

NEW YORK LAWYERS' PRACTICAL SKILLS SERIES

Arbitration and Mediation

Leona Beane, Esq. Kelly A. Librera, Esq. Gary P. Shaffer, Esq.

2020-2021

<u>Publisher's Note</u>: As a result of the COVID crisis, Governor Cuomo has issued a number of Executive Orders that affect various deadlines and limitations periods, and the New York judicial districts have issued administrative orders that affect court operations and procedures. Practitioners are urged to keep abreast of continuing developments, including additional or extended Executive Orders and Court directives, by regularly visiting the Governor's Executive Orders web page, www.governor.ny.gov/executiveorders, the Unified Court System website,www.nycourts.gov, and the websites for the judicial districts and specific courts. Readers can also visit the NYSBA COVID-19 Information Center, nysba.org/covid-19-information-updates.

NEW YORK STATE BAR ASSOCIATION

New York State Bar Association publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2020 New York State Bar Association All rights reserved ISBN: 978-1-57969-004-5 Product Number: 402421

CONTENTS

PART ONE: ARBITRATION

Keny A. Liviera, Esq	Kelly	A.	Librera,	Esa
----------------------	-------	----	----------	-----

I.	Intr	oduction	1
II.	Arb	pitration Agreement	1
	A.	Basic Agreement	1
	B.	Choice/Conflict-of-Law Issues	4
	C.	Selection of the Arbitrator(s)	5
III.	Enf	Forceability of Arbitration Agreements	6
	A.	Punitive Damages	8
	B.	Fraud or Duress	8
	C.	Waiver	9
	D.	Statute of Limitations	10
	E.	Class Action Arbitration	1
IV.	Arb	pitration Procedure	12
	A.	Service of Notice	12
	B.	Right to Seek Stay	13
V.	App	olication for Stay	15
	A.	Grounds and Procedure	15
	B.	Venue and Consolidation	16
VI.	Hea	aring Procedures	17
	A.	Rights of Parties	17
	B.	Powers of the Arbitrator	20
VII.	Pro	cedure After Decision Is Rendered	22
	A.	Modification of Award by Arbitrator	22
	B.	Vacating or Modifying Award by the Court	23
	C.	Confirmation of the Award	30
VIII.	Jud	gment on the Award	3
IX.		orney-Client Fee Disputes	3
	A.	Amendment of Documents	32
	B.	Procedure	32
	C.	Arbitration Hearings	32
	D.	De Novo Review	33
A mbitm	ation I		
Arbiur	auon r	Forms Index	37
PART	Two:	MEDIATION	
Leona		1	
•	·	ffer, Esq.	
I.		oduction	6.
	Α.	Alternative Dispute Resolution	65
	В.	Benefits of Mediation	66
	C.	Historical Uses of Mediation	68
	D.	Developing Uses of Mediation in the United States	68

E.	The Different Types of Mediation
Cu	rrent Uses of Mediation to Resolve Disputes
A.	The Courts
	1. The Federal Courts
	a. Western District of New York
	b. Northern District of New York
	c. Southern and Eastern Districts of New York
	d. Southern District of New York
	e. Eastern District of New York
	2. New York State Courts
	3. The Commercial Division in New York State
	4. Other Court Programs in New York State
	a. Attorney Fee Disputes
	5. Voluntariness and "Good Faith"
B.	Administrative Agencies
C.	Community Dispute Resolution Centers
D.	Role of Bar Associations and ADR Organizations in the Expanded Interest
D .	and Use of Mediation
The	
A.	Agreement Between the Mediator and the Parties and Attorneys
В.	The Mediation Process—What Happens In Advance?
	1. Disclosure by the Mediator
	2. Pre-Mediation Telephone Conference Call
	3. Facilitating Needed Discovery
	4. Confidential Mediation Statement
C.	The Mediation Process—Getting Started
	1. Can or Should There Be Witnesses at the Mediation?
	2. Fact Witness
	3. Support Witness
	4. Expert Witness
D.	The Beginning of the Mediation Session
E.	Hearing From Both Sides
F.	The Caucus
G.	After the Caucus
H.	Some Mediator Techniques
	1. Restating, Reframing and Summarizing
	2. "BATNA" and "WATNA"
	3. Reality Testing
	4. Interests or Positions
	5. Non-Monetary Interests
	6. The Mediator's Proposal
I.	Dealing With Impasse
J.	Needing Additional Information
K.	Additional Mediation Sessions
17.	Settlement Agreement
	A NORTH AND

IV. Conf		identiality and Ethics	94
	Α. (Confidentiality	94
		Uniform Mediation Act (UMA)	97
		The Mediator Is Not a Legal Advisor	97
		Ethical Concerns	97
		ation Provisions in Agreements	99
VI.	Conc	lusion	100
Appendix	κA	Model Standards of Conduct for Mediators	101
Appendix	ĸВ	Model Standards of Practice for Family and Divorce Mediation	111
Appendix	к С	Rules of the Chief Administrative Judge, Part 146	123
Appendix	κD	Stipulation and Agreement—Confidentiality (Eastern District of NY)	125
Appendix	x D-1	Remote Mediation Confidentiality Stipulation (Eastern District of NY)	127
Appendix	ĸΕ	Mediation Confidentiality Agreement (Southern District of NY)	131
Appendix	x E-1	Mediation Confidentiality Agreement (for remote mediations) (Southern	
		District of NY)	133
Appendix	κF	CPLR 4547. Compromise and Offers to Compromise	135
Appendi	x G	USCS Fed Rules Evid R. 408. Compromise and Offers to Compromise	137
Table of	Auth	orities	139
		hors	151

INDEX OF FORMS*

Demand for Arbitration—Consumer Arbitration Rules	39
Demand for Arbitration—Construction Arbitration Rules	40
Notice of Petition to Compel Arbitration	41
Petition to Compel Arbitration	43
Notice of Motion to Stay Action and Compel Arbitration	45
Supporting Affidavit on Notice to Stay Action and Compel Arbitration	47
Notice of Motion to Compel Arbitration Before the New York Stock Exchange	49
Affidavit in Support of Motion to Compel Arbitration and to Stay This Action	51
Notice of Motion to Stay Arbitration	53
Affirmation in Support of Motion to Stay Arbitration	55
Disposition by Arbitrators Upon Application for Modification of Award	57
Notice of Motion to Confirm Arbitration Award	58
Affidavit in Support of Motion to Confirm Arbitration Award	59
Notice of Motion to Dismiss or Stay the Action Pending Arbitration	61

^{*} Two of the forms contained in this Part One are omitted from the downloadable forms accompanying this publication because they are obtainable from The American Arbitration Association at www.adr.org.

LEONA BEANE, ESQ.

Leona Beane is Professor Emeritus of Law at Baruch College (City University) in New York City, where she taught for 21 years. Professor Beane received her B.B.A. and M.B.A. from the City College of New York, M.S. from Columbia University and J.D. from New York Law School. She has been a practicing attorney involved in estates, guardians and A.D.R., and is an active member of several bar associations. She has chaired and/or lectured at several programs over the years for the New York State Bar Association: "Drafting Corporate Documents for the Close Corporation," "Forming and Advising Businesses" and others. She chaired and lectured at programs on guardians and Article 81 of the Mental Hygiene Law, having lectured in different parts of the state for several different Bar Associations. In 1998 and 1999, Ms. Beane lectured at several judicial seminars on guardianship topics, at the Judicial Institute in April 2003, and the Guardianship Roundtable in May 2011. She served on the Board of Advisors to the Vera Guardianship Project and assisted in the initial training of its staff.

She is a past president of both the National Association of Women Lawyers and the Association of Small Claim Arbitrators, and is an arbitrator and mediator for the U.S. District Court, Eastern and Southern Districts. She is also an arbitrator for the Financial Industry Regulatory Agency (FINRA). She is a mediator in the Commercial Division of the Supreme Court, New York County; the Bankruptcy Court, Eastern and Southern Districts; the EEOC and Safe Horizon, in addition to several other forums. She had been Chair of the Arbitration and ADR Committee of the New York County Lawyers' Association for four years. She has served on the Executive Committee of the Dispute Resolution Section of the New York State Bar Association for 10 years, and is chair of its Committee on Mediating Trusts, Estates, Guardianships and Elderly Disputes. She is a member of the New York chapter of the National Academy of Distinguished Neutrals.

She has published several articles on various legal topics, including partnership law, contracts, guardians, guardians *ad litem* and mediation relating to estate matters and guardianship. She also is a chapter author and an Associate Editor of *Guardianship Practice in New York State* (NYSBA 1998). In recent years she has been devoting more of her practice to ADR matters. She has organized CLE programs on "The Advantages of Mediating Trusts and Estates Disputes" for the NYSBA.

KELLY A. LIBRERA, ESQ.

Kelly Librera is a partner in Winston & Strawn's New York office. Ms. Librera represents clients in international arbitration matters throughout the world. She also represents clients in complex commercial litigation in federal and state courts throughout the United States, with a focus on cases involving allegations of financial and consumer fraud. Significant recent representations include International Center for Dispute Resolution arbitrations on behalf of a United Arab Emirates luxury jewelry distributor and a Japanese manufacturer and supplier of earth-moving equipment. Ms. Librera's clients include major international banks, private equity funds, global insurers.

GARY P. SHAFFER, ESQ.

Gary Shaffer has a private mediation practice that focuses on commercial, employment, divorce, and personal injury matters. He received his B.A. with honors from Harvard University and his J.D. with honors from the Cardozo School of Law, where he also served on the Law Review. He is a member of the New York State Bar Association's Dispute Resolution Section, and a board member of the New York State Council on Divorce Mediation. Prior to focusing exclusively on mediation, he was an attorney with the New York City Law Department, where he litigated land use, employment, personal injury, and multi-party or class action matters in the state and federal courts. Among other things, he

served as lead trial counsel for New York City in the World Trade Center litigation that arose from the 9/11 attacks. In addition, he was the Assistant Commissioner for Regulatory Policy and Enforcement at the New York City Department of Buildings.

Mr. Shaffer has been appointed to several court mediation panels, including those for the Southern District of New York, the United States Second Circuit Court of Appeals, the Commercial Division of Supreme Court, New York County, and the New York State Appellate Division, First Department. He has written and lectured on various aspects of mediation (in particular, on the success of automatic court-annexed mediation programs throughout the country), trained others in mediation, and co-chaired the 2017 New York State Bar Association's Annual Meeting of the Dispute Resolution Section. He writes a regular blog about different topics relating to mediation, which can be viewed on his website, www.shaffermediation.com.