

AGENDA ITEM

DATE: October 30, 2012

TO: Members, Regulations, Admission and Discipline Oversight Committee

FROM: Douglass Hull, Director
State Bar Mandatory Fee Arbitration Program

SUBJECT: State Bar Rules, Title 3, Division 4, Chapter 2, Fee Arbitration - request for public comment

EXECUTIVE SUMMARY

The rules of State Bar programs have been undergoing revision since 2005. Rules governing the State Bar's mandatory fee arbitration program are among the last to be revised. Revised rules are organized into a single structure called the Rules of the State Bar, recast into clearer and simpler language and follow shared basic principles.

This agenda item requests a forty-five day period of public comment on proposed revisions to the rules governing the mandatory fee arbitration program and the Schedule of Charges and Deadlines. The Committee on Mandatory Fee Arbitration has reviewed and provided input on the revisions.

The revised rules are placed in the State Bar Rules at Title 3, Programs and Services. It is anticipated that the revised fee arbitration rules will be the basis of revisions to the rules of fee arbitration programs conducted by local bar associations.

Board members with questions may contact Doug Hull at doug.hull@calbar.ca.gov or (415) 538-2015, or Mary Yen at mary.yen@calbar.ca.gov or (415) 538-2369.

BACKGROUND

The Rules of the State Bar provide one structure for more than two dozen sets of program rules that formerly had their own organizational scheme and stylistic conventions. The new structure was adopted by the Board of Trustees in July 2007 and consists of seven Titles:

- Title 1. Global provisions
- Title 2. Rights and responsibilities of members
- Title 3. Programs and services
- Title 4. Admissions and educational standards

Title 5. Discipline
Title 6. Governance
Title 7. Miscellaneous provisions

Title 1 provides basic principles for all State Bar rules, including scope of the rules; the public comment rule; principles of construction and usage conventions; definition of common terms; and explanation of how to compute dates. All State Bar rules must be read in the context of the global provisions of Title 1, absent a provision to the contrary. One global rule concerns exclusions from the rules, as follows:

Rule 1.4 Exclusions. The Rules of the State Bar do not include

- (A) Rules of the Supreme Court of California or California Rules of Court that apply to the State Bar, its members, services, or programs;
- (B) statutes or case law applicable to the State Bar, its members, services, or programs; or
- (C) policies and procedures that relate to the internal management or operations of the State Bar.

ISSUE

Whether to authorize a forty-five day public comment period on the proposed revisions to the rules governing the mandatory fee arbitration program (Attachment A).

DISCUSSION

State Bar rule 1.10 (Public comment) requires public comment before State Bar rules can be adopted, amended, or repealed. The standard public comment period of forty-five days can be shortened to a minimum of thirty days or extended to a maximum of ninety days. Authorization for public comment implies no position on the proposals by the board committee or the Board of Trustees.

1. Primary Changes

The primary changes made by the revisions are discussed below.

Reorganization. The revised rules place related topics together under three articles with these overarching themes: general provisions; State Bar fee arbitration proceedings and award; and enforcement. The revisions improve the organization of the current governing rules.

Current fee arbitration rules are organized into ten articles covering these topics: definitions; arbitration generally; the State Bar program; initiation of fee arbitration, panels; the hearing; the award; enforcement; service; and referral for discipline. There is no overarching theme for how the rules are organized except perhaps by chronological occurrence. Some current rules have multiple subject matters. For instance, compensation of arbitrators is treated with the rules on hearings.

Procedural requirements. The revised rules transfer the operational details of procedural requirements to forms and their instructions whenever feasible. The transfer simplifies updating of operational provisions for deadlines, addresses, specific language, and the like. Compliance with the detail requirements of forms and instructions is assured by State Bar rule 1.24, which states “When a rule refers to a form, the State Bar reserves the right to reject a form that is altered in language or structure or that is not completed and submitted according to instructions.”

For example, the current rule regarding the request for fee arbitration has procedural details such as requirements for signatures and mode of payment. Revised rule 3.530 simply refers to the State Bar form called Request for Arbitration, which indicates the user should look to the application form for such details.

Language of the award. Current rule 41.3 recites substantially the language that must appear on an award form. Revised rule 3.544(B) moves the required language to the award form, stating that “The award must be in writing on the State Bar Arbitration Award form ...”. The State Bar Arbitration Award form will contain the required language that is stated in the current rule.

Schedule of Charges And Deadlines. The Rules of the State Bar refer to a central fee schedule rather than state charges, fees and deadlines in the rules of each program. A Schedule of Charges and Deadlines for all State Bar rules ensures that fees and deadlines can be found in a single location and provides the Board of Trustees an opportunity to review amounts periodically and adjust them in light of current economic factors. For instance, revised rule 3.534(A) states that “The party requesting arbitration must submit the filing fee set forth in the Schedule of Charges and Deadlines with the Request for Arbitration or when the State Bar accepts removal of jurisdiction in accordance with these rules.”

Attachment B is an example of how the fee arbitrations fees and deadlines will be transferred to the Schedule of Charges and Deadlines. There are no changes in the fee arbitration fees and charges appearing on the schedule. Public comment is not requested on Attachment B; it is provided for information only.

Other Substantive changes. The revisions include a change to close a gap and another change to improve efficiency.

First, current rule 42.0 provides for correction or amendment of an award. Current rule 42.1 specifies the grounds for correction, but does not specify the grounds for amendment. Proposed rule 3.545(A) identifies grounds for amendment, using language from *Arbitration Advisory 03-02, The Amendment of Supplementation of Arbitration Awards, March 27, 2003*:

Rule 3.545(A). An award may be corrected or amended by the sole arbitrator or at least two concurring members of a panel. Correction is permitted only for an evident mistake in calculation or a description of a person, thing, or property, or

for a defect of form not affecting the merits of the dispute. Amendment is permitted when an award is inadvertently incomplete and amendment does not substantially prejudice the legitimate interests of a party. Unless requested by the arbitrator, no additional testimony or documentary evidence may be submitted.

A second change concerns a condition required to modify or rescind an order for administrative penalties in response to an attorney's request. Current 49.0 (a)(1) states that an essential condition required to modify or rescind an order for administrative penalties is an attorney's failure to receive the order. Because proving receipt is difficult, proposed provision 3.564(C) changes the required condition from failure to receive an order to failure to be served the order:

In response to the attorney's written request, the presiding arbitrator may modify or rescind an order for administrative penalties if all of the following conditions are met:

- (1) the attorney agrees to comply with the award;
- (2) the attorney was not served the order for administrative penalties; and
- (3) the attorney satisfactorily establishes in a declaration under penalty of perjury that he or she promptly submitted a request that warranted modification or rescission of the penalties.

2. Format of the Revised Rules as Published for Public Comment

The attached revised fee arbitration rules use endnotes extensively for two purposes.

First, because the rules are recast into a new organization with simplified, clearer language, a redlined legislative edit of the current rules would be virtually illegible and impossible to follow. In place of a legislative style edit of the current rules, endnotes appearing in italics are drafters notes used to explain a revision or to indicate the current rule that is the source of a revised rule. (See, e.g., endnote 40, which explains a revision in revised rule 3.513.) Italicized drafters endnotes will not appear in the final revised rules.

Second, endnotes appearing in roman type will be in the final revised rules. Roman type endnotes cite to governing authority for a rule, such as a governing Business and Professions Code statute, or cross reference to a related revised rule. (See, e.g., endnote 1, which appears in revised rule 3.500 to cite statutory authority for the Board's adoption of fee arbitration rules.) Authority cited in an endnote is part of the rules, in accordance with global rule 1.20(K) (Construction): "If a rule cites the authority for the rule, the citation is part of the rule."

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

If approved following public comment, the revised rules will be placed in Title 3, Division 4, at Chapter 2.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

Staff and the Committee on Mandatory Fee Arbitration recommend that the Regulation, Admissions and Discipline Oversight Committee authorize a forty-five day public comment period for the attached proposed revisions to the rules (Attachment A for the mandatory fee arbitration program. The comment period would begin November 16, 2012 and run through December 31, 2012.

PROPOSED RESOLUTION OF THE REGULATION, ADMISSIONS AND DISCIPLINE OVERSIGHT COMMITTEE:

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

RESOLVED, the Board Committee on Regulation, Admissions and Discipline Oversight authorizes for publication, for a forty-five day public comment period from November 16, 2012 through December 31, 2012 the proposed revised rules(Attachment A) for the mandatory fee arbitration program of the State Bar and it is

FURTHER RESOLVED, that this authorization to release for public comment is not, and is not to be construed as, an approval of the proposed rules.

ATTACHMENTS:

- A. Proposed revised rules governing the State Bar's mandatory fee arbitration program
- B. Draft Schedule of Charges and Deadlines for the mandatory fee arbitration program, for information only