

ARBITRATION ADVISORY

2015-01

DISCLOSURE GUIDELINES

Replaces and Supersedes Arbitration Advisories 1994-01, 1995-01 and 1997-01

January 16, 2015

<p>Points of view or opinions expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not been adopted or endorsed by the State Bar's Board of Trustees and do not constitute the official position or policy of the State Bar of California.</p>

INTRODUCTION

The State Bar Rules that govern Mandatory Fee Arbitration provide a standard for disqualification when an arbitrator believes he or she cannot make a fair and impartial decision. The purpose of this advisory is to provide guidelines for arbitrators to follow when disclosures should be made about circumstances or relationships which may affect their ability to make a fair and impartial decision. This advisory also explains why the disclosure requirements for private contractual arbitration under the California Arbitration Act do not apply to Mandatory Fee Arbitrations.

DISCUSSION

A. Overview Of Mandatory Fee Arbitration Program and Differences From Contractual Arbitration

The Mandatory Fee Arbitration Act ("MFAA") is codified in Business and Professions Code Sections 6200 et. seq. The Legislature created the MFAA as a separate and distinct arbitration scheme operated by the State Bar of California and local bar associations to resolve disputes between attorneys and clients over legal fees, costs, or both. B&P 6200(a). The California Arbitration Act ("CAA") is found in Code of Civil Procedure Sections 1280 et. seq. It regulates private arbitration in the state. It applies to all civil disputes. Whereas arbitration under the CAA is based on the parties agreement to arbitrate, participation in arbitration under the MFAA is based on a separate statutory scheme that is voluntary for the client and mandatory for the attorney if the client initiates it. B & P 6200(c). Arbitration under the CAA is binding, and

the parties usually agree that the arbitrator's decision will be final. In contrast, an award made in a MFAA proceeding is non-binding, and either party may reject the award and request a new trial unless the parties agree after a dispute has arisen that the award will be binding. B&P 6204(a); *Schatz v. Allen, Matkins, Leck, Gamble & Mallory* (2009) 45 Cal. 4th 557.

Because MFA is a distinct statutory process, the State Bar Board of Trustees has established certain Minimum Standards for Operation of Mandatory Fee Arbitration programs. The State Bar and all local MFA programs must comply with these standards. In addition, the filing fees which the local programs charge the parties are to cover administrative costs only, and the Board of Trustees must approve them. Since the program is designed to be low cost, the fees are usually minimal, so as to permit wide access to attorneys and clients and they can be waived for economic hardship. Neutrals who serve in MFAA programs are volunteers and are not paid. Attorneys' fees and costs are not recoverable in an MFA proceeding, except for possible reallocation of the filing fee in the arbitrator's discretion.

By contrast, in arbitrations conducted under the CAA, the parties select the arbitrator after following the selection process contained in their agreement or in Code of Civil Procedure, the parties pay the required arbitrator's fees and compensation, and there can be an award of fees and costs to the prevailing party. CCP Section 1281.9 requires arbitrators selected or appointed in a private arbitration to disclose any matter that could raise doubt that the arbitrator would be unable to be impartial. As a practical matter, CCP Section 1281.9 also requires disclosure of any matter which may give the appearance of potential bias. In making these disclosures CCP Section 1281.9[a][1] incorporates the disqualification standards for judges set forth in CCP Section 170.1.

Because of these significant statutory and practical differences, the MFAA is expressly exempted from the disclosure standards applicable to contractual arbitrations. See California Rule of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 3(b)(2)(C). This standard provides that the stricter contractual arbitration standards in CCP Section 1281.9 and CCP Section 170.1 do not apply to "an attorney-client fee arbitration proceeding subject to the provisions of Article 13, Chapter 4 of Division 3 of the Business and Professions Code."

The most recent case to discuss disclosure requirements in private arbitrations and mandatory fee arbitrations was *Benjamin, Weil & Mazer v. Kors* (2011) 195 Cal. App. 4th 40. In that case, the Court of Appeal addressed the disclosure issue in Footnote 10. The court observed that the disclosure requirements for contractual arbitrations under the CAA did not apply to fee arbitrations under the MFAA citing the exemption under Standard 3(b)(2)(C) and the various differences between the two statutory schemes. *Id.* p. 59.

B. Disclosure Guidelines Under the MFAA

Under Business and Professions Code Section 6204.5 the State Bar is directed to "provide by rule for an appropriate procedure to disqualify an arbitrator upon request of a party."

In Rule 3.537(B) of the State Bar Fee Arbitration Rules (Title 3, Div. 4, Chpt. 2, State Bar Rules) the following standard is provided: “An arbitrator who believes he or she cannot render a fair and impartial decision or who believes there is an appearance that he or she cannot render a fair or impartial decision must disqualify himself or herself or accede to the party’s challenge for cause.”

Based on this standard, if an appointed arbitrator believes he or she cannot render a fair and impartial decision, then he or she should voluntarily withdraw or refuse the appointment. If additional circumstances arise that affect an arbitrator’s ability to issue a fair and impartial decision after the arbitrator’s appointment but before the award is made, the arbitrator should disclose the circumstances to the parties and, if necessary, have the program appoint another person to serve as arbitrator.

The following is a list of suggested questions which a prospective arbitrator may want to consider in making any disclosure:

1. Do you have a financial interest in the fee arbitration?
2. Have you represented the client or the attorney who is the subject of the fee arbitration?
2. Have you practiced with the attorney who is the subject of the fee arbitration?
3. Have you socialized with the client or the attorney who is the subject of the fee arbitration?
4. Are you related to the client or attorney who is the subject of the fee arbitration?
5. Do you have any connection with the attorney, client, potential witnesses or any attorney representing the attorney or client?

It is important to keep in mind, however, that disclosure does not equal disqualification. Thus, while the Committee on Mandatory Fee Arbitration recommends that potential arbitrators err on the side of broad disclosure, it is only necessary for a potential arbitrator to recuse herself or himself if the arbitrator also concludes that the matter disclosed would adversely affect the arbitrator’s ability to render a fair and impartial decision.

CONCLUSION

An award under the MFAA is not binding absent a written agreement to make it binding after the fee dispute has arisen. One of the most important factors in deciding whether or not to accept an award is whether the parties believe they have received a fair and impartial hearing.

Thus, it is vitally important to the success of the MFA program for each arbitrator to make the recommended disclosures to ensure that both the client and attorney not only receive a fair hearing, but also that the parties believe that the arbitrator(s) have been open and forthright about any circumstances or relationships that possibly might be perceived, however remotely, to have had an impact on their impartiality.