

Memorandum

To: Nate Alder, Bar President

From: Rusty Vetter, Chair of Commission Sub-Committee

Date: June 30, 2009

Subject: Fee Dispute Resolution Program Review

cc: Su Chon, Yvette Donosso, Karthik Nadesan, John Baldwin

Please accept this as the Commission Sub-Committee's report of its review of the Bar's Fee Dispute Resolution Program. The Sub-Committee members consisted of Rusty Vetter, Su Chon, Yvette Donosso, and Karthik Nadesan.

We all met with Bar Staff member, Christine Critchley and the FDR Committee Chair, Steve Johnson to begin our review of the Program. At the meeting, Christine and Steve provided helpful background for the Program and described how the Program functions. They generally seem to be satisfied that the Program is functioning well and meeting its designed purpose. Subsequent to the meeting, written questions were submitted to the Bar to provide additional details concerning the Program and how it might be improved. Attached is the Bar's response to the questions. One concern identified is that because the Program is administered by the Bar, some potential participants would not participate. There is a perception that the Program would not be fair to the client and that the Bar would favor the attorneys who are on the other side of the dispute.

The majority of referrals for the Program come from the Bar's Office of Professional Conduct. An interview was conducted with Billy Walker, Senior Counsel for OPC concerning the Program. Billy seems satisfied with the Program, but does not view it as critical to the success of OPC. Other input was sought from members of the FDR Committee. Attorney volunteers on the Committee seem to be very satisfied with the work of the Program and had few suggestions for improvement. Attempts were made to receive input from judges who volunteer for the program. No judge responded to our request for input. Attempts were also made to receive comments for party-participants in the Program. Only three individuals responded and all seem to be satisfied with the Program.

Our conclusion is that the Program is operating reasonably well within a very limited scope. There seems to be little active support for the Program and we speculate that most Bar members do not know the Program exists. Information about the Program

is difficult to find on the Bar's website. If the Program were discontinued, there seems to be only minimal impact since the Program handles approximately 25 cases each year. On the positive side, the Program costs the Bar very little and is supported by a Bar Staff member who has free time to devote to the program. The attorney volunteers seem to be very supportive of the Program and would likely feel that it would be a loss for the Bar to discontinue the Program. If the Bar were to discontinue support for the Program, law firms should be alerted, since some require that any fee disputes be sent to Program.

Areas for improvement identified by the Bar staff include promoting the Program better and considering making it mandatory. We recommend the Bar continue to support the Program, but make better efforts to promote it. Consideration could also be given to providing a grant to a mediation/arbitration firm to provide the staff support for the Program, which may result in more participation.

Bar Responses to Questions Raised by Sub-Committee

We'd like to include a summary of the Bar staff's views concerning the FDR program in our report to the Commission. Could you provide the following:

1. a summary of the background and benefits of the program;

Formed in September 1, 1986, the Fee Dispute Resolution Program's objective is to facilitate resolution of fee disputes between Utah attorneys and their clients. Approximately 60 volunteers serve as Fee Dispute Resolution Committee members who have had training and donate their time to act as arbitrators/mediators.

Fee Arbitration: A three-member panel, needed for cases that exceed \$3,000 in disputed fees, includes an attorney (Chairman), a judge, and a lay person. In cases that are below \$3,000 in disputed fees are heard by a single arbitrator who is an attorney. The panel determines if the fee charged to the client is appropriate for the work that the attorney had performed on the case.

The steps involved in the Fee Arbitration process are:

1. The petitioner (usually the client) requests information about the Fee Arbitration program. A Verified Petition to Arbitrate Fee Dispute form as well as a copy of the rules is sent to them for completion.
2. Once the form has been completed and sent back to the program director a case file is set up and a copy of the Verified petition, the Fee Arbitration Rules, and the Verified answer form is sent to the Respondent.
3. The Respondent is asked to complete and return the Verified Answer within 10 days; however extensions are frequently given at the request of the respondent due to time constraints.
4. The respondent may decline to participate or may agree to binding arbitration. A copy of the Verified answer is sent to the petitioner and if the respondent has agreed to arbitration then a \$10.00 filing fee will be due before the arbitration will be scheduled.
5. Upon receipt of the filing fee, a copy of the Verified Petition and the Verified Answer will be sent to the chairman of panel that has been assigned. It is up to the chairman to send a copy of the documents to other panel members if a three-member panel is needed. The chairman will also send a Notice of Hearing to all parties involved

including The Fee Dispute Resolution Committee Chairman, Steven G. Johnson.

6. The parties will attend the hearing either in person or by telephone. The panel will conduct the hearing according to the Rules of the Fee Dispute Resolution Committee.
7. A binding decision will be sent to the director from the panel. A copy of the decision, the certified mailing certificate and a letter describing the right to appeal the decision under narrow and specific circumstances will be sent to the petitioner and respondent by certified mail.
8. The case is documented by the program director on a tracking file, and the actual case file is kept in storage.

Fee Mediation: is another option that is offered to the parties of a fee dispute. If the parties agree to mediation, an attorney volunteer from the Fee Dispute Resolution Committee is assigned to mediate the dispute. The mediator is to follow the standard mediation rules provided in the Utah Mediation Act.

The program attempts to provide a service to the public and the profession by resolving disputes over fees. It is well accepted by the community and profession.

Steven G. Johnson is the Chair of the Fee Dispute Resolution Committee that consists of 60 members and one staff member assigned as liaison. The committee consists of attorneys, judges and lay people.

The Fee Dispute Resolution program is an alternative to going through the court to resolve fee disputes between attorneys and clients. It is a valuable service to attorney and client, as well as the court. The Supreme Court has approved the rules and process of the program.

The rules of the Utah State Bar Fee Arbitration/Mediation programs are listed on the Court web site as well as the Utah State Bar web site. The rules are also sent to those who request a petition form and/or information about the program. The rules, forms, and other information are attached.

The Utah State Bar Fee Dispute Resolution Committee meets together as needed to discuss any problems that members would like to address as a committee. The committee will have the next meeting in May of 2009. If any rules or procedures need changing, the committee will vote on each matter

presented. The rule changes need to be approved by the Utah Supreme Court before they are implemented.

2. describe the case intake process and if you consider it to be user friendly, particularly for those without legal representation;

Most of the petitioners find out about the FDR program through the OPC, the Bar's website, or by calling the main Bar phone line. Petitioners may download the form from our site or receive it by mail. The form is very user friendly - especially since we take petitions that range from a couple of lines explaining that they feel cheated to thick files of evidence. We can discuss the program with Spanish speaking petitioners (bilingual bar staff) and that is an immense help to those who have disputes, but have problems understanding English.

3. describe any complaints you have received about the process;

We are in cahoots or collusion with the crooked attorneys because we can't force the attorney to participate, takes too much time etc.

4. provide statistics of volunteer time and general utilization over the past three years;

Most of the panel members (attorneys and lay persons) will receive a case at least every other year. Judges receive a case about once a year. Because numbers are up this year, just about all of the panel members have each received a case this past year.

Specific statistics of attorney, judge and non-attorney panel member time required by these cases have not been maintained. We have not felt a need to add an additional burden on the panel members to keep these kinds of statistics. Following is an approximation of the time required in these cases, based on several years of experience.

For a case under \$3000.00 handled by one attorney as arbitrator, he or she can schedule the case, prepare an appropriate Notice of Hearing, and read through the provided documents in preparation for the hearing in less than 2 hours. Sometimes only an hour is more than sufficient for the case. In these kinds of hearings, the hearing itself takes about an hour. The arbitrator must then prepare a decision, usually supported by reasons for the decision which are similar to findings of fact and conclusions of law. This sometimes takes an additional hour or so to prepare. It is not unusual for attorney panel members to spend 3 to 6 hours even on a small case.

For larger cases (over \$3000.00 in amount), the scheduling takes a lot more time because the attorneys must schedule judges' time. It is not unusual to spend up to an hour just getting a judge lined up. As a recent example, I was required to contact 5 or 6 different judges before I could find one willing to serve

who was also available in the time frame needed by the case. Each judge required a couple of calls to the respective judge's clerk(s), and required a wait (sometimes for a couple of days) for a response from the clerks. I have had a few hearings that took longer than two hours each to hear (one took 4 hours), but one case with a claim in excess of \$500,000 took only about half an hour.

If extensive documents are provided by the parties in advance of the hearing, the attorney-arbitrator must have them copied and sent out to the other panel members. Sometimes the arbitrators can spend over an hour reviewing those documents in advance of the hearing.

It is not unusual for attorney-arbitrators to take at least an hour preparing the decisions. Then he or she must obtain the signatures of the other panel members on the decision document. That can take additional time. In a large case, it is not uncommon for the attorney-arbitrator to spend up to 20 hours on the case. Fortunately, the smaller cases can sometimes be handled with two or three hours of work by the attorney.

5. describe modifications to the program that will involve more mediation and if this will result in more cases;

Currently new mediation rules have been proposed to the Supreme Court, and the rules have been published for comment. They will likely be approved by the Court very soon. These rules set forth the procedures to be followed for mediations of fee disputes. Upon adoption of the mediation rules by the Court, I will prepare a Bar Journal article introducing the new rules to the members of the Bar, and also encouraging use of the fee dispute program for all attorney-client fee disputes. We anticipate that because it appears that some attorneys do not want to participate in the program because arbitration takes away their control of the situation, once they become aware of the mediation option, more attorneys may be willing to participate. We have already had a few attorneys request mediation.

6. The cost of the program to the Bar;

\$13,400 (This includes the portion of salary and benefits (9,850) that is allocated to FDR; Overhead (2,800) (building, copying); and annual lunch committee meeting (1,000). The program is offset slightly by \$10 filing fee paid by those who are scheduled for Mediation or arbitration. (\$200) estimation.

7. how you think the program could be improved (if at all);

There are several things we could do to possibly improve the program.

1. We need more judges signed up to participate as arbitrators, particularly in Salt Lake County. Recently the Chief Justice offered to encourage judges to participate in the program in last September's Judicial Forum. Now, the panel plans to write letters to the judges

soon to invite them to participate. We anticipate that this will help a little in this regard.

2. We also need more non-attorneys in the Salt Lake area. We are considering contacting out current non-attorney panel members and asking them to recommend friends or acquaintances whom we could then contact and ask them to participate. We are also considering putting a notice in a local newspaper and in the *Bar Journal*, inviting non-attorneys to participate or asking attorneys to identify potential panel members for us.

3. We recently have been considering using an attorney who would be the first point of contact after a complaint has been received by the Bar. This attorney panel member would contact the attorney involved in the claim and seek to resolve the matter before it even goes to arbitration or formal mediation. Perhaps a third party trying informally to resolve the matter might actually help resolve more cases at an earlier time. This may also speed up the resolution of matters for some clients.

We will likely discuss this option at our next panel meeting in early May of 2009. Training of panel members in the issues and procedures that may arise in these situations will be necessary.

8. how we could significantly increase participation (such as by 50%);

We believe that our new efforts to use mediation, an upcoming *Bar Journal* article explaining the work of the Fee Dispute Resolution Committee, and perhaps a seminar as part of next year's Fall Forum will increase to some degree the use by Utah lawyers of the Fee Dispute Resolution Committee to help solve their outstanding fee issues. However, it is believed that the only way to increase participation by 50% (we are currently at about 50% participation) is to make the program mandatory. We have discussed this possibility with the Supreme Court, which appeared to be warm to the idea. We decided at that time to first try the mediation option to see if it has any effect on the usage of the program by Utah attorneys. If we do not see a marked increase in the number of attorneys who are willing to participate in the program, we will then revisit the "mandatory" matter. We do not expect that making the program mandatory will be popular with many members of the Bar, so hope to increase our numbers with less controversial measures.

9. What would be the consequences (e.g. financial effect) of a significant increase in participation?

Most of the work is done on ALL cases, a few more steps are needed in those cases that actually have a hearing scheduled.

10. What would be the consequences of not offering the program at all?

It would be a loss to the public and the attorneys. Many clients are too intimidated or lack knowledge in taking a lawyer to court. This is basically the only alternative. I believe most Bars have a Fee Dispute program in place. We frequently participate in surveys etc. with other Bars and the ABA.

Could you also update us on your efforts to get permission from the participants to question them about the program? I think we are leaning toward a very broad survey question that would ask something like "Please tell us about your participation in the Utah State Bar's Fee Dispute Resolution Program. What was your role in the program, did the program work, and how could the Program be improved?"

We need to work on this, I think we (Steve and I) need to send out the questions that you would like to ask so that we can keep the confidentiality rules of the program.