

**COMMITTEE ON MANDATORY FEE ARBITRATION  
THE STATE BAR OF CALIFORNIA**

**AGENDA**

**Thursday, September 29, 2016  
10:00 a.m. – 3:00 p.m.**

San Diego County Bar Association  
401 West A Street, Ste. 1100  
Bayview Conference Room, 11<sup>th</sup> Floor  
San Diego, CA 92101  
(619) 231-0781

- I. Call for Public Comment (Halper)
- II. Approval of Minutes of August 5, 2016 meeting (Attachment A, pp. 1-6) (All)
- III. Chair’s Report (Halper)
- IV. Report from Presiding Arbitrator (Bacon)
  - A. *Sheppard, Mullin, Richter and Hampton v. J-M Manufacturing*
- V. Report from the Office of Mandatory Fee Arbitration (Hull)
  - A. Office statistics (Attachment B, pp. 7-10)
  - B. Schedule of Events (Attachment C, pp. 11-12)
  - C. Appointments (Attachment D, pp. 13-20)
- VI. Business
  - A. Minimum Guidelines for Fee Arbitrators (Attachment E, pp. 21-28)(Buckner/Hull)
  - B. Submission of public Comment on Rules of Professional Conduct (All)
  - C. Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration programs (Buckner/Hull)
  - D. Handbook Updates (Attachment F, pp. 29-58) (all)
  - E. Judicial Outreach efforts (Halper, Bacon, Walsh, Migliaccio, Hull, Stone)

F. Updating the Case Summaries document using technology

(Halper)

Next committee meeting:

DATE: Friday, December 16, 2016

TIME: 10:00 a.m. – 3:00 p.m.

LOCATION: The State Bar of California  
180 Howard Street, 4<sup>th</sup> Floor  
San Francisco, CA 94105  
(415) 538-2000

**COMMITTEE ON MANDATORY FEE ARBITRATION  
THE STATE BAR OF CALIFORNIA**

**MINUTES**

**Friday, August 5, 2016  
10:00 a.m. – 3:00 p.m.**

The State Bar of California  
180 Howard Street, 4<sup>th</sup> Floor  
San Francisco, CA 94105

Members Present: Jobi Halper (Chair), Ken Bacon (Presiding Arbitrator), Michelle Chavez, Michael Fish, Nick Migliaccio (Vice Chair), Lorraine Walsh (Vice Chair), Chris Blank, Carole Buckner, Joel Mark, Dave Parker, Mark Schreiber and Sally Williams.

Not Present: Mary Best, Brandon Krueger, Lee Straus and Clark Stone.

Staff Present: Doug Hull

The meeting was called to order at 10:20 a.m. by Chair Jobi Halper

- I. Approval of Minutes of May 20, 2016 meeting  
The minutes were approved as attached to the agenda. The minutes of the June 13, 2016 meeting will need to be approved at the next CMFA meeting.
- II. Chair's Report
  - A. Jobi discussed the possibility of creating an "arbitrators only" portion of the MFA website. The committee determined not to proceed with that concept.
  - B. It was agreed that disclaimers should be added to the training outline and checklist to make clear that they are not the official position of the Committee.
  - C. A discussion of *Baxter v Bock* occurred. Since part of the issues raised in this case relate to the MFA "handbook", it was determined that local bars should be queried to see if they have a "handbook" they send to arbitrators. If they do, it was suggested that we try to review them to ensure the information contained in them is correct. Doug's office will conduct this effort.

It was also determined that a website review should be conducted to see if there is old information on the web (eg. old versions of the Notice of Client's Right form) at the local bar level. Doug's office will conduct this review.

It was agreed that handbooks are not serving a purpose in light of the training materials and should be disbanded. Ken and Carole volunteered to

Minutes August 5, 2016

Page 1

look at the State Bar's Handbook to see if there is information we may want to transfer to the training materials.

The committee discussed, per Chris' suggestion, renaming the Arbitrator Training Outline to Arbitrator Handbook and Training Outline; Carole also raised the question of developing a Model Handbook.

- D. The concept of a Chairperson roundtable was discussed. In order to conduct outreach, the committee thought it was a good idea to invite local bar chairs to a CMFA meeting to talk about issues they are experiencing. [What did we agree to do first?] We discussed having this at the Annual Meeting
- E. The committee also discussed considering adding further arbitrator disclosure discussion to a Minimum Standard, a Model Rule and/or a State Bar rule.
- F. With relation to *Baxter v. Bock*, the committee approved seeking Board approval for the Committee to (i) submit an "amicus letter" to the California Supreme Court in support of the petition for review and (ii) if the Court grants review, seek amicus status and submit a brief to the Court. The committee will attempt to seek Board approval before the California Supreme Court makes a determination whether to accept this matter for review.  
  
Jobi, Ken & Lorraine volunteered to prepare the foregoing for the Court and seek Board approval.
- G. It was agreed that the committee will attempt to create an online article and accompanying quiz to be posted for the State Bar for MCLE Ethics Credit. The first subject will be billing disputes. Carole and Jobi offered to create such a document.
- H. There was discussion regarding CLE offerings related to MFA—not trainings, but an informational program for attorneys notifying them of the process and how it works. Beverly Hills mentioned such a program. The committee considered presenting something like "good, bad, no ugly". Ken and Lorraine mentioned using the Ins and Outs of MFA program we did for the Placer County Bar.
- I. There was a discussion regarding stipulated settlements and what should be submitted to the programs when a settlement is reached. Jobi asked someone to look into a stipulated agreement for mediation. Nick volunteered to follow up.

### III. Report from Presiding Arbitrator

Minutes August 5, 2016

Page 2

Attachment A

Ken reported on the status of various cases that are being enforced (Viriyapanthu, Scheer). Also discussed *Strom v DeWit* motion; *Salazar v Hardy* abatement request and *Barnes v Winston* situation. Ken also provided an update on the status of the *Sheppard, Mullin* case (court granted extension to 8-26-16 for filing Answer Brief on the Merits)

IV. Report from the Office of Mandatory Fee Arbitration

A. Doug provided a brief review of the statistics

B. Schedule of events  
Attached to agenda

C. Rules of Professional Conduct ("RPC")  
The updates to the RPC are out for public comment. If committee members have comments to make, they should send them to Doug.

V. Discussion/Information Items

A. Minimum Qualification for Fee Arbitrators

This item was discussed. Modifications were suggested to the guidelines attached to the agenda. Incorporation of the requirements of B&P 6068(o) were discussed. Carole will look at the language of the statute and propose language for inclusion with the Minimum Qualifications.

Doug mentioned that the Board rejected a proposed arbitrator because of old discipline record even though Ken had approved the application.

B. Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration programs

Doug and Carole are still working on this. They will report back at the next meeting. Discussed adding standard re disclosures

C. Los Angeles County Bar Association's request to re-print Sample Fee Agreement forms

Seth Chavez from LACBA presented his request that the LACBA be permitted to modify versions of the State Bar Sample Fee Agreement forms and repost them on the LACBA website. LACBA wishes to modify the agreement forms to establish LACBA as venue for arbitrations, and make other modifications. The committee declined the request on the grounds that venue should not be established by a bar association, other rights of parties may be limited by the changes, the agreements comport with the MFAA and other legal requirements and once a program makes changes the committee may no longer have the ability to ensure they match such requirements, and it may appear that the CMFA is treating the LACBA program as a preferred program. The CMFA is open to a renewed, modified request, with more details if LACBA wishes to pursue the issue further.

D. Bankruptcy Advisory

This was not discussed

- E. Blue lining fee agreement language requiring “Binding Mandatory Fee Arbitration” was determined to be inappropriate after research. Instead, the committee agreed that such language is impermissible and must simply be stricken from fee agreements.

F. Handbook

This issue was discussed as part of the Chairs report. Doug agreed to follow up with local bar associations to see if they have “handbooks” they are using for their arbitrators. If so, Doug will request copies of said handbooks to see if there is language that might need to be addressed.

The State Bar’s handbook will be reviewed by Carole and Ken to see if there is information that should be incorporated into the training outline. The handbook may need to be discontinued in order to simplify the process of updating information.

There was discussion of creating a “model” handbook.

G. Judicial Outreach efforts

Jobi, Ken, Lorraine, Nick and Doug provided updates. More to come on this topic. The committee will follow up with Clark at the next meeting.

H. Case summaries

This was not discussed.

I. Cost standards for local bar programs

This was discussed and a handout was provided. Also discussed General Counsel’s opinion about \$150 arbitrator and program charging for use of room; Agreed to put this on the agenda.

J. Arbitration Advisories for Future Review

This was not discussed

Ken gave an update re the status of B&P Code updates re *Schatz* per Conference of California Bar Associations. The proposal through the Sacramento County Bar Association made it through initial review process by all county bar programs and will likely be up for debate at the Annual Meeting.

The meeting adjourned at 3:00 p.m.

Next committee meeting: Discussion re group dinner; Jobi will organize

DATE: Thursday, September 29, 2016  
TIME: 10:00 a.m. – 3:00 p.m.  
LOCATION: San Diego County Bar Association  
401 West A Street, Suite 1100  
San Diego, CA 92101

This page is intentionally blank.

# STATE BAR MANDATORY FEE ARBITRATION PROGRAM STATISTICS 2016

## INTAKE ACTIVITY 2016

	JAN.	FEB.	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	YTD	Year End 2015
Fee Arbitration Requests	12	3	10										25	88
Requests with Jurisdiction Challenges or Removal Requests	1	1	1										3	6
Enforcement Requests	0	3	4										7	44
Phone Intake	331	324	361										1016	3900

## ENFORCEMENT ACTIVITY (All cases, all years)

	JAN.	FEB.	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	YTD	Year End 2015
Orders Filed Assessing Administrative Penalties	0	0	0										0	14
Motions Filed To Enroll Attorney Inactive	2	0	1										3	5
Attorney Placed on Inactive Status	0	0	2										2	2
Prepare Motion	0	0	0										0	6
Impose Penalty	0	0	0										0	10
ExParte App. Inactive/Default	0	0	0										0	0
Attorney on Payment Plan	0	1	1										2	12
Cases Abated	0	1	1										1	7
Cases Paid and Closed	5	4	4										14	31
Cases Closed: Other	0	3	3										3	14

## ARBITRATION CASES: CLOSED STATUS (All Cases, all years)

	JAN.	FEB.	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	YTD	Year End 2015
Findings & Award Served	2	6	14										22	57
Cases Closed, No Award	0	4	5										9	45
Total Cases Closed	2	10	19										31	102

# STATE BAR MANDATORY FEE ARBITRATION PROGRAM STATISTICS 2016

## ARBITRATION CASE STATUS REPORT (All Cases, all years)

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	Year End 2016	Year End 2015
Case Forwarded to PA for Jurisdiction Decision	2	6	2											0
Fee Waiver/Filing Fee Due	1	0	0											1
Request Received/Not Served	4	1	1											2
Request Served/Reply Due	11	3	9											9
Ready to Assign	2	6	0											1
Assigned/No Hearing Set	8	7	14											11
Notice of Hearing Date Served	11	7	7											23
Findings & Award Due	19	22	10											2
Total Cases Currently Open	58	52	43											49
Cases Currently in Abeyance	0	0	0											0

**STATE BAR MANDATORY FEE ARBITRATION PROGRAM STATISTICS  
AUGUST 31, 2016**

INTAKE ACTIVITY	Through AUG. 31, 2016	Through AUG. 31, 2015	At year end <b>2015</b>
Fee Arbitration Requests	56	61	88
Requests with Jurisdiction Challenges or Removal Requests	7	4	6
Enforcement Requests	17	28	44
Phone Intake	2615	2654	3900

ENFORCEMENT ACTIVITY	Through AUG. 31, 2016	Through AUG. 31, 2015	At year end <b>2015</b>
Payment Plan	3	6	12
Orders Filed Assessing Administrative Penalties	2	9	14
Ex Parte App. To Enroll Inactive/Default	0	0	0
Prepare Motion	2	2	6
Motions Filed To Enroll Attorney Inactive	6	1	5
Attorney Placed on Inactive Status	5	1	2

OPEN ARBITRATION CASES CURRENT DISPOSITION	Month of AUG. 2016	Month of AUG. 2015	At year end <b>2015</b>
Jurisdiction Challenges & Removal Requests	3	3	0
Fee Waiver/Filing Fee Due	1	3	1
Request Received/Not Served	0	4	2
Request Served/Reply Due	6	9	9
Ready to Assign	4	5	1
Assigned/No Hearing Set	5	6	11
Notice of Hearing Date Served	13	9	23
Findings & Award Due	4	9	2
Total Cases Currently Open	36	48	49

Closed Status (Arbitration cases, all years)	Through AUG. 31, 2016	Through AUG. 31, 2015	Year end <b>2015</b>
Findings & Award Served	51	41	57
Cases Closed With No Award	20	31	45
Total Cases Closed	71	72	102
Cases Currently in Abeyance	0	0	0

## Mandatory Fee Arbitration Requests Filed By Local Bar Programs\*

	2010	2011	2012	2013	2014	2015	2016
1 <sup>st</sup> Quarter	418	379	365	271	287	304	196
2 <sup>nd</sup> Quarter	409	373	454	323	280	273	257
3 <sup>rd</sup> Quarter	449	341	368	295	301	295	
4 <sup>th</sup> Quarter	392	392	329	255	256	267	
Total	1668	1485	1516	1144	1124	1139	

\* This number is based on the number of reimbursement requests from local bars. The State Bar pays to participating local bar programs a flat \$50 fee per MFA case assigned to a mediator or arbitrator.

**Committee on Mandatory Fee Arbitration**

**Calendar of events**

<b>Date</b>	<b>Event</b>	<b>Type</b>	<b>Location</b>	<b>Participants</b>
Thursday, September 29, 2016 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	San Diego County Bar Association 401 West A Street Bayview Conference Rm., 11th Floor San Diego, CA 92101	All members
Friday, September 30, 2016 10:30 a.m. - 12:00 p.m.	Mandatory Fee Arbitration: The Good, the Bad, there is No Ugly	MCLE	<b>State Bar Annual Meeting</b> San Diego Marriott Marquis & Marina	Mark, Bacon
Friday, September 30, 2016 1:30 p.m. - 3:00 p.m.	Updates on Enforceable and Ethical Fee Agreements, including Alternative Fee Agreements	MCLE	<b>State Bar Annual Meeting</b> San Diego Marriott Marquis & Marina	Halper, Bacon
Friday, September 30, 2016 3:30 p.m. - 5:00 p.m.	Getting Paid: The relationship between your billings and fee agreements	MCLE	<b>State Bar Annual Meeting</b> San Diego Marriott Marquis & Marina	Migliaccio, Walsh
Saturday, October 1, 2016 10:30 a.m. - 12:00 p.m.	Protecting and Collecting Fees	MCLE	<b>State Bar Annual Meeting</b> San Diego Marriott Marquis & Marina	Fish, Buckner
October/November? (Still waiting to hear from Desert Bar)	Training	Basic	Desert Bar Association	Mark, Straus
October/November? Tuesdays	Training	Advanced	Ventura County Bar Association 4475 Market St., Suite B Ventura, CA 93303	Mark, Straus(?)
Wednesday, November 2, 2016 4:00 – 7:00 pm	Training	Basic	Sonoma County Bar Association 37 Old Courthouse Square, Suite 100 Santa Rosa, CA 95404	Fish, Bacon
November ,2016	Training	Basic	San Diego County Bar Association 401 W. A St., Suite 1100 San Diego, CA 92101	Powell, Best
Friday, December 16, 2016 10:00 a.m - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 180 Howard Street, 4th Fl. AB San Francisco, CA 94105	All members
Friday, January 27, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 845 South Figueroa Street, 2 F-G Los Angeles, CA 90017	All members
2017?	Training	Basic	Riverside County Bar Association	
Friday March 24, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 180 Howard Street, 4th Fl. AB San Francisco, CA 94105	All members
Friday, May 19, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 180 Howard Street, 4th Fl. DE San Francisco, CA 94105	All members
Friday, July 7, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 845 South Figueroa Street, 2 F-G Los Angeles, CA 90017	All members
Thursday, August 24, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	Anaheim, CA in conjunction with the State Bar's Annual Meeting	All members

This page is intentionally blank.

# State Bar of California Committee Application Form 2017-2018

This application form can be filled out on your computer, and then printed for your signature and attachments (see instructions below). Alternatively, the document can be printed in its blank form and completed by hand (use a pen with dark ink).

**Questions:** Contact the Appointments Office at [appointments@calbar.ca.gov](mailto:appointments@calbar.ca.gov) or (415) 538-2370.

## INSTRUCTIONS

**You may only apply to a maximum of two committees; appointment will be limited to one committee. A separate application form is required for EACH committee appointment sought, and is to include detail about the experience RELEVANT to the committee appointment sought. If the space provided is not sufficient for your response, type "See Attached" and attach a separate page.**

**Committee requirements:** Review the requirements for each committee at the committee's description found at the State Bar's website at: <http://cc.calbar.ca.gov/>. Information on committee requirements is also available from the State Bar's Appointments Office and from the committee's staff contact (name and number listed at the website description).

**Participation of Diverse Members:** The State Bar of California values diversity and broad-based representation in its appointments. The recruitment and selection of applicants with diverse backgrounds, experiences, outlooks, and ideas and geographical diversity brings qualities essential to the governance of the legal profession and to the services the State Bar provides to its diverse members and to the public.

The State Bar's Board of Trustees is committed to the active solicitation and encouragement of members with a broad array of backgrounds and life experiences including members with skills or attributes that are underrepresented in the legal profession to submit applications for appointments to all bar sponsored entities.

The Board seeks to recruit and obtain applicants with a breadth and depth of perspective including, but not limited to the following: geographic location, practice area, size of law practice, length of time practicing, volunteer work, specific accomplishments, educational background, race, ethnicity, gender, age, sexual orientation, and disability for each of the entities to which the board makes appointments.

The State Bar provides equal access to all applicants and complies with all applicable anti-discrimination laws in its appointment process.

**Statement of Interest:** Your statement should **clearly state** why you wish to serve on the committee and what you can contribute that makes you a good candidate for appointment. Suggested areas for inclusion in the statement: (1) unique characteristics, perceptions, experiences, personal talents, or qualifications that you would bring to the committee; (2) communication skills and leadership abilities that you possess that will lend to the activities of the committee; and (3) hardships or disadvantages you have had to overcome and how this experience will contribute to your service with the State Bar

### APPLICATION CHECKLIST:

- Application form with all questions completed.
- Resume or biography (5 pages maximum). **If a resume or biography exceeds 5 pages, only the first 5 pages will be considered during the appointment process.**
- Letters of recommendation (maximum three). A letter of recommendation is helpful but not required. If letters are being submitted, they **must** be submitted with the application. **If more than three letters are received, only the first three will be considered with the application.**
- Sign and date application, and follow the application filing instructions. Your application is confidential.
- If you submit an application electronically (e-mail or fax), please do not mail a hard copy.**

# APPLICATION FILING INSTRUCTIONS

- **Attach your application, resume, and letter(s) of recommendation in the following order:**
  - 1) Application form, signed and dated.
  - 2) Resume or biography (5 pages maximum).
  - 3) Letter(s) of recommendation (maximum three)
- **Submitting Application:** For each committee application (maximum two applications), submit one (1) single-sided copy of the application form and the attachments; collate and staple in the order noted above.
- **Resume/Biography:** Your resume or biography may include any of the following: business, occupational or professional licenses; legal and general educational background; academic, professional or civic honors; articles or publications authored (**do not attach copies**); accomplishments of note; proven commitment to volunteer work/capacity to make expected time commitment; national, state and/or local bar committee service, professional and/or community association memberships, personal and/or organizational references.
- **Letters of Recommendations (maximum three):** A letter of recommendation is helpful but not required. If letters are being submitted, they **must** be submitted with the application.

## SPECIFIC ELIGIBILITY CRITERIA:

- **ABA House of Delegates:** You must be member in good standing of the ABA. In your statement of interest, describe your ABA activities and contributions you have made to the organization in the past two years.
- **2018 Commission on Judicial Nominees Evaluation (JNE) Commission:** Lawyer applicants must be State Bar members in good standing and in active practice. Public member applicants must not be admitted to the practice of law. In your statement of interest, please describe why you want to serve on the commission, any experience you have with interviewing professional applicants, and your ability to make the overall time commitment and to attend a **mandatory Orientation meeting to be held Friday-Saturday, Jan. 26-27, 2018**. A letter of recommendation, especially from an employer, is helpful.
- **Section Executive Committee:** Applicants to a section executive committee must be members of that section to be eligible for appointment. The level of each applicant's involvement in the section's activities is considered during appointment review.
- **California Board of Legal Specialization and its Advisory Commissions:** Lawyer applicants to these commissions must generally be certified specialists; however, one lawyer member of an advisory commission and two lawyer members of the CBLS may be non-specialists, such as professors. Newly certified specialists are encouraged to apply to the CBLS and its advisory commissions. To become a certified specialist, see: [www.californiaspecialist.org](http://www.californiaspecialist.org).

**DEADLINES:** Unless otherwise published at the State Bar's website, the 2017 application deadlines for the following entities are:

**Jan. 27, 2017:** ABA House of Delegates, Judicial Council, and the State Bar's Standing, Section Executive and Special Committees

**May 4, 2017:** 2018 JNE Commission, Review Committee of the JNE Commission (RJNE)

Applications for committees with immediate vacancies may have different deadlines. Please check the State Bar's website at <http://cc.calbar.ca.gov/> for deadlines for committees with immediate vacancies. On occasion, the application deadline for a committee may be extended. Deadline extensions are posted at the website; applicants also may contact the Appointments Office for information about extended deadlines.

## MAIL OR DELIVER EACH COMMITTEE APPLICATION TO (if submit electronically, do not mail hard copy):

Appointments Office  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639  
E-mail: [appointments@calbar.ca.gov](mailto:appointments@calbar.ca.gov)  
Fax: (415) 538-2305

**Applications must be received by the established deadline, and must be signed and dated.** Signatures may be via pen or via official digital signature, such as through Adobe Pro, but typed "/s/" signatures will not be accepted. Applications may be submitted via mail, e-mail or fax.

**THE STATE BAR OF CALIFORNIA**

**APPLICATION FOR 2017 – 2018 APPOINTMENTS**

Your application is confidential. You may only apply to a maximum of two committees; appointment will be limited to one committee. A separate application form is required for each committee appointment sought, and is to include detail about the experience RELEVANT to the committee appointment sought. Review the requirements for each committee at the State Bar’s website. Committee requirements are also available from the State Bar’s Appointments Office and committee staff. You will be notified by email of the decision on your application no later than 8/27/2017. Your notification will be sent via email to your State Bar public email of record; attorney members should ensure that their contact information is update-to-date. Terms for most committees begin at the close of the 2017 State Bar Annual Meeting (8/27/2017); terms for the American Bar Association (ABA) House of Delegates begin at the close of the 2017 ABA Annual Meeting (8/15/2017); the Judicial Council term begins 9/15/2017; and terms for the 2018 Judicial Nominees Evaluation (JNE) Commission begin 2/1/2018.

Office Use Only-Processed:

**Instructions.** Fill in on your computer using the fillable text boxes, or complete by hand using a pen with dark ink or by typewriter. Print a copy of the completed application. Date and sign the application. Attach: (1) resume or biography (five page maximum), and (2) any letters of recommendation (maximum three). Do not submit copies of books, articles or certificates with your application. Follow filing instructions at the beginning of this form.

**NAME:**

**STATE BAR NUMBER:**

**CHECK HERE IF YOU ARE NOT ADMITTED TO PRACTICE LAW IN CALIFORNIA:**  If you are not a lawyer and/or are not admitted to practice law in California, you may apply for some positions as a public member. Some committees require public members to be non-lawyers. Please review the committee descriptions at the State Bar website for requirements. If appointed, your address information may be published at the State Bar’s website. If you do not wish your e-mail address to be public, check the “private” box at the e-mail address line below.

**COMMITTEE APPOINTMENT SOUGHT**  
Select ONE committee from the drop-down list below:

**COMMITTEE NAME:**

**EMPLOYER / FIRM / AGENCY:**

**ADDRESS:**

**CITY / STATE / ZIP CODE:**

**DAYTIME PHONE:**

**FAX NUMBER:**

**E-MAIL ADDRESS:**

My e-mail is public

My e-mail is private

---

**HOW DID YOU LEARN OF THIS VACANCY?** *(check one; specify if requested)*

Board of Trustees *(name)*: \_\_\_\_\_  
Committee chair  
Colleague

Local bar association  
State Bar publication or State Bar website  
Other *(specify)*: \_\_\_\_\_

---

**WHICH ONE OF THE FOLLOWING BEST DESCRIBES YOUR OCCUPATION?** *(check one; specify if requested)*

Private practice  
Publicly employed lawyer  
Corporate law department  
Law teaching  
Quasi-judicial officer

Non-governmental legal services organization  
Non-profit organization  
Retired justice or judge  
Retired lawyer  
Other *(specify)*: \_\_\_\_\_

---

**WHAT IS THE SIZE OF YOUR OFFICE?** *(check one)*

Sole practitioner  
2-10 lawyer office  
11-35 lawyer office

36-100 lawyer office  
101+ lawyer office  
Not applicable

---

**LIST DATE ADMITTED TO THE STATE BAR OF CALIFORNIA** *(month and year)*: \_\_\_\_\_

I am currently *(check one)*:      Active      Inactive

List other jurisdictions to which you have been admitted to practice: \_\_\_\_\_

---

**LIST LENGTH OF TIME IN PRACTICE:** \_\_\_\_\_

If not a lawyer, list length of time in profession: \_\_\_\_\_

---

**LIST FIELDS IN WHICH YOU PRACTICE:**

**LIST FIELDS IN WHICH YOU ARE CERTIFIED AS A SPECIALIST:**

---

**VOLUNTEER SERVICE.** List prior volunteer service with the State Bar, local or specialty bar associations, community or other organizations. Please focus on activities that prepare you for a position to the committee appointment sought:

---

**STATE BAR SECTIONS.** List the State Bar sections of which you are a member (*all applicants to a section's executive committee must be members of that section*).

---

**DISCIPLINE RECORD.** List any formal disciplinary charges filed against you by the State Bar of California, including disposition of such charges and any public record of discipline.

---

**STATEMENT OF INTEREST.** Please state why you wish to serve on the committee and what you can contribute that makes you a good candidate for appointment.

---

**EXPERIENCE:** Describe any previous work or experience you may have had with the committee.

---

**ADDITIONAL BACKGROUND:** Describe any additional background you would like to share relevant to your appointment to the committee, including but not limited to how you can contribute to the diversity and broad composition of the State Bar's committees and commissions.

---

**Applicants are requested, but not required,** to provide the following information. If you wish to self-identify as a member of a community or to describe your background, please complete the following:

**Gender:**      Male  
                   Female

**Ethnicity:** \_\_\_\_\_

**Age:** \_\_\_\_\_

**Sexual Orientation** (e.g., do you self-identify as a member of the gay, lesbian, bisexual or transgender community):

**Other Diversity Factor(s):**

---

**SIGNATURE:** Sign and date your application.

**Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_  
(Signatures may be via pen or official digital signature; typed "/s/" signatures will not be accepted.) (m/d/yy)

**DEADLINES:** Unless otherwise published at the State Bar's website, the 2017 application deadlines for the following entities are:

**Jan. 27, 2017:** ABA House of Delegates, Judicial Council, and the State Bar's Standing, Section Executive and Special Committees

**May 4, 2017:** 2018 JNE Commission, Review Committee of the JNE Commission (RJNE)

Applications for committees with immediate vacancies may have different deadlines. Please check the State Bar's website at <http://cc.calbar.ca.gov/> for deadlines for committees with immediate vacancies. On occasion, the application deadline for a committee may be extended. Deadline extensions are posted at the website; applicants also may contact the Appointments Office for information about extended deadlines.

**APPLICATION CHECKLIST:**

- Application form with all questions completed.
- Resume or biography (5 pages maximum). **If a resume or biography exceeds 5 pages, only the first 5 pages will be considered during the appointment process.**
- Letters of recommendation (maximum three). A letter of recommendation is helpful but not required. If letters are being submitted, they **must** be submitted with the application.
- Sign and date application, and follow the application filing instructions. Your application is confidential.
- If you submit an application electronically (e-mail or fax), please do not mail a hard copy.**





# STATE BAR OF CALIFORNIA

**INTER-OFFICE  
COMMUNICATION**

**DATE:** September 23, 2016

**TO:** CMFA

**FROM:** Doug Hull

**SUBJECT:** Guidelines & Minimum Qualifications of Arbitrators

---

At the last CMFA meeting, we discussed the arbitrator qualifications. A copy of the covering memo is attached.

At that meeting, the committee considered modifications to the policy. It was suggested that the reporting requirements of B&P 6068(o) may need to be considered for inclusion with the policy. In light of that discussion, further modifications have been advanced. Attached please find in legislative and clean formats, further proposed revisions to the qualifications.



# STATE BAR OF CALIFORNIA

**INTER-OFFICE  
COMMUNICATION**

**DATE:** July 29, 2016

**TO:** Committee on Mandatory Fee Arbitration

**FROM:** Doug Hull

**SUBJECT:** Proposed modification to Guidelines and Minimum Qualifications of Arbitrators

---

When applicants volunteer to serve as State Bar arbitrators, they must meet the Minimum Qualifications in order to be appointed. The current version of the Guidelines and Minimum Qualifications of Arbitrators for the State Bar Fee Arbitration Department contains some internal inconsistencies. It would be appropriate to address those inconsistencies.

This item proposes modifications to the Minimum Qualifications as attached. I worked with our General Counsel's office to update the language. The attachment shows the clean version of the document along with the proposed changes in legislative format.

This item seeks approval of these changes.

Attachments:

- D1. Clean version
- D2. Legislative version
- D3. Original version

**The State Bar of California  
Committee on Mandatory Fee Arbitration  
Guidelines & Minimum Qualifications of Arbitrators  
for the State Bar Fee Arbitration Department**

**I. Arbitrator Appointments Selection Committee**

The Appointments Selection Committee shall consist of the Presiding Arbitrator and the Program Director of the State Bar of California Mandatory Fee Arbitration Department. Recommendations for appointments of arbitrators are submitted to the appropriate State Bar Board Committee, which in turn forwards its recommendations to the full Board of Trustees of the State Bar for appointment.

**II. Guidelines for Minimum Qualifications of Arbitrators**

The following guidelines are intended to set forth the minimum qualifications for lawyer and non-lawyer arbitrator appointments as well as the retention of appointees on the arbitrator panel. Any information provided by the applicant on his or her application form will be evaluated and could be used as grounds for exclusion from appointment. An applicant's failure to show, upon request of the Appointments Selection Committee, that he/she affirmatively meets these minimum qualifications may result in the rejection of an applicant or removal of an arbitrator from the Fee Arbitration Department.

**III. Appointment to the Mandatory Fee Arbitration Panel**

1. Requirements of All State Bar Fee Arbitrators

Prior to assignment to a panel, arbitrators are required to attend at least one comprehensive training program for arbitrators on attorney fee arbitration through a local bar association or the State Bar of California.

Conviction of any felony or misdemeanor crime may constitute grounds for rejection of the applicant or removal from the State Bar Fee Arbitration Department panel. The filing of disciplinary charges with the State Bar Court or imposition of any public discipline by the State Bar Court or a federal court or agency authorized to impose comparable professional discipline against attorneys may constitute grounds for rejection of an application or removal from the panel.

2. Lawyer Arbitrators

To be qualified for appointment as a lawyer arbitrator, an applicant must:

- (1) be, and have been for at least five years, an active member in good standing with the State Bar of California; or

- (2) be a retired judge who is an active member of the State Bar of California; and
- (3) not have a pending professional disciplinary matter filed with the State Bar Court, any federal court or agency, or other state bar discipline authority. Conviction of a crime for any felony or misdemeanor may constitute grounds for rejection of the applicant. The imposition of any public discipline by the State Bar Court, or a federal court or agency or other state bar discipline authority authorized to impose comparable professional discipline against attorneys may constitute grounds for rejection of an application.

### 3. Non-Lawyer Arbitrators

To be qualified for appointment as a non-lawyer arbitrator an applicant must:

- (1) provide sufficient information to the Appointments Selection Committee to its satisfaction concerning his or her business, professional or volunteer experience, education, or other relevant qualifications to serve as an arbitrator; and
- (2) have never been an active or inactive member of the bar of any state or the District of Columbia; and
- (3) have never worked regularly for a public or private law office or practice, court of law or attended law school for any period of time; and
- (4) have never worked as a paralegal, law firm staff, or law clerk.

## **IV. Ongoing Requirements**

- (1) During the term of service, all lawyer arbitrators are required to report to the Program Director the existence of any professional disciplinary complaint filed with the State Bar Court or imposition of public professional discipline by the State Bar of California or by any federal court or agency authorized to impose comparable professional discipline against attorneys.
- (2) During the term of service, all arbitrators are required to report to the Program Director the existence of any criminal conviction, whether misdemeanor or felony.
- (3) Once appointed, all arbitrators shall attend a comprehensive training at least once every five (5) years.

**The State Bar of California  
Committee on Mandatory Fee Arbitration  
Guidelines & Minimum Qualifications of Arbitrators  
for the State Bar Fee Arbitration Department**

**I. Arbitrator Appointments Selection Committee**

The Appointments Selection Committee shall consist of the Presiding Arbitrator and the Program Director of the State Bar of California Mandatory Fee Arbitration Department. Recommendations for appointments of arbitrators are submitted to the appropriate State Bar Board Committee, which in turn forwards its recommendations to the full Board of Trustees of the State Bar for appointment.

**II. Guidelines for Minimum Qualifications of Arbitrators**

The following guidelines are intended to set forth the minimum qualifications for lawyer and non-lawyer arbitrator appointments as well as the retention of appointees on the arbitrator panel. Any information provided by the applicant on his or her application form will be evaluated and could be used as grounds for exclusion from appointment. An applicant's failure to show, upon request of the Appointments Selection Committee, that he/she affirmatively meets these minimum qualifications may result in the rejection of an applicant or removal of an arbitrator from the Fee Arbitration Department.

#  
#  
#  
#

**III. Appointment to the Mandatory Fee Arbitration Department Panel**

1. 1. Requirements of All State Bar ~~Arbitration Department~~ Fee Arbitrators

~~Prior to assignment to a panel,~~ arbitrators are required to attend ~~and submit proof of attendance of~~ at least one comprehensive training program for arbitrators on attorney fee arbitration through a local bar association or the State Bar of California ~~every five (5) years of service on the Fee Arbitration Department panel.~~

Conviction of ~~a crime for~~ any felony or misdemeanor crime may constitute grounds for rejection of the applicant or removal from the State Bar Fee Arbitration Department panel. The filing of disciplinary charges with the State Bar Court or imposition of any public discipline by the State Bar Court or a federal court or agency authorized to impose comparable professional discipline against attorneys may constitute grounds for rejection of an application or removal from the panel.

~~During the term of service with the Department, all arbitrators are required to report to the Program Director the existence of any criminal conviction, whether misdemeanor or felony. [A]~~

2. 2. Lawyer Arbitrators

To be qualified for appointment as a lawyer arbitrator, an applicant must:

- (1) be, and have been for at least five years, an active member in good standing with the State Bar of California; or
- (2) be a retired judge who is ~~either an active or inactive~~ member of the State Bar of California; and
- (3) not have a pending professional disciplinary matter filed with the State Bar Court, any federal court or agency, or other state bar discipline authority. Conviction of a crime for any felony or misdemeanor may constitute grounds for rejection of the applicant. The imposition of any public discipline by the State Bar Court, or a federal court or agency or other state bar discipline authority authorized to impose comparable professional discipline against attorneys may constitute grounds for rejection of an application.

~~During the term of service, all lawyer arbitrators are required to report the existence of any professional disciplinary complaint filed with the State Bar Court or imposition of public professional discipline by the State Bar of California or by any federal court authorized to impose comparable professional discipline against attorneys. [A2]~~

### 3. ~~2.~~ Non-Lawyer Arbitrators

To be qualified for appointment as a non-lawyer arbitrator ~~with the State Bar of California's Mandatory Fee Arbitration Department,~~ an applicant must:

- (1) provide sufficient information to the Appointments Selection Committee to its satisfaction concerning his or her business, professional or volunteer experience, education, or other relevant qualifications to serve as an arbitrator; and
- (2) ~~(2)have~~ never ~~have~~ been an active or inactive member of the bar of any state or the District of Columbia; and
- (3) have never worked regularly for a public or private law office or practice, court of law or attended law school for any period of time; and
- (4) have never worked as a paralegal, law firm staff, or law clerk.

## IV. Ongoing Requirements

- (1) During the term of service, all lawyer arbitrators are required to report to the Program Director the existence of any professional disciplinary complaint filed with the State Bar Court or imposition of public professional discipline by the State Bar of

California or by any federal court or agency authorized to impose comparable professional discipline against attorneys.[A3]

(2) During the term of service, all arbitrators are required to report to the Program Director the existence of any criminal conviction, whether misdemeanor or felony. [A4]

(3) Once appointed, all arbitrators shall attend a comprehensive training at least once every five (5) years.

This page is intentionally blank.

# **FEE ARBITRATION HANDBOOK**

Prepared by:

Committee on Mandatory Fee Arbitration  
State Bar of California  
Mandatory Fee Arbitration Program  
180 Howard Street, 6<sup>th</sup> Floor  
San Francisco, California 94105-1639

March 2016

# TABLE OF CONTENTS

INTRODUCTION .....	i
I. OVERVIEW OF PROCEDURE.....	1
II. INITIATION OF ARBITRATION.....	4
III. DEALING WITH UNREPRESENTED CLIENTS.....	6
IV. JURISDICTION.....	8
V. ASSIGNMENT AND DISQUALIFICATION OF ARBITRATORS .....	9
VI. TIME REQUIREMENTS.....	11
VII. STATUTE OF LIMITATIONS .....	12
VIII. EVIDENCE.....	13
IX. ARBITRATOR IMMUNITY .....	15
X. PRACTICE AND PROCEDURE.....	16
XI. FACTORS TO BE CONSIDERED BY ARBITRATORS .....	20
XII. AWARDS .....	24
XIII. MEDIATION OF FEE DISPUTES .....	26
CONCLUSION .....	27

## INTRODUCTION

In 1979, California implemented a mandatory fee arbitration requirement for its lawyers, providing for the arbitration of fee disputes between clients and their attorneys upon the client's request. The law was sponsored by the State Bar of California at the request of local bar associations. Business and Professions Code Sections 6200-6206 were enacted for the purpose of providing a quicker, less expensive alternative to the courts to resolve disputes between clients and their attorneys concerning the amount of fees and/or costs charged.

Under the statutes, the State Bar has promulgated "Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs" and has recommended standardized forms for use in fee arbitration matters, including a sample award form and award checklist. Because the Mandatory Fee Arbitration ("MFA") statute~~ory~~ authorizes local bar associations to provide fee arbitration, each local bar program promulgates its own rules of procedure for fee arbitrations. The State Bar's Minimum Standards are intended to provide local bar programs with essential procedural requirements that must be set forth in their rules. In 2006, the State Bar's Board of Governors first adopted Model Rules of Procedure for Fee Arbitrations for local bar adoption. While not required, the Model Rules were developed to provide a convenient template of best practices and rules consistent with the MFA statutes, the Minimum Standards, and current developments in case law.

The purpose of this handbook is to assist you in the general practice and procedure of handling fee arbitration disputes. However, the rules of procedure governing the program for which you are serving should always be consulted for guidance on local bar procedures and deadlines.

The State Bar wishes to thank you for your important volunteer service as a fee arbitrator with the MFA Program. Without your assistance and generous cooperation, this valuable program for members and clients alike would not be possible.

## I. OVERVIEW OF PROCEDURE

The purpose of the mandatory fee arbitration (MFA) program is to provide parties with a less expensive, speedier and confidential alternative to court, as well as divert appropriate fee dispute complaints by clients about lawyers filed with the State Bar<sup>1</sup>, for the resolution of fee and cost disputes between attorneys and their clients. The MFA statutory scheme requires lawyer participation if requested by the client, for whom MFA is voluntary, unless the parties previously agreed to MFA in which case the client is also required to participate. Under the current program, the State Bar and local bar associations impanel volunteer arbitrators to hear matters and issue a written arbitration award.

Disputes are heard by either a sole arbitrator or a panel of three arbitrators, depending upon the amount in dispute. As required by statute, all three-arbitrator panels must include one lay (non-attorney) arbitrator. In addition, at the client's option, either the sole arbitrator or one lawyer member of a three person panel must practice either civil or criminal law, depending on the nature of the practice area of the underlying case which gave rise to the dispute.

The arbitrators have general authority to issue subpoenas, hold hearings, hear all relevant or pertinent evidence regarding the fee dispute, and make appropriate awards and findings following the arbitration hearing. A decision of the sole arbitrator, or one agreed upon by two or more of the panel members, will constitute the decision of the panel. The sole arbitrator or panel chair will write the statement of decision and award, and obtain signatures of each panel member on the original and any copies that may be required, returning the original and signed copies to the association or arbitration committee. The arbitrator or panel shall not serve the award on the parties. The award must be delivered to the arbitration program for review for procedural compliance and service by mail on the parties. If one panel member disagrees with the other two, the dissenting member may write a brief dissenting opinion, if desired, which must be attached to the decision of the other two panel members for service.

In reaching a decision, arbitrators are required by statute to admit evidence relating to claims of malpractice and professional misconduct, but shall consider that evidence only as it relates to the value of the services rendered by the lawyer. No award of affirmative relief may be granted for injuries relating to a claim of malpractice or professional misconduct. Thus, arbitrators may rule that an attorney's fee was inappropriate due to the way the case was handled, and reduce the fee. However, arbitrators may not award damages, or reduce the fee to compensate for other losses incurred by the client, resulting from the lawyer's negligence.

The MFA statute prohibits an arbitrator from awarding to either party his or her attorney's fees 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. Neither may the attorney charge the client for fees and costs incurred in preparation for or in the course of the arbitration proceeding even if the contract between the parties provides for such fees and/or costs.

---

<sup>1</sup> A 1973 special committee of the American Bar Association observed that "disputes concerning fees are universally recognized as constituting the most serious problem in the relationship between the Bar and the public."

It is the intent and spirit of local fee arbitrations that each local bar association have and retain the authority to administer mandatory fee arbitration and mediation services for cases falling within its jurisdiction. Consistent with the spirit of providing MFA services locally through the local bars, the MFA Program is intended to provide maximum opportunity for clients to bring matters before the arbitration panel without having to hire new counsel to resolve a dispute with prior counsel. All arbitrators should keep in mind, therefore, the underlying legislative intent and purpose of the MFA Program to provide an informal forum for the resolution of fee disputes and discourage rigid, costly or legalistic procedures.

The arbitration procedure is also intended to be a speedier alternative to court, and is designed to provide, ideally, a complete and final resolution for the parties. Every effort should be made to meet time limits established by local rule, and, in any event, to conduct the hearing and issue the award as promptly as possible. For this reason, continuances of the hearing are discouraged, absent a showing of good cause.

Each of the parties to the fee dispute should be encouraged to attend the fee arbitration hearing. Telephonic appearances by parties unable to appear should be considered. However, arbitrators are not permitted to rule against a party solely because that party is absent from the hearing.

As set forth in the MFA statute, MFA is non-binding unless both parties agree in writing to binding arbitration, but **only after the fee dispute has arisen**. Pre-dispute agreements for binding MFA should not be enforced by the program or the arbitrator. The request and reply forms handled at the intake stage should indicate whether the parties want non-binding arbitration or agree to binding arbitration. After non-binding MFA, either party has a right to a new trial in court as long as the action is filed within 30 days following service of the award. In binding arbitration, the arbitrators are, as a practical matter, the final judge of the issues presented. Ordinarily courts will not review such an award on its merits (except on certain, specific, statutory grounds). Thus, in a binding arbitration, neither party is likely to obtain a new trial of the same issues.

A good practice for the arbitrator(s) is to simply **confirm the parties' respective choices when the hearing takes places, before any evidence is taken**. If the case is non-binding, but the parties wish to submit to binding arbitration, the arbitrators must require the parties to sign a statement (stipulation) that they both agree to binding arbitration. The arbitrator must not state a preference or encourage the parties' decision in this area.

After binding or non-binding arbitration, either party may enforce the award if fees are to be refunded or paid, or seek relief from the appropriate court. **Failure to file an action following non-binding arbitration converts the award to a binding decision by operation of law**. The State Bar's Mandatory Fee Arbitration Committee believes that, based on anecdotal information, a significant percentage of non-binding arbitrations become binding through the intent or inaction of the parties. Therefore, it is imperative that non-binding MFA cases be treated just as seriously by the arbitrator as a binding award. Every effort should be made by the arbitrators to make a complete examination, and to the extent possible, a resolution, of the fee dispute.

Arbitrators should assume that their authority over the dispute is lost if an award is not timely made under local rules. The arbitration procedure is intended to be expeditious, and is designed to provide as complete a remedy for the parties as possible, within the parameters of examination of the fee dispute. The award should be issued promptly and submitted to the program for review for procedural compliance and service on the parties.

Enforcement of the award is typically left to the parties. However, if an award requires an attorney to refund money and the attorney does not do so promptly, there are procedures governed by Business and Professions Code section 6203(d) for the State Bar to assist in the enforcement of the award. This may result in the attorney being placed upon temporary inactive status.

The State Bar and local bar associations have attempted to enhance administrative consistency between programs and reduce the need for creative typing. You should contact the administrator of your program for the sample award and other forms that are used. To assist you in writing an enforceable award, you should also obtain the award checklist from your local bar program. Arbitrators should use the forms both to expedite and to standardize the proceedings.

Questions concerning the operation of the program should be directed to the program administrator who is encouraged to consult with the State Bar's Director of the Office of Mandatory Fee Arbitration for policy guidance.

## II. INITIATION OF ARBITRATION

Under California law, mandatory fee arbitration may be initiated in one of two ways:

1. **Client requests:** The client may request fee arbitration by filing a request for arbitration form with the local bar program. If there is no local bar program with jurisdiction over the fee dispute, the Client will be instructed to file with the State Bar's MFA program. Client's request for arbitration may be made either on the initiative of the client, or in response to receipt of a "Notice of Client's Right to Arbitrate" sent by the attorney. Arbitration is initiated only when the client completes and submits the appropriate request for arbitration form to the State Bar or local association and pays the appropriate filing fee or files a request to waive the filing fee (if the program has a provision for waiver of filing fees).

A client may also file for arbitration with the State Bar of California if, for some reason, the local association is unable to hear the dispute, or if either party perceives that they cannot receive a fair hearing through the local program.

Removal to State Bar Program: If a party believes that he or she cannot obtain a fair hearing through the local bar after a local bar MFA has been filed, the party will be advised of the right to seek removal to the State Bar's program. Requests for removal are subject to the decision of the State Bar's Presiding Arbitrator. While a request for removal is pending with the State Bar, the local bar MFA case must be suspended. The program or arbitrator may wish to file its position regarding the merits of the basis for removal for the Presiding Arbitrator's consideration. The State Bar will serve a written decision on the removal request on the parties and the program.

Initiation of arbitration by the client will result in the appointment of a sole arbitrator or arbitration panel, and the issuance of an award following a noticed hearing, even if the attorney has not filed a reply, fails to appear or otherwise fails to participate in the proceedings.

2. **Attorney requests:** An attorney may also initiate arbitration, either before or after sending a "Notice of Client's Right to Arbitrate", by preparing and filing an attorney's request to arbitrate form with the program. **However, because MFA is voluntary for the client before arbitration can proceed, the client must consent in writing to arbitrate.** The client's participation in MFA will be required only if the parties previously agreed to submit fee disputes to the MFA Program (as long as the pre-dispute agreement does not require binding MFA). A pre-existing agreement requiring binding MFA should not be enforced by the program or arbitrator.

Generally fee arbitration is mandatory for the attorney and voluntary for the client. It is mandatory for both the client and attorney when they previously agreed in writing to arbitrate, through a program authorized under Business and Professions Code section 6200 et seq., any

dispute of fees, costs or both, regardless of who commences the proceeding. Parties can agree to binding arbitration in advance of the commencement of the hearing, but only after the dispute has arisen.

Any court proceedings filed by the attorney for the collection of fees and/or costs are stayed after the client has timely filed a request for arbitration, or consent to the attorney's request for arbitration. The arbitrator should be sensitive to the fact that there may be a pending lawsuit stayed by virtue of the arbitration process. In addition, if the arbitrator learns that a lawsuit is pending that has not been stayed, the arbitrator should advise the program administrator to contact the client to advise the court that the matter shall be stayed.

The client waives the right to arbitrate whenever:

- (1) The client commences a civil action against the attorney concerning the fees in dispute;
- (2) The client fails to make a timely request for fee arbitration within 30 days of receipt of the "Notice of Client's Right to Arbitrate" form;
- (3) The client commences an action or files a pleading seeking either:
  - (a) judicial resolution of a fee dispute; or
  - (b) affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct; or
- (4) Under Business and Professions Code section 6201(b), the client receives the "Notice of Client's Right to Arbitrate" and files an answer in a civil action or equivalent response in another proceeding before requesting arbitration.

Notwithstanding the client's waiver of the right, parties may stipulate to arbitration.

### III. DEALING WITH UNREPRESENTED CLIENTS

Lawyers and clients involved in fee disputes are frequently apprehensive about the arbitration process and skeptical about whether they will get a fair hearing. It is not enough that the hearing, in fact, be fair; it must also *appear* to be fair. This is especially so with unrepresented clients.

Think about it. A client has a fee dispute with his or her lawyer, the dispute is to be heard through the lawyer's professional association following procedures and using rules written by lawyers, and the matter will be decided either by a single lawyer or a three person panel composed of two lawyers and only one non-lawyer. The unrepresented client may be uncomfortable in this setting, more than anyone else, may feel like the chicken walking into a den of foxes in search of fair treatment<sup>[CB1]</sup>.

It goes without saying that the hearing should, in fact, be fair. With unrepresented clients, however, it is especially important that the arbitration *appear* to the client to be fair, as the unrepresented client does not have a lawyer to explain to him or her why the adverse party lawyer was on a first name basis with the arbitrator lawyer(s) but the arbitrator lawyer(s) addressed the client by his or her last name and/or could not remember the client's name, why something the client thought was pertinent was ruled irrelevant or beyond the scope of the hearing and could not be brought up, discussed, or argued at the hearing, or why the adverse party lawyer and the arbitrator lawyer(s) was/were speaking to each other in the same foreign language—legalese—which the client did not speak and could not understand.

There are a few simple things arbitrators can and should do to make both parties, and especially unrepresented clients, feel more comfortable about the fairness of the hearing and whether it is fair.

Be courteous. Of course, arbitrators should always be courteous, but they should be especially polite and courteous to unrepresented clients.

Treat both sides with equal formality. For example, do not greet the lawyer by his or her first name and then turn to the client and say, "Good morning Ms. Smith, I'm Mr. Arbitrator." Address both sides in the same manner.

Do not have a conversation that does not include both parties. An arbitrator, of course, should not have communications about a case with one party when the other is not present. But arbitrators should also avoid any conversation with one party when the other is not included, even if the conversation has nothing to do with the case. This is especially true when one party is an unrepresented client. ~~What might an unrepresented client think if (s)he arrives at the hearing to find the lawyer arbitrator(s) chatting with the lawyer party, even if the subject of the conversation is not the case? When the arbitration hearing is over, if one party leaves first, the arbitrator(s) should not engage in conversation with the other party. Picture the unrepresented client returning to retrieve something left behind and finding the lawyer arbitrator(s) having a friendly conversation with the lawyer adverse party. Even when all parties are present it is~~

~~possible to engage in conversation that does not truly include everyone present. It is especially easy for lawyers to converse about legal subjects to the exclusion of non-lawyers present.~~ Arbitrators should be alert to and avoid such conversations.

Use plain language. It is easy to lapse into the jargon of lawyers, but that can leave the client feeling that he or she is the only one in the room who does not speak the language in which the hearing is being conducted. Moreover, the unrepresented client does not even have an interpreter. Even non-legal words such as “prior” and “subsequent” can sound legalistic to many people who would be more likely in every day speech to say “before” and “after.” Use plain language, and try to avoid sounding like a lawyer. If the lawyer party to the dispute uses legal terms, or if it is necessary for the arbitrator(s) to use legal terms, the arbitrator should take the time to explain and be sure the unrepresented client understands. Of course, in explaining, the arbitrator(s) should not be condescending or speak down to any party.

Tell the parties that the rules of evidence do not apply. Technical rules of evidence do not apply in fee dispute arbitration hearings. Any information may be considered if it is of the type and character upon which ordinary people rely in the ordinary course of their day to day lives. The arbitrator(s) should make it clear to both parties that the technical rules of evidence do not apply; matters that might keep evidence out of a court may be considered by the arbitrator(s) as going to the weight of the evidence. The unrepresented client, especially, should be given every reasonable opportunity to present his or her case.

Be patient. Arbitrators should always be patient, of course, but they should be particularly a little more patient with unrepresented clients. No one likes to take two hours to hear a matter that should only take one, but it is important that the parties feel they have had their say; i.e., that they got to present their side of the dispute and that the arbitrator(s) listened. It is especially important to let an unrepresented client have a little extra leeway and time to present his or her case. Many times the losing party be it lawyer or client will accept the award, even if they think it is wrong, if they believe the arbitrator(s) listened, heard, understood, and considered what they had to say.

Be fair. Be courteous. Be patient. Conduct the arbitration hearing in a manner that demonstrates especially to the unrepresented client the fee arbitration program is fair to both lawyers and clients.

#### IV. JURISDICTION

Local bar associations are encouraged to accept jurisdiction based upon the location of the attorney's office or where the majority of legal services were provided.

Business and Professions Code Sections 6200, et seq. provide that the mandatory fee arbitration does not apply to following types of disputes:

- (1) Disputes where the attorney is also admitted to practice in another jurisdiction or is only admitted to practice in another jurisdiction, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California;
- (2) Disputes concerning fees that are set by statute or court order;
- (3) Fee disputes when the time for filing a civil action requesting the same relief would be barred by an applicable statute of limitations (unless the attorney has filed a lawsuit for fees against the client); and
- (4) Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.

There is jurisdiction, however, even if the client has signed a promissory note for the fees and/or costs, even if the attorney has retired, is suspended or disbarred, or is otherwise no longer engaged in the active practice of law.

Although arbitrators have no authority to award affirmative relief in the form of damages, or reduce the fee to compensate for other monetary losses incurred by the client, evidence must be heard regarding a claim of the attorney's mishandling of a case to determine whether the fee charged was fair in relation to the value of services rendered.

A local association or the State Bar may decline to act if it determines that it lacks jurisdiction. Arbitrators should be sensitive to the issue of jurisdiction at the time of the hearing to determine if they have authority to render an award. If there is a legitimate dispute regarding the existence of the attorney-client relationship, that dispute must be resolved in the courts unless the parties stipulate that it may be resolved by arbitration.

In addition, a party may request removal of a proceeding to the State Bar Mandatory Fee Arbitration Program. Once such a request has been made, local proceedings must be suspended until the State Bar Program has determined whether it will accept the case. The "Guidelines and Minimum Standards for the Operation of a Mandatory Fee Arbitration Programs" require the local bar program to release jurisdiction upon notification of the State Bar's acceptance of the matter.

## V. ASSIGNMENT AND DISQUALIFICATION OF ARBITRATORS

Administrators of fee arbitration programs are empowered to assign arbitrators once properly completed forms have been submitted with the required filing fee, if any. They may be assigned a matter based on their experience in handling the type of dispute involved, their general trial and legal experience, their experience in the fee arbitration program, and their lack of apparent conflicts with the parties.

Business and Professions 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. However, the client's designation of civil or criminal must conform to the practice area of the underlying case which gave rise to the fee dispute. In addition, one member of any panel shall be a non-attorney. Neither party is entitled to an arbitrator who has subject matter expertise in the practice area of the case which gave rise to the fee dispute.

The obligation of the arbitrator at the time of the hearing is one of impartiality. The arbitrator should have no interest, financial or otherwise, in the outcome of the fee dispute. The grounds for disqualification of a judge under Code of Civil Procedure section 170.1 are the same grounds for disqualifying an arbitrator. The local program's chairperson will consider any challenges to the nominated arbitrator who does not disqualify himself or herself if it appears that substantial rights of the parties may be affected or in the event that the arbitrator assigned appears to have an interest in the matter pending before the arbitrator.

If any arbitrator, for any reason, may not be impartial as to each party, that arbitrator shall disqualify himself or herself from any further consideration of the proceedings, notify the parties of such disqualification, and promptly notify the fee arbitration administrator of the disqualification and the reasons for it. An arbitrator should disclose any prior or present relationship to any party or participant in the proceeding, no matter how remote in time or context, and any other fact that may bear upon his or her disqualification as an arbitrator as described in the preceding paragraph. Notwithstanding this general duty to disclose information of potential appearance of bias, the fee arbitrator's disclosure need not comport with the more detailed standards required of neutral arbitrators under the California Arbitration Act[CB2].

If, during the course of the proceedings, an arbitrator becomes aware of facts upon which disqualification should occur, such disqualification should take place in as prompt a fashion as possible, with due regard for the rights of the parties in protection of their lawful rights and remedies.

In addition, local rules provide for the option of disqualification by the parties of arbitrators. Parties are permitted to disqualify at least one arbitrator without stating a reason, and to have an unlimited number of challenges to arbitrators "for cause." Disqualification requests must be fairly decided and doubts should be resolved in favor of disqualification. If the arbitrator declines to recuse himself or herself following a recusal request, the challenge should be referred to the program's chair for a decision.

For more discussion on the issue of disqualification, see: (1) Arbitrator Advisory No. 1995-01, "Disclosure Required of Fee Arbitrators by Code of Civil Procedure Section 1281.9," dated April 28, 1995; (2) Administrator Advisory No. 1994-01, "Avoiding Arbitrator and Administrator Bias," dated January 7, 1994; and (3) Arbitrator Advisory No. 1994-03, "Avoiding Arbitrator Bias," dated July 15, 1994<sup>[CB3]</sup>.

## VI. TIME REQUIREMENTS

The fee arbitration law provides that hearings be conducted and awards rendered as soon as possible after the request is filed. A notice designating the arbitrator(s) who will hear the dispute will be served on the parties by the program administrator after the completed arbitration request and response have been received. The sole arbitrator or panel chair is responsible for contacting the parties to set the hearing date. It is important to schedule the hearing promptly upon receipt of the assignment.

A hearing date should be one that is most convenient for the greatest number of participants. Although continuances are not favored, a request for continuance based on good cause should be granted. It is within the arbitrator's discretion to determine what is good cause. It is important to note that a frequent ground for challenge of arbitration awards is the failure to postpone the hearing when sufficient cause has been shown. Arbitrators should keep continuances to a minimum and schedule all proceedings in the matter within the times set forth in local rules and state law. The need for expeditious resolution, however, must be tempered with the consideration of the schedules of the parties and arbitrators.

The award should be rendered as soon as possible after the arbitration hearing. Arbitrators should keep in mind that parties expect the award within the time set forth in the rules of procedure and they should make every effort to ensure that it is completed within that time frame.

Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award will become binding 30 days after the mailing of the notice of the award, unless a party has, within the 30 days, sought a trial after arbitration. If the award is binding, the party must abide by it. There is no appeal from a binding award. Even so, a binding award can be corrected or vacated by a court. A petition to correct or vacate the arbitration award must be filed in the proper court within 100 days from the date of service of the award.

## VII. STATUTE OF LIMITATIONS<sup>[CB4]</sup>

Business and Professions Code section 6206 provides that the running of the statute of limitations for an attorney to file an action for fees and/or costs is suspended for the duration of the arbitration, and for 30 days following mailing of the notice of award.

Business and Professions Code section 6206 further provides that arbitration may not be commenced if the time for filing a civil action requesting the same relief would be barred under the appropriate statute of limitations. This provision does not apply, however, if the attorney has filed a civil action and the client seeks to stay that proceeding by the filing of an arbitration.

There is some conflict in the ~~law~~ ~~egal~~ ~~community~~ as to whether an attorney ~~has~~ ~~might~~ ~~have~~ two years or four years to commence an action to recover fees under Code of Civil Procedure sections 337, 337a or 339, while a client might be limited to a shorter period of limitations under CCP section 340.6 to seek a refund of an unreasonable or unearned fee. While there is no clear guidance from the Legislature, the Committee on Mandatory Fee Arbitration has provided an opinion that CCP section 340.6 should not be applied to preclude the client's commencement of a fee arbitration under Business and Professions Code section 6200 et seq. See Arbitrator Advisory No. 2016-01, "Statute of Limitations for Fee Arbitrations," dated March 25, 2016 in the Appendices, for further discussion of statute of limitation ~~issues~~<sup>[CB5]</sup>.

## VIII. EVIDENCE

In some respects, the standard of evidence is not unlike that permitted in court. Technical rules of evidence, however, do not apply. Any information may be considered if it is of the type and character upon which ordinary people may rely in the ordinary course of business affairs. Arbitrators should be sure both parties understand that the rules of evidence do not apply and that matters which might keep evidence out of a court may be considered and may affect the weight to be given the evidence. All parties, but especially unrepresented clients, should be given every reasonable opportunity to present their cases. As noted above, it is important that the parties feel they have had their say; i.e., that they got to present their side of the dispute and that the arbitrator(s) listened. Many times the losing party—be it lawyer or client—will accept the award, even if they think it is wrong, if they believe the arbitrator(s) listened, heard, understood, and considered what they had to say.

Initially, arbitrators should attempt to ascertain whether or not there is a valid written fee agreement. If there is such a written agreement, and if there were no additional written or oral agreements between the parties, evidence which explains the agreement may be considered, while evidence which tends to contradict the terms of the agreement may not be considered. If it is determined that grounds exist to set aside the written fee agreement, the fee to be determined should be on the basis of “quantum meruit”, or the relative value of the services rendered to the client. See Arbitration Advisory 1993-02, “Standard of Review in Fee Disputes where there is a Written Fee Agreement”, dated November 23, 1993, in the Appendices.

Fee agreements regarding contingent fees must be in writing (Business and Professions Code Sections 6146, 6147). Fee agreements for hourly fees and costs anticipated to exceed \$1,000.00 must ordinarily be in writing, and contain information regarding the hourly rate, other standard rates, fees and charges applicable to the case, the general nature of the legal services to be provided, and the respective responsibilities of the attorney and client as to performance of the contract (Business and Professions Code Section 6148).

If the fee agreement is oral, or there is no specific agreement, the evidence may consist of any information which relates to the nature and extent of the agreement.

The provisions of Business and Professions Code Section 6148 require all bills for services rendered by an attorney to clearly state the basis, including the amount, rate, basis of calculation, or other method of determination of fees and costs. It further provides that bills be provided to the client no later than 10 days following the client's request. The client is entitled to make such requests no more than once every 30 days. A copy of Business and Professions Code 6148(b) is included in the Appendices.

Under Sections 6147(b) and 6148(c), failure to comply with these provisions renders the fee agreement voidable at the client's option. If the client elects this option, the attorney is entitled to a reasonable fee. If it appears that the attorney has not complied with Sections 6147 or 6148, but it is not clear whether the client has voided the agreement, the arbitrators may wish to clarify this issue at the time of the hearing and, if appropriate, make an independent evaluation

of the value of services performed. See Arbitration Advisory 2012-01, “Voidability of Fee Agreements”, dated January 27, 2012 in the Appendices

If a retainer fee has been charged and is subject to the dispute between the parties, arbitrators should take care to define the original terms of the retainer payment to ascertain whether the fee was to be a flat rate fee, or a retainer from which the attorney was permitted to draw as services and charges were incurred<sup>[CB6]</sup>.

A “true” or “classic” retainer is permissible but seldom used. A true retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. It is earned by the lawyer when it is paid, and the lawyer is entitled to the money regardless of whether the lawyer actually performs any services for the client. (*Baranowski v. State Bar of California* (1979) 24 Cal.3d 153, 164 n.4.) More commonly today, what attorneys call a “retainer” is, in fact, an advance payment or deposit against which the attorney bills. Recent cases have held that if any part of the so called “retainer” is paid for or applied to fees for the performance of legal services, it loses its character as a true or classic retainer and is simply an advance fee payment or security deposit, and it remains the property of the client until the attorney actually performs the services.

The law is unclear whether an advanced deposit for fees must be placed into a client trust account. Two courts have declared that it is undecided in California whether, under Rule of Professional Conduct 4-200, an advanced payment or deposit for services must be deposited into a client trust account. (See: *S.E.C. v. Interlink Data Network of Los Angeles Inc.* (9th Cir. 1996) 77 F.2d 1201, 1206, n.5; *Katz v. Worker's Comp. Appeals Bd.* (1981) 30 Cal.3d 353, 356, n.2.) Yet, in *T&R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp.1, the Appellate Department of the Los Angeles County Superior Court held that under Rule 4-100 an advance fee must be deposited into an attorney's trust account, and that an attorney's failure to segregate the advance fee deposit from his or her general funds constitutes a breach of fiduciary duties. The *T&R Foods* the court reasoned that the language of Rule 4-100 indicated “an intent by the State Bar that funds retain an ownership identity with the client until earned.” (Id. at 7.) However, because it was decided by the appellate department of a superior court, *T&R Foods* is not binding on California Courts or state governmental agencies. (See, Arbitration Advisory 2011-01, Enforcement of “Non-Refundable” Retainer Provisions dated January 28, 2011.)

In fee arbitrations, strict notions of who has the burden of proof rarely if ever should become determinative of the outcome of the proceeding. Arbitrators should exercise their discretion to allocate to each party such burden of proof or of producing evidence as may be appropriate “to insure ... a fair, impartial, and speedy hearing and award.” See Business and Professions Code section 6200; see also, Arbitrator Advisory No. 1996-03, “Burden Of Proof In Fee Arbitrations,” dated June 7, 1996 in the Appendices. Generally, the party whose evidence is relatively more persuasive than the other should be entitled to prevail on the issue for which that evidence was considered.

The test of sufficiency of the evidence is based upon a preponderance. This means that the party whose evidence is relatively more persuasive than the other should be entitled to prevail on the issue for which that evidence was considered.

## **IX. ARBITRATOR IMMUNITY**

Pursuant to the MFA statute, in any arbitration conducted by the State Bar, or a local bar association pursuant to the rules of procedure approved by the State Bar, arbitrators, as well as the bar association and its directors, officers and employees, have the same immunity which attaches in judicial proceedings. Therefore, in handling an arbitration matter, fee arbitrators are protected by the same immunity enjoyed by judicial officers. This involves immunity from civil liability, testifying in civil or criminal cases or turning over arbitrator's notes or findings.

The specific immunity granted to arbitrators in an approved fee arbitration program is established by Business and Professions Code section 6200(f). The sunset of the provisions of Code of Civil Procedure section 1280.1 effective January 1, 1997 does not affect the immunity of fee arbitrators.

Arbitrators must be aware, however, that the immunity operates only to protect an arbitrator and the administrative program while acting pursuant to the rules of an approved program. An arbitrator who ignores the program rules or acts outside them may forfeit the immunity provided by statute. For example, an arbitrator who elects to participate in settlement negotiations between the parties in violation of the program rules may be exposed to a claim by a dissatisfied party that the arbitrator acted outside the rules. Please refer to Arbitrator Advisory No. 1996-05, "The Arbitrator's Role in Settlements at the Time of Hearing," dated December 13, 1996 in the Appendices.

## X. PRACTICE AND PROCEDURE

This portion of the handbook is intended to answer anticipated questions regarding practice and procedure under the local rules for fee arbitration. The following is a random selection of information which may prove useful in the conduct of the arbitration:

- (1) **Request for Arbitration:** Arbitration is mandatory for an attorney and voluntary for a client, unless the parties previously agreed in writing to arbitrate through this program.
- (2) **Response:** Each party responding to a request for fee arbitration should file a reply before the hearing begins. If an attorney fails to respond or refuses to participate, the arbitration will proceed as scheduled and a decision made on the basis of the evidence presented. This also applies to the client when the client is required to arbitrate through this program because of a prior written agreement to do so.
- (3) **Non-Binding Arbitration:** Although arbitration under Business and Professions Code section 6200 et seq. is characterized as mandatory (that is, if the attorney does not participate in the hearing, it will proceed without the attorney), arbitrations in such a case are non-binding, unless, after the dispute arises, both parties agree in writing to be bound by the award. Under non-binding arbitration, both the attorney and the client have the right to request a court trial within 30 days after the notice of the award is served, unless the party did not attend the arbitration hearing. The right to a trial after arbitration may be lost if the court later determines that a failure to attend the arbitration hearing was willful. The award becomes binding automatically if neither party makes such a request for trial within the 30 days prescribed.

Non-binding arbitration should be viewed with the same seriousness of purpose by the arbitrator as binding arbitration.

- (4) **Binding Arbitration:** If the parties agree to binding arbitration, the arbitrators must verify that appropriate boxes have been checked on the client's request for arbitration form, and the attorney's reply form, or that the agreement to be bound was put in writing after the dispute arose. An agreement for binding arbitration in the parties' original fee agreement is not enforceable. A binding award is final when served and may only be corrected or vacated under the limited circumstances set forth in CCP section 1285 et seq.
- (5) **Setting the Hearing Date:** The sole arbitrator or panel chair is responsible for setting the hearing date. While a time that is relatively convenient for all arbitrators and parties to the dispute is desirable, this is not always possible. The sole arbitrator or panel chair must then set a date which is most convenient for the greatest number of participants. Care should be taken to schedule proceedings in accordance with the time limits set forth in the rules for fee arbitrations. A calendar of dates may be mailed to the parties with a strict return deadline for

them to submit any unavailable dates may streamline the date selection while avoiding ex parte contact. It is important to also notify your local program.

- (6) **Continuances:** Continuances of the hearing date contradict the MFA program's purpose to provide resolution of fee disputes expediently but may be granted only for good cause. Arbitrators should probably grant a continuance of the hearing when, without fault, the party cannot obtain evidence in time for the hearing. Continuances, however, should be brief. Arbitrators should use discretion to determine what constitutes is-good cause and grant or deny the continuance as appropriate. A continuance that is unreasonably denied, however, may be a ground for vacating the award (see No. 16 below). If a continuance is granted, all parties must be notified and a new hearing date scheduled as soon as possible. As with scheduling any hearing, it is important to also notify your local program.
- (7) **Subpoenas:** Arbitrators are empowered to issue subpoenas for the attendance of persons and the production of books and records at the arbitration hearing. Some programs provide for telephonic appearances of parties or witnesses. There is no clear guidance whether the arbitrator has any authority to compel attendance or issue sanctions. The arbitrator does not have the same contempt powers as would be vested in a judicial officer. If there is a failure to attend by a material witness, the arbitrator should consider granting a continuance to allow parties to seek judicial remedies to compel attendance. The arbitrator may issue a written recommendation to the superior court for such purposes.
- (8) **Oaths:** The sole arbitrator or panel chair has authority to administer an oath in all cases. The oath should be the standard oath given in court:

Do you solemnly state under penalty of perjury that the testimony you are about to give in this arbitration proceeding shall be the truth, the whole truth, and nothing but the truth?

It is recommended that fee arbitrator give the oath whether or not required by local rule to provide the parties with the desired solemnity of the proceedings. It is within the arbitrator's discretion whether to swear in all parties and witnesses at the same time or to do so as they are each called.

- (9) **Non-Appearance by Party:** Although it is preferable that all parties to a dispute attend the hearing, arbitrators may not rule against a party simply because the party did not appear. Nor may the arbitrators make a non-binding award binding based on a party's non-appearance. Waivers of personal appearances may be accepted in some instances. Consult your local rules. If the hearing has been properly noticed, the arbitrators may proceed with the hearing, even if one of the parties does not appear. However the arbitrators should take reasonable steps to contact the party to determine the reasons for the non-appearance. Depending on the circumstances, it may be more appropriate to continue the hearing until the party can be present. If the arbitrators determine that the non-appearance is

willful, however, and the award will be non-binding, arbitrators should include their findings on willful nonappearance in the award.

An exception to the right to a new trial in court following non-binding MFA occurs when the party requesting trial “willfully” failed to appear for the arbitration hearing. Although the court makes the determination whether the non-appearance of the party was “willful,” the arbitration award should include the circumstances surrounding the non-appearance and may include the arbitrator’s own finding on the issue of whether the failure to appear was “willful”.

- (10) **Burden of Proof:** As in other civil cases, the sufficiency of the evidence for a position is based upon a preponderance of the evidence standard. The prevailing party on an issue should be the party whom the evidence more convincingly favors than the evidence opposed to them. See Arbitration Advisory 1996-03 “Burden of Proof in Fee Arbitrations”, dated June 7, 1996.
- (11) **Consideration of Malpractice:** The arbitrators must receive evidence relating to claims of malpractice or professional misconduct, but only to the extent that those claims affect the fees to which the attorney is entitled (Business and Professions Code section 6203(a)). In deciding the appropriate level of fees to be awarded, the arbitrators should consider whether the alleged malpractice or misconduct by the attorney affected the **value** of the services provided to the client in the disputed matter. If the attorney's actions reduced the value of the services, the arbitrators may reduce the fees to account for the decreased value. However, arbitrators may not award damages, or reduce the fee to compensate for other losses incurred by the client due to the manner of handling the case. If appropriate, arbitrators may award a refund of unearned fees and/or costs that were previously paid to the attorney.
- (12) **Awarding Attorney's Fees:** Under Business and Professions Code section 6203(a), the arbitrators may not award, nor may any party recover, costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding, even if the parties had an agreement that provided for such an award. However, a court may award costs and attorney's fees to the prevailing party incurred in a proceeding to correct, vacate or confirm the award, or in a trial after arbitration under Business and Professions Code section 6204.
- (13) **Award Form** To standardize procedures, the forms supplied to the arbitrators at the time they are assigned should be used to the greatest extent possible. All awards must include substantially the language as set forth in the Guidelines and Minimum Standards, Section II, No. 13 (See Section XII. Awards below).
- (14) **Service of Award** The award must be served on the parties by the association or the arbitration administrator, depending on local rules, and not by the arbitrators. An original proof of service must accompany the award. In addition, a notice advising the parties of their rights after arbitration must also be served on the parties with the award. The notice must be substantially similar to the notice approved by the State Bar for this purpose.

- (15) **Return of Documents:** Following submission of the award, arrangements should be made to have all exhibits and documents picked up by or returned to the parties who submitted them. Any original documents should be returned to the program which provided them to the arbitrators. Handwritten notes or other material prepared by any arbitrator for use in the hearing are to remain in the possession of that arbitrator as they are inadmissible in any proceeding
- (16) **Challenging an Award:** Code of Civil Procedure section 1286.2 contains several grounds for vacating an award, including failure to accept relevant evidence or to postpone the hearing on sufficient cause being shown and failure of the arbitrator to disqualify himself or herself as required by the provisions of CCP section 1282(e). For further discussion of these issues, see Sections IV (Nomination and Disqualification of Arbitrators), V (Time), and VII (Evidence) of this Handbook. After non-binding arbitration, both the attorney and the client have the right to request a court trial within 30 days after mailing the notice of the award, unless the party did not attend the arbitration hearing. The award becomes binding automatically, however, if neither party makes such a request within the time prescribed.

## **XI. FACTORS TO BE CONSIDERED BY ARBITRATORS**

Many factors will affect the determination of an individual fee dispute, and may be considered by the arbitrator(s). These include:

### **A. Statutory Provisions**

1. **Business and Professions Code Requirement:** Written fee agreements are required under Business and Professions Code Section 6147 where an attorney asserts a right to a contingent fee, or, under Section 6148, where it is reasonably foreseeable that the total expense to the client, including attorney's fees, will exceed \$1,000.00 at the commencement of representation of the client.

The result of failure to have a written agreement meeting all the standards contained in these statutes, or the failure of the attorney to comply with the billing requirements of section 6148(b), is that the fee agreement is voidable at the client's option and the attorney shall be entitled to a reasonable fee.

2. **Rule of Professional Conduct considerations.** A determination of a fee to be allowed may be affected by the Rules of Professional Conduct for attorneys in California.

- a) **Unconscionable Fees:** Rule 4-200 of the Rules of Professional Conduct reads:

“(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

“(B) Unconscionability of a fee agreement shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee agreement."

b) Conflicts of Interest. Rules 3-300, 3-310, 3-600 of the Rules of Professional Conduct.

Acts of impropriety inconsistent with the character of the profession may affect an attorney's entitlement to a fee. See *Jeffry v. Pounds* (1977) 67 Cal. App. 3d 6. [Attorney denied recovery of fees for services performed under conflict of interest].

Arbitrators should be familiar with the requirements of the Rules of Professional Conduct, and in particular Rules 3-300, 3-310 and 3-600 relating to conflicts of interest. An attorney's behavior in violation of established standards of conduct may be considered by arbitrators in determining the entitlement to fees. But see, *Pringle v. LaChapelle* (1999) 73 Cal.App.4<sup>th</sup> 1000 [standard for disgorgement is a "serious and willful" violation, a mere technical violation does not justify disgorgement].

B. The Nature of the Arbitration.

- (1) The overriding purpose of arbitration is to provide for a thorough and impartial determination of the facts, as presented, and to render an appropriate award based upon them.
- (2) In order to make such a thorough and impartial determination, it is important that all arbitrators be familiar with California fee arbitration law (Business and Professions Code Sections 6200 et seq.), the "Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs" promulgated by the State Bar of California, and the local rules for the conduct of fee arbitrations, as well as the matters set forth in this handbook.
- (3) While the hearings are necessarily somewhat informal, it is important that arbitrators conduct themselves with the dignity befitting a judicial proceeding.
- (4) Arbitrators must disclose ~~a~~ all knowledge of the parties and avoid bias, prejudice and even the appearance of impropriety. Arbitrators should refrain from private contact with the parties, except as to scheduling. Arbitrators should refrain from overly familiar conduct with either party in the arbitration.

C. Conduct at the arbitration

- (1) Due to the informal nature of arbitration, strict adherence to rules of evidence and judicial procedure applicable in court is not necessary.
- (2) Arbitrators may wish to consider the relative sophistication, experience and background of the parties. In some cases the party (often the client) may be unfamiliar with, or intimidated by, the proceedings to such an extent that it affects the ability to provide meaningful evidence. Arbitrators should avoid legalese or technical terms and should show consideration to the unrepresented client in legal issues. Arbitrators should make every effort to see that a full and fair review of the facts is provided.

D. Attorney obligations to clients

Some factors which may have a bearing on the determination of the dispute, with regard to the attorney's obligations to a client include:

- (1) The attorney's understanding of the extent of legal knowledge or experience of the client;
- (2) Whether the ramifications of fee agreements or other documents to be signed by the client were fully explained;
- (3) Whether an itemized bill or written or oral explanation of charges was given if requested;
- (4) Whether the billings represent time reasonably spent on behalf of the client, or reasonably necessary to seek to attain the client's objectives;
- (5) Whether the billings reflect charges which exceed the maximum agreed by the parties, and whether or not there was consent to the additional charges.

E. Client obligations to attorneys.

In considering the fee dispute, arbitrators may also take into consideration the client's conduct including the following:

- (1) Whether the client fully informed the attorney as to the facts which might affect the outcome of the case, or the extent of the fee to be charged;
- (2) Whether the client sufficiently informed the attorney as to the ability of the client to pay;
- (3) Whether the client made reasonable efforts to communicate with the attorney in reference to the fee dispute, or amount of charges being incurred;
- (4) Whether the client requested services beyond the scope of estimates of fees provided originally by the attorney.

## **XII. AWARDS**

Business and Professions Code section 6203 and the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs prescribe the minimum contents of fee arbitration awards. All awards in fee arbitration matters must be in writing, preferably using the sample State Bar award form available from the program administrator. The sample award form contains the essential requirement for writing an enforceable fee arbitration award and complies with the Minimum Standards requirements for awards.

Each award must include a determination of all the questions submitted in the arbitration which are necessary to determine the outcome of the controversy. The language of the award should be clear and succinct, and should avoid any inflammatory or irrelevant commentary except as may be necessary to document the terms of and reasons for the award. Generally, the State Bar or the local bar association will serve a duplicate original of the award upon each party, together with an appropriate notice advising the parties of their rights after arbitration and an original proof of service of the award. Most program rules provide that arbitrators are not to serve the award directly on the parties but are to forward the award to the association or arbitration administrator for service on the parties. The local rules may provide a specific time within which the award must be returned by the arbitrator(s). Check your local rules to ascertain your program's requirements.

The State Bar also encourages use by the arbitrators of its award checklist to ensure that the panel considers all relevant issues in formulating its findings and award.

The award should be limited to resolution of the fee dispute, based upon the evidence submitted, rather than attempting to determine matters outside the scope of the fee arbitration program. Findings of fact, while not specifically required, are encouraged assist the parties in determining whether to accept the award or to seek judicial relief after arbitration.

In the award, the arbitrator(s) may provide for recovery of part or all of any filing fee for the arbitration and may allocate the fee between the parties. Such an allocation should be specific, detailed, and stated in dollars in the award, so the parties can determine the precise amount of the filing fee to be paid by whom and to whom. If the award is not clear and specific about dollar amounts, it may be confusing and unenforceable.

In no event may the award provide for an award to either party of attorney's fees incurred in the prosecution or defense of the fee arbitration proceeding.

Arbitrators may award interest as part of the award. The Minimum Standards, reflected in the State Bar's sample award form, imposes automatically post-award interest in the amount of ten per cent per annum after 30 days following service of the award. Pre-award interest is available if warranted by contract and the evidence.

To ensure that awards are clear on their face, arbitrators are required by the Minimum Standards to include the following language in awards:

The arbitrators find that the total amount of fees and/or costs which should have been charged in this matter are: \$ \_\_\_\_\_

Of which client is found to have paid: \$ \_\_\_\_\_

Subtotal \$ \_\_\_\_\_

In addition, the fee arbitration filing fee shall be allocated:

Client: \$ \_\_\_\_\_

Attorney: \$ \_\_\_\_\_

For a net amount of: \$ \_\_\_\_\_

Accordingly, the following award is made:

(a) Client, \_\_\_\_\_, shall pay attorney, \_\_\_\_\_: \$ \_\_\_\_\_

**OR**

(b) Attorney, \_\_\_\_\_, shall refund to client, \_\_\_\_\_: \$ \_\_\_\_\_

**OR**

(c) Nothing further shall be paid by either attorney or client.

An award requiring a payment must also include interest in the amount of ten percent per annum from the 30th day after the date of service of the award.

In addition, if a refund is owed to the client, the award must recite the name of the individual attorney(s) responsible for the refund. This requirement in the Minimum Standards and sample award form is intended to avoid enforcement problems for the client. Under Business and Professions Code section 6204(d), the client may request the State Bar to enforce an unpaid award or judgment following fee arbitration. The State Bar's remedies include the imposition of penalties and an order by the State Bar Court involuntarily enrolling an attorney on inactive (administrative, not disciplinary) enrollment until the penalties and award or judgment is paid to the client. Arbitrator Advisory No. 1994-04, "Identification of 'Individual Responsible

Attorney' in Fee Arbitration Awards," revised July 29, 2011, is included in the Appendices. It discusses issues to consider when making this designation.

### **XIII. MEDIATION OF FEE DISPUTES**

Although mediation can be a valuable tool in resolving fee disputes, as an arbitrator, you must take care that you do not shift roles and attempt to mediate the dispute. Since January 1, 1995, Business and Professions Code section 6200 has permitted mediation, as well as arbitration, of fee disputes. Minimum Standards for mediation of fee disputes are included in the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs. Any authorized fee arbitration program wishing to mediate must follow these Minimum Standards and have their rules of procedure approved by the State Bar Board of Governors.

Mediation is voluntary for all parties. It is initiated after a request has been made to arbitrate the dispute if both parties consent to the process. If both parties agree, the matter is assigned to a mediator with at least 25 hours of specialized mediation training and it proceeds under the specific mediation rules approved for the program. Local bars with mediation programs have reported very positive results with parties reaching an agreement in over 90% of the matters where mediation was chosen. Because the parties have worked out their own resolution of the dispute, they are generally more satisfied with the final outcome than parties in arbitration where a decision is imposed by a third party.

If you believe mediation may be helpful in resolving the particular fee dispute before you and your program offers an approved mediation program, you may postpone the arbitration hearing and refer the parties to the program administrator for a referral to a mediator. If your program does not offer mediation, the parties may still settle their dispute without arbitration, but should do so outside of your presence and without your direct involvement. To do more than encourage settlement and prepare an award based on the settlement puts you and your association at risk of losing the immunity provided by Business and Professions Code section 6200(f). For a more detailed discussion of this issue, see Arbitrator Advisory No. 1996-05, "The Arbitrator's Role in Settlements at the Time of Hearing," dated December 13, 1996 in the Appendices.

#### XIV. CONCLUSION

This Handbook, and the separate volume of appendices, is intended to give arbitrators the technical expertise to successfully arbitrate fee disputes under Business and Professions Code sections 6200-6206. We recognize, however, that it is impossible to address all of the issues and questions which you will face as an arbitrator, particularly issues relating to interpretation of your own program's rules of procedure. For questions not covered by the Handbook, you should contact the fee arbitration administrator for your bar association.

Sitting as an arbitrator is a voluntary ~~activity effort~~ on your part, and a worthy enterprise to assist members of the public with their relationships with attorneys. It is hoped that this process will engender better feelings and respect between the public and attorneys. Please accept the deep gratitude of the bar association for your worthy and considerable efforts, time and expense in serving as an arbitrator for fee disputes.

The State Bar's Committee on Mandatory Fee Arbitration is interested in your comments about the Handbook or about issues or concerns that affect the entire statewide program, e.g. potential amendments to the Business and Professions Code or the Guidelines and Minimum Standards. If you have comments, please contact us at:

Committee on Mandatory Fee Arbitration  
State Bar of California  
180 Howard Street, 6th Floor  
San Francisco, CA 94105-1639  
415/538-2015