

AGENDA ITEM

54-121 MARCH 2013

DATE: February 14, 2013

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Trustees

FROM: Douglass Hull, Director, Mandatory Fee Arbitration

SUBJECT: Proposed Modifications to Notice of Client's Right To
Arbitration Form. Request for Adoption Following Public
Comment

EXECUTIVE SUMMARY

At its November 2012 meeting the Board Committee on Operations, acting in the place of the Regulation Admissions and Discipline Oversight Committee, authorized modifications to the Notice of Client's Right to Arbitration Form to be released for public comment for a period of 45 days. The public comment period expired December 3, 2012. The Committee on Mandatory Fee Arbitration considered the public comments that were received and proposes adoption of the modifications to the form effective immediately, but allowing for attorneys to use the existing version of form until July 1, 2013.

BACKGROUND

Pursuant to Business and Professions Code section 6200, et seq., the Board of Trustees 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 trustees 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 Board of Trustees in April, 2007.

In July 2012, the Committee on Mandatory Fee Arbitration proposed modifications to the existing form and in November 2012, the Board Committee on Operations authorized a 45-day public comment period for the proposed modifications.

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.

The public comment period ended December 3, 2012. Two comments were received. In January, 2013 the CMFA reviewed the form in light of the public comments received and proposes no changes to the version that went out for public comment.

ISSUE

Proposed revisions to the Form

There are several revisions to the form which are described below and identified on Attachment A:

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

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...”¹

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

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

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...”

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.

Current Language	Proposed language	Rationale
n/a	Add State Bar Seal	Help ensure that only the approved form is used
Title modification	Title: Notice of Client's* Right To <u>Fee</u> Arbitration Add asterisk to "Client" so that the definition can be expanded to include 3rd party payors (in the footnote).	Clarifies the purpose of the form Clarifies who can request arbitration. Comports with Minimum Standard 13
Footer modification	Defines the asterisk in the title to the footer: "*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."	Clarifies who can request arbitration. Comports with Minimum Standard 13
Strikes: "The address of the arbitration program you should contact is:"	Replaces it with: "The arbitration program listed below is available to you:"	Informs the client that there may be other fee arbitration programs available to them (in those counties where there are multiple programs)
n/a	Adds: "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."	New language to provide clients with a resource to ensure they understand that other programs may be available to them
Footer modification	Footer: <u>Mandatory</u> State Bar Approved Form (inserts the word 'mandatory')	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.

Review of Public Comment Received

Two public comments were received³. They were forwarded by the Los Angeles County Bar Association. The first was from Leon Alexander. He states:

“I suggest the notice be of the ‘clients right to arbitration of fees and costs’ rather than ‘fee arbitration’”. The words ‘fee arbitration’ might read to mean the right to arbitrate by paying a fee, rather than [sic] to arbitrate about fees.”

The second public comment was from Joel M. Simon. He writes:

“Suggest the following title: Notice of Client’s Right to Independent, Impartial Arbitration of Attorney’s Claims to Fees and Costs.”

While the CMFA appreciates the suggestions proffered by the individuals above, the CMFA determined that the substance of each proposal is already included in the document. The first full paragraph of the form reads as follows:

You have the right under Sections 6200-6206 of the California Business and Professions Code to request arbitration of these fees or costs by an independent, impartial arbitrator or panel of arbitrators through a bar association program created solely to resolve fee disputes between lawyers and clients

The language as proposed is not in the title of the document, but the body of the document. Adding more language to the document title would, in the CMFA’s opinion, clutter up a form that may possibly confuse a client. It is recommended that the title should remain as it currently exists.

CONCLUSION

In light of the above discussion, the CMFA requests that the Board Committee on Regulation, Admissions and Discipline Oversight and the Board of Trustees approve the modifications as requested.

FISCAL / PERSONNEL IMPACT:

None

³ Copies of the public comments submitted are not attached to this agenda item, but will be available upon request.

RULE AMENDMENTS:

None.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

If the Board Committee on Regulation, Discipline and Oversight and the Board of Trustees agree with the recommendation of the Committee on Mandatory Fee Arbitration, it is requested that the proposed modifications to the Notice of Client's Right To Arbitration be approved for adoption effective immediately. It is also requested that attorneys in California be allowed to use the existing form until July 1, 2013.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Committee on Regulation, Admissions and Discipline Oversight agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight recommends that the Board approve the modifications to the Notice of Client's Right to Arbitration Form in the form attached hereto effective immediately; and it is

FURTHER RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight recommends that the Board allow attorneys to use either the new or current version of the Notice of Client's Right to Arbitration Form until July 1, 2013. After July 1, 2013, only the new version of the form must be used.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Board Committee on Regulation, Admissions and Discipline Oversight's recommendation, the following resolutions would be in order:

RESOLVED, that upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board hereby approves the modifications to the Notice of Client's Right to Arbitration Form in the form attached hereto effective immediately; and it is

FURTHER RESOLVED, that attorneys may use either the new or current version of the Notice of Client's Right to Arbitration Form until July 1, 2013. After July 1, 2013, only the new version of the form must be used.