ARBITRATION ADVISORY

96-01

RECORDS RETENTION

April 26, 1996

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INTRODUCTION

It has come to the attention of the State Bar of California Committee on Mandatory Fee Arbitration that the retention of fee arbitration files varies significantly among local bar programs. The retention of files appears to be based more on the individual program's storage capacity rather than on future legal or enforcement concerns. In an effort to assist local programs in addressing file retention concerns, as well as legal and enforcement issues, the Committee offers the following guidelines for program administrators.

HOW LONG TO RETAIN FILES

The Committee recommends that local programs retain files for at least a period of five (5) years from the date the final award was mailed to the parties. Arbitrating parties have four (4) years from the date the award is mailed in which to file a petition to confirm the arbitration award. Up until that time, parties may request documents from the local bar's file which may be required or desired in a judicial proceeding relating to the arbitration. In addition, if a fee arbitration matter proceeds to the State Bar of California for enforcement of an award, the State Bar or the client may request certified documentation from the local bar's files.

WHAT TO RETAIN AND WHY

It is the recommendation of the Committee that the entire file be retained to prevent potential problems which could result from discarding selected parts of the file. This alleviates the burden on administrators who have the responsibility of purging files and making discretionary decisions as to what to retain and what to discard.

The Committee is sensitive, however, to the space and storage limitations facing many programs and provides the following suggestions as to what pertinent file documents must be retained and what should be retained:

Documents which must be retained for enforcement and legal purposes:

A. Findings and Award with Proof of Service, including any

amendments to Findings and Award.

B. Statements from parties; Petitions (pleadings) and attorneys' replies including attachments and/or supporting material.
C. Notice of Attorney Responsibility with Proof of Service.
D. Documents relating to the issue of the responsible attorney.
E. Arbitrator correspondence relating to the wilful non-appearance of any party.
F. Stipulated settlements or correspondence relating to settlement or withdrawal of a matter from arbitration.
G. Declarations regarding waiver of personal appearance.
H. Notice of Hearing.
I. Correspondence relating to disclosure or disqualification of arbitrator(s).

Documents which <u>should</u> be retained:

A. Correspondence regarding refund or filing fee policy.
B. Correspondence notifying parties that a request for arbitration has been filed.
C. Exhibits submitted as evidence at an arbitration hearing, unless local programs send them back to parties.
D. Subpoenas.

The above retention lists are set forth to assist administrators in determining their own retention plan. Programs should determine which vital documents must be saved based on their own standards and experiences.

REQUESTS FOR CASE MATERIAL AND RELEASE OF DOCUMENTARY EVIDENCE

Since it is at the discretion of local programs to determine whether to release documents from a case file, it is recommended that programs develop a formal administrative method to handle such request to avoid administrative and financial burdens. To assure compliance in this area, local programs are encouraged to include a provision for handling requests for case material and the release of documentary evidence in their rules of procedure. They may wish to consider charging a nominal fee for any request involving retrieval of a file from a storage facility which involves a substantial amount of copying. This fee should be related to the actual administrative cost.

Local programs should also develop a formal administrative method to handle subpoena request for closed files, taking into consideration such factors as who is requesting the document(s), what is being requested and for what purpose, whether the request should be granted, and what fee, if any, should be charged for retrieval and copy of the file. Programs must be sensitive to the issue of confidentiality based on Business & Professions Code Section 6202, the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs Rule 11(4), and local program rules. Such requests should be handled with utmost discretion, and administrators are advised to consult with their program chairs, committee leaders or bar counsel regarding legal ramifications.

To avoid problems concerning the release of documentary evidence submitted at

a hearing, local programs should also consider implementing a rule governing this issue. It should be clarified whether the arbitrator or the local program is responsible for returning evidence submitted at the hearing to the respective parties. It is also suggested that local programs impose a deadline notifying parties when the documents will be destroyed if not retrieved by the interested parties.

STORING AND SHREDDING FILES

The Committee recognizes that each program is faced with varying storage needs based on spatial and financial concerns. Storing voluminous files accumulated over many years can place a financial hardship on local programs. For this reason, it is recommended by the Committee that local programs maintain a list of any expunged files for future reference or statistical purposes unless this information is separately maintained.

Since fee arbitration cases are confidential, it is important for administrators to assure confidential shredding. If administrators cannot personally shred case files or be present during the actual shredding, they should request a declaration from the recycling and/or storage facility attesting that files were confidentially shredded. As a note of caution, administrators are encouraged to develop a procedure to return original documents to the owner before shredding, which could include notifying the owner in writing that unless arrangements are made by the owner to retrieve the documents within thirty (30) days, they will be destroyed.

CONCLUSION

These suggestions should enable local programs to maintain an organized retention plan. With defined rules and clear written procedures, programs may efficiently and practically store arbitration files and records without becoming overburdened with administrative, spatial or financial concerns, and minimize, if not avoid, potential legal and enforcement of award problems.