



# The State Bar *of California*

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## **OPEN SESSION**

### **AGENDA ITEM**

**54-121 SEPTEMBER 2019**

### **REGULATION AND DISCIPLINE COMMITTEE III.D**

**DATE:** September 19, 2019

**TO:** Members, Regulation and Discipline Committee  
Members, Board of Trustees

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

**SUBJECT:** Revisions to Rule 38.1 of the State Bar of California Model Rules of Procedure for Fee Arbitrations and State Bar Rule 3.536(E) – Return from Public Comment and Request for Approval

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### **EXECUTIVE SUMMARY**

In November 2006, the Board of Trustees (Board) approved the State Bar's Model Rules of Procedure for Fee Arbitrations (Model Rules). The Model Rules are intended to promote uniformity and consistency among local bar associations which operate fee arbitration programs and ensure that programs are in compliance with applicable statutes, the State Bar adopted Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, and developments in the law.

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

On May 16, 2019, the Committee on Regulation and Discipline (RAD) approved the circulation of these revised rules for a 45-day public comment period. Following the public comment period, and after review of the one public comment received, staff recommends that the Board approve these rules as circulated for public comment.

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## **BACKGROUND**

Pursuant to Article 13 of the State Bar Act, Arbitration of Attorneys' Fee (Business and Professions Code Section 6200, *et seq.*), the Board 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." (Business and Professions Code Section 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 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, they are encouraged 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.

Earlier this year a situation occurred in one of the county bar fee arbitration programs where the attorney for one of parties requested at the outset that 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 arbitrator's compensation equally for a hearing that extends beyond four hours, the rule requires both parties to stipulate to proceed beyond four hours. A review of the Model Rules revealed that there was a lack of clarity on this matter.

## **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, following consultation with the Committee on Mandatory Fee Arbitration (CMFA), recommends that the Model Rule addressing compensation of arbitrators be amended to state expressly 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 the 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 3.508, which states that any agreement to binding arbitration must be made "before the taking of evidence at the arbitration hearing."

The third sentence of the proposed rule change 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.

### **State Bar Rule 3.536(E)**

As required by Business and Professions Code Section 6200(a), the Board has adopted rules for arbitration of disputes regarding attorney fees. These rules govern arbitrations conducted by the State Bar Fee Arbitration program.<sup>1</sup> 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 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.

On May 16, 2019, RAD approved a 45-day public comment period for these rules as proposed above. The public comment period ended on July 8, 2019.

### **Public Comment**

One public comment was received from Susan Bassi. Ms. Bassi raises a concern that "Local Bar associations that conduct arbitration services have proved to be highly problematic and demonstrated informal practices that support cronyism as well as potential antitrust activity."

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<sup>1</sup> These rules are posted on the State Bar website at:

[http://www.calbar.ca.gov/portals/0/documents/mfa/2013\\_RulesofProcedure20130701.pdf](http://www.calbar.ca.gov/portals/0/documents/mfa/2013_RulesofProcedure20130701.pdf)

Ms. Bassi suggests that all arbitration costs should be in writing and an arbitrator should provide a disclosure of “all social, professional and personal relationships an arbitrator has with opposing parties and litigants.” The comment is provided in whole in Attachment B.

On June 28, 2019, the CMFA met and considered this comment in full. The CMFA noted that Ms. Bassi’s comment did not address the arbitrator compensation rule as proposed but rather focused on other arbitrator-related topics.

Staff notes that the concerns raised by Ms. Bassi are addressed in other rules and authorities. For example, the cost for requesting fee arbitration is set forth in State Bar Rule 3.354(A). There is a filing fee of 5 percent of the amount in dispute and this fee is disclosed to the client up front as part of the form initiating a request for fee arbitration. In addition, State Bar Rule 3.537 addresses disqualification or discharge of arbitrators and Arbitration Advisory 2015-01 (“Disclosure Guidelines”) addresses what relationships a prospective arbitrator should disclose prior to accepting appointment.

After review and consideration of the public comment received, both staff and the CMFA recommend that no further revisions to Rule 38.1 of the State Bar of California Model Rules of Procedure for Fee Arbitrations or State Bar Rule 3.536(E) be made.

## **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 and Board of Trustees approve the following resolution:**

**RESOLVED**, that the Board of Trustees, following the publication for a 45-day public comment period and in consideration of the comment received, approve State Bar of California Model Rule of Procedure for Fee Arbitrations 38.1, as revised; and Rule

3.536(E) of the Rules of the State Bar of California, as revised, attached hereto as Attachment A.

**ATTACHMENT(S) LIST**

- A.** State Bar of California Model Rule of Procedure for Fee Arbitrations 38.1 and Rule 3.536(E) of the Rules of the State Bar of California
- B.** Full Text of Public Comment

## **ATTACHMENT A**

### **State Bar of California Model Rule of Procedure for Fee Arbitrations 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.

### **Rule 3.536(E) of the Rules of the State Bar of California**

(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.

## ATTACHMENT B

**From:** Susan Bassi [<mailto:gilroybassi@gmail.com>]  
**Sent:** Wednesday, June 12, 2019 6:54 PM  
**To:** Marlaud, Angela  
**Subject:** Proposedm Rule change State Bar Rule 38.1 and 3.3.56

Please accept the following public comment:

Local Bar associations that conduct arbitration services have proved to be highly problematic and demonstrated informal practices that support cronyism as well as potential antitrust activity.

All arbitration costs should be required to be in writing and should accompany full disclosures of all social, professional and personal relationships an arbitrator has with opposing parties and litigants. In Santa Clara County the local bar has used lawyers as arbitrators who later engage in referrals, appointments and reciprocal judging assignments. it is impossible for the public that could be fair in the absence of disclosures, therefore disclosures should be mandated with the written aspects of any arbitrator fees and costs.

Susan Bassi  
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