

AGENDA ITEM

MAY

Request for Additional Public
Comment Regarding Minimum
Standard Paragraph 13

DATE: April 23, 2007

TO: Members, Board Committee on Regulation, Admission & Discipline
Oversight
Members, Board of Governors

FROM: Jill Sperber, Director, State Bar Office of Mandatory Fee Arbitration
Joel Mark, Vice Chair, State Bar Mandatory Fee Arbitration Committee

SUBJECT: Proposed Revisions to Paragraph 13 of the State Bar's Guidelines and
Minimum Standards for the Operation of Mandatory Fee Arbitration
Programs – Request for Additional Public Comment Period.

EXECUTIVE SUMMARY

Paragraph 13 of the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards") currently requires the client's signature on a third party payor's mandatory fee arbitration request form as a pre-condition to the initiation of a mandatory fee arbitration proceeding. In *Wager v. Mirzayance* (1998) 67 Cal. App. 4th 1187, however, the court confirmed that the third party payor has an unqualified right to pursue such a claim. Proposed revisions to Paragraph 13 recommended by the State Bar of California's Committee on Mandatory Fee Arbitration ("MFA Committee") would eliminate the client's consent requirement before a mandatory fee arbitration proceeding between a third party who paid or agreed to pay attorney's fees for the client and the attorney may proceed.

At the request of the MFA Committee, on March 8, 2007, your Committee authorized publication of further proposed revisions to Paragraph 13 as RAD members directed in their vote. The 45-day public comment period ends April 27, 2007. During the public comment period, representatives from the groups opposed to the deletion of the client consent requirement and MFA Committee representatives met to develop language for inclusion in Paragraph 13 to clarify the attorney's obligation to maintain client confidences and secrets in a third party arbitration. As a result, further revisions to Paragraph 13 are being presented for consideration.

Suggested further revisions to the version of Paragraph 13 returning from public comment include: 1) an express statement that third party arbitration does not waive the attorney's duty to maintain the client's confidences and secrets in the arbitration absent the client's consent to disclosure of confidential information unless disclosure is otherwise permitted by law; 2) absent the client's signature on the arbitration request form, a requirement that notice of the arbitration be given to the client by first class mail; and 3) a requirement that the programs adopt procedures to ensure that notice is given to the client.

The MFA Committee recommends that the RAD Committee approve its request to release the proposed further amendments to paragraph 13 of the Minimum Standards set forth in Attachment A for an additional public comment period shortened to a period of 30 days for good cause.

I. BACKGROUND

The State Bar of California publishes “Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs” (“Minimum Standards”). The Minimum Standards provide local bar associations with Board-approved standards for operating a mandatory fee arbitration program that complies with the Business and Professions Code (Article 13, Bus. & Prof. Code, §6200 *et seq.*) and relevant law. Local bar associations promulgate local bar rules of procedure for fee arbitrations that must comply with the Minimum Standards and be approved by the Board of Governors. At its March 9, 2007 meeting, the Board of Governors approved various substantial revisions to the Minimum Standards except for paragraph 13, which relates to the ability of a non-client third party payor to request mandatory fee arbitration, since that paragraph was still being revised and not final.

A. First Round of Public Comment

The current Minimum Standard (Paragraph 13) relating to third party requests for mandatory fee arbitration provides that the local bar programs may elect to accept a fee arbitration request made by a client who includes another party as the person responsible for the attorney’s fees or entitled to a refund of fees previously paid as long as all parties sign the arbitration request form.¹ The State Bar’s Mandatory Fee Arbitration (MFA) Committee’s proposed revision sought to remove a local bar’s discretion to accept such an arbitration request consistent with the third party guarantor’s unconditional right to request arbitration as confirmed in *Wager v. Mirzayance* (1998) 67 Cal.App.4th 1187, but maintained the client signature requirement.

The sole comment received during the initial public comment period ending September 23, 2005 was from the MFA Committee’s then chairperson, who noted that the holding in *Wager v. Mirzayance* warranted the deletion of renumbered paragraph 13’s requirement that a client sign a mandatory fee arbitration request form when MFA is initiated by a third party payor of the attorney’s fees. As a result, the MFA Committee proposed a further revision to renumbered paragraph 13. The proposed revision would delete the requirement of the client’s signature on a third party guarantor’s mandatory fee arbitration request form.

B. Second Round of Public Comment

When the item returned from public comment at its March 17, 2006 meeting, the RAD Committee deferred the item to its next meeting so that it could consider the effect

¹ Minimum Standard para.13 (previously para.10) states: “[t]hat 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 fee and/or costs, or entitled to a refund of attorney’s fees and/or costs previously paid, (a) the request for arbitration 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.”

of a third party payor's initiation of MFA on the rights of a client in the underlying attorney-client relationship. When the item returned to the June 16, 2006 meeting of the RAD Committee, the proposed revision deleting the client consent requirement was released for a 60-day comment period ending September 21, 2006 as follows:

~~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 a party who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs.** 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;~~

The two public comments received during the second round of comment objected to the proposed wording of Paragraph 13, raising concerns that protection of attorney-client confidences would be jeopardized without the client's consent requirement. After consideration of these comments, the applicable law and relevant public policy considerations, the MFA Committee agreed that, on balance, the better approach on this issue is a Minimum Standard that harmonizes the important right of the client to protect his or her privileged communications with the holding in *Wager* that the person who agreed to pay the lawyer's bills is the one entitled to request an Article 13 arbitration.

As set forth in its Agenda Item for the RAD Committee's November 2006 meeting, the MFA Committee continued to propose a Minimum Standard that permits the initial filing of the request for Article 13 arbitration by the non-client payor of attorney's fees without requiring client consent as a pre-requisite, with two further safeguards. In addition to the client's consent to the relationship at its inception under Rule 3-310(F), Rules of Professional Conduct, the MFA Committee first proposed that the attorney provide notice to the client of the proceeding, thus giving the client the ability to intervene if he or she feels it necessary to protect the privilege or any other right of the client. The attorney would also provide notice to the client of the client's own right to request fee arbitration. Second, the MFA Committee would publish an advisory to educate fee arbitrators about the existence of this issue in general, and about safeguards that can be employed during the proceedings to protect the attorney-client privilege, including those suggested by the Supreme Court in its opinion in *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 116 [32 Cal.Rptr.2d 1, 876 P.2d 487].

C. Third Round of Public Comment

At its November 16, 2006 meeting, at the MFA Committee's request, the the RAD Committee authorized release for public comment the following further modification to paragraph 13 as follows:

~~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 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. 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;~~

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 fee arbitration.

The public comment period, shortened to 60 days for good cause shown, ended January 15, 2007. As with prior releases seeking public comment, the State Bar MFA Committee directly invited all 44 local bar MFA programs to submit comment.

In this third round of public comment regarding the proposed amendment to Minimum Standard Paragraph 13, three public comment letters expressing strong disagreement with the amendment were received from the Orange County Bar Association, the State Bar Committee on Professional Responsibility and Conduct, and from State Bar MFA Committee member, Joel Pores of Orange County, speaking individually.² All three advance on various grounds the proposition that, when a third party payor seeks to resolve a dispute with the attorney by use of the MFA procedures, client consent is the only adequate safeguard for the attorney-client privilege. This is essentially the same ground upon which the earlier public comments (second round) were based.

After consideration of these additional public comments, the State Bar MFA Committee maintained its position that the existing rule advocated by the public comments – where client consent is an absolute pre-requisite to the filing of an MFA proceeding – is in many cases unnecessary, may serve to protect unethical attorney conduct and finds no support in applicable case law. Moreover, according to the MFA Committee, the current rule provides no significant additional protection for client confidentiality. Rather, it merely directs the parties to another forum, the superior court, where there is no client consent pre-requisite to the filing of such an action.

Accordingly, the MFA Committee continued to recommend to the RAD Committee the proposed amendment to Rule 13 as one that provides an appropriate balance of the third party payor's right, confirmed in *Wager*, to bring an independent MFA proceeding and the client's right to have his or her secrets held inviolate by the attorney.

² The State Bar received by facsimile a late comment dated February 21, 2007 from the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee. The comment, which urges retention of the current "client consent" requirement for fee arbitrations initiated by a third party, states that it shares the same concerns expressed in COPRAC's January 5, 2007 comment letter. All comments received were attached to the RAD Committee agenda item for the March 8, 2007.

D. Fourth Round of Public Comment

The item came before the RAD Committee for its March 8, 2007 meeting. After oral presentations in favor and against the proposed amendment to Paragraph 13 of the Minimum Standards were made,³ the RAD Committee voted to approve additional changes to Paragraph 13. The amendments proposed by the RAD Committee would expressly state that in a third party-attorney arbitration, the attorney-client privilege is not waived. In addition, Paragraph 13 would provide that the party requesting arbitration would mail notice of the arbitration to the client by first class mail with a proof of service. The proposed amendments released by the Board for public comment pursuant to the March 8 meeting read as follows:

13. The request for arbitration 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. The rule for third party arbitration does not constitute a waiver of the attorney-client privilege within the arbitration unless the client has waived the privilege or consented. The party requesting the arbitration shall notify the client by first class mail and attach a proof of service by mail.

This proposal was released for a 45-day public period, shortened for good cause shown. The public comment period ends April 27, 2007. No public comments have been received as of the date of this writing.

II. DISCUSSION FOLLOWING RETURN FROM PUBLIC COMMENT

During the fourth and most recent comment period, representatives of the commentators⁴ opposed to the deletion of the client consent requirement and MFA Committee representatives met to discuss the most recent version of paragraph 13 released for public comment. To clarify and emphasize the attorney's duties in third party arbitrations, this ad hoc group developed alternative language for Paragraph 13 set forth below. The following language was developed to further revise Paragraph 13 as follows:

13. The request for arbitration 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. A third-party arbitration is not intended to abrogate the requirement that the attorney exercise independence of professional judgment on behalf of the client or the protection of client confidences and secrets. Absent the client's written consent to disclosure of confidential information, a third-party arbitration is not intended to abrogate

³ The RAD Committee's Chair invited the vice-chairman of the MFA Committee, Joel Mark, a representative of OCBA and LACBA-PREC member, Robert Sall, and the chairman of COPRAC, John Amberg, to address the RAD Committee members at its meeting. Most members of the full Board were also in attendance at the March 8 oral presentation.

⁴ Steven Lewis and Mr. Sall, representatives from, collectively, OCBA, LACBA-PREC, and COPRAC, volunteered to meet about the proposal.

the attorney's duty to maintain client confidences and secrets, unless such disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when a third-party arbitration is initiated, notice of the request must be sent to the client by first class mail at the client's last known address. The programs shall adopt procedures to insure that such notice has been sent to the client.

The MFA Committee believes that this language adequately addresses concerns raised by the public comments about the lawyer's duties owed to the client in a third party arbitration when the client is not a party to the arbitration. This proposed version of Paragraph 13 of the Minimum Standards adequately preserves a third party payor's right to initiate fee arbitration as confirmed by the *Wager* case and appropriately explains that the attorney's duties to maintain client confidences and secrets apply in a third party arbitration when the client is not a party and has not consented to disclosure of confidential information. As explained in prior agenda items, the MFA Committee will issue an arbitration advisory for fee arbitrators to guide them on handling objections to evidence based on attorney-client privilege in the third party arbitration context.

The proposal set forth above confirms that, as RAD members directed in their March 8, 2007 vote, notice of the arbitration must be sent to the client by first class mail but does not prescribe who gives notice to the client-notice could be given by the third party payor as well as by the attorney or even the program. Under this proposal, notwithstanding which party provides notice, the programs must adopt procedures to insure that such notice has been given to the client.

The MFA Committee intends to develop a Model Rule of Procedure for programs to adopt as well as sample correspondence and forms, and a written advisory for program staff to help the programs comply with this additional requirement. When this item returns from public comment again, the MFA Committee will ask the RAD Committee and Board to approve in advance local bar rules of procedure that adopt or substantially comply with the Model Rule on this subject without requiring individual submissions by each program of new local rules for Board approval.

III. REQUEST FOR SHORTENED PUBLIC COMMENT PERIOD

Under the State Bar's Rules for Public Comment, the Board of Governors or a Board Committee may shorten the 90-day public comment period if, in its discretion, it determines that a shortened public comment period is necessary. The MFA Committee recommends that further proposed revisions to the version of Paragraph 13 returning from public comment –set forth in Attachment A-be released for a public comment period of 30 days, be shortened for good cause.

If authorized by the RAD Committee, this will be the fifth round of public comment to consider proposed wording for Paragraph 13 of the Minimum Standards. The additional revisions to Paragraph 13 proposed following the return of the fourth round of comment should address the concerns raised by opponents to the proposed deletion of

the client consent requirement in third party arbitrations. Representatives of the commentators opposed the MFA Committee's suggested revisions to Paragraph 13 contributed to the version of Paragraph 13 set forth in the preceding section above. These further revisions clarify but do not materially change the intent of the version of Paragraph 13 returning from public comment. The focus of the fifth round of public comment will involve a narrower focus on the proposed new sentence that requires the programs to adopt procedures to insure that the client is given notice of a third party arbitration. This new language does not appear controversial.

IV. FISCAL AND PERSONNEL IMPACT

No fiscal impact is anticipated. No direct personnel impact foreseen once the programs have advisories, forms, and rules of procedure developed by the State Bar MFA Committee in place to process third party arbitration requests when the client is not a party.

V. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

VI. EFFECTIVE DATE OF APPROVAL

The proposed revisions to the Minimum Standards would become effective upon final consideration and approval by the Board of Governors, after review and recommendation by the RAD Committee.

VII. PROPOSED RESOLUTIONS

Should the RAD Committee approve the request to release the proposed revisions to Paragraph 13 of the Minimum Standards for an additional 30-day public comment period, the following resolutions would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby find good cause to shorten to a period of 30 days the public comment period of the proposed revisions to Paragraph 13 of the State Bar Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, in the form attached hereto as Attachment A; and it is

FURTHER RESOLVED that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes for public comment for a period of 30 days the proposed revisions to Paragraph 13 in the form attached hereto as Attachment A; 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 revisions.