

AGENDA ITEM

54-122 MAY

DATE: April 23, 2012

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

FROM: Doug Hull, Director, Mandatory Fee Arbitration

SUBJECT: Proposed Modification to Rule 30.0 (“Subpoenas”), State Bar of California Model Rules of Procedure for Fee Arbitrations. Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

Mandatory Fee Arbitration (“MFA”) is available through 41 mandatory fee arbitration programs operated by local bar associations in addition to the State Bar’s program. Local bar program rules of procedure must be approved by the State Bar’s Board of Trustees, or its designated committee, to establish program jurisdiction to arbitrate attorney’s fee disputes under the Business and Professions Code, section 6200(d). This item seeks approval of proposed revisions to the State Bar’s Model Rules of Procedure for Fee Arbitrations.

In November 2006, the Board of Trustees approved the State Bar’s first Model Rules of Procedure for Fee Arbitrations (“Model Rules”) as recommended by the State Bar’s Committee on Mandatory Fee Arbitration (“CMFA”). The Model Rules are intended to promote uniformity and procedural consistency among programs, expedite the rule approval process, and ensure that programs are in compliance with applicable statutes, the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs (“Minimum Standards”), and developments in the law. Local bar associations with mandatory fee arbitration programs are encouraged, but not required, to adopt the Model Rules in whole or in part. To date, nearly all the local programs have done so.

The proposal seeks to modify rule 30.0 of the aforementioned rules to clarify the process for the issuance of subpoenas in fee arbitrations conducted under these rules. The proposal also requires the requesting party to demonstrate a showing of good cause in order for any subpoena to be issued.

The MFA requests approval of the proposed revision to Rule 30.0 after 45 days of public comment. The revision is set forth in Attachment A. Questions about this item should be directed to Doug Hull (415) 538-2015 or doug.hull@calbar.ca.gov.

BACKGROUND

Pursuant to Article 13, Arbitration of Attorney's Fees (Business and Professions Code section 6200, *et seq.*), the Board of Trustees is charged with establishing, maintaining and administering a system and procedure for the arbitration of disputes concerning fees, costs, or both, charged by attorneys for their professional services. The statutory scheme for Mandatory Fee Arbitration provides for fee arbitration services sponsored by local bar associations. (Bus. & Prof. Code, §6200, subd (d).) The Board of Governors adopts and reviews the local bars' rules of procedure "...to insure that they provide for a fair impartial, and speedy hearing and award." (*Ibid.*) Today, mandatory fee arbitration is available through 41 local bar association programs in addition to the State Bar's MFA program.

The Minimum Standards establish the essential provisions that must be included in all local bar program rules of procedure to establish their jurisdiction for Article 13 fee arbitrations. Prior to 2006, local bar programs operated under vastly different procedural rules, some of which were outdated or in some cases, inconsistent with the MFA statutes and Minimum Standards.

In November 2006, the Board of Trustees approved the first set of Model Rules of Procedure for Fee Arbitrations to achieve greater inter-program consistency, expedite the review of local bar rules, and ensure that local bar rules comply with the Minimum Standards. Although the State Bar does not require local bar programs to adopt the Model Rules, the MFA Committee has encouraged them to do so. To date, the vast majority of local bar programs have adopted the Model Rules.

Contained within the Model Rules is a provision for the issuance of subpoenas by the Committee Chair or Panel Chair. The rule states that the program shall provide the blank subpoena forms to the requesting party and that the requesting party is responsible for the service of the subpoenas and any costs associated with the request.

ISSUE

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

The use of subpoenas in Fee Arbitration matters is infrequent and they are not enforceable in fee arbitration proceedings, although it is the opinion of the CMFA that

subpoenas may be enforced by the appropriate civil court upon application by a party (see Arbitration Advisory 2002-01 “Imposition of Sanctions by Arbitrators in Conducting Fee Arbitration Matters” dated May 17, 2002 [which can be found at: http://www.calbar.ca.gov/Portals/0/documents/mfa/2002-01_Imposition-of-Sanction-by-Arbitrators-in-Conducting-Fee-Arbitration-Matters_r.pdf] and Arbitration Advisory 2008-02 “Authority to Compel Compliance with Third-Party Subpoenas” dated May 25, 2008 [which can be found at: http://www.calbar.ca.gov/Portals/0/documents/mfa/2008-02_Authority-to-Compel-Compliance-With-Third-Party-Subpoenas_r.pdf]). Currently, Rule 30.0 states that the Committee Chair “may” issue subpoenas upon request and that the Committee Chair or Panel Chair “shall” provide the subpoena to the requesting party. The rule is interpreted to mean that the Committee Chair has discretion to issue subpoenas, but once the subpoena request is approved by Committee Chair, the local bar fee arbitration program must issue the subpoena. There is no requirement that the party identify the rationale for requesting the subpoena(s).

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

During discussions at the CMFA meetings, the Presiding Arbitrator of the State Bar’s Mandatory Fee Arbitration Program relayed a situation where a party had requested two dozen subpoenas, an extremely high number in fee arbitration proceedings. After review by the Presiding Arbitrator, it was determined that only one subpoena was needed and that the rest were intended to harass the opposing party. When the Presiding Arbitrator issued the ruling, the requesting party argued that the Presiding Arbitrator did not have discretion to make that determination. This rule modification would make it clear that the Presiding Arbitrator does have the discretion to control the issuance of subpoenas, especially if there is no justifiable reason for the said subpoenas. This scenario runs counter to the nature of the fee arbitration process and demonstrates the need for the proposed rule change.

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

1. The requesting party must complete the necessary form and submit it to the Committee Chair or Panel Chair, if one has been appointed.
2. Upon a showing of good cause, the Committee Chair or Panel Chair may sign the subpoena.
3. If the Committee Chair or Panel Chair approves the subpoena, he will sign the subpoena and return it to the requesting party for service.

4. The requesting party is responsible for all costs associated with the subpoena.

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

PUBLIC COMMENT

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

CONCLUSION

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

FISCAL / PERSONNEL IMPACT:

None

RULE AMENDMENTS:

None

BOARD BOOK IMPACT:

None

PROPOSED BOARD COMMITTEE RESOLUTION:

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

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends to the Board of Trustees that it approve the proposed revision to rule 30.0 of the Model Rules of Procedure for Fee Arbitrations, in the form attached hereto as Attachment A.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board of Trustees agree with the recommendation above, the following resolution would be appropriate:

RESOLVED, that the upon recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board of Trustees approves the proposed revision to rule 30.0 of the Model Rules of Procedure for Fee Arbitrations, in the form attached hereto as Attachment A.

Regulation, Admissions and Discipline Oversight