

SUFFOLK COUNTY BAR ASSOCIATION
FEE DISPUTE RESOLUTION COMMITTEE

VOLUNTARY PROGRAM FOR THE
RESOLUTION OF FEE DISPUTES
BETWEEN OR AMONG ATTORNEYS
(FEE ALLOCATION)

RULES AND PROCEDURES

Effective: January 1, 2005

PART I GENERAL PROVISIONS

Section 1.1 Voluntary Program Established

The Board of Directors (the “Board”) of the Suffolk County Bar Association (“SCBA”) believes that the Bar of this County can be well served by providing SCBA administered alternative (i.e., non-judicial) dispute resolution services with respect to certain controversies. The Board has found it particularly desirable to afford SCBA members (and other attorneys who practice law in the County of Suffolk) with a mechanism for the non-judicial (or alternative) resolution of certain disputes between or among attorneys who practice law in the County of Suffolk as to the division or allocation of attorney’s fees and disbursements. Accordingly, SCBA hereby establishes a voluntary Program for the Resolution of Fee Disputes Between or Among Attorneys (the “Program”).

Section 1.2 Administration

The Program shall be administered in accordance with published rules and procedures approved by the Board. The Program’s dispute resolution services shall be delivered through members of the existing SCBA Fee Dispute Resolution Committee and through SCBA staff which assists that Committee.

Section 1.3 Eligible Parties

The program shall hear disputes regarding fee allocations by and between attorneys licensed to practice law in the State of New York. At least one party to the process must practice in the County of Suffolk. Parties may or may not be a member of the Suffolk County Bar Association.

Section 1.3 Applicability of Code of Professional Responsibility

The Program aspires to be administered to promote the division or allocation of attorney’s fees and disbursements only in such manners or ways which are faithful to, and which are consistent with, the provisions of 22 NYCRR §1200.12 (A) [DR 2-107 (A)]. The Program also aspires to promote the division or allocation of attorney’s fees and disbursements only in such manners or ways which are faithful to, and which are consistent with, the provisions of Disciplinary Rule 2-107 of the Model Code of Professional Responsibility (but only to the extent it is not inconsistent with 22 NYCRR §1200.12[A]), as adopted by the American Bar Association. Thus, the Ethical Considerations applicable to Disciplinary Rule 2-

107 of the Model Code of Professional Responsibility, as adopted by the American Bar Association, are to be considered as persuasive (but not necessarily binding) authority in the administration of the Program.

Section 1.4 ADR Services : Mediation and Arbitration

The Program's alternative dispute resolution services shall include Mediation Conferences (with a single neutral Mediator) and Arbitration hearings before either a single neutral Arbitrator or a Panel of three (3) neutral Arbitrators.

Section 1.5 Neutrals: Conflicts of Interest and Impartiality

Prior to participating in any Mediation Conference or in any Arbitration Hearing, each Neutral shall determine whether there exists any conflict of interest between the Neutral and the parties to the Conference or Hearing. Conflicts include, but are not limited to, a personal or business relationship by the Neutral with one of the Disputant attorneys during the last five (5) years; an adversarial relationship between the Neutral (or an attorney in his or her firm) and the Disputant attorney within the last five (5) years; or legal representation of one of the Disputant attorneys by the Neutral (or by an attorney in his or her firm) that concluded within the last five (5) years. Where such a conflict of interest exists and is not waived by the Disputant attorneys, the matter shall be assigned to another Neutral. In addition, if at the start of the mediation or arbitration process, any Disputant attorney objects for cause to an assigned Neutral, or the Neutral does not believe that he or she can serve as an impartial Mediator or Arbitrator, a new Neutral shall be appointed.

PART II MEDIATION

Section 2.1 Mediation Process

Mediation is a proven means of dispute resolution which enables disputing parties to meet together in an informal atmosphere with the assistance of a neutral Mediator in order to find solutions that address their interests and needs. Mediators can provide Disputant attorneys with an effective means of resolving disputes in a non-adversarial manner. Mediation provides an opportunity to address and ameliorate disputes in a process which is quick, inexpensive and conciliatory.

Section 2.2 Mediation: Disputes which may be mediated

(a) The Program will provide mediation services with respect to disputes as to the allocation of fees and disbursements only in matters in which there is no disagreement between (or among) the Disputant attorneys, and the Client(s), as to the total amount of the fee and disbursements which the Disputant attorneys are collectively (or are, in the aggregate) entitled to receive.

(b) In circumstances where the total, aggregate or collective compensation to be received or paid to all attorneys for their fees and disbursements requires court approval (including, but not limited to, approvals required by CPLR Art 12 or by 22 NYCRR §207.38), no Mediation Conference shall take place until after written evidence of that court approval has been presented to the Mediator.

(c) In circumstances where court approval is not required, a Mediation Conference shall only take place after the Disputant attorneys have submitted to the Program's Administrator a written, signed and duly acknowledged statement (or statements) from all Clients which certifies that there is agreement as to the total amount of the fees and disbursements (which amount shall be expressly certified) which the Disputant attorneys are (or were) collectively (or are [or were], in the aggregate) entitled to receive.

Section 2.3 Non-Applicability of Mediation to Employment, "Of Counsel", Separation, Partnership, Members', Shareholders', or Similar Agreements

(a) Mediation under this Program is not available or applicable to any dispute pertaining to the division or allocation of attorneys' fees or disbursements between or among Disputant attorneys (or to the legal representatives of attorneys or their Estates) who are, or who were, partners, members, shareholders or other co-owners of the same firm at any time when any of the services which resulted in the fees to be divided or allocated were performed or when any of the disbursements to be divided or allocated were incurred.

(b) Mediation under this Program is not available or applicable to any dispute between, an employee attorney and, a person or entity who or which employed the employee attorney at the time when any of the services which

resulted in the fees to be divided or allocated were performed or when any of the disbursements to be divided or allocated were incurred.

(c) Mediation under this Program is not applicable to any dispute between, an attorney having a “counsel” or an “of counsel” relationship with another person or entity and, the person or entity with whom or with which he had such a relationship at any time when any of the services which resulted in the fees to be divided or allocated were performed or when any of the disbursements to be divided or allocated were incurred.

Section 2.4 Mediators

Each Mediator participating in the Program shall be an attorney who is a member of the Suffolk County Bar Association Fee Dispute Resolution Committee who has agreed to serve as a Program Mediator and who meets the experience and training requirements deemed appropriate by the Board. No person shall serve as a Mediator who has not received mediator training which is either identical, or substantially similar, to the training provided by the Office of Court Administration for Mediators participating in the mediation of attorney-client grievance disputes pursuant to 22 NYCRR Part 1220.

Section 2.5 Mediators are Not Judges

The Mediator shall conduct a Mediation Conference informally. At the outset of the process, the Mediator should describe the rules by which the Mediation will proceed and make clear to the Disputant attorneys that he or she is serving as a Mediator and not as a judge. The Mediator’s role is to facilitate communication and to suggest ways of resolving the dispute. It is not the Mediator’s role to impose a settlement on the Disputant attorneys. Mediators are encouraged to employ Mediation processes and techniques, including the employment of “caucuses”, to move the Mediation process forward.

Section 2.6 Mediators’ Immunity

Disputant Attorneys shall hold the Neutrals harmless, and shall be immune from process, or being called as a witness.

Section 2.7 Confidentiality of Mediation Conference

Mediation Conferences shall be held in circumstances ensuring confidentiality of the process. Mediators should assure the availability of confidential individual caucus sessions with each Disputant attorney to encourage parties to discuss the genuine interests and needs that may assist the Mediator in helping the parties reach acceptable mutual resolutions. Mediators shall not reveal information to another party to the Mediation when it is identified as confidential by the revealing party. Mediators and Disputant attorneys agree that they shall not reveal any statements, conduct or documents used during Mediation to third parties, except as specifically provided by these rules.

Section 2.8 Professional Misconduct

In accordance with 22 NYCRR 1200.4, should the Mediator become aware of evidence of professional misconduct as a result of Disputant attorneys participation in the Program, then the Mediator shall refer such evidence to the appropriate Grievance Committee at the Appellate Division for appropriate action.

Section 2.9 Mediation Submission Agreement

No Mediation Conference shall be conducted unless prior thereto all the Disputant attorneys execute a Mediation Submission Agreement taking substantially the same form as that set forth in Appendix A.

Section 2.10 Mediation Conference – Scheduling

Efforts shall be made to schedule the Mediation Conference within forty-five (45) days of the Program Administrator's receipt of the Mediation Submission Agreement. Efforts shall be made to schedule the Mediation Conference at a location convenient to the Mediator and to the Disputant attorneys. The Mediator shall not be obliged to participate in the Mediation Conference for a period exceeding six (6) hours. The Mediator may terminate the Mediation Conference if he or she believes that further participation in the process is not likely to result in a partial or full resolution of the dispute.

Section 2.11 Mediation Conference – Outcome – Mediation Agreement

If the Disputant attorneys resolve (or partially resolve) their dispute by Mediation, they may, with assistance from the Mediator, enter into a written and signed Mediation Agreement which reflects the resolution (or partial resolution) of their dispute. Copies of the Mediation Agreement shall be provided to the

Disputant attorneys. The Mediation Agreement shall constitute evidence of the making of an enforceable contract between or among the Disputant attorneys. A copy of the Mediation Agreement may be utilized for any purpose in any action or proceeding to enforce its terms or to seek damages by reason of its breach. The Mediator shall sign the Mediation Agreement if the Mediation Agreement between or among the Disputant attorneys was reached at the Mediation Conference. In that case, a duplicate original of the Mediation Agreement (executed by all Disputant attorneys and by the Mediator) shall be maintained on file with the Program Administrator.

Section 2.12 Mediation: Fees

Prior to scheduling the Mediation Conference, each Disputant attorney shall pay to the Suffolk County Bar Association a Mediation fee of \$150.00. However, if a disputant is a member of the Suffolk County Bar Association the fee shall be waived for that disputant.

PART III ARBITRATION

Section 3.1 Arbitration Process

Arbitration is the process whereby a dispute is voluntarily submitted to one (1) (or to a Panel of three [3]) impartial person(s) - - the Arbitrator(s) - - for a final and binding or non-binding (at the choice of the disputants) determination (known as an “award”). The Arbitrator or Panel decides a case in essentially the same manner as a judge decides a case. The Arbitrator or Panel conducts an evidentiary hearing, reviews the testimony and other evidence presented by the parties, and renders an award that is enforceable in a court of law. Arbitration under the Program is voluntary. Procedures are informal but where a binding determination was chosen the award of the Arbitrator or Panel is final and binding (unless vacated or modified pursuant to CPLR 7511). It is the Program’s expectation that the Arbitration process will be speedy and economical.

Section 3.2 Arbitration: Disputes Which May Be Arbitrated

(a) The Program will provide Arbitration services with respect to disputes as to the allocation of fees and disbursements only in matters in which there is no disagreement between (or among) the Disputant attorneys, and the Client(s), as to

the total amount of the fee and disbursements which the Disputant attorneys are collectively (or are, in the aggregate) entitled to receive.

(b) In circumstances where the total, aggregate or collective compensation to be received or paid to all attorneys for their fees and disbursements requires court approval (including, but not limited to, approvals required by CPLR Art 12 or by 22 NYCRR §207.38), no Arbitration hearing shall take place until after written evidence of that court approval has been presented to the Arbitrator.

(c) In circumstances where court approval is not required, no Arbitration hearing shall take place until after the Disputant attorneys shall submit to the Arbitrator or Panel a written, signed and duly acknowledged statement (or statements) from all Clients which certifies that there is agreement as to the total amount of the fees and disbursements (which amount shall be expressly certified) which the Disputant attorneys are (or were) collectively (or are [or were], in the aggregate) entitled to receive.

Section 3.3 **Non-Applicability of Arbitration to Employment, “Of Counsel”, Separation, Partnership, Members’, Shareholders’, or Similar Agreements**

(a) Arbitration under this Program is not available or applicable to any dispute pertaining to the division or allocation of attorneys’ fees or disbursements between or among Disputant attorneys (or to the legal representatives of attorneys or their Estates) who are, or who were, partners, members, shareholders or other co-owners of the same firm at any time when any of the services which resulted in the fees to be divided or allocated were performed or when any of the disbursements to be divided or allocated were incurred.

(b) Arbitration under this Program is not available or applicable to any dispute between, an employee attorney and, a person or entity who or which employed the employee attorney at the time when any of the services which resulted in the fees to be divided or allocated were performed or when any of the disbursements to be divided or allocated were incurred.

(c) Arbitration under this Program is not applicable to any dispute between, an attorney having a “counsel” or an “of counsel” relationship with another person or entity and, the person or entity with whom or with which he had such a relationship at any time when any of the services which resulted in the fees to be divided or allocated were performed or when any of the disbursements to be divided or allocated were incurred.

Section 3.4 **Arbitrator Immunity** Disputant Attorneys shall hold the Arbitrator(s) harmless, and shall be immune from process, or being called as a witness.

Section 3.5 **Arbitration Submission Agreement**

No Arbitration hearing shall be conducted unless prior thereto all the Disputant attorneys execute an “Arbitration Submission Agreement [Single Arbitrator]” taking substantially the same form as that set forth in Appendix B or execute a “Arbitration Submission Agreement [three (3) Arbitrator Panel]” taking substantially the same for as that set forth in Appendix C.

Section 3.6 **Arbitrators: Oath or Affirmation**

Each Arbitrator participating in the Program as an Arbitrator shall be an attorney who is a member of the Suffolk County Bar Association Fee Dispute Resolution Committee who has agreed to serve as an Arbitrator and who meets the experience and training requirements deemed appropriate by the Board. No persons shall serve as an Arbitrator unless he or she has first qualified to serve as an Arbitrator pursuant to 22 NYCRR Part 137. 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 Program Administrator.

Section 3.7 **Exchange of Information**

(a) At the request of any Disputant attorney or at the discretion of any Arbitrator or Panel, and consistent with the expedited nature of Arbitration, the Arbitrator or Panel may direct:

- (i) the production of documents and other information; and
- (ii) the identification of any witness to be called at the Arbitration Hearing.

(b) At least fifteen (15) days prior to the Arbitration Hearing, the parties shall exchange copies of all exhibits they intend to submit at the Hearing.

(c) The Arbitration or Panel is authorized to resolve any disputes concerning the exchange of information.

Section 3.8 The Arbitration Hearing

- (a) Arbitrators shall have the power to:
 - (i) take and hear evidence pertaining to the proceeding; and
 - (ii) administer oaths and affirmations;
- (b) The rules of evidence need not be observed at the Arbitration Hearing.
- (c) Each party, at his or her own expense, may be represented in the Arbitration and at the Arbitration Hearing by counsel.
- (d) Any party may provide for a stenographic or other record of the Arbitration Hearing at that party's expense. Any other party to the Arbitration shall be entitled to a copy of that record upon written request and payment of his or her proportionate share of the expense of producing and copying the record.
- (e) Each Disputant attorney may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the Arbitrator or Panel may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrator(s) and all the parties, except where any of the Disputant attorneys is absent, or is in default, or has otherwise waived the right to be present.
- (f) The Arbitrator or Panel shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by the Arbitrator or Panel to be cumulative or irrelevant.
- (g) The Arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

- (h) The Arbitrator or Panel or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.
- (i) The Arbitrator or Panel may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the Arbitrator or Panel deems it entitled to after consideration of any objection made to its admission.
- (j) The Arbitration award will be issued to the Disputant attorneys no later than thirty (30) days after the Arbitration Hearing is closed. Arbitration awards will be in writing but need not be “reasoned awards” or otherwise specify the basis for the determination of the Arbitrator or Panel.

Section 3.9 Arbitration Hearing - Scheduling

Efforts shall be made to schedule the Arbitration Hearing within sixty (60) days of the Program Administrator’s receipt of the Arbitration Submission Agreement. Efforts shall be made to schedule the Arbitration Hearing at a location convenience to the Arbitrator (or Panel) and to the Disputant attorneys.

Section 3.10 Professional Misconduct

In accordance with 22 NYCRR 1200.4 should the Arbitrator or Panel become aware of evidence of professional misconduct as a result of Disputant attorneys participation in the Program, then that Arbitrator shall refer such evidence to the appropriate Grievance Committee at the Appellate Division for appropriate action.

Section 3.11 Failure to Participate in Arbitration Hearing

If, after agreeing by Arbitration Submission Agreement to participate in an Arbitration Hearing, a Disputant attorney fails, without good cause, to participate in the Arbitration process or fails to attend the Arbitration Hearing, the Arbitrator or the Arbitration Hearing may go forward in the absence of the Disputant attorney who failed or refused to appear or to otherwise participate.

Section 3.12 Communication with Arbitrators

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

Section 3.13 Majority Decision

When the Arbitration Hearing is conducted before a Panel of Arbitrators, the majority of the Arbitrators must make all decisions. Similarly, all pre-Arbitration Hearing or post-Arbitration Hearing decisions with respect to the Arbitration Hearing must be made by a majority of the Arbitrators.

Section 3.14 Enforcing of Arbitration Awards

Any Binding Arbitration award that has become final may be entered as a judgment upon moving to confirm that award in a court of competent jurisdiction, by appropriate notice, pursuant to the provisions of CPLR Art 75.

Section 3.15 Arbitration: Fees

(a) Simultaneously with the submission of the fully executed Arbitration Submission Agreement to the Program Administrator, each Disputant attorney shall pay to the Suffolk County Bar Association an Arbitration fee equal to \$150.00 (where the Agreement calls for a submission of the dispute to a Single Arbitrator) or \$500.00 (where the Agreement calls for a submission of the dispute to a Panel of three [3] Arbitrators). However, if a disputant is a member of the Suffolk County Bar Association the fee shall be waived for that disputant.

(b) Arbitrators shall not be compensated for their services except to the extent that they attend any Arbitration Hearings which, in the aggregate, exceed six (6) hours in duration. Thereafter, each Arbitrator shall be compensated at the rate of \$150.00 per hour (or part thereof) for attendance at Arbitration Hearings. However, if a disputant is a member of the Suffolk County Bar Association the fee shall be waived for that disputant.

(c) After the conclusion of the first six (6) hours of an Arbitration Hearing, the parties shall, prior to the scheduling of the next Arbitration Hearing date, deposit with the Suffolk County Bar Association a sum sufficient to pay each Arbitrator for the next six (6) hours of his service to participate at the continued Arbitration Hearing. These costs shall be, borne equally by the Disputant, non

SCBA member, attorneys. After the conclusion of the second six (6) hours of Hearings, additional Arbitration Hearing dates may be scheduled following the same requirements for deposits to ensure that Arbitrators are compensated. Any amount deposited with the Suffolk County Bar Association in anticipation of compensating Arbitrators for Arbitration Hearings which is not applied because an Arbitration Hearing did not go forward or was shorter than six (6) hours, will be promptly refunded to the depositor.

(d) Any award made by the Arbitrator or by the Panel may require that one Disputant attorney be reimbursed for any fees or Arbitrator compensation deposited pursuant to this rule. Should one Disputant attorney fail or refuse to pay his or her share of Arbitrator compensation as hereby provided, the other Disputant attorney(s) may advance that share so that the Arbitration Hearing goes forward. In that circumstance, the Arbitrator or Panel shall be made aware that not all Disputant attorneys have shared equally in the payment of Arbitrator compensation and the award of the Arbitrator or Panel may address that issue.