April 5, 2010

Emily Day
Contra Costa County Bar Association
704 Main Street
Martinez, CA 94553

Re: Your Public Comments on Proposed Changes to Notice of Rights Form and Minimum Standards

Dear Emily,

Thank you for submitting your comments on March 9, 2010 to the proposed changes to the "Notice of Your Rights After Arbitration" and the Minimum Standards. Your thoughtful comments were much appreciated. The Fee Arbitration Committee reviewed them at its March 26, 2010 meeting, fueling a robust discussion. This letter summarizes the Committee's consensus reply.

1. **Notice of Rights form Proposed Amendment**: The authority for an arbitrator's right to amend is found in case law, as was confirmed recently in *Karton v. Segreto* (2009) 176 Cal.App.4th 1. The purpose of amendment is to determine an issue the arbitrator inadvertently neglected to decide initially.

   There is a dispute in the law as to the deadline for a party to request amendment. However, the *Karton* court accepted the interpretation adopted by our Committee following *Delany v. Dahl* (2002) 99 Cal. App. 4th 650, which permits amendment any time until the trial court confirms the award. Without definitive authority, the Notice of Your Rights form is left intentionally vague with respect to the time frame for requesting amendment. As a result of our review, however, our next draft may urge parties to seek amendment "promptly."

   Model Rule 40.3 discusses the procedure for seeking correction or amendment, providing that any request be copied to the other side. If your program has not already adopted this rule, your program should consider doing so for the benefit of the parties. Based on your comment, the Committee agreed to explain the right to correct the award by using language from CCP section 1286.6 and include a reference to the program's rules of procedure for requesting correction or amendment of the award.

2. **Minimum Standards Proposed Change to Paragraph 19**: The thrust of your argument opposing the proposed prohibition of conditioning a three member panel on giving up the right to non-binding arbitration appears to be the difficulty for programs to secure lay arbitrators to serve on three member panels. However, this proposal is not arbitrary, contrary to your comment.

The statute provides for arbitration by a single or three member panel. This is an intentional deviation from CCP section 1282 which permits one neutral arbitrator. We understand from the legislative history of the MFA statute that the requirement that a lay person serve on three –member panels was to make client-consumers of MFA more likely to feel comfortable with and thus use the program. However, exactly what factor(s) entitles parties to a three member panel is not defined by statute.

Recognizing that three-member panels may not be appropriate for matters below a certain dollar amount, the Minimum Standards approved by the Board of Governors uses the "reasonable" dollar threshold as the criteria for entitlement to a three- member panel. For now, the MFA Committee has agreed that $25,000 or over is unreasonable. This has been a consistent threshold since the outset of the MFA program in 1979, adjusted for inflation.

In contrast, the statute is clear that there are only two ways that an MFA award becomes binding: 1) by written agreement of the parties entered into after the fee dispute has arisen; and, 2) by allowing a non-binding award to become binding by the passage of time. This again was another legislative design, also for the purpose of making the client-consumers, as well as lawyer-consumers, more likely to use the program with the apparent safeguard of being able to request in essence an advisory award that they later can decide either to accept or reject. There is no statutory authority, however, for a program to take away this right and require binding arbitration or otherwise alter one of the MFA program's hallmarks- a non-binding arbitration with the right to a new trial- merely because it may be more expedient to do so.

Additionally the conclusion that, without requiring binding arbitration to obtain a three member panel, a program will have to spend more time and money to accommodate three member panels is based upon the assumption that parties are more likely to accept single arbitrators to avoid CCCBA's requirement that the arbitration be binding. This assumption, in turn, rests on the belief that clients ultimately prefer non-binding MFA to keep their options open over the perceived protection of a three member panel, which must include a non-lawyer, to hear their fee disputes.

However, it is the experience of the Committee, administrators and attorneys alike, that there is no way to ascertain what motivates clients more. For all we know, the

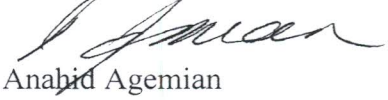
number of three member panels will stay the same despite the proposal because clients may have already concluded that having their fee dispute decided with the help of a lay person and a three member panel is of paramount importance even if it must proceed as binding.

The impact of the proposal is also unclear when considering the number of cases assigned to a single arbitrator initially by CCCBA due to the absence of a binding agreement where the parties later stipulate to binding MFA prior to the taking of evidence. However, the Committee believes that it simply cannot be foretold that the number of three member panels will increase due to a ban on conditioning entitlement to a three member panel on waiving the right to non-binding arbitration.

The Committee disagrees with the rationale you rely upon for explaining that larger fee disputes necessarily beget agreements for binding arbitration. In fact, the opposite is often true. A former chair of our Committee, whose expertise is in handling multi- million dollar fee disputes, states that he rarely, if ever, accedes to binding MFA arbitration initially. He may stipulate to binding closer to the date of hearing depending on the panel and the case. Also, clients and lawyers with smaller fee disputes may feel that binding arbitration is more appropriate because the investment and risk in litigating the dispute in a new trial is adverse relative to the amount in dispute.

In any event, the same resources and time incurred by the program to assign a binding three member panel is the same for a non-binding three member case. Our Committee, comprised of five program administrators, three program chairpersons, as well as lawyers invested in the Program, was sympathetic to the challenges of finding enough lay arbitrators. Some members suggested obtaining a list of the grand jurors in your county whose terms just expired, or hosting a fee arbitrator program, using our members as speakers, just to recruit new lay persons to serve on your panels. However, the Committee was unanimous in its conclusion that the right of the participants to the non-binding option provided by the statute must take precedence over any form of coercion to give up that right, no matter how expedient such a rule may seem to the local program.

Sincerely,



Anahid Agemian
Mandatory Fee Arbitration
Committee Chairperson

Cc. Malcolm Sher, CCCBA Program Committee Chair