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October 13, 2010

Kenneth R. Zuetel, Jr., Esq.
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249 South Euclid Avenue
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Re: Comment on Proposed Revisions to Sample Written Fee Agreement Forms

Dear Mr. Zuetel:

As Vice Chair of the State Bar Committee on Mandatory Fee Arbitration ("MFA"), I am responding to your public comment letter regarding proposed revisions to the State Bar's Sample Fee Agreement Forms. Initially, I would like to thank you for taking the time to comment on the proposed revisions as input from bar members and the public is always welcome.

The comments in your September 9, 2010 letter to Jill Sperber were placed on the agenda for the MFA Committee's meeting on September 23, 2010, and were discussed by the full committee at some length. The MFA Committee decided to slightly modify the proposed revisions to delete the introductory sentence to the disclosure clause which stated: "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." However, the MFA Committee decided to keep the disclosure/independent counsel clause in the optional arbitration clause as a good risk management practice even if not strictly required.

The proposed revision would read as follows (note that in the third sentence, the language "Client is advised that" was also removed by the Committee after reviewing your letter):

"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."

By way of background, the proposed revisions to the sample fee agreement form are primarily intended to address the Supreme Court's holding in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557. In *Schatz*, the Supreme Court held that a

private contractual arbitration may substitute for a trial de novo following non-binding MFA without violating the MFA statutes if the parties previously agreed to contractual arbitration to resolve their fee dispute. The proposed revisions to Paragraph B of the sample form address the holding in *Schatz* and would allow for private arbitration in lieu of the statutory/traditional trial de novo in court.

The disclosure clause in the proposed revisions is not new. To the contrary, that clause has appeared in the State Bar sample fee agreement forms for years. During the process of revising the sample arbitration form to address the holding in *Schatz*, the MFA Committee noted that the location of the existing disclosure clause may be confusing. As a result, the existing clause was moved from its prior location to the end of paragraph 1.A. The disclosure clause in the State Bar sample form is not unusual as virtually identical language is in sample forms produced by the Continuing Education of the Bar (See, Fee Agreement Forms Manual 2nd Ed. (CEB 2007) as well as other well recognized form providers (See, e.g., The Rutter Group California Practice Guide: Professional Responsibility, Ch 5, Form 5:M).

In addition, the sample arbitration clause is listed in the section of optional provisions entitled "Other Clauses of Interest in Fee Agreements." The instructions and comments explain that the forms are merely samples and that attorneys are encouraged to mold the samples to fit their needs and they are expected to utilize their own independent legal and business judgment when evaluating the forms and the comments. In this regard, the MFA Committee respectfully disagrees with the statement in your letter that the language in the proposed revision "will of necessity be included in all future California fee agreements." To the contrary, the disclosure language has been in the State Bar form and other forms for many years without the adverse consequences predicted in your letter.

Moreover, the sample forms are not mandatory and attorneys have always been encouraged to use their own judgment as to which provisions, if any, they may choose to include in their fee agreements. Thus, if an attorney is concerned that the clause advising the client of some of the consequences of agreeing to arbitration and the client's right to consult with independent counsel may send the wrong message or may result in the client retaining other counsel, the attorney is free to exclude that clause while using the remainder of the sample form or any other form the attorney may choose to use.

In reviewing the proposed revisions prior to their submission for public comment the MFA Committee discussed the holding in *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 and COPRAC's formal ethics opinion 1989-116. It was the opinion of a majority of the MFA Committee that while disclosure and a statement regarding the right to consult independent counsel is not required, it nevertheless is a good risk management practice to inform the potential client of possible advantages and disadvantages of arbitration so that the client has sufficient information to make an informed decision whether to agree to the arbitration provision in the fee agreement and waive the right to a jury trial or a trial de novo in court following a non-binding fee arbitration. In fact, COPRAC seemed to acknowledge that point in footnote 5 of its opinion where it noted that there is a strong judicial concern for the rights of consumers to avoid unexpected contract provisions. COPRAC further noted that the

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right to a jury trial is an important right and that for a waiver to be legally enforceable (as opposed to ethically permissible) it must be clear and fully understood.

Your statement that COPRAC concluded that an attorney would meet his/her duty of disclosure simply by incorporating the language of C.C.P. §1295 is not entirely correct. COPRAC stated that to avoid the possibility of an arbitration provision being found to be unenforceable, "a lawyer is well advised to ensure that the arbitration clause is conspicuous, plain and clear." In that regard, COPRAC noted that it "would be wise to include language comparable to that required by Code of Civil Procedure section 1295." As you note, C.C.P. §1295 applies to arbitration of medical malpractice claims, which in the view of the majority of the MFA Committee is distinguishable from an attorney-client fee agreement. In any event, the disclosure/independent counsel clause in the State Bar form is an optional provision and any attorney who decides to use the State Bar forms should use his or her own judgment concerning whether to include an arbitration clause and/or whether to include a disclosure provision in their fee agreement.

As noted above, upon further review the MFA Committee decided to remove the introductory sentence which "encouraged" the client to have an independent attorney review the arbitration provisions. While that sentence has been in the State Bar arbitration form for years, after considering your comments the Committee decided that the language encouraging a client to seek the advice of independent counsel, as opposed to informing the client of the right to consult with independent counsel, may be excessive and the Committee has therefore removed that sentence from the proposed revision to the arbitration clause.

Finally, in the experience of members of the MFA Committee your concerns regarding the potential consequences of advising a prospective client of the right to consult with independent counsel are overstated. As noted above, the disclosure clause has been in the sample State Bar forms for years and we are not aware of that provision being the source of significant problems in attorney-client relations. In reality, the vast majority of potential clients choose not to consult with independent counsel after being informed of their right to do so. However, while not required by law, the disclosure clause does provide some additional protection to the attorney, and thus attorneys who turn to the State Bar forms for guidance may want to consider including such language. Once again, we emphasize that the language of the sample fee agreement forms is optional.

I hope that this letter and the changes which the MFA Committee has made in light of your comments address your concerns.

Very truly yours,



KENNETH E. BACON

cc: Jill Sperber