AGENDA ITEM

JULY 128
Request for Approval of Minimum Standard Paragraph 13 Following Public Comment

DATE: June 27, 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 Revision to Paragraph 13 of the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs **–** Request for Approval Following 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 non-client 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, the court confirmed that a non-client 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 between a third party who paid or agreed to pay attorney's fees for the client and the attorney may proceed, to conform with the *Wager* decision.

At its May 10, 2007 meeting, the RAD Committee released further revisions to Paragraph 13 developed by representatives of the groups opposed to the original proposal that address their concerns about the protections surrounding the attorney-client confidentiality privilege in a fee arbitration between a non-client and an attorney. The version of Paragraph 13 returning from public comment includes the following: 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.

One comment was received during the 45 -day public comment period ending June 12, 2007 suggesting a non-substantive clarification. Another comment received after the deadline suggested other non-substantive amendments. The MFA Committee recommends that the RAD Committee approve the proposed amendments to Paragraph 13 of the Minimum Standards set forth in Attachment A, including the suggested modifications made by both public comments. It is further recommended that the Board approve any prospective local bar rule changes that adopt Paragraph 13 as revised to avoid the requirement of seeking rule change approval by the Board on an individual basis.

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 be approved by the Board of Governors and comply with the Minimum Standards to afford them jurisdiction to arbitrate fee disputes under the Mandatory Fee Arbitration Program. 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 a non-client payor's request for mandatory fee arbitration.

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 initial proposed revision, released for a 90-day public comment period in 2005, 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 in that version of the proposed revision.

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 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 subsequent revision that 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

At its March 17, 2006 meeting, the RAD Committee deferred the item to its next meeting so that it could consider the effect 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, a proposed further

[1] Currently, Minimum Standard Paragraph 13 (paragraph 10 prior to March 9,2007) 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."

revision deleting the client consent requirement was released for a 60–day public 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)~~ ~~t~~ **T**he 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 16, 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 have to 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 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)t~~ **T**he 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. ~~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 60-day public comment period 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 on this proposal.

In this third round of public comment, three public comment letters expressing strong disagreement with the amendment were submitted by the Orange County Bar Association (OCBA), the State Bar's Committee on Professional Responsibility and Conduct (COPRAC), and a State Bar MFA Committee member, Joel Pores of Orange County, speaking individually.[2] All three advanced on various grounds the proposition that, when a non-client payor seeks to resolve a dispute with the attorney by use of the MFA procedures, the client's signature on the arbitration request is the only adequate safeguard for the attorney-client privilege. This was essentially the same ground upon which the earlier public comments (second round) were based.

After consideration of these 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 requirement of client consent provides no significant additional protection for client confidentiality. Rather, it merely directs the parties to another forum, the superior court, where client consent is not a pre-requisite to the filing of such an action.

Accordingly, the MFA Committee continued to recommend to the RAD Committee at its March 8, 2007 meeting that the proposed amendment to Paragraph 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. At the March 8 meeting, 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

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[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 ("PREC"). 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.

[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

13 at the meeting. The amendments proposed by the RAD Committee would include a new sentence expressly stating 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.

D. Fourth Round of Public Comment

The proposed amendments to Paragraph 13 released by the Board on March 9 for public comment 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 ended April 27, 2007. No public comments were received.

However, during this (fourth) comment period, representatives of the commentators[4] opposed to the original proposal deleting the client signature requirement and representatives from the MFA Committee met to discuss the most recent version of Paragraph 13 released for public comment. This ad hoc group developed alternative language for Paragraph 13 set forth below to clarify and emphasize the attorney's duties in non-client requested arbitrations and require that the program develop procedures to insure that notice to the client is given. The proposed further revisions to Paragraph 13 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. 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 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

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Committee members at its meeting. Most members of the full Board were also in attendance at the March 8 meeting, having been invited by the RAD Committee's Chair to hear the oral presentations.

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

client.

The MFA Committee recommended to the RAD Committee at its May 10, 2007 meeting that the above version of Paragraph 13 be released for public comment shortened to 30 days for good cause shown. The RAD Committee granted this request. The public comment period ended June 12, 2007. One comment from the Orange County Bar Association (OCBA) was received during the period and one comment from State Bar's Committee on Professional Responsibility and Conduct (COPRAC) was received after the comment deadline.

II. DISCUSSION FOLLOWING RETURN FROM FIFTH PUBLIC COMMENT PERIOD

The OCBA offered an ~~friendly~~ amendment to the first sentence to distinguish situations where the attorney claiming entitlement to fees has counsel. The suggested language in the first sentence would 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 **claiming entitlement to fees** against such party…."

COPRAC submitted a comment suggesting that the word "person" replace "party" and the phrase "arbitration with a non-client" be substituted for "third party arbitration."

The MFA Committee accepts all the modifications offered by both public comments and believes that these amendments are sufficiently non-substantive and technical in nature as to warrant no additional public comment.

The MFA Committee believes that the proposed version of Paragraph 13, as modified by the suggestions in the public comments, adequately preserves a non-client payor's right to initiate fee arbitration as confirmed by the *Wager* case and appropriately emphasizes that the attorney's duties to maintain client confidences and secrets are not abrogated in a Chapter 13 arbitration when the client is not a party and has not otherwise consented in writing to disclosure of attorney-client privileged 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 the attorney-client privilege in the third party arbitration context.
A program advisory to local bar program administrators will discuss the new notice requirement and suggestions for compliance.

The proposal also 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 who provides notice, the programs must adopt procedures to insure that such notice has been given to the client as an added measure of protection. The MFA Committee will issue a program advisory, including sample correspondence and forms as appropriate, for local bar program staff to establish preferred practices to meet the program's obligation under this standard.

III. PROCEDURE FOR LOCAL BAR ASSOCIATIONS TO AMEND LOCAL FEE ARBITRATION PROGRAM RULES OF PROCEDURE TO CONFORM TO THE PROPOSED NEW REQUIREMENT

The Board of Governors must approve local bar rules of procedure for fee arbitrations. (Bus. & Prof. Code §6200(d); Minimum Standards, para.1.) Should this Committee recommend and the Board then adopt the revisions to Paragraph 13 on third party arbitrations, the 45 local bar MFA programs will be required to amend their local rules of procedure to become consistent with this Minimum Standard.

To encourage and assist local bars to amend and comply with this requirement, Staff recommends the adoption of a resolution providing that if a local bar amends its rules and procedures by incorporating the language of Paragraph 13 of the Minimum Standards as amended, the local bar's amendment will be deemed approved by the Board upon the local bar's filing of a copy of the amendment with the Director of the State Bar's Office of Mandatory Fee Arbitration and the report of the filing by the Director to the Board of Governors. Under this procedure, Staff will review the amendment submitted by the local bar to assure that the amended language is identical to that in Paragraph 13. Local bars that wish to adopt language or a standard different form the version of revised Paragraph 13 would be required to seek independent approval of a rule amendment from the Board.

This proposed procedure is similar to a procedure by the Fair Political Practices Commission for approval of specified provisions of the conflict of interest codes of a state or public agency through the incorporation of language contained in commission rules. 2 Cal. ~~-~~Code Reg. § 18730. A similar procedure here would not only ~~encourage and~~encourage and assist the local bar programs ~~to comply with the new requirement~~in complying with ~~in~~ Paragraph 13, but also would conserve time and resources of both the Board and local bars.

IV. FISCAL AND PERSONNEL IMPACT

No fiscal impact is anticipated. No direct personnel impact is foreseen ~~after~~once the programs have advisories and sample correspondence developed by the State Bar MFA Committee to assist local bar programs with processing 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 Paragraph 13 of 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

For the RAD Committee:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight (RAD Committee) hereby recommends that the Board of Governors approve 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 (RAD Committee) hereby recommends that the Board of Governors further provide that an amendment by local bar associations to their local fee arbitration rules and procedures to conform with the revised requirements of Paragraph 13 are deemed approved by the Board upon the filing with the Director of the State Bar's Office of Mandatory Fee Arbitration of an amendment ~~that~~ incorporat~~e~~ing the provisions of Paragraph 13, as amended herein, and the report of the Director to the Board.

For the Board of Governors:

RESOLVED, that upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of ~~Governors hereby~~Governors hereby approves 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 upon the recommendation of RAD Committee, the Board of Governors hereby provide that an amendment by local bar association to their local fee arbitration rules and procedures to conform with the revised requirements of Paragraph 13 are deemed approved by the Board upon the filing with the Director of the State Bar's Office of Mandatory Fee Arbitration of an amendment ~~that that~~ incorporat~~e~~ing the provisions of Paragraph 13, as amended herein, and the report of the Director to the Board.

GUIDELINES AND MINIMUM STANDARDS
FOR THE OPERATION OF
MANDATORY FEE ARBITRATION PROGRAMS

(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 March 9, 2007; amended ___, 2007.)

Local bar association rules of procedure for fee arbitration shall provide for the following:

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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)~~ ~~t~~ **T**he request for arbitration ~~shall~~ **may** 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;~~ **(i) a person who is**

not the client but who may be liable for or entitled to a refund of attorney's fees or costs ("non-client"), or (ii) the attorney claiming entitlement to fees against a non-client. A fee arbitration between an attorney and a non-client 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 fee arbitration with a non-client is not intended to abrogate 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 an arbitration with a non-client 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.

ATTACHMENT A

~~**State Bar of California Model Rules of Procedure for Fee Arbitrations**~~
~~**(Approved November 17, 2006; amended July 2007)**~~

~~14.4 **The request for arbitration** may be made by (i) a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs ("non-client"), or (ii) the attorney claiming entitlement to fees against a non-client. This rule permitting fee arbitration between an attorney and a non-client does not abrogate the attorney's duty to exercise independence of professional judgment on behalf of the client or protect the client's confidences and secrets. Absent the client's written consent to disclosure of confidential information, the lawyer has a duty to maintain client confidences and secrets, unless disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when an arbitration with a non-client is requested, notice of the request must be sent to the client by first class mail at the client's last known address.~~ ~~**form must be signed by the client. The client may include as a party to the arbitration any person who is not the client of the attorney but who may be liable for or entitled to a refund of the attorney's fees or costs. or both so long as that person signs the request. If arbitration is**~~

~~**requested by any other person who may be liable for or entitled to a refund of attorney's fees included by the client, that person must also sign the request.**~~

~~**ATTACHMENT B**~~