

# AGENDA ITEM

MAY 121

Revisions to Notice of Your Rights After Fee Arbitration form- Request for Approval following Return from Public Comment

**DATE:** April 9, 2010

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

**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 Approval following Return from Public Comment

## **Executive Summary**

This matter is before you to approve proposed revisions to the Notice of Your Rights after Fee Arbitration form following return from 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.

At its March 4, 2010 meeting, the Discipline Oversight committee authorized release for a 45 day public comment period proposed revisions to the State Bar's form. The public comment deadline will expire April 21, 2010. New paragraph F of the Notice form would advise parties of the right to apply to the arbitrator(s) to correct or amend the award, in addition to seeking court relief, consistent with a recent opinion in *Karton v. Segreto* (2009) 176 Cal. App. 4<sup>th</sup> 1. The proposed revisions released for public comment are set forth in Attachment A.

After review of the sole comment received to date, at its March 26, 2010 meeting, the MFA Committee recommended that the language from the Code of Civil Procedure authorizing correction of the award be included in new paragraph F. In addition, although there is no authority on the deadline to request amendment of the award, the

MFA Committee recommends that parties be advised that they must do so “promptly.” New paragraph F was also rephrased slightly to improve the paragraph’s organization. The proposed revisions to the Notice form are set forth as Attachment B.

Questions about this agenda item should be directed to Jill Sperber, MFA Director at (415) 538-2023 or [jill.sperber@calbar.ca.gov](mailto: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-fee arbitration legal options. The State Bar provides to the 45 local bar programs a State Bar approved form entitled Notice of Your Rights After Fee Arbitration for this purpose. Amendments to the Notice form were last approved by the Board in November 2009.

The current Notice form in part 2 informs parties of their option to file a petition in court to correct the award on specified grounds such as arithmetic miscalculation or evident mistake as to a description in the award. The Notice does not, however, explain the right to first apply to the arbitrator for correction, as set forth in CCP section 1284. Nor does the current Notice form explain the arbitrator(s)’ ability to amend the award if certain requirements are met. These rights were emphasized in a recent appellate court opinion. Although in *Karton v. Segreto* (2009) 176 Cal.App. 4<sup>th</sup> 1, the court of appeal focused on the trial court’s duties when deciding a petition to correct an award, the court also confirmed the authority of arbitrator(s) to amend an award. In a footnote, the court of appeal suggested that a party seeking amendment of the award from the court must first request amendment from the arbitrator(s) prior to invoking the court’s jurisdiction. (*Id.* at page 10, fn. 14.)

## **II. ISSUE: PROPOSED REVISIONS TO THE NOTICE OF YOUR RIGHTS FORM**

The recent decision in *Karton v. Segreto*, *supra*, prompted the inclusion of a new section in the Notice of Your Rights after Arbitration form to explain that parties have a right to seek correction or amendment of the arbitration award from the arbitrators(s) if certain requirements are met. At its January 15, 2010, the MFA Committee

recommended adding new paragraph F to the Notice of Your Rights After Fee Arbitration form as set forth in Attachment A, shown there in redlining, as follows:

[new]F. DO I HAVE A RIGHT TO REQUEST THAT THE ARBITRATOR(S) CORRECT OR AMEND THE AWARD?

Once the arbitration award has been served, the arbitrator(s) may not reconsider the same or any new evidence presented after the case has been submitted for a decision. However, if you believe that the award contains a miscalculation of figures or imperfection as to form that does not affect the merits, then you may request a correction of the award. You must file a request to correct the award with the program and serve a copy to the other party within 10 days of the date of service of the award. The arbitrator(s) must either correct or deny correction of the award within 30 days of the date of service of the award.

If you believe that the arbitrator(s) failed to include a finding or issue raised in the hearing, then you may request an amendment of the award. The arbitrator(s) on their own may amend the award any time prior to judicial confirmation of the award.

Seeking an amendment or correction of the award by the arbitrator(s) is not permitted to challenge or appeal the arbitrator's findings or conclusions.

The above proposed language was released for public comment as authorized by the DOC on March 4, 2010 for a 45 day public comment period ending April 21, 2010.

### **III. DISCUSSION: PUBLIC COMMENT RECEIVED AND RESPONSE**

One comment was received to date and reviewed at the MFA Committee on March 26, 2010. The comment, from Contra Costa County Bar Association program administrator Emily Day, inquires about the purpose of amending an award and the procedure for requesting same. Ms. Day's comment includes common questions shared by many individuals attempting to ascertain the difference between correction and amendment of an award.

In response, the MFA Committee has proposed two further changes to new Paragraph F to explain to parties their rights to seek correction or amendment of an award from the arbitrator(s). In order to help explain the distinction between these rights and make clear the precise grounds for seeking correction of the award to address technical errors in the award, the MFA Committee decided to use the precise language of Code of Civil Procedure section 1286.2 listing the grounds for correcting an award.

The second change recommended by the MFA Committee concerns mentioning something about the timing for seeking amendment of the award from the arbitrator(s).

In light of the absence of authority on the timing of requesting an amendment of the award, the draft Notice form released for comment intentionally omitted any reference to the time frame within which to seek an amendment. After review of the comment, the MFA Committee agreed to add a provision in the Notice advising the parties to request an amendment “promptly.”

While drafting the two changes, further non-substantive rephrasing was also made so that the paragraph would read more easily.

As a result of the three changes, recommended new paragraph F to the Notice of Your Rights After Fee Arbitration form as set forth in Attachment B in redlining, would read as follows:

[NEW]F. DO I HAVE A RIGHT TO REQUEST THAT THE ARBITRATOR(S) CORRECT OR AMEND THE AWARD?

Once the arbitration award has been served, the arbitrator(s) may not reconsider the same or any new evidence presented after the case has been submitted for a decision. However, the arbitrator(s) may correct the award only if the award contains a miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award or if the award is imperfect in a matter of form not affecting the merits of the controversy. You may request a correction of the award with the program as long as you file your request with the program within 10 days of the date of service of the award and serve a copy on the other party. The arbitrator(s) must correct or deny correction of the award within 30 days of the date of service of the award.

If you believe that the arbitrator(s) failed to include a finding or issue raised in the hearing, then you may request an amendment of the award. You must file your request promptly with the program and serve a copy on the other party. The arbitrator(s) on their own may amend the award any time prior to judicial confirmation of the award. Seeking an amendment or correction of the award by the arbitrator is not permitted to challenge or appeal the arbitrator’s findings or conclusions.

None of the changes require another period of public comment. If the Board approves proposed new paragraph (F), it would become effective immediately.<sup>1</sup>

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<sup>1</sup> Public Comment Rule 1.10 (B) provides in relevant part, that public comment is not required (1) to conform to specific changes in a law, update references or citations, or make similar editorial changes; or (2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal.

Public Comment Rule 1.10(D) provides that the amendment of a rule becomes effective as of the date specified by the board. If it specifies no date, the date of its action is the effective date. This same rule applies when the proposal is not a rule but another matter that was sent out for public comment.

#### **IV. FISCAL/PERSONNEL IMPACT**

None.

**V. RULE AMENDMENTS:** None.

#### **VI. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT**

None.

#### **VII. RECOMMENDATION**

#### **VIII. PROPOSED BOARD COMMITTEE RESOLUTION**

Should the Discipline Oversight Committee agree with the above recommendation, the following recommendation would be appropriate:

**RESOLVED**, that the Board Committee on Discipline Oversight hereby recommends approval by the Board of Governors of the proposed further revisions to the Notice of Your Rights After Arbitration in the form attached hereto as Attachment B, following their return from public comment.

#### **IX. PROPOSED BOARD RESOLUTION**

**RESOLVED**, that the Board of Governors, upon the recommendation of the Discipline Oversight Committee, hereby approves the proposed further revisions to the Notice of Your Rights After Arbitration in the form attached hereto as Attachment B, following their return from public comment.