the initiating party shall submit a copy to the Administrator with their request to arbitrate. If the client fails to then file a request to arbitrate within 30 days, the attorney who's written agreement provides for such dispute resolution may file the request to arbitrate. An attorney is required to send by regular mail and certified mail return receipt requested a notice of right to arbitrate with appropriate forms upon initiated of any dispute involving fees between client and attorney, and/or prior to commencement of any civil action for collection of fees.

A party may make application to the Administrator to have the filing fee waived, based upon limited financial resources which make the filing fee a financial burden or would prevent said client from utilizing this resolution program. The request must be made in writing to the Administrator who will have the discretion to grant or deny the request. Should the arbitration result in a finding in favor of the client for whom the fee was waived, the waived filing fee will be deducted from such award, and paid directly by the attorney to the Association, after deduction from said award.

The request for arbitration must contain the name and address of the parties along with the telephone numbers of the parties to be contacted, and a brief description of the claim and the amount involved.

Upon receipt of the request for arbitration, the Administrator will 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 Administrator within 15 days of mailing. The attorney will include with the attorney fee response, a copy of retainer or letter of engagement, if any, and an affidavit that a copy of the response was served on the client.

Upon receipt of the attorney fee response, or if no response is received within 15 days of mailing of the attorney fee response form to the attorney, the Administrator will endeavor to appoint an arbitrator or arbitrators to the case with experience in the subject matter of the representation. Arbitrators will be assigned from a panel of neutrals who have qualified to act as arbitrators in fee dispute matters. Disputes involving a sum of less than $6,000.00, but more than $1,000.00, will be submitted to one attorney arbitrator. Disputes involving a sum of $6,000.00 or more, but less than $50,000.00 (unless by agreement of the parties), will be submitted to a panel of three arbitrators, which will include one non-lawyer, unless otherwise provided for in writing.

When a party and attorney are notified of the appointment of the arbitrator(s), any conflict of interest shall promptly be disclosed in writing but not less than five (5) days prior to the scheduled hearing.

Upon receipt of a case, the Administrator will notify the parties of a date, time, and place for the hearing, which notice will be at least fifteen (15) days prior to the scheduled date, with the identity of the arbitrator or arbitrators. All arbitrations will be held at the offices of one of the arbitrators or at the Suffolk County Bar Association.

Section 6 **Powers of arbitrator and conduct of the hearing**

An arbitrator has the following powers:

A. Issue subpoenas and administer oaths

B. Take and hear evidence pertaining to the proceeding

C. Rules of Evidence need not be observed at the hearing and either party, at his or her expense, may be represented by counsel. Representation by counsel must be disclosed on filing form or response

D. Arbitrator(s) may adjourn or postpone the hearing

The burden will 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 must present his or her account of the service rendered and time expended. Witnesses may be called by the parties. Participation may be by written statement sworn to under penalties of perjury. The client will have the right of final reply.

Any party may provide for stenographic or other record at the party's expense, providing that the panel is given duplicate copy at time of hearing upon request by the panel. Any other party to the arbitration will be entitled to a copy of said record, upon written request and payment of the expense for such record.

The arbitration awards will be issued to the parties no later than thirty (30) days after the completion of the hearing. Arbitration awards will be in writing and specify the basis for the determination. Except as set forth herein, all arbitration awards will be final and binding, unless a *trial de novo* is commenced under the Rules within the time set forth therein.

Neither the Associations, nor the Committee, its Chair or members, Administrator, Arbitrator and staff person acting under these Rules, shall be a necessary party in any judicial proceeding relating to any arbitration conducted in accordance with these Rules. None of the parties listed in the preceding sentence shall be liable for any act or omission relating to any dispute in connection with any arbitration conducted under these Rules. Without limiting the scope of the preceding two sentences, it is intended that the Committee, its Chair and its members, and any Arbitrator acting under these Rules have the same immunity as a judicial officer of body would have in a court proceeding. The parties to any arbitration held under these Rules will be deemed to have conferred the immunity described above.

The hearing will be conducted by either the sole or all of the arbitrators in case of a controversy in excess of $6,000.00, but a majority may determine any question and render an award.

Section 7 <u>Trial de novo</u>

A party aggrieved by the arbitration award may, unless there is a written agreement to the contrary, commence an action on the merits of its fee dispute (a *trial de novo*) in a court with jurisdiction over the amount in dispute, within thirty (30) days after the arbitration award has been mailed. If no action is commenced within thirty (30) days of the mailing of the arbitration award, the award shall become final and binding. Upon

filing of a demand for *trial de novo*, the aggrieved party shall also mail a copy of the demands to the Administrator and other side.

Any party who does not participate in the arbitration hearing will not be entitled to a *trial de novo* absent good cause for such failure to participate.

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 8 Communication with arbitrators

No party and no one acting on behalf of any party will communicate unilaterally concerning the arbitration with an arbitrator or a candidate for an arbitrator. Unless the parties agree otherwise or the arbitrator so directs, any communication from the parties to an arbitrator will be sent to the other party.

Section 9 Enforcement of arbitration awards

Any award that has become final and binding may be entered as a judgment upon moving to confirm said decision in a court of competent jurisdiction, by appropriate notice, pursuant to the CPLR Article 75.

Section 10 Vacancies

If, after an arbitrator is assigned to the case, the arbitrator is unable to perform his or her duties, they will promptly notify the Administrator, who will appoint a substitute arbitrator.

In the event that one arbitrator on a panel of arbitrators is unable to attend the hearing or continue, the remaining arbitrators may continue with the hearing to the determination of the controversy, unless one party objects. Upon receipt of an objection, the arbitration will be deemed terminated and the matter will be reassigned by the Administrator, who will appoint a substitute arbitrator to take the place of the arbitrator who was unable to begin or conclude the arbitration hearing.

Section 11 Attendance at hearings

The arbitrators will maintain the privacy of the hearings unless the rules or the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend the hearing. All attorneys are required to participate in the arbitration program. The arbitrators shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It will be discretionary with the arbitrators to determine the propriety of the attendance of any other person, other than a party and its legal representatives.

Section 12 Arbitration in the absence of a party or representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to participate or fails to obtain a postponement. An award will not be made solely on the default of a party. The arbitrator will require the party who is present to submit such evidence as the arbitrator may require to support the participant's position.

Section 13 Waiver of rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with, and who fails to state an objection at the time of said arbitration or prior thereto, will be deemed to have waived the right to object.

Section 14 Majority decision

When the panel consists of more than one arbitrator, unless required by law or by these rules, the majority of the arbitrators (or the remaining arbitrators in the case of a vacancy under Section 10) must make all decisions.

Section 15 Interpretation and application of rules

The arbitrators will interpret and apply these rules in so far as they relate to the arbitrator's powers and duties. When there is more than one arbitrator, and a difference arises among them concerning the meaning or application of these rules, it will be decided by a majority vote. In the event that the Administrator or an arbitrator(s) is unable to resolve any issue concerning the arbitrator(s) duties or administration of this Program,

said question will be referred to the Fee Dispute Resolution Committee for a final decision.

Section 16 Time of award

Unless otherwise agreed by the parties, the award shall be issued not later than thirty (30) days from the date of the completion of the hearing. The Administrator will, upon receipt of the award from the arbitrator or chair of the panel, mail the same to the parties at the address given by the parties for that purpose. The decision will be accompanied by a letter advising the parties of their rights regarding the decision.

Section 17 Record Keeping

A. The Administrator will maintain a separate folder for each "Request for Arbitration" form received. The records are to be kept at the Suffolk County Bar Association for two (2) years. At the end of the two years, they may be disposed of as the Administrator sees fit.

B. With the exception of the award itself, all records, documents, files, proceedings, and hearing pertaining to the arbitration of a dispute under these rules, in which both parties have consented to be bound by the results, may not be open to the public or any person not involved in the dispute, and shall be confidential except to the extent necessary to take ancillary legal action with respect to this fee matter.

C. The Association will maintain the names, addresses, telephone numbers, and summary of credentials of the arbitrators and will update the same from time to time.

Section 18 Financial Hardship Policy

The program's standard policy is to make the program accessible to all who choose to use it. Toward that end, the program maintains a reasonable fee schedule that considers the financial exigencies of the non-lawyer participants, provides extended payment plans, and/or grants full or partial fee waivers under circumstances of extreme financial hardship. Every attempt will be made to keep the names of the individuals who seek hardship assistance and the information disclosed confidential.

Section 19 Amendment of Rules

These rules may be amended from time to time, upon majority vote of the Board of Directors of the Suffolk County Bar Association, the Board of Governors, and the Presiding Justice of the Appellate Division, 2nd Department.

LOCAL PROGRAM FORMS

ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM

UCS 137-1 (11/01)

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]

UCS 137-2 (5/02)

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]

UCS 137-3 (5/02)

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. Fees 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 toll-free 1-(877)-FEES-137 (1-877-333-7137). 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 1-(877)-FEES-137 (1-877-333-7137).

UCS 137-4a (11/01)

(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 NAME, 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

UCS 137-5a (8/02)

(Office Use Only)

Case Number: _____

In the Matter of Fee Dispute Arbitration between

, Client

and

, Attorney

ATTORNEY RESPONSE TO REQUEST FOR FEE ARBITRATION

INSTRUCTIONS

Attached is a copy of a "Request for Fee Arbitration" by the above Client. Please complete this attorney response and return it to the local program listed below 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: _____ Signed: _____

Local Program Address

UCS 137-6 (11/01)

(Office Use Only)

Case Number:

In the Matter of Fee Dispute Arbitration between

, Client

and

, Attorney

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 tape recorder.

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

UCS 137-7 (11/01)

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)

UCS 137-8 (11/01)

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)

UCS 137-9 (11/01)

(Office Use Only)

Case Number: _____

In the Matter of Fee Dispute Arbitration between

, Client

and

, Attorney

.....

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

UCS 137-10 (11/01)

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

UCS 137-11 (11/01)

(Office Use Only)

Case Number: _____

In the Matter of Fee Dispute Arbitration between

Client,

and

Attorney.

STIPULATION OF SETTLEMENT

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.

_____ _____
ATTORNEY CLIENT

(Please print names below signatures)

Dated:_____ [Give copy to each party]

(Office Use Only)

Case Number: _____

UCS 137-12 (11/01)

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:

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

Dated:_____ [Mail copy to each party]

(Office Use Only)

Date Received: _____

Case Number: _____

UCS 137-13 (11/01)

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 PROGRAM NAME .

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: _____

UCS 137-14 (11/01)

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 Federation of Bar Associations – 4th Judicial District.

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: _____

UCS 137-15 (11/01)

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 LOCAL PROGRAM NAME

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: _____

UCS 137-16 (11/01)

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 Attorney-Client Fee Dispute Resolution Program, 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:_____