



STATE OF NEW YORK
UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. MCCONNELL
Counsel

MEMORANDUM

July 9, 2014

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of 22 NYCRR Part 1215 (Joint Rules of the Appellate Division), relating to a requirement that written letters of engagement inform clients about ADR programs available on the Unified Court System's website.

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The New York City Bar Association's Alternative Dispute Resolution Committee has recommended an amendment of Part 1215 of the Joint Rules of the Appellate Division that would require written letters of engagement to advise clients about the information on ADR options and programs available on the Unified Court System's ("UCS") website (Exh. A). The Committee's proposal would add a new subclause (3) to section 1215.1(b), requiring attorneys to provide a "citation or other reference to the explanation of Alternative Dispute Resolution options" on the UCS website "[w]here the representation involves an actual or potential litigation matter." The proposal is intended to be flexible enough to allow attorneys to use their judgment concerning how best to provide such information without suggesting their endorsement of ADR. While the proposed amendment does not prescribe specific language for use in the engagement letter, the Committee's supporting memorandum suggests model language for use by attorneys.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than September 8, 2014.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A



**NEW YORK
CITY BAR**

**COMMITTEE ON
ALTERNATIVE DISPUTE RESOLUTION**

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April 9, 2014

Via U.S. Mail and Email

The Honorable A. Gail Prudenti
Chief Administrative Judge
State of New York
Unified Court System
25 Beaver Street
New York, NY 10004

Dear Judge Prudenti:

Attached for your consideration is a proposal of the Alternative Dispute Resolution Committee (the "Committee") of the New York City Bar Association (the "Association") to amend Part 1215 of Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York ("Part 1215"). Specifically, the Committee's proposal would add a requirement to Part 1215 that attorney engagement letters inform clients about the information on alternative dispute resolution ("ADR") options and programs available on the New York State Unified Court System's website.

Background and Proposal

Part 1215 was added, effective in 2002, by joint order of the Appellate Divisions and requires attorneys, under certain circumstances, to deliver a written engagement letter to their clients. Pursuant to subdivision (b) of §1215.1 of Part 1215, the engagement letter is required to address these 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.¹

The Committee's proposal is intended to promote knowledge of ADR options by requiring the engagement letter also to inform clients about these alternatives. The Committee's proposal would add a requirement to Part 1215 that attorney engagement letters also inform clients about the information on ADR options and programs available on the New York State Unified Court System website.²

The modification of Part 1215 could be accomplished simply by adding the following language as a new subclause (3) of §1215.1's subdivision (b):

3. Where the representation involves an actual or potential litigation matter, citation or other reference to the explanation of Alternative Dispute Resolution options on the New York State Unified Court System's website.³

The Committee's proposal would not prescribe the specific engagement letter language for reference to the Unified Court System's website about ADR options. That choice would be left to each practitioner's judgment. But one could expect that attorneys would quickly adopt language along the following lines:

To the extent that the representation described herein involves or may involve litigation, you should be aware of The New York State Unified Court System's description of Alternative Dispute Resolution options, including mediation and arbitration, which can be found on its website at <http://www.nycourts.gov/ip/adr/index.shtml>, or a copy of which will be provided to you upon request.⁴

Notably, the Committee's proposal does not put practitioners in the potentially objectionable position of appearing to endorse ADR options – either generally or in the specific matter for representation. It requires a citation to an existing government public website, and nothing more.

But the required reference nonetheless will serve to heighten client awareness of, and deepen knowledge about, ADR options – and will do so in an unobtrusive and neutral fashion that can be controlled by the Unified Court System itself through management of its website.

Discussion

The Committee presumably does not need to inform Your Honor about the benefits of robust mediation and alternative dispute resolution programs both to the Court system and

¹ The full text of Part 1215 is attached as Exhibit A.

² See, generally, <http://www.nycourts.gov/ip/adr/index.shtml>.

³ See Exhibit B for the full content of what a potentially revised §1215.1 of Part 1215 would look like and Exhibit C for a draft proposed order implementing the change.

⁴ Similarly, Part 1215 does not prescribe how a written engagement letter should discharge the obligation in subclause (2) of subdivision (b) to notify a client of the right to arbitrate fee disputes. The specific language is left to the attorney's discretion.

potential or actual litigants. The Unified Court System's own web site is testimony, at minimum, to the belief that ADR programs are appropriate tools, under the right circumstances, for a judicial system that is obliged to address a huge volume and wide panoply of disputes. However, reasonable minds certainly can, and often do, disagree on the specifics of how and to what extent ADR programs should be promoted or favored by the judicial system.

The Committee itself has a history of different efforts to promote knowledge and use of ADR options through specific notice requirements. Most recently, the Committee in 2010 endorsed the proposed "Notice of Mediation Alternative" that was being considered by the New York State Bar Association's House of Delegates.⁵ Before that, the Committee in 1998 wrote to Justice Stephen Crane recommending that New York courts implement a rule requiring lawyers to inform their clients about ADR options.⁶ And in 1995, the Association adopted an "ADR Policy Statement" recommending that lawyers should be knowledgeable about ADR processes and should be obligated to advise their clients about these alternatives to litigation.⁷

Proposals in this area over time, including the above ones, have typically met a significant level of resistance, with objections ranging from the underlying concept itself, to concerns over impeding an attorney's freedom of advice or implying that mediation is appropriate in all instances, to the specific content or reach of any proposed notice.⁸

It is with this background in mind, with which your Honor is no doubt familiar, that the Committee has developed its current proposal. The Committee believes that a lower-key approach, relying on existing information materials of the New York State Court system, might still adequately serve the interests of the Court system and actual and potential litigants, but be less susceptible to the charge that it is overly-prescriptive or inappropriately biased towards ADR.

The Committee believes that its proposal has the following benefits:

1. The proposal will familiarize attorneys and their clients with the Uniform Court System website, which contains a trove of resources (in addition to its information about ADR options) with which many are not familiar.
2. By simply referencing the Unified Court System's website, and going no further, the proposal will heighten familiarity with ADR options without requiring an attorney to be seen as potentially endorsing ADR or being prescriptive of the situations in which it is appropriate or suggestive that it is, indeed, always appropriate.
3. By referencing the Unified Court System's website, the substantive content of what the Unified Court System wishes to make known about ADR options can be refined and updated, without further rule-making, by changes or additions from time-to-time to the website itself.
4. By embedding the website reference as part of Part 1215's engagement letter delivery requirement, the reference will presumably be read and noticed by clients. (By contrast, the Committee considered and rejected proposing the website reference be included in the

⁵ See *Letter of Peter H. Woodin*, dated October 22, 2010, attached as Exhibit D.

⁶ See *Letter of Michael A. Cooper*, dated July 14, 1998, attached as Exhibit E.

⁷ See *ADR Policy Statement*, dated October 18, 1995, attached as Exhibit F.

⁸ See, e.g., "New York Lawyers Riled Up Over Mediation Plan" in *New York Law Journal*, November 12, 2010, attached as Exhibit G.

Statement of Client's Rights,⁹ because law office postings or handouts may not always be read or readily observed by clients.)

5. By making the website reference required only when the matter involves or may involve litigation, the obligation is targeted to a limited and appropriate audience.
6. Part 1215 already references the potential, under Part 137, for resolving a fee dispute through ADR; the proposal would simply add another, albeit more general, reference to ADR options.
7. By not mandating the specific content of the required reference, the proposal is flexible enough to allow attorneys to use their judgment on how they wish to inform their clients about the website within the confines of their engagement letter, even to the extent, if they wish, of stating that the reference is included pursuant to court rules.

And, although not a specific benefit of the Committee's proposal itself, we believe there may be an ancillary benefit simply in amending Part 1215 in any fashion that requires broadly publicizing the change – and, therefore highlighting the underlying engagement letter delivery requirement itself. Although it is beyond the Committee's ability to survey, anecdotally we believe that today, more than ten years after its adoption, there are a sizeable number of practitioners who are simply not familiar with Part 1215 or with all of its details.

The proposal outlined herein has the full support and endorsement of the Committee. Please let me know if I can furnish any additional information or answer any questions you may have about any aspect of it.

Sincerely,



Chris Stern Hyman
Chair, Alternative Dispute Resolution Committee

Encls.

cc: Carey R. Dunne, Esq.
President, New York City Bar Association

Alan Rothstein, Esq.
General Counsel, New York City Bar Association

Roger E. Schwed, Esq.
Member, Alternative Dispute Resolution Committee

Charles M. Newman, Esq.
Member, Alternative Dispute Resolution Committee

⁹ See Part 1210.1 of Title 22.

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PROFESSIONAL AFFILIATIONS & QUALIFICATIONS

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

- a. 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.
- b. The letter of engagement shall address the following matters:
 1. Explanation of the scope of the legal services to be provided;
 2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.
- c. 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.

As amended April 3, 2002

Part 1215 Written Letter of Engagement

§1215.1 Requirements

- a. 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.
- b. The letter of engagement shall address the following matters:
 1. Explanation of the scope of the legal services to be provided;
 2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator;
 - ~~2-3.~~ Where the representation involves an actual or potential litigation matter, citation or other reference to the explanation of Alternative Dispute Resolution options on the New York State Unified Court System's website.
- c. 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).

JOINT ORDER OF THE APPELLATE DIVISIONS

The Appellate Divisions of the Supreme Court, pursuant to the authority invested in them, do hereby amend, effective [immediately] [date], Part 1215 of Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," and do hereby add, effective [immediately] [date], a new subclause (3) to subdivision (b) of §1215.1 of Part 1215 of said Title, as follows:

Part 1215 Written Letter of Engagement

§1215.1 Requirements

a. 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.

b. The letter of engagement shall address the following matters:

1. Explanation of the scope of the legal services to be provided;
2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator; and
3. Where the representation involves an actual or potential litigation matter, citation or other reference to the explanation of Alternative Dispute Resolution options on the New York State Unified Court System's website.

c. 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).