JULY 54-122
Revisions to Model Rules of Procedure for Fee Arbitrations- Following Return from Public Comment

DATE: June 11, 2008

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

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

SUBJECT: Proposed Revisions to the State Bar Model Rules of Procedure for Fee Arbitrations– Request for Approval Following Return from Public Comment

Executive Summary

Mandatory Fee Arbitration (MFA) is available through 45 mandatory fee arbitration programs operated by local bar associations in addition to the State Bar's program. Local bar program rules of procedure must be approved by the State Bar's Board of Governors to establish program jurisdiction to arbitrate fee disputes under the Business and Professions Code, section 6200, *et seq*.

In an attempt to achieve procedural consistency between programs, expedite the rule approval process, and ensure that programs are in compliance with the Minimum Standards and developments in the law, in November 2006, the Board of Governors approved the State Bar's Model Rules of Procedure for Fee Arbitrations as recommended by the MFA Committee. The local bar associations are not required, but are encouraged, to adopt the Model Rules in whole or in part. To date, roughly half of the local programs have adopted them and more are in the process of adopting them in whole or in part.

The MFA Committee has reviewed local program rules incorporating the Model Rules of Procedure over the past two years. Based on its review, the MFA Committee identified various Model Rules that were either incomplete or in need of updating to comply with recent amendments to the Minimum Standards. The proposed revisions are described in this agenda item. At its March 2008 meeting, the RAD Committee released the proposed revisions for a 60-day public comment period the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations in the form set forth in Attachment A. Two comments were received and discussed by the MFA Committee at its May 23,

2008 meeting. The MFA Committee continues to recommend that the Board of Governors approve the proposed revisions.

The MFA Committee recognizes, however, that its proposed change to Model Rule 37 would significantly depart from the current rule, which permits certified shorthand reporting of fee arbitration hearings. The revision would prohibit such reporting in addition to already prohibited audio or video recordings. Since this proposal may warrant further discussion, the Chair of the MFA Committee is prepared to address the members of the RAD Committee at the meeting.

I. Background

Pursuant to Article 13, Arbitration of Attorney's Fees (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 statutory scheme for Mandatory Fee Arbitration (MFA) provides for fee arbitration services through local bar associations in addition to the State Bar. (Bus. & Prof. Code, §6200, subd (d).) The Board of Governors adopts rules of procedure to govern the arbitration of attorney fee and cost disputes sponsored by local bar associations. Mandatory fee arbitration is available through 45 local bar programs in addition to the State Bar's own program.

To this end, the Board adopts rules of procedure for local bar programs, subject to Board review "...to insure that they provide for a fair impartial, and speedy hearing and award." (*Ibid*.) The State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards") establish the essential provisions that must be included in all local bar program rules of procedure to establish their jurisdiction for Article 13 fee arbitrations. The Minimum Standards were last amended July 20, 2007 when several new provisions were added.

Prior to 2006, local bar programs operated under vastly different procedural rules, some of which were outdated or in some cases, inconsistent with the MFA statutes and Minimum Standards. To achieve greater inter-program consistency, expedite the review of local bar rules, and ensure that local bar rules comply with Minimum Standards, the State Bar's Mandatory Fee Arbitration (MFA) Committee developed Model Rules of Procedure for Fee Arbitrations for local bar programs to use. The Board of Governors approved the Model Rules of Procedure for Fee Arbitrations in November 2006.

Although the State Bar does not require local bar programs to adopt the Model Rules, the MFA Committee has encouraged them to do so. To date, roughly half of the local bar programs have adopted the Model Rules and more programs are in the process of adopting them in whole or in part. After reviewing

local bar rules that adopted the Model Rules, the MFA Committee identified several Model Rules that were either incomplete or required modification. In addition, several new Model Rules were proposed to track the new provisions in the Minimum Standards.

At its September 27, 2007, November 30, 2007 and January 25, 2008 meetings, the MFA Committee developed proposed revisions to various Model Rules. The MFA Committee requested that the RAD Committee release the proposed revisions set forth in Attachment A for public comment. These proposed changes were released for a 60-day public comment period ending May 9, 2008.

II. Proposed Revisions to the Model Rules of Procedure for Fee Arbitrations

1. **Right to Correct, Vacate or Confirm Award**- Rule 5.0: expand rule title to include binding arbitration and add new sentence to indicate that awards are subject to being corrected, vacated or confirmed. This addition is made in response to a fee arbitration client who previously commented on other MFA materials to suggest that the program's rules of procedure should clearly set forth this right.

2. **Jurisdiction by the Program**-Rule 11.0: add language that program jurisdiction exists "if a substantial portion of the legal services were performed" in the county where the program is located. This provision tracks the standard for determining program venue in the event of a dispute included in a recent amendment to the Minimum Standards (paragraph 18) approved March 9, 2007, after the Model Rules were implemented

3. **Removal to the State Bar Program**-Rule 12: add new language confirming that a party who successfully moves the dispute to the State Bar program is entitled to a refund of the filing fee paid to the local program.

4. **Requests for Arbitration**-Rule 14: add new paragraph 14.1 to clarify that arbitration may be requested by "the client, an attorney or a third party entitled to request mandatory fee arbitration." New paragraph 14.5 sets forth new paragraph 13 of the Minimum Standards setting forth a non-client's right to MFA and the requirement of program notice to the client in the event of a non-client request for arbitration. The Board approved paragraph 13 effective July 20, 2007, after the Model Rules were implemented.

5. **Filing Fee**-Rule 15.2: add new rule clarifying that joinder of additional parties shall not increase the filing fee paid to the program. This provision was prompted by the Board's amendment to the Minimum Standards (paragraph 13) permitting non-client requests for arbitration as long as the program provides notice to the

client. The MFA Committee recognizes that notice to the client could result in the client's own request for fee arbitration or to join a pending fee arbitration between the client's attorney and non-client payor. The MFA Committee believes that charging an additional filing fee might discourage use of fee arbitration and possibly thwart the complete resolution of the fee dispute.

6. **Consolidations**-Rule 20.0: add new language authorizing consolidation of arbitration requested by a client with pending related arbitration absent a showing of good cause for denial of the consolidation request. This new language is designed to promote complete resolution of fee disputes in a single arbitration in the event the client files for or joins a pending related fee arbitration between a non-client regarding the client's matter and the attorney.

7. **Stipulation to Single Arbitrator**-Rule 31.5: the revision would permit a stipulation to either the panel chair or the second attorney arbitrator in the absence of a panel member in a 3-member panel arbitration. This change tracks the amendment to Minimum Standards paragraph 10 effective March 9, 2007, which does not require that the panel chair be the sole arbitrator but the single arbitrator must be an attorney.

8. **Transcripts or Recordings**-Rule 37.0: the revision would significantly depart from the current rule, which permits certified shorthand reporting of fee arbitration hearings. The revision would prohibit stenographic recording in addition to currently prohibited audio or video recordings.

Discussion:

The rule permitting a stenographic record of MFA proceedings had been in the Model Rules and in many local program rules for some time. Research, however, failed to find any authority for such a rule. In fact, California Rule of Court 3.824(b)(1) provides that "[t]he arbitrator may, but is not required to, make a record of the proceedings." And, Rule 3.824(b)(3) provides that "[n]o other record may be made, and the arbitrator must not permit the presence of a stenographer or court reporter or the use of any recording device at the hearing, except as expressly permitted by (1)."[1]

An arbitration award may be set-aside only on limited grounds (Code of Civil Procedure section 1286.2.) The argument most often articulated in favor of permitting the making of a record is so that there might be a record with which to establish "misconduct" of the arbitrator (C.C.P. section 1286.2(a)). Reported cases where an arbitration award has been set aside for "misconduct" almost universally hold that an arbitrator's conduct during the hearing, including

[1] As discussed later, the Rules of Court references are specific to judicial arbitrations and should be read by way of example only, and not as binding authority.

decisions to admit evidence, rulings on procedural matters, etc., does not amount to misconduct sufficient to justify vacation of the award. *See, Moncharsh v. Heily & Blase* (1993) 3 Cal.4th 1. As a sole exception, Code of Civil Procedure section 1286.2(a)(5) does provide that an award may be vacated where a party has been

"substantially prejudiced" by "the refusal of the arbitrators to hear evidence material to the controversy . . ." However, a stenographic record is not required

to present this ground. *See, Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 438; *Atlas Floor Covering v. Crescent House & Garden, Inc.* (1958) 166 Cal.App.2d 211, 215. Moreover, pursuant to Rule 3.824(b)(2), any record of the hearing that might evidence the alleged misconduct with respect to the admission of evidence would be inadmissible in court in any event.

More important, Rule 3.824(b)(2) provides that: "Any record of the proceedings made by or at the direction of the arbitrator are deemed the arbitrator's personal notes and are not subject to discovery, and the arbitrator must not deliver them to any party to the case or to any other person [except an employee or in connection with a subpoena in a criminal prosecution]." Accordingly, any record made for the purpose of proving misconduct would not be admissible for that purpose in any event. Virtually all of the other grounds for vacation of the award either deal with events happening outside the hearing process or are evident from the award or based upon other evidence not generated during the hearing process.

Finally, according to Business and Professions Code section 6200, local program rules need to facilitate a hearing and award process that is "fair, impartial and speedy." The MFA Committee concluded that permitting a stenographic record would not promote these ends and may detract from them.

9. **Award**-Rules 39.1, 39.6 and 39.8-revision to rule 39.1 clarifies specifically that the nonappearance of a party in non-binding arbitration warrants a statement of the circumstances bearing on willfulness. This revision is consistent with the exception to a right to trial de novo following non-binding arbitration set forth in Bus. & Prof. Code section 6204 (a). New language in rules 39.6 and 39.8 provides a more complete and accurate description of the arbitration panel's authority by setting forth verbatim language from the statute (Bus. & Prof. Code section 6203(a).

III. Public Comment Received and the MFA Committee's Response

The State Bar received two public comments during the public comment period. The comments are attached here as Attachment B. The MFA Committee considered these comments at its May 23, 2008 meeting.

Model Rule 12-The first comment, from Andrew Harris, the chair of the Nevada County Bar Association's MFA program, observed that Model Rule 12's suggested refund of any filing fee paid to a program in the event of a transfer of the arbitration to another program is not advisable for his program. Nevada County's program charges nominal filing fees, including a $100 nonrefundable administrative charge.

The MFA Committee appreciates that many small local programs charge nominal filing fees that barely cover their costs. The Model Rule proposal is advisory only and need not be adopted by such programs in order to ensure that they meet basic administrative costs. Yet it is incumbent upon all local bar programs to maintain a refund schedule that "is "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.) The Model Rule 12 proposal is intended to encourage bar programs which charge greater fees, such as 5-7% of the amount in dispute, to refund such fees in the event that the program must relinquish its jurisdiction and transfer the case to another program.

The second comment is from Kathie Lustig, an Oregon resident and client in a prior California mandatory fee arbitration, who frequently comments on State Bar MFA Program materials. Ms. Lustig raises a number of unrelated concerns about MFA which the MFA Committee will address in a separate communication to Ms. Lustig.

Model Rule 11.2- Model Rule 11.2 would provide that a local bar's determination of which program has jurisdiction over a fee dispute is final and may not be appealed to the State Bar. Ms. Lustig's objection is based on her philosophical belief that all local bar rulings should be subject to State Bar appeal. This rule amendment is proposed to simply track new paragraph 18 of the Minimum Standards. Finality of local bar determinations of jurisdiction is based on the general policy of promoting local bar program finality. In fact, the State Bar lacks statutory authority to sit as an "appeals board" over local bar MFA programs.

Model Rule 40.2- Ms. Lustig's objects, not to a proposal, but to a model rule already approved by the Board of Governors. Even so, the ten day time period for a party to request correction of an award is not jurisdictional. The arbitrator may correct an award under certain parameters anytime before judicial confirmation of the award, which could be up to four years from service of the award. (Arbitration Advisory no. 03-02.)

Model Rule 37.0- Both comments address this rule. Mr. Harris believes that his program may lean towards discretionary approval of a stenographic reporter depending upon the length and complexity of arbitration and the nature of claims in subsequent post-arbitration litigation. Ms. Lustig opposes the proposed ban on recording the hearing.

The MFA Committee continues to believe that recording of MFA hearings by any means is inconsistent with the legislative intent that local programs provide hearings that are "fair, impartial and speedy" (Business & Professions Code section 6200(d.) Also, recording the arbitration conflicts with the Supreme Court observation that one of the purposes of the MFA program is to ameliorate the "disparity in bargaining power in attorney fee matters which favors the attorney in dealings with infrequent consumers of legal services." (*Aguilar v. Lerner*, 32 Cal.4th 974, 983 (2004)).

Such recordings also appear to be inconsistent with Business & Professions Code section 6202's statement regarding the maintenance of the confidentiality of attorney-client communications for all purposes except the MFA

hearing. And, such recordings appear unnecessary for any legitimate purpose in the context of the MFA process for all the reasons articulated by the MFA Committee in the discussion when the proposed rule first was submitted. It should be clarified that the Rules of Court references are specific to judicial arbitrations and should be read by way of example only, and not binding authority).

Finally, local programs are not bound by the Model Rules, and are free to adopt a rule providing for stenographic recordings (with appropriate safeguards regarding cost and availability, etc.). However, because the Model Rules are intended to reflect "best practices" for MFA proceedings, and because the MFA Committee believes for all the reasons articulated in the original discussion and here that a prohibition against stenographic recording of MFA hearings is such a "best practice," it continues to believe that such a prohibition is appropriate for inclusion in the Model Rules.

IV. Effective Date of Approval

The proposed revisions to the Model Rules of Procedure for Fee Arbitrations would become effective upon final consideration by the Board of Governors, upon the recommendation of the RAD Committee.

V. Fiscal/Personnel Impact

None.

VI. Impact on Board Book/Administrative Manual

None.

VII. State Bar Rules Impact

None.

VIII. Proposed Resolutions

The MFA Committee requests that the Board of Governors, upon recommendation of the RAD Committee, adopt the proposed revisions to the Model Rules in the form released for public comment without modification. The Model Rules reflect the MFA Committee's considered collective opinion based upon several years studying the rules and their practical effect throughout the state. But they are advisory. Given that California has 45 very distinct bar

programs with different resources and populations to serve, "one size does not fit all." Local bars are free to adopt local bar rules that do not adhere to the Model Rules as long as they are consistent with the State Bar's Minimum Standards. If you agree with this recommendation, your adoption of the following resolutions would be appropriate:

For the Board on Regulation Admissions & Discipline Oversight:

> **RESOLVED**, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends that the Board of Governors adopt the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations in the form attached hereto as Attachment A.

For the Board of Governors:

RESOLVED, that upon recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of Governors hereby approves the proposed revisions to the State Bar's Model Rules of Procedure for Fee Arbitrations in the form attached hereto as Attachment A.