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DATE: August 26, 2009

TO: Members, Board Committee on Operations

FROM: Lawrence C. Yee, Acting General Counsel
Richard J. Zanassi, Chief Assistant General Counsel
Mary Yen, Assistant General Counsel

RE: *Fagelbaum &Heller LLP v. Robert O. Smylie*, California Supreme Court Case No. S175015, Court of Appeal, Second Appellate District, Case No. B205181, Los Angeles Superior Court, Case No. BC359482 - Request for Amicus Curiae Letter to Support Granting the Petition for Review

EXECUTIVE SUMMARY

Defendant and Petitioner Robert O. Smylie ("Smylie") requests that the State Bar of California send an amicus curiae letter under Rule 8.500(g) of the California Rules of Court in support of his petition for review in *Fagelbaum &Heller LLP v. Robert O. Smylie*, California Supreme Court Case No. S175015. Smylie seeks review of the decision of the Court of Appeal holding that Smylie, a California lawyer, had waived his right as a client to non-binding arbitration under the State Bar's Mandatory Fee Arbitration Act ("MFAA"), Cal. Bus. & Prof. Code § 6200 et seq., when he raised and sought affirmative relief for legal malpractice in a contractual arbitration initiated under the California Arbitration Act ("CAA"), Cal. Civ. Code Proc. § 1280 et seq., by the law firm that had represented him in two prior lawsuits. *Fagelbaum & Heller LLP v. Robert O. Smylie*, 174 Cal.App.4th 1351, 95 Cal.Rptr.3d 252 (2009). Under California Business and Professions Code section 6201, subd. (d)(2), an MFAA arbitration is deemed waived if the client files any action or pleading seeking "[a]ffirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct."[1] Finding under existing case law that Smylie's cross-demand for arbitration and relief on his malpractice claim was a "pleading" under section 6201, subd. (d)(2), the court of appeal

[1] In an MFAA arbitration, evidence of malpractice and professional misconduct is admissible, but only to the extent that it relates to the fees or costs to which the attorney is entitled, and any refund to the client may consist only of "unearned fees, costs, or both previously paid to the attorney." Cal. Bus. & Prof. Code § 6203(a).

concluded that his demand effected a waiver of his right to MFAA arbitration. 174 Cal.App.4th at 1362.[2]

The court of appeal affirmed the trial court's order to consolidate and compel binding arbitration[3] and its later judgment confirming an arbitration award for the law firm and against Smylie. Smylie then petitioned the California Supreme Court for review.

Under the State Bar's amicus curiae policy, participation as an amicus is "extremely limited." While the procedural history and issues raised by Smylie are complicated, the court of appeal's decision does not involve the validity or interpretation of the MFAA that "seriously affect the administration of justice and attorney-client relations" or "matter compelling public interest." Moreover, an amicus letter would not "constitute a significant contribution" to the determination of the merits of the issues at this point in time. State Bar Amicus Curiae Participation Policy, Board Book tab 14, art. 1, § 3. Accordingly, it is recommended that Smylie's request for an amicus curiae letter from the State Bar be denied.

RECOMMENDATION

For the reasons summarized below, the Office of General Counsel recommends that the Board Committee on Operations decline the request by counsel for appellant Robert O. Smylie that the Bar participate in *Fagelbaum & Heller LLP v. Robert O. Smylie*, California Supreme Court Case No. S175015, by filing an amicus curiae letter supporting the petition. There is nothing basic to the State Bar in the grounds for review. The request does not meet the requirements of the State Bar's amicus policy.

RESOLUTION

If the Board Committee on Operations concurs with the Acting General Counsel's recommendation, it would be appropriate to adopt the following resolution:

> **RESOLVED** that the Board Committee on Operations declines to authorize the Acting General Counsel, or his designee, to file an amicus curiae letter in *Fagelbaum &Heller LLP v. Robert O. Smylie*, California Supreme Court Case No. S175015, Court of Appeal, Second Appellate District, Case No. B205181, Los Angeles Superior Court, Case No. BC359482.

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[2] The court noted in dicta that waiver was not the only ground under the MFAA upon which the trial court "*could have compelled CAA arbitration*." It stated that under California Business and Professions Code section 6201, subd. (c), the trial court had discretion to vacate the automatic stay upon finding that the matter is inappropriate for MFAA arbitration and suggested that under the circumstances in this case allowing the non-MFAA arbitrations to proceed would also have been appropriate. *Id.*(italics added).

[3] The law firm was also a sub-lessee of Smylie. Three arbitration proceedings had been initiated, two of which were based on attorney-client fee agreements and the third based on the sublease's arbitration provision. The contractual arbitration in which Smylie raised and sought affirmative relief for legal malpractice was initiated by the law firm based on an arbitration provision in the sublease.

QUESTIONS PRESENTED BY PETITIONER

The Petition for Review states the issues on review are:

1. "Whether a client's waiver of his rights under the Mandatory Fee Arbitration Act ("MFAA") should be sparingly found *or* should the client be deemed to have waived these important statutory rights by inadvertently asserting in a collateral unlawful detainer proceeding that no monies are due to his former lawyer because of malpractice and overbilling in circumstances where the client:

   (a) Expressly stated that the issue of the amount of fees owed to the attorney, if any, was the subject of a pending MFAA proceeding; and

   (b) The issue of an attorney's entitlement to fees based on an assertion of malpractice is statutorily permitted to be raised in an MFAA proceeding pursuant to Business and Professions Code section 6203?"

2. "Whether a trial court has discretion under Business and Professions Code section 6201 subdivision (c) to vacate the automatic stay imposed under the MFAA and order the case to binding arbitration if it determines the case is too complex and is unlikely to resolve the dispute between the parties?"

STATE BAR AMICUS POLICY

State Bar amicus participation must involve issues basic to the State Bar. Examples of these issues include the validity and interpretation of the State Bar Act. Amicus curiae participation is considered appropriate where, among other conditions, significant legal questions are involved and a State Bar amicus curiae pleading would constitute a significant contribution to the determination of such questions; the court may consider the opinion of the State Bar on the matter in question to be enlightening; and, the resolution of the issue before the court will have an impact upon the development of the law. (State Bar Amicus Policy, Board Book tab 14, art. 1, § 3.)

However, and significantly, the amicus policy provides that as a general rule State Bar participation should be extremely limited. Specifically, Section 3 of the State Bar's rules for Amicus Curiae Participation state the State Bar's policy on amicus participation:

> The State Bar is a judicial branch agency and <u>should not ordinarily take a partisan position in another's lawsuit</u>. State Bar amicus curiae participation is thus extremely limited and necessarily involves issues basic to the State Bar as, for example, validity and interpretation of the State Bar Act or State Bar rules; validity and interpretation of State Bar sponsored legislation; or the validity and interpretation of legislation or acts of court that can seriously affect the administration of justice and attorney-client relationships. It is also recognized that the State Bar amicus curiae participation will have greater impact on the courts if used <u>sparingly</u>.

Board Book, Tab 14, art. 1, § 3 (emphasis added). Additionally, amicus curiae participation is authorized only as follows:

> a. At the appellate level, and generally only in the highest court where an issue is likely to be determined.
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> b. When one or more significant legal questions are involved and a State Bar amicus curiae pleading would constitute a significant contribution to the determination of those questions.
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> c. Where the position sought to be advanced is consistent with previous policy of the State Bar or is a matter of compelling public interest, which the Board of Governors then adopts as policy of the State Bar consistent with its due charge. Where the pleading amicus curiae would not support a previous policy of the State Bar, the Board of Governors shall first determine whether the position sought to be advanced ought to be the policy of the State Bar; and the board will make a determination of whether the policy position of the State Bar should be advanced in that particular case through a pleading amicus curiae.
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> d. The court may consider the opinion of the State Bar on the matter in question to be enlightening and persuasive.
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> e. The resolution of the issue before the particular court involved will have an impact upon the development of the law.
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> f. The filing of the pleading is feasible, including timing, availability of counsel and expenses.
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> g. The filing of any pleading on behalf of the State Bar will be in compliance with the governing rules of court.

SUMMARY OF FACTS AND PROCEEDINGS BELOW

In 2001, attorney Robert O. Smylie ("Smylie") employed Fagelman & Heller LLP ("F&H") to defend him in litigation called *Neo-Tech v. Smylie*. F&H claims the parties entered into a written fee agreement with a binding arbitration clause. Smylie has denied the fee agreement was in writing, or that he orally agreed to arbitration.

In a 2003 written fee agreement with a binding arbitration clause, Smylie employed F&H to represent him in bad faith litigation against Smylie's insurance carrier, which refused to defend Smylie in *Neo-Tech*.

F&H also subleased law office space from Smylie. For calendar year 2006, F&H and Smylie entered into a sub-sublease containing a binding arbitration clause[4].

[4] The clause provided, in relevant part: "The parties hereto hereby agree that any controversy or claim arising out of or relating to this Sub-Sublease, or any breach or material default hereof will be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association…."

Between late 2005 and early 2006, there was allegedly a botched settlement offer in the bad faith litigation.

F&H maintains that, in March 2006, Smylie and it entered into a rent credit agreement allowing F&H to set-off legal fees owed by Smylie in the bad faith litigation against F&H's monthly rent obligation. Around this time, the bad faith litigation ended with a defense verdict.

In April 2006, Smylie refused to allow F&H further rent credit and demanded rent payment. F&H submitted a demand to ADR Services, Inc. ("ADR") for contractual binding arbitration under the 2003 written fee agreement. Smylie did not submit an answer.

In June 2006, Smylie applied to the Beverly Hills Bar Association ("BHBA") for non-binding fee arbitration under the MFAA. Smylie claimed that the total amount in dispute was $1,077,566, that Smylie had paid F&H $471,639, and that Smylie was owed a refund of $471,639, leaving a balance of zero. In an attachment, Smylie alleged that F&H had committed legal malpractice in an amount exceeding the amounts Smylie already paid plus those claimed by F&H as still owing.[5]

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[5] The Mandatory Fee Arbitration Act is in the State Bar Act. Relevant provisions follow.

BPC § 6200:
(a) The board of governors shall… establish, maintain, and administer a system and procedure for the arbitration, and may establish, maintain, and administer a system and procedure for mediation of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar ….
(b) This article shall not apply to any of the following:
… (2) Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct, except as provided in subdivision (a) of Section 6203. …
c) Unless the client has agreed in writing to arbitration under this article of all disputes concerning fees, costs, or both, arbitration under this article shall be voluntary for a client and shall be mandatory for an attorney if commenced by a client.
(d) The board of governors shall … allow arbitration and mediation of … disputes under this article to proceed under arbitration and mediation systems sponsored by local bar associations … .

BPC § 6201
…(b) If an attorney… commences an action in any court or any other proceeding and the client is entitled to … arbitration under this article, and the dispute is not one to which subdivision (b) of Section 6200 applies, the client may stay the action or other proceeding by serving and filing a request for arbitration…. The request for arbitration shall be served and filed prior to the filing of an answer in the action or equivalent response in the other proceeding;… .
(c) Upon filing … the request for arbitration, the action or other proceeding shall be automatically stayed until the award of the arbitrators is issued or the arbitration is otherwise terminated. The stay may be vacated… after a hearing duly noticed by any party or the court, if and to the extent the court finds that the matter is not appropriate for arbitration *under the provisions of this article*. The action or other proceeding may thereafter proceed subject to the provisions of Section 6204.
(d) A client's right to request or maintain arbitration under… this article is waived by the client commencing an action or filing any pleading seeking either of the following:
… (2) Affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.

BPC § 6203
(a) The award shall be in writing and signed by the arbitrators …. It shall include a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy. …

In July and August 2006, Smylie served F&H with 3-day notices to pay rent or quit. On August 23, 2006, F&H invoked the sub-sublease's arbitration clause by submitting a demand to the American Arbitration Association ("AAA").

On September 14, 2006, Smylie filed a cross-demand with AAA, requesting forfeiture of lease, possession of premises, unpaid rent, rental damages, late fees, interest and attorneys fees. Anticipating that F&H would claim rent credit for legal fees owed, the cross-demand alleged that Smylie had paid F&H $471,670 in legal fees and costs, that F&H claimed $605,927 was still owing, but that due to F&H's overbilling and legal malpractice, Smylie not only owed no legal fees and costs but was entitled to a refund, and that the fee dispute and demand for refund were subject to a non-binding MFAA arbitration with BHBA. The cross-demand also alleged that Smylie had notified F&H it could no longer offset rent with outstanding legal fees.

In September 2006, the parties participated in mediation through BHBA, but did not reach agreement. F&H attempted to go forward with the ADR arbitration, but ADR would not proceed without a court order.

On September 29, 2006, F&H filed a complaint against Smylie in superior court. The first cause of action alleged breach of a 2001 oral fee agreement for representation in *Neo-Tech*. The second cause of action added that the *Neo-Tech* fee agreement had been in writing, but was lost. The third cause of action alleged breach of the 2003 written fee agreement, and that F&H had instituted binding arbitration based on the written agreement.

In October 2006, F&H filed a motion to compel binding arbitration and to consolidate arbitration proceedings, with documents and declarations regarding the chronology of events. F&H argued that Smylie had waived his right to MFAA non-binding arbitration by alleging - in the BHBA form and the AAA cross-demand - that F&H committed legal malpractice. Smylie opposed the motion, denying that there was ever a written retainer agreement for the *Neo*-Tech litigation or that he orally agreed to arbitration.

On November 22, 2006, the trial court granted F&H's motion to compel arbitration and consolidated the MFAA and AAA arbitrations into the ADR binding arbitration.

Evidence relating to claims of malpractice and professional misconduct, shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying any such claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney.

BPC § 6204

(a) The parties may agree in writing to be bound by the award of arbitrators appointed pursuant to this article at any time after the dispute over fees, costs, or both, has arisen. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days… .

(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 … .

(d) The party seeking a trial after arbitration shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. …

A three-member ADR panel conducted the arbitration proceeding on dates in 2006 and 2007. In September 2007, the Binding Arbitration Award issued. The arbitration panel found that the parties entered a lost written fee agreement with an arbitration clause for the *Neo-Tech* attorney-client relationship; that F&H had not committed legal malpractice or prejudice to Smylie in the bad faith litigation; that F&H should be awarded legal fees and costs for both litigations; and that the parties had entered a rent credit agreement that should be enforced. F&H was awarded $1,078,897 in attorney fees and costs.

In November 2007, F&H moved to confirm the ADR award. Smylie opposed the motion. Smylie requested that the trial court vacate the award, contending that the arbitrators were without power to conduct binding arbitration because he was not afforded the right to non-binding MFAA arbitration, or that the court correct the award as set forth in a motion he had brought at arbitration. The trial court granted F&H's motion, entered judgment confirming the ADR award, and filed a statement of decision. The statement of decision found that Smylie waived the right to MFAA arbitration by alleging on five occasions that F&H committed legal malpractice. The statement said the first two waivers were effected by Smylie's allegations on the BHBA non-binding arbitration form and the AAA cross-demand.[6]

Smylie appealed from the judgment, raising a number of issues, including that the trial court should have stayed the lawsuit until non-binding arbitration under the MFAA was completed, and that the court should have stayed, instead of compelling, contractual arbitration initiated by F&H under the California Arbitration Act ("CAA")[7]. Smylie claimed he did not waive MFAA non-binding arbitration because he did not seek affirmative relief due to malpractice, and that there was no agreement for CAA arbitration of the *Neo-Tech* fee dispute.

In June 2009, the Court of Appeal issued an Opinion rejecting Smylie's contentions and affirming the trial court's judgment. Smylie's Petition for Rehearing was denied.

On July 27, 2009, Smylie's attorney filed a Petition for Review with the California Supreme Court.

On August 4, 2009, F&H's attorney filed an opposition Answer to Smylie's Petition for Review.

On August 14, 2009, Smylie's attorney filed a Reply to Answer to Petition for Review.

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[6] The three other waivers cited in the statement were Smylie's opposition to an application made by F&H for a right to attach order, Smylie's opposition to F&H's motion to compel arbitration, and Smylie's full participation in the ADR arbitration without asserting that the arbitrators lacked jurisdiction because of his pending MFAA arbitration.

[7] The CAA is found in Code of Civil Procedure section 1280 et seq. The referenced contractual arbitration appears to relate to the binding arbitration provisions in the *Neo-Tech* fee agreement and the Sub-sublease.

SUMMARY OF THE SECOND DISTRICT COURT OF APPEAL'S OPINION

On June 16, 2009, the Court of Appeal certified the Opinion for publication. As it relates to the issues raised in the Petition for Review, the Opinion held that: 1) Smylie waived his right MFAA arbitration by requesting affirmative relief for F&H's alleged malpractice; and
2) the sub-sublease's arbitration agreement was broad enough to cover Smylie's malpractice claim.

With respect to the waiver issue, Smylie had contended that his AAA cross-demand did not seek affirmative relief on account of malpractice because he sought only unpaid rent. He argued that he cannot be deemed to have waived his right to MFAA arbitration because his cross-demand did not seek affirmative relief due to alleged malpractice or professional misconduct, but only alleged that the fee dispute was pending before the BHBA. (*Fagelbaum & Heller LLP v. Smylie* (Cal. App. 2nd Dist, 2009) 174 Cal.App.4th 1351, 1361 [95 Cal. Rptr.3d 252]; Bus. & Prof. Code § 6201, subd. (d)(2).)

In holding that Smylie's AAA cross-demand effected a waiver of his right to MFAA arbitration, and concluding the trial court correctly ruled that Smylie waived MFAA non-binding arbitration by requesting affirmative relief in the AAA cross-demand[8], the Court of Appeal reasoned that: The allegations in the cross-demand clearly implied that there was a rent credit agreement but that, because Smylie claimed he no longer owed F&H legal fees due to F&H's malpractice, the agreement was terminated. In order to award cash rents in lieu of credits in the AAA arbitration, the arbitrator would necessarily have to reach the issues of whether there had been a rent credit agreement, and if so, whether such debt should be eliminated by deducting Smylie's damages for alleged malpractice. Thus, the AAA cross-demand did not simply seek past due rent, but a rescission of the rent credit agreement and a refund of monies that would be due as rent, if the arbitrator found that Smylie's damages for malpractice was sufficient to offset the entire debt. Since a demand for arbitration is a pleading (*Blatt v. Farley* (1990) 226 Cal.App.3d 621, 627), a cross-demand is a pleading. Thus, the AAA cross-demand was a pleading seeking affirmative relief consisting of money that would be due only if the outstanding legal fees due were eliminated by deducting alleged damages for malpractice. (*Fagelbaum & Heller LLP v*. *Smylie, supra*,174 Cal.App.4th at 1361-1362).

The court determined that waiver was not the only MFAA ground upon which the trial court could have compelled AAA arbitration. The Opinion observed the MFAA provides the court with discretion to vacate the automatic stay upon finding that the matter is inappropriate for MFAA arbitration. (*Fagelbaum & Heller LLP v*. *Smylie, supra*,174 Cal.App.4th at 1362; Bus. & Prof. Code § 6201, subd. (c).) The Opinion states that "Given the complex issues of malpractice and attorney misconduct at the heart of Smylie's claims and defenses, the MFAA fee arbitration was unlikely to resolve the parties' disputes; thus, the court had discretion to allow F&H's other proceedings - the consolidated ADR and AAA arbitrations - to go forward immediately." (*Fagelbaum & Heller LLP v*. *Smylie, supra*,174 Cal.App.4th at 1362.)[9]

[8] The court did not reach Smylie's contentions that the trial court erred in concluding there were four other occasions on which he waived MFAA arbitration.

[9] In a footnote, the Court of Appeal noted that MFAA arbitration and contractual arbitration are different creatures, that the ADR arbitrator does not have the power to determine the MFAA issues, and thus that the trial court's

On appeal, Smylie had contested the existence of an agreement to arbitrate *Neo-Tech* fees. The Court of Appeal determined that Smylie placed all outstanding and previously paid legal fees and costs in issue in the AAA arbitration. The court concluded that the language of the arbitration clause of the sub-sublease was broad enough to include related controversies not expressly described in the agreement. The court determined that Smylie's refusal to accept offsets against outstanding legal fees and costs, and instead demand rental payments, based on the malpractice claim, created a dispute clearly related to the sub-sublease in which Smylie had agreed to binding arbitration. Thus, the Opinion held that the sub-sublease's arbitration clause was broad enough to include the *Neo-Tech* controversy. (*Fagelbaum & Heller LLP v. Smylie, supra*, 174 Cal.App.4th at 1363-1364.)

POSITIONS OF THE PARTIES ON REVIEW

The Petition on Review contends the Court of Appeal erred in its interpretation of Smylie's cross-demand. Smylie claims the cross-demand sought to put the AAA arbitrator on notice of the pending MFAA fee arbitration, but without seeking a refund of fees. Smylie asserts the Court of Appeal erred in inferring that he sought to offset his damages for malpractice against a legitimate debt owing, and because the fee dispute was not before AAA, the Opinion attributes jurisdiction to the AAA panel that it did not have. The petition argues that the proper course of action would have been for the arbitrator to stay the AAA proceeding pending determination of the fee dispute either in the MFAA arbitration or in a subsequent ADR arbitration, and that once that occurred, the AAA arbitration could go forward to determine the issues of rent and possession.

The petition contends the trial court and Court of Appeal seemed to apply an erroneous standard - a presumption in favor of a client's waiver of his rights under the MFAA. The petition argues that, rather than strictly construing the waiver provision to apply to situations where the client has filed a malpractice action for damages, such as occurred in *Aguilar v. Lerner* (2004) 32 Cal.4th 947, the trial court and Court of Appeal found waiver where malpractice was asserted strictly in a defensive manner. The petition contends that the Supreme Court should grant review to set forth a clear rule that a client who asserts malpractice as a defense to fees in compliance with Bus. & Prof. Code § 6201, subd. (d)(2) shall not be deemed to have waived his rights under the MFAA.

With respect to the second issue raised, the petition contends that the Court of Appeal made a mistake of law in holding that the trial court had discretion to vacate the stay and order binding arbitration given the complexity of the issues and the unlikelihood that the MFAA would resolve the parties' disputes. The petition contends this statement was an impermissibly massive expansion of the trial court's discretion to deprive clients of their rights under the MFAA, and that the statement will create uncertainty because malpractice claims are common to MFAA fee disputes in reported cases. The petition asserts that the Opinion's statement of the law omitted critical statutory language that limits the court's discretion to vacate a stay of MFAA

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purposed consolidation of the MFAA arbitration with the two contractual arbitrations was, in essence, an order that the ADR and AAA arbitrations go forward *instead of* the MFAA arbitration. (*Fagelbaum & Heller LLP v. Smylie, supra*,174 Cal.App.4th at 1363, fn 2.)

arbitration.[10] The petition seeks review to limit the trial court's discretion to vacate the automatic stay, as in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 574, where the Supreme Court found language similar to the vacating language of section 6201, subd. (c), but in another provision of the MFAA, to be limiting in nature. The petition asserts that, since the MFAA has its own set of rules and limitations, the Court of Appeal erred in applying a discretional standard pertaining to contractual arbitration, whether the case was amenable to arbitration. The petition further asserts that, even if the trial court had discretion to vacate the stay, the trial court did not exercise its discretion because the statement of decision does not contain grounds provided for in the statute, and the error should be corrected on review.

The petition contends that the MFAA's waiver provision has caused great confusion in the courts and is a trap for clients, that the Supreme Court should take this opportunity to adopt a clear test on the waiver issue, and that the waiver provision should be narrowly interpreted and any waiver claim should be subject to strict scrutiny. The petition states the test should be whether the client's pleading seeks only to raise malpractice defensively on the issue of attorneys fees and costs or whether it seeks affirmative relief such as damages. The petition asserts that the effectiveness of MFAA arbitration proceedings will be dramatically reduced if the trial court's broad interpretations of the waiver provision and vacating a stay provision are allowed to stand, and the continuing viability of the MFAA is an important issue of law meriting the Court's attention.

F&H's Answer states this case is factually unique, that it does not present unsettled question of law or conflict in the law among the Courts of Appeal necessitating uniformity of decision by the Supreme Court (see Cal. Rules of Court, rule 8.500(b)(1).) On the waiver issue, the answer asserts that the Court of Appeal correctly concluded that Smylie waived MFAA arbitration in harmony with the statute and existing case law, and that the petition does not present a single case in conflict with the Court of Appeal's Opinion. Regarding the second issue, the answer asserts that the Court of Appeal followed the language of Bus. & Prof. Code, § 6201, subd. (c), with support from existing case authority, to find the trial court appropriately used its discretion to lift the MFAA stay, and that the petition does not cite a single authority to the contrary. Hence, this issue is settled, and the law is not in conflict on this issue.

Smylie's Reply to F&H's Answer claims the Court of Appeal's Opinion is inconsistent with the MFAA and existing case law.

RECOMMENDATION THAT THE STATE BAR DECLINE TO PARTICIPATE WITH AMICUS CURIAE SUPPORT

Smylie asked the State Bar's Committee on Mandatory Fee Arbitration ("MFA") to make a recommendation on the request for amicus curiae support. The MFA informed the Office of General Counsel that it takes no position with respect to the merits of either party's claims, but recommends that the Board support the petition so that the Court may clarify the issues for future arbitration or litigation of similar fee disputes and collateral claims. The MFA is concerned that the trial court and appellate court may have misapplied the two MFAA statutes. The MFA acknowledges that the facts surrounding the waiver issue are convoluted, but

[10] The alleged omission is in *italics* at section 6201, subdivision (c) in footnote 2.

believes that judicial rejection of the client's attempt to preserve the right to MFAA arbitration while defending the AAA arbitration warrants examination, and that it raises a significant issue for other parties with competing claims. On the issue of whether the trial court had discretion to lift the automatic stay and consolidate actions, the MFA is concerned that nowhere in the MFAA statutes is the trial court given such expansive discretion to lift the stay due to the complexity of issues or in the interests of judicial or arbitral economy, and that the exercise of discretion must be made within the confines of the MFAA only.

With due respect for the concern of the MFA, the petition's grounds for review do not meet the requirements of the Bar's amicus policy. Although the MFAA is in the State Bar Act, nothing in the issues is basic to the State Bar. While interpretation of two provisions of the MFAA is at issue, the validity of those provisions is not. Moreover, the grounds for review do not seek resolution of a conflict amount the Courts of Appeal, or of a significant legal question where State Bar amicus curiae participation would constitute a significant contribution to the determination of the question and the court would consider the opinion of the State Bar on the issues to be enlightening. The first ground for review clearly is specific to the facts. The second ground takes an alternative basis for affirming the trial court's judgment and tries to characterize it as presenting a significant legal question with consequences beyond the parties' disputes. However, the convoluted and disputed facts make it highly questionable that review will be granted, or even if review is granted, that its resolution will contribute to the development of the law. Moreover, State Bar amicus curiae participation would not constitute a significant contribution to resolve the question.

Therefore, it is recommended that the State Bar decline the request to participate as amicus curiae.