College of Commercial Arbitrators

March 21, 2022

Via Email and US Postal Service

Advisory Committee on Professional Ethics
Attention: Carol Johnston, Committee Secretary
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 08625-0970

RE: **Comments on Advisory Committee on Professional Ethics Report**

Dear Justices of the Supreme Court and Committee Members:

The College of Commercial Arbitrators (**CCA**) is an organization of about 250 of leading domestic and international arbitrators (eleven of whom reside and/or arbitrate in New Jersey). The CCA defines and promotes the highest standards of arbitrator ethics and best practices in alternative dispute resolution. It provides meaningful contributions to the arbitral profession, the public, the legal community, and businesses that use commercial arbitration as a means of dispute resolution.

On behalf of the CCA and its Board of Directors, please accept these comments on the Report of the Advisory Committee on Professional Ethics of January 18, 2022 (**Report**).

The Report responds to the New Jersey Supreme Court's request that the Committee "make recommendations to [the] Court and propose further guidance on the scope of an attorney's disclosure requirements" relating to binding arbitration provisions in attorney retainer agreements to resolve fee disputes or legal malpractice claims. *Delaney v. Dickey*, 244. N.J. 466, 474; 242 A.3d 257, 276 (2020). As one of the alternatives for the Court's consideration, the Committee proposed that an Arbitration Rider be annexed to all retainer agreements together with a checklist explaining differences between arbitration and litigation.

The Court and the Committee have a strong interest in ensuring that the Rules of Professional Conduct promote the integrity of the legal profession. The CCA, which is made up of lawyer/neutrals, fully endorses a careful review of ethical concerns associated with mandatory arbitration clauses in retainer agreements, particularly when such clauses may be obtained in situations where there is unequal bargaining power.

That said, an Arbitration Rider endorsed by the Court carries substantial weight and it should be balanced and avoid unintended consequences. As currently drafted, the Arbitration Rider lacks these qualities as explained below. Therefore, we urge that the Report and its recommendations not be adopted without revision.[1]

Comments on the Explanations in the Arbitration Rider Checklist

Echoing the Supreme Court's *Delaney* decision, the Report noted that the client should understand the fundamental differences between an arbitral forum and a judicial forum before consenting to an arbitration clause in a fee agreement. The CCA agrees. However, the language of the proposed rider and checklist fails to accomplish that goal. Instead, the Rider sets out a one-sided and distorted view of the arbitration process compared to the court process. It is important for the Rider to present balanced information.

The Report addresses weaknesses of arbitration while not referencing any of its advantages. The Report does not address any similar weaknesses of the court process such as higher average legal cost, longer average duration, inability to participate in the selection of the decisionmaker(s), and lack of privacy.

One of the weaknesses of the proposed Arbitration Rider is its failure to distinguish between commercial and individual clients. The Rider treats a sophisticated client the same as individuals who may be among the least sophisticated of clients. Some members of the Committee acknowledged that institutional / commercial clients with a legal department stand in a different posture than individual clients, but the Rider does not recognize this fact.

We identify some of these imbalances in the proposed Arbitration Rider in the comments to the checklist below.

- Paragraph 1 does not recognize that in arbitration the parties can select an arbitrator with background and expertise in the subject of the dispute by contrast to litigation in court.

- Paragraph 2 does not recognize that a client may also have to travel outside his/her "county" if the retainer agreement contains a submission to the jurisdiction of a particular court, or the Rules of Court require it. Such a retainer agreement would suffer from the same conflict of interest as one requiring arbitration. That paragraph also inaccurately states that the arbitrator chooses the location of the arbitration.

- Paragraph 3 oversimplifies the scope of judicial review of lower court decisions and omits the bases for modification or vacatur of arbitration awards.

[1] The CCA's comments do not address, and the CCA takes no position on, the discussion by the Committee in the Report of matters relating to the *Delaney* decision.

- Paragraph 4 states that, "an arbitrator's decision is private and confidential." However, the Federal and New Jersey law do not provide for automatic confidentiality of arbitration proceedings and leave confidentiality to the parties and their own contractual arrangements. Further, if a party seeks confirmation or vacatur, the award will ordinarily become a public record.

- Paragraph 5 states that, "Parties to arbitration share the costs of the services of the arbitrator and the fees of the arbitration forum." This is often varied by contract or by applicable arbitration rules. For example, Consumer Due Process Protocols by two of the leading arbitration providers (the American Arbitration Association and JAMS) generally provide that the commercial entity in an arbitration proceeding with a consumer, not the consumer, is responsible for costs and expenses of consumer arbitration. Plus, fee waivers for consumers are available from most arbitral organizations.

- Paragraph 5 also states that, "If you do not have sufficient money, and cannot obtain a lawyer who agrees to advance the costs and fees of arbitration, you may not be able to pursue a remedy for the dispute, meaning that the dispute with your lawyer cannot be addressed if you choose arbitration." That is also true for court proceedings. Moreover, in either a court or arbitration, an individual may bring a claim *pro se*.

- Paragraph 6 correctly states that, "Arbitration forums may limit discovery more than courts. When discovery is limited, there is less opportunity to gather information." However, in allowing discovery arbitrators must take "into account the needs of the parties . . . and the desirability of making the proceeding fair, expeditious, and cost effective." N.J.S.A. 2A: 23B-17 (c). Arbitrators focus on discovery related to a claim or defense, permitting parties sufficient discovery to be able to fairly present their case. This paragraph fails to point this out and to explain that discovery can be, and usually is, the most expensive aspect of a court proceeding, and that allowing targeted discovery and controlling deposition length – as good arbitrators do consistent with the needs of the case – will save money and avoid time consuming litigation without compromising the fairness of the proceeding.

Recommendation

The CCA recommends that the proposed Arbitration Rider, checklist, and explanations not be approved as drafted.

Should our recommendation be accepted, we conclude with an offer. The involvement of additional practitioners with strong backgrounds in arbitration, litigation, and the rules of professional conduct will aid in producing a better, balanced work product that will benefit the public and promote the integrity of the legal profession. Please know that CCA Fellows remain willing to continue to assist the Supreme Court in this important work.

Thank you in advance for your consideration of these comments.

Respectfully,

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