

AGENDA ITEM

MAY 54-121

Request for Approval of
Proposed Revisions to
State Bar Rules of
Procedure for Fee
Arbitrations and
Enforcement of Awards-
Return from Public
Comment

DATE: April 21, 2009

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

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

SUBJECT: Proposed Revisions to the Rules of Procedure for Fee Arbitrations and Enforcement of Awards by the State Bar of California – Request for Approval following Return from Public Comment

Executive Summary

This agenda item is presented for the RAD committee and Board of Governors to approve the proposed revisions to the State Bar's rules of procedure in the form set forth in Attachment A following their return from the authorized public comment period.

The Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California (MFA rules of procedure) govern the State Bar's Mandatory Fee Arbitration (MFA) Program. Many proposed amendments would conform to recent State Bar policy set forth in the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs and the Model Rules of Procedure.

Four additional arbitration rule amendments are sought: 1) increase the upper cap on the program's filing fees established as 5% of the amount in dispute from \$3,500 to \$5,000; 2) increase the dollar threshold for arbitration by a three member panel from \$10,000 to \$15,000; 3) modify required award language to eliminate required pre-award interest determination and add automatic post-award interest of 10% per annum from 30th day after service of award; and 4) add language promoting confidentiality of the award by prohibiting disclosure by the program to non-parties absent a court order.

Proposed amendments to the enforcement of award rules would clarify procedures governing the State Bar's unique authority to enforce unpaid arbitration awards requiring a refund by the attorney of attorney's fees/costs consistent with the enabling statute, Business and Professions Code section 6203(d).

Two comments were received, but neither comment raises substantive issues meriting reconsideration of the proposed rule revisions. Questions should be directed to Jill Sperber at (415)538-023/jill.sperber@calbar.ca.gov.

I. BACKGROUND

Pursuant to 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 Board of Governors adopts rules of procedure sponsored by local bar associations to govern the arbitration of attorney fee and cost disputes to "...ensure that they provide for a fair, impartial and speedy hearing and award" (Bus. & Prof. Code §6200, subds. (a), (d)). Board approval also confers the ability of the program to rely on the immunity provision granted by statute. (Bus. & Prof. Code §6200(f).)

The State Bar's Committee on Mandatory Fee Arbitration (MFA Committee) oversees the Mandatory Fee Arbitration (MFA) Program administered by the State Bar in addition to the 45 approved local bar MFA programs. As one of its duties, the MFA Committee reviews and makes recommendations to the Board of Governors regarding proposed revisions to the State Bar MFA Program's rules of procedure for fee arbitrations for its approval. The State Bar's MFA rules of procedure, like those promulgated by local bar association MFA programs, are, by statute, subject to review by the Board of Governors. The Board must be assured that the rules of procedure for any MFA program are consistent with the MFA statutes and the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards", para. 1).

In addition to fee arbitration, the State Bar is uniquely authorized by statute to assist clients enforce unpaid fee arbitration awards requiring a refund of attorney's fees or costs by the attorney. (Bus. & Prof. Code §6203, subd. (d).) The enforcement statute authorizes the State Bar to place an attorney on involuntary inactive status until the member complies with any arbitration award or judgment confirming an award. The State Bar's rules of procedure include an additional section not included in standard arbitration rules setting forth the procedural process for State Bar enforcement of award requests from clients.

The State Bar's rules of procedure for fee arbitrations and enforcement of awards were last revised effective August 2, 2007. In 2008, the Board of Governors approved various amendments to the Minimum Standards and the State Bar's Model Rules of Procedure for Fee Arbitrations. Model Rules of Procedure are provided to the local bar programs as a convenient template establishing best practices and reflecting latest developments in the law. The majority of the rule amendments sought here conform to the State Bar's recent amendments to those documents.

The MFA Committee also recommends four other rule changes: 1) raise the upper cap on program filing fees, based on 5% of the amount in dispute, from \$3,500 to \$5,000; 2) increase the monetary threshold for three member panels from \$10,000 to \$15,000; 3) eliminate from the award form a required pre-interest determination, replaced by an automatic 10% per annum interest after 30 days following service of the award; and 4) promote confidentiality of the program's arbitration case file, including the award, as to non-parties. The remaining rule amendment proposals govern the State Bar's unique authority to assist clients with enforcement of unpaid awards rendered against attorneys pursuant to Business and Professions Code section 6203(d) as discussed below.

At its January 24, 2009 meeting, the MFA Committee reviewed the proposed rule changes set forth in Attachment A and agreed to recommend that the RAD Committee release them for public comment. At its March 5, 2009 meeting, the RAD Committee released the rule revisions for a public comment period of 30 days, ending April 7, 2009.

II. PROPOSED RULE AMENDMENTS RELEASED FOR PUBLIC COMMENT

Summarized here are the proposed revisions to the State Bar's rules of procedure for fee arbitrations and enforcement of award cases recommended by the MFA Committee for approval by the RAD Committee and adoption by the Board of Governors.

A. Proposed Fee Arbitration Rule Amendments

1. **The July 11, 2008 Model Rules amendments-** On July 11, 2008, the Board of Governors approved amendments to the State Bar's Model Rules of Procedure ("Model Rules".) Model Rules were first implemented upon the recommendation of the MFA Committee to promote inter-program uniformity, convey best practices and current legal developments, and expedite the rule approval process. Many of the model rule amendments were made to track the prior March and July 2007 amendments to the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration programs. Since the State Bar rules of procedure should track the most current version of the Model Rules and must comply with the Minimum Standards, many rule revisions proposed on the attached simply track the July 2008 Model Rule Amendments and/or Minimum Standard 2007 amendments except as noted below:

Model Rule 11 concerning local bar program jurisdiction and the new model rule governing disputes between programs should be deleted from the State Bar rules of procedure (see Rule 12 on jurisdiction) because that model rule applies only to filings with a local, not the State Bar's, arbitration program.

Model rule 19.4 governing stipulated awards was not a prior State Bar rule. New State Bar Rule 20.4 would reflect this model rule.

Model Rule 37 was amended last year to eliminate stenographic recording. Staff recommends retaining the right to such recording, however, leaving State Bar Rule 39 permitting stenographic recording unrevised.

2. **State Bar Rule 16-filing fee.** The Minimum Standards provide that any filing fee schedule and refund policy “are 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. Standards, para. 17.) Program filing fees are generally paid by the petitioner. For many local bar programs, like the State Bar, the filing fee is based on a set percentage of the amount in dispute with a minimum and a maximum filing fee. Traditionally, the State Bar rules have not contained its filing fees because they are reflected on the arbitration request form instead. To conform to the Model Rules, however, it is recommended that the State Bar include its filing fee structure in the rules of procedure.

The State Bar Program’s filing fees have not been revised in over ten years, if not longer. The current filing fee is 5% of the amount in dispute, with a minimum of \$50 and a maximum (upper cap) fee of \$3,500. The State Bar also offers complete or partial waivers of the fee for those unable to afford the fee. The refund schedule is graduated, permitting full or partial refunds depending on what stage the case terminates. However, no refund is given if the case settles within ten days of hearing (rule 20.3).

Comparison to local bar program filing fees. Before recommending an increase of the upper cap charged, the MFA Committee reviewed a list of 28 (out of 45) filing fees for approved local bar programs for comparison purposes. Of this list, ten (10) programs have a maximum filing fee of \$5,000. One program includes a surcharge in \$250 increments with no cap. Three programs have maximum fees of \$7,000, \$7,500 and \$7,750, respectively. Four programs have maximum fees of \$3,500, the same as the State Bar or less than \$5,000. One program has a \$3,000 cap (although some smaller programs have lower maximum fees than \$3,000) and another program has a \$4,000 cap. Some bar programs have no fee cap stated but these are small programs that have not updated their rules in many years. The MFA Committee concluded that an increase of the maximum filing fee from \$3,000 to \$5,000 is reasonably related to the amount in dispute and cost of providing the service but not in such an amount as to discourage the use of the service.

Large fee disputes require additional program resources. Staff is mindful that many local bar programs emulate the State Bar’s filing fees. In addition, the State Bar Program provides fee arbitration to parties who are unable to obtain fee arbitration locally, such as incarcerated petitioners. On the other hand, greater program resources are required to process larger fee arbitration cases. Large fee disputes often involve representation of parties by counsel, monitoring collateral litigation, frequent exercise of procedural rights such as challenges and

continuances, and assignment to a three member panel willing to volunteer extra time commitments often required to arbitrate large fee disputes. Volunteer arbitrators required to travel for the hearing are also entitled to State Bar travel reimbursement paid by State Bar general revenues.

Anticipated effect of higher maximum filing fee of \$5,000. The State Bar's current maximum fee of \$3,500 applies to cases where the amount in dispute is \$70,000 or more (5% of \$70,000 is \$3,500.) The State Bar program filed 19 such cases of a total 106 cases in 2008 and 12 such cases of a total 123 cases in 2007. In 2008 alone, the State Bar would have received an additional \$38,700 in filing fees had the maximum filing fee of \$5,000 been in effect. If approved, the maximum filing fee of \$5,000 would apply only to cases where the amount in dispute is \$100,000 or more (5% of \$100,000 is \$5,000.) In 2008, 15 cases (and in 2007, 8 cases) filed with the State Bar program claimed fees in dispute of \$100,000 or more. Since the higher filing fee cap would affect only the largest fee dispute arbitration matters (where the amount in dispute is \$70,000 or more), and as a practical matter, mostly only those petitioners more likely able to absorb a higher filing fee, the proposed fee cap increase is unlikely to discourage use of the program.

Based on the foregoing analysis, staff recommends an increased maximum filing fee cap of \$5,000. The filing fee would continue to be based upon a flat 5% of the disputed amount. A filing fee waiver could still be considered by the program with the higher cap in place.

3. **State Bar Rule 22.1- appointment of panel.** In the past decade, the State Bar raised the monetary threshold entitling parties to a three member arbitration panel from \$7,500 to \$10,000. The MFA statutes recognize that fee arbitrations may be conducted by a single arbitrator or three member panel. A three member panel must consist of two attorneys and one lay member. (Bus. & Prof. Code §6200, subd.(e).) The MFA statutes do not provide guidance for the standard to determine the monetary threshold for a three member panel. The Minimum Standards provide the following minimal guidance: "A monetary threshold above which three-member panels will be used must be reasonable." (Min. Stds., para. 19.) The Model Rules provide for \$10,000 as the recommended threshold amount for three member panels.

In recent years, many local bar programs obtained Board approval for a higher dollar threshold of \$25,000 for entitlement to a three member panel. The MFA Committee recently reviewed whether the State Bar should increase its monetary threshold, though not as high as \$25,000. One suggestion was to increase the threshold to \$20,000 or more in dispute. However, the State Bar sets a standard for the local bar programs to follow.

To evaluate whether an increase in the monetary threshold dollar for three member panels is reasonable, the MFA Committee reviewed 28 larger local bar programs. Following the State Bar's example, the vast majority -16 programs- set

the dollar threshold at \$10, 000. Two programs have a threshold under \$10,000. A modern trend has developed ahead of the State Bar, however, with five programs having increased their threshold to \$25,000 for a three member panel. After weighing the competing factors involved, the MFA Committee agreed to recommend that \$15,000 is a reasonable dollar threshold for a three member panel for the State Bar program.

4. State Bar Rule 22.3-disputes of \$1,000 or less. When the amount in dispute is \$1,000 or less, parties are not entitled to a hearing unless a hearing requested (and only then if the fee dispute is over \$500.) Staff recommends deletion of the requirement of keeping a permanent record of these disputes when a hearing is not required. This requirement was implemented when the rule was implemented as a pilot program to see whether the elimination of a hearing for very low fee disputes would be problematic from a consumer protection perspective. Since the pilot program has been in effect (over five years), there have been no complaints about the elimination of an automatic hearing for disputes of \$1,000 or less. State Bar records indicate that only one hearing was requested and a hearing was provided.

5. State Bar Rule 27.3-confidentiality of file and non-disclosure of award by program absent a court order.¹ The MFA statutes are silent regarding the confidentiality of arbitration case files and awards kept by the program. In recent years, various programs have sought guidance from the State Bar on non-party requests for awards or arbitration program files. Some requests target a particular arbitration program, specific attorney or client, or the fee arbitrator. This rule amendment would clarify that the program may refuse to disclose an award or program file to a non-party absent a court order compelling disclosure. A corresponding change to the Model Rules will be proposed later.

6. State Bar Rule 41.3-award language. The current rule is consistent with Minimum Standard paragraph 16, which requires the arbitrator to determine the issue of pre-award interest. The Minimum Standards are silent about awarding post-award interest. Last year, the MFA Committee created the first model award format for local bar use. The model award format eliminated the line items providing for pre-award interest replacing it with automatic post-award interest at 10% per annum following 30 days after service of the award, and regardless of whether the prevailing party is the client or the attorney.

Eliminate line item blank space for pre-award interest. The MFA Committee made those modifications to the model award format to reduce undue focus by the arbitrator on the relatively infrequent occasions warranting an award of pre-award

¹ Although the Agenda Item and the public comment posting discuss the content of and rationale for the proposed language change, the text of the proposed amendment to Rule 27.3 (confidentiality of the award) was inadvertently omitted from the version of the attached rules posted on the State Bar's website for public comment. Although one of only two comments received inquired about the intended impact of the rule on otherwise permissible program disclosures pertaining to attorney misconduct, no other inquiries or comments were made about this proposed amendment.

interest that a line item blank space otherwise may create. In the infrequent cases where pre-award interest may be appropriate, the procedures and law for making such an award is included in the Award Checklist, and the arbitrator is free to include such interest where appropriate.

Add automatic accrual of post-award interest. The MFA Committee also wishes to provide for automatic interest not otherwise provided for by statute or case law to accrue following fee arbitration awards. Under current law, absent an express award of post-award interest in the award, interest would accrue only with respect to judicially confirmed arbitration awards or judgments after fee arbitration. This result places the burden on prevailing parties-both clients and attorneys- to seek judicial relief- thereby using court resources and time- to obtain accrued interest on a monetary debt owed. Making post-award interest an automatic part of MFA awards protects the party in whose favor the award is rendered and lessens the frequency of judicial intervention.

Automatic accrual of interest would also provide needed clarification of the amount owed by the attorney to a client requesting enforcement of an unpaid award by the State Bar. Currently, the State Bar enforcement of award requests require State Bar Court case by case interpretation as to whether post-award interest against attorneys will be enforced.

Although changing this rule would precede any change to the Minimum Standards or Model Rules, the MFA Committee recommends the proposed change for the State Bar program at this time. The State Bar's sample fee arbitration award was recently amended to include this automatic finding.

B. Proposed Enforcement of Award Rule Amendments

1. **State Bar Rule 43- Jurisdiction.** Proposal clarifies jurisdiction for enforcement by State Bar consistent with Business and Professions Code section 6203(d) to include enforcement of stipulated awards, mediated settlements, or judgments.
2. **State Bar Rule 45.3-Attorney's Response.** Proposed change to rule 45.3 attempts to better define when an order re administrative penalties should be sought by the State Bar for failure to cooperate with the State Bar. Last sentence qualifies that finality of an order is subject to possible rescission permitted by the rules.
3. **State Bar Rule 46-Payment plans.** Proposed language includes judgments, stipulated awards and mediated agreements consistent with the enforcement of award statute. The last part of 46.2 (b) would become subsection 46.2(c). Rule 46.3 adds new (c) to permit option of revised payment plan. Rule 46.4 adds judgment or agreement consistent with the enforcement statute.
4. **State Bar Rule 47- Determination of Attorney Responsibility/Inability to Pay.**

Changes “to request for enforcement” instead of “request for assistance.”
Amendment expands authority to enforce “judgment” or “agreement” consistent with the MFA enforcement statute.

5. **State Bar Rule 48**-Administrative Penalties- consistent with proposed changes to rule 45.3.

6. **State Bar Rule 49**- Title change only.

7. **State Bar Rule 50** –Title change and substitute move for petition.

III. PUBLIC COMMENTS RECEIVED

Two comments were received regarding the State Bar’s rule revision proposals. A comment from member Maggi Draper (Attachment B) objects to raising the filing fee cap due to her belief that mandatory fee arbitration operates as “contracts of adhesion.” However, as the MFA Committee chairman’s written reply (not included here) to Ms. Draper explains, the MFA program is voluntary and not compulsory for clients unless, in the rare case, the client and attorney agree in advance to submit any fee dispute to non-binding MFA.

In his comment, Allan J. Mayer asks what is meant by “program” with respect to rule 27.3’s proposed language prohibiting program disclosure of the award absent a court order. The definitions section of the State Bar rules provides that the State Bar is “the Program” within the meaning of the rules. (Rule 1.14.)

Mr. Mayer’s comment appears to inquire about the potential impact of rule 27.3 on limiting a fee arbitrator or program from disclosing evidence of an attorney’s criminal conduct or disciplinary misconduct revealed during arbitration to authorities. There is no foreseeable impact. The Minimum Standards create an express exception to the usual confidentiality provisions for arbitrator disclosure to the State Bar of evidence of attorney misconduct revealed during fee arbitration. (Min. Standards, para.6.) This disclosure exception exists notwithstanding the proposed rule change, i.e., whether or not the award may be disclosed by the program to a non-party without a court order. The rule proposal to add the requirement of a court order for program disclosure to a non-party protects the MFA program and promotes confidentiality of the MFA proceedings.

IV. FISCAL/PERSONNEL IMPACT

None.

V. IMPACT ON BOARD BOOK/ADMINISTRATIVE MANUAL

None.

VI. PROPOSED RESOLUTIONS

For the RAD Committee:

If the RAD Committee agrees with the request to recommend the proposed revisions to the State Bar MFA rules of procedure set forth in Attachment A, adoption of the following resolution would be appropriate:

RESOLVED that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends that the proposed amendments to the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California, following publication for public comment and consideration of comments received, be adopted by the Board of Governors in the form attached hereto as Attachment A.

For the Board of Governors:

RESOLVED, following publication for public comment and consideration of comments received, and upon the recommendation of the Board Regulation, Discipline and Oversight Committee, that the Board of Governors approves the proposed amendments to the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California in the form attached hereto as Attachment A.