

AGENDA ITEM

54-122 MAR

DATE: February 12, 2013

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

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

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

EXECUTIVE SUMMARY

This agenda item returns proposed State Bar rules 3.500-3.566 [fee arbitration] from a forty-five day period of public comment. No public comments were received. It is requested that the Board adopt the proposed rules to govern the State Bar's mandatory fee arbitration program and repeal the existing rules governing the program, effective July 1, 2013.

The Committee on Mandatory Fee Arbitration has reviewed the proposal and concurs with the request. It is anticipated that rules 3.500-3.566 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 over two dozen State Bar programs have been undergoing revision since 2005. Revised rules are organized into a single structure called the Rules of the State Bar, are recast into clearer and simpler language and follow shared basic principles. The Rules of the State Bar were adopted by the Board in July 2007 and consist 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

Rules governing the State Bar's mandatory fee arbitration program are among the last to be revised. If adopted by the Board, the revised fee arbitration rules will be placed in the State Bar Rules at Title 3, Programs and Services, as rules 3.500-3.566.

Title 1 provides basic principles for all State Bar rules, including scope of the rules; principles of construction and usage conventions; and definition of common terms. 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 adopt rules 3.500-3.566 of the Rules of the State Bar (Attachment A) and repeal the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar.

DISCUSSION

The proposal was approved for a forty-five day period of public comment ending December 31, 2012. No public comments were received.

The Committee on Mandatory Fee Arbitration reviewed the proposed revised rules before and after the public comment period. The committee concurs with the request to adopt the revised rules and repeal the current Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar.

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 details 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 ...”. This form will have the language that currently appears in the rule.

Other substantive changes. 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.

Renumbering the rules

The revised fee arbitration rules are numbered as 3.500-3.566 to indicate their placement in Title 3 of the Rules of the State Bar. All revised rules adopted by the Board have been renumbered to indicate their placement in the Rules of the State Bar.

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.”

There are no changes in the fee arbitration fees and charges that will be transferred to the Schedule of Charges and Deadlines. If the Board approves the revised rules, the transfer of fees and deadlines to the Schedule of Charges and Deadlines will be requested at the May Board meeting.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

The revised rules will be placed in Title 3, Division 4, at Chapter 2, as rules 3.500-3.566.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

Staff and the Committee on Mandatory Fee Arbitration recommend that the Board adopt rules 3.500-3.566 of the Rules of the State Bar (Attachment A) and repeal the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar, effective July 1, 2013.

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 following public comment and no comments having been received, the Regulation, Admissions and Discipline Oversight Committee recommends that the Board of Trustees adopt rules 3.500-3.566 of the Rules of the State Bar in the form at Attachment A, and repeal the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar, effective July 1, 2013.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Regulation, Admissions and Discipline Oversight Committee's recommendation, the following resolution would be in order:

RESOLVED, that following public comment and no comments having been received, and upon the recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board hereby adopts rules 3.500-3.566 of the Rules of the State Bar in the form at Attachment A, and repeals the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar, effective July 1, 2013.

ATTACHMENT: A. State Bar rules 3.500-3.566 re the State Bar
Mandatory Fee Arbitration program