WSBA

COURT RULES & PROCEDURES COMMITTEE

SUPPLEMENTAL MATERIALS

August 30, 2010 MEETING

- Subcommittee X Report (pp. 309 – 312)

Perkins Coie

August 26, 2010

TO: WSBA Court Rules & Procedures Committee

FROM: Rebecca S. Engrav, Subcommittee X

RE: **Revisions to MAR Proposals**

Summary:

At their meeting last month, the Board of Governors ("BOG") discussed this year's version of the slate of MAR proposals, which this Committee passed back in January 2010. Many members of the BOG expressed concern with the multiple triggers for the 20-day period within which to request a trial de novo in MAR 7.1, and thus we are again looking at that portion of MAR 7.1.

Subcommittee X Recommendation:

Simplify the *language* of the "triggers" portion of MAR 7.1, but keep in *substance* the same triggers, in large part. Our proposal is to change our suggested revision to MAR 7.1 as shown on the attached (single redline is change from current rule, double redline is change from what we submitted to the BOG). The Subcommittee also would like feedback from the full Committee on a more drastic option, which is to eliminate post-award fee motions and require that fees be requested at the time of the arbitration hearing, and awarded (or denied) in the original arbitration award.

Discussion:

As sent up to the BOG, there were five triggers in the rule, but they really amount to three concepts:

(1) issuance of the award (option (1) in what we sent up to the BOG)

(2) decision on attorneys' fees (options (2) and (3) in what we sent up to the BOG)

(3) arbitrator's filing of proof of service of any of the above (options (4) and (5) in what we sent up to the BOG)

The first is not debatable, so we here address the second and third concepts.

Attorney Fee Decision as Trigger

Subcommittee X thinks that requiring requests for trial de novo to be filed *prior* to receiving a fee decision is unjust and further would result in prophylactic requests. A party seeking fees is

by definition a prevailing party. So imagine a party who won the arbitration and seeks fees. The party won the arbitration, so has no reason to file request for trial de novo at the outset. If the 20-day period ends prior to receiving the arbitrator's decision on fees, the party will have no ability to request trial de novo if, for example, the arbitrator completely denies fees without good basis.

One option would be to shorten the time period for attorney fee briefing we proposed in MAR 6.4 (see prior materials at page 82). We rejected this idea as not feasible. If the time periods for filing, opposing, and deciding fees were shortened enough to get a ruling several days in advance of the 20-day period, they would be extremely burdensome on practitioners, and there would be no recourse if the arbitrator is late deciding the issue.

Another option is to keep the substance of the proposal the same, but make the language of MAR 7.1 simpler. Thus, litigants would still have 20 days to request trial de novo after the decision on fees, but the rule can state simply that the trigger is the "decision" on fees, rather than breaking it into awards of fees and denials. The majority of Subcommittee X generally favors this option, and it is in the attached MAR 7.1.

A third option would be to eliminate the opportunity to seek fees after the original arbitration award. In some (but definitely not all), the practice is to request fees prior to and at the arbitration hearing, and the arbitrator decides fees in the original award. This would certainly make the "triggers" for requesting trial de novo simpler. But it is more burdensome on practitioners, and some feel that arbitrators do not like to know which party may or may not be seeking fees at the time of the hearing. Thus, we do not recommend this approach, although we are curious to hear from more practitioners—especially any from counties in which this is the practice.

Proof of Service

It is important to keep in mind that the issue here is *not* the original proof of service issue that got the MAR revisions started. The issue here is what happens when the arbitrator files the award on day X and files proof of service two days later. Which day triggers the 20 days for requesting trial de novo? We suggested amended MAR 7.1 to state the latter simply to conform to existing case law, and thus eliminate a trap for the unwary practitioner.

To back up, the governing statute states:

> Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, *together with proof of service* thereof on the parties. Within twenty days after *such filing*, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

RCW 7.06.050(1) (emphases added).

In turn, the court of appeals held that the arbitrator does not perfect the filing of the award until she files proof of service, which is part of the "such filing" that by statute triggers the 20-day period. Although the court relied in part on an analogy from *Nevers* (the case re *litigants* filing the proof of service of *request for trial de novo*), which other aspects of our proposed amendments change, it also relied simply on the statutory language:

> This language suggests "such filing" includes the filing of both the award and the proof of service. The logical result, then, is that the 20-day time limit did not begin to run in these cases because the arbitrators did not "file" their awards.

Roberts v. Johnson, 137 Wn.2d 84, 91, 969 P.2d 446, 449 (1999).

Regardless of whether we amend the rule, the *Roberts* case remains good law and holds that the 20-day period does not begin until proof of service of the filing of the arbitration award. It makes good sense to make that clear in the rule, and the Subcommittee sees no reason not to. To make the rule simpler and easier to read, however, the Subcommittee has restructured to eliminate proof of service as a separate trigger. (We discussed the possibility that an arbitrator might file proof of service before filing the award. Under our proposed revision, the 20 days would begin from filing of proof of service. Ultimately we decided this possibility is remote, and further so long as the litigant has the award in hand and can evaluate whether to request trial de novo, as would be the case in this situation, it is not unjust.)

"The Later of"

We inserted this into the lead-in language because the BOG thought it would be helpful. Now that we are down to two triggers, it seems unnecessary and awkward ("of" appears many times in that sentence). However, the BOG felt strongly that this would be helpful.

SUGGESTED AMENDMENT
MANDATORY ARBITRATION RULES (MAR)
Rule 7.1 – Request for Trial De Novo

(a) Service and Filing. ~~Within 20 days after the arbitration award is filed with the clerk, any~~Any aggrieved party not having waived the right to appeal may ~~serve and file with the clerk a written~~ request ~~for~~ a trial de novo in the superior court ~~along with proof that a copy has been served~~. Any request for a trial de novo must be filed with the clerk and served, in accordance with CR 5, upon all other parties appearing in the case~~.~~ within 20 days after the filing of proof of service of the later of: (1) the award or~~;~~ (2) ~~an amended award; (3) a denial of~~ a decision on costs or attorney fees~~; (4) proof of service of the last filed award; or (5) proof of service of a denial of costs or attorney fees~~. A request for a trial de novo is timely filed or served if it is filed or served after the award is announced but before the 20-day period begins to run. The 20-day period within which to request a trial de novo may not be extended.

(b) Form. The request for a trial de novo shall not refer to the amount of the award, including any award of costs or attorney fees, and shall be ~~in~~ substantially in the form set forth below:

[Form unchanged.]

(c) Proof of Service. The party filing and serving the request for a trial de novo shall file a copy of proof of service with the court. Failure to file proof of service within the 20-day period shall not void the request for a trial de novo.

(~~b~~d) Calendar. When a trial de novo is requested as provided in section (a), the case shall be transferred from the arbitration calendar in accordance with rule 8.2 in a manner established by local rule.

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