

# AGENDA ITEM

**MARCH 54-121**  
**Request for Approval**  
**of Proposed**  
**Revisions to**  
**Arbitration and**  
**Mediation Rules of**  
**Procedure of the Bar**  
**Association of San**  
**Francisco**

**DATE:** February 9, 2009

**TO:** Members of the Board Committee on Regulation, Admissions and Discipline Oversight  
Members of the Board of Governors

**FROM:** Jill Sperber, Director, Office of Mandatory Fee Arbitration

**SUBJECT:** Request for Approval of Proposed Revisions to Arbitration and Mediation Rules of Procedure of the Bar Association of San Francisco

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## **EXECUTIVE SUMMARY**

This agenda item is before the RAD Committee and the Board to approve the proposed revisions to the Arbitration and Mediation Rules of Procedure of the Bar Association of San Francisco (BASF) in the form attached as Attachment A hereto.

The BASF has submitted proposed revisions to rules of procedure for fee arbitrations and mediations conducted by its attorney-client fee dispute program. The proposed revisions would clarify several procedural requirements and add new rules to comport with current law and several recent amendments to the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs.

At its November 7, 2008 and January 23, 2009 meetings, the State Bar's Committee on Mandatory Fee Arbitration (MFA) reviewed the BASF's proposed revisions to its local rules for attorney-client fee arbitrations. The MFA Committee agreed to recommend approval to the Board Committee on Regulation, Admission and Discipline (RAD) and the Board of Governors, subject to modifications which were since made by the BASF, as being in compliance with the State Bar Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs and Minimum Standards for Mediation ("Minimum Standards"). Two rule amendments pertain to post-MFA arbitration rights following a recent Supreme Court opinion. The proposed rule revisions set forth in Attachment A are submitted for approval by the Board of Governors.

## **I. BACKGROUND:**

Pursuant to Business and Professions Code section 6200, subdivision (d), local bar associations are authorized to sponsor mandatory fee arbitration programs. The programs must have local bar rules of procedure that comply with Business and Professions Code sections 6200-6206 and the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs and Minimum Standards for Mediation ("Minimum Standards") and that are approved by the Board of Governors. Approval by the Board of Governors provides the local bar programs with jurisdiction to arbitrate and mediate fee disputes submitted under the auspices of the Mandatory Fee Arbitration Program. (Minimum Standards, Para.1.)

The arbitration rules of procedure of the Bar Association of San Francisco (BASF) were last revised on November 7, 2007 to reflect Board policy requiring program notice to clients of non-client requests for mandatory fee arbitration embodied in paragraph 13 of the Minimum Standards (Rule 3C). The Board has since approved revisions to the Model Rules of Procedure for Fee Arbitrations in July 2008. Although the Model Rules are not required to be adopted locally, they serve as a template for local bar programs to incorporate for their convenience and to ensure local program compliance with the Minimum Standards and the law. Although BASF did not adopt the Model Rules, in response to the Model Rule revisions of 2008 and other 2007 amendments to the Minimum Standards, the local bar association submitted proposed revisions to its local rules to the State Bar's MFA Committee at its November 7, 2008 and January 23, 2009 meetings.

After the meetings, BASF proposed amendments consistent with a recent California Supreme Court opinion upholding post-MFA binding arbitration.

## **II. DISCUSSION**

At its meetings, the MFA Committee found that the proposed revisions to the rules of procedure were acceptable subject to several suggested. Following the meetings, the BASF MFA program accepted the suggestions made by the MFA Committee. Subject to the agreed upon changes, the MFA Committee agreed to recommend to the RAD Committee that the proposed revisions to the BASF local rules be recommended to the Board of Governors for approval. The proposed revisions to the fee arbitration and mediation local rules submitted by the BASF are set forth as Attachment A. The revisions are shown in redlining to compare the current rules and proposed rule amendments pending Board approval.

Summary of Key Revisions Proposed:

- Page 2, Rule 3.A.7- sets forth test used in Minimum Standards (para. 18) to determine disputes re proper venue and that original filing date will be used in event of transfer of case to another program.
- Page 2, Rule 9.0-clarifies the procedure for requesting removal from BASF to the State Bar's MFA program.
- Page 4, Rule 5C and Page 11, Rule 11E-consistent with new California Supreme Court opinion *Schatz v. Allen Matkins* (S150371), sets forth the right to enforce a binding arbitration agreement instead of a new trial in court following non-binding MFA pursuant to a preexisting arbitration agreement.

- Page 8, Rule 8.L-provides for a new potential administrative continuance fee payable to the program. The MFA statutes and State Bar’s Minimum Standards are silent on continuance policies other than the provision of a “speedy” hearing and award. (Bus & Prof. Code §6200(d); Min. Stds. Para.3.). Since the MFA Program is intended to be a speedier alternative to litigation, continuances are discouraged. An administrative fee payable to request a continuance would discourage unnecessary continuance requests. The Minimum Standards do not expressly prohibit a program from charging a continuance fee. Because the proposed local rule permits the Committee to exercise its discretion in whether to impose any continuance fee, the MFA Committee concludes that this rule proposal does not offend the MFA statutes or Minimum Standards.
- Page 12, Rule 13.E-increases the rate of arbitrator compensation from \$300 to \$500 for half day increments beyond the first day of hearing. Rule clarifies procedures for request for arbitrator compensation and for parties to deposit arbitrator compensation funds in advance. Model Rule 38.1 provides for compensation to arbitrators. The BASF proposed rate increase is reasonable. The rule amendments describing arbitrator compensation request and deposit procedures provide helpful clarification.
- Page 14-15, Section IV- proposed revisions to mediation rules are consistent with the State Bar’s Minimum Standards for Mediation.

### **III. FISCAL AND PERSONNEL IMPACT:**

None.

### **IV. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT:**

None.

### **V. PROPOSED RESOLUTIONS:**

For the Regulation, Admissions & Discipline Committee:

**RESOLVED**, that, the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends that the Board of Governors resolve to approve the proposed revisions to the Arbitration Rules of Procedure of the Bar Association of San Francisco in the form attached as Attachment A hereto as being in compliance with Business and Professions Code sections 6200-6206 and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitrations and Minimum Standards for Mediations.

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 Arbitration and Mediation Rules of the Bar Association of San Francisco in the form attached as Attachment A hereto as being in compliance with Business and Professions Code sections 6200-6206 and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitrations and Minimum Standards for Mediations.