

Committee on Mandatory Fee Arbitration
FEE ARBITRATOR
BASIC TRAINING

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Information compiled from the Committee on Mandatory Fee
Arbitration State Bar of California Mandatory Fee Arbitration Program
April 2005 Handbook; August 2005 Arbitrator Training Outline;
Arbitration Advisory 07-01; and CCCBA Rules of Procedure

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Program Overview

- Under Business & Professions Code § 6200, effective 1979, the State Bar is required to arbitrate fee disputes.
- The State Bar Committee on Mandatory Fee Arbitration, established in 1984, oversees attorney fee arbitration programs run through local bar associations.
- The Contra Costa County Bar Association Fee Mediation/Arbitration Program's Rules of Procedure comply with the "Guidelines and Minimum Standards for the Operations of Mandatory Fee Arbitration Programs".
- The Rules of Procedure (ROP) for the Hearing of Fee Arbitrations & Mediations by the Contra Costa County Bar Association govern our Program. All arbitrators received a copy of the current rules upon assignment of a case.

Procedure Overview

- A single arbitrator is assigned to cases for disputes involving less than \$25,000.00.
- A panel of three arbitrators is assigned to cases for disputes of \$25,000.00 or more, one of whom shall be a public (non-lawyer member). The parties may agree, in writing, to have the matter heard by a single attorney arbitrator.
 - If one of the panel members fails to appear, upon written stipulation of the parties, the hearing may proceed with the panel chair acting as the sole arbitrator. Under no circumstances will the hearing proceed with two arbitrators or with one lay arbitrator.
[ROP 3(j)(2)(iii)]

Procedure Overview

- A list of volunteers is maintained by the Program. Although we try to limit assigning our volunteers no more than one case every year or two, this may vary based upon the number of requests filed each year, the type of law the underlying case involves, and your willingness to serve. For instance, about half of the cases filed involve family law, so those volunteers may be called upon to serve more often than a real estate law volunteer.
- The assignments are made by emailing a request to you first to check your availability and to determine that there is no conflict. **The Subject line reads: “CCCBA Fee Arbitration Program – Request for your service as an arbitrator”.**

Procedure Overview

- Upon accepting the assignment, the file is mailed to you along with instructions and the necessary forms.
 - For more information, you may access our ROP, forms, and guidelines on our website at www.cccba.org (follow these links: Build Your Practice – ADR Programs – Fee Arbitration Program)
- Within 5 days, complete the Arbitrator Statement of Disclosure form and return it to the CCCBA Program.

Avoiding the Appearance of Bias

- Code of Civil Procedure § 1281.91(d) requires arbitrators to disqualify themselves on “any grounds specified in Section 170.1” for disqualification of a judge.
- If appearance of bias could be an issue, even if the arbitrator believes that he or she will still be fair, the better rule is to disclose early to give the parties an opportunity to disqualify.
 - The CCCBA Program provides a disclosure statement to arbitrators to complete at the beginning of each assignment and return to the Program office.
- If an unforeseen disclosure is made at the hearing, consider continuing the hearing to give parties a chance to think about it. It is preferable to deal with the problem in house before an award is issued rather than taint the entire process.

Procedure Overview

- Upon receipt of the disclosure the Program mails out the “Notice of Appointment of Panel” to the parties with a copy to you.
- Parties have 15 days from receipt of the notice to file a disqualification or challenge by writing to the Program and copying the other party and the arbitrator.
- If no objection is filed you may proceed to set the hearing date. Arbitrations with a single arbitrator should commence within 45 days after the date of service of the notice of assignment; and within 90 days for a three member panel.
- Send out the “Notice of Hearing Date” with a copy to the Program.

Procedure Overview

- Contract the Program if any problems or changes arise.
- After the hearing mail the original award to the Program. The deadline for arbitrations with a single arbitrator is 15 days from the date of the hearing; and 25 days for a three member panel.
 - **The Program will serve the award to the parties along with the “Notice of Your Rights After Fee Arbitration” as required by the State Bar of California.**

Checklist of Materials

You will receive the following material from the Program upon your assignment:

- Request by Client for Arbitration of a Fee Dispute
- Attorney's Reply to Client's Request for Arbitration
- Notice of Attorney Responsibility
- Arbitrator Statement of Disclosure form
- For disputes \$1,000 or less: Desk Arbitration Submission Date form & Declaration form
- Request for Arbitration Hearing Dates form
- Notification of Hearing Date form
- Waiver of Personal Appearance form
- Hearing Procedures Script prepared by the State Bar of California
- List of Arbitration Advisories
- REQUIRED Award Format & State Bar of California Arbitration Award Checklist
- CCP §1284 Correction of Award
- CCCBA Rules of Procedure for the Hearing of Fee Arbitrations & Mediations

Preparation for the Hearing

- Shaping the issues. Read the petition, response and any accompanying materials as soon as you receive them. If you do not have a good sense of what the dispute is about, take the initiative now to ask the parties for clarification. Do not wait until the hearing.
- Identifying the parties. The parties are the petitioner (usually the Client) and the respondent (usually the Attorney). If there are questions as to who are the proper parties, discuss them with the administrator right away.

Preparation for the Hearing

- Setting the hearing date and notice of hearing. The hearing shall commence within 45 days for a single arbitrator and 90 days for a three member panel after the date of service of the “Notice of Assignment of Panel”....The designated panel shall serve written notice of hearing on each party and the Program at least fifteen (15) days prior to the hearing date. [ROP 3(j)]
 - The CCCBA Program provides a “Request for Arbitration Hearing Dates” form that you may use to contact the parties for mutually convenient hearing dates and times. The CCCBA conference rooms may be used as a neutral site, but please call (925) 686-6900 x 2 to confirm availability.
- Continuances – Upon stipulation or application to the sole arbitrator or Panel Chair the matter may be continued for good cause shown. A good practice is to ask the party seeking the continuance to clear the continued date with the other side first. After the date has been cleared the arbitrator should notify all parties of the continuance in writing.

Preparation for the Hearing

- Taking control of the proceedings from the outset. When you contact the parties to schedule the hearing, it is a good time to ask the parties, if they have not already done so, to furnish you with the fee agreement, billing statements (if they are an issue), any other documents they may wish to rely on at the hearing, and any documents you would like to see. Tell each side to send the other side a copy of everything sent to you.
 - **If no required exchange is ordered by the Sole Arbitrator or Panel Chair and if either party intends to submit documents, copies must be mailed directly to each arbitrator and to the opposing party AT LEAST TEN (10) DAYS PRIOR TO THE SCHEDULED HEARING DATE. In the arbitrator's discretion, a party shall not be precluded from submitting documents not provided in advance of the hearing. [ROP 5(e)]**

Discovery & Subpoenas

CCCBA Rule of Procedure 5 (d) does not allow discovery. However, informal exchange of documents should be encouraged.

- B&P Code 6200(g)(3) allows an arbitrator to issues subpoenas for the attendance of witnesses and the production of relevant documents. As a practical matter, only the appropriate civil court may truly compel attendance/enforcement upon application by a party.
- The sole arbitrator or Panel Chair, shall, for good cause shown, issue subpoenas or subpoenas duces tecum at the request of a party. CCCBA shall provide the blank subpoenas and the requesting party shall be responsible for obtaining the arbitrator's signature and for service of the subpoenas. The party requesting subpoenas will be responsible for any witness fees and costs. [ROP 5(f)]

Ex Parte Communications

Ex Parte communications create suspicion and should be avoided.

- A party or an attorney or representative acting for a party shall not directly or indirectly communicate with or argue to an arbitrator regarding a matter pending before such arbitrator except:
 - At scheduled hearings; or
 - In writing with a copy to all other parties, and their respective counsel, if any, and the CCCBA; or
 - For the sole purpose of scheduling a hearing or other administrative procedures with notice of same to the other parties; or
 - For the purpose of obtaining the issuance of a subpoena as set forth in the CCCBA Rules of Procedure; or
 - In an emergency.

[ROP 4 (e)]

Informality of the Proceeding

- Fee arbitration hearings should be much less formal than judicial trials, and probably less formal than judicial arbitrations or small claims hearings.
- The level of formality to be observed is up to the arbitrator. But keep in mind the statutory purpose of providing a forum where clients can present their cases without legal representation.
- Some level of formality helps the arbitrator to maintain control, and shows both sides they are playing by the same rules; and excessive informality may be perceived as bias, particularly by unrepresented clients.
- A client who doesn't understand the proceeding may believe there was bias and may be dissatisfied with the process.

Dealing with Unrepresented Clients

Text prepared by the Committee on Mandatory Fee Arbitration
State Bar of California Mandatory Fee Arbitration Program
Fee Arbitrator Handbook April 2005

- Lawyers and clients involved in fee disputes are frequently apprehensive about the arbitration process and skeptical about whether they will get a fair hearing. It is not enough that the hearing, in fact, be fair; it must also *appear* to be fair.
- With unrepresented clients, however, it is especially important that the arbitration *appear* to the client to be fair, as the unrepresented client does not have a lawyer to explain to him or her why the adverse party lawyer was on a first name basis with the arbitrator lawyer(s) but the arbitrator lawyer(s) addressed the client by his or her last name and/or could not remember the client's name, why something the client thought was pertinent was ruled irrelevant or beyond the scope of the hearing and could not be brought up, discussed, or argued at the hearing, or why the adverse party lawyer and the arbitrator lawyer(s) was/were speaking to each other in the same foreign language--legalese--which the client did not speak and could not understand.

Dealing with Unrepresented Clients

- Be courteous. Of course, arbitrators should always be courteous, but they should be especially polite and courteous to unrepresented clients.
- Treat both sides with equal formality. For example, do not greet the lawyer by his or her first name and then turn to the client and say, “Good morning Ms. Smith, I’m Mr. Arbitrator.”
 - **The most common complaint from clients is that the arbitrator was overly friendly with the attorney (i.e. they hugged, they called each other by their first names, they talked shop).**

Dealing with Unrepresented Clients

- Do not have a conversation that does not include both parties. Arbitrators should avoid any conversation with one party when the other is not included, even if the conversation has nothing to do with the case. This is especially true when one party is an unrepresented client. What might an unrepresented client think if s/he arrives at the hearing to find the lawyer(s) chatting with the lawyer party, even if the subject of the conversation is not the case?
- When the arbitration hearing is over, if one party leaves first, the arbitrator(s) should not engage in conversation with the other party. Picture the unrepresented client returning to retrieve something left behind and finding the lawyer arbitrator(s) having a friendly conversation with the adverse party. Even when all parties are present, it is especially easy for lawyers to converse about legal subjects to the exclusion of non-lawyers present. Arbitrators should be alert to and avoid such conversations.

Dealing with Unrepresented Clients

- Use plain terms, or if it is necessary for the arbitrator(s) to use legal terms, the presiding arbitrator should take the time to explain and be sure the unrepresented client understands. In explaining, the arbitrator(s) should not be condescending or speak down to any party.
- Tell the parties that the formal rules of evidence do not apply. The arbitrator(s) should make it clear that the technical rules of evidence do not apply in fee arbitration hearings. Any information may be considered if it is of the type and character upon which ordinary people rely in the ordinary course of their day-to-day lives. Matters that might keep evidence out of a court may be considered by the arbitrator(s) as going to the weight of the evidence. The unrepresented client, especially, should be given every reasonable opportunity to present his or her case.
 - **An often heard complaint is that the arbitrator does not listen to the client and let them present all their evidence.**

Dealing with Unrepresented Clients

- Be patient. Arbitrators should always be patient, of course, but they should be a little more patient with unrepresented clients. No one likes to take two hours to hear a matter that should only take one, but it is important that the parties feel they have had their say; i.e., that they were given the opportunity to present their side of the dispute and that the arbitrator(s) listened. It is especially important to let an unrepresented client have a little extra leeway and time to present his or her case.
 - Many times the losing party - be it lawyer or client - will accept the award, even if they think it is wrong, if they believe the arbitrator(s) listened, heard, understood, and considered what they had to say.
- In conclusion, be fair, be courteous, be patient.

Awards

- **And last but not least is the complaint that the award was poorly written and did not address the issues or explain how the arbitrator made the determination.**
- The State Bar of California has prepared a “Required Award Format” to assist arbitrators in the preparation of the award. It provides you with the necessary fill-in-the-blank language and reminds you to include a statement of facts and reasoning.
 - The State Bar prepared an “Arbitration Award Checklist” covering all pertinent issues that may have to be determined in preparing a fee arbitration award. It includes an instruction and reference guide.

Awards

- Whenever there are three arbitrators, a majority vote shall be sufficient for all decision of the arbitrators, including the award. The award shall be signed by the arbitrators concurring therein. Any dissent from the award shall be served with the award. [ROP 6(c)]
- If appropriate, costs may be ascertained.
 - The award may include an allocation of the filing fee and any fee paid by the client for filing a stay with the court; however, it shall not include an award for any other costs of the arbitration, including attorneys fees resulting from the arbitration proceeding, even if the parties had a contract providing for the award of such fee. [ROP 6(d)]

Checklist for Conducting Arbitration Hearings

Text prepared by the Committee on Mandatory Fee Arbitration
State Bar of California Mandatory Fee Arbitration Program
Fee Arbitrator Handbook April 2005

- **1. ARRIVAL OF PARTIES: Waiting area.**
 - Unless the request or response indicates a personality conflict suggesting a separation of the parties, their arrival should be acknowledged by the receptionist or secretary.
 - The receptionist or secretary should be reminded to refer to the parties and counsel formally with absolutely no business or social inquiries or discussions. They should also be reminded that the proceedings are confidential.
- The parties and their witnesses should remain in a common area until the arbitrator is ready.

Checklist for Conducting Arbitration Hearings

- **2. HEARING ROOM:** Conference Room preferable.
 - A conference room is preferable to the arbitrator's office.
 - The parties should have facilities to lay out their papers and take notes.
 - Coffee, tea, water, et cetera, is a matter of individual preference. At times it assists in establishing a less formal atmosphere for the benefit of the client.

Checklist for Conducting Arbitration Hearings

- **3. PLACEMENT AND INTRODUCTIONS:** No personal contact by an arbitrator prior to meeting with all parties.
 - The arbitrator(s) should have no contact with a party out of the presence of all parties or their attorneys.
 - The presiding arbitrator should introduce himself or herself, and where applicable, the other arbitrators, to the parties. The arbitrator(s) should avoid first name introductions and use of first names throughout the hearings.

Checklist for Conducting Arbitration Hearings

- Throughout the proceeding, there should be no “talking shop” between the arbitrator(s) and the attorney/respondent. A reference to a local trial, a specific judge, or even an appellate decision that just came down, may be interpreted as a social or professional relationship between the respondent attorney and the arbitrator. **A client may interpret “shop talk” as grounds for vacation of the award. See CCP § 1286.2(a), (b), and (c).**
- As in any proceeding, the parties should be separated at the conference table to protect privacy of notes taken and prepared writings intended to be used by a party during the proceedings.

Checklist for Conducting Arbitration Hearings

- **4. OATH OR AFFIRMATION:** The arbitrator must be prepared to administer the affirmation, should a party or witness decline to be sworn.
 - The arbitrator should initially ask if any party or witness prefers to affirm under penalty of perjury, as distinguished from being sworn. Otherwise, the oath can be administered by the presiding arbitrator. It is discretionary as to swearing in all parties and witnesses at the same time, or doing so as they are individually called.

“Do you solemnly swear (or affirm) that the testimony you are about to give in this arbitration proceeding shall be the truth, the whole truth, and nothing but the truth?”

Checklist for Conducting Arbitration Hearings

- **5. PRESIDING ARBITRATOR'S PRELIMINARY STATEMENT:**
Statement as to proposed rules of procedure.
 - The presiding arbitrator should inform the parties that within the arbitrator's discretion, any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary.
 - The parties will be given the opportunity to present all testimony and documents deemed appropriate. The proposed procedure is intended to provide due process and an orderly sequence for the dispute to be heard. The award should evidence due process.

Checklist for Conducting Arbitration Hearings

- **Alternative:** There are times when, by reason of the parties' sophistication or the dollar amount in controversy, formality can be minimized. Few client(s) know the distinction between an opening statement and testimony. Accordingly, the arbitrator can ask the client to present his/her position, including an explanation of the reasons, and such writings as the client deems appropriate for the arbitrator(s) to understand the client's position and to render an award. Prior to taking the dispute under submission, inquiry should be made of the parties as to whether they have anything further to say, any additional writing(s) to submit, or any additional witness(es) they wish to have heard. The award should evidence due process.

Checklist for Conducting Arbitration Hearings

- **6. WITNESSES: Exclusion of Witnesses.**
 - The presiding arbitrator should announce that all witnesses (who may at that point have been sworn) are excused from the hearing room until called to testify.
 - If requested, the presiding arbitrator should allow a client to have a friend or member of the family present as an “observer”, either under revised rules, or by stipulation.
 - The arbitrator(s) have broad discretion to include of either side in the hearing where such representatives are necessary for the presentation of the case.

Checklist for Conducting Arbitration Hearings

- **7. HEARING: Arbitrator(s) interruptions.**
 - The arbitrator(s) should avoid interrupting or asking questions prior to the conclusion of direct and cross-examination. There are obvious exceptions, i.e. for clarification.
 - The arbitrator(s) must not appear as an advocate for any party. At times, this is difficult. The intent of the arbitrator may be to show a party why testimony or documents do not support an argument or position being presented. The purpose of the arbitrator may be to afford the party the opportunity of testifying or presenting further evidence on that issue.
 - Too often, extended questions are perceived by the party, especially the client, as a prejudgment of the dispute. This perception is later voiced as a reflection upon the arbitrator(s) and the arbitration proceedings.

Checklist for Conducting Arbitration Hearings

- **8. CONCLUSION:** Statement by the presiding arbitrator and disposition of exhibits.
 - The presiding arbitrator should inquire as to any further witnesses, documents, or testimony that either party has not, through inadvertence, presented. If not, the proceedings will stand submitted.
 - An expression of appreciation to the parties is appropriate, with the statement that the award will be rendered and all parties advised by mail.
 - The arbitrator(s) should also inform the parties that they will receive a notice as to their rights following arbitration. In addition to the award, they should read and review the notice. There are time limitations that may or may not be applicable and their remedies or rights may be lost if they are not pursued timely.

Checklist for Conducting Arbitration Hearings

- As to exhibits, if photocopies are used or made, originals can be returned to the party submitting them.
- Any party who has submitted exhibits or documents to the panel, shall, upon service of the award, make arrangements to retrieve them.
- If no arrangements have been made within 60 days the exhibits or documents will be destroyed.

Arbitration Advisory 07-01 Arbitral Immunity

Refer to the advisory for the complete text.

- **CAUTION:** An Arbitrator or the fee arbitration program may lose its statutory and common law arbitral immunity by acting or failing to act in ways that are outside of the normal arbitration process that are not integrally related to the arbitration function. Case law establishes that an arbitrator's failure to render an award for no stated ethical reason, ***attempting to provide mediation services in the course of the arbitration hearing outside the program's mediation rules***, or by engaging in other actions that are not integrally related to the arbitration process, can subject the arbitrator or program to a suit for civil damages. Be careful to conform your conduct to all applicable statutory requirements of the Mandatory Fee Arbitration Program and to the local bar rules of procedure.