**SUFFOLK ACADEMY OF LAW**
***The Educational Arm of the Suffolk County Bar Association***
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# SIGNATURE SERIES:
# The Ethics of Attorney's Fees and Retainers

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**Robin S. Abramowitz** is a member of BOND Schoeneck King, PLLC. She counsels clients in a wide range of litigation, including commercial, construction and bankruptcy, and through all phases including arbitration and mediation. She is an arbitrator on the Long Island General Commercial Panel and the Construction Panel for the American Arbitration Association. She is a court roster mediator for both the Suffolk and Nassau County Commercial Divisions and the Suffolk County Surrogate's Court. Prior to joining Bond, Robin was a partner at Lazer, Aptheker, Rosella & Yedid, P.C. Robin is an AV rated attorney and has been selected as a New York Metro Super Lawyer for 2021 and 2022.

Robin is a past president of Suffolk County Women's Bar Association. She is currently the Treasurer of the Suffolk County Bar Association and serves on the Professional Ethics & Civility Committee. Robin also serves on the Board of Governors for the Attorney-Client Fee Dispute Resolution Program.

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# RECOVERING ATTORNEY FEES-PART 137 ARBITRATION AND WRITTEN LETTERS OF ENGAGEMENT

By Robin S. Abramowitz, Esq.

The Attorney-Client Fee Dispute Resolution Program, better known as Part 137 was established by the Chief Administrative Judge on May 18, 2001, effective January 1, 2002. As to those cases in which it is applicable, it is mandatory for attorneys to participate in this program, while it is voluntary for the client, with some exceptions. The Suffolk County Bar Association runs the program in Suffolk County.

The requirements of a having a written letter of engagement, is an independent requirement under the NYCRR, and to an important extent, goes hand in hand with the requirements of Part 137. Both can adversely impact the ability for an attorney to recover his or her fees if these rules and regulations are not adhered to by the practitioner.

22 NYCRR § 1215.1 which became effective in 2002 provides in relevant part that an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide a client with a written letter of engagement before commencing the representation or if not prior to, then within a reasonable time thereafter (if it is otherwise impracticable to provide it before commencement of the representation, or if the scope of services to be provided cannot be determined at the time of commencement of representation). 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. The letter of engagement shall explain the scope of legal services to be provided, an explanation of the attorney's fees to be charged, the expenses and billing practices and where applicable it shall provide the client with notice of the right to arbitrate fees under Part 137. An attorney may comply with 22 NYCRR 1215.1 by

entering into a written retainer agreement with the client with the same terms as required by the written letter of engagement.

An attorney is required use Part 137 to resolve the fee dispute at the client's election where the amount in dispute is between $1,000 and $50,000 and where Part 137 applies. The parties may mutually agree to use the program for amounts that fall outside of this range. Section 137.1(b) excludes certain civil matters from jurisdiction of the program such as: claims involving substantial legal questions, which include claims of malpractice and misconduct; disputes where the attorney's fees have been set by statute, court rule, or allowed as ofright by the court; disputes where no attorney's services have been rendered in over two years; disputes where the request for the arbitration is made by a person not the client of the attorney or a legal representative of the client; and disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in New York or where no material portion of the services was rendered in New York. Section 137.l(b) also excludes fee disputes where the representation was for acriminal matter.

Attorneys may consider having in their letters of engagement or retainer agreements a provision that the client agrees to arbitrate any fee disputes in the Part 137 program so that it becomes mandatory for both the attorney and the client. There can also be an upfront waiver of a right to a trial *de nova.* However, any provision in the retainer agreement that affects or alters the client's rights under Part 137 must be "knowing and informed". Therefore, before the attorney binds a client to arbitration of any fee dispute under Part 137 through the written letter of engagement or written retainer agreement, the attorney must have presented the client with the relevant Part 137 information and the client must have read the materials.

If the attorney wishes to add a waiver of the right to a trial *de nova*, then the attorney must advise the client of his or her right to a trial *de novo* and that he or she is not required to waive it.

Before an attorney may bring an action in court for unpaid fees that fall within the jurisdiction of Part 137, the attorney must provide the client with Notice of the Client's Right to Arbitrate the Fee Dispute and related forms. To ensure that the attorney met this prerequisite to bringing an action, the attorney must allege in the complaint either that (i) he or she gave the client notice of the right to arbitrate and that the client failed to respond within 30 days or (ii) alternatively, the dispute is not covered by Part 137 because it falls within one of the exceptions.

There are many cases both at the trial level and the appellate level that have dismissed a complaint for attorneys fees for failure to comply with Part 137. Generally, the complaints are dismissed without prejudice to the commencement of a new action by the attorney following compliance with the notice and arbitration requirements of 22 NYCRR Paii 137. The plaintiff attorney must allege in the complaint that he or she provided the defendant (former client) with written notice by personal service or by certified mail of his or her right to elect to submit the fee dispute to arbitration and the client did not submit a request to arbitrate the claim, or that Part 137 does not apply to the fee dispute. The failure to allege in the complaint that the defendant received such notice and did not timely file a request for arbitration, or that the fee dispute arbitration is inapplicable to the action for reasons specified in Part 137, requires that the complaint be dismissed. *Zisholtz & Ziholtz, LLP v. Mandel,* 165 A.D.3d 1312 (2d Dept. 2018). Waivers of the right to arbitrate in letters of engagement drafted by the attorney are invalid. *Pazcazi Law Offs., PLLC v. Pioneer Natural Pools, Inc.* 136 A.D.3d 878 (2d Dept. 2016).

What happens when the attorney gives notice of the right to arbitrate more than two years after the last time services were rendered, which results in the client's request for arbitration being denied, and the attorney then uses that denial as a basis to claim in the court action that Part 137 is inapplicable? The failure to give the client the ability to arbitrate the fee dispute under Part 137 by not giving notice of the right to arbitrate within the two years period from the time the last legal services were performed was found by the Appellate Division, First Department to bar the attorney's claim in a subsequent court action. Absent the requirements of Part 137, an attorney would have six (6) years to bring an action for breach of contract. However, if Part 137 is applicable, waiting more than two years before seeking to recover the outstanding fees may bar the ability to recover those fees in any forum. Under Part 137, the arbitration would be time barred if brought more than two years after the attorney last provided services. Based on the decisions of the court in *Filemyr v.Hall,* 186 A.D.3d 117 (1[51] Dept. 2020) citing to *Borah, Goldstein, Altschuler, Schwartz & Nahins, PC V Lubnizki*, 13 Misc. 3d 823 (Civil Ct NY Co. 2006), the subsequent action for legal fees will be dismissed and any ability to recover those fees will be lost.

In *Filemyr,* the attorneys gave notice ofright to arbitrate more than two years after the attorneys last provided legal services. When the client sought to arbitrate the fee dispute the Committee on Fee Dispute and Conciliation denied arbitration of the claim because more than two years has passed since the attorney last provided services. The attorney then filed the action asserting that he gave notice of the right to arbitrate, but that the Committee denied the request to arbitrate based on the fact that legal services had not been provided within the prior two years. In dismissing the complaint, the court upheld three affirmative defenses to the action. First, the court found that the attorney's violation of Part 137 constituted unethical conduct which

supported the defense of unclean hands. Second, the loss of the right to arbitrate that resulted from the attorney's delay supported the defense of laches. Finally, the court found that by waiting more than two years before taking any action to recover his fees, the attorney waived his right to initiate an action in court. Thus, the attorney lost all avenues to recover his fees simply by waiting more than two years after he last provided legal services.

How does Part 137 impact on Surrogate's Court Procedures Act §2110? In a January 12, 2022 decision by Rockland County Surrogate Judge Keith J. Cornell, (22 WL 222514) he held that failure to comply with Part 137 does not require dismissal of SCPA §2110 petition nor does it divest the court of subject matter jurisdiction of the petition. His rationale was in relevant part based on the Surrogate's obligation to supervise the fee paid by the estate to its attorneys and the requirement that the matter be sent to arbitration would directly conflict with the SmTogate's duty.

The court decisions are less harsh with respect to not having a written letter of engagement or retainer agreement, then the failure to abide by Part 137. The Appellate Division, Second Department found that a strict rule prohibiting the recovery of attorneys' fees for noncompliance with 22 NYCRR 1215.1, where the failure to comply is not willful, is not appropriate and could create an unfair windfall for the client. *Seth Rubenstein, P.C. v. Ganea* 41 A.D.3d 54 (2d Dept 2007). Notwithstanding the failure to have a written letter of engagement, the attorney may seek to recover his or her fees based on quantum meruit. Without the written letter of engagement, the attorney bears the burden of proving the terms of the retainer and establishing that the terms were fair, fully understood and agreed to by the client.

The takeaway from the court decisions is that an attorney must be diligent when seeking to recover unpaid legal fees. If Part 137 applies, timely notice of the right to arbitrate must be given to the client so that the client does not lose the right to arbitrate the fee dispute. If Part 137 does not apply, then in any action commenced to collect fees, the attorney must specifically allege why the claim is exempt from Part 137.

*Note: Robin S. Abramowitz is a member of Bond Schoeneck & King. She practices in the areas of commercial, real estate and construction litigation, arbitration, and mediation. She is also the Treasurer of the Suffolk County Bar Association, is on the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program and a member of the SCBA Professional Ethics & Civility Committee.*

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# THE LEGAL PROFESSION

## *Letters of Engagement Rules*

**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 lette.r 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.

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# Rules of the Chief Administrative Judge

## *PART 137. Fee Dispute Resolution Program*



**Section 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

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**Section 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 $1,000 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

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**Section 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 nova 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

**Section 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. 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 expiration of a term of office shall be appointed for the unexpired term of the member he or she succeeds.

(e) A majority of current members of the board of governors shall constitute a 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

Amended 137.3(d) on MaY. 14, 2009

Amended 137.3(e) on Mar. 28, 2016, effective April 1, 2016

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**Section 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; and

(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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

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**Section 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.

Historical Note

Sec, filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

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**Section 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 or where the attorney seeks to commence an action against the client for attorney's fees, 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

Amended (a)(1) on Nov.17.2017 effective Jan 1, 2018

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**Section 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

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**Section 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 nova.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

**Section 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

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**Section 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

**Section 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

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**Section 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.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

Standards and Guidelines

Amended Section 6 of Appendix A on December 1, 2021

# 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.

## 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(8)(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.

D. Stenographic or Other Record pursuant to 137.7(e)
   1. Any party who wishes to make a stenographic record shall make arrangements directly with a stenographer, shall assume the costs and shall notify the local program administrator and the other party of these arrangements at least five days in advance of the hearing.
   2. If any other party desires a copy of the stenographic record, they shall make the request and payment directly to the stenographer.
   3. Other audio or video recording is permitted only with the arbitrator's approval. Requests to record the proceeding in this manner shall be made to the arbitrator, through the local program administrator, at least five days in advance of the hearing.
   4. Part 137 hearings are confidential. No party or arbitrator who makes a recording shall disclose the recording except as required for

administration by the local program in connection with a complaint about an arbitration.

5. Any party or arbitrator requesting a copy of the recording or transcript shall notify the local program administrator of the request. However, all arrangements to receive copies of recordings or transcripts shall be made without any further involvement of the administrator.
6. Pursuant to paragraph one of this section above, at the request of the appearing party and on notice to the parties in advance of the hearing, arbitrators may assess the cost of a stenographer's appearance fee if the matter does not go forward because the other party failed to appear.

## 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.

H. The Board may use any means of electronic communication, including e-mail, that is available to all members of the Board, for the purpose of proposing and adopting any resolution that could otherwise be raised at a meeting of the Board. Unless and until the applicable law or rules provide otherwise, any resolution adopted by electronic voting will be reviewed at a subsequent meeting of the Board.

**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 $10,000 shall be submitted to one attorney arbitrator;

2. 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.

**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

Or By email to:
feedispute@nycourts.gov

# SCBA Lawyers Helping Lawyers Committee

**The SCBA Lawyers Helping Lawyers Committee** provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

**Please call the**
**Lawyers Helping Lawyers Helpline at (631) 697-2499**
**to speak with an attorney who will provide support and recommend resources. All calls are private and confidentiality is protected under Judiciary Law Section 499. (Lawyer Assistance Committee)**

***Feel Free to Join Us at Our Weekly Recovery Meeting***