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August 2, 2010

Jill Sperber, Director of Mandatory Fee Arbitration
State Bar of California
180 Howard Street, 6th Floor
San Francisco, California 94105

**RE: Orange County Bar Association Rules of Procedure
for Mandatory Fee Arbitration**

Dear Jill:

Enclosed you will find the newly revised Orange County Bar Association ("OCBA") Rules of Procedure for Mandatory Fee Arbitration ("MFA") for review and approval by the State Bar Board of Governors. The following is a brief overview of the changes made.

1. Rule #7 (A) and (G) Assignment of Arbitrators

The change to 7(A) has been made to comply with your letter of May 21, 2010 and the newly revised Guidelines and Minimum Standards for the Operation of MFA Programs which prohibits as a condition to obtaining a three member panel, a requirement that the parties waive their right to non-binding arbitration.

The change to 7(G) has been made to make reference to the mediation component of the OCBA MFA Program.

2. Rule #36 (B) Refunds

Changes to Rule 36 (B) were made merely to clarify the OCBA MFA refund policy.

For your consideration, I have enclosed a redlined version of the revised Rules as well as a clean copy of the Rules for your records.

The Rules have been approved by the OCBA Executive Committee and Board of Directors. Please do not hesitate to contact me if you have any questions or need further clarification at 949/440-6700, Extension 128. Thank you for your prompt attention to this matter.

Sincerely,
ORANGE COUNTY BAR ASSOCIATION

Rebecca Mannara
**Rebecca Mannara, Administrator
Client Services Department**

Enclosures (Rules)

Item 5(B)
RECEIVED
AUG 04 2010
MANDATORY
FEE ARBITRATION
PROGRAM

**ORANGE COUNTY BAR ASSOCIATION
RULES OF PROCEDURE FOR
MANDATORY FEE ARBITRATION**

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- 1 - Business and Professions Code sections 6146 - 6149
- 2 - Business and Professions Code sections 6200 - 6206
- 3 - California Code of Civil Procedure sections 1285 - 1287

| Revised ~~10/8/07~~7/28/2010

1. **Introduction**

The Orange County Bar Association (“OCBA”) Mandatory Fee Arbitration (“MFA”) Committee arbitrates disputes between attorneys and clients concerning the costs and fees charged for an attorney’s professional services. The arbitration proceedings are conducted under the Mandatory Fee Arbitration Program (“Program”) according to these Rules of Procedure (“Rules”).

These Rules are intended to implement the mandatory fee arbitration provisions set forth in Business and Professions Code Sections 6200-6206 and the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs.

A. Purpose

The purpose of the OCBA MFA Program is to provide for a fair, speedy and impartial hearing and determination of fee disputes between attorneys and clients.

B. Chairperson(s) of the MFA Committee

The OCBA President shall appoint MFA Committee Chair(s) who shall exercise the powers and bear the responsibilities set forth in these Rules as may be necessary to carry out the functions of the MFA Program. Included in these powers is the determination of all questions of interpretation of these Rules and of procedure there under at any stage of the proceedings. With the consent of the OCBA President, the MFA Committee Chair(s) may appoint an MFA Advisory Committee.

C. Arbitrators

The membership of the MFA Committee for the Program shall be composed of both attorney arbitrators and non-attorney arbitrators.

Attorney Arbitrators:

Attorney arbitrators shall be members in good standing of the State Bar of California and the OCBA, and in the opinion of the OCBA possess the qualifications and characteristics necessary to function effectively as fair and impartial arbitrators.

Non-Attorney Arbitrators:

Non-Attorney Arbitrators shall be individuals who have not been licensed to practice law or otherwise affiliated with the legal profession and who in the opinion of the OCBA possess the qualifications and characteristics necessary to function effectively as fair and impartial arbitrators.

D. OCBA Staff

The Executive Director of the Association shall appoint an employee of the Association to function as administrator of the Program.

2. Notice of Client's Right to Arbitrate

- A. Prior to or at the time of filing any court action or commencing any other proceeding through another arbitration organization against a client for the recovery of fees, an attorney must serve by first class mail, or have a process server deliver to the client the State Bar approved "Notice of Client's Right to Arbitrate" form [Bus. & Prof. Code § 6201(a)].
- B. The client has thirty (30) days from receipt of the above-reference notice to request arbitration of the fee dispute by filing a completed PETITION TO ARBITRATE A FEE DISPUTE form with the Program administrator accompanied by the proper filing fee. The client waives the right to arbitrate if the client fails to file a request for arbitration within the thirty (30) day period.
- C. If the "Notice of Client's Right To Arbitrate" form is not accompanied by a proof of service when it is received by the client or any other questionable circumstance should arise regarding the receipt of such notice, the MFA Committee has the authority to determine jurisdiction based on the evidence presented.

3. Court and other Fee Arbitration Proceedings

Any action or other proceeding shall be automatically stayed upon the filing and service of a request for mandatory fee arbitration or in the event the parties have otherwise consented to mandatory fee arbitration under this Program. [Bus. & Prof. Code § 6201(c).]

4. Determination of Jurisdiction

The MFA Committee has the authority to determine jurisdiction and shall decline to act if it determines a lack of jurisdiction.

- A. Jurisdiction will normally be accepted if:
 - (1) at least one of the attorneys involved in the dispute has an office in Orange County; or
 - (2) at least one of the attorneys involved in the dispute maintained an office in Orange County at the time the services were performed; or
 - (3) a substantial amount of the legal services were performed in Orange County; or
 - (4) arbitration is not available at the local County Bar Association in the County where the attorney practices and the client resides in Orange County; or
 - (5) arbitration is available with the local County Bar Association in the County where the attorney practices but both parties, for good cause, desire to arbitrate the matter in Orange County and the local County Bar Association agrees to transfer jurisdiction to the OCBA.
- B. The MFA Committee will not hear or settle disputes in which a client seeks relief for

damages on the basis of alleged malpractice or professional misconduct. The MFA Committee cannot hear or rule on any counter-claim for damages.

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 may be entitled, as provided in Bus. & Prof. Code § 6203(a). [See Rule 20(D).]

- C. The MFA Committee has no jurisdiction over fees that are fixed by court order, the order of an administrative agency, or by statute.
- D. The request for arbitration may be made by (i) a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs ("non-client"), or (ii) the attorney claiming entitlement to fees against a non-client. A fee arbitration between an attorney and a non-client is not intended to abrogate the requirement that the attorney exercise independence of professional judgment on behalf of the client or the protection of client confidences and secrets. Absent the client's written consent to disclosure of confidential information, a fee arbitration with a non-client is not intended to abrogate the attorney's duty to maintain client confidences and secrets, unless such disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when an arbitration with a non-client is initiated, notice of the request must be sent to the client by first class mail at the client's last known address. The program shall adopt procedures to insure that such notice has been sent to the client.
- E. The MFA Committee is only empowered to hear disputes over fees and costs in matters where there is an actual attorney-client relationship or other legal basis for the payment of fees and costs for professional services rendered. If the question of whether an attorney-client relationship (or other legal basis for the payment of fees and costs) exists between the parties is an issue in dispute, the MFA Committee will only proceed if the party contesting the relationship stipulates that the Committee may hear and decide that issue.
- F. Unless the client has agreed in writing to arbitration of all disputes concerning fees, costs or both, arbitration shall be voluntary for the client and shall be mandatory for an attorney if commenced by a client. [Bus. & Prof. Code § 6200(c).]
- G. The MFA Committee will only have jurisdiction over a dispute initiated by an attorney when all parties to the dispute have previously agreed in writing to arbitration of all disputes regarding fees, or sign a stipulation to that effect.
- H. In a matter where the fee agreement provides for a contingent fee, the Committee usually cannot hear the dispute until the underlying matter has concluded.
- I. Subject to appropriate review, the MFA Committee Chair has discretion to decline to exercise the jurisdiction of the OCBA over any fee or cost dispute. Where jurisdiction is declined, the parties will be notified promptly of their right to proceed with fee arbitration before the State Bar of California, if applicable.

- J. Neither the MFA Committee Chair nor any participant on the MFA Advisory Committee shall represent any party in any matter arbitrated by the OCBA.

5. Binding or Advisory - Effect of Arbitration

- A. An arbitration award is binding only if both parties stipulate in writing to binding arbitration after the dispute has arisen. Consent to binding arbitration by one party may be withdrawn prior to the time consent to binding arbitration is given by the opposing party and such withdrawal must be received in writing by the OCBA at least (10) days prior to the date of the arbitration. If all parties have consented to binding arbitration, no party may thereafter withdraw that consent without the written agreement of all other parties. [Bus. & Prof. Code § 6204(a).]

A binding arbitration provision in an attorney-client fee agreement is not sufficient to make an arbitration binding. The parties must stipulate in writing to binding arbitration either at the time of filing or after a party has elected to arbitrate.

If the Petitioner has consented to binding arbitration, but the amount in controversy is thereafter materially changed as a result of new matter raised in the Reply of the Respondent, the Petitioner may thereafter withdraw his/her/its consent to binding arbitration, provided such withdrawal is communicated in writing to the OCBA within ten (10) days after service of the Reply on the Petitioner.

- B. An advisory arbitration award is not binding on the parties and entitles either party to petition for a trial after arbitration. A "Rejection of Award and Request for Trial After Arbitration" must be filed within thirty (30) days from the date the award is mailed to the parties by the Program administrator. Rejection of the award should be filed with the court, *not* with the OCBA.

An advisory award becomes binding after thirty (30) days if neither party seeks trial after arbitration, pursuant to Bus. & Prof. Code Section 6203(b).

- C. If either party objects to the determination of binding vs. non-binding arbitration the question will be determined by the arbitrator(s) on the date of the hearing, and such determination shall be made a part of the award.
- D. A binding arbitration award is not subject to appeal. A binding arbitration award may be vacated or corrected by a court order only upon the grounds listed in California Code of Civil Procedure (CCP) Sections 1286.2 and 1286.6.

6. Initiation of Mandatory Fee Arbitration Proceedings

- A. Mandatory Fee Arbitration is initiated, and is deemed "requested" when the petitioner files a written petition for arbitration on the approved form with the OCBA, pays the appropriate filing fee, and serves a copy of the petition on all other parties. The request shall contain enough information about the fee dispute to enable the MFA Committee to determine whether or not it has jurisdiction.

- B. If the amount in dispute is less than \$1,500.00, the Petitioner must agree to binding arbitration. The MFA Committee will not proceed to hear the matter if the amount in dispute is under \$1,500.00 and the Petitioner does not stipulate to binding arbitration. In such an event, however, the Petitioner may file for arbitration with the State Bar program.
- C. When notifying the attorney a petition has been filed, the OCBA shall also serve a copy of the approved State Bar Notice of Responsibility form.
- D. Any response by the attorney to the petition for arbitration must be mailed to the OCBA and the petitioner within twenty (20) days of notification by the OCBA of the filing of the petition. In the event the attorney, or a client who has previously agreed in writing to MFA arbitration proceedings, fails to respond or refuses to participate in the arbitration, the hearing will proceed as scheduled and a decision will be made on the basis of the evidence presented.
- E. Any amendment to the petition for arbitration or the reply to the petition must be filed at least twenty (20) days prior to the arbitration hearing.
- F. If the issues to be arbitrated are not clearly set forth in the petition, response or accompanying documents, the presiding arbitrator may request that the parties clarify the issues. The arbitrators may, in their discretion, decline to determine any issues not set forth in said documents.

7. **Assignment of Arbitrators**

The assignment of arbitrators shall be made by the MFA Committee Chair or by OCBA staff under the direction of the Executive Director.

- A. If the amount in dispute is less than \$10,000 or less the matter will be assigned to a single arbitrator. ~~All matters where the amount in dispute is under \$10,000 will be assigned to a single arbitrator unless the parties have agreed to binding arbitration.~~ If the amount in dispute is \$10,000 or more than \$10,000 the matter will be assigned to a panel of three (3) arbitrators unless the parties to the arbitration agree in writing to have the matter heard by a single arbitrator.
- B. When three (3) arbitrators are chosen, one shall be designated to be the presiding arbitrator. All three-person panels shall include one non-attorney arbitrator.
- C. Bus. & Prof. Code Section 6200(e) provides that, at the request of the client, one attorney member of a three person panel or the sole arbitrator shall be an attorney who practices either civil or criminal law, consistent with the area of law practiced by the attorney whose services are in dispute. Any such requested designation by the client must be made at the time of filing the petition on the form provided by the OCBA.
- D. All participants will be notified by the OCBA staff of the identity of the assigned arbitrator(s). Each party has the right to request the disqualification of one arbitrator

without stating any cause. A request for disqualification should be received within ten (10) days of notification of the identity of the assigned arbitrator(s). Thereafter, arbitrators may only be disqualified for cause, and any such request must state in writing the reason for disqualification. The MFA Committee Chair or his/her appointee shall make the final decision in resolving all requests to disqualify any arbitrator.

- E. No MFA Committee member shall arbitrate a dispute if he/she has any financial or personal interest in the result of the arbitration or if the arbitrator determines that he/she is not qualified to arbitrate for any reason. A person appointed as arbitrator must promptly disclose to the parties and the Chair any past or present relationship with the parties, their counsel or associates, or any circumstance which might reasonably be the basis for a claim of bias or an appearance of bias. If disqualification of the arbitrator is not requested by one of the parties in writing within five (5) days after such disclosure, any claim of disqualification shall be considered waived. An arbitrator can decline to arbitrate a matter at any time. Whenever an arbitrator is disqualified a successor will immediately be appointed.
- F. The MFA Committee Chair shall have the authority to reassign any pending case to a replacement arbitrator or panel at any time as may be appropriate. The MFA Committee Chair may reassign any arbitration to avoid undue delay.
- G. The parties shall also be given the option of mediating their fee dispute, before the arbitration occurs, on the petition and reply forms. If all parties agree to mediate when the petition and reply forms are submitted, a mediator will be assigned. If the matter does not settle in mediation, it will proceed to arbitration and an arbitrator or panel of arbitrators will be assigned. These Rules shall apply to such cases.

8. Qualifications of Arbitrators

All attorney arbitrators of the MFA Committee shall be members in good standing with the OCBA and shall have at least four (4) years experience in the practice of law. All MFA Committee members must attend fee arbitrator training or have comparable arbitration experience.

9. Time Guidelines for Arbitration

All time schedules set forth in these Rules are advisory only. Failure to comply with the suggested time periods is not per se grounds for dismissal of the petition nor disqualification of the award, nor will it deprive the MFA Committee of jurisdiction over any proceeding.

- A. The hearing date should be scheduled within thirty (30) days of assignment to allow for any continuance, postponement, or pre-hearing briefs or arguments, if any are permitted by the presiding arbitrator. Once set, no hearing should be postponed more than twice without the prior consent of MFA Committee Chair.
- B. All post-hearing submissions should be completed within twenty (20) days after the close of the hearing, and the final award should be submitted by the presiding

arbitrator to the MFA Committee Chair within sixty to ninety (60-90) days of assignment.

10. Contact With Arbitrators

A party or a representative of a party shall not communicate with an arbitrator regarding a pending matter before such arbitrator, except at scheduled hearings, or for the purposes of scheduling a hearing date or other administrative procedures, such as obtaining approval to issue a subpoena under Rule 18.

When contacting the arbitrator(s) for any other purposes, parties must submit their communication in writing with a copy to the OCBA, and to all other parties and their respective counsel, if any.

11. Notice of Hearing

When an arbitrator receives a case file, it shall be his/her duty to arrange a time and place for the arbitration hearing and to notify the parties, other panel members and the OCBA staff of that hearing not less than ten (10) days before the hearing date unless otherwise agreed upon by the parties. The arbitrators may communicate informally with the parties to the dispute in order to arrive at a mutually agreeable time and place for the hearing.

A form to request arbitration hearing dates will be sent by the OCBA to all parties. This form must be completed and returned to the designated arbitrator within the time period provided on the form. Failure to complete or return the form on time will constitute consent to the scheduling of the hearing at the sole discretion of the presiding arbitrator.

12. Continuance of Hearing

Hearing dates should be considered to be firm appointments. Once the hearing date has been set and the notice of hearing mailed, continuances are disfavored and should not be granted in the absence of good cause. It is the policy of the MFA Committee that no hearing should be postponed or continued more than twice.

Application for a continuance must be made as soon as possible after the need for a continuance arises, in writing to the presiding arbitrator and the OCBA. The presiding arbitrator shall make the final decision of granting or denying a continuance and shall be responsible for scheduling the new hearing date. In the event that the presiding arbitrator grants a continuance, the matter should be reset for hearing date no later than thirty (30) days from the original hearing date.

13. Representation by Counsel

Any party may be represented by counsel at his/her own expense. A party intending to be represented must notify the arbitrators and the OCBA of the name and address of counsel. All notices to which a party may be entitled will be mailed to their attorney on record in the OCBA files unless the attorney has provided written notification with a proof of service to all parties of his/her withdrawal. The OCBA must be notified in writing if an attorney of record

with a fee arbitration case ceases to represent the party involved in the arbitration.

Counsel who represent a party in an arbitration are referred to Rule 3-700 of the Rules of Professional Conduct of the State Bar of California pertaining to all matters regarding withdrawal of representation.

14. Discovery

A client petitioning for arbitration is entitled to inspect, during normal business hours, the following documents and records in the possession of the attorney:

- (1) The file relating to the matter in which the fee dispute arose;
- (2) All time sheets or time records relating to the services performed by the attorney in the matter in which the fee dispute arose;
- (3) All statements or billings, client ledger cards, bookkeeping or computer records relating to the matter in which the fee dispute arose;
- (4) A copy of any written fee agreement or other contract for payment of legal services relating to the matter in which the fee dispute arose.

A request by the client to inspect any of the foregoing items must be in writing and must be given to the attorney within a reasonable period of time prior to the arbitration hearing. At the option of the attorney, he or she shall either allow the client to inspect and make copies of the materials, or provide full, complete and legible copies of the requested documents, all without charge to the client no later than five days from receipt of the request. If the attorney fails to comply with the client's request, the presiding arbitrator may, at his/her discretion, disallow the production of those documents at the hearing.

15. Recording the Hearing

No hearing may be tape recorded. Any party may provide for the attendance of a certified shorthand reporter at that party's expense in a binding arbitration. Every party shall be entitled to a copy of the reporter's transcripts of the testimony upon written request and payment of the charges therefore. No court reporter will be allowed to record a non-binding arbitration.

16. Interpreter

Any party may bring an interpreter to the hearing for assistance. Arrangements for an interpreter must be made by the party needing assistance at his/her/its own expense. It is recommended that any interpreter be court-approved, but it is not mandatory. The opposing party and the arbitrators must be notified in writing of the name of the interpreter at least five (5) days prior to the hearing.

17. Witnesses

If any party wishes to have witnesses appear on his or her behalf without subpoena, that party must submit their names and the expected time involved in direct examination, in writing to the opposing party and the arbitrators at least seven (7) days prior to the hearing. Third-party witnesses shall normally be allowed to appear and testify telephonically.

18. Subpoena

The arbitrators, upon written application, may issue subpoenas directing the attendance of witnesses and/or production of relevant documents at the hearing. The MFA Program will provide blank subpoena forms to any party upon request. It is the party's responsibility to complete the subpoena(s), obtain the arbitrator's signature, and serve the subpoena(s) at least five(5) days in advance of the hearing. Further, it is the responsibility of the party serving the subpoena(s) to tender witness fees in the correct amount if requested pursuant to the laws of the State of California.

The application to the arbitrators must be in writing, provide the reason(s) why the particular evidence or witness is required at the hearing, and be delivered to the arbitrators at least fourteen (14) days prior to the hearing. The party shall also provide copies of the issued subpoena(s) to the MFA Program, the arbitrator(s) and the other parties in the matter. The original proof of service of the subpoena should be delivered to the arbitrators at the time of hearing.

The standard subpoena for the attendance of witnesses shall permit either personal attendance or telephonic attendance. Only upon good cause shown to the arbitrator in the written application, shall the subpoena direct personal attendance. The standard subpoena for the production of relevant documents shall direct production by mail, delivery or facsimile prior to the hearing.

If a witness fails to appear or if the documents fail to be produced at a hearing pursuant to a valid subpoena, the arbitrator has the discretion to continue the hearing to allow for the parties to arrange for the presence of the witness and/or documentary evidence, or to otherwise seek a judicial order compelling attendance or production.

19. Costs

An arbitration award may not grant attorney's fees or other costs incurred in the prosecution or defense of the fee arbitration proceedings, notwithstanding any contract between the parties providing for such an award of attorney's fees or other costs. [Bus. & Prof. Code § 6203(a).] All parties will bear their own costs except that the arbitrator may allocate the filing fee.

20. **Hearing Procedure/ Rules of Evidence**

- A. The presiding arbitrator, or the panel by majority vote, shall rule on the admission and exclusion of evidence and on questions of procedure, and shall exercise all powers relating to the conduct of the hearing, including the order of presentation of evidence, the time allotted for evidence and oral argument, and length of hearing.
- B. The presiding arbitrator shall administer oaths to witnesses and interpreters at the hearing. The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. California Rules of Evidence and Rules of Judicial Procedure applicable in the courts of California need not be observed. Arbitrators may receive any evidence which they deem appropriate or reliable, including but not limited to evidence submitted by telephone during the hearing, provided speaker phone availability.
- C. Any relevant attorney-client communications or work product between the client and the attorney who is a party to the arbitration may be disclosed at the arbitration or to settle the dispute or to enforce an arbitration award. In no event will any disclosure be considered a waiver of the confidential character of matters for any other purposes.
- D. Parties are permitted to present testimony and documentary evidence which is relevant to the fee dispute. Any evidence relating to claims of malpractice and professional misconduct by the attorney shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney may be entitled. The panel may hear any evidence which is trustworthy and material to the fee dispute.

Stipulations and admissions which narrow issues or foreclose the need for formal testimony are encouraged.

- E. If a matter raised during the hearing, in the opinion of the arbitrators, constitutes substantial evidence of a violation of the Rules of Professional Conduct or violations of the applicable provisions of the Bus. Prof. Code, the arbitrators may refer the matter to the MFA Committee Chair for possible referral to the Chief Trial Counsel of the State Bar of California for disposition as the State Bar deems appropriate.
- F. Hearings are closed to the public, except for witnesses while testifying and others who are directly participating in the proceeding. In the discretion of the presiding arbitrator, in addition to counsel, if any, the Client may be accompanied by at least one other person in the hearing room. OCBA MFA staff have an absolute right to attend the proceedings without notice, and have the same immunities as the arbitrators pursuant to the laws of the State of California. All attendees shall be subject to the rules governing confidentiality of the proceeding.
- G. The presiding arbitrator may adjourn the hearing at any time if necessary.
- H. The presiding arbitrator, at his/her own discretion, may hold the matter open after the hearing for later submissions. In such an event, both parties must be provided an

equal opportunity to submit additional materials. A date must be set for final submission of the matter. Other than as directed by the presiding arbitrator, no evidence may be received or communicated to any panel member. Communication with any panel member is strictly forbidden following completion of the hearing itself.

21. Release of Documentary Evidence

- A. All documents offered as evidence at the arbitration hearing will be marked as exhibits and will be returned by the presiding arbitrator to the respective parties at the conclusion of the hearing unless an arbitrator elects to retain the documents for consideration in preparing the award. If an arbitrator has retained any documents, the parties are instructed to pick up their respective documents within thirty (30) days from the date of service of the award. The arbitrator(s) shall be entitled to destroy all documents in his/her possession sixty (60) days after the date of service of the award.
- B. The OCBA will furnish to any party certified copies of any papers in its possession which may be required in judicial proceedings relating to the arbitration. This will be done upon written request at the expense of the requesting party.

22. Arbitration in the Absence of a Party

- A. The arbitration may proceed in the absence of any party who, after given proper notice, fails to appear at the hearing or otherwise obtain a continuance. An adverse award shall not be issued against a party solely because of that party's non-appearance. Rather, the presiding arbitrator shall require the presentation of evidence sufficient to justify an award. A decision will be made on the basis of the evidence presented. An award may be made in favor of a party who is absent if the evidence so warrants.
- B. Any party who resides 150 miles or more from the site of the hearing, or any party who is incarcerated at the time of the hearing, may waive personal appearance and submit testimony and exhibits by written declaration under penalty of perjury or, in the discretion of the presiding arbitrator, may appear by telephone.
- C. Unless a subpoena has issued to compel his/her attendance, any party may appear solely through counsel or may otherwise request a waiver of his/her personal appearance. Any such request must be made in writing to the presiding arbitrator and the OCBA at least five (5) days prior to the hearing. If granted, the party may submit testimony and exhibits by written declaration under penalty of perjury or by telephone. The decision to permit testimony by declaration or by telephone shall be in the sole and absolute discretion of the presiding arbitrator.
- D. Any party who has willfully failed to attend the arbitration hearing may not request a trial in civil court after a non-binding arbitration. The decision as to whether the party's non-attendance was willful is left to the discretion of the court, however the arbitrator(s) may include findings in the award as to the willful non-attendance of any party.

23. Arbitration in the Absence of an Arbitrator

If one member of an arbitration panel fails to appear for the hearing, or is unable to participate in the arbitration, the arbitration may proceed with a single arbitrator, with the stipulated written consent of the parties. Only the single arbitrator may then participate in the deliberations and the making of an award. If the parties do not agree to proceed in the absence of a three panel arbitration, the hearing shall be continued to a date on which all members of the panel can be present.

24. Death or Incompetency of a Party

In the event of death or incompetency of a party prior to the close of the hearing, the personal representative (as defined in Probate Code § 58 or such other applicable law or regulation) of the deceased party or the guardian or conservator of the incompetent party may be substituted in the place of the deceased or incompetent party and proceed to prosecute or defend the proceeding as the case may be.

25. Settlement of Disputes; Withdrawal of Arbitration

Upon written confirmation signed by both parties that a dispute has been settled prior to appearance by the parties at the hearing, the matter shall be dismissed by the OCBA in the absence of an assigned arbitrator(s), or by the arbitrator(s) if a notice of assignment of the arbitrator(s) has previously been served on the parties.

If the petitioner wishes to withdraw the dispute from binding arbitration before the MFA Committee and the matter has not settled, all parties must agree to the withdrawal. If the arbitration is non-binding, or after reasonable confirmation that all parties agree to the withdrawal, and for good cause shown, the matter shall be dismissed as set forth above.

If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award. Such an award is referred to as a consent award.

26. Making and Content of Award

- A. The arbitrator or presiding arbitrator of a panel is responsible for preparation of an award. The written award shall be in the format required by the MFA Program which includes the language set forth by the State Bar of California Guidelines and Minimum Standards.
- B. In the case of an arbitration heard before a three-member panel, the decision of any two (2) of the arbitrators will be conclusive.
- C. The award shall be in writing and signed by the arbitrator or by the arbitrators who are in agreement. The award should include a determination of all issues which were necessary in coming to a decision. Failure to comply with all requirements of this section shall not invalidate an award issued by an arbitrator or a panel. The award

shall contain the following:

- (1) The date of the hearing(s);
 - (2) The date of the award;
 - (3) Identity of those who were present at the hearing;
 - (5) Whether the award is binding or non-binding;
 - (6) The amount that the attorney claims the services were worth;
 - (7) The amount that the client claims the services were worth;
 - (8) The amount that has been previously paid to the attorney;
 - (9) The amount that the arbitrator(s) determines the services to be worth;
 - (10) The amount of the filing fee paid by petitioner and the allocation of that fee between petitioner and respondent. In the event no allocation of the filing fee is made in the award, the petitioner shall be responsible for the entire filing fee.
 - (11) Whether interest is awarded and the amount thereof. Arbitrators may award interest on the unpaid balance at a rate not to exceed the maximum interest rate that may be awarded on judgments in accordance with California law.
 - (12) If a refund is to be awarded to the client, there must be a clear statement indicating the amount to be refunded to the client and an individual attorney(s) must be designated as the responsible party;
 - (13) A clear statement of the award, including specific language that sets forth the amount of the award, if any, and which party is to pay it, and outlining what action must be taken by the parties.
- D. The award may also include findings as to the willful non-attendance of any party in accordance with Rule 22D.

27. Processing the Award

- A. The signed award shall be mailed to the OCBA staff within thirty (30) days following the final submission of the matter, unless additional time is granted by the MFA Committee Chair.
- B. The OCBA staff will mail a signed copy of the award, together with the Notice of Rights After Arbitration in the form prepared by the State Bar of California together with the excerpts from the California Code of Civil Procedure and the excerpts from the California Business and Professions Code, with a proof of service, to each party to the arbitration by first class mail. The OCBA staff has fifteen (15) days in which

to process the award after its receipt from the arbitrator(s) unless additional time is granted by the MFA Committee Chair.

After submission of the award, unless otherwise stated in these Rules, neither party shall communicate in any manner with an arbitrator. All post-award communications from the parties must be directed to the OCBA staff.

28. Correcting/Amending an Award

The arbitrators cannot rehear the case or reconsider their decision. The arbitrators can only correct an award for 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.

The grounds for any revision of the award shall be limited to those which are set forth in the Code of Civil Procedure Section 1286.6 (a)and(c).

A. An application for correction must be made in writing and must specifically state the ground therefore, signed by the requesting party and served on all other participants, the presiding arbitrator and the OCBA within ten (10) days from the date the Award was mailed by the OCBA staff.

(1) Any other party may file an objection to the application for correction within ten (10) days thereafter.

(2) If the presiding arbitrator makes any amendment or correction to the award, the modified award will be served by the OCBA on the interested parties.

(3) If the award is not corrected and served within thirty (30) days from the filing of an application to correct the award, the application is considered denied.

B. The provisions of this section shall not operate to stay or otherwise postpone the time limit for the filing of a Rejection of Award and Request for Trial After Arbitration [see Rule 5(B)] if the award is non-binding.

29. Immunity

In any arbitration proceeding conducted by the Program, the arbitrators, as well as the Orange County Bar Association, its directors, officers and employees, have the same immunity which attaches in judicial proceedings. [Bus. & Prof. Code § 6200(f).] None of them may be called upon as a witness to give evidence produced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and may not provide affirmative evidence by way of impeachment, or for any other purpose at any subsequent trial or civil proceeding. [Evid. Code § 703.5.]

30. Confidentiality

All matters which come to the attention of arbitrators while acting as members of the MFA

Committee shall be considered strictly confidential and the content of same shall not be discussed with nor divulged to any person other than the involved parties, the OCBA staff or MFA Committee Chair.

Except as provided in Rule 20(E), the arbitration case file shall be kept confidential by the MFA Committee unless disclosure is required by law or by order of a court of competent jurisdiction.

31. Removal to State Bar Fee Arbitration Program

A client or an attorney who believes that he or she cannot obtain a fair and impartial hearing under these Rules shall be entitled to submit their dispute to the State Bar upon request. In a matter already pending before this program, the OCBA shall release jurisdiction of the matter upon notification of the State Bar's acceptance of said matter for arbitration.

The party seeking removal is responsible for providing the State Bar with the proper forms, filing fees and requested material(s) within the time limits set by the State Bar.

32. Enforcement of Award

Any award made pursuant to these Rules may be enforced in any court which has jurisdiction over the amount of the arbitration award, in the manner provided for in Section 6203 of the Business and Professions Code or as otherwise provided by law.

33. Service

Unless otherwise specifically stated in these Rules, service shall be made by personal delivery or by deposit in the United States mail, postage prepaid, addressed to the person to whom it is to be served, at that person's office or place of residence as last given. The service is completed at the time of deposit. The time for performance of any act will commence on the date service is completed and will not be extended for reason of service by mail.

34. Filing Fees

The OCBA Board of Directors establishes the filing fee schedule. The schedule of filing fees to be paid at the time of the filing of the petition for arbitration is as follows:

- \$75 filing fee for any amount in dispute under or equal to \$1,500
- 5% of amounts in dispute over \$1,500 with a maximum of \$5,000

35. Compensation of Arbitrators & Administrative Charges

A. No arbitrator will be entitled to compensation for services unless the hearing extends beyond one (1) day. A hearing of four (4) hours or less is considered a one-half day hearing. A hearing which extends beyond four (4) hours is considered a one-day hearing. Unless waived in writing, each arbitrator shall be compensated at the rate of \$200 for each one-half day and \$400 for each day after the first day of the hearing.

Any compensation is to be paid equally by each party directly to each arbitrator, in advance, for each day of the hearing for which compensation is due. No compensation will be paid to any arbitrator for services outside of formal hearing sessions. Any disputes concerning compensation of the arbitrators shall be determined by the MFA Committee Chair his/her determination is binding upon all parties, including the arbitrators.

36. Refunds

- A. The OCBA Mandatory Fee Arbitration Committee will retain a \$75 non-refundable administrative fee on all cases filed regardless of disposition.
- B. All requests for a refund of fees paid on cases that have been settled or otherwise withdrawn from the Program will be processed according to the following schedule:
- If a case has not been first assigned to an arbitrator, a panel of arbitrators or a mediator, 75% of filing fee will be refunded.
 - If a case has been assigned and no hearing date or mediation session has been scheduled, 50% of the filing fee will be refunded.
 - If a hearing date or mediation session has been scheduled, and both parties notify the OCBA and the arbitrator(s) or mediator in writing at least five (5) business days prior to the first hearing date or mediation session, 25% of the filing fee will be refunded.

There are no refunds thereafter. In no event will a refund of fees be granted if the parties have not settled their fee dispute and properly notified the OCBA in writing.

37. Retention of Files

The MFA Committee may, without prior notice, destroy any file five years after service of the award or, if no award is rendered, five years after the last paper is received from any party.

Requests for documents from closed files must be in writing stating the reason for the request. A nominal administrative fee may be charged in cases where file storage retrieval and copying are necessary. This fee will be directly related to the actual administrative cost.