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March 22, 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:

As requested by Judge Grant's notice of February 11, 2022, we respectfully submit these comments to the Report of the Advisory Committee on Professional Ethics of January 18, 2022 (the "Report").

Our concern about the Report is that it presents an unbalanced and unfair comparison of arbitration to litigation. Adoption and publication of the proposals in the Report will leave the wrong impression in the minds of legal professionals and the public about arbitration generally, in direct contradiction to the Supreme Court's consistent support for arbitration and the New Jersey legislature's support for arbitration as expressed in the Revised Uniform Arbitration Act, N.J.S.A. 2A: 23B – 1 et seq.

The Supreme Court in *Delaney v. Dickey*, 244. N.J. 466 (2020) discussed the need for potential clients to be informed about arbitration when attorneys seek to include arbitration agreements in retainer agreements. We completely agree. To assure that attorneys can properly inform clients, the required information must be accurate and not a one-sided presentation about either arbitration or litigation.

We are New Jersey-based arbitrators with extensive experience in both litigation and arbitration. Each of us has contributed to the New Jersey legal community in many ways over the years. That includes service as judges in the United States District Court for the District of New Jersey. Among the signatories of this letter are former leaders of the Justice Marie Garibaldi ADR Inn of Court and of the NJSBA Dispute Resolution Section. Some of us have

served as members of Supreme Court Committees including one of us on the Ad Hoc Committee on the Arbitration of Family Matters. We are all Fellows of the College of Commercial Arbitrators (the "CCA"). As such we became aware that the CCA itself is submitting its own comment letter. We endorse everything the CCA says in that letter.

We will not repeat the points in that letter. Instead, we highlight three things.

First, arbitration may be advantageous to a potential client for many reasons. Among them is the desire to maintain the privacy of communications between the client and the attorney which may not be possible in either a fee dispute litigation or a malpractice action. Another is the likely cost of litigation compared to a more expedited arbitration. A third is the desire to select the arbitrator with experience in the issue that may be disputed with the attorney. There are others as well. An attorney should be free to discuss both advantages and disadvantages with a prospective client as opposed to presenting a checklist of inaccurate and negative views about arbitration. The *Delaney* Court recognized all this saying,

> To be sure, arbitration can be an effective means of resolving a dispute in a low cost, expeditious, and efficient manner. The parties may be afforded the opportunity to choose a skilled and experienced arbitrator in a specialized field to preside over and decide the dispute. And the proceedings may be conducted in a forum out of the public glare. *Id.* at 493.

Importantly, adopting and promulgating a Court-endorsed but unbalanced description of arbitration may have consequences beyond the attorney/client retainer agreement. The Court's approach on the topic of guiding attorneys' disclosures in the context of retainer agreements could have an impact on arbitration generally. There is no need for the Court to publish overly negative comments about arbitration in one context that may leave misimpressions about arbitration in the minds of both lawyers and future potential users of arbitration. That would impede the continued appropriate development of arbitration.

Since its founding in 1926, the American Arbitration Association (the "AAA") alone has administered more than 5,600,000 cases and has been entrusted by major corporations and governmental agencies to resolve their disputes. The AAA, with others, promulgated Consumer Due Process Protocols to protect the due process rights of consumers in arbitration. Most recently, in 2019 alone, the AAA granted over $1,200,000 in fee waivers to parties demonstrating financial need. Other respected institutions such as JAMS, the CPR International Institute for Conflict Prevention and Resolution, and a host of others, provide important resources for resolution of commercial disputes worldwide.

Finally, the development of fair and balanced guidelines for attorneys in this area should include lawyers with broad experience in both litigation and arbitration and who are aware of the arbitration history mentioned above and the continued effort to make arbitration a fair alternative to litigation when appropriate.

We offer our services to the Supreme Court in this important work.

Thank you considering these comments.

Respectfully,

John R. Holsinger, Esq.

The following New Jersey Fellows of the College of Commercial Arbitrators authorized John R. Holsinger to add their names to the letter:

Robert E. Bartkus, Esq.
Hon. Garrett E. Brown, Jr. (ret.)
Angela Foster, PhD, Esq.
Laura A. Kaster, Esq.
Professor George A. Bermann
Neal M. Eiseman
Hon. Faith S. Hochberg (ret.)
Peter L. Michaelson, Esq.

JRH: rgg