

STATE BAR OF CALIFORNIA
Voluntary Mediation of Fee Disputes Program
(PROPOSED) MODEL RULES FOR
VOLUNTARY FEE MEDIATION

1. ESTABLISHMENT AND PURPOSE OF A MEDIATION PROGRAM

It is the policy of the Board of Trustees of the State Bar of California (“State Bar”) and the State Bar Mandatory Fee Arbitration Committee (the “Committee”) to promote the consensual resolution of attorney/client fee disputes and attorney/attorney fee disputes and to avoid the unnecessary arbitration of these disputes. The State Bar believes that mediation is a desirable alternative to the fee arbitration program provided by the State Bar pursuant to Business and Profession Code Sections 6200 et seq. The State Bar recommends to the local bar Mandatory Fee Arbitration programs (“Program”) the establishment of a Mediation of Fee Disputes Program governed by these Model Rules for Voluntary Fee Mediation (“Rules”).

2. JURISDICTION

- A. The mediation program is for consensual mediation of fee disputes. Participation is voluntary. No party to any fee dispute will be required to engage in mediation through this program, and any party may terminate the mediation at any stage.
- B. The Programs administer the mediation program of attorney/client fee disputes under Business and Professions Code §§6200 et seq.

3. APPOINTMENTS AND QUALIFICATION OF MEDIATORS

The Program will appoint a pool of volunteer Mediators, both lawyers and non-lawyers, who meet the qualifications established by the State Bar in Guidelines and Minimum Standards for Operation of Mediation Programs, including a requirement of at least 40 hours of mediator training, and any additional experience that Programs may require.

4. THE PROCESS

A. Commencement of Mediation

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 will proceed to arbitration under the Rules of Procedure for Fee Arbitrations.

B. Assignment of Mediator

The Program will notify the parties of the assignment of a Mediator within fifteen (15) calendar days after receipt of a Request and a Reply indicating the willingness to

mediate the fee dispute.

C. Disqualification of Mediator

1. 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 any personal bias regarding the parties or the subject matter, or who feels that the perception of bias could exist, will not serve as the Mediator in the fee dispute.
2. Any party may challenge the Mediator with cause at any time in writing within three (3) calendar days upon discovering a basis for such 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 after receipt of the notice of Mediator Assignment. The challenging party must provide a copy of the challenge to the other party.
3. Upon the withdrawal or disqualification of the Mediator, the Program will reassign the matter and notify the parties of the new Mediator within five (5) calendar days.

D. Compensation of Mediator

The filing fee initially paid to the Association 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 Association'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.

E. Mediation Session Date

Within five (5) calendar days after the time to challenge a Mediator other than for cause has expired, the Mediator must attempt to arrange a mediation date to take place within forty-five (45) calendar days after the date of the 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. The Mediator must 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 Agreement to Mediate from the Parties in the form provided by the Program and that substantially complies with the State Bar of California's approved form.

F. Mediation Session Date Continuance

A party may ask the Mediator for a continuance of the mediation session date. Any continuance is at the discretion of the Mediator. If the other party objects to the continuance request, the requesting party may either attend the 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.

G. Preparation for the Mediation Session

Not less than five (5) calendar days before the mediation session, and not more than ten (10) calendar days after the date of the Notice of Mediation, the attorney must provide copies of all detailed billing records relating to the fee dispute to the Mediator and the other party. The parties may, by agreement, exchange other documents containing information relevant to the fee dispute. Either party may provide both the Mediator and the other party with a brief written statement outlining any information not contained in the Request for Arbitration.

H. The Mediation Session

1. Mediation sessions will normally be scheduled for four hours. Additional or longer sessions are permitted as necessary, subject to Section 4 (D) above. Section 4 (D) and these Rules will govern any additional or longer sessions.
2. The parties and their attorney(s) or other advisor(s), if any, and the Mediator will attend the mediation sessions. The Mediator has the discretion to determine if other persons may attend the mediation sessions.

Nothing in these Rules prevents the Mediator from meeting or communicating with the parties or their advisors separately during the mediation sessions. The Mediator may conduct part or all of the mediation sessions by telephone.

3. If a party fails to attend the mediation sessions, the Mediator may reschedule or terminate the mediation. If the mediation is terminated, the fee dispute will proceed to mandatory fee arbitration. The Mediator must report any such action taken to the Program.

5. THE OUTCOME

A. Resolution

If the parties resolve their fee dispute and wish to have the ability 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 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 agreement. The Mediator must promptly notify the Program in writing that the fee dispute is resolved. The Program will close the file and provide the parties with a copy of the State Bar of California's Notice of Your Rights After Mediation. The Mediator will file the original of this agreement with the Program.

B. Written Agreement Requirements:

1. Responsible Attorney

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.

2. Required Language

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

The following agreement is made:

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

[Client] [Non-Client] pays \$ _____

and

Attorney pays \$ _____.

(2) Select one:

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.

(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.)

or

_____ Nothing further will be paid by either attorney or client:

(3) If a lawsuit is pending,

(A)___ Judgment may be entered immediately based on this agreement

Or

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

(4) Complete, final and 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 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.

C. No Resolution

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

6. CONFIDENTIALITY

- A. All communications, negotiations, and discussions during the mediation process are 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. The mediation session(s) and any documents prepared for or during mediation are confidential, under California Evidence Code §§1115-1128, except the agreement itself may be admitted to enforce it as provided in paragraph 5(B)(4).
- C. The Mediator, Program staff and Committee members are deemed ineligible to testify in any civil judicial or quasi-judicial proceeding, including arbitration, as to any statements made at or in connection with the mediation.