



The State Bar *of California*

OPEN SESSION AGENDA ITEM MARCH 2019 REGULATION AND DISCIPLINE COMMITTEE II.A

DATE: March 14, 2019

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence
Isabel Liou, Attorney, Office of Professional Competence

SUBJECT: San Mateo County Bar Association's Proposed Revisions to Mandatory Fee Arbitration Rules of Procedure: Addition of Fee Mediation Rules

EXECUTIVE SUMMARY

This item requests the Regulation and Discipline Committee (RAD) approve proposed rule revisions to the San Mateo County Bar Association (SMCBA) Rules of Procedure for Fee Arbitrations, as set forth in Attachment A.

At its November 2, 2018 meeting, the State Bar's Committee on Mandatory Fee Arbitration (CMFA) reviewed the SMCBA's proposed rule revisions and determined that the requested changes, subject to several minor revisions which the SMCBA later made, comport with the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs (Minimum Standards).

BACKGROUND

Pursuant to Business and Professions Code section 6200(d), local bar associations are authorized to sponsor voluntary fee mediation and mandatory fee arbitration programs. The programs' local rules of procedure must comply with Business and Professions Code sections 6200-6206 and the Minimum Standards adopted by the State Bar Board of Governors in 1978, and last updated in 2010. Approval by the Board of Trustees gives the local bar programs

jurisdiction to mediate and/or arbitrate fee disputes submitted under the auspices of the Mandatory Fee Arbitration Program (Minimum Standards, Para. 1).

RAD last approved revisions to the SMCBA's rules of procedure for fee arbitrations during the November 2018 Board of Trustees meeting. The current proposed revisions to the rules of procedure, if approved, would allow the SMCBA program to offer voluntary fee mediation in addition to its existing mandatory fee arbitration program.

DISCUSSION

The SMCBA seeks to revise its fee arbitration rules of procedure to add a new section of procedural rules for voluntary fee mediation. These proposed fee mediation rules begin at Rule 44.0 and appear after the SMCBA's existing fee arbitration rules of procedure, which were last revised in November 2018. The SMCBA's proposed fee mediation rules largely mirror the State Bar's Model Rules for Voluntary Fee Mediation (Model Rules).

At its November 2, 2018 meeting, the CMFA reviewed the proposed fee mediation rules of procedure and found them to be in compliance with Business and Professions Code section 6200, et seq. and the Minimum Standards, but requested that the SMCBA make three additional changes. These changes included: (1) the insertion of the following Model Rule language, "The mediator may not serve as the arbitrator"; (2) the addition of the phrase "interest of 10% per annum commencing on the 30th day from the date of service will be applied" to the paragraph containing the required language for written settlement agreements obtained as a result of fee mediation; and, (3) the correction of a typographical error involving a rule number. The CMFA approved the SMCBA's proposed fee mediation rules as presented at the November CMFA meeting with the proviso that the SMCBA make the three requested changes. The SMCBA subsequently approved these requested changes at their meeting on November 9, 2018. CMFA therefore recommends that RAD approve the proposed rule revisions to the SMCBA's Mandatory Fee Arbitration Rules of Procedure to permit the addition of fee mediation services to complement its existing fee arbitration program.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: None

RECOMMENDATIONS

It is recommended that the Regulation and Discipline Committee approve the following resolution:

RESOLVED, that the Regulation and Discipline Committee hereby approves the Mandatory Fee Arbitration Rules of Procedure as proposed by the San Mateo County Bar Association, in the form attached as Attachment A, as being in compliance with Business and Professions Code sections 6200-6206 and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitrations.

ATTACHMENTS LIST

- A.** Proposed San Mateo County Bar Association Rules of Procedure for Fee Arbitrations
- B.** Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs
- C.** Model Rules for Voluntary Fee Mediation

**San Mateo County Bar Association Rules of
Procedure for Fee Arbitrations
(Approved _____)**

**ARTICLE I.
DEFINITIONS**

RULE 1.0. Definitions. As used in this chapter:

- 1.1 ACTION:** A civil judicial proceeding brought to enforce, redress or protect a right.
- 1.2 ADMINISTRATOR:** The staff person responsible for administering the local bar association's Mandatory Fee Arbitration Program.
- 1.3 ASSIGNEE:** A person to whom a claim, right or property is transferred.
- 1.4 AWARD:** The decision of the arbitrator or arbitrators in the fee arbitration proceeding.
- 1.5 CLIENT:** A person who directly or through an authorized representative consults, retains or secures legal services or advice from an attorney in the attorney's professional capacity.
- 1.6 COMMITTEE CHAIR:** The person on the Mandatory Fee Arbitration program responsible for supervising the program's fee arbitrators and for ruling on matters as set forth in these rules.
- 1.7 DECLARATION:** A declaration is a document in compliance with the requirements of Code of Civil Procedure section 2015.5, or an affidavit.
- 1.8 FILE:** Fee arbitration records and papers in a specific fee arbitration case.
- 1.9 HEARING PANEL:** One or three arbitrators assigned to hear the fee dispute and to issue the award.
- 1.10 PANEL CHAIR:** Refers to either the sole arbitrator or Panel Chair of a three-member panel assigned to hear a matter. The Panel Chair is responsible for ruling on matters pertaining to the individual case assigned as set forth in these rules.
- 1.11 PARTY:** A person who initiates or is named in an arbitration proceeding under these rules, including an attorney, a client or other person who may be liable for payment of, or entitled to a refund of attorney's fees.
- 1.12 PROGRAM:** Unless indicated otherwise, reference to the program means the Mandatory Fee Arbitration Program of the San Mateo County Bar Association.
- 1.13 STATE BAR:** The State Bar of California. Unless indicated otherwise, reference to the State Bar means the State Bar's Office of Mandatory Fee Arbitration.

ARTICLE II. ARBITRATION GENERALLY

RULE 2.0 Arbitration Mandatory For Attorneys.

Arbitration under Business and Professions Code sections 6200-6206 is voluntary for a client, unless the parties agreed in writing to submit their fee disputes to arbitration, and mandatory for an attorney if commenced by a client.

RULE 3.0 Party's Failure To Respond Or Participate.

In a mandatory fee arbitration, if a party fails to respond to a request for arbitration or refuses to participate, the arbitration will proceed as scheduled and an award will be made on the basis of the evidence presented to the hearing panel. The award may include findings on the subject of a party's failure to appear at the arbitration.

RULE 4.0 Disputes Covered.

Disputes concerning fees, costs, or both charged for professional services by an attorney are subject to arbitration under these rules, except for:

- 4.1** disputes where the attorney is admitted to practice in another jurisdiction, or where the attorney is only admitted to practice in another jurisdiction, and he or she maintains no office in the State of California, and no material portion of the services was rendered in the State of California;
- 4.2** claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct;
- 4.3** disputes where the fees or costs to be paid by the client or on the client's behalf have been determined or are determinable pursuant to statute or court order;
- 4.4** disputes where the request for arbitration is made by a person who is not liable for or entitled to a refund of attorney's fees or costs; or
- 4.5** disputes where the claim has been assigned by the client.

RULE 5.0 Binding Arbitration.

- 5.1** Arbitration is not binding unless all parties agree in writing after the fee dispute arises. Such agreement shall be made prior to the taking of evidence at the hearing. If any party has not agreed in writing to binding arbitration, the arbitration is non-binding; any party may request a trial after arbitration in a civil court pursuant to Business and Professions Code section 6204 within 30 days after the arbitration award has been served. If a trial after arbitration is not requested, the award automatically becomes binding 30 days after the award is served, except that if any party willfully fails to appear at the hearing as provided for under these rules, that

party shall not be entitled to a trial after arbitration. The decision as to whether the non-appearance was willful is made by the court. The party who failed to appear at the hearing shall have the burden of proving that the failure to appear was not willful.

- 5.2** If all parties agree in writing, after the fee dispute arises, that the arbitration is binding, the award is binding and there can be no trial after arbitration in a civil court on the issue of fees and costs. A binding award may be corrected, vacated or confirmed pursuant to Code of Civil Procedure section 1285 et seq.

RULE 6.0 Withdrawal of Binding Arbitration Election

- 6.1** If the parties agree in writing, after the fee dispute arises, to binding arbitration, the arbitration shall proceed as binding. The parties may request binding arbitration as provided on the program forms. In the absence of a written agreement made after the fee dispute arises to submit to binding arbitration, the arbitration shall be non-binding.
- 6.2** A party who has requested binding arbitration may withdraw that request and request a change to non-binding arbitration in writing to the program and the other parties, so long as the other parties have not already agreed to binding arbitration.
- 6.3** If the party who initially requests arbitration requests that the arbitration will be binding, and the respondent party's Reply agrees to binding arbitration but also seeks to materially increase the amount in dispute, then the party who requested arbitration may withdraw his request that the arbitration be binding. Such withdrawal of consent to binding arbitration, by the initiating party, must be communicated in writing to the Program within ten days of that party's receipt of the Reply.
- 6.4** Except as provided above, if the parties have already agreed to binding arbitration, the binding election may be changed to non-binding arbitration only by written agreement signed by all parties and sent to the program.

RULE 7.0 Right To Counsel.

All parties, at their expense, may be represented by an attorney.

RULE 8.0 Waiver Of Right To Request Or Maintain Arbitration.

A client's right to request or maintain arbitration is waived if the client:

- 8.1** answers a complaint in a civil action or other equivalent response to the civil action before filing a request for arbitration, after the required form entitled "Notice of Client's Right to Arbitration" was given pursuant to Business and Professions Code section 6201(a);
- 8.2** commences an action or files any pleading seeking judicial resolution of a fee or cost dispute or seeking affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct;
- 8.3** fails to deliver to the program a request for arbitration on the approved program form that is

postmarked or received on or before the 30th day from the date of the client's receipt of the form entitled "Notice of Client's Right to Arbitration" given pursuant to Business and Professions Code section 6201, subdivision (a). Should the fee dispute transfer to a different fee arbitration program after the request for arbitration is filed, the original date of postmark or receipt of the arbitration request will be preserved for purposes of determining whether jurisdiction exists.

RULE 9.0 Stay Of Proceedings.

If an attorney, or the attorney's assignee, commences an action to collect fees or costs in any court or other proceeding, with limited exceptions including provisional remedies, the court action or other proceeding is automatically stayed upon filing a request for fee arbitration with a State Bar approved fee arbitration program. The party who requested fee arbitration has a duty to notify the court of the stay and attach a copy of the arbitration request form. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately file a notice of stay and attach a copy of the arbitration request form showing that the proceeding is stayed. Upon request, the program may provide a copy of a notice of automatic stay to the party.

**ARTICLE III.
PROGRAM**

RULE 10.0 Determination Of Jurisdiction.

- 10.1** The program shall reject any request for arbitration when it is clear from the face of the request that the provisions of Business & Professions Code section 6200 have not been met or the matter is time barred under Business & Professions Code section 6206. Where the existence of an attorney-client relationship is in dispute, the parties may stipulate to submit the issue for a determination by the program, which otherwise lacks jurisdiction to determine that issue.
- 10.2** The Committee Chair may request that the parties submit written statements supporting their respective positions on the issue of whether the program has jurisdiction over their fee dispute or whether the dispute is time barred. For good cause, Committee Chair may assign the matter to a hearing panel to take evidence and make a determination of whether jurisdiction should be accepted.
- 10.3** Within 15 days from service of notice of a ruling on a challenge to jurisdiction or claim that the matter is time barred, a party may file a written request for reconsideration based on new evidence. The Committee Chair shall rule on the request for reconsideration.
- 10.4** There is no appeal of the Committee Chair's decision following reconsideration. Any ruling on reconsideration by the local bar program is final.
- 10.5** If there is an approved local bar association program that is willing to accept jurisdiction where the parties consent in writing to submit to such jurisdiction, a program may assume jurisdiction over a matter even if the program does not have original jurisdiction.

RULE 11.0 Jurisdiction by the Program

Attachment A: Proposed San Mateo County Bar Association Rules of Procedure for Fee Arbitrations

The Program shall have jurisdiction over a fee dispute if at least one of the attorneys involved in the dispute has an office in San Mateo County, or maintained an office in San Mateo County at the times the services were rendered, or regardless of the location of the office if the majority of the services were rendered in San Mateo County.

RULE 12.0 Removal to the State Bar of California

12.1 If a request for arbitration has been filed with the program and a party to the arbitration requests removal to the State Bar program,

- a) The party seeking removal from the program must submit a declaration signed under penalty of perjury asserting the factual basis for the removal. That party need not submit an additional filing fee to the State Bar until there has been a final ruling by the State Bar's Presiding Arbitrator granting removal to the State Bar.
- b) The State Bar will serve the request for removal and supporting declaration on the other parties and the program. Any written responses must be received by the State Bar within 15 days of service of the request for removal and declaration for consideration by the State Bar's Presiding Arbitrator.
- c) The party seeking removal must provide all additional information requested by the State Bar within the time limits set by the State Bar.
- d) A request for removal to the State Bar will be decided by the State Bar's Presiding Arbitrator under the applicable rules of procedure of the State Bar.

12.2 The State Bar's Presiding Arbitrator shall deny a request for removal if he or she determines that:

- a) The other parties to the local bar program's arbitration or the program itself would be prejudiced by removal and such prejudice outweighs the allegations by the party seeking removal that the party believes that a fair hearing through the local bar's program cannot be obtained; or
- b) The conduct of the party seeking removal during the course of the arbitration proceedings before the local bar program is clearly inconsistent with a bona fide belief by that party that he or she cannot obtain a fair hearing in that forum; or
- c) The party seeking removal has waived any claim that the party cannot obtain a fair hearing before the local bar's arbitration program.

RULE 13.0 Effect Of Failure to Adhere to Time Requirements.

The program shall neither lose jurisdiction, nor shall any arbitration be dismissed nor any award invalidated or modified in any way, solely because of the program's or the hearing panel's failure to comply with time requirements as set forth in these rules.

**ARTICLE IV.
INITIATION OF ARBITRATION PROCEEDING**

RULE 14.0 Request For Arbitration.

- 14.1** Arbitration is initiated by filing a written “Request For Arbitration” with the program on the approved program form and paying the appropriate filing fee as established by the program. Service of the request on the other party with whom there is a fee dispute named on the request form shall be made by the program.
- 14.2** At the time of service of a request on an attorney, the program shall serve with it a copy of the approved “Notice of Attorney Responsibility” form.
- 14.3** The party requesting arbitration may amend the request up to 15 days after mailing it to the program, unless a request for clarification is made by the program. Thereafter, it may be amended only with the approval of the Committee Chair or by the Panel Chair, if a notice of assignment of the hearing panel has been served on the parties.
- 14.4** The request for arbitration may be made by (i) a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs ("non-client"), or (ii) the attorney claiming entitlement to fees against a non-client. This rule permitting fee arbitration between an attorney and a non-client does not abrogate the attorney's duty to exercise independence of professional judgment on behalf of the client or protect the client's confidences and secrets. Absent the client's written consent to disclosure of confidential information, the lawyer has a duty to maintain client confidences and secrets, unless disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when an arbitration with a non-client is requested, the program will give notice of the request to the client by first class mail at the client's last known address.

15.0 Filing Fee

The party requesting fee arbitration shall pay a filing fee with the request form. The arbitrator shall, at his or her discretion, allocate the entire amount of the filing fee, or a portion thereof, to one or both of the parties. Such allocation shall be clearly stated in the Award.

15.1 Filing Fee Schedule

The filing fee for arbitration by the San Mateo County Bar Association is as follows: 6% of the disputed amount with a minimum fee charge of \$100 and a maximum charge of \$7000.

RULE 16.0 Request For Filing Fee Waiver.

- 16.1** A party seeking arbitration may file with the program an application for a filing fee waiver on the approved program form. The person seeking waiver of the filing fee who is not a client and who may be liable for or entitled to a refund of attorney's fees identified by the client as set forth in Rule 14.4, may be required to submit a supporting documents regarding his or her

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own financial status to the program to support the client's application for a filing fee waiver. If the non-client party replies to the program that he or she no longer has an interest in the outcome of the arbitration, the application will proceed based on the client's supporting documents alone.

- 16.2** For good cause shown, the Committee Chair may grant or deny the filing fee waiver or order a reduced fee. The order of the Committee Chair shall be final.
- 16.3** The financial statement filed in support of a request for a fee waiver shall not be disclosed by the program to the other party.

RULE 17.0 Response To Request For Arbitration.

- 17.1** The respondent party's reply to a Request for Arbitration, together with any response, if the respondent party is an attorney, to the issue of the attorney's responsibility for any award that refunds fees or costs or both to the client, shall be submitted to the program on its approved form within 30 days of the service of the request, unless an extension of time to reply is obtained from the program.
- 17.2** If the attorney seeks arbitration, and there is no written agreement between the parties that fee disputes be submitted to fee arbitration, arbitration shall proceed only if the client consents in writing on the approved form within 30 days of service of the request, unless the attorney is seeking removal from a local bar program under rule 10.2 of a matter in which the client has already requested arbitration or has consented to an attorney's request for arbitration.

RULE 18.0 Requests and Responses to Arbitration.

Parties filing or responding to a Request for Arbitration shall file one original and four copies of all forms and supporting documentation with the program. Copies of materials filed with the program will be forwarded to the other party and the hearing panel assigned to hear the matter.

- 18.1** Service of the petition for Arbitration on the attorney shall be made by the Program Administrator. At the time of service of the Petition for Arbitration on the attorney, the Program Administrator shall also serve upon the Attorney a copy of the approved State Bar "Notice of Attorney Responsibility" form. Service shall be effected at the address provided on the petition and at the latest address shown on the official membership records of the State Bar, if different.
- 18.2** Any response by the attorney to a petition for Arbitration, together with any response to the issue of the attorney's responsibility for any award that refunds fees and/or costs to the client, shall be filed within 30 business days of the service of the petition. In the event the attorney fails to respond to a petition for Arbitration or refuses to participate in the arbitration, the hearing will proceed as scheduled, and a decision made on the basis of the evidence.

RULE 19.0 Settlement Of Disputes; Withdrawal From Arbitration; Refund Schedule.

- 19.1** Upon confirmation by the parties or the hearing panel if one has been assigned that a dispute has been settled, the matter shall be dismissed by the program in the absence of an assigned

Attachment A: Proposed San Mateo County Bar Association Rules of Procedure for Fee Arbitrations

hearing panel, or by the panel chair if a notice of assignment of the hearing panel has been served on the parties.

19.2 (a) If a party wishes to withdraw from a binding arbitration and the matter has not been settled, all other parties must agree to the matter being withdrawn.

(b) If there is a written agreement between the parties requiring arbitration of the fee dispute through the Mandatory Fee Arbitration Program, all other parties must consent to a request for withdrawal before the proceeding is dismissed.

(c) If arbitration has been requested by the attorney, the matter may only be dismissed with the agreement of the other parties.

(d) In all other cases, the party who requested arbitration may withdraw from the arbitration proceeding without the consent of other parties at any time before evidence is taken.

19.3 Refund of the filing fee: If the matter is settled or dismissed based on withdrawal any time before the assignment of a panel the program will refund 100 percent of the filing. After the service of the "Notice of Appointment of Panel," there shall be no refund of filing fees.

19.4 If the parties settle the fee dispute and wish to obtain a stipulated award incorporating the terms of a written settlement agreement, the Committee Chair, if no hearing panel has been assigned, or the Panel Chair, if the hearing panel has been assigned, may issue a stipulated award incorporating by reference the parties' written settlement agreement. The Program will serve the stipulated award in the same manner as it would serve an arbitration award as prescribed elsewhere in these rules.

RULE 20.0 Consolidations.

A party may request, in writing, that two or more arbitration matters be consolidated for hearing. The Program will serve the other party with a copy of the request. A written reply may be filed with the program within 15 days of service of the request for consolidation. The Committee Chair shall rule on all written requests to consolidate. The order of the Committee Chair shall be final. Consolidation will not result in a refund of filing fees paid or reduction of filing fees owed to the Program.

ARTICLE V. PANELS

RULE 21.0 Appointment Of Panel.

21.1 For each dispute, the Program shall assign a hearing panel from the program's roster of fee arbitrators. A hearing panel shall consist of one attorney arbitrator if the amount in dispute is less than \$15,000 and three arbitrators if the amount in dispute is \$15,000 or more, one of which shall be a non-lawyer. An attorney arbitrator shall be designated as Panel Chair. If the amount in dispute is more than \$15,000, the parties may agree, in writing, to have the matter heard by a single attorney arbitrator.

- 21.2** Upon the client's request, the program shall assign a sole arbitrator, or in the case of a three person panel, one of the attorney arbitrators, whose area of practice is civil or criminal law. Any such designation made by the client shall be of an arbitrator who practices in the same area of law as was involved in the matter for which the attorney was retained by the client. Any such request made pursuant to Business and Professions Code section 6200, subdivision (e) must be submitted by the client at the time the written "Request for Arbitration" on the approved program form is submitted to the program.
- 21.3** If a fee dispute involves \$1,000 or less, the arbitration shall be decided by the Committee Chair or designee. Each party shall submit all supporting documents and a complete written statement of the reasons for the dispute, a response, or both, under penalty of perjury. The parties have 30 days from the service by the program of the reply to the arbitration request, which will be reflected in a proof of service. The record shall thereafter be forwarded to the Committee Chair or designee for action, who may require either or both parties to submit additional information within 30 days. However, if the amount in controversy is less than \$1,000 but greater than \$500, the parties upon the request of any party, may appear at a hearing, either in person or telephonically, before the Committee Chair or designee assigned to the matter, in addition to providing the written information required by this section. The program shall keep a permanent record of the number of fee disputes in which the amount in controversy is between \$500 and \$1,000 and of that number, the number of fee disputes in which any party requested a hearing. The parties shall be informed of this rule at the time of the program's service of a completed arbitration request form.
- 21.4** Any vacancy of an arbitrator, by way of disqualification or inability to serve, may be filled by the program, but in no event shall the arbitration proceed with only two arbitrators.

RULE 22.0 Notice Of Appointment Of Panel.

A notice identifying the arbitrator(s) who will hear the dispute shall be served on the parties within 60 days of the date on which the reply to the arbitration request is received, or as soon thereafter as is reasonably possible. If no reply is received, the notice of appointment of panel will be served within 60 days of the date on which the time to file the response expired, or as soon thereafter as is reasonably possible.

RULE 23.0 Challenge Disqualification Of Arbitrator(s).

Each party may disqualify one arbitrator without cause and shall have unlimited challenges for cause. Any disqualification without cause of an arbitrator shall be ineffective unless made in writing and served on the program within 15 days of the service of a notice of assignment of panel or substitute arbitrator(s) if there is a disqualification or successful challenge. An arbitrator who believes that he or she cannot render a fair and impartial decision or who believes that there is an appearance that he or she cannot render a fair and impartial decision, shall disqualify themselves or shall accede to a party's challenge for cause. If an arbitrator does not agree to be disqualified, the challenge shall be decided by the Committee Chair.

RULE 24.0 Discharge Of Arbitrator Or Panel.

The Committee Chair shall have the authority to discharge an arbitrator or panel of arbitrators from further proceedings on a matter whenever the Committee Chair, in his or her sole discretion, determines that there has been an unreasonable delay in performing duties under these rules, or for other good cause shown.

RULE 25.0 Prohibited Contacts With Arbitrators.

25.1 A party or an attorney or representative acting for a party shall not directly or indirectly communicate with an arbitrator regarding a matter pending before such arbitrator, except:

- a) At scheduled hearings;
- b) In writing with a copy to all other parties, or their respective counsel, if any, and the program;
- c) For the sole purpose of scheduling a hearing date or other administrative procedures with notice of same to the other parties;
- d) For the purpose of obtaining the issuance of a subpoena as set forth in these rules; or
- e) In an emergency.

**ARTICLE VI.
THE HEARING**

RULE 26.0 Confidentiality.

- 26.1** All hearings shall be closed to the public. However, in the discretion of the hearing panel and in the absence of any objections by the parties, witnesses may be present during the hearing.
- 26.2** The hearing panel, upon request of the client, shall permit the client to be accompanied by another person and may also permit additional persons to attend. Any such person shall be subject to the confidentiality of the arbitration proceedings.
- 26.3** The arbitration award is public; the arbitration case file, including the request, reply, exhibits and transcripts, remains confidential.

RULE 27.0 Waiver Of Personal Appearance.

- 27.1** Upon advance approval of the Panel Chair, any party may waive personal appearance and submit to the hearing panel testimony and exhibits by written declaration under penalty of perjury.
- 27.2** Any party unable to attend a hearing may designate a lawyer or non-lawyer representative.
- 27.3** Any party may request to appear by telephone, subject to the advance approval of the Panel Chair.

- 27.4** A request for waiver of appearance or designation of a representative and the submission of testimony by written declaration or request for telephonic appearance pursuant to this rule shall be filed with the Panel Chair and served on all parties at least 10 business days prior to the hearing.
- 27.5** Any party may request waiver of appearance. The arbitrator will make a ruling on the request based on factors including, but not limited, to the requesting party's distance from the site of the arbitration, the complexity of the issues to be determined, an infirmity or other inability of a party to travel to the arbitration. However, incarcerated parties are entitled to a waiver of appearance as a matter of right upon request.

RULE 28.0 Death Or Incompetence Of a Party.

In the event of death or incompetence of a party, the personal representative of the deceased party or the guardian or conservator of the incompetent may be substituted.

RULE 29.0 Discovery.

No discovery is allowable except as specifically set forth in these rules.

RULE 30.0 Subpoenas.

In this rule, "subpoena" includes a subpoena duces tecum. The program administrator shall provide blank subpoenas to the requesting party. The blank subpoenas are also available online at www.smcba.org. A party seeking to have a subpoena issued shall submit a completed but unsigned Judicial Council subpoena form to the Committee Chair, or Panel Chair if one has been appointed, with proof of service on all parties. Upon showing of good cause, the Committee Chair or Panel Chair may issue a subpoena requested by a party. In the event the Committee Chair or Panel Chair approves the issuance of a subpoena, the Committee Chair or Panel Chair shall sign the submitted subpoena and provide any executed subpoena to the requesting party, who shall be responsible for service of the subpoena. The party requesting a subpoena will be responsible for any witness fees and any costs of service of the subpoena. No subpoena may be served on any party or third party unless it has been approved and signed by the Committee Chair or Panel Chair pursuant to this rule.

RULE 31.0 Commencement of Hearing; Notice; Attendance.

- 31.1** The hearing shall commence within 45 days for a single arbitrator panel or 90 days for a three-member panel after the date of service of the "Notice of Assignment of Panel." A disqualification or allowed challenge of an assigned arbitrator will result in a 15- day extension from the date of the assignment of replacement member(s).
- 31.2** The panel shall serve written notice of hearing on each party at the address in the "Notice of Assignment of Panel" and the program within 15 days of its assignment and at least 15 days prior to the hearing date. Appearance by a party at a scheduled hearing shall constitute waiver by said party of any deficiency with respect to the giving of "Notice of Hearing." Notwithstanding the failure of either party to attend, the hearing shall proceed as scheduled and a decision made on the basis of evidence submitted.

- 31.3** Upon stipulation or application to the Panel Chair, the matter may be continued for good cause shown except in the instance where the continuance is for 30 days or more, in which case the continuance must be approved by the Committee Chair. The request for a continuance shall be received by the Panel Chair no later than 10 business days prior to the scheduled hearing date, unless there has been an emergency.
- 31.4** An award shall not be made against a party solely because of the party's absence. The panel shall require the party who is present to submit such evidence as may be required to support the making of an award.
- 31.5** An award may be made in favor of a party who is absent if the evidence so warrants. If neither party appears and the panel chair has not approved waiver of personal appearance, the panel will issue an award based on the evidence submitted.
- 31.6** If one of the panel members fails to appear, upon written stipulation of the parties, the hearing may proceed with the panel chair acting as the sole arbitrator. Under no circumstances will the hearing proceed with two arbitrators or with one lay arbitrator.
- 31.7** If all parties so stipulate, the sole arbitrator or Hearing Panel shall decide all matters without a hearing based upon the Petition, Reply and any other written materials provided by the parties. All such written materials shall be filed with the hearing panel and served on all other parties.

RULE 32.0 Stipulations Encouraged.

Agreements between the parties as to issues not in dispute and the voluntary exchange of documents prior to the hearing is encouraged.

RULE 33.0 Oaths.

All testimony may be given under oath or affirmation administered by the sole arbitrator or Panel Chair.

RULE 34.0 Evidence.

Any relevant evidence, not subject to a statutory privilege, shall be admitted if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary.

RULE 35.0 Clarification Of Issues And Exchange Of Documents

- 35.1** The Panel Chair may require that the parties clarify the issues, submit additional documentation, and exchange documents no later than 10 business days in advance of the hearing. The Panel Chair may, in his or her discretion, decline to admit into evidence documents that were required to be exchanged in advance but were not, unless he or she determines that there is good cause for failing to provide the documents in a timely basis and the interest of justice require their admission.

- 35.2** All documents shall be exchanged in hard copy unless the Arbitrator in his or her discretion and in the interests of justice provides otherwise. One copy of the documents shall be provided to the Arbitrator and a duplicate copy to the other parties as well as the program. A proof of service shall accompany the exchange.

RULE 36.0 Order Of Proof.

The parties shall present their proof in a manner determined by the sole arbitrator or Panel Chair.

RULE 37.0 Interpreter.

Any party may provide and pay for the attendance of a person to interpret at that party's expense.

RULE 38.0 Transcripts or Recordings.

Any party may provide and pay for the attendance of a certified shorthand reporter at that party's expense. Every party to the arbitration shall be entitled to a copy of said reporter's transcript of the testimony upon request and payment of the expense to the reporter. Any transcript shall remain confidential. No audio or video recording is permissible.

RULE 39.0 Compensation of Arbitrators; Administrative Charges.

- 39.1** No arbitrator shall be entitled to compensation for services unless the hearings extend beyond four hours. Unless waived in writing, each arbitrator will be compensated at the rate of \$150 for each additional hour after a four hour hearing. The compensation shall be paid equally by each party to the program for each day of hearing on which compensation is payable. No compensation will be paid to arbitrators for services other than during formal hearing sessions extending beyond four hours. Any disputes concerning compensation of the arbitrators will be determined by the Committee Chair, and its determination shall be binding on the parties, including the arbitrators.
- 39.2** Except for the prescribed filing fees, no charges will be made by the program, nor by any arbitrator, for administrative or clerical services. A hearing room will be provided by an arbitrator or by the program without charge to the parties.
- 39.3** All parties will bear their own costs, including the costs of interpreters, reporters, and expert witnesses.

**ARTICLE VII.
AWARD RULE**

40.0 Award.

- 40.1** The award shall be submitted to the Program within 15 days of the close of the hearing in any matter heard by a sole arbitrator and within 25 days of the close of the hearing in any matter heard by a three- member panel. The award shall be reviewed pursuant to rule 40.9 and then served on the parties forthwith by the Program.

Attachment A: Proposed San Mateo County Bar Association Rules of Procedure for Fee Arbitrations

40.2 The award shall be in writing. The award shall indicate whether it is binding or non-binding. It shall include a determination of all questions submitted to the panel, the decision of which is necessary in order to determine the controversy, including the name of the responsible attorney(s). Arbitrators are encouraged, where appropriate, to include findings of fact in their awards. Where appropriate, the award should also include the circumstances bearing on the willfulness of any party's nonappearance at the hearing.

40.3 The award shall include substantially the following language, as appropriate:

The Hearing Panel finds that the total amount of fees or costs that should have been charged in this matter are: \$ _____

Of which client is found to have paid: \$ _____

Subtotal \$ _____

Pre-award interest [check box]: ☐ is not awarded.

☐ is awarded in the amount of \$ _____

In addition, the fee arbitration filing fee of \$ _____ as paid by _____ shall be allocated:

Client: \$ _____

Attorney: \$ _____

For a net amount of: \$ _____

Accordingly, the following award is made:

a) Client, _____ (name) _____, shall pay attorney, _____ (name) _____: \$ _____

OR

b) Attorney, _____ (name) _____, shall pay client, _____ (name) _____: \$ _____

OR

c) Nothing further shall be paid by either attorney or client.

40.4 The award may include a refund of unearned fees, or costs, or both previously paid to the attorney.

40.5 Whenever there are three arbitrators, a majority vote shall be sufficient for all decisions of the arbitrators, including the award. Any dissent from the award shall be served with the award.

40.6 Evidence relating to claims of malpractice or professional misconduct, whether or not the client was actually harmed, shall be admissible, but only to the extent that those claims bear upon the fees and/or costs to which the attorney is entitled. The panel shall not award affirmative relief in

the form of damages or offset.

- 40.7** The award shall be signed by all arbitrators concurring with it.
- 40.8** The award may include an allocation of the filing fee; however, it shall not include an award for any other costs of the arbitration, including attorneys' fees resulting from the arbitration proceeding.
- 40.9** The panel shall forward the original of the signed award to the Program, which shall serve a copy of the award by mail on each party together with a Notice of Rights After Arbitration form approved by the State Bar Board of Governors. No award is final or is to be issued until approved for procedural compliance and as to the form of the award by the Committee Chair or such person as the Chair may designate for this purpose. After approval of the award as to the procedural compliance and approval as to the form of the award, the Program shall serve a copy of the award by mail on each party together with a Notice of Rights After Arbitration form approved by the State Bar Board of Governors. Any party who has submitted exhibits or documents to the panel shall, upon service of the award, make arrangements to retrieve them.

RULE 41.0. Correction Of Award By Hearing Panel.

- 41.1** The Hearing Panel may correct a binding or non-binding award only on the grounds set forth in Code of Civil Procedure section 1286.6, subdivision (a) [evident miscalculation of figures or evident mistake in the description of a person, thing or property referred to in the award] and subdivision(c) [the award is imperfect in a matter of form, not affecting the merits of the controversy] under the procedures set forth in Code of Civil Procedure section 1284. An application for such a correction does not extend the deadline for seeking a civil trial after a non-binding award is rendered, and a non-binding award will automatically become binding 30 days after it is served on the parties.
- 41.2** A party requesting correction or amendment under this rule must file a request in writing to the Program and serve a copy on the other party within ten days after service of the award. Any party to the arbitration may make a written objection to such request and must file a request in writing to the Program and serve a copy on the other party within ten days after service of the request for correction or amendment. Any such request for correction or amendment does not toll the time period for filing a civil action to challenge the award. The Program shall serve a copy of the request and any objection to the arbitrator(s) and Panel Chair.
- 41.3** Any corrected or amended award will be served by the Program. The time for filing a petition to confirm, vacate or correct the award begins from the date of service of the amended or corrected award, the date of denial of the request for correction or amendment of the award, or the date that a request that a request for correction of amendment of the award is deemed denied under Code of Civil Procedure 1284, whichever date is earlier.
- 41.4** The Hearing Panel shall either deny the application or correct the award in writing signed by the arbitrator(s) concurring therein. Any jurisdiction on the part of the Hearing Panel to amend or supplement an award expires upon entry of judgment.

**ARTICLE VIII.
SERVICE; ADDRESS**

RULE 42.0 Service.

- 42.1** Unless otherwise specifically stated in these rules, service on the client shall be by personal delivery, by deposit in the United States mail, or by deposit in a business facility used for collection and processing of correspondence for mailing with the United States Postal Service pursuant to Code of Civil Procedure section 1013(a)(3), postage paid, addressed to the person on whom it is to be served, at his or her address as last given, on any document which has been filed in the arbitration. The client shall keep the program advised of his or her current address.
- 42.2** Unless otherwise specifically stated in these rules, service on an individual attorney shall be at the latest address shown on the official membership records of the State Bar. Service shall be in accordance with subsection 42.1 above.
- 42.3** If either party is represented by counsel, service shall be on the party as indicated in subsections 42.1 and 42.2 of this rule, and on the counsel at the latest address shown on the official membership records of the State Bar.
- 42.4** The service is complete at the time of deposit. The time for performing any act shall commence on the date service is complete and shall not be extended by reason of service by mail.
- 42.5** Where a facsimile or email transmission is used to communicate with the program or to file any document, it will not be considered received unless the program also receives within five days of the date of the transmission, the original of the faxed document.
- 42.6** In the event that the client fails to keep the program advised of his or her current address, the program may close the arbitration request, if it is made by the client, after 30 days from the date that the program learns of the invalid address.

**ARTICLE IX.
RETENTION OF FILES**

RULE 43.0 Files.

The Program Administrator may, without prior notice, destroy any file five years after service of the award or, if no award is rendered, five years after the last paper is received from any party.

**ARTICLE X.
MEDIATION RULES OF PROCEDURE**

RULE 44.0 Appointment and Responsibilities

It is the policy of The San Mateo County Bar Association to promote the consensual

resolution of Attorney/Client Fee Disputes and to avoid the necessity of Arbitration of these disputes when agreeable to the parties. Therefore, the Association finds that a Mediation alternative to the Arbitration Program currently offered by the Association, in accordance with Business and Professions Code Section 6200 regulating Attorney/Client Fee Disputes, is desirable and authorizes the institution of a Mediation of Fee Disputes Program regulated by these Rules of Mediation. The Association hereby delegates to the Client Relations Committee the authority and responsibility to appoint and maintain a Panel of qualified Mediators in accordance with the Rules of Procedure for Fee Arbitration and these Mediation Rules.

RULE 45.0 Jurisdiction

- 45.1 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.**
- 45.2 The Program shall have jurisdiction to perform Mediation of Attorney/Client Fee Disputes under the authority of Business and Professions Code Section 6200.**

RULE 46.0 Appointment/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 the Program may require.

RULE 47.0 The Process

- 47.1 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 and Procedure for Fee Arbitrations.**
- 47.2 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.**

RULE 48.0 Disqualification of Mediator

- 48.1** 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.
- 48.2** 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 challenging party must provide a copy of the challenge to the other party.
- 48.3** Upon the withdrawal or removal of the Mediator in response to a challenge for *cause*, the Program shall reassign the matter and notify the parties of the new Mediator within ten (10) calendar days.

RULE 49.0 The Mediation Session

- 49.1** The filing fee already paid to the Program for the filing of the Request for Fee Arbitration includes up to four (4) mediation hours, and administrative costs. Upon agreement of the parties and concurrence of the Mediator, additional or longer sessions may be scheduled. Mediator compensation for additional Mediator time and sessions shall be at an amount to be agreed upon by the parties and the Mediator but shall not exceed \$150 per hour notwithstanding that a Client may have been granted a waiver of the Program filing fee. If the Client is unable to pay for Mediator time beyond the first four (4) hours, the session shall conclude or other arrangements can be made between the Mediator and the parties. Such additional, or longer, sessions shall be governed by these Rules.
- 49.2** 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.
- 49.3** If a party fails to appear, the Mediator shall have the option of rescheduling the mediation or terminating 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. The Mediator may not serve as the arbitrator.

RULE 50.0 Mediation Session Date

- 50.1** 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.

50.2 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.

50.3 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.

RULE 51.0 Settlement before Session

Should the parties settle the dispute on their own before the mediation session, a written confirmation of the settlement should be sent to the Program with a copy to the Mediator and the other side. Filing fee refunds will be issued in accordance with Rule 19.3.

RULE 52.0 The Outcome

52.1 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.

(a) Written Agreement Requirements

i. 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.

ii. 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 (using full names):

(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.)

Interest of 10% per annum commencing on the 30th day from the date of service will be applied.

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.

52.2 If the parties are unable to resolve the dispute through mediation, the Mediator shall notify the Committee in writing within five (5) calendar days and the matter will proceed to arbitration in accordance with the Rules of Procedure of Fee Arbitration.

RULE 53.0 Confidentiality

53.1 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 Rule 52.1 apply.

53.2 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 Rule 52.1.

53.3 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.

**GUIDELINES AND MINIMUM STANDARDS
FOR THE OPERATION OF
MANDATORY FEE ARBITRATION PROGRAMS**

(Adopted by the Board of Governors December 16, 1978, January 1, 1979, revised March 21, 1992, amended April 17, 1993, amended July 17, 1993, amended November 5, 1993, amended June 18, 1994, amended April 8, 1995, amended March 2, 1996, amended November 22, 1996, amended January 25, 1997, amended March 21, 1997; amended April 3, 1998; amended January 26, 2001; amended March 9, 2007, amended July 20, 2007; amended May 15, 2010.)

1. If the current rules of procedure of a local bar association or a lawyer referral service are approved by the Board of Governors and those rules are in compliance with Business and Professions Code sections 6200-6206 and the Minimum Standards set forth herein, the local program will have jurisdiction over fee disputes submitted, and such arbitration will be the arbitration provided for in Business and Professions Code sections 6200-6206.

2. If an approved local program is not available, and the parties do not consent to have the fee dispute submitted to another local program willing to assume jurisdiction over the matter, the State Bar will assume jurisdiction over the fee dispute and proceed under the State Bar's rules of procedure for fee arbitration.

Local bar association rules of procedure for fee arbitration shall provide for the following:

3. Each party shall receive a fair, speedy and impartial hearing and award;

4. The attorney, prior to or at the time of filing an action against the client for the recovery of fees for professional services, shall serve, personally or by first class mail, upon the client the State Bar "Notice of Client's Right to Arbitrate" form;

5. In the event the attorney fails to respond or refuses to participate in the arbitration, the hearing will proceed as scheduled, and a decision will be made on the basis of the evidence;

6. A procedure for preserving the confidentiality afforded by Business and Professions Code section 6202, except that such procedure shall not prohibit the arbitrator(s) or the program from referring a matter to the State Bar's Office of Intake and Legal Advice when possible misconduct by an attorney is disclosed in an arbitration proceeding;

7. An appropriate procedure for the parties to disqualify no less than one arbitrator without cause and to have an unlimited number of challenges for cause;

8. At the time of service of the arbitrator's award on the parties, there shall also be served a notice of the parties' post-arbitration rights in the form approved by the Board of Governors of the State Bar;

9. Except as set forth below, in each three-member panel, one member shall be a lay person and the other two members shall be attorneys and in each sole arbitrator panel, the sole arbitrator shall be an attorney;

10. In the event of a three-member panel, the matter may not proceed with two members in the absence of the third member, but the parties may stipulate to proceed with a sole attorney arbitrator;

11. At the option of the client, one member of a three-person panel or the sole arbitrator shall be an attorney whose area of practice is either civil or criminal law; clients shall be informed of this option at an early stage in the proceedings and provided a means of exercising the option;

12. Authorization for the arbitrators to include an allocation of the filing fee in the arbitration award; and

13. The request for arbitration may be made by (i) a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs ("non-client"), or (ii) the attorney claiming entitlement to fees against a non-client. A fee arbitration between an attorney and a non-client is not intended to abrogate the requirement that the attorney exercise independence of professional judgment on behalf of the client or the protection of client confidences and secrets. Absent the client's written consent to disclosure of confidential information, a fee arbitration with a non-client is not intended to abrogate the attorney's duty to maintain client confidences and secrets, unless such disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when an arbitration with a non-client is initiated, notice of the request must be sent to the client by first class mail at the client's last known address. The programs shall adopt procedures to insure that such notice has been sent to the client.

14. The program shall serve on the attorney(s) designated by the client, no later than the time of service of the notice appointing the arbitration panel, the State Bar approved notice of attorney responsibility form;

15. The award shall be in writing, including a determination of all questions submitted to the panel, the decision of which is necessary in order to determine the controversy, and if a refund is owed, the name(s) of the responsible attorney(s).

16. Each award served on the parties shall contain substantially the following language:

The arbitrators find that the total amount of fees and/or costs which should have been charged in this matter are: \$_____

Of which client is found to have paid:\$_____
Subtotal \$_____

In addition, the fee arbitration filing fee shall be allocated:

Client: \$_____

Attorney:\$_____

For a net amount of: \$_____

Accordingly, the following award is made:

(a) Client,_____, shall pay attorney, _____:\$_____

OR

(b) Attorney,_____, shall refund to client, _____.\$_____

OR

(c) Nothing further shall be paid by either attorney or client. An award requiring a payment must also include interest in the amount of ten percent per annum from the 30th day after the date of service of the

award.

17. For a filing fee schedule and refund policy that are 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.

18. In the event of a dispute between the parties as to which program should hear the matter, the program where the arbitration request was first filed shall determine that the arbitration will be conducted in the county where “the majority of legal services were provided,” and such ruling is final and not appealable to the State Bar. Should the fee dispute transfer to a different fee arbitration program after the request for arbitration is filed, the original date of postmark or receipt of the arbitration request will be preserved for purposes of determining whether jurisdiction exists.

19. A monetary threshold above which three-member panels will be used must be reasonable. The program may not condition the assignment of a three-member panel on a party’s waiver of the right to non-binding arbitration.

20. A lay arbitrator is a person who has not been admitted to practice law in any jurisdiction and has not worked regularly for a public or private law office or practice, court of law or attended law school for any period of time. Paralegal assistants, law firm staff, and law clerks shall not serve as lay arbitrators.

21. Retired judges who are not on active membership status with the State Bar may not serve as fee arbitrators.

22. A client or an attorney who believes that he or she cannot obtain a fair and impartial hearing under the local program's rules of procedure shall be entitled to a hearing through a State Bar panel. Removal to the State Bar shall be governed by Rule 3.506, “Rules of Procedure for the Resolution of Fee Disputes and the Enforcement of Awards by the State Bar of California.”

MINIMUM STANDARDS FOR MEDIATION

When a request for arbitration has been filed with an authorized local bar association or lawyer referral service fee arbitration program, the rules of procedure may include provisions for parties who agree to mediate the dispute prior to proceeding through arbitration. In addition to the Minimum Standards set forth for arbitration of disputes, rules of procedure for those programs which wish to provide for mediation of fee disputes shall provide:

1. For a fair, speedy and impartial mediation procedure suitable to the circumstances;

2. That mediators have completed a minimum of 25 hours of mediation training which includes classroom and practical training;

3. For an appropriate procedure for parties to disqualify no less than one mediator without cause and to have an unlimited number of challenges for cause;

4. For an appropriate procedure for a mediator to disclose any conflict of interest;

5. For a procedure to preserve the confidentiality afforded by Evidence Code section 1152.5;

6. For the use of either lawyer or non-lawyer mediators;

7. That each mediated agreement in which the parties agree that the client shall receive a refund of previously paid fees and/or costs shall include the name of the individual attorney(s) responsible for making the refund;

8. That each mediated agreement shall be in writing and signed by the client and responsible attorney(s) and shall include substantially the following language:

The following agreement is made:

- (a) Client, _____, shall pay attorney, _____: \$ _____
- (b) Attorney, _____, shall refund to client, _____: \$ _____
- (c) Nothing further shall be paid by either attorney or client.

The parties have considered the allocation of the filing fee in making this agreement;

9. That the parties be required to execute an agreement to mediate that substantially conforms with the agreement approved by the State Bar and

10. That, after an agreement has been reached, the program shall provide the parties with a notice of the right to enforce the agreement that substantially conforms with the notice approved by the State Bar.

STATE BAR OF CALIFORNIA

Voluntary Mediation of Fee Disputes Program

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 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 Program 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 Program'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

Attachment C: Model Rules for Voluntary Fee Mediation

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.