Item 5C

Sperber, Jill

From: Knapton, Gerald [GKnapton@rmkb.com]
Sent: Wednesday, August 12, 2009 2:43 PM
To: Sperber, Jill
Subject: public comment to Proposed Revisions to Notice of Your Rights After Fee Arbitration Form

Dear Jill,

Thanks for all the hard work by you, your staff and CMFA. I have read over the draft and suggest that it be revised in light of recent court guidance to add a new section to the Notice contents headed Correction of an arbitration award.

There are two possible routes for having an arbitration award *corrected* for three kinds of simple errors.
One is to apply to the arbitrator(s); and
Two is to apply to the court.
These options should be explained in the Notice of Your Rights After Arbitration.

While these are the two routes, it seems to me preferable to suggest that an application for correction should be made promptly (i.e., within 10 days) to the arbitrators. It appears that at least two appellate courts (*Karton* and *Delaney*) has opined that it would be preferable to have the request for corrections made to the arbitrators so as not to waste the time and effort that goes into reaching an arbitration award.

California Code of Civil Procedure § 1284 reads that a written application **to the arbitrators** may be made by a party to the arbitration.

This section requires that such an application be made within 10 days after service of a signed copy of the award and requires that the arbitrators must make correction within 30 days of the service of the signed copy of the fee award.

There are other time requirements set out in CCP §1284, but the arbitrators are limited to one of only two options:
"The **arbitrators** shall either deny the application or correct the award." (emphasis supplied).

The grounds for correction by arbitrators are those same three grounds specified by CCP §1286.6 for a court to follow if the issue of correction is before it. That section reads in full:

> "Subject to Section 1286.8, the court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that:
>
> **(a)** There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> **(b)** The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or
>
> **(c)** The award is imperfect in a matter of form, not affecting the merits of the controversy."

As I am sure CMFA is well aware, the Appellate Court filed its "published" opinion in *Karton v. Segreto*, B211129 on 7/30/2009 and in the holding explained the 4 options for a court to follow under CCP § 1286: 1. confirm; 2. correct & affirm; 3. vacate; or 4. dismiss the proceedings. The possibility of the court then referring the matter back to the arbitrator(s) is not one of the choices.

But it also goes over the rules for requesting a correction of a fee arbitration award. *Karton* also suggests in *dicta* in footnote 9 that a request for amendment aka "correction" can be made up to 30 days after the award but that it seemed inequitable to allow a party to seek amendment of an award after the 10-day period to seek correction of the award had lapsed (pages 6 to 8)

The important thing to let parties know is that if the award is not correct due to any of the three listed kinds of problems, there IS a choice for parties to a fee arbitration to make within 10 days between the arbitrators and the court for requesting a correction at the outset of the arbitration award and this should be explained in the Notice of Your Rights After Fee Arbitration that will be sent out to parties.

Best regards,
Gerry

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Via Facsimile Transmission and E-Mail ***One page only-No cover sheet***

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RE: Comment re proposed revisions to Notice of Your Rights After Fee Arbitration form

Dear Ms. Sperber:

Pre-dispute agreements to arbitrate between an attorney and client must be in writing, otherwise a court will not enforce such agreements. Business & Processions Code section 6200 (c) and *Perez v. Grajales,* (2008) 169 Cal.App.4th 580. Accordingly, Section E of the "Notice of Your Rights After Fee Arbitration" form should clarify that the right to trial *de novo* does not exist when [and only when] the client and attorney agreed in a signed written agreement, typically the retainer agreement, to resolve disputes arising from the relationship through private arbitration. The following proposed revision complies with the foregoing and the Supreme Court's recent holding in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557.

E. EXCEPTION TO RIGHT TO NEW TRIAL IN COURT: PRE-EXISTING PRIVATE ARBITRATION AGREEMENT

There is an exception to your right to a new trial ~~de novo~~ in court following non-binding mandatory fee arbitration if the attorney and client previously agreed, in a writing signed by the attorney and client, to resolve disputes over fees and costs through private arbitration ~~other than the mandatory fee arbitration program~~. If such an written and signed agreement exists, and either party acts to reject the award ~~in court~~ within the required 30 day time period after service of the ; ~~either~~ award, either party ~~is~~ ~~may~~ shall be entitled to resolve the dispute through the agreed upon private arbitration instead of a new trial in court. ~~Should the parties complete a subsequent arbitration, the parties will have the rights described in Part 2 of this Notice regarding rights after binding arbitration.~~

Sincerely Yours,

Nick Migliaccio

NM: