

# **ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM**

## Standards and Guidelines

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.

### **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.
- E. Local programs shall be responsible for maintaining all necessary files, records and documents required for purposes of the operation of the Program, in accordance with the Records Retention and Disposition Schedule for the Fee Dispute Resolution Program prepared by the Office of Court Administration's Office of Records Management under Part 104 of the Rules of the Chief Administrator.

## **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.
- C. Where the attorney fails to complete and return the "attorney fee response" within 15 days as required by section 137.6(d), the arbitrator or panel of arbitrators may in its discretion decline to accept the late fee response into evidence unless the attorney shows good cause for such failure. If in accepting a late attorney fee response the arbitrator or panel of arbitrators determines that the late fee response prejudiced the client's ability to prepare for the hearing, the arbitrators may accord the late fee response whatever weight, if any, the arbitrators find it deserves.

## **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<sup>1</sup>.

## **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.

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<sup>1</sup>Pursuant to the Administrative Order of the Chief Administrative Judge of the Courts dated April 1, 2011, four pilot sites will utilize a panel threshold of \$10,000 to explore the impact of a higher threshold on the fee arbitration process. These sites are the programs serving the 8th Judicial District (Bar Association of Erie County), the 3rd Judicial District (3rd Judicial District Administrative Judge's Office), the 1st and 12th Judicial Districts (The Joint Committee on Fee Disputes and Conciliation housed at the New York County Lawyers' Association), and the 10th Judicial District-Nassau County (10th Judicial District Administrative Judge's Office, Nassau County). Accordingly, in these programs, effective October 1, 2011, disputes involving a sum of less than \$10,000 shall be submitted to one attorney arbitrator. Disputes involving a sum of \$10,000 or more shall be submitted to a panel of three arbitrators, which shall include at least one nonlawyer member of the public. The pilot will remain in effect through September 30, 2012.

- 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

