

# AGENDA ITEM

**MAY 144**

**DATE:** April 18, 2012

**TO:** Members, Planning, Program Development and Budget Committee  
Members, Board of Trustees

**FROM:** Doug Hull, Director, Office of Mandatory Fee Arbitration  
Carol Madeja, Managing Director, Bar Relations Outreach

**SUBJECT:** Proposed Increase in Reimbursement Rate for Local Bars for Assigned Fee Arbitration or Mediation Cases

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## EXECUTIVE SUMMARY

In 1979, Business and Professions Code 6200 instituted the Mandatory Fee Arbitration Program. Business and Professions Code section 6200(d), permits local bar associations to sponsor mandatory fee arbitration programs subject to oversight by the State Bar of California. In 2006, the then-Board of Governors authorized the State Bar, through the Mandatory Fee Arbitration Program, to reimburse local bar associations \$36 for each fee arbitration and fee mediation matter it assigned to an arbitrator or panel of arbitrators.

The proposal before the Planning, Program Development and Budget Committee and the Board of Trustees is to consider an increase of the reimbursement rate from \$36 to \$50 for each assigned matter. If this proposal is approved, the increase would be effective July 1, 2012.

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## BACKGROUND

Pursuant to 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 and/or costs charged by attorneys for their professional services. The Board is also required to adopt rules to allow for fee arbitration and mediation of disputes covered by the Mandatory Fee Arbitration Program ("MFA") to proceed through programs sponsored by local bar associations. (Bus. & Prof. Code, § 6200, subd.(a),(d).)

California has 41 local bar associations that offer mandatory fee arbitration programs.

Although the State Bar of California provides mandatory fee arbitration, the approved local bar MFA programs maintain primary jurisdiction in fee arbitration matters. Local bar programs conduct the majority of the state's fee arbitration cases subject to State Bar oversight (see Appendix A). State Bar jurisdiction is limited to disputes where a local bar program does not exist, the local program lacks jurisdiction over the fee dispute, or a party asserts that a fair hearing cannot be obtained from the local program. (Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, standards 2 and 22.) In 2011, the State Bar accepted 107 fee arbitration requests, representing less than 7% of the 1,592 arbitration requests handled throughout the state (Attachment A).<sup>1</sup>

## **DISCUSSION**

### **History of State Bar Reimbursement to Local Bar MFA Programs**

#### **\$10 Pilot Program in 1984**

In 1983, for the first time, several local bar programs requested that the State Bar Board of Governors help subsidize the local mandatory fee arbitration programs in recognition of the fact that local programs were facing increasing financial restraints yet wanted to keep their program filing fees affordable and competitive. While mindful of budget constraints upon the State Bar, some form of direct funding by the State Bar was pursued by the Board in view of the fact that the local programs were providing a service to be performed by the State Bar mandated by the Legislature. Accordingly, the Board approved a pilot program for 1984 involving a flat \$10 payment per arbitration case assigned by participating programs.

This rate was apparently based upon various factors, including average amount spent by local bar associations per arbitration, the number of arbitrations conducted on a statewide basis each year and the absolute amount which could be spent by the State Bar for local bar programs. The flat rate was increased to \$12 per case in 1985 and remained the same for the next ten years. According to the State Bar's archived Board agenda items, in 1995, the state's largest local bar fee arbitration program (Los Angeles County Bar Association) sought an increase of the flat rate from \$12 to \$24. The responsible Board Committee referred the request for study by the MFA Committee.

#### **\$24 in 1996**

Effective January 1, 1996, the Board of Governors increased the flat rate reimbursement rate by \$12 to \$24 and expanded the reimbursement policy later that year to apply also to fee mediations conducted by local bar programs under the auspices of the Mandatory Fee Arbitration Program.

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<sup>1</sup> The number of fee arbitration requests reported is based on the number of requests for reimbursements received by the State Bar's Mandatory Fee Arbitration Program. Local bar programs are not mandated to request reimbursement or report to the State Bar the number of arbitration matters it assigns. However, staff is confident that the numbers in the memo represent a fairly accurate number of mandatory fee arbitrations held throughout the state.

In 1998 the reimbursement policy was placed on indefinite hiatus following the State Bar's fiscal crisis in 1998. To help recoup the loss of reimbursement by the State Bar to the local bar programs, effective July 1, 1998, the Board of Governors authorized the local bar programs to charge a fee of \$24 per arbitration request filed in addition to the applicable filing fee required by the local program.

In 2001, in response to requests from the local bar associations to reinstate the State Bar's fee arbitration reimbursement policy, the Board reinstated reimbursement to the local bar associations in 2002 at the \$24 flat rate. The amount budgeted by the State Bar for total annual local bar reimbursement was \$60,000.

### **\$36 since 2007**

In 2006, local bar associations with MFA programs sought an additional increase to \$36 per case, which the Board of Governors authorized for 2007. To accommodate this increase, the total annual local bar reimbursement budget was raised to \$70,000.

Attached for your reference (Attachment B) is a chart showing local bar MFA reimbursements by the State Bar since the last increase (2007-2011). The chart compares total annual reimbursements by the State Bar paid to each program as well as the total annual amount paid by the State Bar to the local bar arbitration programs.

### **2010 Request for Increase**

In November 2010, this proposal (increasing the reimbursement rate from \$36 to \$50) was presented to the then-Board of Governors for consideration. At that time, the Board denied the proposal. This agenda item revives that request.

### **Reimbursement in 2011**

In 2011, the local bar fee arbitration programs received reimbursement for 1,485 assigned arbitrations, totaling \$54,460. The 2011 budget for the business unit used for local bar reimbursements was \$77,500. The 2012 budget is also \$77,500.

The contracts that are issued to and signed by each local bar association are structured in such a way that the budget for that business unit (currently \$77,500) will never be exceeded. A clause in those contracts states that, in the last quarter of the year, if the anticipated total payout for reimbursement exceeds the remaining balance in the business unit, then the remaining balance will be allocated to each local bar association based on the number of arbitrations it assigns.

### **Factors Supporting Rate of Reimbursement Increase**

The local bar request for an increase is based on several factors. First, as a result of the economic recession, local bar program filing fee revenues are down or insufficient to cover increased case filings. Although local bar programs may charge a program filing

fee, the Minimum Standards require that any filing fee must be reasonable and “not in such an amount as to discourage the use of the service.” (Min. Standards, standard 17.) The Committee on Mandatory Fee Arbitration and the State Bar Board of Trustees review the rules of each of the local bar fee arbitration program, including the fee structure, to ensure that the fees are reasonable. Many of the local bar programs submitted their rules for approval in 2010. While some updated their filing fee structure, many did not. The static nature of those fees cause some programs to lose money in light of inflationary pressures of the economy.

Additionally, local bar programs are encouraged to adopt a fee waiver policy to accommodate low income and indigent clients. Fees set by most programs are based on the amount in dispute, so another factor attributable to lower revenues is the increase in the number of low-dollar fee disputes reported by some local programs which do not generate significant filing fees. During difficult economic periods, such as the current environment, clients more frequently seek arbitration of small amounts to help address their own economic issues. Proportionately, the costs involved in administering an arbitration involving relatively low amount is more than the cost of administering a higher dollar dispute. As a result of this confluence, some programs report total decrease in revenue from filing fees despite an uptick in cases filed.

Second, the reimbursement is paid per case only upon assignment by a program to a fee arbitrator or mediator. An estimated ten to fifteen percent of cases filed with the programs are abandoned, settled, or terminated prior to assignment. Therefore, the local programs’ administrative costs for processing those matters, which may take considerable staff and program resources, are never eligible for State Bar reimbursement. Resources are expended in administering these cases, but no reimbursement is received by the local program.

Third, the payments made by the State Bar, while greatly appreciated, were never intended to cover the local bars’ actual operating costs for their MFA programs. Rather, reimbursement is made in recognition that the services provided by the local bars are statutorily mandated to be performed by the State Bar. If local bar programs disbanded their MFA programs, the State Bar would be required by statute to provide MFA services instead. The State Bar would be hard pressed to absorb the actual costs of administering this void in all counties or replicate the quality of service provided, given that volunteer arbitrators and arbitration hearings are all county based.

Finally, low cost, locally based MFA sponsored by local bar associations reflects a legislative preference over centralized MFA administered by the State Bar exclusively. (Bus. & Prof. Code § 6201(d). Local fee arbitration provides numerous benefits to both members and the public, including the ability to tailor procedures to accommodate regional differences. Continued subsidization of the local bar fee arbitration programs helps ensure continued MFA services at the local level.

## **Reports from the Local Bar MFA Programs**

No formal survey reporting local bar program operational costs exists. To address that, staff arranged for an informal email survey of the local bar associations which have executive directors and to the local bar MFA administrators. Responses were received from the following programs: Alameda, Beverly Hills, Contra Costa, Los Angeles, San Luis Obispo, San Francisco (BASF), Santa Clara, Santa Monica, Sonoma and Ventura. Not surprisingly, all participating MFA providers would welcome a higher reimbursement rate and all programs reported that costs have increased in recent years.

The responses to the survey revealed the following information:

#### Increased costs

All of the local bar association programs report that they have experienced increases in costs to run their programs. Many of the programs report that there have been increases in copies, supplies, postage and other office-related expenses. Los Angeles and Alameda cite 11% and 8% increases, respectively since 2010. Santa Clara reports an increase of \$11,000 since 2009, representing a 9% increase.

Staffing costs, including rising health care benefits, have caused programs to experience shortfalls in budgeting relating to the Mandatory Fee Arbitration Program. Santa Monica reports that staff pay cuts were implemented to ensure the continuation of services offered by the bar association. Other programs augment their fee arbitration budget with fees received from their lawyer referral services. This is necessary to ensure that the public has access to a valuable and successful program. While the proposed increase is not intended to cover all of the increases in costs that have occurred since the last time the reimbursement rate was modified, the proposal is designed to help decrease shortfalls experienced by the local bars and help ensure the continued availability of the mandatory fee arbitration at the local level.

#### Impact of fee waivers

In an effort to ensure availability of the fee arbitration program to low-income individuals, many programs offer fee waivers or fee reductions. The requesting party can ask for the waiver and supply documentation to support the rationale for the request for the fee waiver/reduction. Fee waivers are not automatic; the programs must weigh the evidence before it to determine if the request for the fee waiver should be granted. It is important to note that a local bar's financial situation is not a factor in determining whether a fee waiver will be granted or not. The ruling is solely based on the applicant's ability to demonstrate the need for the waiver. In order to keep this program available to low-income individuals, the increase is recommended to help offset the loss of fees from granted fee waivers.

Not all of the programs responding to the survey provide fee waivers. However, for those programs that do provide fee waivers, the impact is significant. Los Angeles reports that 22% of their cases involve requests for fee waivers. While not all fee waiver requests are granted, each of those request must be considered individually, requiring

significant staff and volunteer time to determine whether the request should be granted or not.

Alameda County reports a 14% loss of revenue from fee waivers and Santa Clara notes that since 2009, 16 requests for fee waivers were granted, costing the program \$4,517 in lost revenue. While the proposed reimburse increase would not cover all losses experienced by these programs, the increase would help decrease the shortfall these programs are facing.

For a more detailed review of the responses received from the local bar programs, Attachment C provides that information.

#### Impact on budget if denied

In the survey that was circulated to bar associations with executive directors and administrators of the local bar programs, we asked what the impact would be if this proposal was denied. While two programs stated that there would be a nominal impact, most responded that the proposed increase would help ensure continued operation of the program at the local level. Santa Monica commented that they would have to consider staffing pay cuts, while Alameda cited that they might need to return to discussing the continued existence of the program. While these may be extreme examples of the potential result of denial of this request, it illustrates the lengths to which the local bars go to in order to offer this program. Monies from other revenue-generating programs is allocated to fee arbitration in order to cover expenses while reduction or waiver of fees are granted to make the program available to those who may not be able to afford it.

A potential result that was not noted in the survey responses is that, if the increase is not permitted, programs may seek fee increases in order to continue operation of this program at the local level. These potential increases could put this program even further out of reach for those people who are indigent or are otherwise unable to pay. Such increases are subject to approval by the Board of Trustees.

#### **CONCLUSION:**

All of the county bar programs who offer fee arbitration programs truly believe in the service they are providing to the citizens of California, to the courts and the legal profession. While the requested fee increase does not address all budget concerns they may be experiencing, the proposal does help stem some of the loss local bars are experiencing by offering this service. This proposal also expresses a debt of thanks to those programs for administering the lion's share of mandatory fee arbitrations in California.

**FISCAL / PERSONNEL IMPACT:**

If this proposal is approved, there would be no fiscal impact. The recommended increase from \$36 to \$50 per case can be absorbed by the 2012 budget for local bar reimbursement without impacting the functions of the State Bar's Mandatory Fee Arbitration Program or the work of the Committee on Mandatory Fee Arbitration. No personnel impact will result from this increase.

**RULE AMENDMENTS:**

None

**BOARD BOOK IMPACT:**

None

**RECOMMENDATION**

Based on information contained in this memo, staff recommends adoption of this proposal.

**PROPOSED BOARD COMMITTEE RESOLUTION:**

Should the Planning, Program Development and Budget Committee agree with the above recommendation, the following resolution would be appropriate:

**RESOLVED**, that the Planning, Program Development and Budget Committee recommends that the Board of Trustees authorizes an increase in the reimbursement rate to local bar associations for each fee arbitration or fee mediation matter it assigns pursuant to Business and Professions Code 6200 et. seq. from \$36 to \$50 effective July 1, 2012.

**PROPOSED BOARD OF TRUSTEES RESOLUTION:**

Should the Board concur with the Planning, Program Development and Budget Committee's recommendation, the following resolutions would be in order:

**RESOLVED**, that upon the recommendation of the Planning, Program Development and Budget Committee, the Board of Trustees hereby authorizes an increase in the reimbursement rate to local bar associations for each fee arbitration or fee mediation matter it assigns pursuant to Business and Professions Code 6200 et. seq. from \$36 to \$50 effective July 1, 2012.