



THE NEW YORK STATE ATTORNEY-CLIENT
FEE DISPUTE RESOLUTION PROGRAM

INTRODUCTION TO THE PART 137 PROGRAM

[NYCOURTS.GOV/FEE DISPUTE](https://nycourts.gov/fee-dispute)

FEEDISPUTE@NYCOURTS.GOV

TODAY'S PRESENTERS

- **Dan Weitz, Esq. Director of Professional and Court Services**
- **Martha Gifford, Esq. Chair, Board of Governors**
- **Amy Pontillo, Esq. Counsel, Board of Governors**

AGENDA

- **History of Part 137**
- **Program Structure and Operation**
- **Jurisdiction**
- **Case Mechanics, life of a case**
- **Arbitrator powers and assignment**
- **Burden of Proof**
- **Hearing, Jurisdictional and practical issues**
- **Award**
- **Prior written agreements to arbitrate**
- **What is a reasonable fee**
- **Legal Issues**

WHY PART 137?



- Public Trust and Confidence
- Resolve Disputes without the formality time and expense of litigation
- Informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation.

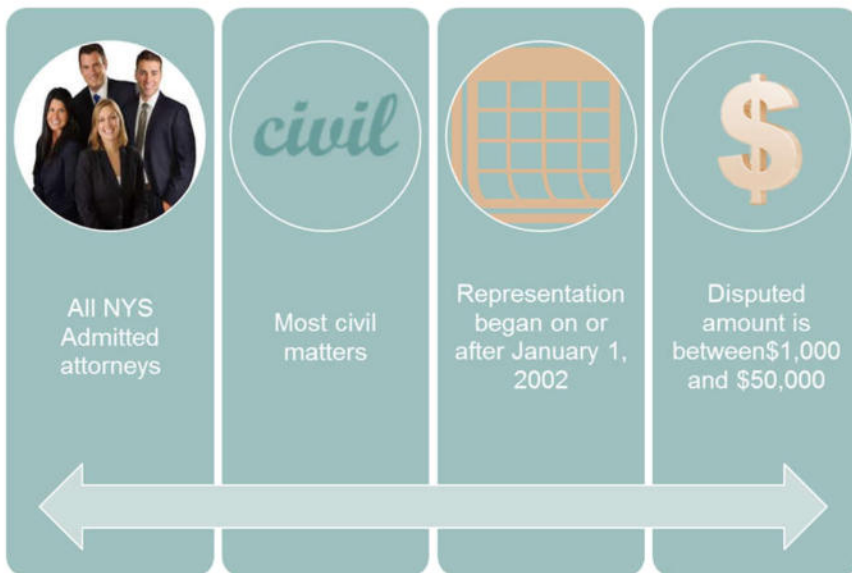
PROGRAM STRUCTURE- THE BOARD AND COUNSEL

- Board of Governors- oversees the program
 - 18 member Board of Governors
 - 12 attorneys
 - 6 non-attorneys
 - Chaired by Martha (Meg) Gifford
- Local Programs serve each judicial district
- Counsel supports the Board and the Programs



APPLICATION:

Applies to:



But does not apply to:

- criminal matters
- substantial legal questions, including professional malpractice or misconduct*
- damages or relief other than adjustment of the fee
- fee is determined by statute, court rules, or court order
- No services for two years
- Services rendered outside New York State
- Request is filed by someone other than the client or client's representative.

WHAT IS A SUBSTANTIAL LEGAL QUESTION?

- Explicit claims of legal malpractice & attorney misconduct
- Complex or protracted issues
- Case-by-case

...and why exclude them?

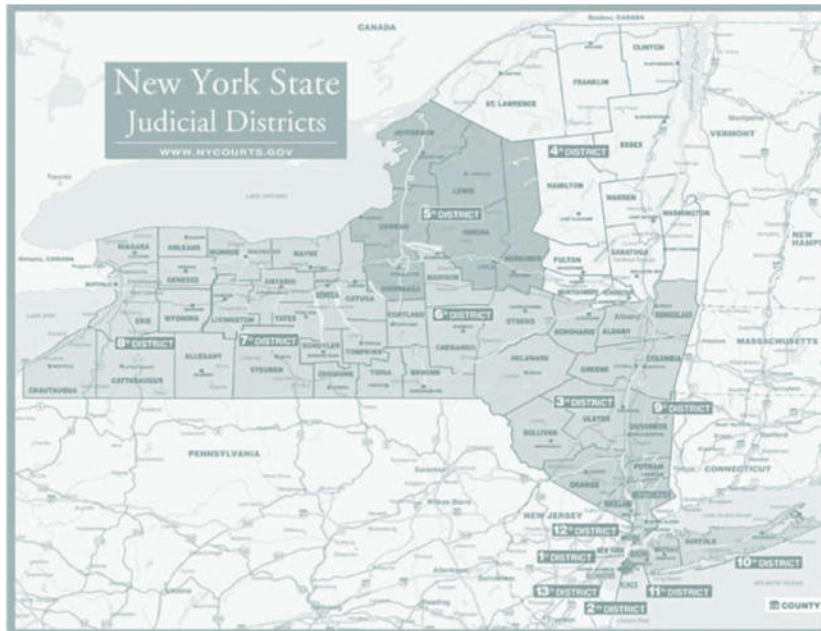
- Time and informality
- 137.0 Scope
- Appellate Divisions' authority over disciplinary actions
- Volunteers
- Issue Preclusion- more later



PROGRAM STRUCTURE- LOCAL PROGRAMS (ARBITRAL BODIES)

- Local bar associations or Judicial District Administrative Offices (or a hybrid).
- Local program rules and procedures
 - Arbitrator qualifications & assignment protocols
 - Fees
- First point of contact for arbitrators, attorneys, and clients
- Jurisdiction
- Case administration
- Venue

VENUE

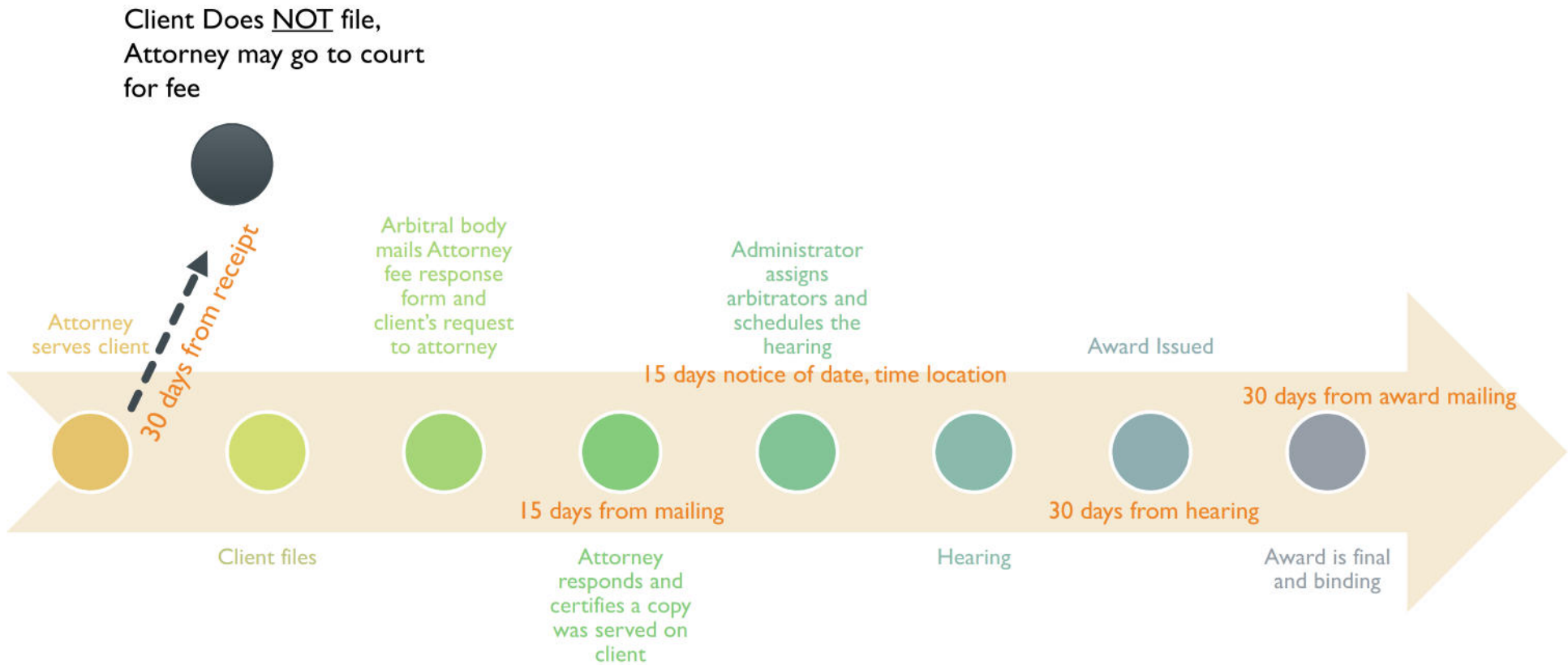


- Where the majority of the legal services were performed.
- Transferred upon a showing of good cause.
- Board intervention if a dispute over venue arises between programs.

SIX WAYS CASES GET TO DISPUTE RESOLUTION UNDER PART 137

1. Attorney sends client notice of the right to arbitrate. [137.2 (a) & 137.6(a)(1)]
2. Client pursues arbitration on his/ her own.
3. Client Consents in advance to arbitrate potential fee disputes. [137.2 (b)]
4. Client consents in advance to arbitrate potential fee disputes and waive the right to trial de novo. [137.2 (c)]
5. Client and attorney agree in advance to arbitrate potential fee disputes in another arbitral forum- not Part 137. [137.2 (d)]
6. Client and attorney may consent to mediate fee dispute*. [137.12]





Arbitration Procedure Timeline

THE HEARING- ARBITRATOR ASSIGNMENT

- Disputes involving \$10,000 or more are assigned to a panel
- Parties may waive the panel in writing (UCS 137-17)
- Disputes involving less than \$10,000 go to one attorney arbitrator
- Decisions
 - On the merits: Majority rule; ***no dissents on the award***
 - Procedural Disagreements: resolved by the Chair unless otherwise stated in local rules.



THE HEARING: ARBITRATORS

- Conflicts
- Immunity
- Defense and Indemnification

THE BURDEN OF PROOF

- Burden of proof is on the Attorney to prove the reasonableness of the fee by a preponderance of the evidence.



A mere scintilla

Substantial
Evidence

Preponderance
(Part 137)

Clear and
Convincing

Beyond a
reasonable
doubt

THE HEARING- ORDER OF THE PROCEEDING 137.7(d)


Part 137 Arbitrator's Information Sheet

Dear Arbitrator: Thank you for volunteering your time to arbitrate this fee dispute. Here are some tips to help you during the hearing. Remember, the Local Program Administrator can help you with questions during the hearing. Please contact _____ at _____ if you have questions or concerns.

SEQUENCE OF ARBITRATION HEARING

Open the Session

Avoid ex-parte small-talk, introduce yourself, and confirm parties' names and their spellings on form.

Discuss the Purpose of the Program

To encourage out-of-court resolution of fee disputes between attorneys and clients in fair, impartial and efficient programs established and administered by bar associations and local offices of the Office of Court Administration.

Frame the Issue for the Arbitration:

The burden is on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history.

Remind parties that the program does not resolve issues of professional malpractice or misconduct.

Offer Parties an Opportunity to Settle:

The arbitrator(s) should not be present during any settlement discussions. If the parties reach a settlement, you may help the parties incorporate the terms of their settlement into a Stipulation of Settlement form. Only those terms of settlement that relate to the attorney's fee should be included in the Stipulation of Settlement form.

Remind Parties of Their Rights.

The parties would have been already notified through the local program of their rights. Parties should have made arrangements ahead of time.

*Counsel
Call witnesses
Stenographic record
Subpoena documents and compel attendance of witnesses*

1 April 24, 2012

- Attorney presents his/her case using documentation of the work performed and billing history
- Client may then present his or her account of the services rendered and time spent
- Parties may call witnesses
- The client has the right of final reply
- See 'Arbitrators' Information Sheet' (see manual appendix F 24)

THE HEARING- ARBITRATOR POWERS

- Take and hear evidence
- Administer oaths and affirmations
- Subpoena attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.
- Rules of evidence need not be observed (but the order of the proceeding does! Remember 137.7(d))

THE HEARING- PARTY RIGHTS AND OTHERS IN THE ROOM

- Stenographic or other record
- Parties may call witnesses
- Attorney and/or to bring a “support person”
- Interpreters

THE HEARING-THRESHOLD JURISDICTION QUESTIONS

Arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances.

- Jurisdiction
 - Did the client timely file the request for fee arbitration after attorney sent notice?
 - Have more than 2 years passed since the last date of services?
 - Is the amount in dispute greater than \$50,000?
 - Does this case present substantial legal questions?

CONFIDENTIALITY- 137.10

- 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
 - Disciplinary investigations
 - Award enforcement CPLR 75

THE HEARING- PARTICIPATION

- Personal appearance is not required.
- Parties may participate on paper
 - Party must submit Testimony and exhibits under written declaration under penalty of perjury. 137.6(i)
 - Other options?



FAILURE TO PARTICIPATE

- The arbitration proceeds and a decision is made on the evidence presented.
- Attorney fails to participate:
 - The attorney shall be referred to the appropriate grievance committee of the Appellate Division. 137.11
- If the attorney without good cause fails to respond to a request for arbitration: 137.(6)(h)
 - Arbitrators have the discretion to decline to accept a late fee response. Standards Section 6. C.
- The client may not withdraw from arbitration once the arbitral body receives the Attorney Fee Response. 137.6(g)

THE AWARD

- Issued within 30 days of the hearing
- In writing, specifying bases for the determination (keep it brief)
 - *Based upon my review of the evidence—including the attorney’s billing statements and the testimony of both the client and the attorney—I find that the attorney has proved by a preponderance of the evidence that the attorney’s fee of \$2,500.00 is reasonable. (page 28 in the manual)*
 - Signed, affirmed (remember no dissents)
 - Remember to date the award! And double-check the date/ year.
- Send the award to the administrator to distribute
- Thirty days after mailing, award becomes final and binding (may still have to confirm award)

[AWARD FORM](#) (see manual Appendix F18)

<p>In the Matter of Fee Dispute Arbitration between</p> <p style="text-align: center;">Amy Pontillo, Client and Dan Weitz, Attorney</p>	<p>ARBITRATION AWARD</p>
<p>1. The AMOUNT IN DISPUTE is:</p>	<p>\$10,000</p>
<p>2. The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client):</p>	<p>\$7,500</p>
<p>3. The AMOUNT of this total PREVIOUSLY PAID by the client is:</p>	<p>\$5,000</p>
<p>4. (a) The BALANCE DUE by the client to the attorney is:</p>	<p>\$2,500</p>
<p>-OR-</p>	
<p>4. (b) The AMOUNT TO BE REFUNDED by the attorney is:</p>	

The total bill for services rendered is \$20,000. Client has already paid \$15,000. Client challenges \$5,000 of the \$15,000 he already paid. Client is silent as to the balance of the bill, \$5,000. Attorney is seeking \$5,000 balance of the \$20,000 bill.

1. How much is in dispute?
2. If you decided attorney was entitled to \$7,500, how would you calculate the award on the form?
3. What would you write in the Statement of Reasons?

Based upon testimony and documentary evidence presented, the attorney proved by a preponderance of the evidence that he is entitled to \$7,500. Accordingly, the client shall pay \$2,500 to the attorney.

<p>In the Matter of Fee Dispute Arbitration between</p> <p style="text-align: center;">Amy Pontillo, Client and Dan Weitz, Attorney</p>	<p>ARBITRATION AWARD</p>
<p>1. The AMOUNT IN DISPUTE is:</p>	<p>\$1,200</p>
<p>2. The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client):</p>	<p>\$900</p>
<p>3. The AMOUNT of this total PREVIOUSLY PAID by the client is:</p>	<p>\$600</p>
<p>4. (a) The BALANCE DUE by the client to the attorney is:</p>	<p>\$300</p>
<p>-OR-</p>	
<p>4. (b) The AMOUNT TO BE REFUNDED by the attorney is:</p>	

The total bill for services rendered is \$2,000. Client has already paid \$1,400. Client challenges \$600 of the \$1,400 she has already paid and the balance of the bill, \$600. Attorney is seeking \$600, the balance of the bill.

1. How much is in dispute?
2. Do you have jurisdiction?
3. If you decided attorney was entitled to \$900, how would you calculate the award on the form?
4. What would you write in the Statement of Reasons?

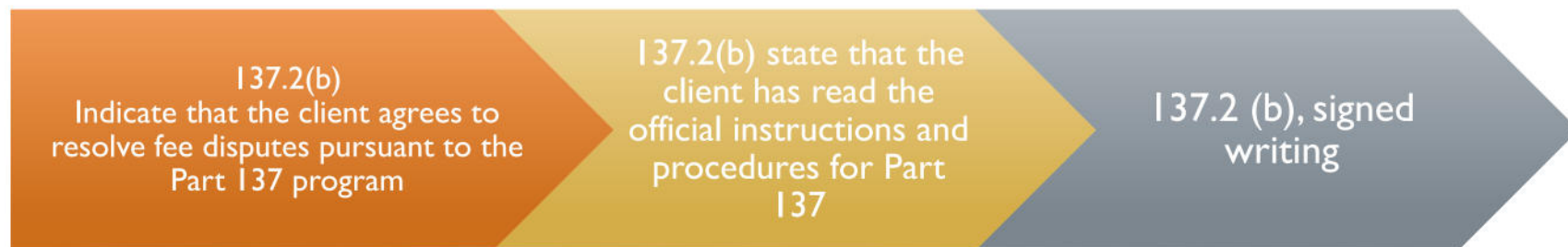
Based upon testimony and documentary evidence presented, the attorney showed by a preponderance of the evidence that she is entitled to \$900 of the disputed amount. Accordingly, the client shall pay \$300 to the attorney.

TRIAL DE NOVO

- Either party may commence an action in court on the merits within 30 days of the mailing
- Arbitrators may not be called as witnesses
- The award may not be admitted into evidence
- Any record made may not be admitted into evidence

PRIOR WRITTEN AGREEMENTS TO ARBITRATE:
KNOWING AND INFORMED CONSENT

PRIOR WRITTEN AGREEMENT: KNOWING AND INFORMED CONSENT TO ARBITRATE FEE DISPUTES [137.2(B)]



PRIOR WRITTEN AGREEMENT: KNOWING AND INFORMED CONSENT TO ARBITRATE FEE DISPUTES AND TO WAIVE DE NOVO [137.2(C)]



PRIOR WRITTEN AGREEMENT: KNOWING AND INFORMED CONSENT TO ARBITRATE OUTSIDE OF PART 137 [137.2(D)]

137.2 (d)
state that the client has
read the official instructions
and procedures for Part
137

137.2(d) Read the
rules and
instructions of the
outside arbitral
forum

137.2 (d) signed
writing

137.2(d) The
arbitration must
be final & binding.

137.2(d) Client
understands (s)he
has the right to use
Part 137 and is not
required to arbitrate
in the outside forum.

WHAT IS A REASONABLE FEE?

- Rules of Professional Conduct: Rule 1.5

“A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

see manual page 21

WHAT IS A FEE DISPUTE? WHAT TRIGGERS THE NOTICE REQUIREMENT?

- Does client have to explicitly dispute the fee?
- What if the client just doesn't pay?
- Notice: Effective January 1, 2018, Section 137.6 is amended as follows:
- Section 137.6 Arbitration procedure.
- (a)(1) Except as set forth in paragraph (2), where the attorney and client cannot agree as to the attorney's fee **or where the attorney seeks to commence an action against the client for attorney's fees**, the attorney shall forward a written notice to the client, entitled Notice of Client's Right to Arbitrate, by certified mail or by personal service.

ISSUE PRECLUSION

- Does a client waive the right to seek malpractice damages against an attorney by participating in a Part 137 arbitration?
- Cases involving malpractice claims are typically screened out of the program.

SHOULD ARBITRATORS ASSESS THE QUALITY OF THE REPRESENTATION?

- What should you do when the client claims that the attorney's performance was so substandard that it constitutes malpractice?

FAILURE TO COMPLY WITH CERTAIN RULES

- What happens if the attorney fails to comply with court rules governing attorney conduct?

SHOULD AN ARBITRATOR AWARD ATTORNEY'S FEES AND OTHER FEES ASSOCIATED WITH DEFENDING A FEE ARBITRATION?

- Almost always NO.
- Filing fees to use the program are different.

MAY ARBITRATORS AWARD INTEREST?

- **Yes, discretionary.**

Levin & Glasser v. Kenmore Property, LLC, 2010 NY Slip Op 898; 70 A.D.3d 443; 896 N.Y.S.2d 311; 2010 N.Y.App. Div. LEXIS 903(App. Div. 1st Dept. 2010).

NON-COMPLIANCE WITH AWARD

- Attorney's obligation to participate in Part 137 extends to honoring the award (*Spina v. de Filippo*- if you are not going to commence an action on the merits [de novo] or seek to vacate, then you must pay).



QUESTIONS?

FDRP

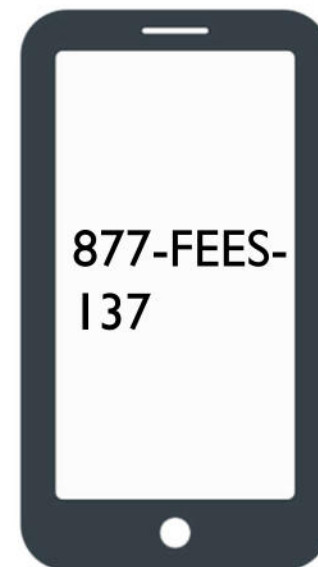


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PART 137 WEBSITE &
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INFORMATION



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