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WHAT TO EXPECT WHEN YOU ARE IN A MANDATORY FEE ARBITRATION

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When an attorney's fee dispute arises in California, a client may demand arbitration under the Mandatory Fee Arbitration Act (the Act) (Bus. & Prof. Code, § 6200 et seq.). The goal of the Act was to provide a cost-effective way to resolve attorney's fee disputes and "to eliminate a disparity in bargaining power between attorneys and clients attempting to resolve disputes about attorney's fees." (*Dorit v. Noe* (2020) 49 Cal.App.5th 458, 467.) This article briefly summarizes the procedural aspects of these arbitrations and provides an overview of the criteria that an arbitrator will apply to decide the fee dispute.

Procedural Basics

The Act empowers the State Bar to establish and administer a system for fee arbitrations. (Bus. & Prof. Code, § 6200, subd. (a).) The State Bar has adopted rules that govern these arbitrations. (Rules Proc. of State Bar, rule 3.500 et seq., <http://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title3_Div4-Ch2-Fee-Arb.pdf> [as of Dec. 15, 2020].) In most California counties, local bar associations have programs that conduct the arbitration; the programs are listed on the State Bar's website. (See Approved Programs, State Bar of California,<http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Mandatory-Fee-Arbitration/Approved-Programs> [as of Dec. 15, 2020].) In the counties that lack State Bar-approved programs, or if one of the parties "explains in a declaration why the party cannot obtain a fair hearing before the local bar association," the State Bar may conduct the arbitration. (Rules Proc. of State Bar, rule 3.505(B)(2).)

Unless the fee agreement requires arbitration, the client gets to decide whether to go to arbitration. If the client requests fee arbitration, it is mandatory for the attorney. (Bus. & Prof. Code, § 6200, subd. (c).) When a lawyer sues for unpaid fees, the lawyer must advise the client in writing that the client has the right to request arbitration under the Mandatory Fee Arbitration Program. (See *id*., § 6201, subd. (a).) If the client requests arbitration within 30 days of that notice, the lawsuit is automatically stayed and the matter moves to arbitration. (*Id.*, § 6201, subd. (c).) If the client instead commences a civil lawsuit or private arbitration against the lawyer, that act waives the client's right to mandatory fee arbitration. (*Id.*, § 6201, subd. (d); *Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1362.)

This is a one-way street by design. If the attorney requests arbitration without an arbitration provision in the fee agreement, the client may decline and insist that the dispute be resolved in court. (Bus. & Prof. Code, § 6200, subd. (c).) If the lawyer wants to guarantee binding arbitration, the lawyer must include a private arbitration provision in the written fee agreement. But though private arbitration provisions do not run afoul of the Act, a client can compel a lawyer to participate in a mandatory fee arbitration over the fee dispute before the private arbitration takes place. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 562.)

The arbitration's scope is limited: the arbitrator may decide only the fee dispute. The arbitrator lacks power to do any more than that. Most important, a fee arbitration may not be used to adjudicate a client's malpractice damages claim. (Bus. & Prof. Code, § 6200, subd. (b)(2).) Allegations of malpractice and professional misconduct are admissible only insofar as they are relevant to the reasonableness of the lawyer's fee. (*Id.*, § 6203, subd. (a).) Though it is not required to support allegations of malpractice, the parties may present expert testimony on the standard of care. (Committee on Mandatory Fee Arbitration, State Bar, Arbitration Advisory No. 2012-03 (July 17, 2012) (hereafter Arbitration Advisory No. 2012-03).) But an arbitrator may not award malpractice damages, whether asserted as an affirmative claim or as an offset against the lawyer's fee claim. (Bus. & Prof. Code, § 6203, subd. (a).)

Unless the parties agree to binding arbitration in writing before the arbitration, the result will be nonbinding. Either party may request a trial de novo within 30 days after notice of the arbitration award is served. (Bus. & Prof. Code, § 6204, subds. (a)-(c).) This is a strict deadline: a recent case held that the deadline isn't extended for service by mail. (See *Soni v. SimpleLayers, Inc.* (2019) 42 Cal. App.5th 1071, 1077.)

If a court action is already pending, the notice must be filed in that action. (Bus. & Prof. Code, § 6204, subd. (b).) If no action is pending, the dissatisfied party must file suit. (*Id.*, § 6204, subd. (c).) Requesting trial de novo has some risks: unless the party seeking the trial obtains a result more favorable than the arbitration

award, the court has discretion to award reasonable attorney's fees and costs to the other party. (*Id*., § 6204, subd. (d).)

The arbitrator's findings do not have preclusive effect in a later malpractice case between the parties. (See Bus. & Prof. Code, § 6204, subd. (e); *Liska v. The Arns Law Firm* (2004) 117 Cal. App.4th 275, 283-287.) That is true even if the parties agree to binding arbitration under the Act. The award will cover only the fee dispute; it will be inadmissible in a malpractice case. (In contrast, an award issued after a private arbitration will have preclusive effect and is subject to review on limited grounds, just like other arbitration awards.)

Arbitrators are discouraged from serving as mediators in the cases they hear. The parties are prohibited from engaging in ex parte communications with an arbitrator while the arbitration proceeds. (Rules Proc. of State Bar, rule 3.538.) If the parties want to mediate, they should go to a separate mediation. The same bar association providers that conduct mandatory fee arbitrations often also offer separate mediation programs.

Some other basics: when an arbitration commences, the arbitration provider will assign a sole arbitrator or a three-arbitrator panel, depending on the amount in dispute. (Rules Proc. of State Bar, rule 3.536(A).) Regardless of any provisions in the fee agreement, the arbitration award cannot include attorney's fees for the preparation for or appearance at the arbitration hearing. (Bus. & Prof. Code, § 6203, subd. (a).) If the fee amount has been court-ordered or set by statute (as in family law, bankruptcy, or probate matters), the mandatory fee arbitration program may not be used. (*Id.*, § 6200, subd. (b)(3).) And if the dispute is over fees for *Cumis* counsel, the Act doesn't apply. (Civ. Code, § 2860, subd. (c); *National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1727-28.)

Criteria for the Arbitrator's Fee Decision

The State Bar's Committee on Mandatory Fee Arbitration has published advisories on various topics to guide arbitrators. They are available on the State Bar's website. (See Arbitration Advisories, State Bar of California, <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Mandatory-Fee-Arbitration/Arbitration-Advisories> [as of Dec. 15, 2020].) In determining a reasonable fee for the attorney's services, the Committee has instructed arbitrators to consider these four questions:

- Was there a written fee agreement?
- What was the reasonable value of the attorney's services?
- How much time did the attorney spend on the matter?
- Did any misconduct or incompetency by the attorney affect the value of the services?

The first of these questions can present thorny contract issues. Even when there's a written fee agreement, clients often argue that the agreement is invalid or unenforceable. The arguments range from the typical bases for avoiding a contract (e.g., fraud, duress, undue influence, and the like) to arguments that the agreement violates the statutes governing written fee agreements. (Bus. & Prof. Code, § 6147 [contingency fee agreements]; *id.*, § 6148 [hourly fee agreements].) If the client persuades the arbitrator that the fee agreement is invalid or unenforceable, its hourly rate or contingency fee provisions will not be enforced, and the attorney may recover only under quantum meruit principles.

The second and third questions overlap because the reasonable value of services often depends on the amount of time worked. Usually the arbitrator will evaluate time records and bills that show the attorney's hourly rate and the number of hours billed for each task. In what is essentially a lodestar analysis, the arbitration award will derive from multiplying a reasonable hourly rate by the reasonable number of hours worked.

The attorney should be prepared to prove each half of that equation. Regarding the hourly rate, the arbitrator will evaluate whether the attorney's rate is reasonable compared to the rates charged by attorneys performing similar work in the community. (Committee on Mandatory Fee Arbitration, State Bar, Arbitration Advisory No. 1998-03 (June 23, 1998).) The arbitrator will consider evidence of peer attorneys' hourly rates.

Evaluating the number of hours worked is a more time-consuming task. The Committee has devoted entire advisories to the topic. (See, e.g., Committee on Mandatory Fee Arbitration, State Bar, Arbitration Advisory No. 2016-02 (Mar. 25, 2016) (hereafter Arbitration Advisory No. 2016-02).) The Committee directs arbitrators to do these four things: (1) "Evaluate the process by which the bill was prepared and the specificity of the time entries"; (2) "Evaluate the staffing used on the matter"; (3) "Evaluate the work performed against the time billed"; and (4) "Look for certain patterns in the descriptions of the work performed, including the time entries." (*Id.* at p. 1.) The Committee has also identified the following indicia of bill padding:

- Time entries prepared long after the work was performed. Though it may be cliché to say that the best practice is to prepare time entries contemporaneously, some clichés are true. The closer the time entries are recorded to when the hours were worked, the more likely an arbitrator will find the entries to be accurate. (*Id*. at pp. 2-3.)

- Time entries prepared by someone other than the professional who performed the services. Procedures that call for staff to record a certain minimum amount of time to be billed for specific tasks (for example, the initial review of correspondence) are likely to be questioned, absent evidence of a contractually agreed upon minimum charge. So are a billing partner's decisions to increase the time entered by other professionals as part of a review of pre-bills. (*Id*. at pp. 2-3.)

- Time entries that lack specificity. The Committee has concluded that lawyers who enter their time personally into billing software generally describe their tasks with more detail—and more accuracy—than those who handwrite their time entries for input by staff. (*Id*. at p. 4.)

• Excessive or inappropriate staffing. An arbitrator may consider whether multiple lawyers were needed at various case events, like court appearances and depositions. An arbitrator also may consider whether a task could have been performed by someone who billed at a lower rate. (*Id*. at p. 5.)

• Excessive time spent on major tasks. An arbitrator may group the time entries to determine how much time was spent on particular tasks. Task and activity codes can help the arbitrator. Then, using his or her experience and judgment, the arbitrator should consider whether the time spent was reasonable, given the quality of the work product. Similarly, the volume of documents in a case is relevant to determining the reasonableness of the time spent on document production tasks. (*Id*. at pp. 6-7.)

High minimum increments, round numbers, and generalized descriptions. The Committee directs arbitrators to be suspicious about high incremental charges (for example, a 0.25 hour minimum increment) and large whole number time entries (unless the event was an "inherently extended activity," like trial, deposition, or mediation). The Committee also tells arbitrators to be skeptical about large amounts of time billed with vague, standardized descriptions. The quintessential example in the advisory is "review documents produced by opposition: 7.5 hours." (*Id*. at p. 8.)

• Block billing. The Committee has opined that block billing may increase time by 10-30% and tells arbitrators they may cut that percentage of hours worked from an award. Though arbitrators do not always follow a mechanical approach, they have discretion to do so, or at the very least to require that the attorney provide additional evidence to support the accuracy of block billed entries. That evidence should include testimony about billing practices and the specific entries. It also should include documentation about the specific work done. (*Id*. at p. 9.)

• Recycled work. It is unethical to bill a client more than the actual time spent on a matter. (ABA Com. on Prof. Ethics, opn. No. 93-379 (1993).) If a lawyer can reuse a brief, an agreement, or other standard document from a previous matter, that efficiency should be passed on to the client. (Arbitration Advisory No. 2016-02, *supra*, at pp. 13-14.)

• False entries. If the client can prove that an entry is demonstrably false, the arbitrator likely will view with skepticism the attorney's other entries. (*Id*. at p. 10.)

These factors overlap with those provided in the Rules of Professional Conduct. There is an important difference, however. The Rules of Professional Conduct speak in terms of an "unconscionable" fee, which is unsurprisingly prohibited. (Rules Prof. Conduct, rule 1.5.) Though an unconscionable fee is per se unreasonable, the client need not show unconscionability to prevail in a fee arbitration. The standard a fee arbitrator applies is lower: a fee need not be unconscionable to be unreasonable.

Though malpractice cannot be asserted as an affirmative claim or offset, allegations of malpractice can nevertheless find their way into a fee arbitration. Suppose that the attorney missed a deadline for responding to discovery (through no fault of the client) and then spent time seeking relief from waiver of objections. Or suppose that the attorney did not advise the client to settle earlier, and the client incurred additional fees litigating a case that should have been resolved. Most dramatically, suppose that the attorney missed the statute of limitations, and the client's claim was lost. Facts like those likely would lead an arbitrator to conclude that the client did not receive reasonable value for what was billed or paid. (Arbitration Advisory No. 2012-03, *supra*.) If a malpractice claim were filed, it would proceed in another forum. But in the fee arbitration, the client could get relief from the attorney's efforts to collect the fee.

Takeaways

Fee disputes most often arise when there has been a breakdown in the attorney-client relationship. They can arise when a lawyer allows a client to fall far behind on paying fees. They also can arise when a client feels that the lawyer neglected the matter, didn't communicate, or didn't achieve the promised result. Fee disputes often involve the theme that the lawyer abandoned the client.

There are at least three takeaways for attorneys:

Mandatory fee arbitrations are for pure attorney's fees disputes. If the client brings an affirmative malpractice claim (as often happens when a lawyer pursues a fee claim), the arbitrator cannot decide the malpractice claim.

Unless the parties agree that the award will be binding, either side can obtain trial de novo of the arbitrator's fee award. Because of that, a binding arbitration outside the Mandatory Fee Arbitration Act, in which malpractice claims can also be addressed, is often a more efficient option for fully resolving a dispute.

Billing practices are critically important. Following best practices will pay dividends in a fee arbitration.

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