

The State Bar of California

GUIDELINES AND MINIMUM STANDARDS FOR THE OPERATION OF MANDATORY FEE ARBITRATION PROGRAMS (Proposed Revisions)

[Deletions in ~~strike-out~~; additions in **bold**]

(Adopted by the Board of Governors December 16, 1978, January 1, 1979, revised March 21, 1992, amended April 17, 1993, amended July 17, 1993, amended November 5, 1993, amended June 18, 1994, amended April 8, 1995, amended March 2, 1996, amended November 22, 1996, amended January 25, 1997, amended March 21, 1997; amended April 3, 1998; amended January 26, 2001; **amended** , 2006.)

~~I. —~~ JURISDICTION

1. If the current rules of procedure of a local bar association or a lawyer referral service are approved by ~~the appropriate committee of the Board of Governors and~~ those rules are in compliance with Business and Professions Code sections 6200-6206 and the Minimum Standards set forth ~~below~~ **herein**, the local program will have jurisdiction over fee disputes submitted, and such arbitration will be the arbitration provided for in Business and Professions Code sections 6200-6206.

2. If an approved local program is not available, and the parties do not consent to have the fee dispute submitted to another local program willing to assume jurisdiction over the matter, the State Bar will assume jurisdiction over the fee dispute and proceed under the State Bar's rules of procedure for fee arbitration.

~~II. —~~ MINIMUM STANDARDS

Local bar association ~~and lawyer referral service~~ rules of procedure for fee arbitration shall provide **for the following**:

~~1.3.~~ Each party shall receive ~~For~~ a fair, speedy and impartial hearing and award;

~~2.4.~~ ~~That~~ The attorney, prior to or at the time of filing an action against the client for the recovery of fees for professional services, **shall** serve, personally or by first class mail, upon the client the State Bar "Notice of Client's Right to Arbitrate" form;

~~3.5.~~ ~~That~~ In the event the attorney fails to respond or refuses to participate in the arbitration, the hearing will proceed as scheduled, and a decision **will be** made on the basis of the evidence;

~~4.6.~~ A procedure for preserving the confidentiality afforded by Business and Professions Code section 6202, except that such procedure shall not prohibit the arbitrator(s) or the program from referring a matter to the State Bar's Office of Intake and Legal Advice when possible misconduct by an attorney is disclosed in an arbitration proceeding.

~~5.7.~~ An appropriate procedure for the parties to disqualify no less than one arbitrator without cause and to have an unlimited number of challenges for cause;

~~6.8.~~ ~~That, a~~At the time of service of the arbitrator's award on the parties, there shall also be served a notice of the parties' post-arbitration rights; ~~which shall substantially~~

conform with the notice in the form

~~7.9. That, e~~ Except as set forth in section ~~VI.~~ below, in each three-member panel, one member shall be a lay person and the other two members shall be attorneys and that in each sole arbitrator panel, the sole arbitrator shall be an attorney;

10. In the event of a three-member panel, the matter may not proceed with two members in the absence of the third member, but the parties may stipulate to proceed with a sole attorney arbitrator.

~~8. 11. That, a~~ At the option of the client, one member of a three-person panel or the sole arbitrator shall be an attorney whose area of practice is either civil or criminal law; clients shall be informed of this option at an early stage in the proceedings and provided a means of exercising the option;

~~9. 12.~~ Authorization for the arbitrators to include an allocation of the filing fee in the arbitration award; and

~~10.13. That if the local program elects to arbitrate a matter in which the petitioner is not the client of the attorney, but may be responsible for the fees and/or costs, or entitled to a refund of fees and/or costs previously paid:~~

~~(a) ¶~~ The request for arbitration shall ~~may be made by (i) a party who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs, or (ii) the attorney against such party. In such cases, the attorney will advise the client of the existence of the proceeding and provide the client with a notice of client's right to arbitration pursuant to Business & Professions Code section 6201(a). Such notice is not a condition to a third party payor's right to proceed with arbitration. e~~ shall be made by the client who will include the non-client(s) as a party; and

~~(b) — that the arbitration request shall be signed by all such parties;~~

approved by the Board of Governors of the State Bar;

~~11.14. For service by t~~ The program shall serve on the attorney(s) designated by the client, no later than the time of service of the notice appointing either the arbitration panel or the mediator(s), as appropriate, the State Bar approved notice of attorney responsibility form;

~~12.15. That in the event a refund is determined to be owed to the client and where questions are raised as to who is the responsible attorney(s) in the arbitration, the arbitrator(s)~~ **The award shall be in writing, including a determination of all questions submitted to the panel, the decision of which is necessary in order to determine the controversy, and if a refund is owed, the name(s) of the responsible attorney(s).** ~~make that determination and shall include in the award the name of the individual attorney(s) responsible for making the refund;~~

~~13. 16. That e~~ Each award served on the parties shall contain substantially the following language:

The arbitrators find that the total amount of fees and/or costs which should have been charged in this matter are: \$ _____

Of which client is found to have paid: \$ _____
Subtotal \$ _____

Pre-award interest [check box]
[] is not awarded.
[] is awarded in the amount of \$ _____.

In addition, the fee arbitration filing fee shall be allocated:

Client: \$ _____
Attorney: \$ _____

For a net amount of: \$ _____

Accordingly, the following award is made:

(a) Client, _____, shall pay attorney, _____: \$ _____

OR

(b) Attorney, _____, shall refund to client, _____ \$ _____

OR

(c) Nothing further shall be paid by either attorney or client.

14. 17. For a filing fee schedule and refund policy that are reasonably related to the amount in dispute and the cost of providing the service ~~The fee~~ **and** shall not be in such an amount as to discourage the use of the service.

18. In the event of a dispute between the parties as to which program should hear the matter, the program where the arbitration request was first filed shall determine that the arbitration will be conducted in the county where “the majority of legal services were provided,” and such ruling is final and not appealable to the State Bar. Should the fee dispute transfer to a different fee arbitration program after the request for arbitration if filed, the original date of postmark or receipt of the arbitration request will be preserved for purposes of determining whether jurisdiction exists.

~~2. THREE MEMBER PANELS~~

~~19. Local programs should establish a reasonable~~ **A monetary threshold above which three-member panels should will be used must be reasonable.**

20. A lay arbitrator is a person who has not been admitted to practice law in any jurisdiction and has not worked regularly for a public or private law office or

practice, court of law or attended law school for any period of time. Paralegal assistants, law firm staff, and law clerks shall not serve as lay arbitrators.

21. Retired judges who are not on active membership status with the State Bar may not serve as fee arbitrators.

22. A client or an attorney who believes that he or she cannot obtain a fair and impartial hearing under the local program's rules of procedure shall be entitled to a hearing through a State Bar panel. Removal to the State Bar shall be governed by Rule ~~11.0~~ **10.210.0**, “Rules of Procedure for the Resolution of Fee Disputes and the Enforcement of Awards by the State Bar of California.”

III.—MINIMUM STANDARDS FOR MEDIATION

When a request for arbitration has been filed with an authorized local bar association or lawyer referral service fee arbitration program, the rules of procedure may include provisions for parties who agree to mediate the dispute prior to proceeding through arbitration. In addition to the Minimum Standards set forth for arbitration of disputes, rules of procedure for those programs which wish to provide for mediation of fee disputes shall provide:

1. For a fair, speedy and impartial mediation procedure suitable to the circumstances;
2. That mediators have completed a minimum of 25 hours of mediation training which includes classroom and practical training;

3. For an appropriate procedure for parties to disqualify no less than one mediator without cause and to have an unlimited number of challenges for cause;
4. For an appropriate procedure for a mediator to disclose any conflict of interest;
5. For a procedure to preserve the confidentiality afforded by Evidence Code section 1152.5;
6. For the use of either lawyer or non-lawyer mediators.
7. That each mediated agreement in which the parties agree that the client shall receive a refund of previously paid fees and/or costs shall include the name of the individual attorney(s) responsible for making the refund;
8. That each mediated agreement shall be in writing and signed by the client and responsible attorney(s) and shall include substantially the following language:

The following agreement is made:

- (a) Client, _____, shall pay attorney, _____: \$ _____
- (b) Attorney, _____, shall refund to client, _____: \$ _____
- (c) Nothing further shall be paid by either attorney or client.

The parties have considered the allocation of the filing fee in making this agreement.

9. That the parties be required to execute an agreement to mediate that substantially conforms with the agreement approved by the State Bar.
10. That, after an agreement has been reached, the program shall provide the parties with a notice of the right to enforce the agreement that substantially conforms with the notice approved by the State Bar.

~~IV. NON-MANDATORY CONSIDERATIONS~~

~~1. GEOGRAPHIC TEST~~

~~Local programs are encouraged to use a geographic test of jurisdiction, that is, to accept jurisdiction of all matters where an office of the attorney is or substantial legal services were performed within the geographic boundaries of the association~~

~~2. THREE-MEMBER PANELS~~

~~V. MISCELLANEOUS~~

~~1. REMOVAL TO THE STATE BAR~~

~~If a matter is pending before a local program at the time a request for removal is made, the local program shall stay all proceedings in the matter until a decision is made by the State Bar whether to accept jurisdiction. The State Bar shall advise the program in writing whether it has accepted jurisdiction.~~

~~Prior to the State Bar granting a request for removal, all parties and the local program shall be given an opportunity to comment on the removal.~~

~~Upon written notification to the local program that the State Bar has accepted jurisdiction, the local program shall release jurisdiction of the matter.~~

~~VI. PILOT PROJECT~~

~~A pilot project to allow the use of two non-attorney arbitrators on three person panels may be conducted under supplemental guidelines adopted by the Board of Governors and under the guidance of the Committee on Mandatory Fee Arbitration ("Committee"). The purpose of~~

the pilot project is to obtain and review information on the effects of using a majority of non-attorneys on a panel, including the effects on logistics and administration of fee arbitration programs and on the goals of achieving fair, speedy and economical resolution of fee disputes. The conclusions of the Committee shall be reported to the Board of Governors at the conclusion of the pilot project.

SUPPLEMENTAL GUIDELINES AND MINIMUM STANDARDS FOR THE OPERATION OF MANDATORY FEE ARBITRATION PROGRAMS (NON-ATTORNEY ARBITRATOR PILOT PROJECT)

I. — PURPOSE

— A pilot project to allow the use of two non-attorney arbitrators on three person panels may be conducted under these guidelines and under the guidance of the Committee on Mandatory Fee Arbitration (“Committee”). The purpose of the pilot project is to obtain and review information on the effects of using a majority of non-attorneys on a panel, including the effects on logistics and administration of fee arbitration programs and on the goals of achieving fair, speedy and economical resolution of fee disputes. The conclusions of the Committee shall be reported to the Board of Governors at the conclusion of the pilot project.

II. — REVIEW AND APPROVAL OF LOCAL PROGRAM GUIDELINES BY THE COMMITTEE

— The pilot project shall be open to voluntary participation by no more than five (5) local bar or lawyer referral services for a

period of no more than two (2) years. Any local program wishing to be included in the pilot project shall submit to the Committee for review the program's proposed written standards. Such standards shall be approved by the Committee before a local program may participate. Approval shall be given only after the Committee determines that the proposed standards meet the Pilot Project Minimum Standards.

III. — PILOT PROJECT MINIMUM STANDARDS

— Local bar association and lawyer referral services shall provide:

1. — For the appropriate selection of arbitrators who will participate in the pilot project and for the adequate training of such arbitrators.
2. — That the parties will be advised of their possible participation in the pilot project prior to the assignment of a panel.
3. — Either that cases included in the pilot project shall be determined by random selection made by the local program or that parties can voluntarily participate and/or remove the matter from the pilot project.
4. — That the chair of the panel shall be an attorney arbitrator.
5. — That the arbitration will be conducted in the same manner as an arbitration with two attorney arbitrators and that the parties shall be provided with a notice of arbitration approved by the Committee which is appropriate for cases in the pilot project.
6. — That appropriate information and data shall be gathered on:
 - A. — the results of the cases in the pilot project and, where reasonably practical, on the results of arbitrations with three person panels not assigned to the pilot project;

~~_____ B. _____ the availability of non-attorney arbitrators and other relevant logistics;~~

~~_____ C. _____ the reactions of the parties and arbitrators participating in the pilot project; and~~

~~_____ D. _____ the accomplishments or difficulties encountered in arbitrations under the project.~~

~~_____ Such information may be gathered by questionnaire or by any other means the Committee finds appropriate. In reviewing and approving local standards for such information gathering, the Committee shall balance the value of the information with the costs and burdens of obtaining it on the local program participating in the pilot project. The data and information obtained shall be reported to the Committee.~~

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