

SJC to consider mandatory fee arbitration

Bar: move rife with potential problems

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The Supreme Judicial Court is moving ahead with plans to consider a rule change that would require attorneys and clients in Massachusetts to resolve fee disputes through arbitration rather than in court.

Proponents say mandatory fee arbitration, which is the norm in near-

ly a dozen states including New York, New Jersey and Maine, would allow clients to settle fee issues quickly. It would also relieve the financial burden for clients who have to hire another attorney when their original lawyer refuses to submit to arbitration voluntarily.

Further, keeping clients and lawyers out of court protects the attorney-client relationship because it prevents the airing of both confidences and grievances in public, proponents say.

"I think it ought to be at the option of the client," said Nixon Peabody at-

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torney Cornelius J. Moynihan, who has served on the Massachusetts Bar Association's fee arbitration panel for 15 years and favors adoption of a

mandatory rule.

"The problem with not having it, the lawyer tries to jerk the client around and that's not good," he said.

But the concept has been met with sharp criticism from many lawyers and bar groups, including the MBA and the Massachusetts Academy of Trial Attorneys, who say such a move is wholly unnecessary given the relatively small number of fee disputes that are not worked out through the state's existing voluntary arbitration process.

The rule could create "chaos" if

Continued on page 25

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Continued from page 1

not carefully crafted, the opponents argue.

"This seems to be a cure in search of a disease, given that there is no evidence of an increased volume of fee disputes," said Martin W. Healy, chief operating officer and chief legal counsel for the MBA, which operates the state's oldest and most active bar association arbitration panel.

The SJC expects to finish up assembling nominees to serve on a committee to study the idea and return with recommendations "soon," court spokesperson Joan Kenney said, adding that no formal timetable has been set for the committee to complete its review.

'All the bad lawyers'

The MBA House of Delegates unanimously voted to formally oppose the idea, saying it would cause unnecessary conflict between lawyers, delay the resolution of claims, and complicate a system that has long worked efficiently.

According to MBA data, from 2008 through 2010, the association's panel fielded 310 complaints, of which about one-third were dismissed.

MBA Vice President Douglas K. Sheff, who drafted the resolution against mandatory arbitration, said it is "one of the worst ideas" he has ever heard and has been met with "resounding" opposition among the bar groups

and judges with whom he has spoken.

"It's giving credence to a myth that lawyers can't be trusted," Sheff said.

The potential rule change "completely ignores the sanctity of contracts," he said. "And who's going to pay for it?"

Peter R. Gossels, an attorney at Weston Patrick in Boston, characterizes the effort as something of a public relations initiative designed to appear tough on "all the bad lawyers."

"It sounds like a good idea, but when you go deeper into it, it isn't so easy," he said.

A 20-year veteran of the Boston Bar Association's now-defunct fee dispute committee, Gossels said the success or failure of a mandatory process will depend largely on how key issues are addressed by the court, including who will conduct the arbitrations, what rules will be in place, how much authority the panel has, and what happens if attorneys do not comply with a decision. Also crucial, he said, will be whether the process will govern disputes between lawyers.

Gossels said the BBA panel was dissolved last August because of a lack of fee complaints.

Better for attorneys, clients

The impetus for mandatory fee arbitration stems from recommendations made by the American Bar Association in an October 2005 report on Massachusetts' judicial disciplinary system, said Bar Counsel Constance V. Vec-

chione, whose office supports "the exploration" of the rule change.

The Office of Bar Counsel is frequently called upon by clients to get involved in fee disputes, something it only does if the fees appear to rise to the level of being clearly excessive and worthy of discipline.

According to the office's annual report, more than 7 percent of the 4,724 inquiries made to the Attorney and Consumer Assistance Program in fiscal 2010 were about attorneys' fees.

Though in most instances the office does not take action, screening and responding to thousands of complaints and referring complainants to outlets like the MBA's fee arbitration board takes time and money, Vecchione said.

"It's the correct thing to do in terms of servicing the public — to have a forum to resolve these matters without involving the disciplinary system," she said. "It's better for lawyers and it's better for clients."

Under the current voluntary system, information about how and where to take a fee dispute outside of court is not always freely given to clients, Vecchione added. "Unless they come to us, clients don't necessarily know they have that option."

'A lot of chaos'

Edward M. Bloom, a Sherin & Lodgen attorney and president of the Real Estate Bar Association, said REBA has its own mediation

process, and though it cannot enforce settlements, overall it works efficiently and is less costly than going to court.

Making arbitration mandatory is bound to create "all types of issues" for lawyers in business deals and real estate transactions, including commercial leases and loan guarantees in which attorneys' fees are written into contracts or, as in mortgages, counsel fees are set by the bank.

If the rule is broad in scope and requires all fee disputes to go to arbitration, it could conceivably encompass battles between consumers and attorneys who are not even representing them, Bloom said.

"It's one thing in litigation for one side suing the other side; they're not suing the attorney," he said. "If you had mandatory arbitration, then the attorney himself could be drawn into this with someone they don't even represent."

Unless the rule is limited to engaged lawyers, Bloom said, it will create "a lot of chaos."

Sheff, a Boston personal injury attorney, predicts mandatory arbitration will lead to an influx in pro se litigants because many lawyers, especially those in contingent-fee cases, will be reluctant to take on matters when there is a possibility that, after investing hundreds of hours, a client can later decide to simply back out of paying a previously agreed-upon fee and try his luck with an arbitrator.

"If we throw out the sanctity of contracts, the whole system goes down," Sheff said. 