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Ms. Jill Sperber
Director, State Bar Office of Mandatory Fee Arbitration
180 Howard Street, 6TH Floor
San Francisco, CA 94105

Re: Comment on Proposed Revisions to Sample Written Fee Agreement Forms

Dear Ms. Sperber:

As a 32 year member of the California State Bar, and one who has confined his practice almost exclusively to the field of binding arbitration law, I wish to voice my objection to the Proposed Revisions to the State Bar's Sample Fee Agreement Forms. My specific objections are to those Revisions which would *advise* and *encourage* a client, prior to executing an attorney fee agreement containing a binding arbitration clause, to have "an independent lawyer" review that agreement.

Those Revisions are ill-advised, and should be rejected, for the following reasons:

First, there is absolutely no legal requirement that an attorney should advise or encourage a client to seek independent counsel prior to executing a fee agreement containing a binding arbitration clause. This very question was addressed by the California Court of Appeal in *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102. There, the Court held that counsel are "not required to encourage [clients] to seek the advice of independent counsel" in advance of signing arbitration agreements. *Id.* at p. 1115; *c.f.,* California State Bar, *Formal Opinion* No. 1989-116, p. 3 ("Advisory Opinion"). The proposed Revisions -- setting forth language which will of necessity be included in all future California fee agreements and advising/encouraging clients to seek independent counsel, would fly in the face of settled law.

Second, the Revisions are premised on an antiquated notion that arbitration is somehow adverse to a client's interests. It's not. Indeed, "by agreeing to arbitrate a . . . claim, a party does not forgo the substantive rights afforded by the [cause of action]; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26; *Broughton v. CIGNA HealthCare* (1999) 21 Cal.4th 1066. The State Bar correctly recognized this when it opined over twenty years ago that "[a]ny assumption that arbitration favors the attorney's economic interests over those of the clients is directly contrary to the holdings of California cases." (Advisory Opinion, note 2).

Simply put, arbitration is a "common, expeditious, and judicially favored method" of resolving disputes. *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706-707; *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 9. And, since the Court of Appeal's holding in the *Powers* case, the law of arbitration has <u>expanded</u> – not contracted – and now expressly encompasses binding arbitration of legal malpractice suits. *Aguilar v. Lerner* (2004) 32 Cal.4th 974. Yet, not a single case – including those involving various professional liability issues – has required that a signatory be encouraged or advised to seek independent counsel prior to executing the arbitration agreement.

In sum, there is nothing extraordinary about arbitration, and nothing which inherently creates a potential conflict in interest necessitating review by independent counsel. Nonetheless, the proposed Revisions implicitly (if not overtly) suggest to clients throughout California that there *might* be something amiss when an attorney uses arbitration to resolve malpractice disputes. Thus, to protect the <u>clients'</u> interest against possible jeopardy, her or she is not only advised, but encouraged, to seek independent counsel. <u>The Revisions are not only unnecessary, they send the wrong message to clients.</u>

Third, when the State Bar last focused on this issue, it noted that counsel would meet their duty of disclosure relating to arbitration by simply incorporating the language of California Code of Civil Procedure § 1295 into their fee agreements. (Advisory Opinion, pp. 4-5). The State Bar also opined that, beyond a Section 1295 disclosure, "no further disclosure or other precautions" would be necessary. Advisory Opinion, p. 3. Yet nothing in Section 1295, dealing with medical malpractice arbitration agreements, suggests (let alone advises or encourages) ANY notification regarding independent counsel. Should the Revisions be adopted, attorneys who have steadfastly followed the State Bar's Advisory Opinion will now have to jump through a new set of hoops in order to comply. Yet, again, there has been no change in the law which might justify the Revisions. If anything, California law has trended in a direction opposite the proposed Revisions, and continues to stress the strong public policy in favor of arbitration and to encourage its use.

Finally, proponents of the Revisions will no doubt retort that they want to set a higher standard for lawyers by encouraging their clients to seek independent counsel review.

However, those proponents fail to anticipate what will likely be the unintended consequences of these Revisions. For one, these Revisions will likely change attorney malpractice arbitration into a relatively expensive and cumbersome process layered with independent counsel providing all sorts of advice regarding those attorneys who had the temerity to insist on arbitration in lieu of a jury trial.

Question: do you really think that, in these days of scare clients and plentiful lawyers, "independent counsel" will be incentivized to *return* clients to their initial counsel after "advising" them?

And what, in sum, are "independent counsel" to advise? That arbitration is *bad*? And that the client should find a *better* attorney (probably like "independent counsel") who does not need to insist on arbitration to protect himself from his negligence? How does that advance the strong public policy favoring arbitration of legal malpractice suits in California?

Or maybe "independent counsel" will advise that California courts have overwhelmingly supported the use of binding arbitration of legal malpractice cases, and that arbitration is advantageous to both attorney and client – i.e., arbitration is *good*? Well then, how does one justify all the unnecessary time and expense which will be wasted in advising and encouraging clients to (and their seeking of) "independent counsel's" input? These, and various other potentially adverse consequences of the Revisions, have not been thoroughly and objectively vetted by the proponents.

In conclusion, should the State Bar adopt these Revisions, it will be taking a position which is not only ostensibly contrary to the California Supreme Court and Courts of Appeal, but to its own prior pronouncements as well. These Revisions are unnecessary, ill-advised, and should properly be rejected.

Respectfully yours,

Kenneth R. Zuetel, Jr.
ZUETEL & ASSOCIATES