

CONTRA COSTA COUNTY BAR ASSOCIATION

Guidelines for Parties in Mandatory Fee Arbitration Proceedings

I. INTRODUCTION

A request has been made to arbitrate a fee dispute between you and your attorney. The purpose of this pamphlet is to help you prepare for the hearing before the arbitrator by answering some common questions about what will happen. For answers to other questions about the fee arbitration program generally, ask for a copy of the pamphlet, "What Can the Mandatory Fee Arbitration Program Do or Me?"

What will be decided in the fee arbitration?

The issues to be decided in the fee arbitration are limited. The arbitrator will decide how much money, if any, you owe the lawyer, or whether you should receive a refund from the lawyer.

Who can answer my questions?

Questions should be directed to the administrator of the program you are using to arbitrate your dispute. Check the rules and/or forms given to you by the program for an address and telephone number. The arbitrator who is assigned to hear your dispute rarely should be called. (See below on how to communicate with the arbitrators.)

Are we allowed to settle the dispute before the hearing date?

Yes. Parties are encouraged to talk about the dispute ahead of time and to try to settle it without an arbitration hearing. Fee disputes occur sometimes because the lawyer and client have not been communicating. Talking to each other about the fees may lead to settlement of the dispute. Some fee arbitration programs will refund a portion of the arbitration filing fee if the dispute is settled early in the process. (Check the rules of the program you are using.)

What does the arbitrator use as a basis for making a decision?

The arbitrator's decision will be based on a number of factors. These include, among other things, how difficult the matter was and the skill needed by the lawyer to handle it; whether the lawyer was prevented from taking other matters because he or she was hired by you; how much the case was worth and what the final results were; any circumstances or time limitations that may have required the lawyer to spend additional hours; the lawyer's experience and ability; the time spent on the matter; and whether you understood and consented to the fee arrangement. The arbitrator may also look at whether actions taken by the parties and other counsel affected the amount of time that your lawyer needed to spend.

What evidence does the arbitrator use to make a decision?

One of the first things the arbitrator will look at is whether there was a written fee agreement between the parties. Lawyers are required to use written fee agreements in most instances. If they do not, however, they are still entitled to a reasonable fee. If there is a written fee agreement, the parties should be sure that the arbitrator has a copy. The arbitrator will also consider the testimony of the parties, the billing statements and other relevant evidence presented.

II. FEE AGREEMENTS

What does the arbitrator look at if there is a written fee agreement?

If there is a written fee agreement, the issues the arbitrator may consider include whether the agreement is valid and whether the terms of the agreement (for example, the hourly rate) are "unconscionable." You should review the fee agreement to see if it answers questions about the lawyer's charges. For instance, if you question charges for telephone calls, you should look in the fee agreement to see if charges for calls are addressed. If the agreement is valid and the arbitrator believes that you knew what you were agreeing to, the arbitrator will generally use the terms of the agreement as a basis for making the decision.

What if the lawyer did a bad job?

The arbitrator also looks at the lawyer's "performance" in deciding the amount of the fee. For instance, did the lawyer spend too much time on a specific task, or did the lawyer make mistakes that required extra time to fix? You should review the lawyer's bills and performance and decide whether you believe that the total amount of the fee is too high. You should be prepared to point out specific items that support your belief.

What if a written fee agreement was required but there isn't one?

If the lawyer did not use a written fee agreement and one was required by law, the arbitrator will consider whether the terms of any oral agreement were reasonable when making the decision about the fees. For example, if there should have been a written fee agreement, and you orally agreed to pay the lawyer \$300 per hour, if the arbitrator believes that \$300 is not reasonable but that \$200 per hour is, the arbitrator can use \$200 when calculating the fee. Or, if the lawyer was charging a minimum fee for telephone calls, even if the actual time was less, and the arbitrator believes that doing so is a reasonable practice, those charges will be enforced.

What if the fee agreement was oral?

If the agreement was oral (and a written fee agreement was not required), the arbitrator will decide what the understanding was between you and the lawyer regarding the terms of the agreement (what was the hourly rate, were there charges for copying, etc.). You should be prepared to present any evidence that supports your claim. For example, if someone was with you when the agreement was reached who can testify about the terms of the agreement. If you had someone who was present when the agreement was reached, you should be prepared to use that person as a witness to verify the conversation.

What if your fee agreement does not comply with the law?

If your fee agreement fails to comply with the law, you may "void" or reject it but the lawyer may still be entitled to receive a reasonable fee. So, as discussed below, you must still be prepared to present a case to the arbitrator with the specific reasons why you believe the fee charged is not reasonable. If you can, you may present evidence of what a reasonable fee should be.

III. PREPARING FOR THE HEARING

What is the role of the arbitrator?

The arbitrator's role is to consider the evidence presented by all parties and make a decision on the lawyer's fees. The arbitrator cannot represent either the lawyer or client in the dispute. Nor does the arbitrator typically independently investigate or gather evidence to support either side's position. The arbitrator must make the decision based on the evidence given by the parties.

What does the arbitrator expect from the parties?

The arbitrator will expect the parties to be fully prepared to explain and support their positions on the value of the lawyer's services and to have all documents and witnesses organized and ready at the hearing. The arbitrator will not expect you to act like a lawyer, but he or she will expect your case to be presented in an organized and efficient manner. If you have documents to submit, arbitrators like to get them before the hearing and to know that copies were given to the other side.

May I communicate with the arbitrator?

Generally, you should not communicate with the arbitrator before or after the hearing, except on procedural issues such as scheduling the hearing and issuing subpoenas. Never discuss the merits of your case with the arbitrator outside of the hearing. You will be given a chance to explain your side of the story at the hearing while the lawyer is present so that the lawyer may respond to each issue you raise.

If you have to communicate in writing with the arbitrator, you should be sure to send copies of all letters and any attachments to the other side.

How do I organize my documents?

The documents you may want to consider using include the lawyer's billing statements, evidence of your payments to the lawyer (for example, copies of cancelled checks), the written fee agreement (if there was one) and any other letters or documents that support your claim. You should have your documents organized in the order in which you plan to present them. Putting them in order by date is one common way to do this. You should also plan to have copies of the documents you intend to present so that you can give copies to the arbitrator and the other side.

What do I do if I have witnesses?

First, you should think about whether the witnesses have important information related directly to your dispute with the lawyer, such as someone who was with you when you and the lawyer made or changed your agreement. You might want to have that person available to testify at the hearing. You should advise the arbitrator and the other side that you expect to call witnesses and arrange your presentation so that they can be easily included.

If you have an important witness who does not want to come to the hearing, you may be able to subpoena that person. You should contact the administrator of the fee arbitration program to find out how this is done. You should also contact the administrator if you have any problems scheduling a witness. While it is always better to bring witnesses to the hearing, you may present their testimony and evidence in writing instead. It is up to the arbitrator to decide how much consideration to give to written statements of witnesses.

How do I organize my presentation?

You should think carefully about why you believe the lawyer's fees are too high and focus your presentation on specific reasons for this belief. For example, if you think the lawyer charged more for telephone calls than was allowed by the fee agreement, you should be prepared to refer to the clause in the agreement that was not followed. If you believe that the services were not performed effectively, you should have very specific examples to show that the lawyer did not do what was promised or expected. You may want to put your arguments and reasons in writing to refer to at the hearing to be sure that you do not leave out any important points.

IV. THE ARBITRATION HEARING

Who can come with me to the hearing?

If you are not comfortable coming to the hearing by yourself, you can probably bring a friend or relative with you. You should check the program rules to see if you must first get permission from the arbitrator to do this. Keep in mind that the person you bring is there to give you support. He or she may not speak for you or participate in the hearing process. Your friend or relative is also bound by the same rules of confidentiality as you and the lawyer are and should not talk about what happened in the hearing to anyone else.

How formal is the hearing?

The arbitration hearing will generally be informal, and you do not need to know the rules and procedures that are followed in court. Arbitration hearings are usually held in a conference room at the arbitrator's office, or at the bar association. Generally, only the arbitrator, you, the lawyer, and maybe witnesses will be in the room. Because fee arbitration proceedings are informal, you do not need to be represented by a lawyer. You may choose to have one represent you if you wish.

Although the hearings are informal, evidence is usually given under oath.

What happens at the hearing?

The arbitrator has the authority to decide how the arbitration hearing should proceed. You may be asked to go first. You will be allowed to discuss the fee agreement and the reasons why the lawyer's fees are being disputed. You may also introduce relevant documents, such as written fee agreements and copies of the lawyer's bills. Your presentation should be simple, factual, and directly related to the issue of lawyer's fees. Usually, this is also the time when you would present any witnesses to help prove your case.

After you have fully presented your case, the lawyer will have a chance to ask you questions (this is called cross-examination).

The next step is usually for the lawyer to make his or her presentation, and to present any witnesses. You will have an opportunity to ask relevant questions after the lawyer has fully presented his or her case. To avoid interrupting the lawyer's presentation, you may want to take notes so that you can bring up any points you disagree with.

Will the arbitrator ask questions?

The arbitrator may ask questions at any time. Sometimes the arbitrator will ask questions while you (or the lawyer) are presenting your case to make sure they fully understand the points you are trying to make.

What happens next?

After all the evidence has been presented, you and the lawyer will usually have a chance to summarize your side of the dispute. Comments during your summary should focus on why the lawyer's fees may be reasonable or unreasonable under the circumstances of your particular case. They should not go beyond whatever evidence has already been presented to the arbitrator.

At all times during the hearing, both sides should avoid making personal attacks, making references to anything outside the lawyer-client relationship, or discussing matters based only on speculation or assumption.

V. THE ARBITRATION AWARD

What is the award?

The award will tell you the decision of the arbitrator - whether you owe money to the lawyer, whether the lawyer owes money to you, or whether neither of you pays any money.

When will I receive the award and what will I receive?

After the arbitration hearing is concluded, the arbitrator will usually take the matter "under submission." You should not expect to receive an award on the day of the hearing. It will usually be mailed to you about 30 days after the hearing.

What can I do after I receive the award?

When you receive the arbitration award, you will also receive information about your options after arbitration. This is called the *Notice of Your Rights after Arbitration*. The notice should answer most questions you have regarding your rights after you receive the award. Pay close attention to the deadlines in the Notice.

Can I contact the arbitrator after the hearing?

Unless you have been directed to do so by the arbitrator, ***you should not contact or send any correspondence to the arbitrator after the hearing has concluded.*** You should contact the program if you have questions.