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Hon. Glenn Grant, J.S.C.,
Acting Administrative Director of the Courts
Comments on Arbitrator Qualifications and Training
P.O. Box 037
Trenton, New Jersey 08625-0037

Re: **Comments on Arbitrator Qualifications**

Dear Judge Grant:

These comments are written in response to the recent **Notice to the Bar** seeking comments to the June 2016 **Report of the Arbitration Advisory Committee to the New Jersey Supreme Court** (hereinafter the Committee) which recommended significant changes to the Court's Arbitration Program under **Rule 4:21A**. While I am supportive of many of the recommendations, one recommendation is of special concern since it would negatively impact commercial arbitrations. Accordingly, I will limit my comments to the impact of that recommendation on commercial arbitrations and not on personal injury arbitration.

While I have the privilege of serving as a Member of the Committee (until August 31, 2016) my comments are solely my own and intended to reflect not only my forty-four years of practice as a member of the Bar of this State, but also, my experience as a commercial arbitrator for a variety of forums, including the Financial Regulatory Authority (FINRA) (**securities arbitrations**); the New Jersey Superior Court (**Commercial and N.J.M.V. Warranty Act arbitrations**) (hereinafter Lemon Law); the National Arbitration Forum (now The FORUM) (**Commercial credit arbitrations**), my previous experience as a Fee Arbitrator for of the Essex County Fee Arbitration Committee and my present experience as a Fee Arbitrator for the Passaic County Fee Arbitration Committee, where, at one point, I served as Committee Chair. Here too my comments are intended only to reflect my individual viewpoint and not those of any of these organizations.

The Comment upon the Recommended Change

One aspect of the Committee Report refers to a recommended change to **Rule 4:21A-2 (b) (the Committee's recommended changes are reflected in bold)** which would provide as follows:

> **(b) Appointment From Roster.** If the parties fail to stipulate to the arbitrators pursuant to paragraph (a) of this rule, the arbitrator shall be designated by the civil division manager from the roster of arbitrators maintained by the Assignment Judge on recommendation of the arbitrator selection committee of the county bar association. Inclusion on the roster shall be limited to retired judges of any court of this State who are not on recall and attorneys admitted to practice in this State having at least ~~seven~~ **ten** years of **consistent and extensive** experience in New Jersey in any of the substantive areas of law subject to arbitration under these rules**; who regularly practice in the county(ies) in which they seek to be an arbitrator;** and who have completed the training and continuing education required by R. 1:40-12(c). **A Certified Civil Trial Attorney with the requisite experience and who regularly practices in the county(ies) in which he or she seeks to be an arbitrator will be entitled to automatic inclusion on the roster.** The arbitrator selection committee, which shall meet at least once annually, shall be appointed by the county bar association and shall consist of one attorney regularly representing plaintiffs in each of the substantive areas of law subject to arbitration under these rules, one attorney regularly representing defendants in each of the substantive areas of law subject to arbitration under these rules, and one member of the bar who does not regularly represent either plaintiff or defendant in each of the substantive areas of law subject to arbitration under these rules. **The arbitration selection committee shall review the roster of arbitrators annually and, if appropriate, shall make recommendations to the Assignment Judge to remove the arbitrators from the roster.** The members of the arbitrator selection committee shall be eligible for inclusion in the roster of arbitrators. The Assignment Judge shall file the roster with the Administrative Director of the Courts. A motion to disqualify a designated arbitrator shall be made to the Assignment Judge on the date of the hearing.

I am concerned about the above proposed change which would require that commercial arbitrators not only be licensed attorneys, but also, under the proposed change be attorneys "**who regularly practice in the county(ies) in which they seek to be an arbitrator.**"

The rationale for the Committee's recommendation may be found on **page 4** of the Committee's Report which states the following:

> It is very important that the arbitrator sitting in the county at the time of the arbitration understands the values in that county. ...Committee members are all aware of the disparities in values and note that must be taken into consideration with regard to inclusion on the roster of arbitrators. For this reason, an attorney who does not regularly practice in the county in which he or she seeks to be an arbitrator should not be admitted as an arbitrator in that county **because the values themselves will be based on those of other counties**. (Emph. added)

Footnote two of the Committee Report reflects a minority view (and one in which I joined) which sought to recommend a change to the *proposed* **Rule 4:21A-2 (b)** by allowing ***any*** qualified commercial arbitrator to be included on the Roster of Arbitrators in ***any* county** in this State **whether or not** the commercial arbitrator "**regularly practices in the county(ies) in which [he] seeks to be an arbitrator**". The rationale for the inclusion of commercial arbitrators **in all counties** rests upon the distinct nature of commercial arbitration from that of personal injury arbitration, not only in subject matter between the two fields, but also, in the effect which causality, duty owed, injury and damage assessment play in each of these types of arbitrations. As will be seen *infra*, most of these latter factors involve far *less of a subjective analysis* in commercial arbitration than they do in personal injury matters.

Our Supreme Court has historically recognized the unique nature of commercial arbitration and its unique method for rendering a fair resolution of commercial matters which are submitted to arbitration. In **Barcon Associates v. Tri-County Asphalt Corp**. 88 **N.J.** 179 (1981), a case dealing with the crucial issue of an arbitrator disclosure in a commercial arbitration and a case decided prior to the creation of our Supreme Court's arbitration program pursuant to **Rule 4:21A**, Justice Pashman, delivering the opinion for the Court, stated:

> **Commercial arbitration** is a long-established practice in **New Jersey** consistently encouraged by the Legislature. Even under seventeenth century colonial rule, **arbitration** was fostered by statute, Boskey, A History of **Commercial Arbitration** in **New Jersey** (pt. 1), 8 Rut. Cam.L.J. 1, 5 (1976), reflecting a public policy unchanged to the present day and embodied in the current **arbitration** act, **N.J.S.A. 2A:24-1** to **-11**, **Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp.**, 131 **N.J.Super.** 159, 166, 329 A.2d 70 (App.Div.1974).
> **The courts of this State have also favored arbitration**. E. g., **Kearny PBA Local # 21 v. Town of Kearny**, 81 **N.J.** 208, 221, 405 A.2d 393 (1979); **Daly v. Komline-Sanderson Engineering Corp.**, 40 **N.J.** 175, 177, 191 A.2d 37 (1963); **Ukrainian National Urban Renewal Corp. v. Muscarelle, Inc.**, 151 **N.J.Super.** 386, 396-97, 376 A.2d 1299 (App.Div.1977), certif. denied, 75 **N.J.** 529, 384 A.2d 509 (1977); **Public Utility Construction and Gas Appliance Workers, Local 274 v. Public Service Elec. & Gas Co.**, 35 **N.J.Super.** 414, 419, 114 A.2d 443 (App.Div.

> 1955), certif. denied, 19 **N.J.** 333, 116 A.2d 828 (1955); **Eastern Engineering Co. v. City of Ocean City,** 11 **N.J.Misc.** 508, 510, 167 A. 522 (Sup.Ct.1933); **Fennimore v. Childs,** 6 **N.J.L.** 386, 388 (Sup.Ct.1797). Because it has retained this status in the law and because it offers significant advantages to the parties, **arbitration** is a widely-used means of resolving **commercial** disputes. See Boskey, supra (pt. 2), 8 Rut.-Cam.L.J. 284, 309-10 (1977). (Emph.added)

Commercial arbitration does offer significant advantages to a party in terms of speedy resolution and in terms of its efficiency in dealing with contractual documents which often lend themselves to a determination of liability and damage assessments in a straightforward, independent manner. See **Ohio Casualty Insurance Company v. Cornell J. Benson,** 87 **N.J.** 191 (1981) (*Thus, our construction of the scope of* ***arbitration*** *clauses is consistent with the policy of favoring* ***commercial arbitration*** *as a speedy and inexpensive method for settling disputes.*). Such arbitrations involve commercial transactional relationships which are generally predicated on **established contract law principles**, not on tort law principles. The various relationships include not only transactions for the sale of goods or services, but also, such matters involving commercial leasing; securities investments; commercial agency matters; consumer leasing ; distribution agreements; financing and a host of other matters.

Nevertheless, the framework for the resolution of such matters rests upon testimony which augments the actual language of the documentary evidence presented at the arbitration (and which has often been agreed to between the parties) and which must be analyzed in light of recognized principles of contract law. This may not be the case in personal injury arbitrations, especially when dealing with the concept of causality, the presence of a duty owed and the value of damages which may be based on subjective factors. Unlike the analysis which occurs with tort claims, once contractual liability is established the **determination of damages in a commercial arbitration can often rest on the language in the contractual documents presented** and less on other subjective factors. The disparities in values which concerned the Committee are simply **not present** in commercial arbitration.

In light of the above, **it is more likely that a resolution of commercial arbitration determinations will not differ from county to county**. As with any commercial arbitration the arbitrator will hear the testimony, review the documents admitted, and make a logical assessment of the facts in light of the controlling law. Once the determination is made the commercial arbitrator will generally look to documentary evidence to determine a party's actual loss. Even if certain classes of commercial arbitrations permit the award of counsel fees and costs these arbitrations often have a statutory basis and are usually determined upon documentary evidence presented such as an **Affidavit of Services** or detailed **billing statements** (if the parties agreed to an hourly rate and that hourly rate is reasonable).

Up until the present, our Supreme Court has permitted ***any*** qualified member of the Bar of this State to conduct commercial arbitrations as outlined above in ***any*** county in this State so long as that arbitrator remains in good standing and maintains continuous training. Now, however, and in contrast to this long standing practice, there is the recommendation found in the Committee Report which adds an unnecessary requirement to the rendition of an Award in commercial arbitration; i.e., the requirement that the commercial arbitrator practices in the county where the arbitration is conducted. This proposed change would apply to both the experienced commercial arbitrator who has been conducting commercial arbitrations for many years in ***any*** county in this state as well as the newly appointed commercial arbitrator.

The Committee's recommendation would cause the local Selection Committee in each county to determine not only whether the individual arbitrator is licensed and qualified, but also, whether under the proposed Rule the arbitrator (as reflected on **page 3 of the Committee Report**) has "**experience with jury verdicts in the county in which the case is venued"**. Considering the nature of commercial arbitration, this should ***not*** be a requirement for *any* commercial arbitrator. The elimination of this latter requirement is all the more applicable to the current class of commercial arbitrators who have conducted commercial arbitrations for many years under our Supreme Court's arbitration program.

In addition, under the Committee's proposed change, even after being selected, the local Selection Committee will make an annual recommendation to the Assignment Judge as to whether that commercial arbitrator is suitable to remain on the roster of arbitrators regardless of whether the arbitrator is experienced in the area, maintains his qualification and remains in good standing. That suitability recommendation, however, would only be based only upon the fact that the commercial arbitrator may no longer represent Plaintiffs or Defendants in commercial matters in that county. There may also be other reasons for removing a particular arbitrator, but any suggestion would be speculative since the recommended Rule change is silent as to the factors which form the basis of the local Selection Committee's recommendation to remove a particular commercial arbitrator.[1] In addition, it may be a difficult task to determine what constitutes **regular** practice in a county; and, it may be even more difficult to decide when an arbitrator with a multiple county practice is no longer practicing in that county in any given year.

For the reasons previously stated, the current recommendation for local practice in a specific county should not be the determining factor as to whether or not a commercial arbitrator may conduct commercial arbitrations in a specific county.

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[1] In fact, since there are no specific standards for removal, despite whatever may be the experience of the commercial arbitrator, a local each Selection Committee may be free to utilize whatever factors it feels necessary to maintain an agreed upon roster.

A commercial arbitrator has specified duties in the conduct of commercial arbitrations, none of which involve the necessity of possessing experience with jury verdicts in a specific county.

To illustrate the above point, assume there is a Plaintiff who brings an action on a commercial lease for rental arrears against the business entity, that has executed a commercial lease and that is the only commercial lessee, as well as against the individual owner of that entity. The Plaintiff may recover as to the business entity if he establishes the original rental obligation through testimony and documentation; that a demand for a specific amount has been made; that the amount demanded has not been paid and is now past due; and that there is a specific remaining balance. However, a no cause may be found against the individual owner since the commercial lease was only in the name of the business entity and there has been no signed personal guarantee executed by the individual owner. In the vast majority of such cases the commercial arbitrator would come to the same decision regardless in what county that determination has been made.

In another example, assume that in a Lemon Law arbitration the nonconformity is not shown to be one which **substantially** impairs the use, value or safety of the motor vehicle or that the nonconformity occurs after the statutory period or after the allowable mileage total, then the likelihood of a commercial arbitrator finding for the Plaintiff is at best remote, if non-existent. In the vast majority of cases both the above Awards would be rendered as stated above regardless in what county the arbitration occurred. The only requirement should be whether the commercial arbitrator understands what is expected of him and not whether he is aware of jury verdicts in that county.

Moreover, there is a concern as to the **consistency** of the Committee's recommendation in proposing the requirement that a commercial arbitrator must "**regularly practice in the county (ies) in which they seek to become an arbitrator**". The problem is simply that even under the Committee's newly proposed rule the above requirement would **not** apply to all commercial arbitrators. This is so because the current Rule would still permit Selection Committee members to conduct arbitrations in their respective counties **even though they neither represent Plaintiffs or Defendants**. The current **Rule 4:21A-2 (b)** provides as follows:

> The arbitrator selection committee … shall be appointed by the county bar association and shall consist of one attorney regularly representing plaintiffs in each of the substantive areas of law subject to arbitration under these rules, one attorney regularly representing defendants in each of the substantive areas of law subject to arbitration under these rules, and **one member of the bar who does not regularly represent either plaintiff or defendant**

> **in each of the substantive areas of law subject to arbitration under these rules. ... The members of the arbitrator selection committee shall be eligible for inclusion in the roster of arbitrators.** (Emph.added)

For the proposed rule to be consistent with what is envisioned by the Committee, it cannot be said that the person who represents neither Plaintiffs or Defendants in that county would be qualified to sit as an arbitrator in that county.

In addition, the current rule would also permit anyone who had been appointed a Judge of the Superior Court, but who has retired, to conduct arbitrations in ***any*** county whether or not he maintains any private law practice. In both of these situations if the touchstone of appointment is ***regular practice in the county of selection***, then neither of the above individuals would fulfill the requirement of the recommendation, regardless of whether or not they are knowledgeable in the commercial field.

The point in raising the above as it concerns commercial arbitrations is that local representation of clients should not be a criterion in the selection of a commercial arbitrator, especially since the conduct of commercial arbitration is unique and requires the arbitrator to assimilate a significant number of facts and analyze these in light of contract principles. Commercial arbitration allows parties, particularly commercial parties, to resolve their legal problem not only more expeditiously, but also, in a less costly manner which ultimately reduces costs for commercial operations. More importantly, in rendering an Award an experienced commercial arbitrator, who has heard the facts for the first time and who has no bias, allows each party to see what that commercial arbitrator understands about the facts presented and what were the significant facts upon which he based the Award. This first impression, even after the Award, would allow the parties to reflect on that Award and can provide them with a framework to discuss settlement before a *de novo* application is filed.

Our Supreme Court has long recognized the significant advantages of commercial arbitration. Those advantages are now diminished, if not completely lost by excluding commercial arbitrators, especially experienced ones, from conducting arbitrations in a specific county because they may not have "**experience with jury verdicts in the county in which the case is venued".**

Conclusion

I would respectfully recommend to the Court as it concerns commercial arbitration that the Rule be written to exclude the requirement that a commercial arbitrator be required to practice in the county where he conducts commercial arbitrations. Such a result would preserve the proper function of commercial arbitration and permit the newly appointed commercial arbitrator as well as the class of experienced commercial arbitrators in this State to conduct commercial arbitrations under the Supreme Court's arbitration program in ***any*** county.

Respectfully submitted,

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PAM/dm