

MARCH 121
Revisions to
Model Rules of
Procedure for Fee
Arbitrations-
Request for
Approval after
Public Comment

DATE: February 10, 2010

TO: Members of the State Bar Discipline Oversight Committee

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

SUBJECT: Proposed Revisions to the State Bar Model Rules of Procedure for Fee Arbitrations– Request for Approval following return from Public Comment

Executive Summary

This item seeks approval of proposed revisions to the State Bar's Model Rules of Procedure for Fee Arbitrations.

Mandatory Fee Arbitration (MFA) is available through 44 mandatory fee arbitration programs operated by local bar associations in addition to the State Bar's program. Local bar program rules of procedure must be approved by the State Bar's Board of Governors or its designated committee to establish program jurisdiction to arbitrate attorney's fee disputes under the Business and Professions Code, section 6200, *et seq.*

In an attempt to promote uniformity and procedural consistency between programs, expedite the rule approval process, and ensure that programs are in compliance with the statutes, Minimum Standards and developments in the law, in November 2006, the Board of Governors approved the State Bar's first Model Rules of Procedure for Fee Arbitrations as recommended by the MFA Committee. The local bar associations are not required, but are encouraged, to adopt the Model Rules in whole or in part. To date, nearly all the local programs have adopted the Model Rules in whole or in part or are in the process of doing so.

Last year, the MFA Committee reviewed the Model Rules and identified various Model Rules that were either incomplete or in need of updating to comply with recent legal developments or the Minimum Standards. The proposed revisions are described in this agenda item and set forth in Attachment A. The revisions set forth in Attachment A were released on January 7, 2010 for a 45 day public comment period. No comments were received to date. It is also recommended that the Board approve any prospective local bar rule changes that adopt these revisions to avoid the requirement of seeking rule change approval by the DOC Committee on an individual basis. Questions concerning

this item should be addressed to Jill Sperber, Mandatory Fee Arbitration at (4150)538-2023 or Jill.Sperber@calbar.ca.gov.

I. Background

Pursuant to Article 13, Arbitration of Attorney's Fees (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 statutory scheme for Mandatory Fee Arbitration (MFA) provides for fee arbitration services sponsored by local bar associations. (Bus. & Prof. Code, §6200, subd (d).) The Board of Governors adopts and reviews the local bars' rules of procedure "...to insure that they provide for a fair impartial, and speedy hearing and award." (*Ibid.*) Today, mandatory fee arbitration is available through 45 local bar association programs in addition to the State Bar's MFA program.

The State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards") establish the essential provisions that must be included in all local bar program rules of procedure to establish their jurisdiction for Article 13 fee arbitrations. Prior to 2006, local bar programs operated under vastly different procedural rules, some of which were outdated or in some cases, inconsistent with the MFA statutes and Minimum Standards.

In November 2006, the Board of Governors approved the first set of Model Rules of Procedure for Fee Arbitrations. To achieve greater inter-program consistency, expedite the review of local bar rules, and ensure that local bar rules comply with Minimum Standards, the State Bar's Mandatory Fee Arbitration (MFA) Committee developed Model Rules of Procedure for Fee Arbitrations for local bar programs to use. Although the State Bar does not require local bar programs to adopt the Model Rules, the MFA Committee has encouraged them to do so. To date, the vast majority of local bar programs have adopted the Model Rules and the rest are in the process of adopting them in whole or in part.

Model rule revisions were approved July 2008. During the past Board year, the MFA Committee identified several additional Model Rules that were either incomplete or required modification consistent with recent legal developments. Also, several new Model Rules were proposed to comply with the Minimum Standards. These revisions were developed by the MFA Committee at its September 10 and November 20, 2009 meetings.

At the MFA Committee request, the Discipline Oversight Committee released the proposed revisions set forth in Attachment A for public comment for a 45 day period at its meeting on January 7, 2010.

II. Proposed Revisions to the Model Rules of Procedure for Fee Arbitrations

1. **Definition of non-lawyer arbitrator**-Rule 1.9: new definition to comply with Minimum Standard para. 20.
2. **Expand definition of trial**-Rule 1.14: add language to define trial as both court trial and private arbitration following non-binding MFA as established in *Schatz v. Allen Matkins* (2009) 45 Cal.4th 557.
3. **Requirement to provide client with notice of right to MFA**-Rule 2.5: New rule complies with Minimum Standard para. 4 which sets forth the statutory requirement that a lawyer deliver the Notice of Client's Right to Arbitration prior to or at time of commencement of an action or proceeding to collect attorney's fees.
4. **Notice of Attorney Responsibility**-Rule 14.3: rule confirms that service must be made before notice of appointment of panel consistent with Minimum Standard para.14.
5. **Dismissal "without prejudice"**-Rule 19.1: protects party's right to re-file for MFA in the event that the parties' settlement agreement is not followed.
6. **Requirement that retired judge serving as fee arbitrator have active membership status**-Rule7: conforms to Minimum Standard para.21.
7. **Confidentiality of case file**-Rule 26.3-revision to confidentiality rule tracks State Bar rule of procedure 27.3, approved by the Board last year to protect the program from disclosure of MFA files to non-parties absent a court order.
8. **Automatic post-award interest**-Rule 39.3: tracks award template awarding automatic post-award interest, deleting automatic pre-award interest, which is allowed but less frequently awarded. Companion change to the Minimum Standards also requested for public comment.
9. **Include option to request amendment in addition to correction of award**-Rule 40.1: as confirmed in *Karton v. Segreto* (2009) 176 Cal. App.4th 1, parties are entitled to seek correction or amendment from the arbitration panel, and after 30 days from service of the award, from the court via a petition as provided by statute.
10. **Referral of attorney misconduct by arbitration provider permitted**-Rule 42: added to provide optional rule implementing Minimum Standard para. 6, authorizing referral of attorney misconduct to the State Bar's Office of Intake.

III. PUBLIC COMMENT

At its January 2010 meeting, the DOC Committee approved release of the proposed revisions for a 45 day public comment period which will end February 23, 2010.

Though not binding and suggested only, the State Bar's Model Rules of Procedure for Fee Arbitrations indirectly affect a narrow albeit important segment of stakeholders, i.e., the local bar association MFA programs. The MFA Committee directly solicited the local bar programs (staff and chairpersons) for public comment. However, no public comments have been received to date. Any public comments received after the date of submission of this agenda item will be circulated the MFA Committee for review and recommendation to the DOC and Board. If further analysis by the MFA Committee is warranted, the MFA Committee will ask that this matter be taken off the DOC's March agenda to return to the MFA Committee's March 26, 2010 meeting for consideration of comments received.

IV. Fiscal/Personnel Impact

None.

V. Impact on Board Book/Administrative Manual

None.

VI. State Bar Rules Impact

None.

VII. Proposed Resolutions

For the Discipline Oversight Committee:

If the Discipline Oversight Committee agrees with the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations in the form set forth in Attachment A, adoption of the following resolution would be appropriate:

“RESOLVED, that the Discipline Oversight Committee hereby recommends approval of the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations, in the form attached hereto as Attachment A, for approval by the Board of Governors; and it is

FURTHER RESOLVED, that the Discipline Oversight Committee hereby recommends that the Board of Governors further provide that amendments by local bar associations to their local fee arbitration rules and procedure that conform with the Model Rule revisions approved here are deemed approved by the Board and its designee (DOC) upon the filing with the Director of the State Bar's Office of Mandatory Fee Arbitration such amendments."

For the Board of Governors:

If the Board of Governors agrees with the recommendation of the Discipline Oversight Committee to approve the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations in the form set forth in Attachment A, adoption of the following resolution would be appropriate:

"RESOLVED, upon the recommendation of the Discipline Oversight Committee, that the Board of Governors hereby approves the proposed revisions to the State bar Model Rules of Procedure for Fee Arbitrations, in the form attached hereto as Attachment A; and it is

FURTHER RESOLVED, that upon recommendation of the Discipline Oversight Committee, the Board of Governors hereby provide that amendments by local bar associations to their local fee arbitration rules and procedure that conform with the Model Rule revisions approved here are deemed approved by the Board and its designee (DOC) upon the filing with the Director of the State Bar's Office of Mandatory Fee Arbitration such amendments."