

AGENDA ITEM

121 NOVEMBER 2014

DATE: October 23, 2014

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Malcolm Sher, Chair, Committee on Mandatory Fee Arbitration
Doug Hull, Director, Mandatory Fee Arbitration

SUBJECT: Fee Mediation Model Rules, Request for Adoption

EXECUTIVE SUMMARY

Mandatory Fee Arbitration (“MFA”) is available through 38 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, *et seq.* The statute also authorizes the State Bar to administer fee mediation programs.

The State Bar’s Mandatory Fee Arbitration program has created, with Board approval, model rules for fee arbitrations. These model rules are helpful to new and existing fee arbitration programs to ensure uniformity among the various local bar associations and increase the likelihood that their rules comport with the Minimum Standards and Guidelines for the operation of a mandatory fee arbitration program. They are also useful to those local bar programs that wish to institute a new fee arbitration program, and can use some guidance in the development of their rules.

To assist those local bar associations that desire to institute a fee mediation program, the Committee on Mandatory Fee Arbitration (“CMFA”) has developed fee mediation model rules. This item requests adoption of those model rules.

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 (MFA) provides for fee arbitration services sponsored by local bar associations, (Bus. & Prof. Code, §6200, subd (d).) The Board of Trustees 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 38 local bar association programs in addition to the State Bar's MFA program.

The State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("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.

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

ISSUE

Bus. & Prof. Code 6200 *et. seq.* also authorizes the State Bar to oversee fee mediation programs. To date, five (5) local bar associations administer fee arbitration and mediation programs. The rules crafted by each organization were subject to the same requirements as those for fee arbitration programs. However, the CMFA thought it useful to create model rules for fee mediation to aid local bar associations that may wish to initiate a fee mediation program, much in the same way it has for fee arbitration.

At its September 11, 2014 meeting, the CMFA approved the attached set of model rules for mediation. The model rules are intended to provide a framework to administer the mediation process. The committee created the following structure for the layout of the rules:

Establishment and Purpose of a Mediation Program

This section references the authority granted by Bus. & Prof. Code §6200 *et. seq.* for a local bar program to create a mediation program.

Jurisdiction

Establishes that participation is consensual and voluntary for the parties;

Appointments and Qualifications of Mediators

Outlines the qualification of mediators appointed by the local bar program.

Process

This section is the most elaborate. It establishes the commencement of the process, the schedule for assignment of the mediator and the process for challenging a mediator. It also outlines the timeframe for conducting the mediation.

Outcome

If the parties reach consensus, this section is included to provide guidance to ensure implementation of the resolution. The CMFA recommends reducing the agreement in writing. Language is included to aid in enforcement of the agreement. This section also instructs the mediator how to proceed if no resolution is reached.

Confidentiality

This section is intended to ensure that the programs understand strict confidentiality of the mediation process.

The CMFA believes these rules provide a framework that is appropriate for the mediation of fee disputes.

CONCLUSION

Fee mediation is available to those parties who initiate fee arbitration, but wish to explore the possibility of settling the fee dispute with the aid of a mediator. There is no additional cost to mediate a dispute through the local bar programs; the fee charged by the program covers both arbitration and mediation. If mediation fails, the matter returns to arbitration.

The rules attached are intended to aid local bar associations with creation of fee mediation programs. The CMFA respectfully requests approval of these rules by the State Bar Board of Trustees.

FISCAL / PERSONNEL IMPACT

None.

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

None.

PROPOSED BOARD COMMITTEE RESOLUTION:

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

RESOLVED, that the Regulation and Discipline Committee recommends that the Board approved the Model Rules for Voluntary Fee Mediation as developed by the Committee on Mandatory Fee Arbitrations and attached here to; and it is

FURTHER RESOLVED, that amendments by local bar associations to their local fee mediation rules and procedure that conform with the Model Rules approved here are deemed approved by the Board and its designee (RAD) upon the filing with the Director of the State Bar's Office of Mandatory Fee Arbitration such amendments.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

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

RESOLVED, that upon the recommendation of the Regulation and Discipline Committee, the Board hereby approves the Model Rules for Voluntary Fee Mediation as developed by the Committee on Mandatory Fee Arbitrations and attached here to; and it is

FURTHER RESOLVED, that amendments by local bar associations to their local fee mediation rules and procedure that conform with the Model Rules approved here are deemed approved by the Board and its designee (RAD) upon the filing with the Director of the State Bar's Office of Mandatory Fee Arbitration such amendments.