

AGENDA ITEM

701 JUNE 2016

DATE: June 13, 2016
TO: Members, Board of Trustees
FROM: Committee on Mandatory Fee Arbitration
SUBJECT: Request to Depublish *Baxter v. Bock*

EXECUTIVE SUMMARY

The State Bar's Committee on Mandatory Fee Arbitration ("CMFA") is charged with reviewing policies, procedures, guidelines and the law relating to mandatory fee arbitration, attorney's fees and fee agreements and recommending appropriate change or modification. (Board Book, Tab 19, Section 14 (a)). In light of this charge, the CMFA held a meeting on June 13, 2016 and voted to request authorization from the State Bar Board of Trustees to request depublishation of the partially published opinion by the Court of Appeal, First Appellate District, Division One in the matter of *Baxter v. Bock*. This request for depublishation is allowed by California Rule of Court 8.1125.

BACKGROUND

The Mandatory Fee Arbitration program ("MFA") is a statutory program designed to resolve fee disputes between attorneys and clients. (Bus. & Prof. code 6200 *et. seq.*) The program is administered by the State Bar of California and local bar associations throughout the state. The State Bar Board of Trustees approves the rules of the State Bar's MFA program as well as the rules of each local bar association program.

All arbitrators who serve under MFA are volunteers. They are trained by either the State Bar or one of the local bar associations.

The fees paid by the party initiating fee arbitration are set by rule and authorized by the State Bar Board of Trustees. As stated in the Minimum Standards and Guidelines for the Operation of Mandatory Fee Arbitration Programs (Attachment C), the fees are to be:

"...reasonably related to the amount in dispute and the cost of providing the service and shall not be in such an amount as to discourage the use of the service."

Standard 17

Fees can also be waived due to economic hardship.

Due to the voluntary nature of the program, disclosures in MFA arbitrations are much less broad than disclosures in arbitrations heard under the California Arbitration Act (“CAA”). CCP Section 1281.9 requires arbitrators selected or appointed in CAA arbitrations to disclose any matter that could raise doubt that the arbitrator would be unable to be impartial.

The MFAA is expressly exempted from the disclosure standards applicable to contractual arbitrations. See California Rule of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 3(b)(2)(C). This standard provides that the stricter contractual arbitration standards in CCP Section 1281.9 and CCP Section 170.1 do not apply to “an attorney-client fee arbitration proceeding subject to the provisions of Article 13, Chapter 4 of Division 3 of the Business and Professions Code.” (The MFA Act)

CAA arbitrations are generally binding. Arbitrations administered through the MFAA are non-binding unless the parties agree to be bound after the dispute has arisen. A non-binding MFA award can become binding by operation of law if neither party seeks to have the award overturned within 30 days of service of the award.

These differences are key distinctions between MFAA arbitrations and CAA arbitrations.

DISCUSSION

On May 18, 2016, the First District Court of Appeal issued an opinion in the matter of *Baxter v. Bock* (consolidated cases A142342, A142984, A143689, A144112). The matter stems from a fee dispute between an attorney (Baxter) and his clients (Bock). The fee arbitration was administered by the State Bar of California’s MFA program. The parties agreed to be bound by the award. The arbitrator determined that the Client owed the Attorney nothing more.

After the arbitration award was issued, Attorney discovered that the arbitrator had experience as a legal fee auditor. Attorney sought to vacate the award partially based on this discovery. Clients sought to confirm the award. The trial court confirmed the award and awarded attorneys’ fees to clients.

Attorney appealed the trial court decision, in part because of the legal auditing experience of the arbitrator. Client also appealed, but on an issue related to the amount of attorneys’ fees awarded (this is unrelated to the concerns of the CMFA).

The Court of Appeal ultimately upheld the majority of the underlying court’s findings. However, there is language in the opinion relating to disclosure requirements of MFA arbitrator that concerns the CMFA. Since the matter was not originally designated for publication, the CMFA did not plan to take any action.

On May 24, 2016, the Court of Appeal issued a supplemental order certifying portions of the opinion for publication, including the language relating the disclosure requirements of arbitrators. Requests for depublication must be submitted within 30 days after the decision is final in the Court of Appeal. (CRC 8.1125(a)(4))

ISSUE

In *Baxter v. Bock*, section II.B.A (Attachment B, Page 12) discusses disclosure in the section entitled "Disclosure Requirements under the MFAA".

While the overall findings in the opinion are compatible with the existing framework of the MFA program, there is text contained in the opinion, that is troubling to the CMFA. On page 13 of Attachment B, the latter part of paragraph 2 reads as follows:

"... the general disclosure requirements of the MFAA and CAA are, for practical purposes, the same, and decisions under the "impartiality" disclosure requirements of the CAA may be applied in evaluating arbitrator disclosure obligations under the MFAA."

This language is of concern to the CMFA. As explained in the letter to the Supreme Court (Attachment A), if this portion of the case is deemed certified for publication, it would be extremely detrimental to the MFA program. Requiring (both attorney and non-attorney) volunteer arbitrators to make the same types of disclosures that are required of CAA arbitrators would have a chilling effect on the number of volunteers who participate in this program. It would also negatively impact the workload of the 29 local bar arbitration programs throughout the state, possibly forcing some programs to shutter. Such closers would negatively impact the availability of this valuable program to the citizens of California.

In order to address this issue, the CMFA has written a letter (Attachment A) seeking to de-certify this case for publication. At its meeting on June 13, 2016, the CMFA discussed the attached letter and voted to submit it to the Board of Trustees. The CMFA seeks authorization to submit this letter to the California Supreme Court for consideration.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

None

BOARD GOALS & OBJECTIVES

None.

BOARD COMMITTEE RECOMMENDATION

Staff and the Committee on Mandatory Fee Arbitration request that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees authorizes the Committee on Mandatory Fee Arbitration to send to the Supreme Court the attached letter requesting depublication of *Baxter v. Bock*.

ATTACHMENT(S) LIST

- A.** Final Draft of letter from CMFA to California Supreme Court
- B.** *Baxter v. Bock* First District Court of Appeal Opinion (Cons. Cases A142372, A142984, A143689, A144112)
- C.** Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs.