

AGENDA ITEM

JULY

Revisions to Sample Fee Agreement
Forms -Request for Public Comment

DATE: June 29, 2010

TO: Members, Discipline Oversight Committee

FROM: Jill Sperber, Director, State Bar Office of Mandatory Fee Arbitration

SUBJECT: Proposed Revisions to the State Bar's Sample Fee Agreement Forms–
Request for 45-day Public Comment Period.

EXECUTIVE SUMMARY

The State Bar of California publishes "Sample Written Fee Agreement Forms" for members of the bar to provide them with guidance on writing enforceable fee agreements that comply with the applicable statutes. The sample fee agreement forms were last revised in March 2010 to provide members with sample disclosure language to comply with recently enacted Rule of Professional Conduct 3-410 [duty to inform client if member lacks professional liability insurance].

During its review, the Mandatory Fee Arbitration (MFA) Committee observed that the sample arbitration and fee arbitration clauses should be updated to comply with a recent California Supreme Court opinion upholding enforcement of contractual fee arbitration, in lieu of a trial de novo in court, after non-binding mandatory fee arbitration.

The MFA Committee's proposed revisions affect only the section in the Sample Fee Agreement Forms entitled "Other Clauses of Interest in Fee Agreements." The proposed revisions include: 1) specify types of potential disputes subject to arbitration between the Attorney and Client and relocate the client's "knowing waiver" language for inclusion in this clause; 2) change title of fee arbitration clause and add an explanation of and an optional provision for binding arbitration in lieu of a new court trial after non-binding MFA; and 3) in the sample mediation clause, include fee mediation by a local bar association provider and add that costs for mediation will be shared equally by the parties.

This item seeks authorization from your committee to release the revisions to the Sample Fee Agreement Forms set forth in Attachment A for a 45 day public comment period. Questions concerning this item may be directed to Jill Sperber (415) 538-2023 or jill.sperber@calbar.ca.gov.

I. BACKGROUND

The State Bar of California publishes "Sample Written Fee Agreement Forms." These forms provide an overview of the statutory requirements for written retainer agreements for use by bar members. The most recent revision was effective March 5,

2010. That revision's focus was to provide sample disclosure language for members to comply with new Rule of Professional Conduct RPC 3-410 [duty to inform client in writing if member does not have professional liability insurance]. During its review for that revision, the State Bar's Mandatory Fee Arbitration (MFA) Committee observed that the arbitration clause in the "Other Clauses of Interest in Fee Agreements" section should be revised. In 2009, the California Supreme Court confirmed that a pre-existing agreement for binding arbitration could be invoked following non-binding mandatory fee arbitration in lieu of a trial de novo in court. At its March 26, 2010 and May 21, 2010 meetings, the MFA Committee drafted proposed language to revise the sample arbitration and mediation clauses for the Board's consideration as discussed below and set forth in Attachment A.

II. PROPOSED REVISIONS TO THE SAMPLE FEE AGREEMENT FORMS

A. Suggested Revisions to the General Arbitration Clause (Paragraph A)

During its review of the Sample Fee Agreement forms in January 2010, the MFA Committee observed that various revisions were warranted with respect to the sample arbitration and mediation clauses offered under "Other Clauses of Interest in Fee Agreements." Specifically, suggested language concerning the client's right to review the arbitration clause with independent counsel and knowing waiver of the rights to trial and appeal appears under the next paragraph, "State Bar Fee Arbitration." The MFA Committee believes that this was an inadvertent drafting oversight from 2005, when the Sample Fee Agreement forms were overhauled. This proposed non-substantive revision would relocate identical language from paragraph B to paragraph A because it more appropriately belongs in the general arbitration clause entitled, "Arbitration of all Disputes including Claims of Malpractice."

The MFA Committee also recommends listing the types of disputes (deleting the word "controversy") that may arise between the parties as set forth in Attachment A. The proposed revision would also specifically identify the parties as "Attorney and Client."

B. Suggested Revision to the Fee Arbitration Clause (Paragraph B)

In 2009, the California Supreme Court confirmed the enforcement of a pre-existing agreement providing for contractual binding arbitration of a fee dispute in lieu of a trial de novo following non-binding mandatory fee arbitration. *Schatz v. Allen Matkins*, 45 Cal.4th 557 (2009). During its review of the Sample Fee Agreement forms earlier this year, the MFA Committee observed that the sample mandatory fee arbitration clause warranted revision to explain the Court's ruling and make clear that a pre-existing arbitration clause such as the arbitration clause in paragraph A could be invoked to substitute for a trial de novo in court following non-binding MFA arbitration. An optional provision providing for an agreement by the parties to proceed with binding arbitration in lieu of a trial in court if either party rejects a non-binding arbitration is also included. Since neither the *Schatz* case nor the statutory scheme clarify the procedure for invoking binding arbitration after non-binding arbitration, and until there is clarification from the courts or

the legislature, the MFA Committee suggests deferring to similar language used in the MFA statutes, i.e., timely “submission of a request for a trial de novo.” The MFA Committee recognizes, however, that the party may be requesting binding arbitration pursuant to the parties’ pre-existing agreement.

The MFA Committee recommends several other non-substantive changes be made to the fee arbitration clause (paragraph B). Since the clause concerns fee arbitrations under Bus. & Prof. Code section 6200-6206, the title should be changed from “State Bar Fee Arbitration” to “Mandatory Fee Arbitration.” This may eliminate some confusion since Bar-approved local bar association programs, rather than the State Bar itself, conduct the majority of fee arbitrations. In addition to this title change, proposed language would clarify that disputes subject to fee arbitration in Paragraph B may only cover, as defined by statute, disputes over attorney’s fees, costs, or both. Lastly, as explained in the previous section of this agenda item, the “client’s knowing waiver” language was deleted and moved to the general arbitration clause in paragraph A.

C. Suggested Revision to the Sample Mediation Clause (Paragraph 2)

After reviewing the arbitration clauses above, the MFA Committee also determined that the sample mediation clause in paragraph 2 should reference fee mediation offered by the local bar associations as well as private mediation. A growing handful of local bar associations offer low-cost, user friendly fee mediation in addition to fee arbitration, and parties should be reminded to consider using such services. The suggested revision to the mediation clause also includes new language providing that the costs for mediation be shared equally by the parties, unless otherwise stipulated in a settlement agreement between the parties.

III. REQUEST FOR 45-DAY PUBLIC COMMENT PERIOD

The Board should release the proposed revisions for public comment to ensure that all interested stakeholders have a chance to comment on the proposed revisions.

IV. FISCAL AND PERSONNEL IMPACT

No fiscal impact is anticipated

V. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

VI. EFFECTIVE DATE OF APPROVAL

The proposed revisions to the Sample Fee Agreement Forms would become effective upon final consideration and approval by the Board of Governors, after review of any public comment and recommendation by the DOC Committee.

VII. PROPOSED RESOLUTIONS

Should the DOC Committee approve the request to release the proposed revisions to the Sample Fee Agreement Forms for a 45-day public comment period, the following resolutions would be appropriate:

RESOLVED, that the Discipline Oversight Committee hereby authorizes for a 45 day public comment period the proposed revisions to the State Bar Sample Fee Agreement Forms, in the form attached hereto as Attachment A; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed revisions.