NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

August 7, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of the Rules of the Attorney-Client Fee Dispute Resolution Program of the Unified Court System (22 NYCRR §137.6[a][1]) to Provide for Notice of the Right to Arbitrate

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of the rules of the Attorney-Client Fee Dispute Resolution Program of the Unified Court System (22 NYCRR §137.6[a][1]) to clarify that, unless expressly exempted under the rule, attorneys should provide a client with notice of the right to arbitrate when filing an action against the client for unpaid fees. The proposed language is as follows:

> Except as set forth in paragraph (2) [addressing advance agreements to fee arbitration], 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.

As set forth in the Board's memorandum in support of the proposal (Exh. A), this change is designed to address case authority holding that the current rule language (as well as the language of former Part 136) does not mandate notice as a prelude to fee litigation unless a client has previously explicitly disputed the fee amount.

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Persons wishing to comment on the proposed rule 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 October 9, 2017.**

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 State
Attorney-Client Fee Dispute Resolution Program
Board of Governors
25 Beaver Street, 8th Floor • New York, NY 10004 • Tel (877) FEES-137 • Fax (212) 428-2696
nycourts.gov/feedispute • feedispute@nycourts.gov

TO: ADMINISTRATIVE BOARD OF THE COURTS

FROM: BOARD OF GOVERNORS

SUBJECT: AMENDMENT TO PART 137.6(a)(1)

DATE: JANUARY 18, 2017

The Board of Governors respectfully requests that the Administrative Board amend the arbitration procedure language of 22NYCRR 137.6(a)(1) (Part 137) to clarify the scope of the attorney notice requirement in the Fee Dispute Resolution Program.

The Board of Governors favors the broader interpretation of the rule first posited by Paikin v. Tsirelman (266 A.D.2d 136) under 22 NYCRR 136 (Part 136), that when an attorney brings a claim against a client who fails to pay a bill that is due and owing, regardless of the client's failure to dispute the bill, the attorney must provide the client with notice of the right to arbitrate. This interpretation better aligns itself with the purpose of the program to, "…provide for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation."

As such, the Board requests the following amendment to Section (a)(1) of 137.6:

> 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.

Background

Under Part 136 Matrimonial Fee Arbitration, predecessor to Part 137, a split emerged between the First and Second Departments on how a fee dispute is defined and thus what triggered the attorney's notice requirement. Under Paikin, the First Department held that outgoing counsel must provide the client with the notice of the right to arbitrate, even in

the absence of an explicit fee dispute. The attorney's reliance on the theory of account stated as a way to avoid the notice and pleading requirements of Part 136 would "effectively eviscerate the fee arbitration rules governing domestic relations matters." The court dismissed the attorney's claim for fees for failure to provide notice to the client and for the attorney's failure to plead the dispute fell into one of the exceptions expressed in Part 136.

The Second Department, in Scordio v. Scordio (270 A.D.2d 328), recognizing that the issue of when the attorney's notice requirement was triggered was not adequately addressed in Part 136, declined to follow Paikin and held that the attorney could recover fees without participating in arbitration where the attorney did not send the notice of the right to arbitrate because the client never explicitly disputed the fee.

Since then, trial courts from the Second Department have followed Scordio's reasoning[i] in interpreting Part 137. However, there is another line of decisions, also out of trial courts in the Second Department, that cite to the First Department's ruling in Paikin[ii]. These cases note Part 137's broader scope compared to Part 136 and follow the premise that non-payment is not an enumerated exception to the rule[iii]. These decisions reason that non-payment, therefore, falls within the scope of the program and the attorney must provide notice to the client when he or she fails to pay. The Board believes that the proposed amendment will more clearly implement the overall policy of the rule.

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[i] Rotker v. Rotker 195 Misc.2d 768, 761 N.Y.S.2d 787 (Sup. Ct., Westchester County 2003); Helene Greenberg Law Offs. v. DiSanto 5 Misc. 3d 130(A), 130A (N.Y. App. Term 2004); appeal from Yonkers City Court, Westchester County; Louissaint v. DePaolo 2010 NY Slip Op 33138(U) (Supreme Court, Queens County 2010).

[ii] Wexler & Burkhart, LLP v. Grant 2006 N.Y. Slip Op. 51005(U) (Sup. Ct., Nassau County 2006); Tomei v Schwartz, 45 Misc. 3d 1207(A) (New York City Civil Court, Richmond County October 10, 2010); Messenger v. Deem, 26 Misc. 3d 808; 893 N.Y.S.2d 434; 2009 N.Y. Misc. LEXIS 3313 (Sup. Ct. Westchester 2009).

[iii] 22 NYCRR Section 137.1 (b) (1)-(8).