

AGENDA ITEM

MARCH

Revisions to State Bar
Rules of Procedure for
Fee Arbitrations and
Enforcement of Awards-
Request for Public
Comment

DATE: February 18, 2009

TO: Members of the State Bar Board Committee on Regulation, Admissions & Discipline Oversight

FROM: Jill Sperber, Director, Office of Mandatory Fee Arbitration

SUBJECT: Proposed Revisions to the Rules of Procedure for Fee Arbitrations and Enforcement of Awards by the State Bar of California – Request for Release for Public Comment

Executive Summary

This agenda item is presented for the RAD committee to release the proposed revisions to the State Bar's rules of procedure in the form set forth in Attachment A for a public comment period of 30 days.

The Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California (MFA rules of procedure) govern the State Bar's Mandatory Fee Arbitration (MFA) Program. The MFA Committee of the State Bar has proposed amendments to the rules of procedure for fee arbitrations. Some amendments conform to recent State Bar policy set forth in the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs and the Model Rules of Procedure.

Four additional arbitration rule amendments are sought: 1) increase the upper cap on the program's filing fees established as 5% of the amount in dispute from \$3,500 to \$5,000; 2) increase the dollar threshold for arbitration by a three member panel from \$10,000 to \$15,000; 3) modify required award language to eliminate required pre-award interest determination and add automatic post-award interest of 10% per annum from 30th day after service of award; and 4) language promoting confidentiality of the award by prohibiting disclosure by the program to non-parties absent a court order.

Proposed amendments to the enforcement of award rules would clarify procedures governing the State Bar's unique authority to enforce unpaid arbitration awards requiring a refund by the attorney of attorney's fees/costs consistent with the enabling statute, Business and Professions Code section 6203(d).

Questions should be directed to Jill Sperber at (415)538-023/jill.sperber@calbar.ca.gov.

I. BACKGROUND

Pursuant to Business and Professions Code section 6200, *et seq.*, the Board of Governors is charged with establishing, maintaining and administering a system and procedure for the arbitration of disputes concerning fees, costs, or both, charged by attorneys for their professional services. The Board of Governors adopts rules of procedure to govern the arbitration of attorney fee and cost disputes. (Bus. & Prof. Code § 6200, subd. (a).)

The State Bar's Committee on Mandatory Fee Arbitration (MFA Committee) oversees the Mandatory Fee Arbitration (MFA) Program administered by the State Bar in addition to the 45 approved local bar MFA programs. As one of its duties, the MFA Committee reviews and makes recommendations to the Board of Governors regarding proposed revisions to the State Bar MFA Program's rules of procedure for fee arbitrations for its approval. The State Bar's MFA rules of procedure, like those promulgated by local bar association MFA programs, are subject to review by the Board of Governors to "...ensure that they provide for a fair, impartial and speedy hearing and award" (Bus. & Prof. Code, § 6200, subd. (d)). The rules of procedure must also be consistent with the MFA statutes and the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards"). A copy of the Minimum Standards is attached here for your reference as Attachment B.

The State Bar's rules of procedure were last revised effective August 2, 2007. During the following year, the State Bar Board of Governors approved various amendments to the Minimum Standards and the State Bar's Model Rules of Procedure for Fee Arbitrations. The majority of rule amendments sought here were prompted by the State Bar Program's desire to conform its own rules to these latest amendments. A copy of the Model Rules of Procedure for Fee Arbitrations amended July 11, 2008 is attached for your reference here as Attachment C.

Additionally, the MFA Committee recommends four additional rule changes: 1) raise the upper cap on program filing fees, based on 5% of the amount in dispute, from \$3,500 to \$5,000; 2) increase the monetary threshold for three member panels from \$10,000 to \$15,000; 3) eliminate from the award form a required pre-interest determination and add an automatic 10% per annum interest after 30 days following service of the award; and 4) promote confidentiality of the award as to non-parties as explained below. The remaining rule amendment proposals govern the State Bar's unique authority to assist clients with enforcement of unpaid awards rendered against attorneys pursuant to Business and Professions Code section 6203(d) as discussed below.

At its January 24, 2009 meeting, the MFA Committee reviewed the proposed rule changes set forth in Attachment A and agreed to recommend that the RAD Committee release them for public comment.

II. RECOMMENDATION

The MFA Committee recommends that the RAD Committee authorize the release of the proposed amendments to the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California for a 30 day public comment period.

III. PROPOSED RULE AMENDMENTS FOR RELEASE FOR PUBLIC COMMENT

Summarized here are the proposed revisions to the State Bar's rules of procedure for fee arbitrations and enforcement of award cases recommended by the MFA Committee for release for public comment by the RAD Committee.

A. Proposed Fee Arbitration Rule Amendments

1. **The July 11, 2008 Model Rules amendments-** On July 11, 2008, the State Bar's Board of Governors approved amendments to the State Bar's Model Rules of Procedure ("Model Rules".) Model Rules were first implemented upon the recommendation of the MFA Committee to promote inter-program uniformity and expedite the rule approval process. Many of those rule amendments were made to track the March and July 2007 amendments to the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration programs. Since the State Bar rules of procedure should track the most current version of the Model Rules and the Minimum Standards, many rule revisions proposed on the attached simply track the July 2008 Model Rule Amendments except as noted below:

Model Rule 11 on local bar program jurisdiction and the new model rule governing disputes between programs was not included in the State Bar rules of procedure (see Rule 12 on jurisdiction) because that model rule is viewed as applicable to only filings with a local, not the State Bar, program.

Model rule 19.4 governing stipulated awards was not a prior State Bar rule. New State Bar Rule 20.4 would reflect this model rule.

Model Rule 37 was amended to eliminate stenographic recording. Staff recommends retaining the right to such recording, leaving State Bar Rule 39 permitting stenographic recording unrevised.

2. **State Bar Rule 16-filing fee.** The Minimum Standards provide that any filing fee

schedule and refund policy “are reasonably related to the amount in dispute and the cost of providing the service and shall not be in such an amount as to discourage the use of the service.” (Min. Stds. Para. 17.) Program filing fees are generally paid by the petitioner at intake. For many local bar programs, like the State Bar, the filing fee is based on a set percentage of the amount in dispute with a minimum and a maximum fee. Traditionally, the State Bar rules have not contained its filing fees but are reflected on the arbitration request form instead. To conform to the Model Rules, it is recommended that the State Bar similarly include its filing fee structure in its rules.

The State Bar Program’s filing fees have not been revised in over ten years, if not longer. The current filing fee is 5% of the amount in dispute, with a minimum of \$50 and a maximum (upper cap) of \$3,500. The State Bar also offers fee waivers for those unable to afford a fee. The refund schedule is graduated, permitting full or partial refunds depending on what stage the case terminates. But no refund is allowed if the case settles within ten days of hearing (rule 20.3).

Comparison to local bar program filing fees. Before recommending an increase of the upper cap charged, the MFA Committee reviewed a list of 28 (out of 45) filing fees for approved local bar programs for comparison purposes. Of this list, ten (10) programs have a maximum filing fee of \$5,000. One program includes a surcharge in \$250 increments with no cap. Three programs have maximum fees of \$7,000, \$7,500 and \$7,750, respectively. Four programs have maximum fees of \$3,500, the same as the State Bar or less than \$5,000. One program has a \$3,000 cap (although some smaller programs have lower maximum fees than \$3,000) and another program has a \$4,000 cap. Note that some bar programs listed have no fee cap stated but these are small programs that have not updated their rules in many years. The MFA Committee concluded that an increase of the maximum filing fee from \$3,000 to \$5,000 is reasonably related to the amount in dispute and cost of providing the service but not in such an amount as to discourage the use of the service.

Large fee disputes require additional program resources. Staff is mindful that many local bar programs emulate the State Bar’s filing fees. In addition, the State Bar Program wishes to extend arbitration services to parties who are unable to obtain fee arbitration locally, such as incarcerated petitioners in some counties and those unable to pay any filing fee. However, extra program resources are required to process larger fee arbitration cases. Large fee disputes often involve representation of parties by counsel, monitoring collateral litigation, the exercise of procedural rights such as challenges and continuances, and assignment to a three member panel willing to volunteer extra time commitments required to arbitrate most large fee disputes. Volunteer arbitrators required to travel are also entitled to State Bar expense reimbursement paid from State Bar general revenues.

Anticipated effect of higher maximum filing fee of \$5,000. The State Bar’s current maximum fee of \$3,500 applies to cases where the amount in dispute is

\$70,000 or more (5% of \$70,000 is \$3,500.) The State Bar program filed 19 such cases of a total 106 cases in 2008 and 12 such cases of a total 123 cases in 2007. In 2008 alone, the State Bar would have received an additional \$38,700 in filing fees had a higher maximum filing fee of \$5,000 been in place. If approved, the maximum filing fee of \$5,000 would apply only to cases where the amount in dispute is \$100,000 or more (5% of \$100,000 is \$5,000.) In 2008, 15 cases and in 2007, 8 cases filed with the State Bar claimed amounts in dispute of \$100,000 or more. Since the higher filing fee cap would affect only the largest fee dispute arbitration matters (where the amount in dispute is \$70,000 or more), and in turn, only those users most able to absorb a higher filing fee, the proposed fee cap increase is unlikely to discourage use of the program.

Based on the foregoing, staff recommends an increased maximum filing fee cap of \$5,000. The filing fee would continue to be based upon a flat 5% of the disputed amount. A fee waiver request could still be considered with the higher cap in place.

3. **State Bar Rule 22.1- appointment of panel.** Over five years ago, the State Bar raised the monetary threshold entitling parties to a three member arbitration panel from \$7,500 to \$10,000. The Model Rules also provide for \$10,000 as the threshold amount for three member panels. Although the MFA statute is silent on the monetary threshold for a three member panel, the Minimum Standards provide some guidance: "A monetary threshold above which three-member panels will be used must be reasonable." (Min. Stds. Para. 19.)

Over the past few years, many local bar programs obtained approval by the Board of Governors for a higher threshold of \$25,000 for three member panels. Staff recently asked the MFA Committee to review whether the State Bar should increase its monetary threshold, though not as high as \$25,000. One suggestion was to increase the threshold to \$20,000 or more in dispute. However, staff is also sensitive about the standard the State Bar sets for the local bar programs and the consumer protection provided by three member panels, which must include two attorneys and a lay person. Otherwise, the arbitration is before a single attorney arbitrator.

To evaluate whether an increase in the monetary threshold dollar for three member panels is reasonable, the MFA Committee reviewed 28 larger local bar programs. Following the State Bar's example, the vast majority -16 programs- set the dollar threshold at \$10,000. Two programs have a threshold under \$10,000. A modern trend has developed ahead of the State Bar, however, with five programs having increased their threshold to \$25,000 for a three member panel. Considering the competing factors involved, the MFA Committee agreed to recommend that \$15,000 would be a reasonable threshold for the State Bar program.

4. **State Bar Rule 22.3-disputes of \$1,000 or less.** When the amount in dispute is \$1,000 or less, parties are not entitled to a hearing unless a hearing requested

(and only then if the fee dispute is over \$500.) Staff recommends deletion of the requirement of keeping a permanent record of these disputes when a hearing is not required. This requirement was implemented because started as a pilot program to see whether the elimination of a hearing for very low fee disputes would be problematic from a consumer protection perspective. Since the pilot program has been in effect (over five years), there have been no complaints about the elimination of an automatic hearing for disputes of \$1,000 or less. State Bar records indicate that only one hearing was requested and provided.

5. State Bar Rule 27.3-confidentiality of file and award. The MFA statutes are silent regarding the confidentiality of arbitration case files and awards kept by the program. In recent years, various programs have sought guidance from the State Bar on non-party requests for awards kept by the program. Some requests target a particular arbitration program, specific attorney, or fee arbitrator. This rule amendment would clarify that the program may refuse to disclose an award to a non-party absent a court order compelling disclosure. A corresponding change to the Model Rules will be proposed later.

6. State Bar Rule 41.3-award language. The current rule is consistent with Minimum Standard paragraph 16, which requires the arbitrator to determine the issue of pre-award interest. The Minimum Standards are silent about post-award interest. Last year, the MFA Committee created the first model award format for local bar use. The model award format eliminated the line items providing for pre-award interest and provided for automatic post-award interest at 10% per annum following 30 days after service of the award, and regardless of whether the prevailing party is the client or the attorney.

Eliminate line item blank space for pre-award interest. The MFA Committee made those modifications to the model award format to reduce undue focus by the arbitrator on the relatively infrequent occasions warranting an award of pre-award interest that a line item blank space otherwise may create. In the infrequent cases where pre-award interest may be appropriate, the procedures and law for making such an award is included in the Award Checklist, and the arbitrator is free to include such interest where appropriate.

Add automatic accrual of post-award interest. The MFA Committee also wishes to provide for automatic interest not otherwise provided for by statute or case law to accrue following fee arbitration awards. Under current law, absent an express award of post-award interest in the award, interest would accrue only with respect to judicially confirmed arbitration awards or judgments after fee arbitration. This result places the burden on prevailing parties-both clients and attorneys- to seek judicial relief- thereby using court resources and time- to obtain accrued interest on a monetary debt owed. Making post-award interest an automatic part of MFA awards protects the party in whose favor the award is rendered and lessens the frequency of judicial intervention.

Automatic accrual of interest would also provide needed clarification of the amount owed by the attorney to a client seeking enforcement of an unpaid award with the State Bar. Currently, the State Bar enforcement of award requests depend on clarification from the State Bar Court to enforce post-award interest against attorneys.

Although changing this rule would precede any change to the Minimum Standards, the MFA Committee recommends the proposed change for the State Bar program at this time.

B. Proposed Enforcement of Award Rule Amendments

1. **State Bar Rule 43- Jurisdiction.** Proposal clarifies jurisdiction for enforcement by State Bar consistent with Business and Professions Code section 6203(d) to include enforcement of stipulated awards, mediated settlements, or judgments.
2. **State Bar Rule 45.3-Attorney's Response.** Proposed change to rule 45.3 attempts to better define when an order re administrative penalties should be sought by the State Bar for failure to cooperate with the State Bar. Last sentence qualifies that finality of an order is subject to possible rescission permitted by the rules.
3. **State Bar Rule 46-Payment plans.** Proposed language includes judgments, stipulated awards and mediated agreements consistent with the enforcement statute. Last part of 46.2 (b) would become subsection 46.2(c). Rule 46.3 adds new (c) to permit option of revised payment plan. Rule 46.4 adds judgment or agreement consistent with the enforcement statute.
4. **State Bar Rule 47- Determination of Attorney Responsibility/Inability to Pay.** Changes to request for enforcement instead of request for assistance, expands to judgment or agreement consistent with the enforcement statute.
5. **State Bar Rule 48-Administrative Penalties-** consistent with proposed changes to rule 45.3.
6. **State Bar Rule 49-** Title change only.
7. **State Bar Rule 50 –**Title change and substitute move for petition.

IV. PUBLIC COMMENT PERIOD OF 30 DAYS REQUESTED

The rules of procedure govern the State Bar's MFA Program only and do not affect the 45 other local bar MFA programs. Therefore, interested parties who are potentially impacted by the proposed amendments and interested stakeholders constitute a fairly narrow set of individuals and groups. Many of the amendments sought conform to existing State Bar policy or the MFA statutes and are not controversial. A shortened comment period of 30 days would provide an opportunity for substantive comment and the MFA Committee enough time to meet and review any

comments for further recommendations to present at the Board's meeting in early May 2009.

V. FISCAL/PERSONNEL IMPACT

None.

VI. IMPACT ON BOARD BOOK/ADMINISTRATIVE MANUAL

None.

VII. PROPOSED RESOLUTIONS

If the RAD Committee agrees with the request to recommend the proposed further revisions to the State Bar MFA rules of procedure set forth in Attachment A, adoption of the following resolution would be appropriate:

RESOLVED that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of proposed amendments to the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California, in the form attached hereto as Attachment A for a public comment period of 30 days; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item.