

AGENDA ITEM

MARCH 124

Request for Approval of Minimum Standards following Public Comment Period

DATE: February 15, 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 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

This item is before you to first resolve whether the client's consent is required before an Article 13 mandatory fee arbitration proceeding between a third party who paid or agreed to pay attorney's fees for the client and the attorney may be initiated.

The Minimum Standards currently require the client's signature on a third party payors' mandatory fee arbitration request form as a pre-condition to the initiation of a mandatory fee arbitration proceeding by a third party payor. In *Wager v. Mirzayance* (1998) 67 Ca. App. 4th 1187, however, the court confirmed that the third party payor has an unqualified right to pursue such a claim. At the request of the State Bar of California's Committee on Mandatory Fee Arbitration ("MFA Committee"), on November 16, 2006, your Committee authorized publication of a proposed revision to new paragraph 13 of the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards") for a 60-day public comment period. The proposed revision would permit third party payors to initiate mandatory fee arbitration without prior client consent, but with the safeguard of notice by the attorney to the client of the payor's arbitration request and of the client's independent right to arbitration.

The comment period ended January 15, 2007. Four public comments were received. Three letters oppose the proposal on the grounds that client confidentiality will not be adequately protected without the requirement of client consent to the initiation of fee arbitration between the payor and the attorney. After consideration of these comments, the MFA Committee continues to believe that the proposed amendment strikes the appropriate balance between the important need to protect client confidences and a third party payor's unqualified right to initiate mandatory fee arbitration as confirmed in *Wager*. In addition, should new paragraph 13 be approved as proposed, the MFA Committee will publish an advisory to instruct fee arbitrators and provide additional training on handling evidentiary objections based upon the attorney-client privilege in the absence of the client.

Assuming that a decision as to the appropriate language for new paragraph 13 is reached, your Committee is requested to recommend that the proposed Minimum Standards as set forth in Attachment A be submitted to the Board of Governors for adoption.

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 (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.

The Minimum Standards were last revised with respect to a single amendment effective January 26, 2001. In June 2005, the MFA Committee proposed several new standards, clarifications, and revisions to the Minimum Standards. The Committee on Regulation, Admission & Discipline Oversight (RAD) authorized release of substantial proposed revisions for a 90-day public comment period from June 23, 2005 to September 23, 2005. The proposed revisions at that time fell into several categories: (1) changes to improve readability and eliminate confusing subtitles and numbering; (2) amendments necessary for consistency with the Business and Professions Code; and (3) removal of items that either did not constitute actual standards (e.g., the procedure to request removal from a local bar program to the State Bar MFA program) or did not pertain to the current fee arbitration program (i.e., standards for a pilot program using non-attorney arbitrators).

A. First Round of Public Comment

One of the Minimum Standards sought for revision was paragraph 10 (renumbered 13 in the proposal). The current standard provides that the local bars 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 MFA’s proposed revision at that time 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 at that time.

The sole comment received 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/guarantor of the attorney’s fees. As a result, the MFA Committee proposed a further revision to renumbered paragraph 13. The

¹ Minimum Standard 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.”

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

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 guarantor'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 revision was released for a 60-day comment period ending September 21, 2006. Renumbered Paragraph 13 proposed the elimination of the current requirement that a client sign the fee arbitration request form 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 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 guarantor 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. First, the MFA Committee proposed that the attorney is to 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, 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~~ **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 public comment period, shortened to 60 days for good cause shown, ended January 15, 2007. As with prior releases for public comment of the Minimum Standards, the State Bar MFA Committee directly invited all 44 local bar programs to submit comment.

II. THE STATE BAR MFA COMMITTEE'S RESPONSE TO THIRD ROUND OF PUBLIC COMMENT TO THE PROPOSED AMENDMENT TO MINIMUM STANDARD PARAGRAPH 13.

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 have been 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. 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 ("MFA Committee") continues to believe the existing rule advocated by the first three 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, the 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 continues to believe that the proposed amendment to Rule 13 provides the 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.

In a fourth letter, the Los Angeles County Bar Association MFA Program requests that further study be given to the question of whether some attorneys may at their peril read Business and Professions Code section 6202 to mean that a third party payor falls within the definition of “client” for purposes of the attorney-client privilege. It seems clear in light of Rule 3-310(F), however, that section 6202 cannot be read to include the third party payor as someone who is a “client” as used in that section. The MFA Committee does not advocate by the proposed amendment that section 6202 resolves the issue. Rather, the MFA Committee presumes that it does not do so, and that the third party payor is not a “client” who may be entitled to force the attorney to divulge client secrets. Accordingly, the balance of this presentation addresses the concerns of the three public comments in direct opposition to the proposed amendment.

Initially, the MFA Committee agrees with the public comments that protection of the attorney-client privilege is a paramount concern in all MFA cases, especially where a third party payor is a participant. The MFA Committee believes, however, that the existing rule advocated by the most recent public comments is not a superior alternative to the amendment proposed by the MFA Committee for a number of reasons, outlined below.

A. The Holding in *Wager* Supports the Proposed Amendment.

In *Wager*, the third party payor had been sued in superior court by the attorney. As the Court of Appeal noted, the attorney had provided no notice of the right to arbitrate either to the third party payor or to the client. The Court held that notice of the right to arbitrate was required to be given to the third party payor. It did not make a similar holding regarding parallel notice to or consent of the client. The justification for the requirement of notice to the third-party payor was: “It is the debtor/creditor relationship which the client has to the attorney, not the relationship of consumer/provider of legal services, with which the mandatory attorney fee arbitration statute is concerned.” With this as its justification, the Court concluded: “When the attorney is retained by one person to provide legal services to another, the one who has agreed to pay the lawyer’s bills is ***the one*** entitled to arbitrate any fee dispute [emphasis supplied].” It also is noteworthy that nothing in *Wager* holds or suggests that client consent is or should be a pre-requisite to the exercise by the payor of the right to employ MFA. Accordingly, the MFA Committee reads *Wager* as confirming that, in the case of a fee dispute between a third party payor and an attorney, it is the payor who has the right to bring the MFA proceeding, and the MFA Committee reads nothing in *Wager* to expressly give to the client the right to veto the exercise of that right by the payor by withholding consent.

B. The Existing Rule Provides No Greater Protection of the Privilege, But Can Defeat the Mandate and Purpose of the MFA Statute.

It also must be kept in mind that the alternative where client consent cannot be obtained is not that there will be no proceeding at all. Rather, the alternative is a suit in superior court, initiated either by the payor or, more likely, by the attorney (as was the

case in *Wager*). And, in such cases, the court would be left to struggle with the same attorney-client privilege issues as would an arbitrator in the MFA proceeding. The existing rule requiring client consent to a MFA proceeding provides no assurance that the attorney-client privilege would not come into jeopardy in the alternative forum. But, such a rule would defeat the mandate and purpose of the MFA statute – that participation is mandatory for the attorney if requested by the payor, and that it provide a low-cost and expeditious alternative to litigation of fee disputes in the courts. *Law Offices of Dixon Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1086-1087, 1095-1096; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 983-986.

C. The Amendment is Consistent With, and Not Offensive to, the Cases Cited in the Public Comments.

The case authority cited by the public comments does not hold that client consent is necessary to the initiation of court action to resolve a dispute between a third party payor and an attorney. Rather, the cited authority holds that such actions may be filed and litigated with or without the consent or participation of the client, and that dismissal is required only if it becomes unavoidable that the attorney-client privilege otherwise will be compromised. See, *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190-1191 (“Moreover, trial courts can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege.”); *Solin v. O’Melveny & Myers* (2001) 89 Cal.App.4th 451, 467 (it is only where a lawsuit “is incapable of complete resolution without breaching the attorney-client privilege [that] the suit may not proceed.’ (*General Dynamics, supra*, 7 Cal.4th at p. 1170.)”). Thus, the amendment to Rule 13 proposed by the MFA Committee is consistent with, rather than offensive to, the authority cited in the public comments.

It also is noteworthy that the *Wager* and *Solin* opinions were out of the same Division and written by the same Justice. Certainly, if that court intended by *Wager* to make client consent a pre-requisite to the payor’s MFA proceeding, it was sufficiently aware of the issue to be expected to have done so expressly. And, nothing else in the materials provided with the public comments provides any authority for why it may be appropriate to require client consent as a pre-requisite to a MFA filing when no such requirement exists as a pre-requisite to a court filing.

Accordingly, it is the view of the MFA Committee that a fair reading of the cases cited in the public comments, and of *Wager*, is that the proposed amendment to Rule 13 is the appropriate rule to apply in MFA cases. The proposed amendment addresses the concern of attorney-client confidentiality not by barring all payor MFA actions where client consent is not obtained at the outset, but by instructing fee arbitrators to deal with the issue of client confidentiality on a case-by-case basis at such time during the proceeding, if ever, when the privilege actually appears to have come under attack.

D. Past Experience has Taught that the Existing Rule More Often Than Not

is Unnecessary.

The MFA Committee approach finds further justification in actual experience. In a number of MFA situations, consent of the client cannot be obtained, such as where some falling out between the payor and client has occurred, or where the client cannot be located or cannot readily consent because of incarceration or deportation. In the latter group of cases, although the unavailable client may in fact want the payor to pursue the MFA proceeding but is physically unable to provide such consent in a timely manner, any manner of attorney mischief, including attorney ethical violations, might go unaddressed by a MFA forum. Yet, the parties nevertheless would be forced to proceed in superior court.

Most significantly in this regard, past experience in fact has demonstrated that, more often than not, attorney-client information is wholly unnecessary in the successful adjudication of a payor-attorney fee dispute. In many cases, the evidence necessary to the successful adjudication of the dispute does not involve any privileged communications. And, in many other cases, the payor is someone already within the circle of persons who legitimately may participate in the attorney-client communication without waiving the communication as to others, or may even be a signatory to the attorney's fee contract:

“Thus, the communication must be made ‘in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonable necessary for transmission of the information to the accomplishment of the purpose for which the lawyer is consulted,’ (Evid. Code, § 952; *Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 762-762 [166 Cal.Rptr. 880].) Those ‘who are present to further the interest of the client in the consultation’ include a spouse, parent, business associate, joint client or any other person ‘who may meet with the client and his attorney in regard to the matter of joint concern.’ (Cal. Law Revision Com. com. to Evid. Code, § 952, 29B West’s Ann. Evid. Code (1966 ed.) pp. 528-529; Deering’s Ann. Evid. Code (1966 ed.) p. 444.)” *Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 346.”

In all such cases where there is no need to consider attorney-client privileged communications, or where the third party payor is someone who may already have received such communications, a rule requiring client consent is entirely unnecessary.

E. The Concerns Expressed in the Public Comments are Addressed by the Proposed Notice Requirement.

The proposed amendment to Rule 13 addresses the concerns of the public comments by requiring notice of the proceeding to go to the client, affording the client an opportunity to participate and assert any privilege argument that the client feels is

appropriate. In addition, the MFA Committee notes that this notice provision in fact is a redundant safeguard. In the first instance, client consent will have been obtained at the outset of the payor-client-attorney relationship in all events under Rule 3-310(F). Moreover, under Rule 3-500, the attorney has the obligation to notify the client of all “significant developments relation to the employment or representation.” Thus, when either the attorney or the payor initiates an MFA proceeding (or a fee claim in any other forum, for that matter), the attorney is required to inform the client of that significant development in all events.

Also, under Rule 3-310(F), the attorney has the obligation to protect the attorney-client privilege despite the participation of the payor in the relationship, including during any MFA proceeding with the payor, whether or not the client has received notice or chooses to become a participant. In fact, where the attorney may fail to protect the client’s secrets in such a proceeding, and thus violate Rule 3-310(F) and section 6068(e), that violation itself would be the determining factor in denying the attorney any fee. See, *Pringle v. LaChappelle* (1999) 73 Cal.App.4th 1000, 1005-1006; *Sullivan v. Dorsa* (2005) 128 Cal.App.4th 947, 964-965.

F. MFA Committee Arbitrator Advisories and Training are Available to Educate Arbitrators on How Properly to Handle Privilege Issues as They May Arise.

Finally, the MFA Committee will be providing additional safeguards for the protection of the attorney-client privilege in payor-attorney MFA proceedings. In addition to the required notice, the MFA Committee will be providing all fee arbitrators with an arbitrator advisory about the issue and how it should be handled, including the requirement that the proceeding may have to be dismissed where it is demonstrated that prejudice to any party may occur due the inadmissibility of the content of attorney-client privileged communications. While such advisories are not legally binding, they have been cited by courts as instructive. See, e.g., *Shvartsman v. The Prudential Ins. Co. of America, et al*, United States District Court, Central District of California, Case No. CV 05-1950 PA (Ex), Order re Award of Reasonable Attorneys’ Fees (Docket No. 42; entered January 3, 2007). Additionally, the MFA Committee will make this issue a part of its ongoing arbitrator training so that arbitrators will be fully educated on how properly to handle any privilege issues as they may arise.

G. Conclusion

For all of these reasons, the MFA Committee remains of the view that the better rule is the one proposed by the pending amendment to Rule 13. In that way, the objective of the MFA statute of providing a cost-effective alternative to court proceedings between third party payors and attorneys will be honored, and the attorney-client privilege will be accorded no less protection than it would if the parties were left to the alternative of proceeding with resolution of the dispute in superior court.

III. FISCAL AND PERSONNEL IMPACT

None.

IV. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

V. 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.

VI. RECOMMENDATION AND RESOLUTIONS

Resolution for the RAD Committee:

If the RAD Committee agrees with the MFA Committee's proposed revisions to the Minimum Standards in the form attached hereto as Attachment A, your adoption of the following resolutions would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight (RAD Committee) hereby recommends that the Board of Governors resolve to approve the proposed revisions to the State Bar Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, in the form attached hereto as Attachment A.

Resolution for the Board of Governors:

If the Board of Governors agrees with the RAD Committee's recommendation to approve the proposed revisions to the Minimum Standards in the form attached hereto as Attachment A, the following resolution would be appropriate:

RESOLVED, that upon the 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 Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs in the form attached hereto."