

AGENDA ITEM

JULY

Revisions to Notice of
Your Rights After Fee
Arbitration form- Request
for Release for Public
Comment

DATE: June 30, 2009

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

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

SUBJECT: Proposed Revisions to the Notice of Your Rights After Fee Arbitration form- Request for Release for Public Comment

Executive Summary

This matter is before your Committee to authorize release of the proposed revisions to the Notice of Your Rights After Fee Arbitration form for public comment for a 45-day period in the form attached hereto as Attachment A.

Business and Professions Code section 6200, *et seq.* governs the Mandatory Fee Arbitration (MFA) Program. Mandatory Fee Arbitration programs are required by statute to deliver to the parties with any fee arbitration award a notice advising them of their rights to judicial relief following the arbitration proceeding. The State Bar-approved Notice of Your Rights After Fee Arbitration form, is required for all MFA programs to serve with fee arbitration awards.

Until recently, a non-binding fee award could be rejected in court followed by a new trial as provided by the MFA statutes. This option is explained in the Notice of Your Rights form. In January 2009, the Supreme Court interpreted this statutory right to include enforcement of a pre-existing binding private arbitration agreement to require arbitration in lieu of a new trial. At its May 27, 2009 meeting, the State Bar's Committee on Mandatory Fee Arbitration (MFA Committee) agreed to recommend that several new sections be added to the Form to advise parties of this arbitration exception to the statutory right to a trial following non-binding MFA.

Questions about this agenda item should be directed to Jill Sperber, MFA Director at (415) 538-2023 or 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. Mandatory fee arbitration (MFA) is not binding unless the parties agree after the fee dispute arises to binding fee arbitration. (Bus. & Prof. Code § 6204(a).) Following non-binding fee arbitration, either party may reject the award and file an action in court for a new trial, as long as the action is filed within 30 days of service of the award. (Bus. & Prof. Code §§ 6204(b), 6204(c).)

Business and Professions Code section 6204.5 requires the State Bar or the local bar association program to deliver to the parties a notice advising them of their rights to judicial relief after the arbitration proceeding. This notice is generally the first time that the parties become informed in detail about their post-arbitration legal options. The State Bar provides to the 45 local bar programs a required form entitled Notice of Your Rights After Fee Arbitration for this purpose. In recent years, the State Bar's MFA Committee developed consumer friendly improvements to the Notice of Your Rights form, such as specifically referencing the applicable Judicial Council forms and detailing more comprehensively than before the various post-fee arbitration options available to the parties. Amendments to the Notice form were last approved by the Board in July 2008.

Until recently, it was unclear whether a party, following non-binding MFA, could avoid a pre-existing binding private arbitration provision by initiating a trial in court as established by the MFA statutory scheme. In January 2009, the California Supreme Court, in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557 attempted to harmonize the statutory right to a trial de novo provided by the MFA Act and enforcement of otherwise valid binding arbitration agreements under the California Arbitration Act. In *Schatz*, the Court determined that such a pre-existing arbitration agreement could be substituted for a party's right to a new trial following non-binding MFA without offending the MFA Act.

The current Notice form informs parties of their respective rights after fee arbitration before the *Schatz* case was decided. Since the *Schatz* case creates an exception to the right to a new trial following non-binding MFA where a pre-existing arbitration agreement exists by permitting a second arbitration to substitute for a new trial, the Notice form should be amended to include this recognized exception.

II. PROPOSED REVISIONS TO THE NOTICE OF YOUR RIGHTS FORM

At its May 27, 2009, the MFA Committee reviewed several new amendments to the Notice of Your Rights form to comport with the Court's pronouncement in *Schatz*. Accordingly, the MFA Committee agreed to recommend revisions to the Notice of Your Rights After Fee Arbitration form in the form attached hereto as Attachment A.

The additions are shown in redlining. One of the proposed amendments includes a new section advising parties that a pre-existing private arbitration agreement may create an exception to the right to a new trial following non-binding MFA. Other proposed amendments extend the statutory references applicable to a new trial following non-binding fee arbitration to apply to a private arbitration if the parties have a pre-existing arbitration agreement.

Other non-substantive revisions, unrelated to the *Schatz* case, are also set forth in redlining in the attached. These amendments were made to correct formatting problems and accurately quote the statutory language used in the MFA statutes in several parts of the Notice.

III. FISCAL/PERSONNEL IMPACT

None.

IV. IMPACT ON BOARD BOOK/ADMINISTRATIVE MANUAL

None.

V. PROPOSED RESOLUTION

If you agree that the proposed further revisions to the Notice of Your Rights After Arbitration form set forth in Attachment A should be released for a 45 public comment period, your adoption of the following resolutions would be appropriate:

“RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the proposed revisions to the Notice of Your Rights After Arbitration in the form attached hereto as Attachment A, for a public comment period of 45 days; and

FURTHER RESOLVED, that authorization by the Board Committee on Regulation, Admissions and Discipline Oversight for publication for public comment is not, and shall not be construed as a recommendation or approval by the board committee or the Board of Governors of the materials published.”