



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

MAY 2019

REGULATION AND DISCIPLINE COMMITTEE III.H

DATE: May 16, 2019

TO: Members, Regulation and Discipline Committee

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

SUBJECT: Request to Circulate for Public Comment: Amendment to Rule 38.1 of the State Bar of California Model Rules of Procedure for Fee Arbitrations & State Bar Rule 3.536(E)

EXECUTIVE SUMMARY

In addition to the State Bar Mandatory Fee Arbitration program, 31 local bar associations across the state offer fee arbitration. Pursuant to Business and Professions Code section 6200, local bar association program rules of procedure must be approved by the State Bar Board of Trustees to establish program jurisdiction to ensure that they provide for a fair, impartial, and speedy hearing and award.

In November 2006, the Board of Trustees approved the State Bar's Model Rules of Procedure for Fee Arbitrations (Model Rules) as recommended by the State Bar's Committee on Mandatory Fee Arbitration (CMFA). The Model Rules are intended to promote uniformity and procedural consistency among local bar programs, expedite the rule approval process, and ensure that programs are in compliance with applicable statutes, the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, and developments in the law.

Staff, in consultation with the CMFA, recommends modifying Model Rule 38.1 regarding arbitration compensation to clarify that in order for an arbitrator to receive compensation, which may only be received for proceedings lasting more than four hours, the parties must agree in writing that they will compensate the arbitrator. Staff and the CMFA also recommend making a corresponding revision to State Bar Rule 3.536(E), which addresses arbitrator compensation for arbitrations conducted by the State Bar Fee Arbitration program.

This agenda item requests that the Regulation and Discipline Committee (RAD) approve the circulation of these revised rules for a 45-day public comment period.

BACKGROUND

Pursuant to Article 13 of the State Bar Act, Arbitration of Attorneys' Fee (Bus. & Prof. Code § 6200, *et seq.*), the Board of Trustees is charged with establishing, maintaining, and administering a system and procedure for the arbitration of disputes concerning fees, costs, or both, charged by attorneys for their professional services. The statutory scheme for mandatory fee arbitration provides for fee arbitration services sponsored by local bar associations. The Board of Trustees adopts and reviews local bars' rules of procedure "to ensure that they provide for a fair, impartial, and speedy hearing and award." (Bus. & Prof. Code § 6200(d).) Currently, mandatory fee arbitration is available through 31 local bar association programs in addition to the State Bar's mandatory fee arbitration program.

In November 2006, the Board of Trustees approved the first set of Model Rules of Procedure for Fee Arbitrations (Model Rules) to achieve greater inter-program consistency, expedite the review of local bar program rules, and ensure the local bar program rules comply with the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs. Although the State Bar does not require local bar programs to adopt the Model Rules, the Committee on Mandatory Fee Arbitration has encouraged them to do so. The vast majority of local bar programs have adopted the Model Rules.

Contained within the Model Rules is a provision for the compensation of arbitrators. The rule states that an arbitrator will not be entitled to compensation unless the hearing extends beyond four hours and, "unless waived in writing," each arbitrator will be compensated at the rate of \$150 per hour for each hour after a four hour hearing.

Recently, a situation occurred in a local county bar program's arbitration proceeding where the attorney for one of the parties requested his client's hearing extend beyond four hours. The arbitration panel chair indicated that, based on the documents provided in advance of the hearing, the matter could be heard in less than four hours. In addition, the program administrator informed the attorney that because the Model Rule required both parties to share the cost of the arbitrators' compensation equally for a hearing that extends beyond four hours, the rule requires both parties to agree to proceed beyond four hours in such situations.

DISCUSSION

RULE 38.1 STATE BAR OF CALIFORNIA MODEL RULES OF PROCEDURE FOR FEE ARBITRATIONS

In order to clarify the application of the rule, staff, in consultation with the Committee on Mandatory Fee Arbitration, is recommending that the Model Rule addressing compensation of arbitrators be amended to state that in order for an arbitrator to receive compensation, not only must the proceeding last more than the four hours, but the parties must also agree to that

compensation in writing. This revision is intended to achieve greater consistency among the local bar programs and the State Bar program, as well as afford greater public protection. This required agreement is intended to safeguard the party's right to know how their obligation to compensate the arbitrator for his or her time is being determined. The recommended revisions to the Model Rule are as follows:

Model Rule 38.0 Compensation of Arbitrators; Administrative Charges.

38.1 An arbitrator has the discretion to require compensation for a hearing that extends beyond four hours. The parties must agree in writing prior to the taking of evidence that they will compensate the arbitrator unless the arbitrator waives compensation. If this agreement is not timely entered into by the parties, then the arbitrator is not permitted to seek compensation for time beyond four hours.
~~No arbitrator shall be entitled to compensation for services unless the hearings extend beyond four hours. Unless waived~~ If agreed to 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. Regardless of whether there is or is not an agreement for compensation, the arbitrator retains the authority to control the total length of the proceedings in order to conduct a fair and thorough hearing.

The first sentence is permissive and is included to inform arbitrators that they retain the discretion whether to seek compensation for a hearing that extends beyond four hours. State Bar staff is aware that some arbitrators forego compensation for their service when a hearing extends beyond four hours. An individual arbitrator's willingness to forego compensation is in line with the underlying philosophy and purpose of the mandatory fee arbitration program of providing a lower cost venue for fee disputes.

The second sentence is intended to ensure the parties and the arbitrator are in agreement as to the exact terms of the arbitrator compensation agreement, making it less likely that a disagreement arises as to this issue. In addition, a timing element is included requiring that any agreement between the parties to compensate the arbitrator must be entered into prior to the taking of evidence. This is consistent with the timing element in State Bar Rule 5.308, which states that any agreement to binding arbitration must be made "before the taking of evidence at the arbitrations hearing."

The third sentence makes clear that a timely written agreement is a condition precedent for the compensation of an arbitrator provided for in this rule.

The fourth sentence is modified to be consistent with the revisions described above that permit compensation so long as the parties enter into a timely written agreement.

The last sentence makes clear that the overall length of any arbitration is to be determined by the arbitrator without regard to the issue of compensation for hearings that extend beyond four hours. For example, if one party agrees to compensate the arbitrator should the hearing extend beyond four hours, but the other party does not so agree, the arbitrator is not limited to a hearing length of only four hours. This sentence emphasizes the arbitrator's primary goal of conducting a fair and thorough hearing, and that the arbitrator maintains discretion to control the duration of the proceeding in order to accomplish that goal, regardless of whether there is an agreement to compensate the arbitrator pursuant to this rule.

Initially, staff felt the rule should specify that the arbitrator must ensure each party is offered equal time to present their case in the absence of a written agreement for compensation that would allow the proceeding to extend beyond four hours. Staff originally proposed the third sentence to read: "If this agreement is not timely entered into by the parties, then the arbitrator is not permitted to seek compensation and the arbitrator shall ensure each party is offered equal time to present their case." After consideration, the CMFA determined that this provision should be removed from the rule. They noted that the provision may create a basis for a party to seek vacatur under Code of Civil Procedure section 1262.2. They were concerned that the equal time language could be used adversely in order to disturb the finality of an arbitration award. Finally, they noted the last sentence of the proposed rule, along with an arbitrator's existing obligations to allow for a full and fair hearing, made the equal time language unnecessary. Staff agrees with the CMFA that removal of the equal time language is the better approach.

STATE BAR RULE 3.536(E)

As required by Business and Professions Code section 6200(a), the Board of Trustees has adopted rules for arbitration of disputes regarding attorney fees. These rules govern arbitrations conducted by the State Bar Fee Arbitration program.¹ State Bar Rule 3.536(E) governs arbitrator compensation. Staff is recommending the following corresponding revisions to the State Bar:

Rule 3.536 Arbitrators

(E) Arbitrators may request compensation for a hearing that extends beyond four hours. In order for an arbitrator to receive compensation, the parties must agree in writing prior to the taking of evidence that they will compensate the arbitrator. If this agreement is not timely entered into by the parties, then the arbitrator is not permitted to seek compensation for time beyond four hours. No compensation will be paid to arbitrators for services other than for formal

¹ These rules are posted on the State Bar website at:

http://www.calbar.ca.gov/portals/0/documents/mfa/2013_RulesofProcedure20130701.pdf

hearings extending beyond four hours. Compensation is hourly at the rate set forth in the Schedule of Charges and Deadlines and is paid equally by the parties. Any dispute regarding compensation is decided by the presiding arbitrator, whose decision is final. Regardless of whether there is or is not an agreement for compensation, the arbitrator retains the authority to control the total length of the proceedings in order to conduct a fair and thorough hearing.

The policy reasons for these recommended revisions are the same as those described above.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title 3, Division 4, Chapter 2

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None - core business operations

RECOMMENDATIONS

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

RESOLVED, that the Regulation and Discipline Committee hereby authorizes for a 45-day public comment period the proposed revisions to the State Bar of California Model Rule of Procedure for Fee Arbitrations 38.1, attached hereto as Attachment A; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee hereby authorizes for a 45-day public comment period the proposed revisions to Rule 3.536(E) of the Rules of the State Bar of California, attached hereto as Attachment B; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed changes.

ATTACHMENT(S) LIST

- A.** State Bar of California Model Rule of Procedure for Fee Arbitrations 38.1 (Clean and Redline)
- B.** Rule 3.536(E) of the Rules of the State Bar of California (Clean and Redline)

ATTACHMENT A
REVISED MAY 15, 2019

State Bar of California Model Rule of Procedure for Fee Arbitrations 38.1
(Clean and Redline)

CLEAN

STATE BAR OF CALIFORNIA MODEL RULE OF PROCEDURE FOR FEE ARBITRATIONS 38.1

38.1 An arbitrator has the discretion to require compensation for a hearing that extends beyond four hours. The parties must agree in writing prior to the taking of evidence that they will compensate the arbitrator unless the arbitrator waives compensation. If this agreement is not timely entered into by the parties, then the arbitrator is not permitted to seek compensation for time beyond four hours. If agreed to 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. Regardless of whether there is or is not an agreement for compensation, the arbitrator retains the authority to control the total length of the proceedings in order to conduct a fair and thorough hearing.

REDLINE

STATE BAR OF CALIFORNIA MODEL RULE OF PROCEDURE FOR FEE ARBITRATIONS 38.1

38.1 An arbitrator has the discretion to require compensation for a hearing that extends beyond four hours. The parties must agree in writing prior to the taking of evidence that they will compensate the arbitrator unless the arbitrator waives compensation. If this agreement is not timely entered into by the parties, then the arbitrator is not permitted to seek compensation for time beyond for hours. No arbitrator shall be entitled to compensation for services unless the hearings extend beyond four hours. Unless waived If agreed to 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. Regardless of

whether there is or is not an agreement for compensation, the arbitrator retains the authority to control the total length of the proceedings in order to conduct a fair and thorough hearing.

ATTACHMENT B
REVISED MAY 15, 2019

**Rule 3.536(E) of the Rules of the State Bar of California
(Clean and Redline)**

CLEAN

STATE BAR RULE 3.536 ARBITRATORS

(E) An arbitrator has the discretion to require compensation for a hearing that extends beyond four hours. The parties must agree in writing prior to the taking of evidence that they will compensate the arbitrator unless the arbitrator waives compensation. If this agreement is not timely entered into by the parties, then the arbitrator is not permitted to seek compensation for time beyond four hours. No compensation will be paid to arbitrators for services other than for formal hearings extending beyond four hours. Compensation is hourly at the rate set forth in the Schedule of Charges and Deadlines and is paid equally by the parties. Any dispute regarding compensation is decided by the presiding arbitrator, whose decision is final. Regardless of whether there is or is not an agreement for compensation, the arbitrator retains the authority to control the total length of the proceedings in order to conduct a fair and thorough hearing.

REDLINE

STATE BAR RULE 3.536 ARBITRATORS

(E) An arbitrator has the discretion to require compensation for a hearing that extends beyond four hours. The parties must agree in writing prior to the taking of evidence that they will compensate the arbitrator unless the arbitrator waives compensation. If this agreement is not timely entered into by the parties, then the arbitrator is not permitted to seek compensation for time beyond four hours. No compensation will be paid to arbitrators for services other than for formal hearings extending beyond four hours. Compensation is hourly at the rate set forth in the Schedule of Charges and Deadlines and is paid equally by the parties. Any dispute regarding compensation is decided by the presiding arbitrator, whose decision is final. Regardless of whether there is or is not an agreement for compensation, the arbitrator retains the authority to control the total length of the proceedings in order to conduct a fair and thorough hearing.