

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

AGENDA

**Thursday, August 17, 2017
10:00 a.m. – 3:00 p.m.**

San Diego County Bar Association
Bayview Room
401 West A Street
San Diego, CA 92101
(619) 321-0781

OPEN SESSION

- I. Call for Public Comment (Migliaccio)
- II. Approval of Minutes of July 7, 2017 meeting (Attachment A, pp. 1-3) (All)
- III. Chair's Report (Migliaccio)
- IV. Report from Presiding Arbitrator (Bacon)
- V. Report from the Office of Mandatory Fee Arbitration (Hull)
 - A. Office statistics (Attachment B, p. 4)
 - B. Schedule of Events (Attachment C, pp. 5-6)
 - C. Appointments (Attachment D, pp. 7-8)
 - D. 2017-2018 Meeting schedule (Attachment E, p. 9)
- VI. Business
 - A. Sample awards (Attachment F, pp. 10-17) (Straus)
 - B. Education Subcommittee
 - i. Proposed outline for Advance Fee Arbitration Training (Fish/Buckner/Straus)
 - ii. Proposed updates to award checklist (Attachment G, pp. 18-25) (Hull)
 - C. Arbitration Advisory on Interest (Mark, Fish)
 - D. Arbitration Advisory re: Costs (Mark, Buckner, Bacon)
 - E. Modification to Sacramento County Bar Association rules of procedure (Attachment H, pp. 26-45) (Bacon)
 - F. Complaint about local bar program (Hull)

G. Other Business

Next committee meeting:

DATE: Friday, October 27, 2017
TIME: 10:00 a.m. – 3:00 p.m.
LOCATION: The State Bar of California
845 South Figueroa Street, 2nd Floor
Conference Room F and G
Los Angeles, CA 90017
(213) 765-1000

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

MINUTES

**Friday, July 7, 2017
10:00 a.m. – 3:00 p.m.**

The State Bar of California
845 South Figueroa Street
2FG, 2nd Floor
Los Angeles, CA 90017

And

201 California Street, 17th Floor
San Francisco, CA 94111

And

55 Fruit Street, Suite 3B
Boston, MA 02114

And

Via conference call
(855) 520-7605 Conference code: 6502212414

Members Present: Nick Migliaccio (Chair, by phone), Lorraine Walsh (Vice Chair), Ken Bacon, Mary Best, Carole Buckner, George Duesdieker, Michael Fish, Brandon Krueger, Patrick Maloney, Joel Mark, Sharron McLawyer, Mark Schreiber (by phone), Lee Straus and Sally Williams.

Not Present: Lee Hess, Clark Stone

Staff Present: Doug Hull

Others present: Myer Sankary

The meeting was called to order at 10:03 a.m. by Vice Chair Lorraine Walsh. (Chair Nick Migliaccio appeared by phone and had previously asked Vice Chair Lorraine Walsh to serve as Chair for this meeting.)

- I. Call for Public Comment
There were no requests for public comment.
- II. Approval of Minutes of May 19, 2017 meeting
The minutes were approved with one change. Mark Schreiber was added to the list of members in attendance.

Minutes July 7, 2017

Page 1

It was noted that the agenda for the instant meeting noted the next meeting is scheduled for August 24. This is incorrect. The next meeting will be held August 17, 2017.

III. Chair's Report

Lorraine commented that she was chairing since Nick is unavailable. No other report was made.

IV. Report from Presiding Arbitrator

No significant report.

V. Report from the Office of Mandatory Fee Arbitration

A. Office statistics

Updated statistics were handed out.

B. Schedule of Events

Requests for training programs were discussed. Programs in Marin, Napa/Solano and Los Angeles were discussed. Michael, George, Lorraine and Ken volunteered for Marin. Clark's name was added to the list. Lee, Pat and Carole agreed to handle a Los Angeles training. Possibly September 20. Ken, Lorraine, Michael and Joel were added to the list of potential speakers for Napa/Solano.

There is an advanced training scheduled for August 16 in San Diego before the next CMFA meeting. Gary Powell, Mary Best and Lorraine Walsh will participate in that training.

VI. Business

A. Sample awards

The proposed "good" sample award was reviewed by the committee. It was approved with some modifications.

B. Education Subcommittee

i. Proposed outline for Advance Fee Arbitration Training

This item was discussed. There was a proposal to merge the proposed outline with the existing checklist. Michael will draft the proposed merger. Carole and Lee will look at the work prepared by Michael.

C. Arbitration Advisory on Interest

This is to be reviewed at the August meeting

D. Arbitration Advisory re: Costs

This will be reviewed at the August meeting

- E. Update on Mediation Confidentiality statute released for Public Comment
Lorraine discussed this matter. It's going to be re-released for public comment. It appears that the CMFAs recommendations are being adopted for inclusion with the proposed legislation.

- F. Other Business
None

The meeting adjourned at 11:45 p.m.

Next committee meeting:

DATE: Thursday, August 17, 2017
TIME: 10:00 a.m. - 3:00 p.m.
LOCATION: San Diego County Bar Association
Bayview Room
401 West A Street
San Diego, CA 92101
(619) 765-1000

**State Bar of California
Mandatory Fee Arbitration Program
2017**

Arbitration

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-To-Date	Year End 2016
Cases Open (Beginning of Month)	28	32	32	31	35	33	30							51
Fee Arbitration Requests	8	7	2	6	4	3	3						33	75
Arbitration Cases Closed	4	7	3	2	6	6	3						31	98
<i>Findings & Award Served</i>	2	3	2	0	4	4	3						18	71
<i>Cases Closed, No Award</i>	2	4	1	2	2	2	0						13	27
Cases Open (End of Month)	32	32	31	35	33	30	30							28
Phone Calls Handled	331	304	365	292	304	251	233						2080	3884

Attachment B

Enforcement

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-To-Date	Year End 2016
Cases Open (Beginning of Month)	64	61	58	55	52	55	54							89
Enforcement Requests Rec'd.	1	1	1	1	3	1	2						10	29
Orders Re Admin Penalties	2	0	0	0	1	1	0						6	5
Inactive Enrollment Motions Filed	0	0	0	0	2	0	2						4	12
Attorney Enrolled Inactive	1	0	0	1	1	0	0						3	7
Enforcement Cases Closed	4	4	3	4	0	2	3						20	54
<i>Cases Paid and Closed</i>	2	2	2	3	0	2	2						13	34
<i>Cases Closed (Other)</i>	2	2	1	1	0	0	1						7	20
Cases Open (End of Month)	61	58	55	52	55	54	53							64

Attachment
Page 4

Committee on Mandatory Fee Arbitration

Calendar of events

Date	Event	Type	Location	Participants
Wednesday, August 16, 2017	Training	Advanced	San Diego County Bar Association Bayview Room 401 West A St #1100 San Diego, CA 92101	Walsh, Best, Powell
Thursday, August 17, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	San Diego County Bar Association Bayview Room 401 West A St #1100 San Diego, CA 92101	All members
Wednesday, September 13, 2017 12:00 p.m. - 3:00 p.m.	Training	Basic	The Old Solano County Courthouse Jury Selection Room 580 Texas Street Fairfield, CA 94533	Walsh, Bacon, Fish
Wednesday, September 20, 2017 5:00 p.m. - 8:00 p.m.	Training	Basic	The State Bar of California 845 South Figueroa Street, 2 C-F Los Angeles, CA 90017	Straus, Buckner, Maloney
Tuesday, September 26, 2017 3:00 p.m. - 6:00 p.m.	Training	Basic	Corte Madera Town Center Community Room 770 Tamalpais Drive Corte Madera, CA 94925	Bacon, Fish, Stone
Friday, October 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
Friday, January 19, 2018 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 180 Howard Street, 8th Floor San Francisco, CA 94105	All members
Friday, April 20, 2018 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 845 South Figueroa Street Conference Room 2B, 2nd Floor Los Angeles, CA 90017	All members
Friday, July 13, 2018 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 180 Howard Street, 4th Floor Conference Room 4A-C San Francisco, CA 94105	All members
Friday, September 14, 2018 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	TBD	All members

From: [Liou, Isabel](#)
To: [Hull, Doug](#)
Subject: San Bernardino training
Date: Thursday, July 20, 2017 11:22:29 AM

Doug,

FYI - Claire of the San Bernardino County Bar would like to hold a fee arbitration training sometime in November 2017. She has a venue, no-cost, with room for 60-70 attendees and can provide snacks.

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Isabel Liou | Attorney
Mandatory Fee Arbitration Program
[The State Bar of California](#) | 180 Howard St. San Francisco, CA 94105
T: (415) 538-2573 | F: (415) 538-2335 | isabel.liou@calbar.ca.gov

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**STATE BAR
COMMITTEE ON MANDATORY FEE ARBITRATION 2017-2018**

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Revised 8/3/17

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Revised 8/3/17

Committee on Mandatory Fee Arbitration
Meeting Schedule
2017-2018

Date	Time	Location
Friday, October 27, 2017	10:00 a.m. – 3:00 p.m.	The State Bar of California 845 South Figueroa Street Conference Room 2FG, 2 nd Floor Los Angeles, CA 90017
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Friday, July 13, 2018	10:00 a.m. – 3:00 p.m.	The State Bar of California 180 Howard Street, 4 th Floor Conference Room 4A-C San Francisco, CA 94105
Friday, September 14, 2018	10:00 a.m. – 3:00 p.m.	TBD (San Diego?)

Fee Incurred and Amount in Dispute

- | | |
|---|-------------|
| 1. The amount that the Client claims should have been charged: | \$18,500.00 |
| 2. The amount that the Attorney claims should have been charged: | \$32,920.50 |
| 3. The amount that the Client has paid the attorney: | \$18,500.00 |
| 4. If there was a written fee agreement, under the agreement, what fees were charged: | \$32,920.50 |
| 5. Amount of the filing fee: | \$1,052.67 |

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Statement of Facts/Issues in Dispute

On March 20, 2016, Applicant engaged Respondent to represent her in connection with a petition for dissolution of marriage. The parties executed an hourly written fee agreement setting forth the terms of their agreement (e.g., initial deposit, hourly fee rates, etc.) (the “Written Fee Agreement”). Applicant remitted to Respondent a refundable initial retainer in the amount of Three Thousand Five Hundred Dollars (\$3,500). In addition, Applicant paid Respondent a total of Fifteen Thousand Dollars (\$15,000) over the course of the representation.

From March 20, 2016 to July 16, 2016, Respondent actively participated and represented Applicant pursuant to the terms of the Written Fee Agreement. Despite multiple attempts by Respondent to meet and confer with Applicant on the remaining outstanding balance owed to Respondent, such meetings never took place and Respondent ultimately substituted out of the case due to non-payment for services rendered.

Applicant is requesting that she not be required to pay Respondent the balance owing on her account in connection with fees and costs in the amount of Fourteen Thousand Four Hundred Twenty Dollars Fifty Cents (\$14,420.50) on the basis that Applicant believes that Respondent did more work than was necessary and Applicant was not aware of the fees and costs that were accumulating in connection with her case. Applicant contends that Respondent could have handled the matters that came up during his representation of Applicant in a more efficient manner, which would have resulted in lower legal fees and costs.

Respondent is requesting that Applicant be required to pay Respondent Fourteen Thousand Four Hundred Twenty Dollars Fifty Cents (\$14,420.50), which represents the outstanding balance of the fees and costs incurred by Respondent in connection with Respondent’s representation of Applicant. Respondent contends that Applicant’s dissolution of

marriage was anything but basic, but rather was incredibly complex and terribly acrimonious, which led to additional pleadings, appearances and time expended in representing Applicant's interests and those of her small children.

The matters placed at issue by the Application, Respondent's Attorney Reply and the testimony of the parties, are the following:

1. The nature of the Written Fee Agreement between the parties.
2. The services performed by the Respondent and the additional fees and costs due Respondent, if any.

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FINDINGS

Statement, Stipulations, Reasoning and Determination of Questions Submitted

[Business and Professions Code Section 6203(a)]

1. What was the nature of the Written Fee Agreement between the parties?

On March 20, 2016, Applicant and Respondent entered into the Written Fee Agreement, which set forth an hourly rate of Three Hundred Fifty Dollars (\$350) per hour for the services of Respondent. The scope of services as set forth in the Written Fee Agreement is .

Pursuant to Business and Professions Code §6148, an attorney who contracts to represent a client in which it is reasonably foreseeable that the total expense to a client, including attorney's fees, will exceed one thousand dollars (\$1,000), the contract for services must be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract, signed by both the attorney and the client, to the client. The written contract shall contain all of the following:

- (a) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees and charges applicable to the case.
- (b) The general nature of the legal services to be provided to the client.
- (c) The respective responsibilities of the attorney and the client as to the performance of the contract.

The Written Fee Agreement complied with the statute and is a valid agreement ~~on~~ between the parties. In addition, the parties orally stipulated at the Hearing that neither party was contesting the validity of the Written Fee Agreement. In addition, the parties orally stipulated that the funds paid by Applicant to Respondent are accurate and correct.

2. What were the services performed by the Respondent and are any additional fees and costs due Respondent?

Once Applicant retained Respondent to represent her in the dissolution of marriage proceedings against John Smith, her then-husband, Respondent provided the following legal services on Applicant's behalf, in addition to the expected legal services in connection with Applicant's petition for dissolution of marriage (e.g., [preparation of the Petition for Dissolution of Marriage](#), mandatory settlement conferences, responding to Applicant's e-mails and phone calls, preparing form interrogatories, preparing declarations and in-person meetings with Applicant):

- ~~Prepared the Petition for Dissolution of Marriage.~~
- Successfully petitioned the Court for an Order granting Applicant with exclusive control of the family residence.
- Successfully petitioned the Court for an Order which sought to prevent John Smith from consuming narcotics while caring for and driving around the minor children.
- Successfully defended John Smith's attempt to impute income to Applicant, due to the fact that she reduced her income in light of some health issues. Respondent was successful in obtaining guideline pendent lite spousal support and not based on a reduced amount.
- Successfully petitioned the Court for an Order to allow Applicant control and exclusive use of the community BMW 325i automobile.
- Successfully petitioned the Court for an Order for joinder of the community retirement accounts so that John Smith would cease unilateral withdrawals.

Applicant contends that even though monthly invoices were being mailed to the correct address, she didn't receive them. Respondent pointed out that on or about May 9, 2016, in a declaration signed by Applicant in connection with documents submitted to the Court in connection with the dissolution of marriage proceedings, the invoices that Respondent had generated to date were part of the declaration. As such, Respondent argued that Applicant was aware on or about May 9, 2016, that fees and costs of almost Ten Thousand Dollars (\$10,000) had accumulated since Respondent's initial engagement on March 20, 2016, which were over and above the Eighteen Thousand Five Hundred Dollars (\$18,500) in fees and costs that Applicant had previously paid in connection with Respondent's services on Applicant's behalf.

Furthermore, Respondent argued that Applicant was aware that Respondent was rendering extensive legal services on her behalf for quite a few issues at her direction, which

were complex and time consuming, due to the antagonistic nature of the divorce proceedings. Based on the Written Fee Agreement, Applicant was also aware that Respondent's hourly rate was ~~Two Hundred Ninety five Dollars (\$295)~~ Three Hundred Fifty Dollars (\$350)(KEB11) per hour.

Respondent had an initial conversation with Applicant about her mounting legal bill on May 30, 2016 and then subsequently had additional follow-ups in June of 2016. Due to Applicant being nonresponsive to Respondent's request to bring her account current, ultimately Respondent filed a motion with the Court to withdraw as counsel of record for Applicant due to non-payment for legal services and costs incurred on Applicant's behalf. Respondent followed Rule 3-700 of the Rules of Professional Conduct and did not prejudice the rights of the Applicant. Shortly thereafter, Respondent was substituted out of the case with Client's consent and the motion to withdraw was taken off-calendar.

Applicant acknowledged that Respondent rendered all of the legal services set forth in the monthly invoices on her behalf and did so successfully. Other than testifying that she was "shocked" at the rising costs, Applicant was unable to point out any specific charge or service that she felt was excessive or that she did not ask Respondent to do on her behalf.

Given the nature of the dissolution of marriage between Applicant and John Smith, Respondent has provided evidence that he was sending Applicant monthly billing statements; provided, however, even if Applicant didn't receive a statement for the month of March 2016 or April 2016, by virtue of the documents filed with the Court on or about May 9, 2016, she was made aware of the legal fees and costs that were mounting in her case. In addition, Applicant was an active participant in all matters surrounding her case and for the series of meetings and hearings that took place over the rest of May and June of 2016. Applicant should have been aware that legal fees and costs were continuing to mount as Respondent vigorously represented her, including agreeing to advance costs for an expert witness to prepare a declaration on the effects of Hydrocodone. Furthermore, Respondent was continuing to send Applicant monthly statements by U.S. Mail and Electronic Mail. Applicant's position that she did not receive any of the billing statements sent by Respondent over the course of representation was found to be unpersuasive.

Applicant's divorce proceedings were not harmonious. Respondent expended a great amount of time on Applicant's case. Based on the various issues handled by Respondent, the fees and costs were reasonable and there was no excessive billing. Therefore, Respondent is entitled to the fees and costs that were billed.

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AWARD

The sole arbitrator finds that the total amount of fees, costs or both which should have been charged in this matter is: \$32,920.50

Of which the client is found to have paid: \$18,500.00

Subtotal: \$14,420.50

Pre-award Interest is not awarded. N/A

The filing fee was paid to the Program by Client.

The filing fee is allocated:	Client	\$1,052.67
	Attorney	\$0.00

ACCORDINGLY, the following award is made:

- Client Sally Client shall pay to Attorney William Lawyer, Esq. the sum of \$14,420.50,
 - plus interest in the amount of 10% per annum from the 30th day after the date of mailing of this award
- Client ~~is responsible for shall pay to~~ the State Bar of California, the filing fee of: \$1,052.67

This award is:

- Binding.** Either party may convert said award into a judgment pursuant to the provisions of Section 6200 and following of the Business and Professions Code and/or Section 1280 and following of the Code of Civil Procedure of the State of California.
- Non-Binding.** Pursuant to Section 6203(b) of the Business and Professions Code of the State of California, said award shall become binding within thirty (30) days of mailing of notice of this award unless within such time one of the parties hereto seeks judicial review by filing appropriate pleadings to such affect in any abated action or by commencing an action in a court having jurisdiction. **NOTE: FAILURE TO ACT WITHIN 30 DAYS OF MAILING OF NOTICE OF AWARD WILL CONVERT A NON-BINDING TO A BINDING AWARD.**

Steve Smith, Esq.	_____	August 1, 2017
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated

If a panel, the additional arbitrators:

_____	_____	_____
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated

_____	_____	_____
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated

REMINDER: The Findings and Award *must* be sent to the MFA program administering the arbitration. *Do not* send it directly to the parties. The MFA Program will serve a copy of this findings and award on the parties and a photocopy will be returned to the arbitrator(s). Thank you.



STATE BAR OF CALIFORNIA

**INTER-OFFICE
COMMUNICATION**

DATE: August 9, 2017
TO: Committee on Mandatory Fee Arbitration
FROM: Doug Hull
SUBJECT: Award checklist

The Fee Arbitration Award Checklist was developed by this committee to help arbitrators ensure all of the necessary issues were covered in an arbitration.

With the changes in law (see *Lee v. Hanley*), I believe it would be prudent for this committee to review this document to ensure the information contained therein is still accurate.

ARBITRATION AWARD CHECKLIST

This one-page checklist enumerates matters that may have to be determined in preparing a fee arbitration award covering all pertinent issues. Instructions and references to additional helpful materials are provided on the following pages.

- ___ **Step 1.** Correctly state the full names of the parties and individual responsible attorney(s). If the existence of an attorney-client relationship is disputed, attach the parties' stipulation to submit the issue to arbitration.
- ___ **Step 2.** If a party failed to appear, make findings on willfulness.
- ___ **Step 3.** Indicate whether binding or non-binding arbitration, and attach a signed stipulation form, if applicable.
- ___ **Step 4.** If the defense of the Statute of Limitations has been raised, is the claim barred? If no, go to **Step 5**; if yes, award 0 on the barred claim and go to **Step 13**.
- ___ **Step 5.** Is there a valid fee agreement (and billings if B&P 6148 applies)? If yes, go to **Step 6**. If no, go to **Step 10**.
- ___ **Step 6.** Calculate the amount fees and costs billed per agreement.
- ___ **Step 7.** Are the agreed fees unconscionable? If no, go to **Step 8**. If yes, go to **Step 10**.
- ___ **Step 8.** Deduct the appropriate amount, if any, for unnecessary or unauthorized services and costs and any fees or costs claimed for fee arbitration and other collection from client.
- ___ **Step 9.** If any of the services were negligently performed, adjust the fees to reflect the value of such negligently performed services. Do not award damages or use them as an offset.
- ___ **Step 10.** Calculate reasonable fees and costs in cases where there is no valid fee agreement or such agreement provides for unconscionable fees.
- ___ **Step 11.** Did attorney commit a serious violation of the Rules of Professional Conduct or otherwise act unethically or illegally charge fees? If yes, determine effect on fees and costs.
- ___ **Step 12.** Deduct for payments/credits on account.
- ___ **Step 13.** Allocate the arbitration filing fee, at the discretion of arbitrator(s).
- ___ **Step 14.** Calculate balance due to attorney or client, including any allowed interest.
- ___ **Step 15.** Write and sign award and any dissent, deciding all issues submitted. Send award to Program for review and transmission to parties with proof of service and notice of rights.

ARBITRATION AWARD INSTRUCTIONS and REFERENCES

Fee arbitrations succeed in finally resolving disputes without litigation when the parties perceive that the arbitrator(s) acted fairly in deciding their case and rendering a comprehensive, intelligible award. Even a party who is dissatisfied with the amount awarded may choose not to seek a trial following a non-binding arbitration if that party perceives that the arbitrator(s) truly listened to his or her position and determined the dispute in a reasoned manner in accordance with the evidence and applicable law. These instructions are intended to assist you in achieving the desired result.

Step 1. Names of Parties and Identification of Responsible Attorney(s).

Be sure that the client and attorneys are correctly named, taking into account marriages and restoration of former names on dissolution of marriage, correct corporate and partnership firm names, and other details needed in any subsequent litigation over the fee dispute. Also, B&P 6203(d) provides for enforcement of an award in favor of a client by placing the non-paying individual responsible attorney(s) on involuntary inactive status. This is not a partnership or corporation, but the bar member(s) personally responsible for making or ensuring payment of the refund. See Fee Arbitration Advisory 1994-04. If the existence of the attorney-client relationship is disputed, any award is subject to being vacated unless the parties stipulate to submitting that issue to arbitration. See Arbitration Advisory 2005-01. Attach the original of any such stipulation to the award.

Step 2. Findings on Willfulness of Non-Appearance of Party at Arbitration Hearing.

A party may not request trial de novo after non-binding arbitration if that party willfully failed to appear at the arbitration hearing noticed under the rules of the Program. B&P 6204(a) provides that it is the court that determines willfulness, but in making that determination, “the court may consider any findings made by the arbitrators on the subject of a party’s failure to appear.” B&P 6203(c) also provides that a party who did not appear at an arbitration hearing shall not be entitled to attorney’s fees or costs even if he or she is the prevailing party obtaining court confirmation, correction or vacation of the award. Therefore, set forth in the award what notice was given and any information known regarding the non-appearance of the party.

Step 3. Indicate Whether Binding or Non-Binding Arbitration, and Attach Any Stipulation.

B&P 6204(a) provides that a fee arbitration is binding only when the parties have so agreed in writing after the dispute arose. Often the writings will be the request for arbitration and reply, but occasionally the agreement for binding arbitration is reached at the commencement of the hearing, in which case the

agreement must be reduced to a writing signed by the parties, and the original should be attached to the award.

Step 4. Statute of Limitations.

B&P 6206 provides that an arbitration shall not be commenced if a civil action requesting the same relief would be barred by the statute of limitations, unless the client requests arbitration after the attorney has filed a civil action. Arbitration Advisory 2011-02 discusses the applicable limitations periods, and recommends not determining whether the claim is barred unless a party raises it as a defense, as is the case in civil actions. If the claim is barred, the claimant is denied a recovery, and the arbitrator(s) will need to determine whether any allocation of the filing fee should be made.

Step 5. Is There a Valid Fee Agreement?

All contingent fee agreements are required by B&P 6147 to be in writing, and with a few exceptions, all other fee agreements with non-corporate clients must be in writing if the fees are expected to exceed \$1,000, per B&P 6148. That section also sets standards for billings. If the requirements for written fee agreements and billings are not met, the agreement is voidable at the option of the client. The arbitrator(s) should treat the agreement as voided by the client if it results in a lower fee. See Arbitration Advisory 2012-01 on voidability of fee agreements. If there was no fee agreement, or the writing requirements were not met, the attorney is only entitled to an award of a reasonable fee, and proceed to paragraph 10 below. See Arbitration Advisories 1993-02 for discussion of the requirements of written fee agreements and 1995-02 for a discussion of billing requirements.

Step 6. Determining Fees and Costs Under Valid Fee Agreement.

When the arbitrator(s) find that a valid fee agreement exists, and the fees are not unconscionable, the attorney will ordinarily be entitled to fees and costs charged per the agreement. See Arbitration Advisory 1993-02 on the standard of review when a valid fee agreement exists. Examine billings and any settlement statements to determine whether the fees and costs charged conform to the terms of the agreement. Discrepancies arise with some frequency when the attorney's billing rate goes up during the representation, or the attorney charges staff services as costs contrary to the agreement. Arbitration Advisory 1995-02 discusses billing requirements of B&P 6148(b), and Advisory 2003-01 provides helpful insights in detection of bill-padding practices.

Step 7. Unconscionable Fees.

Rule 4-200(A) of the Rules of Professional Conduct (RPC) states that an attorney “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” To be unconscionable, a fee must be so far beyond the realm of reasonableness that it shocks the conscience. Subpart (B) of Rule 4-200 requires consideration of all the facts and circumstances existing at the time the agreement is entered into, except where the parties expect that the fee will be affected by later events, and lists eleven factors to be considered, among others. If the fee is unconscionable, the attorney is nonetheless entitled to recover a reasonable fee, as discussed in paragraph 10. If only part of the fee is unconscionable, the agreed fee for the remainder of the fee may be awarded and reasonable fees awarded for the portion of the services for which the agreed fee is unconscionable.

Step 8. Deducting for Unnecessary or Unauthorized Services and Costs and Fee Arbitration and Other Collection From Client.

The attorney should be denied compensation for unrequested services beyond the scope of the agreed representation or for services and costs that were not reasonably necessary to the proper representation of the client. Subsection (c) of B&P 6203 provides that neither party may recover costs or attorney’s fees in a fee arbitration award for preparation for or participation in the arbitration proceeding, except for the filing fee.

Step 9. Adjustment for Professional Negligence in Performance of Services.

B&P 6203 states that evidence relating to claims of malpractice and professional misconduct are “admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled”, but no affirmative relief in the form of damages or offset can be awarded for injuries claimed to have resulted from the malpractice or professional misconduct. If you find malpractice did occur, you may determine that there was a reduced value, or no value for the services, and adjust the fees accordingly, but no other consequential damages resulting from the negligence may be considered in fee arbitration.

Step 10. Determining Reasonable Fees When There is no Valid Agreement.

If there is no valid fee agreement, or the writing and billing requirements of B&P 6147 or 6148 have not been satisfied, the attorney is nonetheless entitled to a quantum meruit award for the reasonable value of the services rendered, but not to exceed the compensation due under a written agreement subject to being voided by the client. The factors to consider in making an award of reasonable compensation are spelled out in Fee Arbitration Advisory 1998-03. The

arbitrator(s) will deny compensation for unnecessary service and costs, and services and costs incurred in the arbitration or other collection efforts against the client, as discussed in paragraph 8, and take into account any professional negligence in valuing the services rendered, as discussed in paragraph 9.

Step 11. Serious Violation of Rules of Professional Conduct or Statutes or Illegal Fees.

The attorney should be denied compensation for any activity in serious violation of the Rules of Professional Conduct or statutes regulating the practice of law. Representing the client while having an impermissible conflict of interest leads to a denial of all fees while the conflict exists. The arbitrator(s) will need to determine the extent that other violations were serious and led to fees and costs being charged to the client, and what should be disallowed. See paragraph 7 above for consideration unconscionable fees. If the attorney has charged or collected a fee which an attorney is entitled to receive only by court order, such as fees for representing a minor, probate fiduciary, or workers' compensation claimant, then compensation should be denied without prejudice to obtaining the required court order. In some circumstances, such as medical malpractice cases, maximum fees are prescribed by statute, and the amount of any claim exceeding the limit should be denied.

Step 12. Deduct for Payments/Other Credits.

Be sure that the attorney has properly credited the client for payments on account and any other credits the attorney may have agreed to in the course of the representation.

Step 13. Allocation of Arbitration Filing Fee.

B&P 6203(a) gives the arbitrator(s) the discretionary authority to allocate the filing fee between the parties. No standard is given, but in practice the allocation is based on the extent to which the payor's claim is found to be supported and the basis of the award. That section provides that no award should be made for other costs or attorney's fees incurred in preparation for and participation in the arbitration, even if the fee agreement provides for an award of such costs and fees.

Step 14. Determine Balance Due Attorney or Client, Including Any Interest.

The arbitrator(s) should carefully calculate the amount due to the attorney or client taking into account the debits and credits set forth above. B&P 6203(a) expressly provides that the arbitrator(s) may award "a refund of unearned fees, cost, or both previously paid to the attorney." The fee arbitration statutes make no mention of awarding interest accrued before the award, but the practice is to

award them if a party would be entitled to such an award in a civil action on the claim. The issue is thoroughly discussed in Arbitration Advisories 1993-01 and 2001-01.

Step 15. Write and Sign Award, and Any Dissent, Deciding All Issues Submitted, and Send Award to Program.

B&P 6203(a) requires that the arbitration award be in writing signed by the arbitrators concurring in it, and that it include “a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy.”

On the other hand, B&P 6202 provides that confidential communications are admissible at the arbitration hearing, but such disclosures are not deemed a waiver of the confidentiality of such information for other purposes. Therefore, you must avoid disclosing privileged attorney-client communications in the award because they may become public in post-arbitration proceedings.

Any dissent should also be in a writing signed by the dissenting arbitrator, and delivered to the parties with the award, as provided in paragraph 15. The arbitration award is usually made following the format of a statement of decision in a civil action, including:

- 1) a caption showing the name of the arbitration forum, the names of the parties, and any case number assigned to the arbitration;
- 2) an introductory paragraph showing the date(s), time(s) and place(s) of the hearings, the notice given for the hearing, and the names of the arbitrator(s), parties, witnesses who testified, and any other persons in attendance. If a party fails to appear, it should include a statement of the facts concerning the willfulness of the non-appearance and whether permission was given by the arbitrators in advance;
- 3) a statement of any agreed facts to which the parties have stipulated in writing or orally in the course of the hearing, and the remaining issues to be determined;
- 4) a statement of the factual findings and conclusions, covering all issues submitted. It is usually stated as what the arbitrator(s) found by a preponderance of the evidence, avoiding directly accusing a party of lying; and
- 5) the award itself, which should include the following language, as appropriate:

The Hearing Panel finds that the total amount of fees, or costs, or both, that should have been charged in this matter are: \$ _____

of which Client is found to have paid: \$ _____

Subtotal \$ _____

In addition, the fee arbitration filing fee of \$ _____ as paid by _____ shall be allocated:

Client: \$ _____
Attorney \$ _____

Pre-award interest is not award
 is awarded in the amount of \$ _____

for a net amount of: \$ _____

Accordingly, the following award is made:

a) Client, _____, shall pay Attorney, _____, \$ _____ plus interest in the amount of ten percent per annum from the 30th day after the date of service of this award.

OR

b) Attorney, _____, shall pay Client, _____, \$ _____ plus interest in the amount of ten percent per annum from the 30th day after the date of service of this award.

OR

c) Nothing further shall be paid by either attorney or client/non-client.

The individual responsible attorney(s) is/are _____.

Send the original signed award and any dissent to the Program for review and transmission to the parties with a proof of service per B&P 6203(a) and notice of post-arbitration rights. The arbitrator(s) should not undertake to serve the award to the parties.

Hull, Doug

From: Kenneth E. Bacon <kbacon@mastagni.com>
Sent: Monday, August 07, 2017 9:53 AM
To: Hull, Doug; nm22@georgetown.edu; Lorraine Walsh; Mark Schreiber
Cc: mburroughs@sacbar.org
Subject: RE: Sacramento County Bar MFA Rules

Doug:

Here are the SCBA's proposed MFA rule changes which I would like to add to the August 17th CMFA Agenda for consideration:

I. FILING FEES:

Current Rule 15.3:

15.3 Filing Fee Schedule

Fees—The filing fees schedule is based on the amount in dispute and is five percent (5%) of the amount in dispute with a minimum of \$50 and a maximum of \$5,000.

a) The amount in dispute is the difference between the fee charged or claimed by the attorney and the amount, if any, which the client has indicated to be the reasonable value of the legal services received as set forth in the "Request for Arbitration" form.

b) The filing fee shall be paid by the party, whether client or attorney, who files the "Request for Arbitration." This fee is to be paid at the time of the filing of the "Request for Arbitration." All filing fees are nonrefundable except as otherwise provided in these Rules. However, in the discretion of the arbitrator(s), the respondent may be directed as part of the award, to reimburse the petitioner, in whole or in part, for such filling fees.

Proposed New Rule 15.3:

Fee - **\$100 plus 5% of the disputed amount if the amount in dispute is less than \$5,000;
\$100 plus 6% of the disputed amount if the amount in dispute is \$5,000 or more and less than \$10,000;
\$100 plus 7% when the amount in dispute is \$10,000 or more with a maximum filling fee of \$7,500.**

a) The amount in dispute is the difference between the fee charged or claimed by the attorney and the amount, if any, which the client has indicated to be the reasonable value of the legal services received as set forth in the "Request for Arbitration" form.

b) The filing fee shall be paid by the party, whether client or attorney, who files the "Request for Arbitration." This fee is to be paid at the time of the filing of the "Request for Arbitration." All filing fees are nonrefundable except as otherwise provided in these Rules. However, in the discretion of the arbitrator(s), the respondent may be directed as part of the award, to reimburse the petitioner, in whole or in part, for such filling fee

II. REFUND OF FILING FEE:

Current Rule 19.1 (that is a typo, should be 19.3)

19.1 Refund of the filing fee: If the matter is settled or dismissed based on withdrawal before the request for arbitration is served on the attorney by the program, 100 percent of the filing fee shall be refunded to the party who paid it. If the matter is settled after the request for arbitration has been served on the respondent party by the program but before assignment of a panel, the program shall retain 10 percent of the filing fee. After assignment of a Hearing panel, if written notice of the settlement is received by the program at least 10 days prior to the date of the scheduled hearing, the program shall retain 50 percent of the filing fee. The remaining fee shall be refunded to the party who paid it. After Hearing panel assignment and less than 10 days before the Hearing, there shall be no refund of filing fees.

Proposed Change to Rule 19.3

19.3 Refund of the filing fee: If the matter is settled or dismissed based on withdrawal before the request for arbitration is served on the attorney by the program, **a minimum fee of \$25 will be retained by the Program with the balance** ~~100 percent~~ of the filing fee shall be refunded to the party who paid it. If the matter is settled after the request for arbitration has been served on the respondent party by the program but before assignment of a panel, the program shall retain ~~10~~ **50** percent of the filing fee **with a \$50 minimum**. After assignment of a Hearing panel, if written notice of the settlement is received by the program at least 10 days prior to the date of the scheduled hearing, the program shall retain **at least 50** ~~50~~ **90** percent of the filing fee, **and the balance, if any**, ~~The remaining fee~~ shall be refunded to the party who paid it **at the sole discretion of the Committee Chair or his/her designee** After Hearing panel assignment and less than 10 days before the Hearing, there shall be no refund of filing fees.

III. MFA CLAIMS BY INCARCERATED CLIENTS

We would like to add a new rule which specifies that the SCBA does not handle requests for MFA by incarcerated clients as those matters invariably involve a full fee waiver and place a burden on the program.

Proposed Change to Rule 14.1:

14.1 Arbitration may be initiated by a client, an attorney or a third party entitled to request mandatory fee arbitration **However, if the Client is incarcerated, the Program will not accept jurisdiction, unless filed by Non-Client Third-Party Payor. Requests by an incarcerated client should be filed instead with The State Bar of California's Mandatory Fee Arbitration Program.**

Kenneth E. Bacon | Senior Associate

 **MASTAGNI HOLSTEDT, A.P.C.**

Civil Litigation Department

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From: Kenneth E. Bacon

Sent: Friday, August 04, 2017 1:44 PM

To: Doug.Hull@calbar.ca.gov

Cc: nm22@georgetown.edu; Lorraine Walsh <lorraine.walsh@sbcglobal.net>; Mark Schreiber <mschreiber@cwclaw.com>

Subject: Sacramento County Bar MFA Rules

Doug:

As we discussed yesterday, the SCBA would like to make some change to our MFA rules, including an increase in the filing fees, a change to the refund policy and adding a provision that the program does not handle requests by incarcerated clients. Would you please add that to the agenda for the August 17th meeting and I'll send the specific language of the proposed changes on Monday.

Ken

Kenneth E. Bacon | Senior Associate

 **MASTAGNI HOLSTEDT, A.P.C.**

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**Sacramento County Bar Association
Mandatory Fee Arbitration
Rules of Procedure**

**ARTICLE I.
DEFINITIONS**

RULE 1.0 Definitions

As used in this chapter:

- 1.1 ACTION:** A civil judicial proceeding brought to enforce, redress or protect a right.
- 1.2 ADMINISTRATOR:** The staff person responsible for administering the local bar association's Mandatory Fee Arbitration Program.
- 1.3 AWARD:** The decision of the arbitrator or arbitrators in the fee arbitration proceeding.
- 1.4 CLIENT:** A person who directly or through an authorized representative consults, retains or secures legal services or advice from an attorney in the attorney's professional capacity.
- 1.5 COMMITTEE CHAIR:** The person on the Mandatory Fee Arbitration program responsible for supervising the program's fee arbitrators and for ruling on matters as set forth in these rules.
- 1.6 DECLARATION:** A declaration is a document in compliance with the requirements of Code of Civil Procedure section 2015.5, or an affidavit.
- 1.7 FILE:** Fee arbitration records and papers in a specific fee arbitration case.
- 1.8 HEARING PANEL:** One or three arbitrators assigned to hear the fee dispute and to issue the award.
- 1.9 PANEL CHAIR:** Refers to either the sole arbitrator or Panel Chair of a three-member panel assigned to hear a matter. The Panel Chair is responsible for ruling on matters pertaining to the individual case assigned as set forth in these rules.
- 1.10 PARTY:** A person who initiates or is named in an arbitration proceeding under these rules, including an attorney, a client or other person who is not the client but may be liable for payment of, or entitled to a refund of attorney's fees.
- 1.11 PROGRAM:** Unless indicated otherwise, reference to the program means the Mandatory Fee Arbitration Program of the Sacramento County Bar Association.
- 1.12 STATE BAR:** The State Bar of California. Unless indicated otherwise, reference to the State Bar means the State Bar's Office of Mandatory Fee Arbitration.

**ARTICLE II.
ARBITRATION GENERALLY**

RULE 2.0 Arbitration Mandatory for Attorneys

2.1 Arbitration under Business and Professions Code sections 6200-6206 is voluntary for a client, unless the parties agreed in writing to submit their fee disputes to arbitration, and mandatory for an attorney if commenced by a client.

RULE 3.0 Party's Failure to Respond or Participate

3.1 In a mandatory fee arbitration, if a party fails to respond to a request for arbitration or refuses to participate, the arbitration will proceed as scheduled and an award will be made on the basis of the evidence presented to the hearing panel. The award may include findings on the subject of a party's failure to appear at the arbitration.

RULE 4.0 Disputes Covered

Disputes concerning fees, costs, or both charged for professional services by an attorney are subject to arbitration under these rules, except for:

- 4.1** disputes where the attorney is admitted to practice in another jurisdiction, or where the attorney 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 was rendered in the State of California;
- 4.2** claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct;
- 4.3** disputes where the fees or costs to be paid by the client or on the client's behalf have been determined or are determinable pursuant to statute or court order;
- 4.4** disputes where the request for arbitration is made by a person who is not liable for or entitled to a refund of attorney's fees or costs; or
- 4.5** disputes where the claim has been assigned by the client.

RULE 5.0 Non-Binding and Binding Arbitration

5.1 Arbitration is not binding unless all parties agree in writing after the fee dispute arises. Such agreement shall be made prior to the taking of evidence at the hearing. If any party has not agreed in writing to binding arbitration, the arbitration is non-binding, and any party may request a trial after arbitration in a civil court pursuant to Business and Professions Code section 6204 within 30 days after the non-binding arbitration award has been served. If a trial after arbitration is not requested, the non-binding award automatically becomes binding 30 days after the award is served, except that if any party

willfully fails to appear at the hearing as provided for under these rules, that party shall not be entitled to a trial after arbitration. The decision as to whether the non-appearance was willful is made by the court. The party who failed to appear at the hearing shall have the burden of proving that the failure to appear was not willful. An award may be corrected, vacated or confirmed pursuant to Code of Civil Procedure section 1285 et. seq.

- 5.2 If all parties agree in writing, after the fee dispute arises, that the arbitration is binding, the award is binding and there can be no trial after arbitration in a civil court on the issue of fees and costs. A binding award may be corrected, vacated or confirmed pursuant to Code of Civil Procedure section 1285 et. seq.

RULE 6.0 Withdrawal of Binding Arbitration Election

- 6.1 If the parties agree in writing, after the fee dispute arises, to binding arbitration, the arbitration shall proceed as binding. The parties may request binding arbitration as provided on the program forms. In the absence of a written agreement made after the fee dispute arises to submit to binding arbitration, the arbitration shall be non-binding.
- 6.2 A party who has requested binding arbitration may withdraw that request and request a change to non-binding arbitration in writing to the program and the other parties, so long as the other parties have not already agreed to binding arbitration.
- 6.3 If the party who initially requests arbitration requests that the arbitration will be binding, and the respondent party 's Reply agrees to binding arbitration but also seeks to materially increase the amount in dispute, then the party who requested arbitration may withdraw his request that the arbitration be binding. Such withdrawal of consent to binding arbitration, by the initiating party, must be communicated in writing to the Program within ten days of that party 's receipt of the Reply.
- 6.4 Except as provided above, if the parties have already agreed to binding arbitration, the binding election may be changed to non-binding arbitration only by written agreement signed by all parties and sent to the program.

RULE 7.0 Right To Counsel

- 7.1 All parties, at their expense, may be represented by an attorney. A party may instead designate a person who is not an attorney to act as the representative of that party. Such designation must be made in writing before commencement of the arbitration hearing. The extent to which the non-attorney representative is permitted to participate in the hearing is subject to the reasonable discretion of the arbitrator or the arbitration panel.

RULE 8.0 Waiver of Right to Request or Maintain Arbitration

A client's right to request or maintain arbitration is waived if the client:

- 8.1 answers a complaint in a civil action or other equivalent response to the civil action

before filing a request for arbitration, after the required form entitled “Notice of Client’s Right to Arbitration” was given pursuant to Business and Professions Code §6201 (a);

- 8.2 commences an action or files any pleading seeking judicial resolution of a fee or cost dispute or seeking affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct;
- 8.3 fails to deliver to the program a request for arbitration on the approved program form that is postmarked or received on or before the 30th day from the date of the client's receipt of the form entitled “Notice of Client's Right to Arbitration” given pursuant to Business and Professions Code section 6201, subdivision (a). Should the fee dispute transfer to a different fee arbitration program after the request for arbitration is filed, the original date of postmark or receipt of the arbitration request will be preserved for purposes of determining whether the request for arbitration was made within the 30-day time period.

RULE 9.0 Stay of Proceedings

- 9.1 If an attorney, or the attorney's assignee, commences an action to collect fees or costs in any court or other proceeding, with limited exceptions including provisional remedies, the court action or other proceeding is automatically stayed upon filing a request for fee arbitration with a State Bar approved fee arbitration program. The party who requested fee arbitration has a duty to notify the court of the stay and attach a copy of the arbitration request form. If the person who requested or caused the stay has not appeared in the action or other proceeding, or is not subject to the jurisdiction of the court, the plaintiff must immediately file a notice of stay and attach a copy of the arbitration request form showing that the proceeding is stayed. Upon request, the program may provide a copy of a notice of automatic stay to the party.

**ARTICLE III.
PROGRAM**

RULE 10.0 Determination of Jurisdiction

- 10.1 The program shall reject any request for arbitration when it is clear from the face of the request that the provisions of Business & Professions Code section 6200 have not been met or the matter is time barred under Business & Professions Code section 6206. Where the existence of an attorney-client relationship is in dispute, the parties may stipulate to submit the issue for a determination by the program, which otherwise lacks jurisdiction to determine that issue.
- 10.2 The Committee Chair may request that the parties submit written statements supporting their respective positions on the issue of whether the program has jurisdiction over their fee dispute or whether the dispute is time barred. For good cause, the Committee Chair may assign the matter to a hearing panel to take evidence and make a determination of whether jurisdiction should be accepted.

- 10.3** Within 15 days from service of notice of a ruling on a challenge to jurisdiction or claim that the matter is time barred, a party may file a written request for reconsideration based on new evidence. The Committee Chair shall rule on the request for reconsideration.
- 10.4** There is no appeal of the Committee Chair's decision following reconsideration. Any ruling on reconsideration by the local bar program is final.
- 10.5** If there is an approved local bar association program that is willing to accept jurisdiction where the parties consent in writing to submit to such jurisdiction, a program may assume jurisdiction over a matter even if the program does not have original jurisdiction.

RULE 11.0 Jurisdiction by the Program

- 11.1** The Program shall have jurisdiction over a fee dispute if a substantial portion of the legal services was performed in the county where the Program is located, or at least one of the attorneys involved in the dispute has an office in Sacramento County or maintained an office in Sacramento County at the times the services were rendered.
- 11.2** In the event of a dispute between the parties as to which program should hear the matter, the program where the arbitration request was first filed shall determine that the arbitration will be conducted in the county where “the majority of legal services were provided,” and such ruling is final and not appealable to the State Bar. Should the fee dispute transfer to a different fee arbitration program after the request for arbitration is filed, the original date of postmark or receipt of the arbitration request will be preserved for purposes of determining whether jurisdiction exists.

RULE 12.0 Removal to the State Bar of California

- 12.1** If a request for arbitration has been filed with the program and a party to the arbitration requests removal to the State Bar program,
- a) The party seeking removal from the program must submit a declaration signed under penalty of perjury asserting the factual basis for the removal. That party need not submit an additional filing fee to the State Bar until there has been a final ruling by the State Bar's Presiding Arbitrator granting removal to the State Bar.
 - b) The State Bar will serve the request for removal and supporting declaration on the other parties and the program. Any written response must be received by the State Bar within 15 days of service of the request for removal and declaration for consideration by the State Bar's Presiding Arbitrator.
 - c) The party seeking removal must provide all additional information requested by the State Bar within the time limits set by the State Bar.
 - d) A request for removal to the State Bar will be decided by the State Bar's Presiding

Arbitrator under the applicable rules of procedure of the State Bar. Upon service of an order granting a request for removal, the party who paid the filing fee to the program shall receive a refund of the filing fee from the Program.

- 12.2** The State Bar's Presiding Arbitrator shall deny a request for removal if he or she determines that:
- a) The other parties to the local bar program's arbitration or the program itself would be prejudiced by removal and such prejudice outweighs the allegations by the party seeking removal that the party believes that a fair hearing through the local bar's program cannot be obtained; or
 - b) The conduct of the party seeking removal during the course of the arbitration proceedings before the local bar program is clearly inconsistent with a bona fide belief by that party that he or she cannot obtain a fair hearing in that forum; or
 - c) The party seeking removal has waived any claim that the party cannot obtain a fair hearing before the local bar's arbitration program.

RULE 13.0 Effect of Failure to Adhere to Time Requirements.

- 13.1** The program shall neither lose jurisdiction, nor shall any arbitration be dismissed nor any award invalidated or modified in any way, solely because of the program's or the hearing panel's failure to comply with time requirements as set forth in these rules.

**ARTICLE IV.
INITIATION OF ARBITRATION PROCEEDING**

RULE 14.0 Request for Arbitration

- 14.1** Arbitration may be initiated by a client, an attorney or a third party entitled to request mandatory fee arbitration.
- 14.2** An arbitration is initiated by filing a written "Request For Arbitration" with the program on the approved program form and paying the appropriate filing fee as established by the program. Service of the request on the other party with whom there is a fee dispute named on the request form shall be made by the program.
- 14.3** At the time of service of a request on an attorney, the program shall serve with it a copy of the approved "Notice of Attorney Responsibility" form.
- 14.4** The party requesting arbitration may amend the request up to 15 days after mailing it to the program, unless a request for clarification is made by the program. Thereafter, it may be amended only with the approval of the Committee Chair or by the Panel Chair, if a notice of assignment of the hearing panel has been served on the parties.

14.5 The request for arbitration may be made by (i) a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs ("non-client"), or (ii) the attorney claiming entitlement to fees against a non-client. A fee arbitration between an attorney and a non-client is not intended to abrogate the requirement that the attorney exercise independence of professional judgment on behalf of the client or the protection of client confidences and secrets. Absent the client's written consent to disclosure of confidential information, a fee arbitration with a non-client is not intended to abrogate the attorney's duty to maintain client confidences and secrets, unless such disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when an arbitration with a non-client is initiated, the program will give notice of the request to the client by first class mail at the client's last known address.

RULE 15.0 Filing Fee

15.1 The party requesting fee arbitration shall pay a filing fee with the request form. The arbitrator shall, at his or her discretion, allocate the entire amount of the filing fee, or a portion thereof, to one or more of the parties. Such allocation shall be clearly stated in the Award.

15.2 The joining of additional parties as petitioner or respondent shall not increase the filing fee.

15.3 Filing Fee Schedule

Fees—The filing fees schedule is based on the amount in dispute and is five percent (5%) of the amount in dispute with a minimum of \$50 and a maximum of \$5,000.

- a) The amount in dispute is the difference between the fee charged or claimed by the attorney and the amount, if any, which the client has indicated to be the reasonable value of the legal services received as set forth in the "Request for Arbitration" form.
- b) The filing fee shall be paid by the party, whether client or attorney, who files the "Request for Arbitration." This fee is to be paid at the time of the filing of the "Request for Arbitration." All filing fees are nonrefundable except as otherwise provided in these Rules. However, in the discretion of the arbitrator(s), the respondent may be directed as part of the award, to reimburse the petitioner, in whole or in part, for such filing fees.

RULE 16.0 Request for Filing Fee Waiver

16.1 A party seeking arbitration may file with the program an application for a filing fee waiver on the approved program form. The person seeking waiver of the filing fee who is not a client and who may be liable for or entitled to a refund of attorney's fees identified by the client as set forth in Rule 14.5, may be required to submit supporting documents regarding his or her own financial status to the program to support the Client's application for a filing fee waiver. If the non-client party replies to the program

that he or she no longer has an interest in the outcome of the arbitration, the application will proceed based on the client's supporting documents alone.

16.2 For good cause shown, the Committee Chair may grant or deny the filing fee waiver or order a reduced fee. The order of the Committee Chair shall be final.

16.3 The financial statement filed in support of a request for a fee waiver shall not be disclosed by the program to the other party.

RULE 17.0 Response to Request for Arbitration

17.1 The respondent party's reply to a Request for Arbitration, together with any response, if the respondent party is an attorney, to the issue of the attorney's responsibility for any award that refunds fees or costs or both to the client, shall be submitted to the program on its approved form within 30 days of the service of the request, unless an extension of time to reply is obtained from the program.

17.2 If the attorney seeks arbitration, and there is no written agreement between the parties that fee disputes be submitted to fee arbitration, arbitration shall proceed only if the client consents in writing on the approved form within 30 days of service of the request, unless the attorney is seeking removal from a local bar program under rule 10.2 of a matter in which the client has already requested arbitration or has consented to an attorney's request for arbitration.

RULE 18.0 Requests and Responses to Requests for Arbitration

18.1 Parties filing or responding to a Request for Arbitration shall file one original and the required number of copies of all forms and supporting documentation with the program. Copies of materials filed with the program will be forwarded to the other party and the hearing panel assigned to hear the matter.

RULE 19.0 Settlement of Dispute; Withdrawal from Arbitration; Refund Schedule

19.1 Upon confirmation by the parties or the hearing panel, if one has been assigned, that the dispute has been settled, the matter shall be dismissed by the program in the absence of an assigned hearing panel, or by the panel chair if a notice of assignment of the hearing panel has been served on the parties.

19.2

- a) If a party wishes to withdraw from a binding arbitration and the matter has not been settled, all other parties must agree to the matter being withdrawn.
- b) If there is a written agreement between the parties requiring arbitration of the fee dispute through the Mandatory Fee Arbitration Program, all other parties must consent to a request for withdrawal before the proceeding is dismissed.

- c) If arbitration has been requested by the attorney, the matter may only be dismissed with the agreement of the other parties.
- d) In all other cases, the party who requested arbitration may withdraw from the arbitration proceeding without the consent of other parties at any time before evidence is taken.

19.1 Refund of the filing fee: If the matter is settled or dismissed based on withdrawal before the request for arbitration is served on the attorney by the program, 100 percent of the filing fee shall be refunded to the party who paid it. If the matter is settled after the request for arbitration has been served on the respondent party by the program but before assignment of a panel, the program shall retain 10 percent of the filing fee. After assignment of a Hearing panel, if written notice of the settlement is received by the program at least 10 days prior to the date of the scheduled hearing, the program shall retain 50 percent of the filing fee. The remaining fee shall be refunded to the party who paid it. After Hearing panel assignment and less than 10 days before the Hearing, there shall be no refund of filing fees.

19.2 If the parties settle the fee dispute and wish to obtain a stipulated award incorporating the terms of a written settlement agreement, the Committee Chair, if no hearing panel has been assigned, or the Panel Chair, if the hearing panel has been assigned, may issue a stipulated award incorporating by reference the parties' written settlement agreement. The Program will serve the stipulated award in the same manner as it would serve an arbitration award as prescribed elsewhere in these rules.

RULE 20.0 Consolidations.

20.1 A party may request, in writing, that two or more arbitration matters be consolidated for hearing. The Program will serve the other party with a copy of the request. A written reply may be filed with the program within 15 days of service of the request for consolidation. The Committee Chair shall rule on all written requests to consolidate. The order of the Committee Chair shall be final. Consolidation will not result in a refund of filing fees paid or reduction of filing fees owed to the Program.

20.2 If a client requests fee arbitration against an attorney who is already a party in a non-client fee arbitration relating to the client's matter or joins a fee arbitration as a party in a fee dispute between the client's attorney and a non-client, consolidation of the arbitration matters is automatic absent a showing of good cause to the contrary.

ARTICLE V. PANELS

RULE 21.0 Appointment of Panel

21.1 For each dispute, the Program shall assign a hearing panel from the program's roster of fee arbitrators. A hearing panel shall consist of one attorney arbitrator if the amount in

dispute is \$10,000 or less and three arbitrators if the amount in dispute is more than \$10,000, one of which shall be a non-lawyer. An attorney arbitrator shall be designated as Panel Chair. If the amount in dispute is more than \$10,000, the parties may agree, in writing, to have the matter heard by a single attorney arbitrator.

- 21.2** Upon the client's request, the program shall assign a sole arbitrator, or in the case of a three-person panel, one of the attorney arbitrators, whose area of practice is civil or criminal law. Any such designation made by the client shall be of an arbitrator who practices in the same area of law as was involved in the matter for which the attorney was retained by the client. Any such request made pursuant to Business and Professions Code section 6200, subdivision (e) must be submitted by the client at the time the written "Request for Arbitration" on the approved program form is submitted to the program.
- 21.3** Any vacancy of an arbitrator, by way of disqualification or inability to serve, may be filled by the program, but in no event shall the arbitration proceed with only two arbitrators.

RULE 22.0 Notice of Appointment of Panel

- 22.1** A notice identifying the arbitrator(s) who will hear the dispute shall be served on the parties within 60 days of the date on which the reply to the arbitration request is received, or as soon thereafter as is reasonably possible. If no reply is received, the notice of appointment of panel will be served within 60 days of the date on which the time to file the response expired, or as soon thereafter as is reasonably possible.

RULE 23.0 Challenge/ Disqualification Of Arbitrator(s)

- 23.1** Each party may disqualify one arbitrator without cause and shall have unlimited challenges for cause. Any disqualification without cause of an arbitrator shall be ineffective unless made in writing and served on the program within 15 days of the service of a notice of assignment of panel or substitute arbitrator(s) if there is a disqualification or successful challenge. An arbitrator who believes that he or she cannot render a fair and impartial decision or who believes that there is an appearance that he or she cannot render a fair and impartial decision, shall disqualify themselves or shall accede to a party's challenge for cause. If an arbitrator does not agree to be disqualified, the challenge shall be decided by the Committee Chair.

RULE 24.0 Discharge of Arbitrator or Panel

- 24.1** The Committee Chair shall have the authority to discharge an arbitrator or panel of arbitrators from further proceedings on a matter whenever the Committee Chair, in his or her sole discretion, determines that there has been an unreasonable delay in performing duties under these rules, or for other good cause shown.

RULE 25.0 Prohibited Contacts With Arbitrators

- 25.1** A party or an attorney or representative acting for a party shall not directly or indirectly communicate with an arbitrator regarding a matter pending before such arbitrator, except:
- a) At scheduled hearings;
 - b) In writing with a copy to all other parties, or their respective counsel, if any, and the program;
 - c) For the sole purpose of scheduling a hearing date or other administrative procedures with notice of same to the other parties;
 - d) For the purpose of obtaining the issuance of a subpoena as set forth in these rules; or
 - e) In an emergency.

ARTICLE VI. THE HEARING

RULE 26.0 Confidentiality

- 26.1** All hearings shall be closed to the public. However, in the discretion of the hearing panel and in the absence of any objections by the parties, witnesses may be present during the hearing.
- 26.2** The hearing panel, upon request of the client, shall permit the client to be accompanied by another person and may also permit additional persons to attend. Any such person shall be subject to the confidentiality of the arbitration proceedings.
- 26.3** The arbitration award is public; the arbitration case file, including the request, reply, exhibits and transcripts, remains confidential.

RULE 27.0 Waiver of Personal Appearance

- 27.1** Upon advance approval of the Panel Chair, any party may waive personal appearance and submit to the hearing panel testimony and exhibits by written declaration under penalty of perjury.
- 27.2** Any party unable to attend a Hearing may designate a lawyer or non-lawyer representative.
- 27.3** Any party may request to appear by telephone, subject to the advance approval of the Panel Chair.

27.4 A request for waiver of appearance or designation of a representative and the submission of testimony by written declaration or request for telephonic appearance pursuant to this rule shall be filed with the Panel Chair and served on all parties at least 10 days prior to the hearing.

RULE 28.0 Death or Incompetence of a Party

28.1 In the event of death or incompetence of a party, the personal representative of the deceased party or the guardian or conservator of the incompetent may be substituted.

RULE 29.0 Discovery

29.1 No discovery is allowable except as specifically set forth in these rules.

RULE 30.0 Subpoenas

30.1 In this rule, “subpoena” includes a subpoena duces tecum. A party seeking to have a subpoena issued shall submit a completed but unsigned Judicial Council subpoena form to the Committee Chair, or Panel Chair if one has been appointed, with proof of service on all parties. Upon showing of good cause, the Committee Chair or Panel Chair may issue a subpoena requested by a party. In the event the Committee Chair or Panel Chair approves the issuance of a subpoena, the Committee Chair or Panel Chair shall sign the submitted subpoena and provide any executed subpoena to the requesting party, who shall be responsible for service of the subpoena. The party requesting a subpoena will be responsible for any witness fees and any costs of service of the subpoena. No subpoena may be served on any party or third party unless it has been approved and signed by the Committee Chair or Panel Chair pursuant to this rule.

RULE 31.0 Commencement of Hearing; Notice; Attendance

31.1 The hearing shall commence within 45 days for a single arbitrator panel or 90 days for a three member panel after the date of service of the “Notice of Assignment of Panel.” A disqualification or allowed challenge of an assigned arbitrator will result in a 15 day extension from the date of the assignment of replacement member(s). Upon stipulation or application to the Panel Chair, the matter may be continued for good cause shown except in the instance where the continuance is for 30 days or more, in which case the continuance must be approved by the Committee Chair.

31.2 The panel shall serve written notice of hearing on each party at the address in the “Notice of Assignment of Panel” and the program within 15 days of its assignment and at least 15 days prior to the hearing date. Appearance by a party at a scheduled hearing shall constitute waiver by said party of any deficiency with respect to the giving of “Notice of Hearing.” Notwithstanding the failure of either party to attend, the hearing shall proceed as scheduled and a decision made on the basis of evidence submitted.

- 31.3** An award shall not be made against a party solely because of the party's absence. The panel shall require the party who is present to submit such evidence as may be required to support the making of an award.
- 31.4** An award may be made in favor of a party who is absent if the evidence so warrants. If neither party appears and the Panel Chair has not approved waiver of personal appearance, the panel will issue an award based on the evidence submitted.
- 31.5** If one of the panel members fails to appear, upon written stipulation of the parties, the hearing may proceed with either of the attorney arbitrators acting as the sole arbitrator. Under no circumstances will the hearing proceed with two arbitrators or with one lay arbitrator
- 31.6** If all parties so stipulate, the sole arbitrator or Hearing Panel shall decide all matters without a hearing based upon the Petition, Reply and any other written materials provided by the parties. All such written materials shall be filed with the hearing panel and served on all other parties.

RULE 32.0 Stipulations Encouraged

- 32.1** Agreements between the parties as to issues not in dispute and the voluntary exchange of documents prior to the hearing is encouraged.

RULE 33.0 Oaths

- 33.1** All testimony may be given under oath or affirmation administered by the sole arbitrator or Panel Chair.

RULE 34.0 Evidence

- 34.1** Any relevant evidence shall be admitted if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary.

RULE 34.5 Clarification of Issues And Exchange Of Documents

The Panel Chair may require that the parties clarify the issues, submit additional documentation, and exchange documents in advance of the hearing. The Hearing Panel may, in its discretion, decline to admit into evidence documents that were required to be exchanged in advance but were not.

RULE 35.0 Order of Proof

- 35.1** The parties shall present their proof in a manner determined by the sole arbitrator or Panel Chair.

RULE 36.0 Interpreter

36.1 Any party may provide and pay for the attendance of a person to interpret at that party's expense.

RULE 37.0 Transcripts or Recordings

37.1 No stenographic, audio or video recording is permissible.

RULE 38.0 Compensation of Arbitrators; Administrative Charges

38.1 No arbitrator shall be entitled to compensation for services unless the hearings extend beyond four hours. Unless waived in writing, each arbitrator will be compensated at the rate of \$150 for each additional hour after a four hour hearing. The compensation shall be paid equally by each party to the program for each day of hearing on which compensation is payable. No compensation will be paid to arbitrators for services other than during formal hearing sessions extending beyond four hours. Any disputes concerning compensation of the arbitrators will be determined by the Committee Chair, and its determination shall be binding on the parties, including the arbitrators.

38.2 Except for the prescribed filing fees, no charges will be made by the program, nor by any arbitrator, for administrative or clerical services. A hearing room will be provided by an arbitrator or by the program without charge to the parties.

38.3 All parties will bear their own costs, including the costs of interpreters and expert witnesses.

**ARTICLE VII.
AWARD**

RULE 39.0 Award

39.1 The award shall be submitted to the Program within 15 days of the close of the hearing in any matter heard by a sole arbitrator and within 25 days of the close of the hearing in any matter heard by a three member panel. The award shall be reviewed pursuant to rule 39.9 and then served on the parties forthwith by the Program.

39.2 The award shall be in writing. The award shall indicate whether it is binding or non-binding. It shall include a determination of all questions submitted to the panel, the decision of which is necessary in order to determine the controversy, including the name of the responsible attorney(s). Arbitrators are encouraged, where appropriate, to include findings of fact. If a party failed to appear for non-binding arbitration, the award should also include the circumstances bearing on the willfulness of any party's nonappearance at the hearing.

39.3 The award shall include substantially the following language, as appropriate:

The Hearing Panel finds that the total amount of fees or costs that should have been charged in this matter are: \$ _____

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

Subtotal \$ _____

Pre-award interest [check box]: [] is not awarded
[] is awarded in the amount of \$ _____

In addition, the fee arbitration filing fee of \$ _____ as paid by _____ shall be allocated:

Client: \$ _____

Attorney: \$ _____

For a net amount of \$ _____

Accordingly, the following award is made:

- a) Client, _____ (name) _____, shall pay
Attorney, _____ (name) _____, shall pay

OR

- b) Attorney, _____ (name) _____, shall pay
Client _____ (name) _____: \$ _____

OR

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

39.4 The award may include a refund of unearned fees, or costs, or both previously paid to the attorney.

39.5 Whenever there are three arbitrators, a majority vote shall be sufficient for all decisions of the arbitrators, including the award. Any dissent from the award shall be served with the award.

39.6 Evidence relating to claims of malpractice or professional misconduct, whether or not the client was actually harmed, shall be admissible, but only to the extent that those claims bear upon the fees and/or costs to which the attorney is entitled. The panel shall not award affirmative relief in the form of damages or offset or otherwise, for injuries underlying any such claim.

39.7 The award shall be signed by all arbitrators concurring with it.

- 39.8** The award may include an allocation of the filing fee; however, it shall not include an award for any other costs of the arbitration, including attorneys' fees resulting from the arbitration proceeding notwithstanding any contract between the parties providing for such an award of costs or attorney's fees.
- 39.9** The panel shall forward the original of the signed award to the Program, which shall serve a copy of the award by mail on each party together with a "Notice of Rights After Arbitration" form approved by the State Bar Board of Trustees. No award is final or is to be issued until approved for procedural compliance and as to the form of the award by the Committee Chair or such person as the Chair may designate for this purpose.

After approval of the award as to the procedural compliance and approval as to the form of the award, the Program shall serve a copy of the award by mail on each party together with a Notice of Rights After Arbitration form approved by the State Bar Board of Trustees. Any party who has submitted exhibits or documents to the panel shall, upon service of the award, make arrangements to retrieve them.

RULE 40.0. Correction of Award by Hearing Panel

- 40.1** The Hearing Panel may correct a binding or non-binding award only on the grounds set forth in Code of Civil Procedure section 1286.6, subdivision (a) [evident miscalculation of figures or evident mistake in the description of a person, thing or property referred to in the award] and subdivision(c) [the award is imperfect in a matter of form, not affecting the merits of the controversy] under the procedures set forth in Code of Civil Procedure section 1284. An application for such a correction does not extend the deadline for seeking a civil trial after a non-binding award is rendered, and a non-binding award will automatically become binding 30 days after it is served on the parties.
- 40.2** A party requesting correction or amendment under this rule must file a request in writing to the Program and serve a copy on the other party within ten days after service of the award. Any party to the arbitration may make a written objection to such request. Such request does not toll the time period for filing a civil action to challenge the award.
- 40.3** Any corrected or amended award will be served by the Program. The time for filing a petition to confirm, vacate or correct the award begins from the date of service of the amended or corrected award, the date of denial of the request for correction or amendment of the award, or the date that a request for correction or amendment of the award is deemed denied under Code of Civil Procedure 1284, whichever date is earlier.
- 40.4** The Hearing Panel shall either deny the application or correct the award in writing signed by the arbitrator(s) concurring therein. Any jurisdiction on the part of the Hearing Panel to amend or supplement an award expires upon entry of judgment.

**ARTICLE VIII.
SERVICE; ADDRESS**

RULE 41.0 Service

- 41.1** Unless otherwise specifically stated in these rules, service on the client shall be by personal delivery, by deposit in the United States mail, or by deposit in a business facility used for collection and processing of correspondence for mailing with the United States Postal Service pursuant to Code of Civil Procedure section 1013(a)(3), postage paid, addressed to the person on whom it is to be served, at his or her address as last given, on any document which has been filed in the arbitration. The client shall keep the program advised of his or her current address.
- 41.2** Unless otherwise specifically stated in these rules, service on an individual attorney shall be at the latest address shown on the official membership records of the State Bar. Service shall be in accordance with subsection 41. above.
- 41.3** If either party is represented by counsel, service shall be on the party as indicated in subsections 41.1 and 41.2 of this rule, and on the counsel at the latest address shown on the official membership records of the State Bar.
- 41.4** The service is complete at the time of deposit. The time for performing any act shall commence on the date service is complete and shall not be extended by reason of service by mail.
- 41.5** Where a facsimile or email transmission is used to communicate with the program or to file any document, it will not be considered received unless the program also receives within five days of the date of the facsimile or transmission, the original of the faxed or emailed document.
- 41.6** In the event that the client fails to keep the program advised of his or her current address, the program may close the arbitration request, if it is made by the client, after 30 days from the date that the program learns of the invalid address.

**ARTICLE IX
REFERRAL OF ATTORNEY TO STATE BAR**

42.0 Referral of Attorney to State Bar.

The Hearing Panel or the program may in its discretion refer an attorney's conduct disclosed in the arbitration proceeding to the State Bar for possible disciplinary investigation without violating the confidentiality surrounding these proceedings.