A ROADMAP FOR MANDATORY ARBITRATION OF FEE DISPUTES

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It is an unfortunate aspect of the practice of law that if you keep at it long enough that sooner or later you will probably encounter the legal experience known as a "fee dispute" with one of your clients.

The issue will most commonly arise when you demand payment of fees owed from a client who resists or ignores such an overture, or when the client demands a refund of what they have previously paid you.

Attorneys are subject to mandatory fee arbitration (MFA) if the client demands same, under Bus. & Prof. Code secs. 6200-6206. It is not mandatory on the client, however. Most county bar associations have set up MFA committees and procedures to administer the arbitration.

The Petition to Arbitrate As A Condition Precedent or Concurrent to Litigation:

Attorneys should always seriously analyze the prospect of taking legal action against a client for fees. Such a legal action can often engender a State Bar complaint or cross-complaint by the client for legal malpractice or other professionally-related causes of action against the attorney, the outcome of which may be far from certain regardless of the attorney's personal opinion on the subject.

In the experience of this practitioner, the type of case that has the greatest potential for the attorney getting sued or reported to the State Bar is when the attorney makes an issue of their fees with a client wherein the client obtained a negative outcome in the underlying matter, regardless of the fact that the attorney may have done their very best in the matter. It is far easier for an attorney to defend their bill when success was the clear outcome in the underlying matter.

Should the attorney either announce an intention to the client of filing a lawsuit for fees, or actually file a lawsuit without first announcing such an intention, then the attorney must comply with Business & Professions Code sec. 6201(a) and send the client by first class mail or personal service a "Notice Of Client's Right To Arbitrate", and which is content specific per the code and for which there are forms available to use from various sources, including the Orange County Bar Association (OCBA).

If a lawsuit has been filed, then the Notice must be served with the summons and complaint, and then the action is stayed pending the service of a fee arbitration award, per Bus. &Prof. Code sec. 6201(c).

Upon receiving the Notice, the client has 30 days to opt for fee arbitration by filing a "Petition To Arbitrate A Fee Dispute" with the program administrator for the local county bar association administering fee arbitration, along with a filing fee. The client waives the right to compel mandatory fee arbitration if they fail to timely file this request, or if they initiate a civil action against the attorney. The waiver of arbitration may be stipulated to be set aside between the client and attorney, however.

The filing fee is based upon the amount in dispute. Under OCBA rules, this fee is $75.00 for any dispute involving $1,500.00 or less, or 5% of any greater amount with a maximum fee of $5,000.00. Also under OCBA rules, any hearing that goes over four hours is considered to be a one

day hearing, and each arbitrator hearing the matter is entitled to be paid $200.00 for each half day and $400.00 for each day following an initial one day hearing.

Fee Arbitration Has Limited Jurisdiction And Tolls Statutes of Limitation:

Fee arbitration does not consider or adjudicate issues such as legal malpractice or breach of fiduciary duty, except to the extent that it may affect the issues of fees or costs billed or owed. See Bus. & Prof. Code sec. 6203(a). Depending on whether an attorney is representing a client or an attorney in a fee arbitration, objections at the actual arbitration hearing to matters that pertain solely to standard of care and non-fee issues should therefore be considered, depending upon your client and case strategy in the matter.

Furthermore, the initiation of fee arbitration tolls the statute of limitations that would pertain to any civil claim related to the dispute, up until thirty (30) days after the arbitration award is mailed or upon notice that the arbitration proceeding is terminated, whichever occurs first. Bus. & Prof. Code sec. 6206.

Binding vs. Non-Binding Fee Arbitration:

Arbitration can be non-binding or binding, depending on what both the client and the attorney agree to, however the OCBA won't hear fee disputes for less than $1,500.00 unless the party filing the Petition agrees for it to be binding. A provision for binding arbitration in an attorney-client retainer agreement is *not binding* on the client should they elect non-binding fee arbitration.

Care should be taken if non-binding fee arbitration is elected, as the advisory opinion *will become binding* unless an appropriate request for a trial de novo is filed within thirty (30) days from the date the award is mailed, per Bus. & Prof. Code sec. 6203(b).

The procedure for confirming, vacating, or correcting an arbitration award is set forth at C.C.P. secs. 1285 - 1288.8, the same code sections that apply to confirming arbitration awards as judgments in other types of matters.

The prevailing party in the trial of any civil proceedings following a request for trial de novo may be awarded their attorney's fees and costs in the civil action following the arbitration, although it is discretionary with the court. The court can consider the award and determinations made at the fee arbitration in exercising its discretion. Bus. & Prof. Code sec. 6204(d).

The arbitration is heard by one arbitrator if the amount in dispute is $10,000.00 or less. If the dispute concerns a greater amount, then those disputes are heard by a panel of three (3) arbitrators, two of whom are attorneys and one of whom is a lay person. However, the parties can still stipulate to the use of only one arbitrator in such a matter. Each party is allowed a peremptory challenge to any one of the arbitrators, without cause, to be made within ten (10) days of the notice of assignment of arbitrator(s).

Regardless of the content of the underlying attorney-client retainer agreement, costs may not be awarded at fee arbitration, other than an allocation of the arbitration filing fee. Bus. & Prof. Code sec. 6203(a). However, a party moving to confirm, correct, or vacate a binding arbitration award may seek attorney's fees and costs incurred in obtaining such civil relief, including fees and costs on appeal, subject to the discretion of the court. Bus. & Prof. Code sec. 6203(c).

If a non-prevailing attorney doesn't satisfy a final fee award against him, the State Bar can place the attorney on inactive status until the attorney does so, and can also impose monetary penalties for non-compliance. Bus. & Prof. Code sec. 6203(d)1, 3.

Discovery Pre-Hearing:

Discovery preliminary to the fee arbitration is limited, allowing the client the right to inspect or receive copies of the retainer agreement, time sheets and records, billings, and the client's actual file out of which the dispute arose.

Upon a proper request made to the presiding arbitrator, subpoenas may be issued, directing the attendance of witnesses and the production of relevant evidence. Appearance of a witness by telephone is allowed in lieu of personal attendance.

There is no provision that would allow depositions, interrogatories, or other discovery procedures that are commonly utilized in civil proceedings. This needs to be taken into consideration if the attorney or the client are considering submitting the matter to binding arbitration.

Rules Of Evidence And Procedure At Hearing:

The presiding arbitrator swears in the witnesses.

Court reporters are not allowed at non-binding arbitrations, but can be used in binding arbitration proceedings if a party wants to provide and pay for same, and allows the opposing party the opportunity to obtain a transcript at their own cost.

Tape-recordings of a hearing are not allowed whatsoever.

While objections to evidence may be made and ruled on, in actual practice the rules of evidence at fee arbitrations are usually applied somewhat looser than what would pertain to an actual court proceeding, especially if the client is in pro per and attempting to put on their case as best they can. The OCBA MFA rules specifically state that "The panel may hear any evidence which is trustworthy and material to the fee dispute."

The attorney-client privilege and attorney work product doctrine are not applicable to fee arbitration hearings, including a trial post-arbitration; or on judicial confirmation, correcting or vacating of an arbitration award. Bus. & Prof. sec. 6202.

If the arbitration is non-binding and is followed by a civil action afterwards, the arbitration ruling is not collateral estoppel or res judicata in that action, other than in consideration of an award of attorney's fees. Bus. & Prof. Code sec. 6204(e).

For the ease of the arbitrator(s) and to put on an effective case, each side should present their documentary evidence in tabbed exhibit binders, and provide same to each arbitrator and the opposing party prior to the hearing, as directed by the presiding arbitrator.

The service and filing of a brief should also be seriously considered by each party, especially if invited to do so by the presiding arbitrator.

The arbitrator(s) are not paid unless the arbitration goes into overtime, as mentioned hereinabove. It therefore behooves the parties to put on an expeditious and summary fee arbitration, to the extent they can do so without leaving out any important parts of the evidentiary picture.

Practical Considerations At Hearing:

Most fee arbitrations concern hourly fee matters, as opposed to flat fee or contingency fee cases. Arbitration of contingency fee cases isn't permissible until the occurrence of the contingency.

If it is an hourly matter, the attorney's billing is usually the most important exhibit in the proceeding.

Whether you are an attorney attempting to justify your bill or you are representing a client who is disputing a bill, serious consideration should be given to retaining an expert witness to testify about the vices or virtues of the billing in question. While this expert would most likely be an

attorney with a background in attorney billing practices or ethics, in some instances an accountant may be called for. Of course, the justification for such an expense will turn on the amount in controversy, and whether the arbitration is binding or non-binding.

As depositions are not provided for, the retention and use of an effective expert witness at the hearing may catch the opposition off-guard and ill-prepared to deal with the cross-examination and consequences of such testimony.

Attorney's bills are easier to justify when they are easy to read and make sense. The ideal attorney bill should actually be a condensed chronological summary of the events of the underlying legal matter, such that you can follow the progress of the case just by reviewing the bill.

Certain types of time entries can be difficult or even embarrassing for an attorney to try to justify.

This would first and foremost include "block-billing", wherein multiple tasks are lumped together under one charge, such that you can't segregate how much time was spent on any one task that is described in the block time entry.

Also difficult to justify are charges for what should be standard overhead expenses, such as billing clients for calendaring items, preparing buck slips for an attorney service to file documents, or filing documents in the client's file.

Also debatable are multiple charges by different members of the same law firm for what is essentially one task, unless they can be justified by some description of division of labor. For example, charging the client partner time, associate time, paralegal time, and secretary time for what is essentially one job or task reeks of overkill and may affect the attorney's credibility. Charging time for one attorney in the firm to talk to another attorney in the same firm about the case is also difficult to justify. Charging any secretary time at all may be difficult to justify, regardless of what the retainer agreement provides for.

Attorney time entries that are noted but not charged to the client (ie., "N/C") on the bill can document that the attorney spent a lot of time on the matter but was otherwise being fair and reasonable by not charging the client for every piece of minutiae associated with the case.

Time entries should describe what is specifically being done for the client. For example, a time entry stating "draft letter to opposing counsel" is not nearly as descriptive or effective as "draft letter to opposing counsel with settlement proposal regarding sale of the disputed property", the latter entry of which would also serve as a reference point as to what document in the file reflects this charge so as to compare the length of the document to the amount of the time entry.

While many attorneys charge a fee minimum (.10, .20 or whatever) for any given task, a rigid application of this approach can lend itself to an over-charging argument by the client, especially if the tasks in question are clearly nominal efforts or tasks on the client's behalf. Noting nominal tasks with a N/C entry can only make the attorney appear more reasonable at a fee arbitration, especially if the nominal document or task in question becomes a heated subject of cross-examination of the attorney by an effective examiner at the arbitration.

Another pitfall is to charge large blocks of time to fill out Judicial Council forms and pleadings that literally take only a few minutes to compose, thanks to the efficiency of the form's format. For example, charging 1.00 or even .50 hours to fill out a set of routine Form Interrogatories or a Case Management Statement may appear to be over-billing.

If the client's argument is just that the attorney spent "too much time" on the matter, at least when the underlying matter had a positive outcome for them, then the attorney's time will be far easier to support, so long as the billing pitfalls discussed hereinabove are largely avoided. It is hard

for a client to make this argument stick when they obtained a good result in the underlying case, especially if the underlying legal matter was of great consequence or importance in their personal life or professional occupation.

Another tool to either attack or support a bill is to analyze it against Professional Rule 4-200, and which prohibits the charging of an unconscionable fee by the attorney to the client. Rule 4-200(B) sets forth no less than eleven (11) specific criteria that are used to determine if a fee is unconscionable or not, and the Rule can be a shield for the attorney or a sword for the client depending on what is set forth in the retainer agreement and the billing that is generated thereafter.

Of particular import would be Rule 4-200(B)(1), which deals with the "amount of the fee in proportion to the value of the services performed". Charging a client tens of thousands of dollars for a monetary dispute that is far less in amount may run afoul of this sub-section.

Also of significance is Rule 4-200(B)(2), which deals with the "relative sophistication of the member and the client". A large bill on a complex legal matter may be easier for the attorney to justify when the client was a professional like a C.P.A., as opposed to a senior citizen with a tenth grade education.

If the attorney obtained a positive result for the client in a complex matter, then Rule 4-200(B)(5) will aid in support of the billing in that it concerns the "amount involved and the results obtained."

If the attorney has special expertise in the underlying matter that they represented the client on, then that expertise should be emphasized, as Rule 4-200(B)(8) deals with the "experience, reputation, and ability of the member or members performing the services." This may require the attorney defending the billing to seriously consider calling as a witness a fellow member of the bar who could attest to such expertise, or at the very least preparing and submitting a curriculum vitae of the attorney as part of the documentary evidence in support of the billing.

The End Result For The Client:

From the standpoint of the client disputing a bill, the goal should be to hopefully terminate the dispute at or before the arbitration, so as to avoid the additional legal costs that will follow if the arbitration is not binding and a trial de novo ends up being filed. If the client has legitimate civil claims against the attorney in addition to the fee dispute, then engaging in fee arbitration is probably a waste of time, as those collateral claims will not be resolved by fee arbitration and the existence of the fee dispute may enhance the significance of the civil claims.

If the totality of the dispute really revolves around the amount of the bill, then part of the fee arbitration from the client's perspective should be to educate the opposing attorney as to how the bill is vulnerable to attack, such that the attorney will have a disincentive to seek a trial de novo. This is probably not going to happen if the bill is of any great consequence, unless the client is represented by counsel of their own and is willing to incur the expenses of pre-arbitration preparation and/or an expert witness.

The End Result For The Attorney:

From the standpoint of an attorney defending their bill, the goal should be that of thorough preparation to justify the charges, and which as mentioned is much easier to do when the client has had a favorable outcome on their legal matter achieved.

For an attorney contemplating serving the client with a Notice of Right To Arbitrate a Fee Dispute, they should also take into consideration the possibility of a legal malpractice claim or State

Bar complaint rearing its ugly head, which even if non-meritorious can end up as an expensive demerit on your claims history when you renew your E & O policy.

Also worthy of serious consideration before embarking on this path is the prospect of successful collection of any arbitration award that may be had in the attorney's favor.

Most significantly, every hour that an attorney spends on a fee dispute is the equivalent of the subtraction of an hour from their past-due bill, not to mention the aggravation factor that accompanies such an exercise.

Performing a competent and reasonably priced job for a client while keeping careful time entries with the thought that the bill may be an exhibit at a fee arbitration in the future is probably a lawyer's best safeguard for avoiding a fee dispute in the first instance.