

AGENDA ITEM

54-121 MAY

DATE: April 23, 2012

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Trustees

FROM: Doug Hull, Director, Mandatory Fee Arbitration

SUBJECT: Proposed Modification to Rule 31.0 (“Subpoenas”), Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California. Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

The Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California (“Rules”) govern the State Bar’s Mandatory Fee Arbitration Program (“MFA”). This proposal seeks to modify rule 31.0 of the aforementioned rules to clarify the process for the issuance of subpoenas in fee arbitrations conducted under these rules. The proposal also requires the requesting party to demonstrate a showing of good cause in order for any subpoena to be issued.

The MFA seeks approval from RAD and the Board of Trustees to revise Rule 31.0 of the Rules of Procedure for Fee Arbitrations and Enforcement of Awards after 45 days of public comment. The revision is set forth in Attachment A. Questions about this item should be directed to Doug Hull (415) 538-2015 or doug.hull@calbar.ca.gov.

BACKGROUND

Pursuant to Business and Professions Code § 6200, *et seq.*, the Board of Trustees 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 Trustees adopts rules of procedure to govern the arbitration of attorney fee and cost disputes. (Bus. & Prof. Code, § 6200, subd. (a).)

Contained within the MFA Rules is a provision for the issuance of subpoenas by the State Bar Presiding Arbitrator. The rule states that the Mandatory Fee Arbitration Program shall provide the blank subpoena forms to the requesting party and that the

requesting party is responsible for the service of the subpoenas and any costs associated with the request.

ISSUE

The Mandatory Fee Arbitration process is designed to be a quicker, cheaper and less formal venue for resolving fee disputes between attorneys and clients. It is a consumer protection program that benefits the citizens of California and members of the State Bar. The less formal nature of Mandatory Fee Arbitration is designed to help clients feel more comfortable with the process. Discovery is not allowed and no rules of evidence are applicable. Clients aren't required to be well-versed in legal procedure in order to have their matter heard in a fair and impartial manner.

The use of subpoenas in Fee Arbitration matters is infrequent and they are not enforceable in fee arbitration proceedings, although it is the opinion of the Committee on Mandatory Fee Arbitration (CMFA) that subpoenas may be enforced by the appropriate civil court upon application by a party (see Arbitration Advisory 2002-01 "Imposition of Sanctions by Arbitrators in Conducting Fee Arbitration Matters" dated May 17, 2002 [which can be found at: http://www.calbar.ca.gov/Portals/0/documents/mfa/2002-01_Imposition-of-Sanction-by-Arbitrators-in-Conducting-Fee-Arbitration-Matters_r.pdf] and Arbitration Advisory 2008-02 "Authority to Compel Compliance with Third-Party Subpoenas" dated May 25, 2008 [which can be found at: http://www.calbar.ca.gov/Portals/0/documents/mfa/2008-02_Authority-to-Compel-Compliance-With-Third-Party-Subpoenas_r.pdf]).

Rule 31.0 currently states that the Presiding Arbitrator "may" issue subpoenas upon request and that the MFA "shall" issue the subpoena to the requesting party. The rule is interpreted to mean that the Presiding Arbitrator has discretion to issue subpoenas, but once the subpoena request is approved by the Presiding Arbitration, the MFA must issue the subpoena. There is no requirement that the requesting party provide a rationale for requesting a subpoena.

At its meetings in November, 2011 and January, 2012, the CMFA discussed several situations where it appeared that certain parties in Fee Arbitration matters were requesting subpoenas to intimidate the opposing party. The rule, in its current form, does not require the requesting party to make a showing of good cause, but simply states that the Presiding Arbitrator may issue them and that the Mandatory Fee Arbitration Program shall provide them. There is no provision in the current rules to ensure that the subpoena in question is germane to the arbitration at hand.

During discussions at the CMFA meetings, the Presiding Arbitrator relayed a situation where a party had requested two dozen subpoenas, an extremely high number in fee arbitration proceedings. After review by the Presiding Arbitrator, it was determined that only one subpoena was needed and that the rest were intended to harass the opposing party. When the Presiding Arbitrator issued the ruling, the requesting party argued that the Presiding Arbitrator did not have discretion to make that determination. This rule

modification would make it clear that the Presiding Arbitrator does have the discretion to control the issuance of subpoenas, especially if there is no justifiable reason for the said subpoenas. This scenario runs counter to the nature of the fee arbitration process and demonstrates the need for the proposed rule change.

In summary, the proposal makes the following modifications to the rule:

1. The requesting party must complete the form and submit it to the presiding arbitrator.
2. Upon a showing of good cause, the presiding arbitrator may sign the subpoena.
3. If the presiding arbitrator approves the subpoena, he will sign it and return it to the requesting party for service.
4. The requesting party is responsible for all costs associated with the subpoena.

The CMFA feels that these changes would adequately address the issues discussed above.

PUBLIC COMMENT

At the March 2012 meeting, RAD authorized this proposal for a 45-day public comment period. Public comment ended on April 20, 2012. No comments were received. In light of this, no modifications were made to the proposal that was released for public comment.

CONCLUSION

The goal of this proposal is to help reduce the likelihood that one party will abuse the subpoena process. After circulation of this rule among its members and discussion at its January 2012 meeting, the CMFA approved the proposed rule change. Public comment resulted in no proposals to modify the suggested rule change. It is requested that this modification be approved by the Board of Trustees.

FISCAL / PERSONNEL IMPACT:

None

RULE AMENDMENTS:

None

BOARD BOOK IMPACT:

None

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends that the Board Trustees approve the proposed revision to rule 31.0 of 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.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Regulation, Admissions and Discipline Oversight's recommendation above, the following resolutions would be in order:

RESOLVED, that upon the recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board of Trustees hereby approves the proposed revision to rule 31.0 of 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.