

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

AGENDA

**Friday, September 14, 2018
10:00 a.m. – 3:00 p.m.**

San Diego County Bar Association
401 West "A" Street
Bayview Room, 11th Floor
San Diego, CA 92101

Questions regarding any agenda item should be directed to Isabel Liou, Committee Staff Liaison, at (415) 538-2573 or 180 Howard Street, San Francisco, CA 94105.

The order of business is approximate and subject to change.

OPEN SESSION

- I. Call for Public Comment (Walsh)
Members of the public may speak to any item on the agenda. The Chair reserves the right to limit the duration of public comment.
- II. Approval of Minutes of July 13, 2018 Meeting (Attachment 1, pp. 1-5) (All)
- III. Chair's Report (Walsh)
- IV. Report from Presiding Arbitrator (Bacon)
- V. Report from State Bar Staff (Staff)
 - A. Office statistics (Attachment 2, p. 6)
 - B. Schedule of Events (Attachment 3, p. 7)
 - C. Recent Developments
- VI. Business
 - A. Arbitration Advisory on Interest – Discuss Current Draft (Mark, Fish)
(Attachment 4, pp. 8-11)
 - B. Arbitration Advisory on Costs – Discuss Current Draft (Mark, Bacon)
(Attachment 5, pp. 12-16)
 - C. San Mateo County Bar Association: Review Proposed Revised Filing Fee Schedule and Proposed Fee Mediation Rules (Duesdieker)
(Attachment 6, pp. 17-30)

- D. Discuss Impact of New Rules of Professional Conduct on MFA Program Materials
(Attachment 7, pp. 31-37) (Buckner, Zukerman)
- E. Tulare County Bar Association: Review Proposed Rules of Procedure
(Attachment 8, pp. 38-84) (TBD)
- F. Discuss Proposed Program Advisory: How to Proceed with Arbitration Requests Involving Attorneys Who Hold Leadership Positions in the Same Bar Association
(Migliaccio)

Next committee meeting:

Due to the pending Governance in the Public Interest Task Force Appendix I subentity study, CMFA meeting dates for the 2018-2019 committee year have not yet been scheduled.

In compliance with the Americans with Disabilities Act, those requiring accommodation at this meeting should notify Isabel Liou at (415) 538-2573. Please provide notification at least 72 hours prior to the meeting to allow sufficient time to make arrangements for accommodations at this meeting.

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

MINUTES

**Friday, July 13, 2018
10:00 a.m. – 3:00 p.m.**

The State Bar of California
180 Howard Street
Conference Room 4A-C, 4th Floor
San Francisco, CA 94105

Members Present (13): Lorraine Walsh (Chair), Ken Bacon (Presiding Arbitrator), Clark Stone (Vice Chair), Lee Straus (Vice Chair), Anahid Agemian, Carole Buckner, George Duesdieker, Michael Fish, Patrick Maloney, Joel Mark, John McDougall, Nick Migliaccio, Roy Zukerman.

Not Present (2): Jobi Halper, Sharron McLawyer.

Staff Present: Chief of Mission Advancement & Accountability Dag MacLeod, Senior Program Analyst Richard Schauffler, Program Supervisor Arayeh Rahimitabar, MFA Staff Attorney Isabel Liou.

Chair Lorraine Walsh called the meeting to order at 10:06 a.m.

I. Call for Public Comment

There were no requests for public comment.

II. Approval of Minutes of April 20, 2018 meeting

The minutes were approved as attached.

III. Chair's Report

Lorraine circulated two recent Daily Journal articles on fee arbitration topics for the committee's information: one article mistakenly states that malpractice claims cannot be brought in during MFA proceedings, and another discussed the settlement of litigation relating to an MFA enforcement action.

IV. Report from Presiding Arbitrator

Ken briefly mentioned that there is one pending Motion for Inactive Enrollment pending with State Bar Court as well as several fee arbitration matters requiring orders.

V. Report from State Bar Staff

A. Office Statistics

Updated statistics were handed out and discussed.

B. Schedule of Events

An updated events calendar was distributed. The State Bar has already received new arbitrator applications from participants at the basic fee arbitration training held at the Alameda County Bar Association in Oakland. In addition to the new advanced fee arbitrator training in September, upcoming programs include basic fee arbitrator trainings at the Kern County Bar Association in early September and the San Luis Obispo County Bar Association (date TBD).

Unfortunately, the California Lawyers Association's (CLA) Annual Meeting will not be open to non-CLA MCLE programs, so CMFA members will not be able to present at this event.

C. Other Business

Business Item F, an update regarding the Appendix I subentity study, was discussed as part of the State Bar's report by Dag MacLeod and Richard Schauffler. They stated that the purpose of their attendance at today's meeting was also to solicit feedback regarding draft Appendix I report materials. Many committee members had concerns regarding the 2017 Task Force report's proposals, including but not limited to potentially shifting committee functions to State Bar staff and reducing the CMFA into a subcommittee under the Committee on Professional Responsibility and Conduct (COPRAC). It is worth mentioning that several current CMFA members have served on COPRAC in the past, including as Committee Chair. Some common viewpoints were the following:

- Shifting CMFA responsibilities to State Bar staff would result in the loss of invaluable real world subject matter expertise, as most current CMFA members have a minimum 25 years MFA experience. This would hamper the State Bar's goal of public protection as this level of expertise (as much as 30-40 years of experience historically for individuals volunteering for the post of Presiding Arbitrator, for example) is difficult and expensive to secure in the job market.
- CMFA and COPRAC are not fungible or duplicate entities because the CMFA tackles real world issues for practicing attorneys, while COPRAC deals with the theoretical perspective of "how things should be". Each entity produces a distinct type of work product for a different purpose, and combining the two could lead to conflicting goals.
- Switching to temporary ad hoc working groups in lieu of a dedicated standing committee would be detrimental to the CMFA's productivity because time is of the essence for some business items, such as evaluating changes to a local program's rules that impact its ability to remain financially solvent, or a limited public comment period for pending legislation related to MFA.
- The relationship between local programs and the State Bar is important and must be maintained. The State Bar's reimbursement keeps local bar

MFA programs afloat, especially when some local programs are in the red due to their MFA program.

- In-person trainings make a big difference in recruiting and retaining fee arbitrators. While online trainings could be used to recruit and educate individuals in more remote areas of the state, in-person trainings are preferred because it establishes rapport with current and potential volunteers as well as local bar staff. Trainings are also beneficial to attorneys who want to better their billing practices and minimize the potential for fee disputes with their clients.
- Tasks such as drafting arbitration advisories are a collaborative group effort and the finished product is a blend of 16 people's knowledge and points of view, which would not be the case if the advisory was drafted by one or two State Bar staff with limited or no MFA experience.

Dag mentioned that it was challenging to manage the State Bar's 200+ committee and commission volunteers. However, the concerns he described (committee members who think that staff work for them, committees who make policy decisions without first seeking the Board of Trustee's approval, etc.) are not applicable to the CMFA. Moreover, the State Bar MFA program depends on 400-500 volunteer arbitrators to hear its cases and these arbitrators are vetted by staff before presenting them to the Board of Trustees for their approval.

In addition, Clark brought up an important point as to why local bar administrators were not involved in the Appendix I study. He suggested that the State Bar should ask the local program administrators what deliverables they would like to see from the State Bar, since local programs handle the majority of fee arbitrations each year. Richard agreed to prepare a survey for local bar administrators; Isabel will provide him with a list of administrator e-mails.

VI. Business

A. Outline for New Advanced Fee Arbitration Training

This item was discussed and all changes were accepted. Roy pointed out that the outline switches between using the word "section" and the symbol "\$" throughout the document, and should be consistent. The Committee voted to use "\$" throughout the outline. Lorraine will prepare a Powerpoint presentation for the training.

B. Arbitration Advisory on Interest

This item was reviewed and edited. Citations to the civil code will be added and references to the Rules of Professional Conduct will be footnoted with the new rule numbers effective November 1, 2018. This item will return on the September 2018 meeting agenda.

C. Arbitration Advisory on Costs

The current draft was discussed and edited. Some areas still need citations. The *In re Tom Carter Enterprises, Inc.* citations were problematic to some members because the case is bankruptcy-specific. It was suggested that the case's reasoning could be helpful to an arbitrator on specific types of costs. Joel will make changes to the draft and this item will return on the September 2018 meeting agenda.

D. Revised Sample Award Form; Sample Findings & Award

The sample Findings & Award incorporates changes from the April meeting and will be accompanied by a case file with sample documents, beginning with a hypothetical *Notice of Client's Right to Fee Arbitration* and ending with a Notice of Hearing. Lee asked the Committee whether the sample documents should keep the State Bar's current attorney/client party identifiers or if they should be changed to petitioner/respondent, which is the current usage in the sample award form and the sample Findings & Award. The Committee voted overwhelmingly to maintain the attorney/client references with Anahid voting for switching to petitioner/respondent. Lee will change the party references in the sample award form and Findings & Award to reflect the committee's preference, and all forms were approved for the training.

E. Western San Bernardino County Bar Association Proposed MFA Rules

Generally, both Joel and Roy had reservations about the WSBCBA's proposed rules because they deviate from the model rules and don't comply with the minimum standards. Roy would like to know the reasoning for these deviations. In addition, the Committee voted 7-4 in favor of not using the client's residence in determining jurisdiction over a fee dispute, with the votes as follows:

Yay (4): Ken, Michael, Joel, Nick.

Nay (7): Anahid, George, Pat, John, Clark, Lorraine, Roy.

Abstain (2): Carole, Lee.

The Committee requested a revised draft of these proposed rules as they cannot be approved in their present state. Isabel will communicate the CMFA's concerns to WSBCBA staff.

F. Status of CMFA Review per the Governance in the Public Interest Task Force, Appendix I

As mentioned above, this item was discussed as part of the State Bar's Report.

- G. San Mateo County Bar Association's Proposed Revised Filing Fee Schedule and Data Supporting Proposed Revision
 This item will be combined with Item K for the September meeting. Lorraine was hoping that the SMCBA would submit a structured fee schedule for the committee's consideration. Nick would like to know if the proposed fee structure would solve the program's deficit. Joel thought that the filing fee amount for smaller disputes should be lower, similar to the Ventura County Bar Program's filing fee schedule. George will communicate these requests to the SMCBA and this item will return on the September 2018 meeting agenda.
- H. Impact of New Rules of Professional Conduct on MFA Materials
 Carole and Roy were assigned to this item. Even though the new rules and numbering won't go into effect until November 1, 2018, it was determined that work should begin now in identifying and changing references to the old Rules of Professional Conduct that may appear in MFA training materials, the sample fee agreements, and arbitration advisories. To start, Carole will work on the sample fee contracts and training materials, while Roy will tackle the arbitration advisories; then, they will switch and review the other set of documents. This item will return on the September 2018 meeting agenda.
- I. Supreme Court Oral Argument in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., S232946*
 This item was discussed.
- J. Arbitrator Quality Assurance Methods
 This item was discussed. Various strategies were mentioned, including phone interviews to evaluate the applicant's eloquence, asking for a bio and/or writing sample, requiring further training as a condition of reappointment or a requirement for problem arbitrators.
- K. San Mateo County Bar Association's Proposed Fee Mediation Rules of Procedure
 This item will be combined with Item G for September. This item, like Item G, was assigned to George. Isabel will compare the proposed rules to the model fee mediation rules and send the analysis to George.

The meeting adjourned at 2:14 p.m.

Next committee meeting:

DATE: Friday, September 14, 2018
 TIME: 10:00 a.m. – 3:00 p.m.
 LOCATION: San Diego County Bar Association
 401 West "A" Street
 Bayview Room, 11th Floor
 San Diego, CA 92101

**State Bar of California
Mandatory Fee Arbitration Program
2018**

Arbitration

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-To-Date	Year End 2017
Cases Open (Beginning of Month)	15	23	23	24	29	26	28	29	34					15
Fee Arbitration Requests	10	2	2	8	3	4	4	4					37	43
Arbitration Cases Closed	3	2	1	2	6	2	4	1					21	56
<i>Findings & Award Served</i>	2	0	0	1	4	2	4	1					14	35
<i>Cases Closed, No Award</i>	1	2	1	1	2	0	0	0					7	2
Cases Open (End of Month)	22	23	24	30	26	28	29	34						15
Phone Calls Handled	317	231	379	548	494	491	439	541					3440	3262

Enforcement

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-To-Date	Year End 2017
Cases Open (Beginning of Month)	51	50	51	51	52	50	50	48	48					50
Enforcement Requests Rec'd.	1	1	0	1	2	1	1	3					10	17
Orders Re Admin Penalties	1	0	0	1	0	0	0	0					2	4
Admin Penalties Imposed	0	1	0	0	1	0	0	0					2	4
Inactive Enrollment Motions Filed	0	0	0	0	0	0	1	0					1	4
Attorney Enrolled Inactive	0	0	0	0	0	0	0	0					0	5
Enforcement Cases Closed	2	0	0	0	4	1	3	3					13	29
<i>Cases Paid and Closed</i>	0	0	0	0	1	1	2	2					6	19
<i>Cases Closed (Other)</i>	2	0	0	0	3	0	1	1					7	10
Cases Open (End of Month)	50	51	51	52	50	50	48	48						51

**Committee on Mandatory Fee Arbitration
Calendar of Events
2017-2018**

Thursday, August 16, 2018 12:00 p.m. - 3:00 p.m.	Training	Basic	Monterey College of Law 100 Colonel Durham Street Classroom 1 Seaside, CA 93955	Fish, McDougall, Stone
Thursday, September 6, 2018 12:00 p.m. - 3:00 p.m.	Training	Basic	Kern County Bar Association 1112 Truxtun Avenue Bakersfield, CA 93301	Fish, Stone, Zukerman
Thursday, September 13, 2018 5:30 p.m. - 7:30 p.m.	Training	Advanced	San Diego County Bar Association 401 West A Street, Suite 120 San Diego, CA 92101	Buckner, Straus, Walsh
Friday, September 14, 2018 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	San Diego County Bar Association Bayview Room, 11th Floor 401 West A Street San Diego, CA 92101	All members
Thursday, October 25, 2018 1:00 p.m. - 4:00 p.m.	Training	Basic	Location TBD San Luis Obispo, CA	Agemian, Mark, Migliaccio

ARBITRATION ADVISORY

2018-xx (replacing 1993-01)

AWARDS OF INTEREST BY THE ARBITRATOR

Points of view or opinions expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not been adopted or endorsed by the State Bar's Board of Trustees and do not constitute the official position or policy of the State Bar of California.

INTRODUCTION

This is intended to summarize existing law and to provide guidance on the awarding of interest as part of the fee arbitration award (the "Award"), including when interest may be awarded. This does not apply to situations where the attorney is retained by the client on a contingency fee basis.

ANALYSIS

1. May interest be awarded as part of the Award? Yes.

Business & Professions Code ("B&PC") sections 6200-6206 provide for the arbitration of fee disputes between attorneys and their clients. Attorneys are required to arbitrate fee disputes when timely requested by the client [B&PC Section 6200(c)]. The arbitrator(s) may resolve all disputes concerning fees, costs or both.

The fee arbitration statutes do not mention an award of interest. However, they likewise do not preclude an award of interest. The statutes specify circumstances when fee arbitration is not available (for instance, when fees are awarded pursuant to statute or court order - B&PC section 6200(b)(3)) and preclude the recovery of certain types of damages (for instance, attorneys' fees cannot be awarded to either party - B&PC section 6203(a)). Since the arbitration statutes carefully define those situations when arbitration is available and preclude certain elements of damages, any elements of damages not specifically precluded which are otherwise recoverable at law may, therefore, be included in the Award.

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, *is entitled also to recover interest* thereon from that day . . ." [Civil Code § 3287(a)] (Italics added.) "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the

terms of the obligation, *with interest thereon.*" [Civil Code § 3302] (Italics added.).

An attorney may ethically charge interest and impose late charges on past-due fees and costs, provided the attorney obtains the client's informed consent and complies with applicable law. [Cal. State Bar Form.Opn. 1980-53; ABA Form.Opn. 388 (1974); Los Angeles Bar Ass'n Form.Opns. 370 (1978) & 374 (1978) & 499 (1999) (interest on costs); Bar Ass'n of San Francisco Form.Opn. 1970-1; San Diego Bar Ass'n Form.Opn. 1983-1; [Rest.3d Law Governing Lawyers § 38](#), Comment "h"]

2. May interest be awarded regardless of the existence of a written contract? Yes, to the client but not to the attorney.

The client's right to recover interest for breach of contract is not predicated on the existence of a written contract. In fact, Civil Code [sections §§ 3287 and 3302](#) do not distinguish between a written agreement, oral agreement or implied agreement for purposes of the right to recover interest. On the other hand, because an award of interest to an attorney requires the informed written consent of the client, an attorney may not recover any pre-award interest in the absence of a statutorily complying written contract.

When there is no written agreement, interest shall only be awarded to the client when the principal amount is readily ascertainable within the meaning of Civil Code Section 3287 [*Macomber v. State of California* (1967) 250 Cal.App.2d 391, 400]. As long as the principal amount owing can be calculated from statements rendered by the attorney, interest should be awarded [*Macomber v. State of California, supra*, at 401].

The same is true even if the client disputes the fees. As long as ~~the~~ there is a statutorily complying written contract ~~provide~~ [providing](#) for the attorney to recover pre-award interest, and the bills are reasonably accurate in compliance with B&PC section 6148(b), and are sufficient to apprise the client of the amount the attorney seeks to recover, then the damages are readily ascertainable [*Marine Terminals Corp. v. Paceco, Inc.* (1983) 145 Cal.App.3d 991, 998], and then the attorney may recover pre-award interest.

Where the proceeding is a "reasonable fee" analysis, almost always the amount owing is not and cannot be ascertainable until the arbitrator(s) determine the reasonable value of the attorney's services. Similarly, where the arbitrator(s) may make any significant reduction in the amount the attorney claims is owing, the value of the final fee is only ascertained after the outcome of the hearing is known. In these situations, no pre-award interest may be included in the award to either party because the amount owing only will become "ascertainable" when the award is issued. ([Civil Code §§ 3287 \(a.\)](#))

3. What rate of [pre-award](#) interest should be used and how should [it](#) interest be calculated?

When there is no written agreement which specifies a [statutory](#) rate of interest, the arbitrators shall award simple interest at the rate of 10% per annum (or the then applicable statutory if different) from the date of breach [CCP § 3289(b)].

When there is a written agreement that specifies the rate of interest, then the rate set forth in

the contract shall apply [Civil Code § 3289(a)]. However, the rate of interest charged or late penalty imposed must not be illegal or amount to an “unconscionable” fee. [See, CRPC 4-200(A). [As of November 1, 2018, the new rule is CRP 1.5](#)]

Pre-award interest should be awarded from the date of breach through the date of the Award [CCP § 3289]. The date of breach is a question of fact primarily based on when the obligation was due. Frequently, the written fee agreement will provide when the obligation is due or on what date a breach is deemed to occur.

In calculating interest, absent a written agreement providing for the compounding of interest, the obligation shall bear simple interest only. Without an express written agreement to the contrary, “[t]he compounding of interest has not been approved, legislatively or judicially, in this state.” [*State of California v. Day* (1946) 76 Cal.App.2d 536, 554].

Another relevant area of inquiry is when the bills are presented to the client. For, instance, if the engagement letter provides for interest from the date of the bills, but the attorney’s office practice is to send the bills to the client on some later date, then the calculation cannot begin until the later date. Additionally, the burden is on the attorney to establish the relevant dates for this calculation.

To calculate pre-award interest, simply use the following formula:

(Amount of Award) x (Applicable Interest Rate) ÷ (365) x (Number of Days elapsed between the Date of Breach and the date the Award is signed).

Example 1: Assume that the facts in a fee dispute demonstrate that a client failed to timely pay \$5,000 (Amount of Award) since March 1 (Date of Breach) and that the valid and enforceable fee agreement states that any unpaid balance shall accrue 5% simple interest (Applicable Interest Rate). Further assume that the arbitration award is to be signed on December 1 of the same year (Date of Award). From the forgoing facts, the equation would look like this.

\$5,000 (The amount of the Award) x .05 (number value of 5%) ÷ 365 (days in a year) x 275 (the number of days elapsed between the date of breach on March 1 and the date the award is signed on December 1) = \$188.36 (Amount of Pre-Award Interest).

Example 2: Assume that the facts of a fee dispute demonstrate that the client is entitled to pre-award interest for some amount wrongfully withheld by the attorney. For example, assume that in a personal injury case, the gross contingency fee agreement states that the attorney shall be paid 30% of any settlement obtained before trial, or 40% of any settlement or judgment obtained after trial actually starts. Now assume that the case settles two months before the first trial date for \$100,000 and that on March 1, 2016 the attorney declares that notwithstanding the terms of the fee agreement, he is entitled to a \$40,000 fee, and deposits the disputed \$10,000.00 in his trust account pending resolution of the client’s fee dispute. Assume further, that the facts of the resulting arbitration demonstrate that the attorney wrongfully withheld the \$10,000.00 (Amount of Award) since March 1, 2016 (Date of Breach). Also assume that the applicable legal interest rate on the date of the breach was 10% (See Civil Code §3289(b) (Applicable Interest Rate). Lastly, assume that the

arbitration award is to be signed on June 1, 2017 (Date of Award). From the forgoing facts, the equation would look like this.

$\$10,000$ (The amount of the Award) $\times .10$ (number value of 10%) $\div 365$ (days in a year) $\times 457$ (the number of days elapsed between the date of breach on March 1, 2016 and the date the award is signed on June 1, 2017) = $\$1,252.05$ (Amount of Pre-Award Interest).

4. Post Award Interest

Unlike the foregoing considerations regarding pre-award interest, an award of post-award interest is required on all awards, in the amount of the statutory rate of interest on all judgments and which will commence accruing from the 30th day after service of the award. The requirement to award post-award interest in all cases serves two important purposes. First, it represents fair compensation to the prevailing party for the failure of the other party to pay the award promptly. Second, where the award requires the attorney to make a refund of some or all of the fee already paid, the award of post-award interest provides a valuable tool to the State Bar and the client when enforcement procedures become appropriate under B&P Code [section 6203\(d\)](#). [\(Code of Civil Procedure § 685.010, Minimum Standardss 16.\)](#)

CONCLUSION

In any civil action based on a contract (express or implied) the prevailing party is generally entitled to recover interest from the date the underlying debt became due until either entry of judgment or the date paid. Nothing in the fee arbitration statutes limit the awarding of interest.

Therefore, the arbitrator(s) may award interest from the date of breach through the date of the Award in all cases to the client and in some cases to the attorney, provided all the foregoing elements are present. Unless the written agreement provides for compounding of interest, the obligation should only bear simple interest. The interest rate should be 10% (or the then applicable statutory rate) unless there is a written agreement which provides otherwise and, in such circumstance, the written contract rate should apply, unless the interest charged is illegal or [unconscionableunconscionable](#).

ARBITRATION ADVISORY

2018-0x

HANDLING DISPUTES REGARDING COSTS AND EXPENSES

Date

Disclaimer Box

INTRODUCTION

Business & Professions Code § 6200, et. seq., confers jurisdiction upon Mandatory Fee Arbitration (MFA) arbitrators to consider and make awards regarding disputes over costs and expenses billed to clients, in addition to disputes over fees. The purpose of this Advisory is to provide guidance to MFA arbitrators regarding disputes over costs and expenses that may arise from time to time in connection with MFA arbitrations.

DISCUSSION

A. General Considerations:

a. Contractual Interpretation

The right of an attorney to charge a client for costs and expenses generally is a matter of contract. Consequently, the arbitrator should first look to the written fee agreement to determine the parties' understandings concerning costs and expenses. The initial agreement is generally considered an arm's-length transaction, where the presumption of overreaching does not apply. *See, generally, Setzer v. Robinson* (1962) 57 Cal.2d 213; *Baron v. Mare* (1975) 47 Cal.App.3d 304.

However, the lawyer's right to charge and collect for costs and expenses are evaluated based upon conditions foreseeable at the time they made, must be explained fully to the client at the outset, must be fair and reasonable, and will be strictly construed against the attorney. *See, generally, Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033; *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569; *Cetenko v. United Calif. Bank* (1982) 30 Cal.3d 528. And, where there is no contract, or where the contractual provisions for charging costs and expenses are unclear, the contract may be voidable at the option of the client pursuant to Business & Professions Code §§ 6147(b) and 6148 (b).

Fairness of the contractual provisions regarding costs and expenses generally will be construed from a reasonable client's perspective. *Matter of Brockway* (Rev. Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944. And, any lack of specificity will be construed strictly in light of such reasonable expectations. *In re County of Orange* (1999) 241 B.R. 212; *Matter of Lindmark* (Rev. Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668.

Finally, even in the absence of a specific agreement as to costs and expenses in the engagement contract, the attorney's fiduciary obligations to the client will include the handling of and charging for costs and expenses such that the attorney's charges for costs and expenses during the course of the representation also must be scrutinized for necessity, reasonableness and fairness. *See, Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925.

b. Other General Considerations

It generally is held that an attorney may not charge a client for normal overhead expenses associated with properly maintaining, staffing and equipping an office, including the expense of maintaining a library. On the other hand, the attorney may recoup non-overhead costs and expenses reasonably incurred specifically in connection with the client's matter for services performed in-house, such as photocopying projects specifically related to a client matter (as opposed to, for instance, occasional photocopying of general correspondence or otherwise for the convenience of the attorney, pleadings, etc.), special deliveries, special secretarial overtime incurred due to the client's specific needs, and other similar services. Since the line between recoverable costs and non-recoverable general overhead is an ever evolving one, whether items such as photocopying, word processing, computer research charges, postage and messenger costs are to be considered general overhead rather than costs are subject to the arbitrator's discretion within these general guidelines, and within the overarching requirement that what the attorney may claim as costs must be fully disclosed and explained to the client at the outset of the relationship, and thereafter subject to scrutiny for necessity, reasonableness and fairness as they are billed periodically to the client. *See, generally*, California Practice Guide on Professional Responsibility, The Rutter Group, 5:550-5:552.

When charging for non-overhead costs and expenses, the charges must reasonably reflect the attorney's actual cost for the services rendered or billed. The attorney may not add a profit element on top of such actual cost, except where the client gives informed written consent to such profit element. American Bar Association (ABA) Formal Opinion 93-379 (1993).

Initial disclosure of the basis for charges for costs and expenses, in addition to how fees are to be calculated, fosters communication that will promote the attorney-client relationship. The relationship similarly will be benefitted if the billing statements for services explicitly reflect the basis for the charges so that the client understands how the fee bill was determined. ABA Formal Opinion 93-379 (1993). In addition, billing statements reflecting non-overhead costs and expenses must break down the charges by type, and otherwise provide the client the information the client reasonably may need to understand the basis for the charges.

The question of whether a cost or expense may be incurred and charged to the client generally is within the implied authority of the attorney, as an agent for the client, unless specifically prohibited by the fee agreement. *See*, Civil Code section 2319 ["An agent has

authority . . . to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of the agency.”]. Thus, absent specific client instructions not to incur a particular cost or expense, the arbitrator’s review will be only as to the necessity, reasonableness and fairness, or the possible unconscionability of the disputed cost or expense item.

B. Charges for Specific Costs and Expenses

Percentage of Fees Administrative Charges: Such charges are valid if fully explained to the client and agreed to in advance in writing, but should be scrutinized for unconscionability pursuant to California Rules of Professional Conduct, Rule 4-200, such as where it can be established that the administrative charges are unduly high due to the size of the bill unrelated to the actual overhead consumed in support of the billed fees. *See, e.g.,* Va. LE Op. 1056 (1988) [approving a 4% overhead charge based upon the amount of the fee pursuant to a written fee agreement in matters not involving litigation]; *but, see,* Florida Bar Staff Opinion 30989 (2912) [a 4% administrative charge may not be imposed for each file even if it is disclosed in the client’s contract]. In addition, what services the client is to receive included in the charge must be fully explained to the client. *See,* ABA Model Rules 1.5, 7.1(a)(1); 8.4(c). Such charges also must be justifiable and not duplicative of the attorney’s general overhead factored into the attorney’s hourly rate or other method of compensation. And, such charges must not be unconscionable.

Overhead: When a client has engaged an attorney to provide professional services for a fee (whether calculated on the basis of the number of hours expended, a flat fee, a contingent percentage of the amount recovered or otherwise) the reasonable expectation of the client would be that charges for general office overhead are included in the attorney’s hourly fee. Thus, in the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the attorney’s cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the attorney is making for professional services. ABA Formal Opinion 93-379 (1993); *see, also, In the Matter of Kroff* (1996) 3 Cal. State Bar Ct. Rptr. 838 (1998) [failure to disclose actual costs and how they were determined in the fee agreement and in the attorney’s billing statements violates CRPC Rule 4-100(B)(3)].

In addition, general overhead is not recoverable from a bankruptcy estate. *See, In re Tom Carter Enterprises, Inc.,* 55 B.R. 548 (1985).

Travel and Parking: Normally, where the engagement reasonably requires the attorney to travel on behalf of the client in the course of the representation the client can reasonably expect to be billed as a disbursement the reasonable amount of the airfare, taxicabs, meals while traveling, parking and hotel room. ABA Formal Opinion 93-379 (1993). However, the general rule of informed consent of the client applies. *But see, e.g., In re Tom Carter Enterprises, Inc.,* 55 B.R. 548 (1985) [parking is considered general overhead not recoverable from a bankruptcy estate].

Luncheons: These are considered general overhead, and are not recoverable from a bankruptcy estate. *See, e.g., In re Tom Carter Enterprises, Inc.,* 55 B.R. 548 (1985); *see, also, In re Maruko Inc.,* 160 B.R. 633 (1993); [in house luncheons among attorney staff alone are

considered overhead]. Where requested and approved by the client, such luncheon expenses may be charged to the client.

Secretarial: Regular secretarial services are normally considered general overhead, and are not recoverable from a bankruptcy estate. See, e.g., *In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985).

Messenger Services: Such charges may be billed where the needs of the matter or of the client legitimately and reasonably require the service and where the client may agree in advance to such charges. ABA Formal Opinion 93-379 (1993). However, such charges may not be reasonable where the need for such delivery services arises from the attorney's procrastination or inattention.

Overtime: Staff overtime generally is considered part of general attorney overhead, except where actions of the client or the nature of the case may require extraordinary overtime and where the client agrees in advance to such charges.

Computer Assisted Legal Research (CALR): Billing for CALR is not a settled issue. There is a school of thought that holds that CALR is overhead, particularly as is the case more and more where the attorney's "library" is predominately electronic. Another school of thought holds that CALR is billable to the client; and, such charges specifically have been found to be recoverable from a bankruptcy estate. See, *In re Maruko Inc.*, 160 B.R. 633 (1993); *In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985). In light of this uncertainty, at a minimum, the arbitrator should first confirm whether such charges have been agreed to by the client in advance. The next area of inquiry will be the reasonableness of the charge. Some providers offer "pro-forma" invoices for such charges, but these are not usually the actual charged to the firm relative to each client. Thus, where such charges are passed along to the client, the arbitrator should inquire as to the methodology used to assure that the charges were reasonably allocated among all clients using such services for the month or other billing period. Again, the arbitrator should determine whether the client knowingly and voluntarily agreed to pay any premium charged for CALR. Finally, the arbitrator should consider the mathematical unfairness, if any, where, for example, the attorney pays \$1,000 per month for the services and one client is the only client using the service for the month. Under such circumstances, charging the client the full \$1,000 for a small amount of CALR may be improper and potentially unconscionable.

Photocopying: Generally, charges for occasional or convenience photocopying are considered part of general overhead. On the other hand, discrete or large photocopying projects may be charged to the client, especially where there is some extraordinary need for such services, including pleadings, document productions, etc., and where the client agrees in advance. Thus, the attorney and the client may agree in advance that, for example, photocopying will be charged at \$.15 per page. However, the question arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. Under those circumstances the attorney is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., a fair percentage of the salary of a photocopy machine operator). See, ABA Formal Opinion 93-379 (1993); SDCBA

Legal Ethics Opinion 2013-3. On the other hand, where a large photocopying project may be completed by an outside provider at a page rate less than the general page rate agreed upon by the attorney and client at the outset of the representation, the attorney should retain the outside service (subject to client confidentiality safeguards) to complete the project and bill the client only for the actual cost of the project charged by the outside provider.

Long Distance Calls: Given the current state of telephonic communication, it is the opinion of the Committee that long distance calls are part of general overhead and should not be billed as separate expenses. An exception would be where the call charge is for an attorney's out-of-contract call (such as international calls may be) or part of a video conference or involving multiple parties where the attorney will be billed in addition to the attorney's general telephone cost.

Process Service: It is appropriate to bill the client for such charges where provided by an outside service. *See, e.g., In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985). Where such service is provided by in-house employees, the charge to the client should be no more than the reasonable cost to the attorney measured by a reasonable percentage of the employee's overall salary.

Witness Fees: These fees are expenses that properly may be charged to the client. *See, e.g., In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985).

CONCLUSION

The reasonableness, fairness or unconscionability of an attorney's charges for costs and expenses can never be a matter of exact mathematical calculation. Rather, the attorney's charges for costs and expenses should be evaluated pursuant to the fee agreement, and also examined for necessity, reasonableness, disclosure, method of calculation and the reasonable expectations of the client. Such examination also should include reference to the foregoing guidelines of what the arbitrator may consider when the client may dispute the attorney's charges for costs and expenses.



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August 15, 2018

The Committee of Mandatory Fee Arbitration
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Mandatory Fee Arbitration

The State Bar of California

Re: The San Mateo County Bar Association's Fee Arbitration Program Fee Schedule

Dear Committee,

I am one of the Directors for the San Mateo County Bar Association (SMCBA) and the current Board liaison for the Client Relations Committee, which is responsible for overseeing the SMCBA's Fee Arbitration Program. As you may be aware, we recently submitted a request to alter our fee schedule to both simplify it (as the tiered fee schedule led to confusion by clients and lawyers alike) and to hopefully increase the amount the SMCBA brings in from the program, as we have been operating it at an average loss of approximately \$50,000 a year, over the past three years. Our request has now been denied twice. I am writing today in an effort to explain why the requested change is both reasonable and necessary.

First, while we believe the Fee Arbitration Program provides a great benefit to the community, we cannot continue to operate the Program at a deficit of over \$50,000 a year. This year to date, the Program has cost \$73,819.08 to run *after* taking into account the income earned from the Program. Since the SMCBA is not required to run the Program, and instead can refer people to the State Bar's Fee Arbitration Program, this deficit is of great concern to the Board and calls into question whether we should be operating this Program at all. In an attempt to maintain the Program, we have proposed a new fee schedule which would marginally increase the SMCBA's income from the Program. As you can see from the attached chart, had we implemented our proposed fee schedule three years ago, we would have increased our income by \$7,086.81 in 2017/2018, \$30,443.48 in 2016/2017, and \$13,804.25 in 2015/2016 **but still would have operated at a loss of over \$10,000 for each of those years** (including a \$66,732.27 loss for the current year!). While the proposed change to the fee schedule will not completely remedy the fact that maintaining the Program is costing the SMCBA significant resources, it would allow us to continue running it. Any increase in cost to clients seeking to use the Program, as compared to our current fee schedule, will be borne primarily by those parties with large amounts in dispute, who typically have more resources, thus, the effect on low income individuals will be very minimal. We will also continue to provide fee waivers to those who are financially unstable. Moreover, we will be implementing a

mediation option for the Program shortly, which will further increase the costs to run and maintain it. We are dedicated to keeping this Program operational, but need the support from the State Bar in order to do so.

Second, it is our understanding that part of the reasoning for the refusal to grant our proposed fee schedule is due to the fact that it is a flat percentage charge instead of a tiered approach. However, it is our understanding that the State Bar's fee schedule is very similar (a flat 5% of the amount in dispute), so it is unclear why this would have a negative effect on those using the Program through the SMCBA but not through the State Bar. In addition, the Mediation Rules we are proposing do not have substantive changes compared to the State Bar's mediation model rules. Further, the flat fee would resolve the confusion that parties often have in trying to calculate the fee they must pay to use the Program, which currently results in SMCBA employees constantly dealing with this issue and refunding money, and in doing so, expending more valuable resources.

Based on the above, we respectfully request that the State Bar grant the fee schedule change for the SMCBA as submitted. Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura M. Mazza', written over a horizontal line.

Laura M. Mazza, Director
San Mateo County Bar Association
333 Bradford St., Ste. 200
Redwood City, CA 94063

Cc: Leah Wilson
Executive Director, State Bar of California

Activity	Year End 2017-2018	Year End 2016-2017	Year End 2015-2016
Fee Arb. Requests	13	23	31
Amount Received	\$ 7,458.05	\$ 29,881.53	\$ 23,535.89
Amount Refunded	\$ (1,536.73)	\$ (1,635.61)	\$ (650.00)
Fee Waiver Granted	0	1	1
Fee Waiver	\$ -	\$ (350.00)	\$ 3,000.00
Total Amount Received	\$ 5,921.32	\$ 28,245.92	\$ 22,885.89
Reimbursement from SB	\$ 350.00	\$ 1,000.00	\$ 1,250.00
Amount Disputed	\$216,802.09	\$1,424,368.71	\$1,149,836.14

Current Fee Schedule

FYI 2017-2018

Fee Arbitration Income	\$5,921.32
Committee Expenses (meets quarterly)	-\$526.72
Employee's Fees Expenses	-\$79,213.68
	\$ (73,819.08)

FYE 2016-2017

Fee Arbitration Income	\$28,245.92
Committee Expenses (meets quarterly)	-\$512.40
Employee's Fees Expenses	-\$71,562.36
	\$ (43,828.84)

FYE 2015-2016

Fee Arbitration Income	\$22,885.89
Committee Expenses (meets quarterly)	-\$348.72
Employee's Fees Expenses	-\$52,491.48
	\$ (29,954.31)

Proposed Fee Schedule

FYI 2017-2018

Fee Arbitration Income	\$13,008.13
Committee Expenses (meets quarterly)	-\$526.72
Employee's Fees Expenses	-\$79,213.68
	\$ (66,732.27)

FYE 2016-2017

Fee Arbitration Income	\$85,462.12
Committee Expenses (meets quarterly)	-\$512.40
Employee's Fees Expenses	-\$71,562.36
	\$ (13,385.36)

FYE 2015-2016

Fee Arbitration Income	\$68,990.16
Committee Expenses (meets quarterly)	-\$348.72
Employee's Fees Expenses	-\$52,491.48
	\$ (16,149.98)

Case Count Per Fiscal Year

Disputed Amount:	Filing Fee Required:	2015-2016	2016-2017	2017-2018
\$1,000.00 or less	\$100.00	2	0	0
\$1,000.01 to \$5,000.00	\$150.00	9	6	3
\$5,000.01 to \$10,000.00	\$350.00	3	3	1
Over \$10,000.01	Amount over the \$10,000.01 x 3% + \$350.00, with a \$3,000 cap	17	14	9

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 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.
- 14.2** 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.
- 14.3** 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.
- 14.4** 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. This rule permitting fee arbitration between an attorney and a non-client does not abrogate the attorney's duty to exercise independence of professional judgment on behalf of the client or protect the client's confidences and secrets. Absent the client's written consent to disclosure of confidential information, the lawyer has a duty to maintain client confidences and secrets, unless disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when an arbitration with a non-client is requested, the program will give notice of the request to the client by first class mail at the client's last known address.

15.1 Filing Fee

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 both of the parties. Such allocation shall be clearly stated in the Award.

15.2 Filing Fee Schedule

The filing fee for arbitration by the San Mateo County Bar Association is as follows: 6% of the disputed amount with a minimum fee charge of \$100 and a maximum charge of \$7000.

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

failure to comply with time requirements as set forth in these rules.

**ARTICLE IV.
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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 both of the parties. Such allocation shall be clearly stated in the Award.

15.2 Filing Fee Schedule

The filing fees for arbitration by the San Mateo County Bar Association are as follows:

\$100.00	for disputes up to \$1,000 or less
\$150.00	for disputes up to \$1,000.01 to \$5,000.00
\$350.00	for disputes up to \$5,000.01 to \$10,000.00
\$350.00	plus 3% of any disputes up over \$10,000.01 with a maximum fee of \$3,000.00. (i.e., \$25,000 dispute pays \$350 + \$450 = \$800)

~~2. JURISDICTION~~

The mediation program is for consensual mediation of fee disputes.

RULE 45.0 Jurisdiction.

~~A.45.1 Participation is in this Mediation Program is entirely voluntary for the parties. No party to any fee dispute will shall be required to engage in mediation Mediation through this program Program, and any party may terminate the mediation Mediation at any stage.~~

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~~B.45.2 The Programs administer the mediation program of attorney/client fee disputes The Program shall have jurisdiction to perform Mediation of Attorney/Client Fee Disputes under the authority of Business and Professions Code, §§Section 6200 et seq.~~

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~~3. APPOINTMENTS AND QUALIFICATION OF MEDIATORS~~

RULE 46.0 Appointment/Qualification of Mediators.

~~The Program will Committee shall appoint a pool of qualified volunteer Mediators, both lawyers and non-lawyers, who meet Attorneys and Non-Attorneys, to a pool of Mediators. The Committee shall establish and publish guidelines for the qualifications established by the State Bar in Guidelines and Minimum Standards for Operation of Mediation Programs, including a of Mediators, which include the requirement of at least 40 that all Mediators have a minimum of 25 hours of mediator Mediator training, and any additional experience that Programs may require.~~

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~~4. THE PROCESS~~

RULE 47.0 The Process.

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A.—Commencement of Mediation

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47.1 : The matter will proceed to Mediation will commence only if all parties indicate on the Request for Fee Arbitration and Reply forms or otherwise agree in writing that they wish to mediate the fee dispute. If all parties do not wish to mediate, the fee dispute matter will proceed to arbitration under Arbitration in accordance with the Rules of Procedure for Fee Arbitrations.

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B.—Assignment of Mediator

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47.2 : The Program will notify the parties of will receive the assignment of a Mediator within fifteen (15) calendar days after receipt of the Request and a Reply indicating the willingness of all parties to mediate the fee dispute.

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C. **RULE 48.0 Disqualification of Mediator.**

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48.1 The Program shall, as part of the assignment process, the Program will inform the prospective Mediator of the names of the parties and the nature of the fee dispute. A Mediator who has case and ask if there is any personal bias or conflict regarding the parties or the subject matter, or any reason that the perception of bias or an actual conflict could arise with any of the parties. A Mediator who has any personal bias or conflict, or who feels that the perception of bias could exist, will may exist, regarding a party or the subject matter of the dispute, shall not serve as the Mediator in the fee dispute.

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48.2 Any party may challenge the one (1) Mediator with for no cause, at any time in writing within three (3) calendar days upon discovering a basis for such and an unlimited number of Mediators for cause. The challenge. The Program will determine the validity of a for cause challenge where it is disputed. Any party may challenge up to one Mediator without cause, in writing to the Program, within five (5) calendar days must be made in writing to the Chair of the Client Relation Committee no later than 10 business days after receipt of the notice Notice of Mediator Assignment. The challenging party must provide, addressed to the Program, with a copy of the challenge to the Mediator and the other party.

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48.3 Upon receipt of a challenge for no cause, a new Mediator will be assigned to the matter and the parties notified within ten (10) calendar days.

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48.4 Upon receipt of a challenge for cause, the Chair will review the stated reasons for challenge, confer with the assigned Mediator if appropriate, and make a decision as to whether a new Mediator assignment is necessary.

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48.5 Upon the withdrawal or disqualification removal of the Mediator, or in response to a challenge of cause, the Program will shall reassign the matter and notify the parties of the new Mediator within five (Ten) (10) calendar days.

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D.—Compensation of Mediator

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RULE 49.0

Approved by BOT 11/7/14

SMCBA proposed fee mediation rules

~~The filing fee~~ initially paid to the Program for the Request for Arbitration includes all administrative costs for mediation and arbitration. The first four (4) hours of the Mediator's services are provided without any fee to the parties. If more than four (4) hours of mediation are required after the initial period is completed, the parties and Mediator may agree to schedule additional or longer sessions. The Mediator may charge compensation from the parties for such additional or longer sessions subject to the restrictions in this paragraph. The Mediator may charge compensation in an amount of no more than \$150.00 per hour. The parties and the Mediator must agree upon the rate in writing before any additional or longer sessions commence. The Mediator's fee will be shared by the parties equally or as otherwise agreed by the parties and the Mediator in writing. Parties granted a waiver of the Program's filing fee are not entitled to waived or reduced Mediator fees after the four hour initial mediation, absent written agreement by the Mediator and the other party. If the parties do not agree to compensate the Mediator, and the Mediator does not agree to proceed without compensation, the Mediation will terminate.

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E. Mediation Session Date

49.1 ~~Within five (5) ten (10) calendar days after the time to challenge a mailing of the final Mediator other than for cause has expired, assignment, the Mediator must attempt to shall arrange a mediation~~ Mediation date, ~~to which shall take place within forty five (45) sixty (60) calendar days after the date of the notice~~ Notice of Mediator Assignment. ~~If the Mediation cannot proceed within forty five (45) calendar days of the assignment, absent approval by the Program, the ability to mediate will be lost and the matter will proceed to arbitration.~~ was mailed. ~~The Mediator, must shall~~ promptly send to the Program and to the parties a Notice of Mediation, which must include the location, date, and time of the mediation session. The Notice must also include a statement that the attorney attending the mediation session is the person responsible to pay or receive any sum, or has the written authority of the firm to do so (the "Responsible Attorney"). ~~Before the commencement of the Mediation, the Mediator will secure an the Agreement to Mediate from, which shall include notification of the Parties in location, date and time of the form provided by session, to the parties and the Program and that substantially complies with the State Bar of California s approved form.~~

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F. Mediation Session Date Continuance

49.2 ~~A party may ask the Mediator Any request for a continuance of the mediation session date.~~ Any may be made to the Program, with a copy to the Mediator and all parties. ~~A continuance is at the discretion of the Mediator. It will be granted only with the other party objects to the agreement of all parties. Should one side object to a continuance request, the requesting party may shall be given the choice to either attend the session on the date set or proceed directly to Arbitration without utilizing the Mediation service.~~

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~~Prior to the first mediation session on the date set or inform the Mediator and other party that he or she will proceed directly to mandatory fee arbitration without utilizing the Program's mediation service. The Mediator must promptly notify the Program in writing of any continuance of the mediation session date or the parties' election to proceed with mandatory fee arbitration.~~

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G. Preparation for the Mediation Session

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brief written statement outlining any pertinent information not contained in the Request or Reply. The Mediator and each party to the mediation shall sign a Mediation Agreement, in the form provided by the Program which substantially complies with The State Bar of California's required form, prior to the commencement of the first mediation session.

RULE 50.0 Settlement before Session.

Should the parties settle the dispute on their own before the mediation session, a written confirmation of the settlement should be sent to the Program with a copy to the Mediator and the other side. Filing fee refunds will be issued in accordance with Rule 19.3.

RULE 51.0 The Mediation Session.

~~4-51.1 The filing fee sessions will normally be already paid to the Program for the filing of the Request for Fee Arbitration includes up to four (4) mediation hours, and administrative costs. Upon agreement of the parties and concurrence of the Mediator, additional or longer sessions may be scheduled for four hours. Additional or longer Mediator compensation for additional Mediator time and sessions are permitted as necessary, subject to Section 4 (D) above. Section shall be at an amount to be agreed upon by the parties and the Mediator but shall not exceed \$150 per hour notwithstanding that a Client may have been granted a waiver of the Program filing fee. If the Client is unable to pay for Mediator time beyond the first four (4 (D) and-) hours, the session shall conclude or other arrangements can be made between the Mediator and the parties. Such additional, or longer, sessions shall be governed by these Rules will govern any additional or longer sessions.~~

~~2-51.2 TheOnly the parties andto the mediation, their attorney(s)Attorneys or other advisor(s), if any, and the Mediator will attendhave the mediation sessions. Theright to be present during the Mediation. However, the Mediator hasshall have the discretionauthority to determine if other personsothers may attendbe present during the mediation-sessionsprocess.~~

~~51.3 Nothing in these Rules preventsshall prevent the Mediator from meeting or communicating with the parties and/or their advisors separately during the mediation-sessions. The Mediator may conduct part or all of the mediation sessionscourse of the Mediation or from otherwise communicating separately with them. At the discretion of the Mediator, any mediation session may be conducted by telephone.~~

~~3-51.4 If a party fails to attend the mediation sessionsappear, the Mediator may reschedule or terminate the mediation. If shall have the option of rescheduling, the mediation is terminated, the fee dispute will proceed to mandatory fee arbitration or terminating the mediation. The Mediator mustshall report any such action taken to the ProgramCommittee.~~

5. THE OUTCOME

~~1. Resolution~~

RULE 52.0 The Outcome.

~~52.1 Upon any agreement of the parties resolve their fee dispute, the parties shall reduce said agreement to writing. If the agreement states that the client shall receive a refund of fees or~~

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~~costs, the agreement shall state the name(s) of the individual attorney(s) responsible for making the refund. The agreement shall be signed by the client(s) and wish to have the ability the attorney(s) responsible for making any refund of fees and/or costs to enforce the terms of their agreement under the State Bar Rules, all points of the agreement must be immediately reduced to writing at the client. The parties shall sign as many originals as there are parties to the mediation session. All parties must sign the agreement and receive a copy. Signing the agreement constitutes consent to the terms of the agreement. The Mediator may not draft any release or provide legal advice concerning the , plus one for the Committee. Once an agreement. The Mediator must promptly notify the Program in writing that the fee dispute is resolved. The Program will close reached, the file and Committee or its designee shall provide the parties with the Notice Of Rights After Mediation, as approved by the State Bar.~~

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(a) Written Agreement Requirements

i. Responsible Attorney

~~a copy of the The State Bar of California's Notice of Your Rights After Mediation. The Mediator will file the original of this Guidelines and Minimum Standards require that each~~

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~~mediated agreement within which the Program parties agree that the Client shall receive a refund of previously paid fees/costs shall include the name of the individual Attorney(s) responsible for making the refund.~~

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~~J. **Written Agreement Requirements:**~~

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~~4. **Responsible Attorney**~~

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~~The Notice of Mediation must state that the attorney attending the mediation session is the person responsible to pay any sum to, or receive any sum from, the Client and has the authority of the law firm (if any) to do so. If the parties wish to have the ability to enforce the agreement under the State Bar Rules, the agreement must include the name of the individual attorney(s) responsible for making the refund, even if a law firm will make the refund.~~

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~~5.ii. **Required Language**~~

~~For any settlement Each mediated agreement reached during a mediation session to be enforced under Business & Professions Code §§6200, et seq., the agreement must shall be in writing, and signed by the Clients Client and Responsible the responsible Attorney(s), and shall include substantially must include the following language:~~

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~~The following agreement is made: (using full names):~~

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~~(1) The parties agree that the arbitration/mediation filing fee of \$_____ is apportioned as follows:-~~

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~~[Client] [Non-~~

~~Client] pays \$_____ and~~

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~~☉ _____, shall pay Attorney pays \$_____.~~

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~~(2) **Select one:**~~

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~~The parties agree that [Client] [Non-Client] [Attorney] _____ will pay/refund \$_____ to [Client] [Non-Client] [Attorney] _____ who will accept such payment in full settlement of the issues as noted above.~~

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~~(If payment is to be made by a law firm, the agreement must name an individual attorney who will have primary responsibility for making the payment.)~~

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~~or
\$_____.~~

~~OR~~

~~☉ Attorney, _____, shall pay Client, _____,
\$_____.~~

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~~OR~~

~~☉ Nothing further will shall be paid by either attorney or client:/non-client.~~

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~~(3) If a lawsuit is pending,~~

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~~(A) Judgment may be entered immediately based on~~

~~The parties have considered the _____ allocation of the filing fee in making this~~

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~~Approved by BOT 11/7/14~~

~~SMCBA proposed fee mediation rules~~

agreement.

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Or

(B) Judgment may be entered if there is a breach of any terms.

(4) Complete, final

The Parties waive the provisions of Evidence Code Sections 1115-28 that would otherwise prohibit disclosure of the terms of this agreement, and further, stipulate that this agreement is binding agreement:

THIS AGREEMENT IS BINDING AND ENFORCEABLE AND, IF NECESSARY FOR ITS ENFORCEMENT, IS ADMISSIBLE IN EVIDENCE OR OTHERWISE SUBJECT TO DISCLOSURE. The parties agree that they have reached a full and final settlement of all disputes between these parties regarding fees or costs. This Agreement is binding and contains the material terms of the agreement between the parties and, if necessary for enforcement, will be exempt from confidentiality. For purposes of enforcement a copy of this agreement can be used with the same force and effect as the original. If a lawsuit is pending, this agreement may be enforced under shall be enforceable pursuant to California Code of Civil Procedure, §664.6. To the extent required to enforce this agreement, pursuant to Evidence Code §1123(a), the parties agree that this Settlement Agreement is exempt from the confidentiality provisions of Evidence Code §1119 and is admissible in evidence to enforce the settlement Section 664.6.

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52.2 If the parties cannot are unable to resolve the dispute through mediation, the Mediator must shall notify the Program Committee in writing within five (5) calendar days, and the fee dispute matter will proceed to mandatory fee arbitration under in accordance with the Rules of Procedure of Fee Arbitration. The Mediator may not serve as the arbitrator.

6. CONFIDENTIALITY

RULE 53.0 Confidentiality.

A.53.1 All communications, negotiations, and discussions during the mediation process are or settlement discussion by and between participants and/or Mediators shall remain confidential except for the purposes of enforcing any written agreement reached through the mediation, in which case, the waiver provisions of paragraph 5 (B)(4) apply.

B.53.2 The mediation session(s) and, or any documents prepared for or during the mediation are, shall be confidential, under in accordance with the provisions of California Evidence Code §§ Sections 1115, 1128, except the agreement itself may be admitted to enforce it as provided in paragraph 5(B)(4).27.

C.53.3 The Mediator, Program staff and Committee members are shall be deemed ineligible to testify in any civil, judicial or quasi-judicial proceeding, including arbitration Arbitration, as to any statements made at or in connection with the mediation.-

Cross-Reference Chart of the Current California Rules to the New Rules

Sorted by the Current California Rule Number

Current Rules of Professional Conduct <i>Operative until October 31, 2018</i> (Rule Number and Title)	New Rules of Professional Conduct <i>Effective on November 1, 2018</i> (Rule Number and Title)
1-100(A) [Rules of Professional Conduct, in General]	1.0 Purpose and Function of the Rules of Professional Conduct
1-100(B)	1.0.1 Terminology
1-100(D)	8.5 Disciplinary Authority; Choice of Law
1-110 Disciplinary Authority of the State Bar	8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
1-120 Assisting, Soliciting, or Inducing Violations	1.2.1 Advising or Assisting the Violation of Law ¹ 8.4 Misconduct
1-200 False Statement Regarding Admission to the State Bar	8.1 False Statement Regarding Application for Admission to Practice Law
1-300 Unauthorized Practice of Law	5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
1-310 Forming a Partnership With a Non-Lawyer	5.4 Financial and Similar Arrangements with Nonlawyers
1-311 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Members	5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer
1-320(A)	5.4 Financial and Similar Arrangements with Nonlawyers
1-320(A)(4) & (B)-(C) [Financial Arrangements With Non-Lawyer]	7.2(b) Advertising
1-400 Advertising and Solicitation	7.1 Communications Concerning a Lawyer's Services 7.2 Advertising 7.3 Solicitation of Clients 7.4 Communication of Fields of Practice and Specialization 7.5 Firm Names and Trade Names
1-500 Agreements Restricting a Member's Practice	5.6 Restrictions on a Lawyer's Right to Practice
1-600 Legal Service Programs	5.4 Financial and Similar Arrangements with Nonlawyers
1-650 Limited Legal Service Programs	6.5 Limited Legal Services Programs
1-700 Member as Candidate for Judicial Office	8.2 Judicial Officials
1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator	2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator
2-100 Communication With a Represented Party	4.2 Communication with a Represented Person
2-200(A) Financial Arrangements Among Lawyers	1.5.1 Fee Divisions Among Lawyers
2-200(B)	7.2(b) Advertising
2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased	1.17 Sale of a Law Practice
2-400 Prohibited Discriminatory Conduct in a Law Practice	8.4.1 Prohibited Discrimination, Harassment and Retaliation

¹ The Supreme Court has amended current rule 1-120 and adopted it as rule 1.2.1 pending the State Bar's submission of additional revisions to proposed rule 1.2.1. (See the Supreme Court Order Administrative Order 2018-04-11, S240991.)

Cross-Reference Chart of the Current California Rules to the New Rules

Sorted by the Current California Rule Number

Current Rules of Professional Conduct <i>Operative until October 31, 2018</i> (Rule Number and Title)	New Rules of Professional Conduct <i>Effective on November 1, 2018</i> (Rule Number and Title)
3-100 Confidential Information of a Client	1.6 Confidential Information of a Client
3-110 Failing to Act Competently	1.1 Competence
3-110(B)	1.3 Diligence
3-110, Discussion ¶.1	Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers Rule 5.2 Responsibilities of a Subordinate Lawyer Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
3-120 Sexual Relations With Client	1.8.10 Sexual Relations with Current Client
3-200 Prohibited Objectives of Employment	3.1 Meritorious Claims and Contentions
3-210 Advising the Violation of Law	1.2.1 Advising or Assisting the Violation of Law ²
3-300 Avoiding Interests Adverse to a Client	1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to the Client
3-310(B), (C) Avoiding the Representation of Adverse Interests	1.7 Conflict of Interest: Current Clients
3-310(D)	1.8.7 Aggregate Settlements
3-310(E)	1.9 Duties To Former Clients
3-310(F)	1.8.6 Compensation from One Other Than Client
3-320 Relationship With Other Party's Lawyer	1.7(c)(2) Conflict of Interest: Current Clients
3-400 Limiting Liability to Client	1.8.8 Limiting Liability to Client
3-410 Disclosure of Professional Liability Insurance	1.4.2 Disclosure of Professional Liability Insurance
3-500 Communication	1.4 Communication with Clients
3-510 Communication of Settlement Offer	1.4.1 Communication of Settlement Offers
3-600 Organization as Client	1.13 Organization as Client
3-700 Termination of Employment	1.16 Declining or Terminating Representation
4-100 Preserving Identity of Funds and Property of a Client	1.15 Safekeeping Funds and Property of Clients and Other Persons
4-200 Fees for Legal Services	1.5 Fees for Legal Services
4-210 Payment of Personal or Business Expenses Incurred by or for a Client	1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client
4-300 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review	1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
4-400 Gifts From Client	1.8.3 Gifts from Client
5-100 Threatening Criminal, Administrative, or Disciplinary Charges	3.10 Threatening Criminal, Administrative, or Disciplinary Charges

² The Supreme Court has amended current rule 1-120 and adopted it as rule 1.2.1 pending the State Bar's submission of additional revisions to proposed rule 1.2.1. (See the Supreme Court Order Administrative Order 2018-04-11, S240991.)

Cross-Reference Chart of the Current California Rules to the New Rules

Sorted by the Current California Rule Number

Current Rules of Professional Conduct <i>Operative until October 31, 2018</i> (Rule Number and Title)	New Rules of Professional Conduct <i>Effective on November 1, 2018</i> (Rule Number and Title)
5-110 Performing the Duty of Member in Government Service (Note: Rule 5-110 recently was revised effective November 2, 2017.)	3.8 Special Responsibilities of a Prosecutor
5-120 Trial Publicity	3.6 Trial Publicity
5-200(A)-(D) Trial Conduct	3.3 Candor Toward the Tribunal
5-200(E) Trial Conduct	3.4 Fairness to Opposing Party and Counsel
5-210 Member as Witness	3.7 Lawyer as Witness
5-220 Suppression of Evidence (Note: Rule 5-220 recently was revised effective May 1, 2017.)	3.4 Fairness to Opposing Party and Counsel (Note: See also Rule 3.8(d) regarding the duties of a prosecutor.)
5-300 Contact With Officials	3.5 Contact with Judges, Officials, Employees, and Jurors
5-310 Prohibited Contact With Witnesses	3.4 Fairness to Opposing Party and Counsel
5-320 Contact With Jurors	3.5 Contact with Judges, Officials, Employees, and Jurors

New Rules With No California Counterpart

Rule 1.2 Scope of Representation and Allocation of Authority

Rule 1.8.2 Use of Current Client's Information³

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

Rule 1.10 Imputation of Conflicts of Interest: General Rule

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Rule 1.18 Duties to Prospective Client

Rule 2.1 Advisor

Rule 2.4 Lawyer as Third-Party Neutral

Rule 3.2 Delay of Litigation

Rule 3.9 Advocate in Non-adjudicative Proceedings

Rule 4.1 Truthfulness in Statements to Others

Rule 4.3 Communicating with an Unrepresented Person⁴

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings

Rule 5.3 Responsibilities of a Subordinate Lawyer

Rule 6.3 Membership in Legal Services Organizations

³ But see Bus. & Prof. Code § 6068(e).

⁴ But see current rule 3-600(D) regarding similar duties in an organizational context.

**Report on References to Rules of Professional Conduct
in Arbitration Advisories**

_____ All advisories have been searched for references to the Rules of Professional Conduct. Of the 42 advisories issued since 1993, 12 have been superseded¹, and 27² make no reference to any specific Rule.

_____ In three advisories rules are cited which, with one exception, are substantively identical to provisions of the new rules which will be effective November 1, 2018, and therefore those advisories need no amendment other than changing the citations, as follows:

1993-02 cites Rule 4-200 pertaining to illegal or unconscionable fees. The new reference should be Rule 1.15.

2011-01 cites Rule 4-100 pertaining to holding unearned fees in trust, Rule 4-200 forbidding illegal or unconscionable fees, and Rule 3-700(D)(2) pertaining to refund of unearned fees on termination of employment. The new references should be Rules 1.15, 1.5, and 1.6(e)(2) respectively.

2012-03 cites Rule 3-300 pertaining to conflicts of interest, Rule 3-310(F)(1) pertaining to compensation by a non-client, and Rule 3-700(D)(2). Those can be changed to cite Rules 1.8.1, 1.8.6, and 1.6(e)(2), respectively.

A more general citation of Rule 3-310 needs more analysis than I have presently given, as the rule has been broken up and restated in several provisions of the new rules.

¹1994-01, 1995-01, 1996-02, 1996-04, 1996-05, 1997-01, 2000-01, 2001-02, 2003-01, 2003-02, 2009-01, 2011-02.

²1993-01, 1994-02, 1994-03, 1994-04, 1995-02, 1996-01, 1996-03, 1997-02, 1997-03, 1998-01, 1998-02, 1998-03, 2001-01, 2002-01, 2003-03, 2004-01, 2007-01, 2007-02, 2008-01, 2008-02, 2012-01, 2012-02, 2014-01, 2015-01, 2015-02, 2016-01, 2016-02.

Proposed Changes to California State Bar Fee Agreements

Resulting from the Rules of Professional Conduct Effective November 1, 2018

Two significant changes to the RPCs regarding attorneys' fees that impact the Sample Fee Agreements:

1. Advance fees must now be deposited into client trust accounts; and
2. Advance flat fees are treated differently than in the past, as described below.

RPC 1.15(a) provides that "fees" (in addition to costs and expenses" must be placed in a client trust account. The existing Sample Fee Agreements are consistent with this requirement and provide as follows:

Hourly Fee Agreement:

4. DEPOSIT

Client agrees to pay Attorney an initial deposit of \$_____ [PROVIDE DEPOSIT AMOUNT] by _____ [DATE] which will be deemed an advance deposit for fees and costs to be incurred in this matter. The hourly charges and costs will be charged against the Deposit. The initial Deposit, as well as any future deposits, will be held in Attorney's Client Trust Account. Client authorizes Attorney to use that deposit to pay the fees and other charges. Client acknowledges that the deposit is not an estimate of total fees and costs to be charged by Attorney, but merely an advance.

The Contingency Fee Agreement provides:

7. DEPOSIT

Client agrees to pay Attorney an initial deposit for costs of \$_____ [PROVIDE AMOUNT], to be returned with this signed Agreement. Attorney will hold this initial deposit in a trust account. Client hereby authorizes Attorney to use that deposit to pay the costs, disbursements and other expenses incurred under this Agreement.

This complies with new RPC 1.15(c).

RPC 1.15 (b) provides for an exception to the above requirement that fees be deposited into a client trust account for a "flat fee."

RPC 1.5(e) defines a "flat fee" as follows:

A flat fee is a fixed amount that constitutes complete payment for the performance of the described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

RPC 1.15(b) provides that a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided two requirements are met:

- (1) The lawyer/firm discloses to the client in writing that (i) the client has a right to require that the fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and
- (2) If the flat fee exceeds \$1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing signed by the client.

Comment [3] to RPC 1.15 further provides that "absent written disclosure, and the client's agreement in writing signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account."

The State Bar currently has three sample fee agreements: 1) hourly litigation 2) hourly non-litigation and 3) contingency fee. The optional clauses form provided by the State Bar along with the Sample Fee Agreement contains the following statement as to flat fees:

Client agrees to pay a flat fee of \$_____ for Attorney's services under this Agreement. This fee is fixed and does not depend on the amount of work performed or the results obtained. Client acknowledges that this fee is negotiated and is not set by law. The fee shall be paid by Client [Option 1: on _____ (insert date)]; [Option 2: in equal installments of \$_____ due _____]; [Option 3: when the work is completed]. The Flat Fee, upon payment, becomes the property of Attorney and need not be deposited into the Attorney/Client trust account. Either party may terminate the representation at any time, subject to Attorney's obligations under the Rules of Professional Conduct and the approval of the court if the matter is in litigation. If either party terminates the representation before Attorneys have provided all legal services described in this Agreement, Client may be entitled to a refund of all or part of the flat fee based on the value of the legal services performed prior to termination.

This language is inconsistent with the new RPC and should be revised to read as follows:

FLAT FEE

Client agrees to pay a flat fee of \$_____ for Attorney's services under this Agreement. This fee is fixed and does not depend on the amount of work performed or the results obtained. Client acknowledges that this fee is negotiated and is not set by law. The fee shall be paid by Client [Option 1: on _____ (insert date)]; [Option 2: in equal installments of \$_____ due _____]; [Option 3: when the work is completed].

If the Flat Fee exceeds \$1,000.00, Client has a right to require that the Flat Fee be deposited into Attorney's Client Trust Account. Client agrees that the Flat Fee [Option 1: shall be deposited into Attorney's Client Trust Account] [Option 2: may be deposited into Attorney's operating account].

Either party may terminate the representation at any time, subject to Attorney's obligations under the Rules of Professional Conduct and the approval of the court if the matter is in litigation. If either party terminates the representation before Attorneys have provided all legal services described in this Agreement, Client is entitled to a refund of all or part of the Flat Fee that has not been earned in the event the representation is terminated.

Tulare County Bar Association

(MCLE Provider #1087)

Post Office Box 1711

Visalia, CA 93279-1711

Voicemail: (559) 697-5503

Email: tularecobar@gmail.com

July 18, 2018

Isabel Liou, Attorney
Mandatory Fee Arbitration Program
The State Bar of California
180 Howard Street
San Francisco, California 94105

[Via Email: isabel.liou@calbar.ca.gov](mailto:isabel.liou@calbar.ca.gov)

Re: Tulare County Bar Association
Mandatory Fee Arbitration Program

Dear Ms. Liou:

As you may be aware, the Tulare County Bar Association (TCBA) has suspended its Mandatory Fee Arbitration Program in order to update and reorganize procedures. I have been appointed by the TCBA Board as the new Arbitration Committee Chair and have been working diligently on revising our Rules of Procedure. Accordingly, I attached hereto our proposed Rules of Procedure for Fee Arbitration for review and approval by your office. These Rules of Procedure were taken from the State Bar Model Rules of Procedure, excepting the blank lines reserved for the filing fee schedule under Rule 15.3, refund of filing fee under Rule 19.3 and the amount in dispute for requiring a three-arbitrator panel under Rule 21.1. Under Rule 21.1, we are asking for a three-arbitrator panel only when the amount in dispute is over \$25,000.00. We chose this amount because we have had trouble finding and keeping non-lawyer arbitrators in the past.

Thank you for your consideration of our proposed Rules of Procedure. If you have any questions, please feel free to contact me.

Very truly yours,



Ricky Tripp
Arbitration Committee Chair
Tulare County Bar Association

Attachment

**Rules of Procedure for Fee Arbitrations the Tulare County Bar
Association
(Proposed July 2018)**

**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 NON-LAWYER ARBITRATOR:** A lay arbitrator is a person who has not been admitted to practice law in any jurisdiction and has not worked regularly for a public or private law office or practice, court of law or attended law school for any period of time. Paralegal assistants, law firm staff, and law clerks shall not serve as lay arbitrators.
- 1.10 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.

- 1.11 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.
- 1.12 PROGRAM:** Unless indicated otherwise, reference to the program means the Mandatory Fee Arbitration Program of the Tulare County Bar Association.
- 1.13 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.
- 1.14 TRIAL:** Trial after non-binding fee arbitration means: (1) an action in the court having jurisdiction over the amount in controversy or (2) arbitration pursuant to the parties’ pre-existing arbitration agreement.

**ARTICLE II.
ARBITRATION GENERALLY**

RULE 2.0 Arbitration Mandatory For Attorneys.

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 2.1 Notice of Client’s Right to Arbitration Before Lawsuit or Other Proceeding to Collect Fees.

The attorney shall, prior to or at the time of service of summons in a lawsuit against the client for the recovery of fees, costs, or both for professional services rendered or prior to or at the commencement of any other proceeding under a contract that provides for alternative to arbitration under Business and Professions Codes section 6200-6206, forward to the client a written “Notice of Client’s Right to Arbitration” using the State Bar approved form. Failure to give this notice shall be a ground for the dismissal of the lawsuit or other proceeding.

RULE 3.0 Party’s Failure to Respond or Participate.

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. A party who is found to have willfully failed to appear at the arbitration is not entitled to a trial after non-binding 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 also 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. Following service of a non-binding arbitration award, either party may request a trial pursuant to Business and Professions Code section 6204 within 30 days after the non-binding arbitration award has been served except that if any party is found to have willfully failed 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. If a trial after arbitration is not requested, the non-binding award automatically becomes binding 30 days after the award is served. An award may also 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 before the taking of evidence.

RULE 7.0 Right to Counsel.

All parties, at their expense, may be represented by an attorney.

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** files an answer or other response to a complaint in an action or other equivalent response in any other proceeding 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 section 6201(a);
- 8.2** commences an action or files any pleading seeking judicial resolution of a fee or cost dispute or 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.

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 notify the parties of its intent to 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, 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 Tulare County or maintained an office in Tulare 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.

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 may serve with it a copy of the approved “Notice of Attorney Responsibility” form. If the form was not previously served, the program must serve this form no later than the time of service of the notice appointing the arbitration panel.
- 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.

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.

The filing fee is \$50.00 for disputes up to \$1,000.00
\$100.00 for disputes up to \$5,000.00
\$150.00 for disputes up to \$15,000.00
\$250.00 for disputes up to \$25,000.00 or
\$500.00 for disputes over \$25,000.00

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 14.4, 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.

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 Disputes; 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 without prejudice 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.

19.3 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, 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 25 percent of the filing fee paid. 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.

19.4 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. A stipulated award can be enforced by the State Bar on behalf of the client in the same manner as an award after arbitration as provided by Business and Professions Code section 6203(d).

RULE 20.0 Consolidations.

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.

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 \$25,000 or less and three arbitrators if the amount in dispute is more than \$25,000, 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 \$25,000, 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** If a fee dispute involves \$1,000 or less, the arbitration shall be decided by the Committee Chair or designee. Each party shall submit all supporting documents and a complete written statement of the reasons for the dispute, a response, or both, under penalty of perjury. The parties have 30 days from the service by the program of the reply to the arbitration request, which will be reflected in a proof of service. The record shall thereafter be forwarded to the Committee Chair or designee for action, who may require either or both parties to submit additional information within 30 days. However, if the amount in controversy is less than \$1,000 but greater than \$500, the parties upon the request of any party, may appear at a hearing, either in person or telephonically, before the Committee Chair or designee assigned to the matter, in addition to providing the written information required by this section. The parties shall be informed of this rule at the time of the program's service of a completed arbitration request form.

21.4 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.

21.5 A retired judge cannot serve as an attorney arbitrator unless he or she is an active member of the State Bar of California.

RULE 22.0 Notice of Appointment of Panel.

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 to Arbitrator(s).

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 himself or herself 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.

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.

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 case file, including the request, reply, exhibits and transcripts, as well as the award itself, are to remain confidential. Absent a court order compelling disclosure of the award, the program may not disclose the award to any individual or entity that was not a party to the arbitration proceeding. An award shall remain confidential except as may be necessary in connection with a judicial challenge to, confirmation or enforcement of, the award, or as otherwise required by law or judicial decision.

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 may designate a lawyer or non-lawyer representative.
- 27.3** Any party unable to attend a hearing 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.

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.

No discovery is allowable except as specifically set forth in these rules. Nothing in these rules deprives the client of the right to inspect and obtain the client's file kept by the attorney.

RULE 30.0 Subpoenas.

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 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.

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.

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

RULE 34.0 Evidence.

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 34.1 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.

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

RULE 36.0 Interpreter.

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.

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:

The Hearing Panel finds 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 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) _____: \$ _____ 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, _____ (name) _____, shall pay client, _____ (name) _____: \$ _____ 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.

- 39.4** The award may include a refund of unearned fees, 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 Hearing Panel shall deliver 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 Your Rights After Arbitration form approved by the State Bar Board of Governors. No award is final or is to be served 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. 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 or Amendment of Award by Hearing Panel.

- 40.1** The Hearing Panel may correct an 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 correction of the award does not extend the deadline for seeking a 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 under this rule must file a request in writing to the Program, with a proof of service, 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. Any correction of the award by the Hearing Panel must be made within 30 days after service of the award.
- 40.3** A party may request amendment of the award. A party must file a request to amend the award in writing to the Program, with a proof of service, and serve a copy on the other party at any time prior to judicial confirmation of the award. Any party to the arbitration may make a written objection to such request.. Any corrected or amended award, or denial of application to correct or amend the award, shall be served by the Program in the same manner as provided by rule 39.9.

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), 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 41.1 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 transmission, the original of the faxed 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.

~~1.10~~ ~~1.10~~ **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.

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1.11 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.

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1.12 PROGRAM: Unless indicated otherwise, reference to the program means the Mandatory Fee Arbitration Program of the Tulare County Bar Association.

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1.13 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.

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1.14 TRIAL: Trial after non-binding fee arbitration means: (1) an action in the court having jurisdiction over the amount in controversy or (2) arbitration pursuant to the parties' ~~pre-existing arbitration agreement~~, pre-existing arbitration agreement.

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**ARTICLE II.
ARBITRATION
GENERALLY**

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RULE 2.0 Arbitration Mandatory For Attorneys.

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.

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RULE 2.1 Notice of Client's Right to Arbitration Before Lawsuit or Other Proceeding to Collect Fees.

The attorney shall, prior to or at the time of service of summons in a lawsuit against the client for the recovery of fees, costs, or both for professional services rendered or prior to or at the commencement of any other proceeding under a contract that provides for alternative to arbitration under Business and Professions Codes section 6200-6206, forward to the client a written "Notice of Client's Right to Arbitration" using the State Bar approved form. Failure to give this notice shall be a ground for the dismissal of the lawsuit or other proceeding.

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RULE 3.0 Party's Failure to Respond or Participate.

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. A party who is found to have willfully failed to appear at the arbitration is not entitled to a trial after non-binding arbitration.

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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:

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4.1 disputes where the attorney is also admitted to practice in another jurisdiction or where

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the attorney is only admitted to practice in another jurisdiction, and he or she maintains

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~~4.1~~ no office in the State of California, and no material portion of the services was rendered in the State of California;

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~~4.2~~ ~~4.2~~ claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct;

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~~4.3~~ ~~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;

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~~4.4~~ ~~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

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~~4.5~~ ~~4.5~~ disputes where the claim has been assigned by the client.

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RULE 5.0 Non-Binding and Binding Arbitration.

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~~5.1~~ ~~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. Following service of a non-binding arbitration award, either party may request a trial pursuant to Business and Professions Code section 6204 within 30 days after the non-binding arbitration award has been served, except that if any party is found to have willfully failed 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. If a trial after arbitration is not requested, the non-binding award automatically becomes binding 30 days after the award is served. An award may also be corrected, vacated, or confirmed pursuant to Code of Civil Procedure section 1285 et seq.

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~~5.2~~ ~~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.

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RULE 6.0 Withdrawal of Binding Arbitration Election.

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~~6.1~~ ~~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.

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~~6.2~~ ~~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.

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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.

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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 before the taking of evidence.

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RULE 7.0 Right to Counsel.

All parties, at their expense, may be represented by an attorney.

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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 files an answer or other response to a complaint in an action or other equivalent response, in any other proceeding 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 section 6201(a);

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8.2 commences an action or files any pleading seeking judicial resolution of a fee or cost dispute or affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct;

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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.

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RULE 9.0 Stay of Proceedings.

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.

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15.3 Filing Fee Schedule.

The filing fee is ~~\$50.00~~ for disputes up to ~~\$1,000.00~~ up to ~~\$5,000.00~~ ~~\$100.00~~ for disputes up to ~~\$15,000.00~~ ~~\$250.00~~ for disputes up to ~~\$25,000.00~~ or ~~\$500.00~~ for disputes over ~~\$25,000.00~~

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RULE 16.0 Request for Filing Fee Waiver.

~~16.1~~ ~~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 14.4, 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~~ ~~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~~ ~~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.

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RULE 17.0 Response to Request for Arbitration.

~~17.1~~ ~~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~~ ~~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.

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RULE 18.0 Requests and Responses to Requests for Arbitration.

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.

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RULE 19.0 Settlement of Disputes; Withdrawal from Arbitration; Refund Schedule.

19.1 ~~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 without prejudice 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 ~~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) ~~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) ~~c)~~ If arbitration has been requested by the attorney, the matter may only be dismissed with the agreement of the other parties.

d) ~~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.

19.3 ~~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, ~~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 ~~25~~ percent of the filing fee paid up to a maximum of \$~~500~~. 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 up to a maximum of \$~~500~~. 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.

19.4 ~~19.4~~ 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. A stipulated award can be enforced by the State Bar on behalf of the client in the same manner as an award after arbitration as provided by Business and Professions Code section ~~6203(d)~~.

RULE 20.0 Consolidations.

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

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21.4 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.

21.5 ~~21.5~~ A retired judge cannot serve as an attorney arbitrator unless he or she is an active member of the State Bar of California.

RULE 22.0 Notice of Appointment of Panel.

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 to Arbitrator(s).

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 -himself or herself 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.

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.

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)~~ ~~-----~~ a) At scheduled hearings;-

~~b) b)~~ In writing with a copy to all other parties, or their respective counsel, if any, and the program;-

~~c) e)~~ For the sole purpose of scheduling a hearing date or other administrative procedures with notice of same to the other parties;-

~~d) e)~~ For the purpose of obtaining the issuance of a subpoena as set forth in these rules; or

e)

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| deprives the client of the right to inspect and obtain the client's file kept by the attorney.—

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RULE 30.0 Subpoenas.

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.

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RULE 31.0 Commencement of Hearing; Notice; Attendance.

~~31.1~~ ~~31.1~~ The hearing shall commence within 45 days for a single arbitrator 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.

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~~31.2~~ ~~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.

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~~31.3~~ ~~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.

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~~31.4~~ ~~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.

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~~31.5~~ ~~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.

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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.

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RULE 32.0 Stipulations Encouraged.

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

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RULE 33.0 Oaths.

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

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RULE 34.0 Evidence.

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.

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RULE 34.1 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.

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RULE 35.0 Order of Proof.

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

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RULE 36.0 Interpreter.

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

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RULE 37.0 Transcripts or Recordings.

No stenographic, audio, or video recording is permissible.

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RULE 38.0 Compensation of Arbitrators; Administrative Charges.

~~38.1~~ ~~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.

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Accordingly, the following award is made:

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40.1 The Hearing Panel may correct an 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 correction of the award does not extend the deadline for seeking a 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.

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40.2 ~~40.2~~ A party requesting correction under this rule must file a request in writing to the Program, with a proof of service, 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. Any correction of the award by the Hearing Panel must be made within 30 days after service of the award.

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40.3 ~~40.3~~ A party may request amendment of the award. A party must file a request to amend the award in writing to the Program, with a proof of service, and serve a copy on the other party at any time prior to judicial confirmation of the award. Any party to the arbitration may make a written objection to such request. Any corrected or amended award, or denial of application to correct or amend the award, shall be served by the Program in the same manner as provided by rule 39.9.

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ARTICLE VIII.
SERVICE;
ADDRESS

RULE 41.0 Service.

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41.1 ~~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), 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 ~~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 41.1 above.

41.3 ~~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~~

~~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~~ ~~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 transmission, the original of the faxed document.

~~41.6~~ ~~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.

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