

AGENDA ITEM

161 MARCH 2017

DATE: February 17, 2017

TO: Members, Stakeholders, Access to Justice, and Appointments Committee
Members, Board of Trustees

FROM: Douglass Hull, Director

SUBJECT: Modification to Guidelines and Minimum Qualifications of Arbitrators for
State Bar Fee Arbitration Department

EXECUTIVE SUMMARY

The appointment of fee arbitrators to the Mandatory Fee Arbitration Program is guided by the Guidelines and Minimum Qualifications of Arbitrators ("Guidelines") to the State Bar Fee Arbitration Department. This item requests modification to the Guidelines to clarify that the Presiding Arbitrator and Director have some discretion in appointing arbitrators who may have had a criminal conviction or discipline imposed.

BACKGROUND

The State Bar's Mandatory Fee Arbitration Program ("MFA") is responsible for hearing and resolving fee disputes between attorneys and clients. Business and Professions Code 6200 *et. seq.* mandates the State Bar to "establish, maintain, and administer a system and procedure for the arbitration...of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar or by members of the bar of other jurisdictions." (B&P 6200(a))

The Program accepts jurisdiction of cases where either: 1) there is no local bar program with jurisdiction over the matter or 2) a party claims, and it is determined, that he or she cannot obtain a fair hearing through the local bar program. When a fee arbitration request is filed with the State Bar's Mandatory Fee Arbitration Program, the arbitration is required to be conducted in the county where substantial legal services were rendered (Rule 3.507(a), Rules of the State Bar of California, Tit. 3, Div. 4, Chpt. 2). Therefore, the State Bar Fee Arbitration Department must maintain a panel of available, qualified fee arbitrators to cover all counties in the state. For arbitrations over \$15,000, three-member panels are appointed with one panelist being a lay arbitrator. The Bar must recruit both attorneys and non-attorneys in order to handle those disputes in excess of \$15,000.

DISCUSSION

The MFA maintains a roster of volunteer attorney and non-attorney (“lay”) fee arbitrators. In order to determine who qualifies to serve as an arbitrator, the State Bar Board of Trustees adopted the Guidelines and Minimum Qualifications of Arbitrators (“Minimum Qualifications”) in 2001. The Minimum Qualifications have been revised throughout the years as necessary.

In July, 2016, it was discovered that the Minimum Qualifications contained conflicting language with regard to the appointment of attorneys who may have a prior conviction or public discipline imposed by the State Bar Court or other professional discipline.

The current policy contains two references to imposition of discipline or criminal convictions where the applicant *may* be denied appointment to the panel. In Section II, paragraph 2, the current policy reads (see Attachment A):

“Conviction of a crime for any felony or misdemeanor *may* constitute grounds for rejection of the applicant or removal from the State Bar Fee Arbitration Department panel. The filing of disciplinary charges with the state Bar Court or imposition of any public discipline by the State Bar Court of a federal court authorized to impose comparable professional discipline against attorneys *may* constitute grounds for rejection of an application or removal from the program”

(emphasis added)

Later in the Guidelines (see Attachment A, Section II. Paragraph A.1.(3)), the language indicates that professional discipline is a bar to appointment as an arbitrator:

“...*no applicant shall have a pending professional disciplinary matter filed with the State Bar Court or the imposition of any public professional discipline by the State Bar of California or by any federal court authorized to impose comparable professional discipline against attorneys at any time.*”

(emphasis added)

However, that same paragraph goes on later to state:

“The existence of any pending federal or other state bar discipline *may* be considered by the Appointments Selection Committee as grounds for denial of appointment to the Fee Arbitration Department”

(emphasis added)

That overall tenor of the language indicates that the Presiding Arbitrator and the Director can exercise discretion when it comes to recommending members to the panel who may have discipline and/or a conviction.

The Board Book also speaks to the issue of criteria for appointments relating to attorneys involved in the discipline system. The Board Book includes the following language:

“Section 2 Criteria

The Board adopts the following criteria to guide the board committee which reviews, reports on and makes recommendations to the Board concerning such appointments:

(a) In considering recommendations of applicants to the Board for appointment, the board committee shall:

...

(4) Identify factors which could militate against appointment, but which should be weighed among other factors:

(a) if a lawyer appointment, any public information known to the State Bar about the applicant or a record of public discipline imposed

...

In no case shall the Board of Trustees appoint a person who is subject to State Bar disciplinary probation.”

(Board Book, Tab 5.3, Article 2, Section 2 (a)(4)(a))

This policy indicates that a record of discipline would militate against the appointment of an applicant to serve as arbitrator, but the issue must weighed among other factors.

The MFA is very careful about the appointment of State Bar Arbitrators. The goal of the program is to ensure that quality applicants are appointed to serve. The MFA is aware that many attorneys may have experienced issues in their past, have dealt with those issue and have rehabilitated themselves. The CMFA believes that the Appointments Selection Committee should be offered some latitude in this regard to advance the names of those members who may erred at some point in the past, but have seen the error of their ways and have made amends since then.

In light of this philosophy, the Committee on Mandatory Fee Arbitration (CMFA) has drafted proposed modifications to the minimum standards to address the conflicting language with the current policy. The CMFA also proposes other modifications to the Minimum Standards to align the language of the policy to other ethical obligations that attorneys currently must comply with. The proposed policy modifications include references to reporting requirement of Bus. & Prof. Code 6068(o)(e). The revisions are included as Attachment B (legislative format) and Attachment C (clean format).

The specific language to address the issues identified above is included in new paragraph III. B.(3):

“...an applicant must:

...

not have a pending professional disciplinary matter filed with the State Bar Court, any federal court or agency, or other state bar discipline authority. Conviction of a crime for any felony or misdemeanor required to be reported under Business & Professions Code

section 6068(o)(5) may constitute grounds for rejection of the applicant. The imposition of any public discipline by the State Bar Court, or a federal court or agency or other state bar discipline authority authorized to impose comparable professional discipline against attorneys may also constitute grounds for rejection of an application.”

This language does not allow any attorney with a pending disciplinary matter to be appointed as an arbitrator, but does allow for those who may have had discipline imposed in the past to possibly serve, at the discretion of the Appointment Selection Committee and the Board. The rationale behind these changes is to allow the possibility of appointing an attorney who may have had disciplinary issues in the past serve as an arbitrator. Attorneys currently involved in the discipline system are not allowed to be appointed, but if they are exonerated of all charges, they can reapply to serve, if they so desire. If discipline has been imposed, appointment is dependent upon the nature of the discipline, the length of time that has passed since the imposition of discipline and consideration of harm to the clients.

Additional modifications to the policy incorporate the requirements that non-lawyer arbitrators must not have worked for a public or private law office or practice, court of law or attended law school or have worked as a paralegal or other law firm staff. These requirements currently exist in the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, as approved by the Board of Trustees (Attachment D). The language is incorporated here for ease of reference.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None

BOARD GOALS & OBJECTIVES

BOARD COMMITTEE RECOMMENDATIONS

If the Stakeholders, Access to Justice, and Appointments Committee agrees with the recommendation of the CMFA to update the appointment policy, it is requested that the Committee recommends that the Board of Trustees adopt the following resolution:

RESOLVED, that the Board of Trustees approves adoption of the modification of the Guidelines and Minimum Qualifications of Arbitrators for the State Bar Fee Arbitration Department as attached hereto as Attachments C.

ATTACHMENT(S) LIST

- A.** Guidelines and Minimum Qualifications of Arbitrators for the State Bar Fee Arbitration Department (current)
- B.** Proposed modifications to Guidelines and Minimum Qualifications of Arbitrators for the State Bar Fee Arbitration Department (legislative format)
- C.** Proposed modified Guidelines and Minimum Qualifications of Arbitrators for the State Bar Fee Arbitration Department
- D.** Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs