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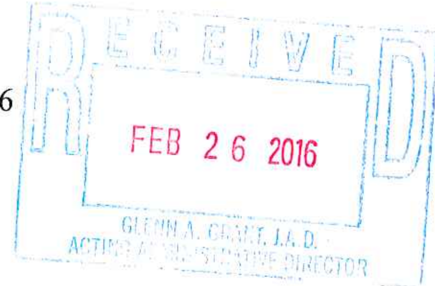

February 19, 2016

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments: Final Offer Arbitration Pilot Proposal
Hughes Justice Complex
PO Box 037
Trenton, NJ 08625-0037

Re: Final Offer Arbitration Pilot Program

Dear Judge Grant:

The Hunterdon County Bar Association has reviewed the "Recommendation of the Supreme Court's Arbitration Advisory Committee For A Pilot Program of Final Offer Arbitration, under Rule 4:21A." Pursuant to your request, please accept this letter as our comments. We appreciate the Committee's efforts in improving the Arbitration process. However, for the reasons set forth below, we do not believe that the Final Offer Arbitration, in its current form, is in the best interest of arbitrators or litigants. We also propose modifications to the Final Offer Arbitration Program that address our concerns.

Primarily, we object to the Final Offer Arbitration Program because it deprives the Arbitrator of the opportunity to apply his or her own sense of fairness. *N.J.S.A.* 2A:23B-15 provides that "[a]n Arbitrator may conduct an Arbitration in such a manner as the Arbitrator considers to be appropriate for a fair and expeditious disposition of the proceeding." Requiring the Arbitrator to select between only two possible damage awards conforms with the goal of an "expeditious disposition" however, it fails to meet the "fairness" goal of the statute. Oftentimes, the Arbitrator, with his or her "new set of eyes", sees a new aspect to a case that affords an opportunity to resolve the matter. Hence, confining the Arbitrator to one of two outcomes restricts the Arbitrator from interjecting his or her insight to the matter and thus negatively impacts the ability to be fair, which contravenes the statute.

Second, Final Offer Arbitration is contrary to the current procedures which govern the New Jersey Arbitration Program. That is, the Procedures Manual for Arbitrators in the Civil Arbitration Programs provides "[t]he Arbitration Award should be based on the evidence presented. In making the determination, the Arbitrator shall be guided by his or knowledge, expertise, and integrity. The reward should reflect the experience and legal culture of the County of venue." *Revised September 2007* at 6. Further, the Procedures Manual for Arbitrators in the Civil Arbitration Programs provides, "[w]ith the consent of all counsel and Pro Se litigants, any previous or current offers or demands in the case may be disclosed to the Arbitrator(s). Said disclosures shall not result in that Arbitrator's disqualification. The Arbitrator shall not be bound by these disclosures unless the respective litigants have entered into a binding high/low agreement. Id. at 6. (Emphasis added).

Based upon both the guiding statute for the arbitration process, as well as the procedures set forth in the Arbitrator's policy manual, it is inappropriate to bind the Arbitrator or counsel to any given demands. The Policy Manual assumes the voluntary agreement of counsel to a high/low agreement, not their compulsion to enter into one before the proceeding. The Arbitrator must have the discretion to reject any of the numbers desired by counsel.

As we understand the Final Offer Arbitration Program, the Arbitrator's award must be either the plaintiff's damage demand or the defendant's damage offer. The Final Offer Arbitration Program is contrary to the current policies of the Program since it bars the Arbitrator from using his or her own knowledge, expertise and sense of fairness in arriving at an appropriate award. It also ignores the Arbitrator's obligation to assure that his or her award properly reflects the experience and legal culture of the County of venue.

Forcing the Arbitrator to choose between a plaintiff-submitted number and a defense-submitted number will only polarize the resolution process. Typically, arbitrators represent either plaintiffs or defendants. Under the current arbitration system, the Arbitrator engages in a balancing process and applies his or her own knowledge, expertise, integrity and sense of fairness. Therefore, a defense attorney arbitrating a case can be moved to the plaintiff's side and a plaintiff's arbitrator can be moved to the defense side. However, in the "winner take all approach" of the Final Offer Arbitration Program, it is likely that the defense number will be selected by the defense arbitrator and the plaintiff number selected by the plaintiff arbitrator.

We understand that the Final Offer Arbitration Program seeks to change the current arbitration program, so arguably, if Final Offer Arbitration Program is eventually expanded from a pilot program and adopted as the State-wide Arbitration Program, the current policies will be moot. However, the current policies seem more in line with the general nature of arbitration, the diplomatic dispute resolution by a third or disinterested party. Comparatively, the Final Offer Arbitration Program, as it is presently presented, is not in line with arbitration in the litigation setting. It would be disappointing to reject the tenets embodied in the current governing policies.

An example of how the two-option process can go awry is where there is a liability dispute. Oftentimes, parties will disagree over liability and damages. That is, the Arbitrator will have to "call" both parts of the equation. Limiting the award to one of two options bars the Arbitrator from

the myriad of awards where both liability and damages are at issue. While it is intriguing to borrow from America's pastime, baseball, a personal injury matter differs from a salary dispute in that in the salary dispute, money is the **only** issue in dispute. In a personal injury matter, liability, damages and the impact of credibility of the parties are all assessed by the Arbitrator. The Arbitrator's expertise, knowledge and experience in the venue are factors in the decision. These factors should not be minimized or dismissed.

Notwithstanding the foregoing, the Final Offer Arbitration Program positively addresses a common and unfortunate scenario. On many occasions, the parties appear at Arbitration without any prior discussion regarding value of the case or resolution. The authors of the Final Offer Arbitration Program wisely recognize that it is inefficient in the resolution process to wait until the Arbitration to discuss settlement positions. Accordingly, the mandatory exchange of offers and demands prior to arbitration is a valuable step towards streamlining the resolution process. In that regard, we propose that the Final Offer Arbitration Program remain as authored with the exception that the demand and offer be used as a "high" and "low" for the arbitration. The Arbitrator's award shall be either of or between the proposed numbers.[1]

Appointing a plaintiff and defense Arbitrator as a joint panel is another alternative. This model works quite effectively in many other Counties, such as Mercer, Camden, Atlantic, Ocean, Gloucester and Cumberland and does not greatly increase costs, and at the same time provides a much greater degree of fairness and reliability in results.

As the policy manual indicates above, the arbitration process should duplicate a trial, as best as possible. Id. at 6. In that regard, in a trial, a defense attorney would never allow a plaintiff's attorney as its sole juror; nor would a plaintiff's attorney allow a defense attorney as its sole juror. Yet this is exactly what occurs when counsel participate in the Final Offer Arbitration Pilot Program. While appointing a plaintiff's attorney and a defense attorney to sit as two-panel arbitrators is not a perfect solution, it would at least offer a greater degree of balance and fairness. There would be jockeying and negotiating on the final award, which is exactly what happens at a trial when both lawyers do their jobs properly in *voir dire* and a fair and balanced jury is selected. If the end result of the two-person panel is to foster a greater confidence in the Arbitrator's decision, then another benefit may be a lower appeal rate.

Finally, in the event the Court nonetheless wishes to proceed with the Final Offer Arbitration Program without these suggested modifications, we recommend that either counsel or the Arbitrator should be able to decline to choose between the two awards or opt out of the program entirely. Requiring the Arbitrator and counsel to participate and be bound by one of the two submitted awards goes against the very nature of arbitration proceedings and the policies which underlie arbitration.

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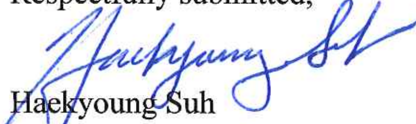
[1] As indicated previously, the mandatory "high low" is a change from the current Arbitration Policy however, is a compromise within the spirit of Arbitration.

For all the foregoing reasons, we do not support the Final Offer Arbitration Pilot Program in its current form; nor do we believe it is in the best interests of the Arbitrator or the litigants. However, high-low mediation or a two-arbitration panel and the ability to opt-out, while not perfect, offer balance to the Final Offer Arbitration Program.

Respectfully submitted,



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