

AGENDA ITEM

NOVEMBER 112-H

Proposed Increase Reimbursement
to Local Bars Contracting with the
State Bar for Assigned Fee
Arbitration or Mediation

DATE: October 26, 2010

TO: Members of the Board Committee on Operations
Members, Board of Governors

FROM: Jill Sperber, Director, State Bar Office of Mandatory Fee Arbitration
Carol Madeja, Director, Bar Relations Outreach

SUBJECT: Proposed Increase in Reimbursement Rate for Local Bars for Assigned
Fee Arbitration or Mediation Cases

Issue Presented

Whether to recommend that the Board of Governors approve a request to increase the flat rate of reimbursement from \$36 to \$50 paid by the State Bar to local bar fee arbitration programs for each case assigned to a fee arbitrator or mediator under the Mandatory Fee Arbitration (MFA) Program. The rate increase, if approved, would become effective January 1, 2011.

The current reimbursement rate of \$36 per assigned case has been in effect since 2007, with a total annual budget allocation of \$70,000 for such reimbursement. The local bar associations with MFA programs have made this request to help them defray the increasing operational costs and, for some, loss of revenue for its MFA programs. Assuming that the number of cases eligible for reimbursement remains on average 1,550 cases based on 2009 actual and 2010 projected numbers, an increase in the flat rate from \$36 to \$50 per assigned case would require approve of an increase of \$7,500 over the current budget of \$70,000 to \$77,500 for this budget item. However, if Board approves the flat rate increase requested, this amount can be transferred from another MFA cost center to absorb the projected net increase needed.

If you have any questions, please contact 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 is also required to adopt rules to

allow for fee arbitration and mediation of disputes covered by the Mandatory Fee Arbitration Program to proceed through programs sponsored by local bar associations. (Bus. & Prof. Code, § 6200, subd.(a),(d).)

California has 41 local bar associations that offer mandatory fee arbitration programs. Although the State Bar also offers mandatory fee arbitration, the approved local bar MFA programs conduct the majority of the state's fee arbitration cases because they assume primary jurisdiction over attorney-client fee disputes subject to State Bar oversight. The State Bar's jurisdiction is limited to disputes where a local bar program does not exist, the local program lacks jurisdiction over the fee dispute, or a party asserts that a fair hearing cannot be obtained from the local program. (Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, standards 2 and 22.) In 2009, for example, the State Bar accepted 104 fee arbitration requests, representing only a fraction of the over 2,000 arbitration requests handled by the local bar programs combined.¹

History of State Bar Reimbursement to Local Bar MFA Programs

\$10 Pilot Program in 1984

In 1983, for the first time, several local bar programs requested that the State Bar Board of Governors help subsidize the local mandatory fee arbitration programs in recognition of the fact that local programs were facing increasing financial restraints yet wanted to keep their program filing fees affordable and competitive. While mindful of budget constraints upon the State Bar, some form of direct funding by the State Bar was pursued by the Board in view of the fact that the local programs were in fact providing a service obligated by the Legislature to be performed by the State Bar.

Accordingly, the Board approved a pilot program for 1984 involving a flat \$10 payment per arbitration case assigned by participating programs. This rate was apparently based upon various factors, including average amount spent by local bar associations per arbitration, the number of arbitrations conducted on a statewide basis each year and the absolute amount which could be spent by the State Bar for local bar programs.

The flat rate was increased to \$12 per case in 1985 and remained the same for the next ten years. According to the State Bar's archived Board agenda items, in 1995, the state's largest local bar fee arbitration program (Los Angeles County Bar Association)

¹ The number of fee arbitration requests filed with the local bar programs is not immediately available to the State Bar. Each local bar association offering fee arbitration programs keeps its own statistics. The State Bar tracks the number of cases eligible for State Bar reimbursement to participating bar programs. Not all programs choose to have reimbursement contracts with the State Bar nor is it required to have one for operation. In 2009, for example, 8 programs declined. Further, reimbursement is based only upon the assignment of the case to an arbitrator or mediator, not the number of fee arbitration requests made with the program. For these reasons, the reported number of total cases is a rough estimate.

sought an increase of the flat rate from \$12 to \$24. The responsible Board Committee referred the request for study by the MFA Committee.

\$24 in 1996

Effective January 1, 1996, the Board of Governors increased the flat rate reimbursement rate by \$12 to \$24 and expanded the reimbursement policy later that year to apply also to fee mediations conducted by local bar programs under the auspices of the Mandatory Fee Arbitration Program.

The flat rate of \$24 for reimbursement remained the same from 1996 until 1998. However, the reimbursement policy was placed on indefinite hiatus following the State Bar's fiscal crisis in 1998. To help recoup the loss of reimbursement by the State Bar to the local bar programs, effective July 1, 1998, the Board of Governors authorized the local bar programs to charge a fee of \$24 per arbitration request filed in addition to the applicable filing fee required by the local program.

In 2001, in response to requests from the local bar associations to reinstate the State Bar's fee arbitration reimbursement policy, the Board reinstated reimbursement to the local bar associations in 2002 at the \$24 flat rate. The amount budgeted by the State Bar for total annual local bar reimbursement (cost center 10501) was \$60,000.

\$36 since 2007

In 2006, local bar associations with MFA programs sought an additional increase to \$36 per case, which the Board of Governors authorized for 2007. To accommodate this increase, the total annual local bar reimbursement budget was raised to \$70,000. The cost center for local bar reimbursement is 10501. For 2009, with 33 programs participating with State Bar contracts eligible to seek reimbursement, the State Bar dispersed a total of \$55,764 based on 1,549 cases assigned collectively.² For the first two quarters of 2010, the State Bar reimbursed local bar programs the amount of \$29,772 based on 827 cases.

Attached for your reference (Attachment A) is a chart showing local bar MFA reimbursements by the State Bar since the last increase (2007-2010 to date). The chart compares total annual reimbursements by the State Bar paid to each program as well as the total annual amount paid by the State Bar to the local bar arbitration programs

² Even when requests for reimbursement spiked to 1,718 cases in 2008, the State Bar dispersed \$61,848, an amount still within the allocated budget of \$70,000. In 2007, the number of cases eligible for reimbursement was 1,553, a number more consistent with 2009 and 2010 (to date) averages.

II. Recommendation

Based on broad support expressed by the local bar MFA programs in 2010, the State Bar's Offices of Mandatory Fee Arbitration and Local Bar Outreach request that the Board Operations Committee recommend that the Board of Governors increase the flat rate of local bar reimbursement from \$36 to \$50 effective January 1, 2011. Although past rate increases traditionally occurred in \$12 increments, which would result in a flat rate of \$48 over the current rate of \$36, the rate of \$50 is requested based on rising costs and lower revenues reported by the programs. The proposed flat rate increase of \$14 will help local programs offset increased administrative costs related to their fee arbitration services and for some, lower revenues due to the tough economy, and enable them to continue to provide this valuable public and member service locally.

Factors Supporting Rate of Reimbursement Increase

The local bar request for an increase is based on several factors. First, the reimbursement is paid per case only upon assignment by a program to a fee arbitrator or mediator. An estimated ten to fifteen percent of cases filed with the programs are abandoned, settle, or terminated prior to assignment. Therefore, the local programs' administrative costs for processing those matters, which may take considerable staff and program resources, are never eligible for State Bar reimbursement.

Second, as a result of the economic recession, local bar program filing fee revenues are down or insufficient to cover increased case filings. Although local bar programs may charge a program filing fee, the Minimum Standards require that any filing fee must be reasonable and "not in such an amount as to discourage the use of the service." (Min. Standards, standard 17.)

In addition, programs are encouraged to adopt a fee waiver policy to accommodate low income and indigent clients. Since fees are set by most programs based on the amount in dispute, another factor attributable to lower revenues is the increase in small fee disputes reported by some local programs which do not generate large filing fees. As a result of this confluence, some programs report total decrease in revenue from filing fees despite an uptick in cases filed.

Third, the payments made by the State Bar, while greatly appreciated, were never intended to cover the local bars' actual operating costs for their MFA programs. Rather, reimbursement is made in recognition that the services provided by the local bars are statutorily mandated to be performed by the State Bar. If local bar programs disbanded their MFA programs, the State Bar would be required by statute to provide MFA services instead. The State Bar would be hard pressed to absorb the actual costs of administering this void in all counties or replicate the quality of service provided, given that volunteer arbitrators and arbitration hearings are all county based.

Finally, low cost, locally based MFA sponsored by local bar associations reflects a legislative preference over centralized MFA administered by the State Bar exclusively. (Bus.& Prof. Code § 6201(d)). Local fee arbitration provides numerous benefits to both members and the public, including the ability to tailor procedures, such as filing fees, to accommodate regional differences.

Reports from the Local Bar MFA Programs

No formal survey reporting local bar program operational costs exists. Therefore, staff arranged for an informal email survey of the Executives of California Lawyer's Associations (ECLA) 2010 members. A similar survey was emailed to the local bar MFA administrators.

While all participating MFA providers would welcome a higher reimbursement rate, the following local bar associations, including the largest MFA providers, provided express support for an increase in the flat rate of reimbursement for their MFA programs: Alameda County, the Bar Association of San Francisco, the Beverly Hills Bar, Contra Costa County, Fresno County, Kern County, Los Angeles County, Monterey County, Nevada County, Orange County, San Diego County, San Mateo, Santa Clara County, and Ventura County Bar Associations.

The Alameda County Bar Association reports that its MFA case load has remained steady, but that revenue from filing fees is down. Many petitioners, which are usually clients, request and qualify for full or partial waiver of the filing fee payable to the program. In 2010 to date, the ACBA has forgone \$11,686 in granted fee waiver requests, representing a loss of 24% in filing fee revenue. "The average case costs the program \$850 to administer; while user fees offset some of these expenses, the program runs at a deficit. An increase in the reimbursement rate from the State Bar would help sustain the program...."

The Bar Association of San Francisco's caseload has increased by 20% since the last increase in 2007, while its revenue from filing fees has dropped by 10% and its operational costs have risen by 23%. The decrease in program revenue is attributable to granting more fee waivers and processing small fee disputes. "BASF relies on the per case reimbursement to help defray the costs of providing the service."

The Beverly Hills Bar Association (BHBA) reports a slight increase in cases. However, due to the rise in complex MFA cases, the administrator reports an increase in her time and resource allocation as the program's sole staff person. BHBA supports the request for a rate increase to enable BHBA to continue providing the same level of services.

In support of its request for an increase in the rate of reimbursement, the Contra Costa County Bar Association (CCCBA) reports a 17% increase in fee arbitration cases in 2009, compared to 2006 before the last increase became effective. The CCCBA has higher costs, largely due to a decline in membership and a 15% decrease in LRS fees which were used to partly fund the fee arbitration program. CCCBA reports that it operates MFA at a loss, but views the program as an important public service. However, staff time and office overhead costs have remained static, or have increased slightly since last year. CCCBA writes, "an additional \$14 per case in State Bar reimbursements would help justify continued operation of our Fee Arbitration Program."

With an annual caseload averaging 500 MFA matters, the Los Angeles Angeles County Bar's MFA program is by far the state's largest MFA provider. LACBA reports that this year alone has seen a 10% increase in cases, on top of the 10% increase since 2006. Its operational costs similarly rose 12% since 2008 (including increased support staff). Since the last rate increase, LACBA has expended significant resources for Information Technology to establish a new MFA case management system. In addition, LACBA hired a new Volunteer Services Manager to oversee its 450 volunteer base of arbitrators and mediators serving its MFA program.

Nevada County Bar's administrator, a volunteer lawyer, has only 5-6 cases per year, but granted fee waivers to petitioners (clients) in half of the cases filed this year. "By receiving reimbursement, our program is nearly self sustaining but additional monies would offset the recent fee waivers and keep our program self sustaining."

The MFA program administered by the Orange County Bar Association (OCBA) is one of the largest programs in the state. Although its caseload and MFA filing fee revenues have remained steady over the past three years since the last increase, the MFA program's expenses have risen 23%. This has resulted in a budget increase of \$27,000 in MFA program operational costs.

The San Diego County Bar Association reports that the current rate does not cover staff administrator's salary/benefits, operational costs of space, telephone expense, repairs and maintenance, equipment costs or program office supplies. Its Lawyer Referral and Information Service funds part of the MFA program but its LRIS as seen a rise in its own operational costs since 2009 of 3%. Its MFA caseload, however, has remained steady at 150 cases per year since 2007.

Santa Clara County's Bar Association program reports that since 2007 (the last reimbursement increase identified inadvertently as "2006"), current reimbursement levels represent only 3% of its program costs and only 5% of the income it derives from

filing fees, even including higher bracket fee arbitrations. Notwithstanding the reimbursement and filing fees, the bar's general fund program has subsidized 43% of the average total program costs. In any event, State Bar reimbursement, while appreciated, does not cover the administrator's time per case, let alone other expenses.

III. FISCAL/PERSONNEL IMPACT

None. In order to accommodate the recommended increase from \$36 to \$50 per case, the 2011 budget for local bar reimbursement (Cost Center 10501) should increase to \$77,500 from the current \$70,000 budgeted.³ This net increase of \$7,650 can be absorbed by transferring funds budgeted for the State Bar's MFA Committee (Cost Center 10503) without impacting the functions of the MFA Committee it funds. No personnel impact will result from this increase.

IV. IMPACT ON BOARD BOOK/ADMINISTRATIVE MANUAL

None.

V. PROPOSED RESOLUTION

Committee Resolution

If the Board Committee on Operations agrees with the recommendation of staff that the reimbursement rate to the local bar association's fee arbitration programs should be increased to \$50 with a total budget of \$77,500 for 2011, the following resolution should be adopted:

RESOLVED, upon the recommendation of staff, the Board Committee on Operations recommends that the Board of Governors allocate \$77,500 to reimburse local bar associations with approved fee arbitration programs the sum of \$50 for each matter in which a mediator or arbitrator is assigned effective January 1, 2011.

Board Resolution

If the Board of Governors concurs with the recommendation of the Board Committee on Operations, the following resolution should be adopted:

³ The contracts for local bar reimbursement contain a provision stating that if the State Bar determines that it becomes necessary to ensure that the total expenditure for this item does not exceed the amount budgeted for the calendar year, or if the total amount budgeted is reduced, the flat rate payment to the participating local bars may be reduced on a pro rata basis among all participating local bars during the affected period as may be necessary.

RESOLVED, upon the recommendation of the Board Committee on Operations, the Board of Governors allocates \$77,500 to reimburse local bar associations with approved fee arbitration programs the sum of \$50 for each matter in which a mediator or arbitrator is assigned effective January 1, 2011.