ARBITRATION ADVISORY

2005-02

RESISTING ATTEMPTS TO SUBPOENA FEE ARBITRATORS OR FEE ARBITRATION DOCUMENTS

June 30, 2005

INTRODUCTION

Local bar Mandatory Fee Arbitration (MFA) programs and fee arbitrators are occasionally served with subpoenas to appear and/or for the production of fee arbitration file documents in related civil actions. Usually, the subpoenas are issued by a party in post-arbitration litigation. However, sometimes the records of the program are sought by a party or even a non-party to research or document a party's "pattern of conduct."

This Advisory addresses how local bar programs and arbitrators should respond to such subpoenas in light of the applicable statutes and case law dealing with arbitral immunity, lack of capacity to testify, and related references. The Committee recommends that attempts to subpoena the testimony of arbitrators or records of arbitration cases be resisted to preserve the confidentiality and integrity of the Mandatory Fee Arbitration (MFA) Program.

Under the MFA statutes, the bar association, volunteers, and staff who conduct a State Bar approved Mandatory Fee Arbitration Program enjoy the same immunity that protects judicial officers. Individuals covered by this type of immunity cannot, with some exceptions, be compelled to testify in any proceeding or held liable for any damages resulting from their arbitral activities.[1]

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[1] Business & Professions Code § 6200(f) provides as follows:

> "In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, an arbitrator or mediator, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings."

SUBPOENAS FOR THE ATTENDANCE OF FEE ARBITRATOR OR FOR THE PRODUCTION OF ARBITRATOR'S NOTES

Based on this statutory immunity, subpoenas issued by parties or even non-parties to compel the attendance of a fee arbitrator or for the production of his or her notes should be strongly contested. Since fee arbitrators are not required to keep notes after the arbitration concludes and the award is served, if an arbitrator's notes were destroyed, simply inform the party requesting them of that fact. If the arbitrator's notes were not destroyed, or if the arbitrator's appearance is sought, the subpoena should be resisted.

The question of who resists the subpoena - the arbitrator or the program - depends on the structure and resources of the individual bar associations. In some cases, the program chair will object to the subpoena. Other bars may need to rely on the arbitrator to assert an objection. Whenever possible, the Committee encourages the program chair to resist the subpoena in order not to dissuade volunteers from future participation in the Program.

The manner in which an objection to a subpoena for the attendance of the fee arbitrator or his notes is made depends on the unique circumstances surrounding the case. For instance, a telephone call to the party who issued the subpoena to explain that the MFA immunity applies may result in withdrawal of the subpoena altogether. A follow- up letter objecting on the grounds that the statutory immunity applies is recommended. Failing voluntary withdrawal of the subpoena by the party, a subpoena can also be resisted by opposing a motion to compel or opposing an OSC re contempt for refusal to obey the subpoena. The objecting party can also file a motion to quash and, in any situation where it appears likely that notes will be ordered produced, make a request for *in camera* inspection of the notes only by the judge.

1. Arbitrators Are Deemed "Not Competent" to Testify in Subsequent Proceedings

California public policy has long prohibited calling judges as witnesses in civil actions related to those over which that judge may have presided [*Merritt v. Reserve Ins. Co.* (1973, review denied) 34 Cal.App.3d 858, 882-883].

California Evidence Code Section 703.5 reads as follows:

> "Competence to Testify**.**
>
> "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to dis-qualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11

(commencing with Section 3160) of Part 2 of Division 8 of the Family Code."

The statute means what it says, and declarations by arbitrators in related cases are not accepted [*Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 528]. The statute's application is limited to arbitrators and mediators and does not apply to other proceedings which did not involve either arbitrations or mediations [*Saeta v. Superior Court (Dent)* (2004) 117 Cal.App.4th 261, 267].

The MFA Committee believes that the MFA Program would plainly fall within the statutory concept of an *arbitration,* notwithstanding its distinction from arbitrations conducted under the California Arbitration Act [*see Aguilar v. Lerner* (2004) 32 Cal.4th 974, 983, *et seq.]*.

2. Exceptions

Before responding to any subpoena to compel the attendance of a fee arbitrator, the program should evaluate the possible applicability of the following four statutory exceptions to California Evidence Code Section 703.5:

"[E]xcept as to a statement or conduct that could:

(a) give rise to civil or criminal contempt
(b) constitute a crime
(c) be the subject of a investigation by the State Bar or Commission on Judicial Performance, or
(d) give rise to disqualification proceedings under [CCP §170.1]".

Under the Code of Civil Procedure, grounds for vacating an award include: arbitrator corruption, arbitrator misconduct, unreasonable refusal to postpone or hear evidence, and failure to disqualify oneself upon grounds specified in Section 1281.91 [C.C.P §1286.2].

If the subpoena is intended to produce evidence to support or refute a petition to vacate the award on these grounds, it is possible that the court would compel compliance with the subpoena. Otherwise, unless one of the four enumerated exceptions applies, an arbitrator cannot be compelled to testify. Absent any authority to the contrary, the Committee concludes that the arbitrator cannot be compelled to testify. The same rule should apply to an arbitrator's notes

SUBPOENAS FOR ATTENDANCE OF MFA STAFF OR FOR AN MFA CASE FILE

The arbitral immunity applies not only to individual arbitrators but to the organization sponsoring the arbitration as well [*Thiele v. RML Realty Partners* (1993) 14 Cal.App.4th 1526. *Stasz v. Charles R. Schwab* (2004, review denied) 121 Cal.App.4th 420, 433-434]. Therefore, the program should strongly resist subpoenas that compel the attendance of a MFA program staff or chairperson for the same reasons that apply to fee arbitrators.

On the other hand, if MFA staff is being subpoened for the sole purpose of authenticating an award, the program should offer to provide a certified copy of the award or a custodian of records declaration with the award in lieu of an appearance. Any such agreement to do so should

be confirmed by the program in writing to the party who issued the subpoena.

SUBPOENAS FOR MFA AWARDS

Subpoenas occasionally request the Findings and Award from a case. Most rules of procedure indicate that while the fee arbitration proceeding itself is confidential, the award is public. The Committee considers that one additional implied exception to the principle set forth in Evidence Code Section 703.5 above exists regarding MFA Awards. Since the MFA statute clearly contemplates that Awards may become the basis for enforcement proceedings, the final Award itself might thus be the subject of a subpoena to the MFA program, thus creating the fifth exception. However, blanket or "dragnet" requests for production of multiple awards to support unrelated litigation (e.g., "all awards involving Attorney Smith" or "all awards where Client Susie is a party") should probably be resisted.[2]

LACK OF CLEAR AUTHORITY TO COLLECT ATTORNEY'S FEES

Missing from the MFA statutes is a counterpart to Evidence Code Section 1127: "If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing." This language may offer some support for a request for fees, but only by analogy.

However, Code of Civil Procedure Section 2023.010 (renumbered from §2023 effective July 1, 2005) defines misuse of the discovery process to include "(1) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery." Code of Civil Procedure Section 2023.030 subdivision (a) allows a court to impose a monetary sanction of reasonable expenses, including attorney's fees, against one engaging in the misuse of the discovery process.

The Committee suggests that a program attempt to recover its attorney's fees for litigating an improper subpoena to a fee arbitrator or program under this statute.

CONCLUSION

When applicable, a discovery subpoena should be met with a written objection citing the above authorities and - if appropriate - notification of intent to seek compensatory sanctions, including reasonable attorney's fees and costs, should the party issuing the improper subpoena persist. Good judgment and reasonable caution dictate that a subpoena to appear or present documents in court probably requires that a formal objection be made to counsel and the court lest a judge conclude that the refusal to appear constituted contempt.

[2]Note that the Award (and determinations of the arbitrators) "... are not admissible nor operate as collateral estoppel or res judicata in any action or proceeding." [Bus. & Prof. Code, § 6204(e)].