

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT SPR12-01

Title	Action Requested
Alternative Dispute Resolution: Judicial Arbitration	Review and submit comments by Friday, June 15, 2012
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 3.819 and 3.827	January 1, 2013
Proposed by	Contact
Civil and Small Claims Advisory Committee Hon. Dennis M. Perluss, Chair	Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov

Executive Summary and Origin

This is a modified version of a proposal that was circulated for public comment in the spring of 2011. The Civil and Small Claims Advisory Committee proposes that the rules for the judicial arbitration program be amended to: (1) provide that an arbitrator can request compensation if the arbitrator devoted a substantial amount of time to a case that was settled without filing of an award; and (2) clarify that, in order to prevent entry of a judicial arbitration award as the judgment in a case, any request to dismiss the entire case must be signed by all parties to the case and any request to dismiss all parties to the arbitration must be signed by all those parties.

Background

California Code of Civil Procedure sections 1141–1141.31 establish judicial arbitration, a court-connected, nonbinding arbitration program for civil cases valued at \$50,000 or less. Courts with 18 or more judges are required to have this program for unlimited civil cases, and it is optional for courts with fewer than 18 judges and for limited civil cases. (Code Civ. Proc., § 1141.11.) Rules 3.810–3.830 of the California Rules of Court establish procedures for the judicial arbitration program. Under the judicial arbitration statutes and rules in effect until January 1, 2012, the parties had 30 days after the arbitrator filed his or her award to request a trial de novo or the arbitrator’s award would be entered as the judgment of the court. Based on legislation sponsored by the Judicial Council, the judicial arbitration statutes were amended effective January 1, 2012, to encourage settlement and reduce the number of trial de novo requests following judicial arbitration by (1) giving parties 60, rather than 30, days to file a request for a trial de novo; and

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

(2) providing that filing a request for dismissal during this time period will also prevent entry of the arbitrator's award as the judgment of the court. (See Code Civ. Proc., §§ 1141.20, 1141.23.)

Prior Circulation

In spring 2011, the Civil and Small Claims Advisory Committee circulated for public comment a proposal to amend the judicial arbitration rules to correspond to the amendments to the judicial arbitration statutes and to clarify what happens if the parties settle the case before an arbitration award has been filed. Among other things, this earlier proposal would have required parties to serve arbitrators with a copy of any notice of entry of dismissal and would have provided that if this notice is served, the arbitrator must cancel any scheduled hearing, must not file the arbitration award, and may submit a request for payment. Based on the public comments, the advisory committee decided to move forward in 2011 only with the rule amendments needed to correspond with the statutory changes and to modify and recirculate a proposal for rule amendments addressing other aspects of the judicial arbitration rules. In October 2011, the Judicial Council approved the amendments to the judicial arbitration rules needed to correspond with the changes to the judicial arbitration statutes.

The Proposal

This proposal is intended to improve and clarify the procedures for payment of arbitrators in the judicial arbitration program and respond to identified concerns about who must sign a request for dismissal in order for it to prevent entry of an arbitration award as the judgment in the case.

Arbitrators' fees

Rule 3.819 currently provides that, with certain exceptions, an arbitrator in the judicial arbitration program may not be paid unless the arbitrator's award or a notice of settlement has been filed. The proposal that was circulated for comment last spring would have modified 3.819(a) to instead specify that an arbitrator may not be paid unless the arbitrator's award or a notice of entry of dismissal had been filed. One of the comments submitted on this earlier proposal expressed concern about delays in paying arbitrators when the arbitrator has devoted time to a case in which the parties ultimately enter into a conditional settlement. When there is a conditional settlement, it may be quite some time before the conditions are satisfied and either a request for dismissal or notice of entry of dismissal is filed. Based on this concern, the commentator suggested that this rule continue to generally permit paying an arbitrator if a notice of settlement is filed.

The committee agreed with the concept that an arbitrator who has devoted time to a case should be able to seek payment if the parties enter into a conditional settlement before an arbitration award is filed. Rule 3.819(b), part of the rule that the committee had not previously proposed be amended, currently permits an arbitrator to request payment from the court if the arbitrator devoted a substantial amount of time to a case that was settled without a hearing. This existing provision should cover situations in which the parties reach a conditional settlement before an arbitration hearing is held. However, it would not cover situations in which such a settlement is

reached after a hearing is held but before an arbitration award is filed. This revised proposal would amend rule 3.819(b) to provide more broadly that an arbitrator can request compensation if the arbitrator devoted a substantial amount of time to a case that was settled without filing of an award.

Given this proposed amendment to 3.819(b), the committee concluded it was not necessary for 3.819(a) to refer to the filing of a notice of settlement and is therefore proposing that this language be deleted from 3.819(a). The committee is also proposing amendments 3.819(c), which addresses the contents of arbitrators' fee statements. Currently this provision requires that the statement include the date "a settlement" was filed. To make this provision clearer, this language would be replaced with a requirement that the statement include the date any "notice of settlement" or any request for dismissal was filed.

Required signatures on request for dismissal

The amendments to rule 3.827 that took effect January 1, 2012 provided, in part, that, for the filing of a request for dismissal to prevent entry of a judicial arbitration award as the judgment in the case, the request must be in the form of a *Request for Dismissal* (form CIV-110) of the entire case or as to all parties to the arbitration, must be fully completed, and must include the signatures of all those whose consent is required for dismissal. Since the adoption of this provision, several individuals have noted that there is case law holding that after a judicial arbitration award has been filed, a plaintiff no longer has the unilateral authority to voluntarily dismiss a complaint under Code of Civil Procedure section 581(b)(1). This code section provides, in relevant part: "[a]n action may be dismissed . . . [w]ith or without prejudice, upon written request of the plaintiff to the clerk, . . . *at any time before the actual commencement of trial.*" (Italics added.) Case law has held that a trial is deemed to have commenced when a judicial arbitration award has been filed (see *Lee v. Kwong* (2011) 193 Cal.App.4th 1275).

Code of Civil Procedure section 581(b)(2) also provides, however, that an action may be dismissed " [w]ith or without prejudice, by any party upon the written consent of all other parties." Thus, with the consent of all parties, a case may be voluntarily dismissed even after the filing of a judicial arbitration award. To make it clearer that rule 3.827 is not intended to imply that the plaintiff may unilaterally dismiss a case after a judicial arbitration award has been filed, this proposal would amend rule 3.827 to specifically require that, for the filing of *Request for Dismissal* to prevent entry of the arbitration award as the judgment in the case, any request to dismiss the entire case must be signed by all parties to the case and any request to dismiss all parties to the arbitration must be signed by all those parties.

Alternatives considered

As indicated above, the committee previously considered and circulated for public comment a proposal that would have required parties to serve arbitrators with a copy of any notice of entry of dismissal and would have provided that if this notice is served, the arbitrator must cancel any

scheduled hearing, must not file the arbitration award, and may submit a request for payment. Based on concerns raised by commentators about that proposal, the committee decided not to pursue that proposal.

Implementation Requirements, Costs, and Operational Impacts

This proposal may require some changes in current trial court procedures relating to judicial arbitration and in the procedures followed by arbitrators in this program. This may require some additional training for both trial court staff and arbitrators on courts' judicial arbitration panels. These should be small, one-time costs. In addition, the proposed change to rule 3.827 should eliminate confusion about who must sign a request for dismissal in order for it to prevent entry of the arbitrator's award as the judgment and thereby avoid costs associated with correcting problems associated with requests for dismissal that do not contain needed signatures.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committees are interested in comments on whether the proposal appropriately addresses its stated purpose.

The advisory committees also seek comments from *courts* on the following cost and implementation matters:

- Will the proposal provide cost savings? If so please quantify.
- What are the implementation requirements for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management system, or modifying case management system.
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

Code of Civil Procedure sections 1141–1141.31 can be accessed at: <http://www.leginfo.ca.gov/calaw.html>

Rule 3.819 and 3.827 of the California Rules of Court would be amended, effective January 1, 2013, to read:

Title 3. Civil Rules

Division 8. Alternative Dispute Resolution

Chapter 2. Judicial Arbitration

Rule 3.819. Arbitrator's fees

(a) Filing of award or notice of settlement required

Except as provided in (b), ~~t~~The arbitrator's award must be timely filed with the clerk of the court under rule 3.825(b) ~~or a notice of settlement must have been filed~~ before a fee may be paid to the arbitrator.

(b) Exceptions for good cause

On the arbitrator's verified ex parte application, the court may for good cause authorize payment of a fee:

- (1) If the arbitrator devoted a substantial amount of time to a case that was settled without a ~~hearing~~ an award being filed; or
- (2) If the award was not timely filed.

(c) Arbitrator's fee statement

The arbitrator's fee statement must be submitted to the administrator promptly upon the completion of the arbitrator's duties and must set forth the title and number of the cause arbitrated, the date of ~~the~~ any arbitration hearing, and the date the award ~~or,~~ any notice of settlement, or any request for dismissal was filed.

Rule 3.827. Entry of award as judgment

(a) Entry of award as judgment by clerk

The clerk must enter the award as a judgment immediately upon the expiration of 60 days after the award is filed if no party has, during that period, served and filed either:

- (1) A request for trial as provided in these rules; or

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(2) A *Request for Dismissal* (form CIV-110) of the entire case or as to all parties to the arbitration. The *Request for Dismissal* must be fully completed ~~and~~. If the request is for dismissal of the entire case, it must include the signatures of all parties ~~those~~ whose consent is required for dismissal. If the request for dismissal is of all parties to the arbitration, it must include the signatures of all those parties.

(b)-(c) * * *