Amy Pontillo: So welcome to the Fee Dispute Resolution Program: Attorney-Client Fee Arbitration Orientation to the program today. Our speakers are Dan Weitz, who is the Director of Professional and Court Services. The Division of Professional and Court Services houses the ADR office, and the ADR office supports Department 37 program. Dan served as co-counsel to the board since its inception around 2001 up until his appointment to director in 2017.

We also have Martha Gifford, also known as Meg. She's the chair of our board. She has served on the task force that created the fee dispute resolution program and she has been on the board since the program started. She currently has a solo practice in antitrust counseling, is a past chair of the State Bar Association's Antitrust Law Section and a past president of the Women's Bar Association of the State of New York.

And I'm Amy Pontillo. I'm senior counsel to the Office of ADR programs and I've been with the office since 1999. I served as co-counsel to the board with Dan from 2007 until 2017 when he moved on to become director of our division. So now I'm counsel to the board and to the apartment 37 programs. And I'm also currently chairing the Committee on Animals and the Law for the State Bar Association.

I got to remember to move my slides. So just so we have a sense of what we're going to be talking about today and where we're going, we're going to talk about the history of Part 137, basically the why and how of the fee arbitration program. We're going to talk about the program structure and operation, meaning how the local programs operate and their relationship to the board. We'll talk about jurisdiction in particular, what kinds of cases does Part 137 take and what kind of cases are excluded. Talk a little bit about case mechanics and we'll look at the life of a case. We'll talk about your powers as arbitrators and how you'll be assigned. Some of the powers include administering oaths and issuing subpoenas. We'll talk about the burden of proof, we'll talk about what the standard is and who bears that burden. We'll talk about the hearing and jurisdictional and practical issues.

So for example, if a jurisdictional issue comes before US arbitrators, how you would resolve those issues. We'll also talk about some alternate format hearings. We'll talk about the award for example, calculating the award. Meg will take us through how to calculate the award and writing the statement of reasons. We'll talk about prior written agreements to arbitrate in some of the necessary elements. We'll talk about what a reasonable fee is. We'll look at the disciplinary rule 1.5 and we'll talk about some legal issues. And with that I am going to hand it over to Dan.

Dan Weitz: So welcome everyone. There are a number of key reasons why Part 137 exists and we'll just quickly survey three of them. The task force that Meg had served on is probably familiar to Meg, these principles, but number one, to promote public trust and competence in the profession by allowing attorneys and clients to resolve disputes without the formality time and expense of litigation and in

an informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. So those are the sort of core principles behind the existence of this program to keep in mind as we learn more about the nuts and bolts of the rule and the role of an arbitrator.

Amy, am I turning it back over to... Oh, I'm going through this one, too. So the program and structure of the board is as follows. There's a board of governors that oversees the program. It's an 18 member board of governors with 12 attorneys, six non-attorneys. It's chaired by Meg Gifford who is with us today. There are local programs in each judicial district and counsel, which is Amy supports the board and the programs.

There are a number of things that the rule applies to. It applies to all New York admitted attorneys for most civil matters. There are some exceptions where representation began on or after January 1st, 2002 and for disputes between 1000 and 50,000. So that's what the rule applies to. It does not apply to, as you can see, criminal matters or issues involving substantial legal questions including professional malpractice or misconduct, damages or relief other than the adjustment of the fee. Fee is determined by statute court rule or court order, typically. Most contingency fees would fall under that exception. Whether if no services have been provided for two years, the rule would not apply or if the services are rendered outside of New York state or if the request is filed by someone other than the client or the client's representative.

Amy Pontillo: And Dan, I would also just add, I don't know if you mentioned this, that the program also applies to fees that have already been paid. So it's not just outstanding fees.

Dan Weitz: Very good point.

Amy Pontillo: Okay.

Martha Gifford: Amy, may I add just a clarification on the final point. When we say clients representative, that means essentially a legal representative. Not necessarily a lawyer, but someone who has a relationship that would be recognized by the law with the client standing in for the client. So to illustrate, a parent is not a client's representative for an adult client unless I suppose a power of attorney has been given to the parent. But what we are trying to do here is to make sure that the person who has the direct interest in the payment of the fee and who was responsible for the control of the matter, i.e. the client himself or herself is the one who's involved in the fee dispute.

Amy Pontillo: Thank you for clarifying, Meg.

Dan Weitz: So the exception with regard to what is a substantial legal question, some criteria to keep in mind are explicit claims of legal malpractice or attorney misconduct. They are thieves and liars and misappropriated funds and things

like that. Complex or protracted issues are considered substantial legal questions if it's going to take you a lot of time and a lot of paperwork to go through.

It's usually assessed on a case by case basis whether or not a particular matter involves a substantial legal question. And the reason for excluding them include the time and informality of this program. They're volunteers serving here. The scope of 137 is meant to deal with the reasonableness of a fee and not substantial legal questions like malpractice or attorney misconduct. The appellate divisions have authority over disciplinary actions and the 137 rule was not meant to infringe upon that in any way.

And as I mentioned your volunteers. And so to have you involved in determining substantial legal questions and complex or protracted issues is not the intent of the spirit of your volunteerism. And there is a potential, although less so, issue of issue preclusion and we'll talk about that more in detail later.

For program structure, we mentioned that there are local programs are sometimes referred to as arbitral bodies. They are either local bar associations or judicial district administrative offices, meaning that's how the arbitrations are handled. They're in some places there are hybrids where they sort of share responsibility between the judicial district office and a bar association. Each one of these arbitrable bodies has their own local program rules and procedures that often deal with arbitrator qualifications and assignment protocols and fees. They are all consistent with Part 137 and approved by the Board of Governors.

These local programs are the first point of contact for arbitrators, attorneys and clients as opposed to Amy and the statewide office. They make decisions with regard to jurisdiction, that previous slide, whether it's subs determining substantial legal questions or whether the services were rendered more than two years ago and is it outside the monetary amounts of 1,000 and 50,000. Those jurisdictional questions are often handled at the local level by arbitrable bodies. They obviously handle the case administration and we'll walk you through that in a moment. And they make decisions with regard to venue of whether it should be in one particular arbitrable body or another.

Martha Gifford: Dan, can I make a comment about jurisdiction? Although the issue of jurisdiction whether the fee dispute should even be heard within the scope of Part 137 is almost always a question for the local program administrator because most of these fee disputes don't raise significant jurisdictional issues. And where there is an issue, it's often very obvious what the issue is and whether it is or is not within Part 137. However, arbitrators should be aware that there are occasions when a party may raise to the arbitrators a question of whether there really is jurisdiction. So it is not taken away from the arbitrators to determine jurisdiction where the issue is properly raised in or before the hearing. It's probably not very common that that would happen, but I just want to make sure that you are aware that it's not ruled out that you may occasionally be asked to look at a jurisdictional question.

Dan Weitz: So we mentioned venue and Part 137 discusses venue in terms of where the majority of the legal services were performed. And that's typically could be where the attorney's offices are, where they filed in court or where many of the meetings were held, paperwork handled, majority of legal services were performed in that county, for example. Cases for a venue may be transferred upon a showing of good cause. Sometimes we have reasons to move a case from one county or one program to the next and the board will get involved but only if a dispute over venue arises between programs. So program A doesn't want to take it and program B doesn't want to take it. And in that instance, Meg and Amy and the board of governors would intervene and make a determination with regard to which venue is appropriate.

Martha Gifford: And I think that has a consequence for the arbitrators, which is if you're in a hearing or pre-hearing correspondence and the administrator has obviously already sent this dispute to you to arbitrate, therefore the administrator has no issue, a venue has arisen. If however, a party then says to you as an arbitrator, I don't think we should go forward here with this matter because I think that the venue is not correct and we should be in Queens instead of Brooklyn, your role at that point is to immediately notify the administrator who will then notify the notify us, Amy in particular, because the issue of venue is not one for decision by the arbitrators.

Amy Pontillo: Thank you, Meg, for clarifying that.

Dan Weitz: So we try to break down how cases get to Part 137. This is helpful to you more so just in terms of context and serving as arbitrators of knowing what proceeded in the case before it got to you. But you don't need to actually have this memorized. But there's a number of ways in which cases can get to the program. The first is that the attorney would send the client the notice of the right to arbitrate. And 137 points out that in the event of a fee dispute, an attorney has the obligation to send the client notice of the right to arbitrate. So that's probably the most common way in which cases get to arbitration.

The client could pursue arbitration on his or her own. They may or may not have received notice, but they know about the program and they contact the local program themselves and commence the arbitration. And we'll get to ways in which arbitration is commenced. Clients can consent in advance to arbitrate potential fee disputes. 137 0.2 discusses that and the requirements for it to be knowing and informed and so forth. Clients can consent in advance to arbitrate potential fee disputes and waive the right to a trial de novo. Something that we'll talk about later, but that's the right to basically undo the arbitration award and proceed in court.

Clients and attorneys can also agree in advance to arbitrate potential fee disputes in another arbitrable forum, not Part 137. They can go to a commercial provider as long as they comply with the requirements again of informed consent and notice and so forth. And then finally, clients and attorney can consent to mediate fee disputes under the rule. However, there is only one

program that is approved by the Board of Governors to mediate 137 fee disputes. And that is the NYCLA program, the joint committee on fee disputes [inaudible 00:15:28] the New York County Lawyers Association.

Amy Pontillo: Thank you, Dan. And I'll just note that many of the attorneys on the Skype right now will be volunteering for NYCLA with the exception of one. So I'm just going to take a little break here and see if there were any questions about what we've just spoke about. Just remember to unmute yourself. No. Okay, so I'm going to move on then.

I'm going to talk a little bit about what a case looks like from filing actually a little bit before that when the fee dispute arises until the award is mailed. And we're going to get into this a little bit more later, but first there has to be a fee dispute. And so what is a fee dispute? But we'll see in a few slides that it can be an explicit claim but it could also be non-payment under certain circumstances. So in the way that I've been thinking about it is, and this is under 137.6, that if an attorney is thinking about suing for the fee, the attorney should also be thinking about Part 137 first. So it's just a thought exercise.

So first what happens is the attorney has to serve the client by certified mail or personal service and that again is if one of those other options on that previous slide wasn't already used. For example, the client filed on his or her own. So the attorney has to serve the client by certified mail or personal service notice of the right to arbitrate and the client has 30 days to file with the local program. So if the client does not file within those 30 days, the attorney can go to court and sue for the fee. And there are certain pleading requirements once the attorney does go to court.

For example, the attorney has to plead that either the dispute doesn't fall into the jurisdiction of the program or the client was served notice and the client did not timely file. So say the client does file for fee arbitration, the local program will then send the client request form to the attorney. The attorney then has 15 days from the mailing of the client request to send in the attorney response and certify a copy was served on the client. This can be found in 137.6(d).

The administrator then schedules the hearing and keep in mind this could take several weeks and it all depends on the party schedules, the arbitrator schedule. It also depends on whether or not there's a panel and we'll talk about why you would have an arbitration panel. So sometimes you have at least five different schedules that you have to consider before the hearing can actually take place.

But once it is scheduled, the administrator will give 15 days notice of the date, time and location of the hearing. The hearing then takes place and you should know that hearings are generally no more than two hours and most arbitrations require just one hearing. So then once the hearing is over, the parties are dismissed and then the arbitrators will deliberate outside of the party's presence. So arbitrators can do this while they're still all together convened or if

you want to follow up with one another after that. This is if there's a panel and you need to deliberate with your co-arbitrators.

So arbitrators must issue the award within 30 days after the date of the hearing. This is 137.7(f). And if an aggrieved party chooses to commence a trial de novo, which is an action on the merits of the fee dispute, he or she must do so within 30 days of the mailing. And this is found in 137.8. Otherwise, the award becomes final and binding. But it may be subject to Article 75 confirmation procedures.

So that's a post award. If somebody's not complying with the award, which we hear that most do, but if somebody doesn't comply with the award or commence a trial de novo and you need to enforce the award somehow you would go through Article 75 and seek to confirm the award.

So disputes involving $10,000 or more are assigned to a panel. So panels must have at least one non-attorney member of the public and the chairperson is always going to be an attorney. However, parties can waive the panel in writing and we have a model form online that arbitrators or the administrator can use to get consent of the parties if they want to go forward with one arbitrator rather than having to schedule an entire panel.

Disputes that involve less than $10,000 go to one attorney arbitrator. Decisions on the merits of the award are always going to be by a majority rule. So if two of you on a panel have determined that this is what the award is going to be, then that is what the award is. And we have said there are no dissents on the award. The board has said that there's no dissents on the award because the whole intent of the program is to have an informal and expeditious process and we shouldn't be writing these long dissents or writing any dissent to try change that informality and finality of the award.

Sometimes there's a procedural disagreement among the panel and that might include something like ruling on objections, allowing or excluding certain testimony or evidence or whether or not to grant an adjournment. And those procedural disagreements are going to be resolved by the chair of the panel unless there's something else stated in the local rules. And I'll just draw your attention to NYCLA's rules because actually, no, I won't draw your attention to Michael's rules because they don't specify.

A little bit on conflicts. So we ask all our arbitrators to check for conflicts before you accept a case and to recuse yourself or don't accept a case if there's any personal bias against a party or the subject matter, there's a financial interest in the subject matter or there's a close personal or financial relationship. If you do a conflict check in your firm's database and you somehow have represented one of these parties at some point, that might be a reason to recuse yourself.

So what happens if you find that there is a conflict? It's in our standards and guidelines, section 9F, that once you conduct the conflict check, if there are any conflicts, you have to disclose that information if you have a reason to believe that it may provide a basis for recusal. Either party may also request that an arbitrator be removed. This is a 137.6(f) for a personal or professional relationship. They have to do so no later than five days before the scheduled hearing date.

But sometimes the conflict doesn't arise until the actual hearing takes place. And if that were to occur, you finally get everybody together and then you see that, oh, you recognize one of the party's faces or you recognize the name and you didn't recognize it before for whatever reason. Again, the suggestion is to disclose, talk to your administrator and proceed from there.

A little bit about immunity. Under 137.7(h) if you're acting within your role as an arbitrator, you're immune from suit. Also see our standards and guidelines, section 9I or 1, arbitrators are not competent to testify in a subsequent proceeding or a trial de novo and defense and indemnification. So we have an opinion from the Attorney General from 2004 that basically says that if you do wind up getting sued as an arbitrator, the state is going to step in and defend and indemnify you.

So if you ever do happen to get sued or you get a subpoena, you would contact your administrator who will then contact me and we'll work that out. And honestly, this has only happened one time, the program's been around for about 20 years, so that's not something I think that really needs to be concerned with. Meg or Dan did you want to add anything to that?

Martha Gifford: Just an interesting point, the condition, if you will for the AG agreeing that arbitrators are covered by the state's program of defense and indemnification is that the board will approve all arbitrators, all neutrals for the program. So if any of you might have wondered why you don't get appointed immediately in part, though we hope it's a small part, is the fact that your resumes get reviewed not only by the administrator but also by a committee of the board. And that constitutes our review that triggers your right to defense and indemnification.

Amy Pontillo: Thank you. Dan, you want to talk about the burden of proof a little bit?

Dan Weitz: Sure. So this should be familiar territory to most of you, but the burden of proof that applies in this program is that the attorney has to prove the reasonableness of the fee by the preponderance of the evidence. So we thought that we were run through these standards just to make sure we're all on the same page. The a mere scintilla of evidence, for example, is a very insignificant or trifling item of evidence. That's a lot less than substantial evidence, which obviously is more than a mere scintilla or relevant evidence as reasonable might accept as adequate to support a conclusion.

Of course, our standard, the preponderance is a requirement that more than 50% of the evidence points to something or a party with a stronger evidence, however slight the edge may be. In fact our little graphic up there of 49% to 51% if you really wanted to nitpick, it's probably 49.9 and 50.1% and that's the preponderance of the evidence. And of course on the other end of the spectrum is clear and convincing evidence, which is that a party must prove that it is substantially more likely than not that it is true. That's clear and convincing. And of course beyond a reasonable doubt is what we're most familiar with in terms of criminal proceedings.

So remember that the burden of proof in these proceedings are preponderance of the evidence, however slight the edge, it goes to the person at that edge and it's the attorney's obligation to prove the reasonableness of the fee by the preponderance of the evidence. We're going to come back to that theme as well because it's very important to keep in mind who has the burden of proof in the 137 program, which again is the attorney. Meg or Amy, anything to add on that?

Amy Pontillo: No.

Martha Gifford: No.

Amy Pontillo: Okay. Are there any questions from any of our guests today? No. Okay, so I'm going to move on. Okay, so I'm going to talk a little bit about the order of the proceeding. This comes up in 137.7(d). The order of the proceeding is pretty important. And it goes back to the burden, it goes back to who bears that burden and that's the attorney. So the attorney presents his or her case using documentation of the work performed and billing history. So if the client were to go first, what would happen there? The client would be presenting the case and the burden would actually be shifting over to the client. So it's very important that the attorney goes first.

And it's so important that the board came up with this sequence of arbitration hearing, which basically comes from that training manual that I circulated to everyone. But this is a pullout and if you have your manual on your computer now and you're using the bookmarks, you can click to it and it should be appendix F 24.

So that's something you can pull out. You can put the administrator's name on there and the telephone number. So if you ever need to contact your administrator, all that information is going to be on your sheet, your handout that you're going to have with you.

So the arbitrator's information sheet lists the order of the proceeding among many other things. Once the attorney presents his or her case using documentation of the work performed in the billing history, the client can then present his or her account of the services rendered and time spent. Parties can then call witnesses and the client always has the right of final reply. And that's it

for that one. Does anybody have any questions on this slide or anything to add, Dan or Meg?

Dan Weitz: No, I would just reiterate the importance of having the attorney go first. There had been issues in the past, fortunately not widespread of we did hear of an arbitrator or panel of arbitrators having the client go first, which in essence shifts the burden of proof to the client. So there's a reason for the order and it seems elementary, but we just wanted to emphasize that again.

Martha Gifford: Absolutely. It is fundamental to the program that the burden of proof be on the attorney from the outset and remain on the attorney. And the interaction of that requirement with the preponderance of the evidence standard is very critical to keep in mind. In terms of what goes on when each of the parties is presenting his or her evidence or accounts of the relationship and the issues relating to the fee it will go forward like a fairly typical arbitration in that the arbitrators of course are free to ask any end all questions that they have of each of the parties.

It is certainly possible that a party may want to ask questions of the other party and that seems fine. I would suggest that the arbitrators control that process so that it does not get out of hand. But any and all questions relating to the reasonableness of the fee should be aired and I think we'll hear more in a moment about other issues that may come up during the hearing.

Amy Pontillo: Thank you. Okay, so a little bit about your powers as arbitrators. So you have the power to take in here evidence, administer oaths and affirmations. And these are the oaths and affirmations for the witnesses and the parties to the hearing. And in the manual on the PDF, page 16, or if you print it out a hard copy, it's page 13, there's an example of how you can administer the oath or the affirmation and some things to consider when administering the oaths and affirmations.

You have the power to subpoena attendance of witnesses and the production of books, papers and documents pertaining to the proceeding. And we might be talking about this in a little bit also. So if a party chooses to participate on paper, which is an option, it's allowed in the rule and we've had parties say, well the client doesn't want to go, the client wants to participate on paper or vice versa, but I want that person there, the rule will override that wanting to subpoena that other party to actually physically appear because it's within the rule, it's within their right to participate on paper. So I hope I got that kind of correct Meg.

Martha Gifford: Yes.

Amy Pontillo: Okay. So the rules of evidence need not be observed, but remember the order of the proceeding does have to be observed. So this is a more informal process. It's supposed to be set up to allow a client to come into a hearing about the fee

with an attorney who is experienced in the law. So it's kind of a way to level the playing field there. So that's one reason why an arbitration rules of evidence don't have to be observed.

Martha Gifford: And Amy, you will probably be dealing with this I think in a minute or so, but it's just very important to make a distinction between a decision by one of the parties not to physically appear or personally participate even by phone, for example, on the one hand. And a decision not to submit anything, any materials on the other hand. In other words, our rule is very clear that a party may participate by submission of papers, whatever those papers might be.

But when it comes to the lawyer, the lawyer in particular cannot say, and this would I think come up only in a case where the client initiated the fee dispute and is seeking a repayment of fees. So the lawyer cannot say, I'm not going to participate in this proceeding. I understand that the proceeding is going to go on, but not only am I not going to be there, I don't need to provide any documents or papers because the fee's already been paid and I'm entitled to it.

Not only is that contrary to the rule about the burden of proof, but the attorney who does that must be reported by you or by the program to the disciplinary committee. So if that occurs, if the arbitrators are informed by the lawyer that she is not going to participate in the hearing at all, then you must let the administrator know immediately of that circumstance.

Amy Pontillo: Yes.

Dan Weitz: Amy, I would just add the point you made before about the rules of evidence not applying, I know this is more of an issue for the skills portion of our training of arbitrators, but for the relevance of that provision, what we mean is that hearsay and things like that are not necessarily applicable, but you're, as arbitrator's, going to be confronted probably with a party, whether it be an attorney or not, objecting to the admission of certain statements and so forth.

And the practice tip on that is not to firmly remind people that the rules of evidence don't apply, but instead perhaps say I'll allow it and give it the weight that I believe it deserves. But the idea again, is supposed to be informal, it's supposed to be comfortable, it's not supposed to be intimidating, particularly to the clients. And if they had to somehow navigate the rules of evidence, it would make it a lot more alike going to court.

Amy Pontillo: Absolutely. Thank you for clarifying that and adding that about hearsay because that could be an objection that you might hear from an attorney or sometimes even a client. Oh, well that's hearsay. And like Dan said, well I'll allow it and give it the weight it deserves. And then you deliberate on that. Thank you. Okay, and yes, and Megan, to your point, participation in appearance and attendance are different concepts here. So yeah, absolutely, we're going to get to that in a couple of slides. But there's a process if you are not going to appear physically at

the hearing, if the attorney's not going to appear physically at the hearing, there's a process for submitting paper under penalty of perjury.

So at the hearing, the parties have rights and there are some other people that you might see in the room. So for example, parties are entitled to a stenographic or other record. Other record hasn't necessarily been defined, but you might see a stenographer in the room. The parties may call witnesses and if the parties do call witnesses, and I might be jumping ahead, but a process suggestion might be... because you have to administer oaths and affirmations. Maybe we have everybody in the room at one time, administer your oath and affirmations to everybody there and then ask the witnesses to please step outside until they're called.

Parties are entitled to an attorney, but they're also entitled to bring a support person. So sometimes in particular the client wants to bring a friend or a parent just to be with them and to provide support in the room. And this is different. This is not an advocate, this is not somebody who necessarily should be speaking on behalf of the client. It's just somebody there to offer moral support. And finally, there might also be interpreters in the room. And Dan, I'm just going to hand it over to you to maybe if you want to talk a little bit more about any of those issues, but particularly the support person and the interpreters.

Dan Weitz: Yeah, well support persons, again, it goes with the informality of the proceeding. So sometimes people want to bring someone there to help coach and so forth. I think the only issues that have arisen is when there's someone who is actually an admitted attorney in New York and wants to go in, but as a support person to a friend as opposed to an attorney. And Amy, I'd have to almost kick it back to you to remind us how we've dealt with that or if it's even worth going into, if it's come up enough. My only point would be in general, we allow people to bring in support persons.

Amy Pontillo: Okay. Did you say somebody who has a friend who's an attorney?

Dan Weitz: Right, exactly. So they want their attorney friend to be there, but they want to come in without representing the client as the attorney. And I think we've said they either have to represent them or not.

Amy Pontillo: Yeah, I agree with that. I think it's one or the other. Either you're an attorney there or you're an advocate, you're a representative or you're not.

Dan Weitz: Right.

Martha Gifford: Yeah. On the concept of a support person, I agree with all of this. There's a possible relationship to the issue of witnesses as well. It's fine if the client brings a support person as has been said, but if that person starts to interject, if it turns out that person let's say is a sibling or a family relationship and may actually have his or her own knowledge of the relationship between the client

and the lawyer, if that person starts to interject, I think that you should consider whether that person then actually needs to be sworn in as a witness because you don't want to find that you are taking into account factual material that a support person has injected into the hearing without the formality of reminding that person that whatever he or she says needs to be true.

Dan Weitz: Very good point. And I would just add on interpreters, we in the court system view that the issue of interpreters in the free arbitration program has an access to justice question. And when they are needed, the local program usually works it out with us. And if we through the courts can provide an interpreter, we do so. So it's something that you administratively would not have to handle as arbitrators, but it's important to know that you might have an interpreter in your hearing.

And in the arbitration skills training, the skills portion of the trainings, we talk about things like seating arrangement, where would you put these people? Don't want to go into it in detail now, but that's another thing that you give some thought to as arbitrators is where do you seat the interpreter? Where would you seat support persons and witnesses and so forth?

Amy Pontillo: Absolutely. Thank you. Yeah, and this is true what Dan says. This is not whether you get an interpreter or how you get an interpreter, it's not something that arbitrators need to be concerned with. But some of the local rules, and I'm just drawing your attention to it because NYCLA does have this in their rules, that if somebody wants an interpreter that they'll have to go find that interpreter themselves and pay for it. But like Dan said, it is access to justice and it is something that we as the courts are going to help out with and get whenever we can.

Okay. And I'm definitely going to ask Dan and Mike to jump in here and help me out, but I'll just go through this. So sometimes it's not just whether the fee is reasonable, that's not just the only issue that you're going to have to determine. Sometimes there's more fact finding needed before the program administrator can determine whether or not the case actually falls within into the jurisdiction of the program.

And some examples of that are, so did the client timely filed the request for fee arbitration after the attorney sent notice? So there's that 30 days that the client gets to file for fee arbitration and sometimes the client doesn't file within the 30 days and actually the programs will still accept a case where the client has filed late.

However, if the attorney objects to the late filing, then the administrator will have to do some additional fact finding to determine whether in fact the client filed late because it's not always clear. The client might not have the certified mail available to show the administrator or some information might not be available to the administrator unless there's more deep fact finding. So that might be an issue that would go to the arbitrator.

Another issue that comes up is because there's that kind of statute of limitations within the rule that we can only take cases where less than two years have passed since the last state of services. So sometimes it's hard to tell when the last state of services were. So that might be an issue that you would see as an arbitrator. The amount in dispute is always some... not always. It's sometimes confusing about how much is in dispute.

So for example, the client might have an overall a bill of $41,000 and she's saying that she's just disputing 10,000 of that. So how much is actually a dispute here? Is this more than $50,000? If you go through the math of the award form, which Meg is going to do in a little bit? And then finally something that you might see because maybe the client for example, the client is claiming that, like Dan said earlier, that the attorney's a liar and a thief and he stole my money or I missed a statute of limitations because the attorney wasn't doing his job or I wasn't able to recover on this because the attorney missed something.

This might be another issue that you would see as an arbitrator to determine, well does this sound like it's more malpractice than it is a fee dispute? And if it is, then you don't have jurisdiction anymore at that point and you would contact the administrator and let them know that the case should be closed. Dan and Meg?

Martha Gifford: Yes. So the substantial legal question issue is one that is not likely to come up until you are in the hearing and the lawyer gets up and makes her presentation, the client then gets up and starts making his presentation. And at some point in there you either directly hear the word malpractice, which by the way, you should think about because you may recognize that although the client is using the word malpractice, what the client is talking about is really not malpractice. It may be simply the lawyer took too long to do this or the lawyer used too many hours to do this and she should have been able to do this in 30 hours and not 60.

All right, so not talking about malpractice. So you have to have in mind if you start hearing facts that suggest malpractice to you, even if the client doesn't use the word or if you do hear the word, keeping in mind whether the facts that the client is citing are really not malpractice. So that is an issue that is not likely to occur, as I say, until you are in the hearing.

On occasion, the issue will actually appear on the face of the client's filings with the program and in that event the program administrator will take care of it and either determine with some help from Amy that the matter really doesn't speak to malpractice and it should just go ahead as an arbitration or that yes, the administrator was correct to catch this. It does look like a malpractice issue and so we'll have to tell the parties that the matter can't be arbitrated, but it is more likely that a question of this type would come up once the hearing has begun.

Guy: Yes, this is Guy, I do have a question. If there does seem to be some question about attorney malpractice but there still is a fee dispute as well, can the

hearing proceed just on the fee dispute based on the understanding that the malpractice issue is separate and would not be heard by the arbitrator?

Dan Weitz: Meg, are you deliberating?

Martha Gifford: Amy, do we cover this in one of the slides that's coming up, the question of issue preclusion?

Amy Pontillo: We do talk about issue preclusion in a little bit. Do we want to-

Dan Weitz: And we talk about the quality representation. But I think to answer it here and if we return to it, I think our strong recommendation is no. If there is a colorable claim of misconduct, then the entire fee dispute should be diverted to the disciplinary committees because if there were misconduct, that implicates the entire fee, whether or not other aspects of it might have been deemed reasonable. And let the appellate divisions make a determination as to whether they want to send it back to the program for determination.

Martha Gifford: Yes. And that has occurred from time to time where the grievance committee will decide that they can separate the issues or that although what is being said at the hearing sounded like malpractice and so to be cautious, you terminated the hearing and it was sent off to the grievance committee. The committee may decide that no, they're comfortable that this doesn't rise to the level of malpractice or misconduct and they send the whole thing back.

So the wise course is, as Dan said, to bring the hearing to a stop and notify the administrator. Now you could, and Amy, I believe that we have had such a situation... you could stop. We're assuming that what you've just heard is probably being said by the client. And you could ask and if you've got a panel, you and your colleagues could ask some specific questions of the client that might lead you to a clearer understanding of whether the client really is talking about some conduct that might rise to the level of misconduct or malpractice or that the answers to your questions give you a sense of confidence that although the client is using that language, really all the client is talking about is the issue of the fee itself, the reasonableness of the fee. So you might be able to clarify it in the hearing and then decide to continue the hearing.

Amy Pontillo: Thank you. Guy, does that help so far knowing that we'll probably get [inaudible 00:53:20] a little bit? Okay, thank you.

Guy: Yes, very clear.

Amy Pontillo: Great. Okay, confidentiality 137.10. 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. The board had the intention and has interpreted this section of the rule to mean at least the ancillary legal

action part definitely to do with the ward enforcement under CPLR 75 because if you're going to go into court and petition to have the award confirmed, you're necessarily going to have to present that award. So that is something that would not be confidential once you go to court to seek to confirm the award.

Another interpretation of that has been disciplinary investigations. And so the disciplinary process and you're all attorneys, you do know that it's confidential. It's very confidential and information doesn't come out until a very public censure or decision is made about the attorney's suspending or disbarring the attorney. And also as we mentioned earlier, that the fee dispute program was not meant to take anything away from the appellate divisions and their authority to discipline attorneys.

So if for some reason the disciplinary committee deems it necessary to get information that's in our case files, we have a process for that. And that's again, not something that you would be involved in. It's something that the administrator would be involved in, in consultation with myself and the board. Meg and Dan, did you want to add anything to confidentiality?

Martha Gifford: So just to emphasize, no party should ever contact an arbitrator directly after the proceeding is over and request copies of any documents or anything else relating to the fee dispute, even if it's for a very good reason. So you should expect not to get such requests, but if you do, obviously you need to say that you cannot respond and also notify the administrator right away.

Amy Pontillo: Absolutely. Okay. So this is what we were talking about earlier about participation. So a party's personal appearance is not required, but a party may participate on paper and the party must submit testimony and exhibits under written declaration under a penalty of perjury. And this is found under 137.6(i). So again, that doesn't mean that any party can just say... well, it means that the attorney can't say, well I'm not responding to this fee dispute, I'm not going to submit anything and I'm not going to show up.

It could possibly mean that the attorney submitted some paperwork, but whether or not an attorney actually participated is probably going to be determined by a court if one of the parties tries to bring a trial de novo and then the other side says, well you have no right to a trial de novo, which we're going to talk about in a second because that person didn't participate.

Participation will also come up if there's a grievance matter, if the grievance asks whether or not this attorney participated. So there has to be some procedure involved. You can't just not show up and not present anything to be considered by the arbitrators and to be considered to have participated. Meg, did you want to speak to that at all?

Martha Gifford: Yeah, we'll talk about de novo shortly. I think that there's one set of circumstances, I've not heard of it happening. But in effect I guess a party can

say to the arbitrators prior to the hearing, essentially I'm giving up, right? I'm not going to show up and I'm not going to submit anything. And if it's the attorney, it would be because I have decided to withdraw my claim for additional fees to be paid. Or withdraw a defense to a claim by the client for additional fees and say, yeah, okay I will pay. That would not be a failure to participate. That would be essentially resolving the fee dispute. And at that point then a procedure for settlement should be followed and there is a form, multiple forms, Amy on the website for recording a settlement.

Amy Pontillo: We have a stipulation of settlement form that the parties can use. Yes.

Martha Gifford: So I just wanted to distinguish between a failure to participate, which requires a referral of the attorney for failing to participate to the grievance committee and a sudden resolution that aggregates the need for the hearing.

Amy Pontillo: Thank you again for clarifying. And so just another note on participation, and this is just some practical concerns and it's an issue that would be presented to you as an arbitrator. So for example, you have a party that is out of state and can't come to the hearing but definitely wants to participate. There are options. You may allow parties to participate through Skype or some kind of video conference or a teleconference. There are definitely things that you would want to consider because as arbitrators you'll have to look at demeanor and credibility and you're also going to probably hear objections from the other side if one party says that they want to just participate on the phone. And that's information that you would consider as an arbitrator to determine whether the proceeding can go forward on the phone or by video.

And I'm just going to punt this over to Dan for a second because he's also our Americans with Disabilities Act coordinator and something to consider is parties who are home bound and maybe just physically can't get to a hearing because of a disability. Do you want to talk about that a little bit, Dan?

Dan Weitz: Sure. The Americans with Disabilities Act requires that particularly when it applies to the courts, that the program services and activities of the courts under Title 2 of the ADA must be accessible to people with disabilities. This is a program service and activity of the courts. It's sponsored under a court rule. So we should be mindful of that and make reasonable accommodations for people with disabilities. If they're home bound and unable to appear in person, then we should do everything we can to accommodate them so that they can participate as fully as possible, whether it be telephonically or through Skype or through some other kind of technology. There's lots to say on that subject, but just to put that on your radar as arbitrators that we must be sensitive to those issues and do what we can to accommodate people who are in need of an accommodation.

Amy Pontillo: Thank you, Dan. What happened? Okay, so we talked a bit about this already, but referral to the grievance committee, failure to participate. I'm going to start from the bottom because we didn't talk about this one yet. So it's in the rules.

It's 137.6(g). The client may not withdraw from arbitration once the arbitral body receives the attorney fee response. Again, this is different than settling the matter. This is the client, after the attorney sends in the fee response says, oh what I don't want to go forward with this anymore. Just for whatever reason, they can't withdraw at that point.

And what will happen is that the arbitration will go ahead and a decision is made on the evidence that is actually presented. The same thing though, if an attorney doesn't participate, but the consequences are a bit worse there. So if the attorney fails to participate again and fails to show good cause again, I think that's something that the court will look at or the disciplinary committee will look at. So if the attorney fails to participate without good cause, the attorney is referred to the grievance committee of the appellate division, that's 137.11.

But also the hearing is going to go ahead and a decision is going to be made on the evidence presented. And think about it, remember the burden is on the attorney and the attorney doesn't show up. How does that affect his or her case if he hasn't presented anything and hasn't participated? So something to think about.

So this point on arbitrators have the discretion to decline to accept a late fee response, that came from the administrators telling us that sometimes an attorney will not respond to the client request and will not have any communication with the local program and then just shows up on the date of the hearing and has all these files and documents and all these things that need to be considered into evidence.

And what happens at that point, the client is at a disadvantage because the client has no idea what the attorney was going to be presenting. The arbitrators probably aren't going to like that either because they haven't had a chance to look at any of the documentation before they had the parties come to the hearing and to provide testimony.

So as an arbitrator, you have the discretion to decline to accept a late fee response and this is contemplating that scenario where you have an otherwise non-participatory attorney who is showing up with all this information and nobody's had the benefit of looking at any of that information before. Meg, Dan, did you want to add anything?

Martha Gifford: Yes, I think I agree with all of that. This issue of documentation actually relates back as well to the prior slide about how parties can participate. First of all, it's certainly within the authority of you as arbitrators as in any kind of arbitration to require both of the parties to submit their documentation in advance, both to the arbitrators and to each other. And that has some obvious benefits to it.

You can choose not to do that and choose to allow people just to show up at the hearing. And if it's a small amount that's in dispute, that might be a very

reasonable approach. But that is up to you. If you're going to authorize or even suggest to the parties participation by telephone for a party or for a witness for that matter or by Skype or FaceTime, you would presumably want the documentation in advance because I don't know how else you are going to deal with documentation from a party who's on the phone or in particular on the phone where there is no opportunity to show the document and it would have to be then emailed or faxed right then.

But even on Skype, it's not going to be very helpful if a party who's on Skype just holds up a document and says, here, this is what I'm relying on. So in those cases you will, I think want to exercise your authority to require that the documentation be provided at a reasonable time in advance of the scheduled date.

Amy Pontillo: Great. Thank you. Okay, so Meg, this is you again, if you want to talk a little bit about the award.

Martha Gifford: Yes. So just a reminder, you must issue your award within 30 days of the hearing or the award must be issued within 30 days of the hearing. Please keep in mind that you need to prepare and sign your award and then provide it to the administrator to issue. Those last steps shouldn't take very long, but give the administrator a little bit of advance time to get this out within the 30 days. I think it may go without saying, but I will say it anyway, this leads us to suggest that you don't postpone preparing your award, that you try to do that either as a solo arbitrator or as a panel member as quickly as possible after you've completed the hearing and reviewed any documentation that you need to take another look at, at that point.

As Amy said earlier, there is a form of course for the award. We'll be looking at that in just a moment. It is in the manual, it is Appendix F 18. Your award is in writing of course, and you are asked to specify the basis for your determination. However, we ask that you keep the description of the basis for your determination brief in summary form. And as you see on the slide, we have an example of what we're looking for based upon my or our review of the evidence, which included the attorney's billing statements, the testimony of both the client and the attorney. If there was testimony of one or more witnesses, you would want to mention that.

If the client provided documentation, whether it be a series of emails or letters that were not in the attorney's records or not that the attorney provided to you as arbitrators, you would want to mention that the client also provided certain documentation. So just a recital of what it was you took into account as the basis for your determination. Then you would recite that I or we find that the attorney has proved by a preponderance of the evidence that the attorney's fee of X dollars is reasonable and then we'll show you on the award how you record how much of that fee needs to be now paid to the attorney or a statement that if that's already been paid, that nothing more is due to the attorney.

If you are finding that the client should be repaid some amount or should not be required to pay an additional amount, you would not say that the client has proved by a preponderance of the evidence, et cetera, you would say we find that the attorney has failed to prove by a preponderance of the evidence and then go on to specify what it is that the attorney has failed to prove. Okay, that is important. You'll sign the award form, remember no dissents.

And I want to just pause here and note that one of the reasons for keeping the determination very brief and for not filing a dissent if there is one, is because with all due respect, it's not relevant. There is no appellate review of the award. The program does not have the right to overturn the award. The only issue is a possible enforcement of the award and more likely a move by one of the parties or both to seek de nova review and in de nova review as we'll discuss in a moment neither the reasons for the award nor any dissents are relevant, admissible, permissible. They're just out of the picture at that point.

Dated. Very important and on occasion an award has not been dated or has been dated wrong. And if that ever becomes an issue, then we have a big headache. So date it correctly. Send the award to the administrator to distribute it and it will become final and binding 30 days later. So now we're going to look at the award form. Okay.

Amy Pontillo: I just wanted to show what the actual award arbitration award looked like. I'll get to the slides right after this. And as Meg said earlier, so you'll see our statement of reasons. There's only three lines. We don't want you to use any extra paper. It should all fit on those three lines.

Martha Gifford: Right. If there were a number of witnesses and if there were a number of different kinds, if a witness brought a document and you feel you need to note that, that's fine. But explanation, no, no further explanation. So we're pretty insistent on that. All right, so here we go. This is just a graphic with boxes to make it really clear and so we can do this exercise.

But this is the information that needs to be inserted by the arbitrators onto the award form. So as you see in this example, the total bill for services was $20,000 of which the client has paid 15,000. The client disputes 5,000 of the 15,000 that she's already paid, right? So she is now saying I should only have been charged $10,000. She doesn't say anything about the balance of the bill, the remaining 5,000.

The attorney in the attorney's response is seeking the $5,000 and obviously is disputing that he should repay the 5,000. So how much of this bill of the total of 20,000, how much of this is in dispute? Anyone want a hazard a guess.

Amy Pontillo: I'm sorry.

Martha Gifford: Oops, we answered it. Okay, so 10,000 is in dispute and that's because even though the client was silent as to the remaining unpaid 5,000, the attorney is clearly not silent as to it. And so we've got a total of $10,000. Okay. So you've heard all of the evidence and testimony that you've looked at documents and you've determined that of that disputed 10,000... so keeping in mind that's 5,000 that was already paid and 5,000 that hasn't been paid, you've decided that the attorney was entitled to $7,500.

So you would put the $7,500 figure in box 2. Okay. Now the amount of the $7,500 that was previously paid by the client in this example, $5,000. Okay? Because she paid 15,000, although she says that she should only have had to pay 5,000. So of the $7,500 in dispute, she has paid $5,000. So in this example you have to say is there a balance due by the client to the attorney or is there an amount to be refunded by the attorney? And in this case, obviously the balance due is by the client to the attorney and it is the remainder of the $7,500 to which the attorney is entitled $2,500.

Now by the way, you might have decided that the attorney was it of the amount entitled... oh, excuse me, of the amount of dispute, you might have decided that the attorney was entitled only to $5,000. In which case what we would suggest that you do is put a zero in both 4A and 4B just so that your award is completely clear. That the attorney was only entitled to 5,000. Well, the client paid that 5,000 and the attorney is not entitled to the remaining 5,000.

So that means nobody pays anything to anybody. But make it clear to us by putting a zero in both boxes. If you want to make your awards totally transparent and clear and no question whatsoever, in this example that we're looking at here, you might also put a zero into the 4B box. Any questions on this example?

Amy Pontillo: Sorry.

Martha Gifford: Amy, is there anything you have to add to this?

Amy Pontillo: No, thank you.

Martha Gifford: Okay.

Amy Pontillo: And we talked about the statement of reasons already, right or...

Martha Gifford: Oh, yes. Yes. Right. So well in this case we've drafted up a little statement of reasons for you and I'll just read it Amy, so you don't have to try to fiddle around with the pictures. Based upon the testimony and documentary evidence presented, the attorney showed or proved by a preponderance of the evidence that he is entitled to $7,500. It does say she, but Dan's the attorney in this case so I'm [inaudible 01:19:00] the client shall pay $2,500 to your attorney.

Now what this statement of reasons is really just a statement in words of the numbers that you've got on the form. As we said before, you could say in your statement of reasons based upon the testimony of both parties and a witness presented by the client and based upon the attorney's billing records and email correspondence provided by the client, you can certainly do that, but it should always be the attorney showed or failed to show by a preponderance whatever it was that was being sought.

Amy Pontillo: Thanks, Meg. I just want to make a process suggestion here because we are kind of short on time.

Martha Gifford: Yes we are. Okay.

Amy Pontillo: So want to skip the next example?

Martha Gifford: Yes. And the slides are going to be provided to our arbitrators here.

Amy Pontillo: Yes, they should have them. And of course if there are any questions you can talk to the administrator or you can contact me.

Martha Gifford: Right. So very quickly I should be able to do this momentarily. We've already talked about the trial de novo. It is what it says it is. It is a completely new proceeding. The arbitration disappears despite all your good work. The arbitration just is no longer and the parties may not refer to the arbitration in the trial de novo. If there was a record in the arbitration. If it was made, it may not be admitted into evidence. The award may not be admitted into evidence and most happily for you, you may not be called as witnesses.

Amy Pontillo: Thank you. Okay, so this next section is on prior written agreements to arbitrate. I'm just going to generally say that if an attorney and a client want to agree ahead of time to go to arbitration, if there is a fee dispute, it has to be knowing and informed on the part of the client. And there are various things that need to be included in order for there to be knowing and informed consent. And it's all spelled out in the next few slides.

I also wanted to draw your attention to our forms, which are in your manual but also online because that provides model language. So if you as attorneys wanted to have an agreement to prior written agreement to go to arbitration of a fee dispute, you can copy that language that's on our model forms. And I just want to draw a distinction between prior written agreements to arbitrate and the requirement under the letter of engagement rule, which is 22 N.Y.C.R.R. 1215.1 and 2. That's something different. That is a requirement that says basically under certain circumstances a letter of engagement is required and under certain circumstances involved in that you will have to put in that letter of engagement that the client may have the right to go to arbitration. So it's something different and it's not as exacting as knowing and informed consent to

actually waive the right to use the fee arbitration program. Let's see. Okay, Dan, do you wanted to go over quickly what is a reasonable fee?

Dan Weitz: Sure. And for our viewers, everything that we're reviewing right now is stuff that you can read and it's our effort here to just highlight it all for you. So in terms of trying to attach some criteria to this determination that you have to make of what is a reasonable fee, among the things you can look to or the rules of professional conduct, rule 1.5. The rule is right there. It's also in your manual on page 21 along with a number of factors including the time and labor required and the fee customarily charged in the locality. You can review that rule and use that as a resource when needing to come up with criteria for how to determine the reasonableness of the fee.

Amy Pontillo: Thank you. So what triggers the notice requirement for an attorney and what is a fee dispute? So briefly, some background on this. Under Part 136, which was the matrimonial fee arbitration program, there was a split in the departments. And in the first department they said that the client doesn't have to explicitly contest a fee in order to trigger the attorney's notice requirement. So whenever an attorney was going to go into court and sue for a fee, they had to first provide notice. And this is even if the client was silent and just not paying.

But in the second department, they said in the case of [Scollo 01:24:05] v Scollo, all your cases are in the back of the manual. Well, there has to be some explicit saying that the client is disputing the fee, they can't just not pay. So under Part 137, there were some cases back and forth and there was some disparity, but cases from the trial courts and even from the second department were generally going in the direction of the first department, which was non-payment will trigger notice. And the rationale in those cases is that Part 137 was intended to be broader than Part 136 and cast a wider net.

Because there was some confusion and it wasn't entirely clear what would trigger the notice requirement and when would the fee dispute program apply? What is a fee dispute? Just this year, effective January 1st, 2018, 137.6 was amended to include. So accept us set forth in a previous paragraph 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 written notice to the client, entitled Notice of Client's Right to Arbitrate by certified mail or personal service.

So this is how I mentioned before that. So if an attorney's thinking about going to court to sue, the attorney should also be thinking whether or not Part 137 applies.

The viewer code for this video is 56527. Again 56527. I'm not sure, should we just touch on issue preclusion and then-

Martha Gifford: Yeah.

Amy Pontillo: Okay.

Dan Weitz: Sure. I can do that very quickly.

Amy Pontillo: Oh, sorry.

Dan Weitz: One of the reasons that we mentioned people, clients in particular might want to be told about making claims about malpractice and so forth is that in a precursor to Part 137 and Rule 136, which applied to matrimonial fee disputes, there was a real issue of issue preclusion. Bottom line, you can read about this, the question would be, does a client waive a right to seek malpractice damages against an attorney by participating in a 137.

Cases involving malpractice are typically screened out of the program. And in terms of case law that's in your material, there's a second department case, [Molar 01:26:47] v [Campania 01:26:49], which points out that Part 137 explicitly precludes malpractice from the arbitration process. So therefore, issue preclusion should not attach, should a client seek 137 arbitration and then later want to bring a malpractice action.

But if a client continues to raise issues of malpractice, it's important to let them know that there still is that potential, particularly outside of the second department. And if you're in NYCLA, you know you're in the first department.