



# The State Bar of California

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**OPEN SESSION  
AGENDA ITEM  
SEPTEMBER 2020  
REGULATION AND DISCIPLINE COMMITTEE III.C**

**DATE:** September 24, 2020

**TO:** Members, Regulation and Discipline Committee

**FROM:** Marc Shapp, Assistant General Counsel, Office of General Counsel

**SUBJECT:** Amendment to Rules of Procedure Governing Fee Arbitration Award Enforcement Proceedings: Request for Circulation for Public Comment

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## **EXECUTIVE SUMMARY**

The State Bar, through the Presiding Arbitrator of the Mandatory Fee Arbitration (MFA) Program, may enforce fee arbitration awards against attorneys who have failed to timely comply with those awards. The Presiding Arbitrator's enforcement authority includes bringing an action in the State Bar Court seeking the involuntary inactive enrollment of such an attorney. Fee arbitration awards are dischargeable under federal bankruptcy law. When an attorney with an unpaid fee arbitration award declares bankruptcy, the State Bar has an affirmative obligation to immediately: (1) cease pending proceedings to place such an attorney on involuntary inactive enrollment; or (2) reinstate to active status an attorney who is enrolled inactive due solely to the unpaid award.

The Presiding Arbitrator has successfully acted to obtain a State Bar Court order lifting the involuntary inactive enrollment of a bankrupt attorney on at least one occasion. However, the Rules of Procedure of the State Bar of California (Rules of Procedure) governing MFA Program enforcement proceedings in the State Bar Court do not specifically provide for the cessation of enforcement proceedings, or for the lifting of an order of involuntary inactive enrollment, upon an attorney's filing for bankruptcy protection. In order to ensure consistent and timely compliance with federal bankruptcy law, staff recommends amending the Rules of Procedure governing MFA Program enforcement proceedings.

This item requests that the proposed rules amendment included as Attachment A be circulated for public comment for a period of 60 days.

## BACKGROUND

The Mandatory Fee Arbitration Act (MFAA), Business and Professions Code sections 6200-6206, establishes a system for arbitration before local bar associations in attorney fee disputes. The State Bar implements the requirements of the MFAA through the MFA Program, pursuant to the Rules of the State Bar, title 3, division 4, chapter 2, and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs. The Presiding Arbitrator of the MFA Program is appointed by the Board of Trustees “to supervise the arbitrators in the [MFA Program] and to decide the matters indicated by these rules.” (Rules of the State Bar, rule 3.500(B)(8).) Among the Presiding Arbitrator’s duties is the enforcement of fee arbitration awards against attorneys who have failed to timely comply, including by seeking such an attorney’s involuntary inactive enrollment in proceedings before the State Bar Court. (*Id.*, rules 3.560 and 3.565.)

MFA Program enforcement proceedings are conducted in the State Bar Court pursuant to Rules of Procedure, rules 5.360-5.371. After an attorney award debtor is ordered involuntarily inactively enrolled under these rules, it is up to the attorney to file a motion to terminate inactive enrollment. (Rules of Procedure, rule 5.370.) The attorney is only eligible to return to active status “[w]hen the award debtor has paid in full the arbitration award plus any costs and penalties assessed because of the award debtor’s failure to comply.” (*Id.*, subd. (A).)

## DISCUSSION

In 2016, the Ninth Circuit Court of Appeals ruled in a case to which the State Bar was a party (*In re Scheer* (9th Cir. 2016) 819 F.3d 1206) that a fee arbitration award is dischargeable debt in bankruptcy because it does not meet the “fine, penalty, or forfeiture” exception to discharge under section 523 of the U.S. Bankruptcy Code (11 U.S.C.A. § 532, subd. (a)(7)). On remand, the Bankruptcy Court determined that the State Bar’s rules that require an attorney to file a motion for reinstatement after filing for bankruptcy protection conflict with the automatic stay and antidiscrimination provisions in U.S. Bankruptcy Code sections 362 and 525 (11 U.S.C.A. §§ 362 and 525). The State Bar does not enjoy sovereign immunity in the bankruptcy context, and therefore is subject to suit under the U.S. Bankruptcy Code. (See *Central Virginia Community College v. Katz* (2006) 546 U.S. 356, 378 [In ratifying the Bankruptcy Clause of the U.S. Constitution, the states “acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted” in bankruptcy proceedings].)

Although the *Scheer* case arose from a chapter 7 bankruptcy case, the Ninth Circuit’s analysis applies equally to a bankruptcy filing under any other chapter. That is because discharge is available generally as to all debt or all debt provided for in a bankruptcy plan. (See 11 U.S.C.A. §§ 727, subd. (b), 1141, subd. (d), 1228, subd. (a) and (c), 1328, subd. (a) and (c).)

In other words, when an attorney files for bankruptcy protection, the State Bar has an affirmative obligation to return the attorney to active status where their involuntary inactive enrollment is due solely to a failure to pay a fee arbitration award. This obligation includes

ceasing MFA Program enforcement proceedings that may be pending at the time the attorney files for bankruptcy protection.

Since the *Scheer* case was concluded, at least one attorney ordered involuntarily inactive enrolled through MFA Program enforcement proceedings subsequently filed for chapter 7 bankruptcy protection. In that case, the Presiding Arbitrator was notified by staff of the bankruptcy filing, and worked with staff to file a motion in the State Bar Court to terminate the involuntary inactive enrollment of the bankrupt attorney. Although the Presiding Arbitrator quickly and successfully moved to terminate the attorney's inactive enrollment, that motion was made, and was ruled upon, without reference to any express authority in the Rules of Procedure governing the consideration of the motion.

Violations of federal bankruptcy law expose the State Bar to the risk of potential monetary penalties, including punitive damages. (See 11 U.S.C.A. § 362, subd. (k).) The State Bar's exposure to liability may depend in part on the length of any violation. Therefore, it is imperative that procedures are in place to be able to act as soon as the State Bar is on notice that an attorney award debtor has filed for bankruptcy protection. The proposed revisions to the Rules of Procedure governing MFA Program enforcement proceedings reflected in Attachment A are recommended to ensure consistent and prompt compliance with the automatic stay and antidiscrimination provisions of U.S. Bankruptcy Code.

The proposed amendment to Rules of Procedure, rule 5.363, creates a new, mandatory basis for the Presiding Arbitrator to move to withdraw a motion for inactive enrollment when the Presiding Arbitrator determines that the attorney award debtor has filed for federal bankruptcy protection. This amendment also provides for the Presiding Arbitrator to cease MFA Program enforcement proceedings in accordance with the automatic bankruptcy stay.

The proposed amendment to Rules of Procedure of the State Bar, rule 5.370, creates a new process for the Presiding Arbitrator—rather than an attorney award debtor—to file a motion to terminate the attorney's inactive enrollment upon notice of bankruptcy. Because termination of an inactive enrollment is necessary to comply with federal bankruptcy law, the State Bar Court is required to issue its order to that effect as soon as reasonably practicable upon a showing that the attorney has in fact filed for bankruptcy protection. In addition, it is possible that a dischargeable debt is not actually discharged by the Bankruptcy Court. Therefore, this proposed amendment also grants the Presiding Arbitrator discretion to file a subsequent inactive enrollment motion if the bankruptcy case is dismissed without discharging the fee arbitration award debt. In order to safeguard the due process rights of attorney award debtors, any such motion must be filed as a new initial pleading according to the existing applicable Rules of Procedure.

During the development of these proposed amendments, staff considered the possibility that adopting the proposed Rules of Procedure could encourage some attorneys to declare bankruptcy in order to avoid paying a fee arbitration award, or to avoid the consequence of involuntary inactive enrollment. An attorney might theoretically take advantage of the protections of the bankruptcy system with successive filings in an attempt to thwart discipline

proceedings. However, this possibility is unlikely to impact MFA Program enforcement proceedings. Because the Presiding Arbitrator retains the discretion to file a new inactive enrollment motion if the bankruptcy case is ended without discharge of the fee arbitration award, an attorney would ultimately have little to gain from filing improperly in Bankruptcy Court. On the other hand, if the attorney award debtor is entitled to bankruptcy relief, the Ninth Circuit has made clear that this relief should include the discharge of a fee arbitration award.

## **FISCAL/PERSONNEL IMPACT**

This proposal has the potential to increase the caseload burden for the MFA Program. However, this proposal will also reduce the State Bar's exposure to potential liability in bankruptcy proceedings.

## **AMENDMENTS TO RULES OF THE STATE BAR**

Title 5, Division 6, Chapter 4

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: None - compliance

## **RECOMMENDATIONS**

**Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Regulation and Discipline Committee directs staff to make available for a 60-day public comment period proposed amended Rules of Procedure of the State Bar, rules 5.360 through 5.371, attached hereto as Attachment A; and it is

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

## **ATTACHMENT(S) LIST**

- A. Proposed amended Rules of Procedure of the State Bar, rules 5.360 through 5.371

**Rule 5.360 Nature of Proceeding; Definitions**

- (A) **Scope.** These rules apply to proceedings to enforce fee arbitration awards under Business and Professions Code § 6203(d).
- (B) **Supplemental Definitions.** For purposes of rules 5.360-5.371, the following definitions supplement those of rule 5.4:
- (1) “Arbitration award” means an award made in a fee arbitration under § 6203 in which an attorney was ordered to pay a refund to a client. The award is binding or has become binding either by operation of law after confirmation under § 6203(c) or by a judgment in a post-arbitration trial under Business and Professions Code § 6204.
  - (2) “Award debtor” means an attorney who must pay a refund to a client under an arbitration award.
  - (3) “Client” means a client or former client of an attorney to whom the attorney must pay a refund under an arbitration award.
  - (4) “Inactive enrollment motion” means a motion to place an award debtor on involuntary inactive enrollment under § 6203(d).
  - (5) “Presiding Arbitrator,” or his or her designee, means the person responsible for supervising arbitrators hearing State Bar mandatory fee arbitrations under Business and Professions Code §§ 6200 et seq.

Eff. January 1, 2011; Revised: January 25, 2019.

**Rule 5.361 Initial Pleading; Service**

- (A) **Beginning Proceeding.** A proceeding under this chapter begins when the Presiding Arbitrator files an inactive enrollment motion. The motion must be accompanied by a certified copy of the arbitration award and by declarations and exhibits necessary to establish the statutory requirements for involuntary inactive enrollment under Business and Professions Code § 6203(d). The motion must contain the following language in bold-face type:
- “NOTICE: If you do not file a timely response to this motion and request a hearing, you will waive your right to a hearing regarding your involuntary inactive enrollment.”**
- (B) **Service of Motion.** The Presiding Arbitrator must serve the inactive enrollment motion and supporting documents on the award debtor under rule 5.25.
- (C) **Service of Later Pleadings.** Later pleadings must be served on the award debtor under rule 5.26. The award debtor must serve the Presiding Arbitrator under rule 5.26 at the address shown on the inactive enrollment motion.

### **Rule 5.362 Response; Failure to File Response; Amending or Supplementing Initial Pleading**

- (A) Debtor's Response to Motion.** The award debtor must file and serve a response to the inactive enrollment motion within 10 days after the inactive enrollment motion is served. The response must be supported by declarations and exhibits, if any, setting forth the factual basis for the award debtor's contentions about the motion.
- (B) No Response.** If the award debtor does not respond to the inactive enrollment motion, and if it appears to the Court from the motion and supporting documents that the statutory requirements for involuntary inactive enrollment are satisfied, the Court must order the award debtor to be placed on involuntary inactive enrollment. Unless otherwise ordered, the order takes effect five days after it is served.
- (C) Amending or Supplementing Motion.** If the award debtor files a response or if the Court denies the motion despite no response, the Presiding Arbitrator may file an amendment or supplement to the inactive enrollment motion within five court days after the response or the Court's order denying the motion is served.

### **Rule 5.363 Withdrawal of Motion**

- (A) Discretionary Withdrawal of Motion.** The Presiding Arbitrator may withdraw the inactive enrollment motion if the award debtor files a response to the inactive enrollment motion stating that the arbitration award has been paid in full, or that the award debtor is willing to agree to and comply with a payment plan satisfactory to the client or the Presiding Arbitrator.
- (B) Mandatory Withdrawal of Motion.** The Presiding Arbitrator must withdraw the inactive enrollment motion filed pursuant to this rule if the Presiding Arbitrator determines that the award debtor has filed for federal bankruptcy protection under any chapter of the United States Bankruptcy Code.

### **Rule 5.364 Request for Hearing; Waiver of Hearing**

If the award debtor files a timely response to the inactive enrollment motion and requests a hearing, the Court will set a hearing and give at least 20 days' notice. If the award debtor does not file a timely response and request a hearing, the award debtor waives the right to a hearing.

### **Rule 5.365 Burden of Proof**

In proceedings on an inactive enrollment motion under these rules:

- (A) Presiding Arbitrator.** The Presiding Arbitrator has the burden to show by clear and convincing evidence that either:
  - (1) the award debtor has failed to comply with the arbitration award and has not proposed a payment plan acceptable to the client or the State Bar, or

- (2) the award debtor agreed to a payment plan and has failed to make one or more payments required by the payment plan.

**(B) Award Debtor.** The award debtor has the burden to show by clear and convincing evidence that he or she:

- (1) is not personally responsible for making or ensuring payment of the arbitration award;
- (2) is unable to pay the arbitration award or the payments due under a previously agreed payment plan; or
- (3) has proposed, and agrees to comply with, a payment plan that the State Bar unreasonably rejected as unsatisfactory.

### **Rule 5.366 Discovery**

For good cause, the Court may permit limited discovery. Otherwise, there is no discovery in a proceeding under these rules.

### **Rule 5.367 Hearing Procedure; Evidence**

**(A) Issues.** In a hearing, the issues are limited to whether the award debtor:

- (1) has failed to comply with the arbitration award or with any previously agreed payment plan;
- (2) has proposed a payment plan acceptable to the client or the State Bar;
- (3) has proposed a payment plan that the State Bar unreasonably rejected as unsatisfactory;
- (4) is personally responsible for making or ensuring payment of the arbitration award; or
- (5) is unable to pay the arbitration award or any payments due under a previously agreed payment plan.

**(B) Declarations.** Subject to appropriate objection, the Court will admit in evidence the declarations submitted in support of and in response to the inactive enrollment motion as the direct testimony of the respective declarants.

**(C) Cross-Examination.** In a pleading, an opposing party may ask that a declarant be produced for cross-examination at the hearing. If the request is filed and served at least 10 days before the hearing or, if the declaration was filed under rule 5.362, within three court days after the declaration was served, then the party that filed the declaration must produce the declarant as requested.

### **Rule 5.368 Ruling on Motion; Costs**

**(A) Contents of Order.** The Court will issue a written order on the inactive enrollment motion, stating its reasons for its decision and making findings on any disputed factual issues.

- (B) **Motion Granted.** If the order grants the motion, then:
- (1) unless otherwise ordered, the order takes effect five days after it is served, and
  - (2) when the Presiding Arbitrator submits a bill of costs, the Court will award reasonable costs to the State Bar under Business and Professions Code § 6203(d)(3).
- (C) **Definition of Reasonable Costs.** For the purpose of this rule, reasonable costs include all expenses paid by the State Bar that would qualify as taxable costs recoverable in civil proceedings, plus the amount that the Discipline Committee from time to time determines to be the reasonable administrative costs to the State Bar and the Court of processing inactive enrollment motions under these rules. Relief from costs may be sought under rule 5.130.
- (D) **Unreasonably Rejected Payment Plan.** If the Court finds that the State Bar unreasonably rejected a payment plan proposed by the award debtor, the Court may deny the motion and order the award debtor to comply with a payment plan satisfactory to the Court.

#### Rule 5.369 Review

- (A) **Ruling on Motion.** A ruling by a hearing judge on an inactive enrollment motion under these rules is reviewable under rule 5.150.
- (B) **Stay of Order.** An order granting an inactive enrollment motion will not be stayed pending review unless ordered by the Court under rule 5.150.

#### Rule 5.370 Termination of Inactive Enrollment

- (A) **Termination Upon Payment Eligibility.** When the award debtor has paid in full the arbitration award plus any costs and penalties assessed because of the award debtor's failure to comply, the award debtor may move to terminate an involuntary inactive enrollment ordered under these rules.
- (B1) **Motion; Response.** The motion must be accompanied by one or more declarations and by proof of payment. It must be served on the Presiding Arbitrator, who has 10 court days after service to respond.
- (C2) **Order.** When the Presiding Arbitrator files the response or the time to file the response expires, the Court will promptly issue an order on the motion. If the Court finds that the arbitration award and any costs and penalties have been paid, it will terminate any involuntary inactive enrollment ordered under this chapter.

- (B) Termination Upon Notice of Bankruptcy.** At any time after an order granting the inactive enrollment motion, if the Presiding Arbitrator determines that the award debtor has filed for federal bankruptcy protection under any chapter of the United States Bankruptcy Code, and unless an involuntary inactive enrollment ordered under these rules has already been terminated or the State Bar's enforcement efforts have otherwise been concluded, the Presiding Arbitrator must move to terminate an involuntary inactive enrollment ordered under these rules.
- (1) Motion.** The motion must be accompanied by a copy of the notice of bankruptcy filed in the federal court. The motion must be served on the award debtor. No response by the award debtor shall be required.
- (2) Order.** Upon receipt of a motion showing that the award debtor has filed for federal bankruptcy protection, the Court must, as soon as reasonably practicable, order the inactive enrollment terminated. Any such order of termination will apply only to the involuntary inactive enrollment order issued under these rules, and will be without regard to any other basis for an attorney's inactive enrollment.
- (3) Effect of Bankruptcy Dismissal.** Upon receiving notice that the award debtor's bankruptcy filing has been dismissed by the bankruptcy court, the Presiding Arbitrator may subsequently file a new inactive enrollment motion pursuant to rule 5.361.

### **Rule 5.371 Inapplicable Rules**

The following rules do not apply in a proceeding on an inactive enrollment motion under these rules:

- (A) General.** Rules that by their terms apply only to disciplinary proceedings or to other specific proceedings.
- (B) Specific.** Rules 5.44(A), (C), and (D) (amended pleadings); 5.50 (abatement); rules 5.60-5.71 (subpoenas and discovery); rules 5.80-5.102 (default; obligation to appear at trial; pretrial; notice of trial); rules 5.105-5.108 (admission of certain evidence); rules 5.151-5.157 (review).

Eff. January 1, 2011. Revised July 1, 2014.