October 20, 2010

To the Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

Re: Request that the Court Order that the Opinion of the First Appellate District, Division Two, in Case No. A125732, *Benjamin, Weill & Mazer v. Kors,* Filed October 12, 2010, Not be Published

To the Honorable Chief Justice and Associate Justices:

We write pursuant to California Rules of Court, Rule 8.1125, to request respectfully that this Honorable Court order that the Opinion of the First Appellate District, Division Two, in Case No. A125732, *Benjamin, Weill & Mazer v. Kors,* filed October 12, 2010 [Los Angeles Daily Journal D.A.R. 15842] ("*Kors*"), not be published.

The four below-signing individuals each have been a member of the State Bar Committee on Mandatory Fee Arbitration ("CMFA") for a number of years, and we each have had extensive experience with all aspects of State Bar's Mandatory Fee Arbitration ("MFA") Program and with a number of local MFA programs. We each have been Chair of the CMFA, in Mr. Mark's case twice. Over the years, we each have participated in the training of thousands of volunteer MFA arbitrators. And, we each have been appointed by the State Bar Board of Governors to serve as Presiding Arbitrator of the State Bar, the officer designated to administer State Bar MFA Program the statewide, and rule upon various controversies which arise through the State Bar MFA Program and also which may be presented by local MFA programs.

Mr. Mark is the current Presiding Arbitrator. He also has served one term on the State Bar Committee on Professional Responsibility and Conduct ("COPRAC"), and recently was appointed by the State Bar Office of Chief Trial Counsel to serve as a Special Deputy Trial Counsel in State Bar disciplinary matters.

We write today, however, as individuals only, and not in any past or current official capacity in connection with in any of the above-mentioned volunteer positions.

We are deeply concerned that, if the *Kors* Opinion is published, it will be misconstrued to impose onerous disclosure requirements on attorneys volunteering their service as unpaid arbitrators in the State Bar and local MFA programs conducted under the Mandatory Fee Arbitration Act ("MFAA"), Article 13 of the

State Bar Act, Business & Professions Code sections 6200, et seq., and upon the State Bar and local programs that administer and conduct MFA proceedings throughout the State. Were that to happen, we do not believe it an exaggeration to predict that it would be inevitable that the MFA system ultimately would collapse.

In the *Kors* case, the Court of Appeal reversed the trial court's denial of one party's petition to vacate an arbitration award based upon the fact that the panel chair had failed to disclose various matters that were required to be disclosed by Standard 7(d)(14)(A) of the California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration (the "Standards"). (Opinion, p. 10.) In additional justification for its holding, the Court of Appeal noted that "[p]rivate arbitration . . . is a commercial enterprise" (Opinion, p. 13) and that the "widespread use in this state of referees and arbitrators selected and paid by the parties in disputes removed from the judicial system has raised issues that have long been recognized and studied, including the danger that the arbitrator's impartiality might be compromised by economic considerations." (Opinion, p. 13.)

The arbitration provider in the *Kors* case, however, was not a commercial enterprise. Rather, the parties by contract had agreed that the rules applicable to their arbitration would be the rules of the Bar Association of San Francisco ("BASF") MFA Program, one of the most well-respected of some 41 local MFA programs throughout the State operating under the MFAA.

As this Court explained in *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 983-986, the MFAA was enacted to address "the most serious problem between members of the bar and the public" – fee disputes between attorneys and their clients. As this court also noted in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 564-567, in order to achieve the objectives of the MFAA, there are significant differences between MFA under the MFAA and conventional contractual arbitration governed by the California Arbitration Act ("CAA").

MFA is subject to statutory mandates of the MFAA and oversight by the State Bar Board of Governors. All MFA programs must comply with the Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards"), which also are approved by the Board of Governors. They also are subject to the Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California ("State Bar Rules"). All local program rules are subject to the approval of the Board of Governors, usually after screening by and upon the recommendation of the CMFA. Filing fees charged by MFA programs are to cover administrative costs only and are subject to approval by the Board of Governors. Filling fees are required by the State Bar Rules to be sufficiently low to

permit wide access by lawyers and clients, and are subject in most programs to waiver for economic hardship. The neutrals who serve in MFA programs are volunteers and not paid participants. In all three-member MFA panels, one member of each three-member panel is required to be a non-attorney. Malpractice claims are not permitted in MFA (except and only to the extent that malpractice may bear upon the value of the services and thus upon the amount of the fee owing from the client to the attorney). MFA matters are non-binding with a collateral right to a trial de novo unless the parties agree after the fee dispute has arisen to be bound by the MFA award. And, attorneys' fees and costs are not recoverable by either party in an MFA matter, except for the possible reallocation of the filing fee at the discretion of the arbitrator(s).

Because of these differences between MFA programs and conventional commercial arbitration providers, and the MFA's unique statutory structure and close oversight, MFA arbitrators were expressly exempted from the disclosure requirements in the Standards applicable to conventional contractual arbitrators who receive compensation for their services as neutrals. (*See*, Standard 3(b)(C).)

In addition, State Bar Arbitration Advisory 95-01 ("Disclosure Required of Fee Arbitrators by Code of Civil Procedure Section 1281.9"), also approved by the Board of Governors following public comment, advises fee arbitrators and MFA programs as follows:

> Code of Civil Procedure Section 1281.9 does not appear to require disclosure in mandatory attorney fee arbitrations conducted under Business and Professions Code Section 6200. For several reasons, Code of Civil Procedure Section 1281.9 does not appear to apply to fee arbitrations conducted under Bus. & Prof. Code Section 6200. All of the arbitration programs approved by the State Bar, and the State Bar's program, provide for the program, and not the parties, to select the arbitrators, whereas Code of Civil Procedure Section 1281.9 (and Code of Civil Procedure Section 1280(d)) defines a neutral arbitrator as an arbitrator proposed by the parties. Moreover, the statute states that it applies only to 'any arbitration agreement involving a claim for damages.' Since fee arbitrations do not involve claims for damages (Bus. & Prof. Code Section 6203), and since fee arbitrations do not arise out of an independent arbitration agreement but are creatures of statute, the prerequisites for applying the statute do not appear to be present. . . . .

The BASF MFA rules to which the parties stipulated in the *Kors* case provide that its MFA matters are conducted pursuant to the MFAA and are subject to the Minimum Standards. The BASF MFA rules further provide that the CAA is applicable only as to matters not otherwise dealt with in the BASF MFA rules or in the MFAA and that, in the event of any conflict between the BASF MFA rules and the CAA, the BASF MFA rules shall govern. The panel chair in question was appointed and served without compensation pursuant to the BASF MFA rules, and one member of the panel was a non-attorney arbitrator. It is true that the *Kors* case technically was ordered to arbitration pursuant to a contractual provision and not pursuant to a client's initiation of the proceeding following notice from the attorney of the client's rights under the MFAA. However, the fee dispute was arbitrated neither by a commercial dispute resolution provider nor under rules applicable to conventional contractual arbitrations.

Unfortunately, the *Kors* case should never have been submitted to binding arbitration before the BASF MFA program. The problem originated with an agreement between attorneys and their client made in the parties' initial engagement agreement that "specified that any fee dispute between the parties was to be submitted to binding arbitration pursuant to the rules of the Bar Association of San Francisco (BASF)." (Opinion, pp. 2-3.) Business & Professions Code section 6204(a), however, provides that a stipulation to binding MFA can be made only after the fee dispute has arisen. It was compounded by the Superior Court order sending the matter to BASF, presumably with neither party pointing out the confusion of MFA and CAA arbitrations in the process. Lastly, the BASF MFA Program probably should have protested, as it has no rules for private commercial arbitration. Presumably, it simply placed the matter into the usual MFA administrative framework under its MFA rules because it believed the Superior Court intended it to do so. Regrettably the Court of Appeal opinion conflates the two systems, with potentially disastrous results for MFA.

Business & Professions Code section 6200(c) permits an attorney to contractually obligate the client to elect non-binding MFA in their initial engagement letter before any fee dispute has arisen. And, many times parties will contractually agree to submit their fee dispute to MFA after there may have been a waiver of MFA by the client initially. Accordingly, many MFA matters come to local MFA programs pursuant to a contract rather than a client's initial election to MFA after the fee dispute arises.

The facts in the *Kors* case were limited, and involved the rather unique situation of a contractual stipulation to binding arbitration but under rules

applicable to MFA. Literally read, however, the *Kors* Opinion would be applicable to all such MFA matters where the parties have agreed even to non-binding MFA pursuant to a contract either at the outset of their relationship or after their fee dispute arose. The concern is that the *Kors* Opinion in fact will be read broadly as being applicable to all MFA proceedings where the parties (as was the case in *Kors*) ended up in MFA by contract, if not as being applicable to all MFA proceedings across the board. And, if broadly applied, we fear there is a strong likelihood that the consequences that the *Kors* Opinion will create for California's MFA process will be drastic, if not fatal.

A great number of local MFA program volunteer attorney arbitrators have become involved in the program because of prior or current experience representing attorneys in fee disputes or malpractice actions, as had the panel chair in the *Kors* case. Similarly, many attorney arbitrators regularly hear MFA matters involving other attorneys who practice in the same practice area, such as family law, probate, business litigation, tort litigation, etc. If general practice backgrounds or specific past or current client representations are required to be disclosed because such information may be a valid ground for recusal of MFA attorney arbitrators, local MFA programs and the State Bar MFA Program would lose a significant number of their panelists who either would be subject to recusal motions on the same grounds as in the *Kors* case or would choose not to serve rather than to make such disclosures. In addition, local programs also would lose another significant resource – the knowledge, skill and experience that attorneys with such training and background bring to MFA programs.

Additionally, it seems inevitable that, even if the loss of arbitrator resources were not as drastic as may be imagined, the burden on MFA program administrators will increase significantly. Additional efforts will have to be expended in dealing with an increased number of recusal motions, in recruiting arbitrators to make up for the ones who may be lost due to the application of the additional disclosure requirements, and in making up for the loss of expertise provided by attorneys who have experience with fee disputes and malpractice issues. It is difficult enough for MFA programs to recruit volunteer arbitrators without facing this additional challenge, and any significant loss of such arbitrators may cause any number of local programs to cease operations.

And, because local MFA programs are permitted to charge filing fees only to the extent necessary to cover administrative costs, local MFA programs neither are equipped nor have the economic resources – as do private providers such as JAMS, the AAA and FINRA – to keep the kinds of disclosure records required by the

private arbitration statutes. As a result, we also can expect that at least some local programs will consider discontinuing their programs for this reason as well. That in turn would put a heavy burden upon the State Bar MFA Program, and possibly disable it from fulfilling the mandates and objectives of MFAA entirely.

MFA programs operating under the statutory scheme embodied in the MFAA have proven to be extremely effective at accomplishing the intended objectives of providing a cost-effective and efficient method for resolving disputes between members of the State Bar and their clients and of keeping the vast majority of these disputes out of the judicial system, in large measure due to the volunteer participation of attorneys such as the panel chair in the *Kors* case. Although no statistics are kept for precise measurement, it is the general experience of participants and administrators in the MFA process that well in excess of 90% of the fee disputes that are administered by local MFA programs and by the State Bar program end up as the final resolution of the dispute. By applying disclosure requirements applicable to conventional commercial arbitration to MFA matters, however, the MFA process will be far less effective in achieving the important objectives of the MFAA at best, and possibly will be rendered unable to do so at all at worst.

While these issues could be addressed by review or modification of the *Kors* Opinion, we respectfully suggest that, in the interest of conserving the time of the Court, it would seem to make more sense that the Opinion simply not be published.

For all of these reasons, we respectfully request that this Honorable Court order that the Opinion of the First Appellate District, Division Two, in Case No. A125732, *Benjamin, Weill & Mazer v. Kors,* filed October 12, 2010, not be published.

Thank you for your anticipated favorable consideration of this request.

Very Truly Yours,

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