



The State Bar of California
Committee on Mandatory Fee Arbitration

180 Howard Street, San Francisco, CA 94105-1639

June 14, 2016

To the Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA. 94102

Re: California Rule of Court 8.1125 Request to Depublish the Opinion in *Baxter v. Bock*,
Consolidated Case Nos. A142372, A142984, A143689, A144112 filed May 18, 2016
with Partial Publication Order filed May 24, 2016

Dear Chief Justice and Associate Justices:

The State Bar of California's Committee on Mandatory Fee Arbitration ("CMFA") respectfully requests depublishation of *Baxter v. Bock*, Consolidated Case Nos. A142372, A142984, A143689 and A144112 pursuant to California Rule of Court 8.1125. This depublishation request is timely filed within thirty (30) days of the opinion becoming final.

On May 24, 2016, the Court of Appeal issued an order publishing Part B of the *Baxter* opinion. Part B addresses the obligation of Arbitrator Disclosures in fee dispute arbitrations administered under the Mandatory Fee Arbitration Act ("MFAA") set forth in Article 13 of the State Bar Act and codified in Business and Professions Code Sections 6200-6206.

I. State Bar Mandatory Fee Arbitration Committee Interest in Requesting Depublication

The MFAA was enacted for the purpose of providing an alternative to the courts to resolve disputes between clients and their attorneys concerning the amount of fees charged. The MFAA established a procedurally consumer-friendly program that allows clients and their attorneys to attempt resolution of fee disputes through informal fee arbitration. The statute requires the Board of Trustees to "establish, maintain and administer" a Mandatory Fee Arbitration ("MFA") program and the State Bar delegates the responsibility for such programs to local bar associations to the extent possible. In carrying out that responsibility, the State Bar and local bar association programs rely on unpaid volunteer attorney and lay arbitrators.

As mandated by the MFAA, the State Bar of California's Board of Trustees has directed the CMFA to administer a Mandatory Fee Arbitration program throughout the State, including creation of rules and procedures for disputes under the MFAA. Under the statutory scheme, the State Bar Board of Trustees appoints all sixteen members of the CMFA to three-year terms. The CFMA oversees 29 approved local bar association programs and the State Bar's program, and ensures that all programs follow the *Guidelines and Minimum Standards for the Operation of*

Mandatory Fee Arbitration Programs adopted by the State Bar Board of Trustees (“Minimum Standards”). The CMFA also is responsible for training volunteer attorneys and laypersons throughout the State to serve as arbitrators concerning the rules and procedures which govern MFAA arbitrations, drafts and publishes Arbitration Advisories on the State Bar website to educate arbitrators and programs on MFA rules, and reviews statutes and case law concerning MFA-related issues.

On January 16, 2015 the CMFA published a revised Arbitration Advisory on the issue of MFA arbitrator disclosure. (Arbitration Advisory No. 2015-01 *Disclosure Guidelines*.) The revision replaced and expanded the CMFA’s prior Arbitration Advisories 1994-01, 1995-01 and 1997-01. While the prior 1995 Advisory made clear the CMFA’s position that CCP §1281.9 did not apply to MFA proceedings, the new advisory further reflects the Judicial Council’s subsequent Ethics Standards for Neutral Arbitrators in Contractual Arbitration and recent case law confirming the CMFA’s opinion on that issue. See, California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitrations, Standard 3(b)(2)(C); see also *Benjamin, Weil & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 60-61, fn. 10.

The *Baxter* decision, at Part B, contradicts the Judicial Council’s Ethics Standards, contravenes the Court of Appeal’s statements in *Kors* concerning application of CCP Section 1281.9 to MFA proceedings, and negates Rule 3.537(B) of Title 3, Div. 4, Chapter 2, Rules of the State Bar of California pertaining to Mandatory Fee Arbitration (“State Bar Rules”) and CMFA Arbitration Advisory 2015-01, which is on point. The opinion, if applied to the MFA program, will impact the manner in which the State Bar and local bar associations manage the MFA program. The CMFA’s interest in depublication is based on its responsibility to the State Bar of California and the MFA program and the onerous disclosure obligations the decision would impose on MFA programs thereby undermining the ability of the State Bar and local bar associations to operate such programs.

II. Reasons for Depublication of *Baxter*

The *Baxter* opinion should be depublished because it misapplies the type of disclosure requirements set forth in the California Arbitration Act (“CAA”) to a MFAA fee arbitration, and application of such disclosure obligations would substantially damage the existence of the program under its current framework.

The *Baxter* court mistakenly states, “[T]he 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.” *Baxter*, Section II.B2 (a), *Disclosure Requirements under the MFAA*, at 13. Instead the disclosure requirements for private contractual arbitration under the CAA do not apply to arbitrations under the MFAA. The Judicial Council’s decision to exclude MFAA arbitrations from the CAA is sensible given the MFAA framework; CAA disclosure standards are more stringent than would be appropriate in MFAA hearings.

In reaching its conclusion that the general disclosure requirements of the MFAA and CAA are, for practical purposes, the same, the *Baxter* court relied upon an outdated 2005 Fee Arbitration

Handbook no longer used by CMFA, rather than the actual State Bar Rules approved by the CMFA and the Board of Trustees or the Arbitration Advisories (see attached Arbitration Advisory 2015-01). The 2005 Fee Arbitration Handbook (which has since been modified) is simply a secondary resource prepared by the CMFA. In its training materials, the CMFA recommends that its volunteer arbitrators recuse themselves if they do not believe they can, for any reason, be impartial and that they disclose any past or present relationship to any party or participant in the MFA proceeding and any other facts that may bear upon her or his disqualification. The CMFA training materials stress that while arbitrators are exempt from the contractual arbitration disclosure requirements under C.C.P. §1281.9, arbitrators should always err on the side of broad disclosure. CMFA Fee Arbitrator Training Outline, Section IV.B (2)&(4).

Baxter involves a fee arbitration administered by the State Bar's MFA Program under the State Bar Rules. State Bar Rule 3.537 governs disclosures and disqualification of arbitrators (not the 2005 Fee Arbitration Handbook). Rule 3.537(A) and (B) provides as follows:

“(A) A party may disqualify one arbitrator without cause. A party is entitled to unlimited challenges of an arbitrator for cause. The State Bar must be notified of the disqualification within fifteen days of serving the Notice of Arbitrator Assignment.

(B) An arbitrator who believes he or she cannot render a fair and impartial decision or who believes there is an appearance that he or she cannot render a fair and impartial decision must disqualify himself or herself or accede to a party's challenge for cause. If the arbitrator believes there are insufficient grounds to accede to a challenge for cause, the presiding arbitrator decides the challenge. The decision is final.”

The CMFA drafted, and the State Bar Board of Trustees approved, State Bar Rule 3.537, which is, by design, much narrower than the broad disclosure requirements applicable to contractual arbitrators under C.C.P. §1281.9. The court's decision mistakenly relies on the 2005 Training Handbook rather than the approved State Bar Rules in its conclusion that the disclosure requirements for MFA arbitrators are “for practical purposes” the same as the disclosure requirements for CAA arbitrators. As discussed more particularly below, if that now published part of the opinion is allowed to stand as precedent, it will have a potentially devastating impact on MFA programs throughout the State and thereby undermine the intent of the MFAA.

A. Overview of MFA and Differences from CAA

As this Court explained in *Aguilar v. Lerner* (2004) 32 Cal. 4th. 974, 983-086, the MFAA was enacted to address “the most serious problems between members of the bar and public”-- fee disputes between attorneys and their clients. As this Court also noted in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal. 4th 557, 564-567, in order to achieve the objectives of the MFAA, there are significant differences between MFA under the MFAA and conventional contractual arbitration under the CAA.

All Mandatory Fee Arbitrations are subject to statutory mandates of the MFAA and oversight by the State Bar Board of Trustees, through the CMFA. All MFA programs must comply with the *Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs* approved by the Board of Trustees. All local bar association programs rules are subject to the approval first of the CMFA, then the Board of Trustees. The CMFA, and then the Board of Trustees, also must approve the filing fees that the MFA programs charge to cover administrative costs. The Minimum Standards require the filing fees to be sufficiently low to permit wide program access to clients and attorneys and are subject to waiver for economic hardship. Attorneys practicing in California are *mandated* to participate in MFA if the client requests. Bus. & Prof. Code §6200(c). MFA arbitrators volunteer to serve. Thus, both local programs and the State Bar program must locate suitable volunteers to arbitrate or the program fails. The program administering the MFA then assigns the arbitrator (or Arbitration Panel) from a list of arbitrators it already has vetted and trained. Notably, MFA arbitrations are non-binding with a right to trial (or arbitration) *de novo* after an award is issued. Bus. & Prof. Code §6204(a). The parties only may agree to a *binding* MFA *after* their fee dispute has arisen. *Id.* They may not do so by retainer agreement at the beginning of representation; such agreements are unenforceable. Lastly, attorney's fees and costs are not recoverable with the exception that the arbitrator can reallocate payment of the filing fee. Bus. & Prof. Code §6203(c).

In contrast, the CAA regulates private arbitrations of civil disputes and has its own statutory scheme codified in Code of Civil Procedure Section 1280 et. seq. Participation in CAA is based solely on the parties' contract requiring arbitration, and the decision is binding subject to statutory grounds for vacatur. The parties select the arbitrator following the selection process outlined in their agreement or according to the applicable statute if the agreement does not specify the selection process. The parties are required to pay the arbitrator's fee and there can be an award of attorney's fees and costs.

B. Arbitrations under the MFAA are Exempt from CAA Disclosures under California Rule of Court Standard 3(b)(2)(C)

Because of these significant statutory and practical differences between MFAA and CAA, and the MFA's unique statutory structure and oversight, *MFA arbitrations are expressly exempt from the disclosure standards applicable to contractual arbitrations*. See Cal. Rule of Court, Ethical Standards for Neutral Arbitrators in Contractual Arbitration, adopted by the Judicial Council in July 2002. Standard 3, subdivision (b)(2)(C), states: "*These standards do not apply to: An attorney-client fee arbitration proceeding subject to the provisions of Article 13 of Chapter 4 of Division 3 of the Business and Professions Code*" (emphasis added), which is the MFAA.

C. The Statewide MFA Program Will Be Negatively Impacted If the Stringent CAA Disclosure Standards are Required

As mentioned *supra*, the MFA Program depends upon *volunteer* attorney and lay arbitrators. There is a tremendous burden on the State Bar and local bar associations to recruit and train suitable volunteer arbitrators in order to meet the statute's requirements. Many attorney arbitrators volunteer because of their interest in fee disputes cultivated from prior or current experience representing attorneys and clients in fee disputes or legal malpractice actions. Other

attorney arbitrators regularly hear MFA arbitrations involving other attorneys who practice in the same practice area such as family law, criminal law, and business or tort litigation.

Applying CAA requirements in MFAs would require every arbitrator volunteering in the program to be subject to lengthy disclosure obligations. Doing so may well hamper the program's ability to attract volunteers. Indeed, the volunteer element of the arbitrators is the single greatest aspect that sets the MFAA obligations apart from CAA obligations.

The CCA's stringent disclosure requirements are set forth in CCP §1281.9 and the Ethical Standards for Neutral Arbitrators in Contractual Arbitrations in California Rule of Court Standards 7, 8 and 9. These Standards are appropriate for private arbitrations. However, many of these Standards should not apply to MFA. For instance, CAA Standard 7 requires disclosure of general practice background or specific past or current client representation. Many arbitrators will not volunteer with this burdensome requirement. Indeed, as discussed above, the MFA programs *look for* attorneys skilled in the areas associated with fee disputes as most likely volunteers. This knowledge, skill and subject matter experience of the volunteer arbitrators is extremely beneficial to the MFA programs and parties.

Not only will application of CAA disclosure chill volunteerism in this important State Bar program, administering complex disclosure requirements will dramatically overburden the local bar association and State Bar programs both in ensuring proper disclosure of lay arbitrators and attorneys and due to the inevitable increase in challenge requests. The disclosures under the CAA are lengthy and remove a nimble feature of the programs. Since local bar association programs are only permitted to charge filing fees to cover the cost to administer the program, they do not have the same economic resources as private arbitration providers such as private paid programs (i.e. JAMS) to keep the required disclosure lists and records under the CAA standards. The local bar programs work on very limited budgets and staff. If local bar programs perceive the MFA as too costly or difficult to administer they will discontinue their programs. Indeed, in the last several years the number of local MFA programs has decreased from over 40 to 29, largely due to the costs and burdens of running them. In turn, the burden of administering the program will be shifted to the State Bar and possibly disable it from fulfilling the mandates of the MFAA.

MFA programs operating under the statutory scheme outlined in the MFAA have proven to be extremely effective in accomplishing the intended objective of the program--to provide a cost-effective, speedy and less formal method for resolving fee disputes between attorneys who provide legal services in California and their clients. The vast majority of these disputes are kept out of the judicial system in large part because of the volunteer participation of attorneys and laypersons. If the disclosure standards under CAA are applied to MFA, the MFA programs will be far less effective in achieving the important objectives of the MFA and could severely damage the program.

III. Conclusion

For all the reasons stated herein, the members of the State Bar Committee on Mandatory Fee Arbitration respectfully request the Court depublish the opinion of the First District Court of Appeal, Division One in *Baxter v. Bock*.

Sincerely yours,

On behalf of the State Bar of California's
Committee on Mandatory Fee Arbitration,



Jobi Halper, Chair
Committee on Mandatory Fee Arbitration
Of the State Bar of California



Kenneth Bacon, Presiding Arbitrator
Mandatory Fee Arbitration Program
Of the State Bar of California

Attachment: State Bar Committee On Mandatory Fee Arbitration Advisory 2015-01 "Disclosure Guidelines"

cc: Justices of the First District Court of Appeal, Division One
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Hon. Sandra L. Margulies
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ARBITRATION ADVISORY

2015-01

DISCLOSURE GUIDELINES

Replaces and Supersedes Arbitration Advisories 1994-01, 1995-01 and 1997-01

January 16, 2015

Points of view or opinions expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not been adopted or endorsed by the State Bar's Board of Trustees and do not constitute the official position or policy of the State Bar of California.

INTRODUCTION

The State Bar Rules that govern Mandatory Fee Arbitration provide a standard for disqualification when an arbitrator believes he or she cannot make a fair and impartial decision. The purpose of this advisory is to provide guidelines for arbitrators to follow when disclosures should be made about circumstances or relationships which may affect their ability to make a fair and impartial decision. This advisory also explains why the disclosure requirements for private contractual arbitration under the California Arbitration Act do not apply to Mandatory Fee Arbitrations.

DISCUSSION

A. Overview Of Mandatory Fee Arbitration Program and Differences From Contractual Arbitration

The Mandatory Fee Arbitration Act ("MFAA") is codified in Business and Professions Code Sections 6200 et. seq. The Legislature created the MFAA as a separate and distinct arbitration scheme operated by the State Bar of California and local bar associations to resolve disputes between attorneys and clients over legal fees, costs, or both. B&P 6200(a). The California Arbitration Act ("CAA") is found in Code of Civil Procedure Sections 1280 et. seq. It regulates private arbitration in the state. It applies to all civil disputes. Whereas arbitration under the CAA is based on the parties agreement to arbitrate, participation in arbitration under the MFAA is based on a separate statutory scheme that is voluntary for the client and mandatory for the attorney if the client initiates it. B & P 6200(c). Arbitration under the CAA is binding, and

the parties usually agree that the arbitrator's decision will be final. In contrast, an award made in a MFAA proceeding is non-binding, and either party may reject the award and request a new trial unless the parties agree after a dispute has arisen that the award will be binding. B&P 6204(a); *Schatz v. Allen, Matkins, Leck, Gamble & Mallory* (2009) 45 Cal. 4th 557.

Because MFA is a distinct statutory process, the State Bar Board of Trustees has established certain Minimum Standards for Operation of Mandatory Fee Arbitration programs. The State Bar and all local MFA programs must comply with these standards. In addition, the filing fees which the local programs charge the parties are to cover administrative costs only, and the Board of Trustees must approve them. Since the program is designed to be low cost, the fees are usually minimal, so as to permit wide access to attorneys and clients and they can be waived for economic hardship. Neutrals who serve in MFAA programs are volunteers and are not paid. Attorneys' fees and costs are not recoverable in an MFA proceeding, except for possible reallocation of the filing fee in the arbitrator's discretion.

By contrast, in arbitrations conducted under the CAA, the parties select the arbitrator after following the selection process contained in their agreement or in Code of Civil Procedure, the parties pay the required arbitrator's fees and compensation, and there can be an award of fees and costs to the prevailing party. CCP Section 1281.9 requires arbitrators selected or appointed in a private arbitration to disclose any matter that could raise doubt that the arbitrator would be unable to be impartial. As a practical matter, CCP Section 1281.9 also requires disclosure of any matter which may give the appearance of potential bias. In making these disclosures CCP Section 1281.9[a][1] incorporates the disqualification standards for judges set forth in CCP Section 170.1.

Because of these significant statutory and practical differences, 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 most recent case to discuss disclosure requirements in private arbitrations and mandatory fee arbitrations was *Benjamin, Weil & Mazer v. Kors* (2011) 195 Cal. App. 4th 40. In that case, the Court of Appeal addressed the disclosure issue in Footnote 10. The court observed that the disclosure requirements for contractual arbitrations under the CAA did not apply to fee arbitrations under the MFAA citing the exemption under Standard 3(b)(2)(C) and the various differences between the two statutory schemes. *Id.* p. 59.

B. Disclosure Guidelines Under the MFAA

Under Business and Professions Code Section 6204.5 the State Bar is directed to "provide by rule for an appropriate procedure to disqualify an arbitrator upon request of a party."

In Rule 3.537(B) of the State Bar Fee Arbitration Rules (Title 3, Div. 4, Chpt. 2, State Bar Rules) the following standard is provided: “An arbitrator who believes he or she cannot render a fair and impartial decision or who believes there is an appearance that he or she cannot render a fair or impartial decision must disqualify himself or herself or accede to the party’s challenge for cause.”

Based on this standard, if an appointed arbitrator believes he or she cannot render a fair and impartial decision, then he or she should voluntarily withdraw or refuse the appointment. If additional circumstances arise that affect an arbitrator’s ability to issue a fair and impartial decision after the arbitrator’s appointment but before the award is made, the arbitrator should disclose the circumstances to the parties and, if necessary, have the program appoint another person to serve as arbitrator.

The following is a list of suggested questions which a prospective arbitrator may want to consider in making any disclosure:

1. Do you have a financial interest in the fee arbitration?
2. Have you represented the client or the attorney who is the subject of the fee arbitration?
2. Have you practiced with the attorney who is the subject of the fee arbitration?
3. Have you socialized with the client or the attorney who is the subject of the fee arbitration?
4. Are you related to the client or attorney who is the subject of the fee arbitration?
5. Do you have any connection with the attorney, client, potential witnesses or any attorney representing the attorney or client?

It is important to keep in mind, however, that disclosure does not equal disqualification. Thus, while the Committee on Mandatory Fee Arbitration recommends that potential arbitrators err on the side of broad disclosure, it is only necessary for a potential arbitrator to recuse herself or himself if the arbitrator also concludes that the matter disclosed would adversely affect the arbitrator’s ability to render a fair and impartial decision.

CONCLUSION

An award under the MFAA is not binding absent a written agreement to make it binding after the fee dispute has arisen. One of the most important factors in deciding whether or not to accept an award is whether the parties believe they have received a fair and impartial hearing.

Thus, it is vitally important to the success of the MFA program for each arbitrator to make the recommended disclosures to ensure that both the client and attorney not only receive a fair hearing, but also that the parties believe that the arbitrator(s) have been open and forthright about any circumstances or relationships that possibly might be perceived, however remotely, to have had an impact on their impartiality.