

AGENDA ITEM

**MAY
Request for
Approval of
Amendments to
Rules of Procedure
for Fee Arbitrations
by Marin County Bar
Association**

DATE: April 1, 2010

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

FROM: Doug Hull, Director, Office of Mandatory Fee Arbitration

SUBJECT: Request for Approval of Proposed Amendments to Rules of Procedure for Fee Arbitrations by the Marin County Bar Association

EXECUTIVE SUMMARY

This agenda item is before your Committee to approve rule amendments proposed by the Marin County Bar Association ("MCBA") to its Rules of Procedure for Fee Arbitrations in the form attached as Attachment A hereto.

MCBA's proposed rule changes simply bring the bar association's rules of procedure in line with the State Bar Model Rules of Procedure. The Model Rules were adopted by the State Bar Board of Governors and provides a template for local bars in creating rules for fee arbitration programs. These rules are advisory in nature and are simply provided to assist the local bar in creating rules that comply with the Minimum Standards and Guidelines, which were also adopted by the State Bar Board of Governors.

The Mandatory Fee Arbitration Committee recommends approval of the Marin County Bar Association rule amendments to your Committee as they are in compliance with the Minimum Standards and Guidelines

Any questions about this item should be directed to Director Doug Hull (415)538-2015 or doug.hull@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 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 MCBA's rules of procedure for fee arbitrations on November 22, 2005. Recently, the local bar submitted proposed amendments to its local bar rules.

II. DISCUSSION:

The amendments provided by the MCBA track the current version of the Model Rules for Fee Arbitrations. The following rule updates are listed to give this committee a sense as to those changes. The MFA Committee found all of these updates to be in compliance with both the Model Rules and the Minimum Standards and Guidelines:

Rule 1.3 defining the assignee in a fee arbitration matter was eliminated. This amendment provides new definition to comply with Minimum Standard para. 20.

Rule 1.9 was added to define the term "Non-Lawyer Arbitrator". The definition in this rule tracks the State Bar Model rules.

Rule 1.14 was added to define 'trial' in the context of fee arbitration proceedings. 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.

Rule 2.1 was modified to clarify the timing of when a "Notice of Client's Right to Arbitration" must be send to a client and the form which the notice must be in. This proposed change updates MCBA's rules to match the language in the State Bar Model Rules.

Rule 3.0 clarifies the rights a non-participating party in arbitration as established in *Wager v. Mirzayance* (1998) 67 Cal.App.4th 1187 and in compliance with paragraph 13 of the Minimum Standards.

Rule 5.1 clarifies the process for correcting, vacating or confirming an award in compliance with Bus. & Prof. Code 6204(a) and CCP 1285 et seq.

Rule 6.4 clarifies when the parties may elect for non-binding arbitration after the fee dispute arises, but prior to the taking of evidence in the arbitration.

Rule 8.0 through 8.3 clarifies the waiver to right of arbitration in conformity with language contained in Bus. And Prof. Code 6201(a)

Rule 9.0 updates notification requirements for requesting a stay in legal proceedings relating to the fee dispute. This update identifies the party who is responsible to notify the court of the pending arbitration.

Rule 10.0 through 10.5 update language relating to jurisdiction to track the language in the State Bar Model Rules. This language clarifies that those disputes that are time barred are not subject to fee arbitration.

Rule 11.2 provides for resolution of jurisdiction between two local bar programs in conformity with the Model Rules in conformity with paragraph 18 of the Minimum Standards.

Rule 12.4 provides that the party who paid the filing fee in local bar arbitrations which are removed to the State Bar are entitled to a refund, which conforms to the Model Rules.

Rules 14.0-14.5 clarify who may request a fee arbitration. The addition of Rule 14.1 is included to clarify that a third party payor is entitled to request fee arbitration in compliance with paragraph 13 of the Minimum Standards. Rule 14.3 confirms that service must be made before notice of appointment of panel consistent with Minimum Standard para.14. Rule 14.5 is updated to also conform to paragraph 14 of the Minimum Standards reflecting an attorney's responsibility to maintain client confidences in the event that a third party payor is a participant in an arbitration

Rule 15.0 – 15.3 cleans up language relating to the filing fee structure. There is no substantive change to this bar's filing fee structure.

Updates to rule 19.1 protect a party's right to re-file for MFA in the event that the parties' settlement agreement is not followed. Updates to rules 19.2 and 19.4 clarify how settlement is handled and when a party may withdraw from arbitration and incorporation of a settlement agreement into a written award.

Rule 20.0 regarding consolidations is updated to incorporate language in the model rules.

The amendment to rule 21.1 would increase the dollar threshold that must be in dispute to obtain a three member panel, from \$10,000 or more to \$15,000 or more. When the MFA Program was created thirty years ago, the most common dollar threshold for a three member panel was \$7,500. It was later increased by some programs, including the State Bar's own MFA program, to \$10,000. The State Bar's threshold is currently \$15,000. In recent years, to keep pace with inflation, the Board has approved higher dollar thresholds for a growing number of local bar programs to dollar thresholds up to \$25,000. The amendment to MCBA rule 21.1 reflects the trend of increasing the threshold, but maintains it in line with the State Bar's standard. Rule 21.3 is updated to clarify the timing of a response in those matters where the fee dispute is \$1000 or less. Rule 21.5

comports with the State Bar provision that retired judges acting as arbitrators must be on active status with the State Bar.

Rule 26.3-revision to confidentiality rule tracks State Bar rule of procedure 27.3, approved by the Board last year to protect the program from disclosure of MFA files to non-parties absent a court order.

Rule 27.2 was added to include allowing a lawyer or non-lawyer to serve as a representative for a non-appearing party

Rule 29.0 was amended to clarify that clients have the right to inspect and obtain a copy of their file kept by the attorney.

Rule 37 was amended in conformity with the model rule which do not allow for recording of arbitration proceedings.

Rule 39.3 was amended in conformity with Paragraph 16 of the Minimum Standards, requiring accrual of interest on the award 30 days after service.

Rules 40.1 through 40.3 were updated to clarify when an award may be corrected or amended. These rules describe the process for making such a request and are in conformity with the Model Rules.

Rule 42: added to provide optional rule implementing Minimum Standard para. 6, authorizing referral of attorney misconduct to the State Bar's Office of Intake.

III. FISCAL AND PERSONNEL IMPACT:

None.

IV. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT:

None.

V. PROPOSED RESOLUTION:

If your Committee agrees with the recommendation to approve the amendments to the MCBA's rules of procedure for fee arbitrations, the following resolution would be appropriate:

RESOLVED, that, the Regulation Admissions and Discipline Oversight Committee hereby approves the proposed amendments to the Rules of Procedure for Fee Arbitrations by the Marin 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 Arbitrations.