

AGENDA ITEM

DATE: September 13, 2012

TO: Members, Board Committee on Operations

FROM: Doug Hull, Director, Mandatory Fee Arbitration

SUBJECT: Notice of Client's Right to Arbitration, Proposed Modifications to Form, Request for Release for Public Comment

EXECUTIVE SUMMARY

At its July 2012 meeting, the Committee on Mandatory Fee Arbitration ("CMFA") recommended proposed modifications to the Notice of Client's Right to Arbitration Form, subject to a period of public comment and subsequent approval by the State Bar Board of Trustees. The CMFA requests the Board Committee on Operations, acting in the place of the Regulation Admissions and Discipline Oversight Committee, authorize the release for public comment for a period of 45 days. The proposed revised Notice of Client's Right to Arbitration form is attached hereto as Appendix A.

BACKGROUND

Pursuant to Business and Professions Code section 6200, et seq., the Board of Governors is charged with establishing, maintaining and administering a system and procedure for the arbitration of disputes concerning fees, costs, or both, charged by attorneys for their professional services. Business and Professions Code section 6201(a) requires that before or at the time of service of summons or claim in an action or other proceeding against the client for recovery of fees or costs, the attorney must provide written notice to the client. The written notice "...shall be in the form that the board of governors prescribes, and shall include a statement of the client's right to arbitration under this article." (Bus. & Prof. Code § 6201(a).) The Notice of Client's Right To Arbitration was last revised by the State Bar Board of Trustees in April, 2007.

At its July 13, 2012 meeting, the State Bar's Committee on Mandatory Fee Arbitration (CMFA) agreed to recommend that the Board of Governors approve revisions to the Notice of Client's Right to Arbitration form to help improve the current form. The intent of the proposed revisions, outlined below, is to (1) clarify who can request arbitration, (2) provide notice to the client that more than one local bar program may have jurisdiction to hear their fee dispute, and (c) help ensure that attorneys use the proper form when they notify their clients of their rights.

ISSUE

Proposed revisions to the Form

There are several proposed revisions to the form which are described below and identified on Appendix B:

Modification of Title

The form is entitled “Notice of Client’s Right to Arbitration.” The first proposed modification is to include a reference to fee arbitration in the title. The proposed new title would read “Notice of Client’s Right to Fee Arbitration.” The CMFA recommends this addition to the title as a point of clarification.

The second proposed modification to the title includes adding an asterisk to the word “client’s” in the title (“client’s*”). The asterisk is included to help identify who may request arbitration in dispute over legal fees and costs. In the footer of the form, the following language is included to define the asterisk:

“*The request for arbitration may also be made by a person who is not the client but who may be liable for or entitled to a refund of attorney’s fees or costs.”

This modification clarifies that not only is the client entitled to seek to arbitrate a fee dispute, but a third party payor may also request fee arbitration. This change is made to comply with Standard 13 State Bar Guidelines and Minimum Standards for the Operation of a Mandatory Fee Arbitration Program which states, in relevant part:

“The request for arbitration may be made by (i) a person who is not the client but who may be liable for or entitled to a refund of attorney’s fees or costs (“non-client”), or (ii) the attorney claiming entitlement to fees against a non-client...”¹

The proposed additional language is consistent with the language in Minimum Standard 13.

¹ Minimum Standard 13 was modified by the State Bar Board of Governors on July 27, 2007 in light of *Wager v. Mirzayance* (1998) 67 Cal. App. 4th 1187. *Wager* found that the attorney must give notice of right to fee arbitration not only to the person “who directly benefits from the attorney’s provision of legal services”, but also the person “who is the attorney’s debtor on account of the services provided...”

Modification of language referencing the correct local bar program

The current version of the form contains language which identifies the local bar association that the client can contact to initiate the arbitration process. When an attorney sends this notice to their clients, the attorney fills in the contact information for a local bar association that has jurisdiction over the fee dispute. This language is intended to be helpful to the client. It currently reads:

“The address of the arbitration program you should contact is:”

This language is appropriate when there is only one fee arbitration program in the county where jurisdiction lies. However, in certain counties, (ie. Los Angeles County), there may be more than one program available to the client. The form does not make that clear. In order to avoid the situation where the attorney is selecting a specific program when there may be several programs available to the client, the language above is replaced with the following:

“The arbitration program listed below is available to you:”

“You may wish to check the State Bar’s website at www.calbar.ca.gov to see if there are other programs available to you.”

This language provides the client with contact information of a local program, but also informs them that they may wish to check to see if there is another program that might provide them with the services they seek.

Non-substantive modifications

Two other modifications are proposed, which are not substantial in nature.

The first non-substantive modification would add the State Bar seal to the form. This will help ensure that attorneys use the form as prescribed by the State Bar Board of Trustees pursuant to Bus. & Prof. Code 6201(a)², and not a modified version of the form.

The second non-substantive modification adds the word ‘mandatory’ to the phrase “State Bar Approved Form” in the footer of the document. The intent of this modification is to help ensure that attorneys use the form approved by the Board of Trustees and not a modified version.

A summary of each change is given in the chart below.

² Bus. & Prof. Code 6201 reads, in relevant part: “...The written notice shall be in the form that the board of governors prescribes, and shall include a statement of the client's right to arbitration under this article...”

Current Language	Proposed language	Rationale
n/a	Add State Bar Seal	Help ensure that only the approved form is used
Title modification	<p>Title: Notice of Client's* Right To <u>Fee</u> Arbitration</p> <p>Add asterisk to "Client" so that the definition can be expanded to include 3rd party payors (in the footnote).</p>	<p>Clarifies the purpose of the form</p> <p>Clarifies who can request arbitration.</p> <p>Comports with Minimum Standard 13</p>
Footer modification	<p>Defines the asterisk in the title to the footer:</p> <p>"*The request for arbitration may also be made by a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs."</p>	<p>Clarifies who can request arbitration.</p> <p>Comports with Minimum Standard 13</p>
<p>Strikes:</p> <p>"The address of the arbitration program you should contact is:"</p>	<p>Replaces it with:</p> <p>"The arbitration program listed below is available to you."</p>	<p>Informs the client that there may be other fee arbitration programs available to them (in those counties where there are multiple programs)</p>
n/a	<p>Adds:</p> <p>"You may wish to check the State Bar's website at www.calbar.ca.gov to see if there are other programs available to you."</p>	<p>New language to provide clients with a resource to ensure they understand that other programs may be available to them</p>
Footer modification	<p>Footer: <u>Mandatory</u> State Bar Approved Form</p> <p>(inserts the word 'mandatory')</p>	<p>Clarifies that this is a mandatory form to be used by an attorney prior to initiating a legal action for the recovery of legal fees and/or costs.</p>

FISCAL / PERSONNEL IMPACT:

None

RULE AMENDMENTS:

None

BOARD BOOK IMPACT:

None

RECOMMENDATION

It is recommended that Board Operations authorizes the proposed modifications to the Notice of Client's Right to Arbitration form for release for public comment for a period of 45 days.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Committee on Operations agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Operations authorizes staff to make available for public comment for a period of 45 days the proposed modifications to the Notice of Clients Right to Arbitration, in the form attached as Appendix A, and it is

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