AGENDA ITEM

MARCH 164
Consideration/Approval of Proposed State Bar Sponsored Legislation Regarding Fee Arbitration

DATE: February 11, 2009

TO: Members, Board of Governors
Members, Board Committee on Stakeholder Relations

FROM: Jill Sperber
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SUBJECT: Consideration/Approval of Proposed State Bar Sponsored Legislation Regarding Fee Arbitration

EXECUTIVE SUMMARY

The Committee on Mandatory Fee Arbitration has reviewed and recommends approval of the following five (5) legislative proposals regarding fee arbitration for sponsorship by the Board of Governors during the 2009 Legislative Session, subject to review and negotiation with the legislature and other interested parties:

1. State Bar Board delegation of local bar rules of procedure for fee arbitration approval – Currently, the Board of Governors' authority to approve local bar rules of procedure for fee arbitrations is considered to be non-delegable. To maximize Board time and resources and expedite the rule approval process for local bar programs, legislation is requested to permit the Board to delegate its rule approval authority to a designated Committee.
2. Increase the small claims jurisdiction for fee arbitration cases – Legislation effective 2006 raised the jurisdiction for small claims brought by a "natural person" to $7,500 but did not include fee arbitration claims. Since parties in fee disputes are usually "natural persons," legislation is sought to similarly increase small claims jurisdiction for post-fee arbitration claims from no more than $5,000 to $7,500.
3. Clarify Arbitrator's Authority to "Issue" Instead of " Compel" Compliance with Subpoenas – Business & Professions Code section 6200(g)(3) provides fee arbitrators with authority to "compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding."

Although volunteer fee arbitrators may issue a subpoena, they lack power to "compel" compliance vested in judicial officers, such as an order for sanctions. Clarification to indicate that a fee arbitrator may issue but not "compel" compliance with a subpoena is appropriate.

4. Amend Statute to Confer on Fee Arbitrators Jurisdiction to Determine the Existence or Absence of an Attorney-Client Relationship – The Court of Appeals in *Glassman v. McNab*, 112 Cal.App.4th (2003; rev. denied) decided that the MFA statutory scheme does not confer jurisdiction on the arbitration panel to decide the threshold issue of whether an attorney-client relationship existed between the parties. To effectuate the intent of the MFA Program, a legislative amendment is needed to establish that fee arbitrators have jurisdiction to decide this threshold issue without requiring an express stipulation by the parties conferring such jurisdiction.
5. Amendments to Change "Mailing" Fee Arbitration Documents to "Service"-various references in the MFA statutes refer to the mailing of documents by the arbitration program. To avoid confusion and potential loss of important rights, this legislative proposal would substitute the term of art "service" for "mailing."

Questions regarding this agenda item should be directed to Jill Sperber at (415) 538-2023 or jill.sperber@calbar.ca.gov.

I. PROPOSAL TO MAKE BOARD'S LOCAL BAR ARBITRATION RULE APPROVAL AUTHORITY DELEGABLE

BACKGROUND

California's Mandatory Fee Arbitration (MFA) Program established by the Board of Governors contemplates that local bar associations will provide fee arbitration services in addition to the State Bar. Section 6200(d) of the Business and Professions Code provides that the local bar rules of procedure are subject to review by the Board of Governors as follows:

> "[t]he board of governors shall adopt rules to allow arbitration and mediation of attorney fee and cost disputes under this article to proceed under arbitration and mediation systems sponsored by local bar associations in this state. Rules of procedure promulgated by local bar associations are subject to review by the board to insure that they provide for a fair, impartial, and speedy hearing and award."

The State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, which interprets the statutory requirements and establishes procedural guidelines for local bar arbitration programs, provides that local bar associations with rules of procedure approved by the Board of Governors will have jurisdiction over fee disputes submitted under the MFA Program. (Min. Standards, para. 1.) Board approval of local rules is also required to claim local bar association and fee arbitrator immunity provided by statute. (Bus. & Prof. Code section 6200(f).)

Until 2007, review and approval of local bar fee arbitration rules was performed by the Board's Committee on Regulation, Admissions and Discipline Oversight (RAD) and its functional predecessor, "CORD" upon recommendations by the MFA Committee. In 2007, the State Bar' s Office of General Counsel determined that the Board's rule approval authority under Business and Professions Code section 6200(d) was non-delegable. As a result, the MFA Committee has regularly sought Board approval, upon recommendation of the RAD Committee, of new local bar rules of procedure as well as proposed rule amendments. For most regular Board meetings, the MFA Committee typically submits one or two agenda items seeking Board approval of a local bar's rules of procedure subject to recommendation of RAD. In 2008, five local bar rules items were resolved by the Board.

The MFA Committee, which oversees the 45 local bar programs and wishes to be responsive to them, believes that a legislative amendment to permit the Board to delegate its rule approval authority to a designated Committee such as RAD or even to the MFA Committee is desirable. An amendment authorizing the Board to designate its local bar rule approval authority to a Committee would expedite the rule approval process for local bar associations and conserve the Board's time and resources. Often, a local bar program must often delay implementation of new rules or amendments affecting administrative matters such as filing fees, to obtain MFA Committee review first then RAD and Board approval. If a program's rule revisions are ready in late November, for example the program must wait until March of the following year before the item can be presented at a regular Board meeting. If approved, an amendment making the Board's rule approval authority delegable would streamline the local bar rule approval process by eliminating the requirement of Board approval with one important safeguard. If the designee Committee does not approve the item unanimously, the full Board would be required to review and approve the proposed rule(s) or rule amendments.

Accordingly, the MFA Committee proposes that the following amendment to Business and Professions Code section 6200(d) would be appropriate:

> "[t]he board of governors shall adopt rules to allow arbitration and mediation of attorney fee and cost disputes under this article to proceed under arbitration and mediation systems sponsored by local bar associations in this state. Rules of procedure promulgated by local bar associations are subject to review by the board **or its designee** to insure that they provide for a fair, impartial, and speedy hearing and award."

II. PROPOSED INCREASE OF JURISDICTIONAL LIMIT IN SMALL CLAIMS COURT FOR FEE ARBITRATION CLAIMS CONSISTENT WITH OTHER SMALL CLAIMS

Small claims court jurisdiction for post-fee arbitration litigation is set forth in Code of Civil Procedure section 116.220. It states:

> 116.220(a) The small claims court shall have jurisdiction in the following actions...
>
> (4) To confirm, correct, or vacate a fee arbitration award not exceeding five thousand dollars ($5,000) between an attorney and client that is binding or has become binding, or to conduct a hearing de novo between an attorney and client after nonbinding arbitration of a fee dispute involving no more than five thousand dollars ($5,000) in controversy, pursuant to Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code.

Effective January 1, 2006, the Legislature enacted C.C.P. section 161.221, raising the jurisdictional limit for small claims actions from $5,000 to amounts less than $7,500 for suits "in an action brought by a **natural person**, if the amount of the demand does not exceed [$7,500]...."[Emphasis added]. However, section 161.220 (a) (and the other specialty jurisdiction circumstances set forth in the other section 161.220 subsections), was not similarly amended to increase jurisdiction to claims less than $7,500 to cover post-fee arbitration actions. Absent an amendment to C.C.P section 161.221(a)(4) for post-fee arbitration actions, post-fee arbitration actions must continue to be filed in superior court, limited jurisdiction where the "amount in controversy" is $5,000 or more.

Failure to include post-fee arbitration claims under section 161.220(a)(4) with the section 161.1221 small claims jurisdictional increase appears to be the result of technical oversight. The MFA Committee is unaware of any history indicating that the Legislature intentionally excluded post-fee arbitration jurisdiction from the dollar threshold increase enacted in 2006 for small claims court jurisdiction for natural persons.

Most post-fee arbitration litigants, with few exceptions, are "natural persons" seeking judicial relief in the form of a new hearing after non-binding fee arbitration, confirmation or correction of, or an order vacating, the award. Since fee arbitration jurisdiction depends on the existence of an attorney-client relationship between the parties, most post-arbitration parties are individual clients, non-client individuals who paid the fees, and attorneys. To assist parties in small claims court with post-fee arbitration disputes, the Judicial Council tailored forms specifically for attorney-client fee disputes in small claims court.

Absent confirmation that the Legislature intentionally retained section 161.220(a)(4)'s five thousand dollar amount for small claims court jurisdiction for post-fee arbitration cases, the State Bar should propose, after negotiation with other interested parties, amending section 116.220 (a)(4) as follows:

"116.220(a) The small claims court shall have jurisdiction in the following actions...

(4) To confirm, correct, or vacate a fee arbitration award not exceeding ~~five~~ **seven** thousand **five hundred** dollars (~~$5,000~~ **7,500**) between an attorney and client that is binding or has become binding, or to conduct a hearing de novo between an attorney and client after nonbinding arbitration of a fee dispute involving no more than ~~five~~ **seven** thousand **five hundred** dollars (~~$5,000~~ **7,500**) in controversy, pursuant to Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code."

III. PROPOSED AMENDMENT TO CLARIFY ARBITRATOR'S AUTHORITY TO "ISSUE" INSTEAD OF "COMPEL" SUBPOENAS IN FEE ARBITRATIONS

BACKGROUND

Setting forth some of the arbitrator's authority in fee arbitrations, Business and Professions Code section 6200(g)(3) authorizing a fee arbitrator to "....[c]ompel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding." By the word "compel" the statute suggests that fee arbitrators are authorized to enforce compliance with subpoenas. The MFA Committee believes that this word may be misleading to MFA parties and fee arbitrators.

While a fee arbitrator may issue a subpoena for the appearance of a witness or the production of documents at the arbitration hearing, the arbitrator, often a volunteer fee arbitrator clearly lacks the same authority vested in a judicial officer of the court to compel compliance with the subpoena, such as issue sanctions or bench warrants. In fact, a party seeking compliance with a subpoena would have to obtain a stay of the fee arbitration proceeding and seek court assistance in compelling compliance. (Arbitration Advisory, No. 08-02, May 25, 2008) Authority to Compel Compliance with Third-Party Subpoenas.)

Because a fee arbitrator may issue but not actually "compel" compliance with a subpoena, the MFA Committee recommends clarification through the following amendment:

> (g) In the conduct of arbitrations under this article the arbitrator or arbitrators may do all of the following:
>
> (1) Take and hear evidence pertaining to the proceeding.
> (2) Administer oaths and affirmations.
> (3) ~~Compel, by subpoena,~~ **Issue subpoenas to compel** the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding.

IV. PROPOSED AMENDMENT TO CONFER ON FEE ARBITRATORS JURISDICTION TO DETERMINE THE EXISTENCE OR ABSENCE OF AN ATTORNEY-CLIENT RELATIONSHIP.

Mandatory fee arbitration is voluntary for the client but required for the lawyer unless the parties have a preexisting agreement in writing to submit their fee disputes to mandatory fee arbitration. Subject matter jurisdiction for mandatory fee arbitration depends on the existence of an attorney-client relationship. In *Glassman v. McNab,* 112 Cal.App.4th 1593,1596 (2003); rev. denied), the Court of Appeals held that the MFA statutory scheme does not confer jurisdiction on the arbitration panel to decide the threshold issue of the existence of an attorney-client relationship absent an express stipulation between the parties to confer such jurisdiction on the panel.

The MFA Committee believes that for several reasons, *Glassman* creates an undesirable result – and one unintended by the Legislature – whereby one party could avoid, delay, and increase the cost and complexity of resolving a fee dispute (whether required by statute or preexisting arbitration agreement) simply by refusing to stipulate to confer subject matter jurisdiction on the arbitration panel. First, many fee arbitrations are conducted in pro per by clients, who will be frustrated, if not confused, by the requirement of a stipulation to confer jurisdiction. Attorneys with a valid preexisting MFA arbitration agreement may also be frustrated by uncooperative clients who deny the relationship yet refuse to stipulate to confer jurisdiction on the arbitration panel to determine that threshold issue.

Second, the MFA Committee believes that *Glassman* may enable mischievous avoidance of MFA by some attorneys. For example, an attorney otherwise required by statute to submit to MFA would be able to avoid, delay, and increase the cost and complexity of resolving a fee dispute by denying the existence of an attorney-client relationship and refusing to stipulate to confer jurisdiction to determine that threshold issue on the arbitration panel. The State Bar's MFA Program has processed several cases where a lawyer or client objected to MFA jurisdiction. Although the resulting confusion prompted the MFA Committee to address *Glassman* and advise local programs on handling such jurisdictional challenges, the area remains fraught with potential problems in *Glassman's* wake.

The MFA Committee therefore suggests an amendment to the Business and Professions Code section 6203(a) to clarify that fee arbitrators have jurisdiction to decide the threshold issue of the existence of an attorney-client relationship as follows:

> (a) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions **or issues** submitted to the arbitrators, the decision of which is necessary in order to determine the controversy **including the existence or absence of an attorney-client relationship.**..."

V. PROPOSED AMENDMENTS TO CHANGE "MAILING" TO "SERVICE" OF DOCUMENTS IN FEE ARBITRATION

The MFA statutes (Bus. & Prof. Code section 6200, *et seq*.) contain various references to "mailing" of fee arbitration documents. This term has occasionally created confusion for parties and may jeopardize the rights of parties in ways that the MFA statutes did not intend. While the MFA Committee acknowledges that program service of documents is accomplished by the more user friendly term "mailing," to avoid confusion, the MFA Committee recommends that the term of art "service" be substituted in the three statutory references to "mailing" as follows:

Business and Professions Code 6203:

> "(b) Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award shall become binding upon the passage of 30 days after ~~mailing~~ **service** of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to Section 6204...."; and

Business and Professions Code 6204:

> "(b) If there is an action pending, the trial after arbitration shall be initiated by filing a rejection of arbitration award and request for trial after arbitration in that action within 30 days after ~~mailing~~ **service** of notice of the award....."; and

Business and Professions Code 6204:

> "(c) If no action is pending, the trial after arbitration shall be initiated by the commencement of an action in the court having jurisdiction over the amount of money in controversy within 30 days after ~~mailing~~ **service** of notice of the award....."

FISCAL/STAFF IMPACT

These legislative proposals do not require additional personnel or increased expenses.

BOARD BOOK IMPACT

None.

RECOMMENDATION

Staff recommends that the Stakeholder Relations Committee approve the following proposals, described above, for inclusion in the State Bar's 2009 Sponsored Legislation Program:

1. Amend Business and Professions Code section 6200(d) to permit the Board of Governors to delegate its approval authority for local bar rules of procedure for fee arbitration.

2. Amend the Code of Civil Procedure to increase the small claims jurisdiction for post-fee arbitration claims from no more than $5,000 to $7,500, consistent with the increase in jurisdiction of other small claims actions brought by "natural persons."

3. Amend Business & Professions Code section 6200(g)(3) to clarify arbitrator's authority to "issue" instead of "compel" by subpoena.

4. Amend Business and Professions Code section 6203(a) to expressly confer on the arbitrators jurisdiction to determine whether or not an attorney-client relationship exists as a threshold issue.

5. Amendment Business and Professions Code sections 6203(b), 6204(b), and 6204(c) to change "mailing" to "service."

PROPOSED BOARD COMMITTEE RESOLUTION

If the Stakeholder Relations Committee agrees with the above recommendation, the following resolution is suggested:

> **RESOLVED**, that the Board Committee on Stakeholder Relations recommends that the Board of Governors authorize the Executive Director to seek legislation to do each of the following:
>
> 1. Amend Business and Professions Code section 6200(d) to permit the Board of Governors to delegate its approval authority for local bar rules of procedure for fee arbitration.
>
> 2. Amend the Code of Civil Procedure to increase the small claims jurisdiction for post-fee arbitration claims from no more than $5,000 to $7,500, consistent with the increase in jurisdiction of other small claims actions brought by "natural persons."
>
> 3. Amend Business & Professions Code section 6200(g)(3) to clarify arbitrator's authority to "issue" instead of "compel" by subpoena.
>
> 4. Amend Business and Professions Code section 6203(a) to expressly confer on the arbitrators jurisdiction to determine whether or not an attorney-client relationship exists as a threshold issue.
>
> 5. Amendment Business and Professions Code sections 6203(b), 6204(b), and 6204(c) to change "mailing" to "service."
>
> **FURTHER RESOLVED** that the Board Committee on Stakeholder Relations recommends that the Board of Governors direct the Executive Director to advise the Board of any significant amendments or proposed changes to the legislation that the Board should be made aware of before continuing to pursue such legislation.

PROPOSED BOARD RESOLUTION

If the Board of Governors concurs with Stakeholder Relations Committee's recommendation, the following resolution is suggested:

> **RESOLVED**, upon recommendation of the Board Committee on Stakeholder Relations, that the Board of Governors hereby authorizes the Executive Director to seek legislation to do each of the following:
>
> 1. Amend Business and Professions Code section 6200(d) to permit the Board of Governors to delegate its approval authority for local bar rules of procedure for fee arbitration.
>
> 2. Amend the Code of Civil Procedure to increase the small claims jurisdiction for post-fee arbitration claims from no more than $5,000 to $7,500, consistent with the increase in jurisdiction of other small claims actions brought by "natural persons."
>
> 3. Amend Business & Professions Code section 6200(g)(3) to clarify arbitrator's authority to "issue" instead of "compel" by subpoena.
>
> 4. Amend Business and Professions Code section 6203(a) to expressly confer on the arbitrators jurisdiction to determine whether or not an attorney-client relationship exists as a threshold issue.
>
> 5. Amendment Business and Professions Code sections 6203(b), 6204(b), and 6204(c) to change "mailing" to "service."
>
> **FURTHER RESOLVED** that, upon recommendation of the Board Committee on Stakeholder Relations, the Board of Governors hereby directs the Executive Director to advise the Board of any significant amendments or proposed changes to the legislation that the Board should be made aware of before continuing to pursue such legislation.