

AGENDA ITEM

July 122

Revisions to State Bar
Rules of Procedure for
Fee Arbitrations and
Enforcement of Awards-
Request for Approval
following public comment

DATE: June 21, 2010

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

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

SUBJECT: Proposed Revisions to the Rules of Procedure for Fee Arbitrations and Enforcement of Awards by the State Bar of California – Request for Approval following return from Public Comment

Executive Summary

The Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California (MFA rules of procedure) govern the State Bar's own Mandatory Fee Arbitration (MFA) Program. Proposed amendments to the State Bar's rules of procedure are sought to conform to recent amendments to the State Bar's Model Rules of Procedure for Fee Arbitrations approved by the Board of Governors in March 2010. Other revisions incorporate provisions in the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, another Board approved document.

At its May 13, 2010 meeting, the DOC Committee released the proposed revisions for a public comment period of 30 days. No comments were received. The proposed revisions to the State Bar's rules of procedure are set forth in Attachment A. Questions about this item should be directed to Jill Sperber (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. The Board of Governors adopts rules of procedure to govern the arbitration of attorney fee and cost disputes. (Bus. & Prof. Code, § 6200, subd. (a).)

The State Bar's Committee on Mandatory Fee Arbitration ("MFA Committee") oversees the Mandatory Fee Arbitration Program administered by the State Bar and the 44 approved local bar association MFA programs. As one of its duties, the MFA Committee reviews and makes recommendations to the Board of Governors regarding proposed revisions to the State Bar own MFA Program's rules of procedure for fee arbitrations. The State Bar's MFA rules of procedure, like those promulgated by local bar association MFA programs, are subject to review by the Board of Governors or its designee [DOC] to "...ensure that they provide for a fair, impartial and speedy hearing and award" (Bus. & Prof. Code, § 6200, subd. (d)). The rules of procedure must also be consistent with the MFA statutes and the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards").

The State Bar's MFA rules of procedure for its own program were last revised June 1, 2009.

II. DISCUSSION

At its March 2010 meeting, the State Bar Board of Governors approved amendments to the Model Rules of Procedure for Fee Arbitrations following their return from public comment. As part of that agenda item, the Board also approved any amendments proposed by the local bar programs made to conform to the March 2010 Model Rule revisions without requiring the programs to submit their proposed amendments to the Board for approval. However, the State Bar's own MFA program was inadvertently not specified in the Board's March resolution. As a result, it was determined that the amendments to the State Bar's MFA rules of procedure should be circulated for public comment prior to their adoption by the Board.

Other revisions sought incorporate provisions in the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs.

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

- 1. Definition of non-lawyer arbitrator**-Rule 1.10: new definition to comply with Minimum Standard para. 20.
- 2. Expand definition of trial**-Rule 1.15: 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 2.1: 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 15.2: rule confirms that service must be made before notice of appointment of panel consistent with Minimum Standard para.14.

5. **Dismissal “without prejudice**-Rule 20.1: 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 is on active membership status**-Rule 22.5: conforms to Minimum Standard para.21.

7. **Automatic post-award interest**-Rule 41.3: 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.

8. **Include option to request amendment in addition to correction of award**-Rule 42.1: 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.

9. **Referral of attorney misconduct by arbitration provider permitted**-Rule 53: 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

The public comment period ended June 15, 2010. No comments were received.

IV. FISCAL/PERSONNEL IMPACT

None.

V. IMPACT ON BOARD BOOK/ADMINISTRATIVE MANUAL

None.

VI. RULES IMPACT

Should the Board approve the proposed revisions following their return from public comment, Title III, division 4, Chapter 2 would be revised accordingly.

VII. PROPOSED RESOLUTIONS

For DOC:

If the Discipline Oversight Committee agrees to recommend that the Board approve the proposed revisions to the State Bar rules of procedure for fee arbitrations as set forth in Attachment A, adoption of the following resolution would be appropriate:

RESOLVED, that the Discipline Oversight Committee hereby recommends that the Board of Governors approve the proposed revisions to the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California, in the form attached hereto as Attachment A.

For the Board:

If the Board of Governors agrees to adopt the recommendation of the DOC and approve the proposed revisions to the State Bar rules of procedure for fee arbitrations set forth in Attachment A, adoption of the following resolution would be appropriate:

RESOLVED, that upon recommendation by the Discipline Oversight Committee, the Board of Governors hereby approves the proposed revisions to the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California, in the form attached hereto as Attachment A.