A legal note from Marshal Willick about how the State Bar of Nevada's Fee Dispute Resolution System is Broken – and Needs to be Fixed

For many years the State Bar of Nevada has permitted disgruntled clients to file fee disputes, triggering mediation or arbitration before volunteer attorneys acting in those capacities, leading to decisions as to whether fees are actually owed and, if so, providing a route to obtain a judgment for those fees.

Not all lawyers know that the Bar process could be initiated by either a lawyer ***or*** a client, and recent events have led to far greater interest in that process for both, but the system, as now constituted, is nowhere near up to the task of being useful.

I. BACKGROUND AND IMPORTANCE

The Nevada Supreme Court decision in *Argentena* (*Argentena Consol. Min. Co. v. Jolley Urga*, 125 Nev. ___, 216 P. 3d 779 (Adv. Opn. No. 40, Sep. 24, 2009)) essentially eliminated the availability of the summary attorney's lien adjudication proceeding in many cases.

That summary mechanism has been in common use for the past 50 years, and provided a way for lawyers to obtain at least a judgment for fees owed by clients. Because a potential means for (eventual) collection of fees owed existed, many lawyers continued working for clients even after the clients ran out of money on retainer.

Argentena suggested that instead of the summary adjudication process, attorneys file independent legal actions against their clients for fees owed. This suggestion ignored the practical reality that filing suit against a client is essentially prohibited by most policies of malpractice insurance, since many companies ask on their applications whether counsel sues clients for fees, and refuse to offer policies at all, or greatly increase premiums, if the answer is "yes."

Requiring counsel to choose between having malpractice coverage and getting paid for work done is no choice at all. The real "choice" resulting was between refusing to work for clients who do not have money on retainer at all times, or continuing to do work knowing that there was no practical way to get paid after the end of the case if the client did not wish to voluntarily pay the bill.

Irrespective of its legal merits, which are not discussed here, *Argentena* was a public policy disaster. By making it more difficult for lawyers to ever actually get paid if clients owed them money, the opinion provided a strong incentive for attorneys to withdraw from cases in mid-litigation, thus increasing the total number of proper person litigants and increasing pressure on the court system itself, and on the self-help and *pro bono* programs, especially in family court.

And while some would undoubtedly have no concern with the impact of the opinion on lawyers, both the courts and the organized Bar should be more concerned than they appear to be with the viability of law practices, especially in the midst of the worst economy in Nevada since the Great Depression.

II. THE SUGGESTED SOLUTION OF THE STATE BAR'S FEE DISPUTE SYSTEM

Irrespective of why it says what it does, or whether it was a good idea, *Argentena* is the law, and lawyers cannot as a practical matter sue clients for fees.

This reality has caused some to suggest using the State Bar fee dispute mechanism as an alternative route to determining fees owed and obtaining a judgment. However – at least the way things are today – that system is so dysfunctional that it is not a viable mechanism for such disputes, making the suggestion at best illusory, and at worst hypocritical.

III. HOW AND WHY THE CURRENT SYSTEM DOES NOT WORK

This office had two recent fee disputes heard. The first of these was filed in early 2009. It was not even heard until most of a year later, on October 9th, 2009 – about six months ago. We have not seen hide nor hair of a decision since then.

In the second case, the fee dispute paperwork was submitted in October of ***2008***. After the hearing was rescheduled a half dozen times due to the former client's delays, it was finally decided on the papers (as we had requested be done repeatedly, for months) around December 9 – four months ago. Again, utter silence since the submission.

This is not just an inconvenience. These delays cost law firms and complainants real money and hurt their practices and their lives.

For example, a massive delay occurred on a fee dispute that this office was involved in that was concluded last year. The paperwork on ***that*** dispute was submitted about November, ***2007***, and not resolved until April, 2009. During the delay, the land that would have paid our fees was lost to foreclosure, despite our repeated pleas that both this firm and our former client (who we were still trying to protect, despite the dispute) were being severely prejudiced. We could not formally intervene in the foreclosure (the land was still in the name of our former client's ex) because we had no adjudicated right relating to the fees to turn into a judgment that could be used against the property.

By the time the report stating that we were entitled to our fees issued, it was worthless. The land was believed to be worth hundreds of thousands of dollars, and about $100,000 of that was owed to us. This firm received nothing, and we were rendered unable to give our former client – the other party to the fee dispute – the remaining value of the land, as we wished to do. ***All*** funds from the disputed land were lost to ***all*** concerned, solely because of the inefficiency of the fee dispute resolution process.

The only accurate designation for a program that causes such results is "dysfunctional."

IV. WHO'S TO BLAME

It is certainly not the State Bar employees running the fee dispute resolution program. They have been universally friendly, responsive, and helpful. But they have no authority to actually get anything done.

Rather, this is a situation where – at least collectively – the lawyers have to look right in the mirror. I am sure that some of those volunteering their time and efforts to serve the bar process are diligent and deserve commendation for donating their time. That said, fault lies with those "volunteers" who are apparently more interested in having publicly visible positions than actually doing the work called for by those positions, and with the organized Bar structure which is (or should be) aware of this problem, but so far as can be seen, has done nothing of consequence to address it.

They "should be aware" because if the program is ***not*** being monitored closely enough to see that disputes being filed in one year are being resolved two years later, it is not being monitored at all. And if this problem ***has*** been seen but not addressed, the failure is one of will, or effort, either of which is unacceptable.

The Bar owes a duty to the lawyers it serves, and to the public being injured, to make the fee dispute process actually work in acceptable time frames. At this moment, the Bar is failing in its oversight, and causing financial injury to everyone involved.

V. REASONABLE STANDARDS FOR RESOLUTION OF FEE DISPUTES

Hearings should be required to be held within 30 days of paperwork being submitted. No one is so busy that he or she can't schedule a meeting within a month's time, and if anyone is, that person should not volunteer to perform this function. If parties cannot attend, submission on the papers should be automatic – not something that takes a year of nagging to get accomplished.

The report and recommendations from the mediator or panel should be created and transmitted hours or days – ***not*** weeks, and sure as heck not months or years – after a matter comes to hearing. The only way that the facts of the hearing can possibly be ***remembered***, nevertheless reported and adjudged accurately and fairly, are when the information is fresh in the mind of the person or persons writing the report. If a judge started drafting a decision on a case three months after hearing the evidence, litigants would (justifiably) be screaming about it. The same standard applies here.

VI. WHAT CAN AND SHOULD BE DONE, BY WHOM, AND WHEN

Every single mediator and arbitrator now involved with the fee dispute system should be contacted in the next ten days and asked to commit to performance standards at minimum in accordance with those suggested above. Those not responding, or unwilling to act, should be dropped from the rolls and the matters previously assigned to them should be immediately reassigned. Decisions should be demanded within 72 hours as to all disputes that have already been heard.

If fulfilling the Bar's responsibility requires terminating every mediator and disbanding every panel that is currently engaged in processing fee disputes, and appointing entirely new panels, then that process should be begun, immediately.

If the problem is internal rules that encourage or permit this level of inefficiency and nonperformance, the appropriate paid members of the Bar staff, at the direction of the Board of Governors, should be tasked with re-writing the rules, ***now***. That can, and should, be accomplished in less than two weeks.

And if the response is that volunteers just can't be made to perform this task timely, then the adjudicatory function should be assigned to Bar counsel. Alternatively, the structure of the program could be altered to charge a filing fee (say, $25 to $50), and use that to ***pay*** lawyers to act as fee dispute mediators and arbitrators. In this economic climate, given the number of unemployed and underemployed lawyers now around, it should not be hard to come up with someone qualified to deal with these matters for $50 apiece. Could the Bar call on senior judges to perform this task, for a modest stipend?

These proposed solutions are hardly exhaustive. One lawyer has suggested that a team could be assigned to perform marathon reviews of ***all*** outstanding disputes, along the lines of how senior judges are handling the backlog of malpractice claims and the family court settlement meetings.

Again, it is just a matter of those in positions of responsibility caring enough to want to solve the problem, and having the will to actually get something done.

The substance of the above was sent to the Bar in the form of a private letter – a month and a half ago. There has been no response of any kind, beyond a note from Bar staff indicating the letter was received and copied to those in charge.

I, for one, have never had much patience with bureaucratic inertia, especially when it repeatedly costs me tens of thousands of dollars. And if not for the benefit of lawyers, then attention to this process was and is required to rescue the courts, self-help, and *pro bono* providers from the effects of *Argentena* recounted above.

In light of that case, the Bar ***should*** have responded proactively on this matter half a year ago, streamlining the fee dispute resolution mechanism and making it more widely, easily, ***and quickly*** available to both clients and attorneys. This is not a matter that must be studied, thought about, sent to a commission or otherwise dawdled regarding. It is an immediate problem that can, and should, be solved – now.

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