

## PROPOSED REVISIONS DATED Nov. 2, 2009

### 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.)

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 \$\_\_\_\_\_

Pre-award interest  is not awarded.

\_\_\_\_\_  is awarded in the amount of \$\_\_\_\_\_.

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 30<sup>th</sup> 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 if 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 10.0, “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;

the agreement that substantially conforms with the notice approved by the State Bar.

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.

10. That, after an agreement has been reached, the program shall provide the parties with a notice of the right to enforce