

AGENDA ITEM

NOVEMBER
Request for
Approval of new
Rules of Procedure
for Fee Arbitration
and Mediation by
the Santa Clara
County Bar
Association

DATE: October 20, 2010

TO: Members of the Regulation Admissions & Discipline Committee (RAD)

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

SUBJECT: Request for Approval of new Rules of Procedure for Fee Arbitration and Mediation by the Santa Clara County Bar Association

EXECUTIVE SUMMARY

This agenda item is before the RAD Committee to approve the proposed new Rules of Procedure for Fee Arbitration and Mediation by the Santa Clara County Bar Association in the form attached as Attachment A hereto.

The Santa Clara County Bar Association (SCCBA) has submitted new rules of procedure for fee arbitration and mediation conducted by its mandatory fee arbitration (MFA) program. The SCCBA's proposed new rules of procedure consist of materially new rules to replace its current rules of procedure last approved by the Board in 1998. The proposed new arbitration rules essentially adopt the State Bar's Model Rules of Procedure for Fee Arbitration approved by the Board of Governors, last revised in March 2010.

The State Bar's Committee on Mandatory Fee Arbitration (MFA) reviewed the SCCBA's proposed Rules of Procedure and agreed to recommend approval of the rules for Board approval through your Committee, subject to further changes to some rules subsequently made by SCCBA. As a result of further modifications accepted by the local bar, the MFA Committee finds that the proposed new rules are in compliance with Business & Professions Code section 6200-6206 and the State Bar Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards.") Any questions about this item should be directed to Director Jill Sperber (415) 538-2023 or jill.sperber@calbar.ca.gov.

I. BACKGROUND:

Pursuant to Business and Professions Code section 6200, subdivision (d), local bar associations are authorized to sponsor mandatory fee arbitration programs. The programs' local rules of procedure must comply with Business and Professions Code sections 6200-6206 and the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards.") Approval by the Board of Governors (or its designee, the Discipline Oversight Committee) gives the local bar programs jurisdiction to arbitrate fee disputes submitted under the auspices of the Mandatory Fee Arbitration Program. (Minimum Standards, Para.1.)

The Board of Governors last approved the Santa Clara County Bar Association's (SCCBA's) rules of procedure for fee arbitrations in 1998. In 2006, the Board of Governors adopted the Model Rules of Procedure for Fee Arbitrations. Model Rules are intended to promote uniformity and best practices among the 41 local bar MFA programs. The Model Rules also provide the local bar programs with a template incorporating administrative procedures consistent with the MFA statutes and case law developments. The Model Rules were further revised in July 2008 and March 2010.

The SCCBA submitted proposed new rules of procedure for fee arbitrations based on the Model Rules to the State Bar's Mandatory Fee Arbitration Committee (MFA Committee) for consideration at its July 30, 2010 meeting. The MFA Committee agreed to recommend to RAD that they be approved subject to further recommended changes made by SCCBA.

II. DISCUSSION:

Proposed Rules of Procedure for Fee Arbitration

The proposed new rules essentially adopt the Model Rules of Procedure with modifications. Because the proposed new rules of procedure are so materially different from the SCCBA's current rules of procedure, it was determined that a redlined version comparing the current and proposed versions of the rules is of little assistance. However, SCCBA provided to the MFA Committee proposed new rules of procedure redlined to compare its proposal with the March 2010 version of the Model Rules.

Many of the proposed rules establish appropriate procedures specific to the SCCBA program. For example, its filing fee in rule 15.3, providing for small filing fee amounts for small fee disputes, and 3% of the amount in dispute with an upper cap of \$7,500 for larger fee disputes is well within the range of fees approved for other local bar programs. Similarly, its refund schedule in rule 19.3 also appears reasonable. If notice of hearing has been sent, any refund is subject to the discretion of the Panel Chair. Proposed new language in rule 31 on continuances modifies the Model Rule in that if the request for continuance is made within 72 hours within a noticed hearing, good cause is presumed not to exist except for emergencies.

Other proposed variations to the Model Rules would clarify various procedures. For example, rule 34.5 requires a 15 day deadline for pre-hearing exchange of documents. The suggested modification to rule 40.2 adding language for when a request to

correct the award is deemed denied will be considered for inclusion in the State Bar's Model Rules.

At its July 30, 2010 meeting, the MFA Committee found that many of the proposed rules of procedure for fee arbitrations attached as Attachment A comply with the MFA statutes and are consistent with the Minimum Standards. The MFA Committee agreed to recommend to the RAD Committee that the SCCBA's proposed new Rules of Procedure for Fee Arbitrations be approved subject to further changes it recommended for adoption by SCCBA.

SCCBA agreed with the MFA Committee's recommended changes, many of which were non-substantive. The SCCBA's proposed rules as modified following the July 30, 2010 meeting are set forth as Attachment A. The MFA Committee therefore recommends Board approval of SCCBA's proposed rules as set forth in Attachment A as being in compliance with the applicable statutes (Business and Professions Code sections 6200-6206) and the Minimum Standards.

Additional Rules

In addition to adopting the Model Rules with modifications, the SCCBA also proposed new rule 42 regarding the right to trial after arbitration and new rule 43 regarding the process for complaints about the SCCBA's MFA program. Under different number numbers, these rules were already approved by the Board in 1998 and are not new despite the legislative style used on the attached indicating new language.¹ While the content of both rules is not required to be included as a rule of procedure, the local bar's preference to retain them is acceptable.

Fee Mediation Rules

Lastly, SCCBA's proposal contains a set of rules for fee mediation. Fee mediation, unlike mandatory fee arbitration, is voluntary for both parties. It is authorized by statute as an approved service offered by a local bar association under the MFA program. Local bar mediation rules are also subject to Board review. (Bus. & Prof. Code §6201(d).) The Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs contains a section entitled "Minimum Standards for Mediation." While the SCCBA's rules for mediation [rules 46-53, Article XII of Attachment A] appear in legislative style on Attachment A as new rules, in fact they were previously approved by the Board in 1998. At its July 30, 2010 meeting, the MFA Committee nonetheless found that the fee mediation rules comport with Business and Professions Code section 6200-6206 and the Minimum Standards for Mediation.

III. FISCAL AND PERSONNEL IMPACT:

None.

IV. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT:

¹ The title of rule 42 is being changed, however, to omit the word "court" before "trial" in recognition of the Supreme Court precedent permitting either contractual arbitration or court trial after non-binding MFA. Its new Rule 15 provides the broader definition of trial provided in the Model Rules consistent with this precedent.

None.

V. PROPOSED RESOLUTION:

RESOLVED, that, the Board Committee on Regulation, Admissions & Discipline hereby approves the Rules of Procedure for Fee Arbitrations and Mediation by the Santa Clara County Bar Association in the form attached as Attachment A hereto as being in compliance with Business and Professions Code sections 6200-6206 and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs.