

AGENDA ITEM

NOVEMBER 122

Revisions to Sample Fee Agreement
Forms -Request for Approval after
Public Comment Period

DATE: October 20, 2010

TO: Members, Committee on Regulation, Admissions & Discipline
Members, Board of Governors

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 Approval following return from 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 applicable statutes and other laws. This item seeks a recommendation from RAD to the Board for approval of various revisions to the optional arbitration/mediation clauses following their return from the public comment period ending September 10, 2010. The version of the Sample Fee Agreement Forms sought to be approved, after consideration of the comment received, proposes a slight modification as set forth in the form attached here as Attachment B.

The Mandatory Fee Arbitration (MFA) Committee's proposal was initiated when it observed that the optional arbitration and fee arbitration clauses sections of the Forms should be updated to comply with a 2009 California Supreme Court opinion upholding enforcement of a contractual arbitration agreement, in lieu of a trial de novo in court, after non-binding mandatory fee arbitration.

The MFA Committee's proposed revisions concern only the section of the Sample Fee Agreement Forms entitled "Other Clauses of Interest in Fee Agreements." The proposed revisions affect optional clauses as follows: 1) specify the 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 the title of the 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 following Supreme Court case law; and 3) in the mediation clause, include the option for fee mediation through a local bar association provider and add that costs for mediation will be shared equally by the parties.

In July 2010, the DOC Committee- RAD's functional predecessor- authorized the release of the proposed revisions as set forth in Attachment A for a 45 day public comment period. One public comment was received. The comment objects to the pre-existing "knowing waiver" language in the arbitration clause section advising the client that the rights to trial and appeal are being waived and encouraging the client to first seek review by independent counsel. The comment suggests deletion of this language on the grounds that this language portrays an outdated, negative view of arbitration, is not required by law, and arguably disrupts the attorney- client relationship at its inception.

While the MFA Committee continues to believe that the "knowing waiver" language, which has appeared in the Forms for years, should be retained in this optional arbitration clause as a best practice, it agreed to modify the language as set forth in Attachment B, as discussed below.

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.” The Sample Forms provide an overview of the statutory and other legal requirements for written retainer agreements for use by bar members. The most recent revision was effective March 5, 2010. The narrow focus of that revision 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] effective January 1, 2010.

During its review of the Sample Forms this year, the State Bar’s Mandatory Fee Arbitration (MFA) Committee observed that the optional arbitration and mediation clauses in the “Other Clauses of Interest in Fee Agreements” section should be revised. In 2009, for example, the California Supreme Court confirmed that a pre-existing agreement for binding arbitration could be enforced 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 RELEASED FOR PUBLIC COMMENT

A. Suggested Revisions to the Sample General Arbitration Clause (Subparagraph A of Arbitration)

In 2010, the MFA Committee reviewed the optional arbitration and mediation clauses contained in the Section entitled “Other Clauses of Interest in Fee Agreements.” The MFA Committee observed that optional 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 currently under a subparagraph of arbitration entitled “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 the paragraph on MFA to subparagraph A, the general arbitration clause entitled, “Arbitration of all Disputes including Claims of Malpractice” because the Committee believes that this “knowing waiver” language more appropriately belongs in and was inadvertently relocated from the general arbitration section.

The MFA Committee also recommends listing specifically the types of disputes (deleting the word “controversy”) that may arise between the parties which may be subject to arbitration. The proposed revision would also specifically identify the parties as “Attorney and Client.”

B. Suggested Revisions to the Sample Fee Arbitration Clause (Subparagraph B of Arbitration Clause)

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). In view of this precedent, the MFA Committee observed that the sample mandatory fee arbitration clause in the Sample Fee Agreement forms warranted revision to explain the Court's ruling in *Schatz*. An optional provision providing for an agreement by the parties to proceed with binding contractual arbitration in lieu of a trial in court if either party rejects a non-binding MFA arbitration should be added to the Mandatory Fee Arbitration sample clause.¹

The MFA Committee recommends several other non-substantive changes be made to the fee arbitration clause (subparagraph B). Since this clause concerns only mandatory fee arbitration conducted pursuant to Business & Professions Code section 6200-6206, the title should be changed from "State Bar Fee Arbitration" to "Mandatory Fee Arbitration." This change is made to eliminate some confusion about the MFA provider, since local bar association programs, rather than the State Bar itself, process the vast majority of mandatory fee arbitration cases. In addition to this title change, proposed language would clarify that disputes subject to mandatory fee arbitration in subparagraph 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 "knowing waiver" language was removed from this section and relocated to the general arbitration clause in subparagraph A.

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

. 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. Upon review, 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. The MFA Committee also suggests that the optional mediation clause include 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. SUGGESTED MODIFICATION FOLLOWING PUBLIC COMMENT PERIOD

¹ Since neither the *Schatz* case nor the statutory scheme clarify the procedure for invoking binding contractual arbitration after non-binding fee 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."

At its July 2010 meeting, the DOC Committee authorized release of the proposed revisions for public comment to ensure that all interested stakeholders have a chance to provide comment. The proposed revisions released for public comment are set forth in Attachment A. The 45 day public comment period ended on September 10, 2010.

One public comment, from attorney Kenneth Zuetel, was received. Mr. Zuetel's comment objects to the language in the sample arbitration clause section "encouraging" clients to seek independent counsel to review the arbitration clause and having them initial that they understand that they are giving up important constitutional rights to trial by judge or jury and appeal. The language also conveys the client's right to seek review of the clause by independent counsel prior to agreeing to arbitration.

Mr. Zuetel believes that this language should be deleted from the Forms on the ground that it is ill –advised and not legally required pursuant to the holding in *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App. 4th 1102. Mr Zuetel contends that the sample language casts an outdated, negative image of arbitration. He also suggests that the language will disrupt the formation of an attorney-client relationship. Mr. Zuetel believes that advising the client of the right to seek review by independent counsel of the arbitration clause essentially encourages the client to disengage from the lawyer and will compromise the relationship at its inception. A copy of Mr. Zeutel's September 9, 2010 letter is attached as Attachment C.

At its September 23, 2010 meeting, the MFA Committee determined that the optional "knowing waiver" language is not new: it appears in previous iterations of the Sample Fee Agreement Forms approved by the Board in March 2010, dating back to prior versions effective 2005, 2001, and 1996. In the version released for public comment in July 2010 (Attachment A), the knowing waiver language was simply relocated from the attorney fee arbitration clause section (subparagraph B) to the general arbitration section (subparagraph A). It reads as follows:

Because each party is giving up a right, Client is encouraged to have an independent lawyer of Client's choice review these arbitration provisions before agreeing to them.

By initialing below, Client and Attorney confirm that they have read and understand subparagraphs A and B² above, and voluntarily agree to binding arbitration. In doing so, Client and Attorney voluntarily give up important constitutional rights to trial by judge or jury, as well as rights to appeal. Client is advised that Client has the right to have an independent lawyer of Client's choice review these arbitration provisions, and this entire agreement, prior to initialing this provision or signing this Agreement.

The MFA Committee considered Mr. Zeutel's letter and concluded that the first sentence encouraging the client to seek independent counsel could be deleted without

² The version released for public comment in July 2010 contained an inadvertent error by referring to both subparagraphs A and B. Because the language would be located in paragraph A, the reference to subparagraph B should be deleted.

affecting the remainder of the advisement. The Committee also agreed to delete the words "Client is advised that" in the last sentence but retain the rest of the sentence. The MFA Committee's Vice Chair, Attorney Kenneth Bacon, replied to Mr. Zeutel's letter, explaining the MFA Committee's proposed modification and its position to recommend retaining the optional "knowing waiver" language. (See Attachment D.)

Accordingly, the MFA Committee submits the following modified language to RAD and the Board for approval in the form set forth as Attachment B as follows in Legislative style:

~~Because each party is giving up a right, Client is encouraged to have an independent lawyer of Client's choice review these arbitration provisions before agreeing to them.~~

By initialing below, Client and Attorney confirm that they have read and understand subparagraphs A and B above, and voluntarily agree to binding arbitration. In doing so, Client and Attorney voluntarily give up important constitutional rights to trial by judge or jury, as well as rights to appeal. ~~Client is advised that~~ Client has the right to have an independent lawyer of Client's choice review these arbitration provisions, and this entire agreement, prior to initialing this provision or signing this Agreement.

In clean version, the modified language reads:

By initialing below, Client and Attorney confirm that they have read and understand subparagraph A above, and voluntarily agree to binding arbitration. In doing so, Client and Attorney voluntarily give up important constitutional rights to trial by judge or jury, as well as rights to appeal. Client has the right to have an independent lawyer of Client's choice review these arbitration provisions, and this entire agreement, prior to initialing this provision or signing this Agreement.

The proposed modification does not require an additional period of public comment because, as part of an optional provision of sample written fee agreement forms, it is not a rule with requirements for members.³

IV. FISCAL AND PERSONNEL IMPACT

No fiscal impact is anticipated

V. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

³ State Bar rule 1.10 (public comment), which reads in relevant part:

(A) Proposals for the Rules of the State Bar of California are circulated for public comment before adoption, amendment, or repeal by the Board of Governors. The State Bar also makes available for public comment its proposals for the California Rules of Court.

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.

VII. PROPOSED RESOLUTIONS

For RAD:

Should the RAD Committee agree to recommend to the Board approval of the proposed revisions to the Sample Fee Agreement Forms as modified upon their return from the public comment period, the following resolution would be appropriate:

RESOLVED, that the Regulation Admissions & Oversight Committee hereby recommends that the Board of Governors approve the proposed revisions to the State Bar Sample Fee Agreement Forms, in the form attached hereto as Attachment B.

For the Board:

Should the Board of Governors accept the recommendation from the RAD Committee to approve the Sample Fee Agreement Forms as modified upon their return from the public comment period, the following resolution would be appropriate:

RESOLVED, that upon the recommendation of the Regulation Admissions & Discipline Committee, the Board of Governors hereby approves the proposed revisions to the State Bar Sample Fee Agreement Forms, in the form attached hereto as Attachment B.