THE STATE BAR OF ARIZONA

Fee Arbitration Program

by Samuel A. Thumma and Lynda C. Shely

For nearly 40 years, the State Bar of Arizona Fee Arbitration Program has helped clients and lawyers resolve attorney fee disputes equitably, promptly and inexpensively. The Fee Arbitration Program provides an attractive, voluntary alternative to superior court litigation to resolve difficult and sometimes painful fee disputes that cut to the core of the trust and confidence ordinarily vested in the attorney-client relationship.

This article highlights the evolution of Arizona's Fee Arbitration Program and recent usage of the program. The article also describes the program's jurisdiction, how cases are initiated, the arbitration hearing, the arbitration award itself, as well as enforcement and collection of an award.

Historical Background

The State Bar of Arizona has been a national leader in developing programs that cultivate attorney-client communication as well as professionalism in the practice of law. Arizona was one of the first states to introduce fee arbitration as an alternative to discipline in an effort to benefit both the lawyer and the client. Fee arbitration in Arizona began in the early 1960s as a program designed by the State Bar Board of Governors to provide a forum for the fair and prompt resolution of fee disputes between clients and lawyers. In implementing the program, the State Bar put in place a dispute resolution system that also is designed to be educational for both the client and the lawyer.

Approximately 30 years after Arizona initiated its Fee Arbitration Program, the American Bar Association formally recognized the importance of fee arbitration as a resource for resolving client-lawyer disputes. In a 1992 report, an ABA Commission recommended that state bar associations expand their disciplinary systems to address non-disciplinary complaints about lawyers and to provide more dispute resolution programs, including fee arbitration.[1] Three years later, an ABA Standing Committee promulgated model rules for fee arbitrations.[2] Many of the concepts in those Model Rules were based on experiences with Arizona's Fee Arbitration Program.

Today, nearly all states have some sort of fee arbitration program. A few states have a mandatory system requiring lawyers to participate in fee arbitration. Most states, however, have voluntary fee arbitration programs operating either through the discipline system as a diversion option for a disciplinary complaint or, like Arizona, as a service program. Whether voluntary or mandatory, many fee arbitration programs have filing fees. Arizona, however, is one of the few states that does not charge for fee arbitration. Rather, Arizona's Fee Arbitration Program is a free forum in which lawyers and clients can resolve their differing views on what fees are appropriate for the legal services performed.

Evolution of the Program and Usage

Today, Arizona's Fee Arbitration Program functions in substantially the same way it has since its inception. One major change pertains to the minimum amount necessary for jurisdiction. Originally, the program was available for any dispute over $100, while today there must be at least $500 in controversy. Some of the other significant changes to the program over the years are a change in 1989 that a petition to arbitrate also may be filed against a law firm (not just a lawyer); the addition in 1990 of a three-year statute of limitations; and a 1996 addition providing that fee arbitration is limited to those disputes where *both* the client and the lawyer agree to participate after the dispute arises. Previously, fee arbitration would proceed with a hearing and a non-binding award even if the lawyer declined to participate.

The Fee Arbitration Program is a public service for members of the State Bar of Arizona and their clients. The program operates with one full-time Fee Arbitration Program Coordinator, who reviews petitions to arbitrate, corresponds with the clients and lawyers, assigns the files to Fee Arbitration Committee members, and maintains the files and computerized docketing. Diana Kehayes, the Fee Arbitration Program Coordinator, answers calls each day from attorneys and members of

the public who are interested in fee arbitration. In addition to tracking pending arbitrations and assigning new files, the coordinator also is responsible for updating the Rules of Arbitration of Fee Disputes and assuring that fee arbitration information is publicly available.

The number of petitions to arbitrate has remained fairly constant since 1995, averaging about 250 filings a year. One theory for the lack of increasing filings is that there is comparatively little public information about the Fee Arbitration Program. Recent measures—such as including fee arbitration forms on the State Bar's Web site[3] and a continuing legal education seminar on fee arbitration—are intended to make the program more accessible and to ensure that lawyers and clients will become more familiar with the program.

Of the 250 annual filings, approximately 75 to 100 awards are issued each year. Of the remaining filings, many are dismissed because the program lacks jurisdiction or because a party will not agree to arbitrate. In addition, many matters are resolved prior to a hearing. The goal of the program is to resolve fee disputes without resorting to formal litigation. When such a resolution is accomplished—whether by settlement prior to hearing or through an arbitrator's award—the Fee Arbitration Program has met its goal.

Jurisdiction

In general, the Fee Arbitration Program has jurisdiction over fee disputes between attorneys practicing in Arizona when the dispute arose; between Arizona attorneys and their clients; and between clients and a law firm to which the disputed fee may be owed or has been paid.[4] A jurisdictional prerequisite is an agreement to arbitrate signed by the parties *after* the dispute arises. The Fee Arbitration Program *does not* have jurisdiction to resolve a dispute if a party declines to be bound *or* based on an agreement to arbitrate entered into *before* the fee dispute arises.[5]

The Fee Arbitration Program also lacks jurisdiction if (1) the validity of the fee already has been determined; (2) the dispute is pending in another forum; (3) the claim is a compulsory counter-claim in another proceeding; (4) the amount in controversy is less than $500; or (5) absent a stipulation, the claim is filed more than three years after the latter of (a) the termination of the attorney-client relationship or (b) the final billing to the client.[6] Jurisdiction may be declined where arbitration is unlikely to resolve the dispute or "where the interests of justice would be served by dismissal."[7]

Initiating Proceeding

A fee arbitration proceeding is initiated by a client or an attorney filing with the State Bar's Phoenix office a signed agreement to arbitrate ("Agreement") and a signed petition for arbitration ("Petition").[8] Among other things, the petition sets forth petitioner's claim. Both the petition and the agreement must be in the form provided by the State Bar.[9] Those forms, as well as a copy of the Rules, may be obtained from the State Bar or downloaded from the State Bar's Web site.[10]

The State Bar forwards a copy of the signed petition and agreement to the respondent (the attorney, law firm or client named by the petitioner).[11] The respondent then has 20 days to countersign and return the agreement to the State Bar and file a response to the allegations in the Petition. "A failure to return the agreement within...20 days will be construed as a declination to arbitrate," and the matter will be dismissed.[12] The fully signed agreement is a contract to arbitrate the dispute in accordance with the Rules of Arbitration of Fee Disputes and an avowal that the parties have unsuccessfully attempted to resolve the dispute "or have a reasonable belief that such an effort would be useless."[13] The fully signed agreement also is an acknowledgement to make available to the arbitrator "all relevant records pertaining to the dispute" and that no civil litigation regarding the dispute is pending.[14]

Appointment of Arbitrator and Prehearing Proceedings

If the respondent countersigns and returns the agreement to the State Bar in a timely fashion, the matter is assigned to a member of the State Bar's Fee Arbitration Committee for the appointment of a sole arbitrator or a panel of three arbitrators. Where the amount in controversy is $10,000 or less, one individual is appointed as the sole arbitrator.[15] A sole arbitrator must be a member of the State Bar.[16] Where the amount in controversy is greater than $10,000, one individual presumptively is appointed as the sole arbitrator but, upon request by any party, a panel of three will hear the matter.[17] A three-member panel must consist of two members of the State Bar and one layperson.[18] Although the State Bar maintains a list of laypersons who have indicated a willingness to serve as arbitrators, any layperson may be selected as the panel member.[19]

The parties are then informed in writing of the name of the arbitrator.[20] Within 10 days of notice of appointment, any party may object to any arbitrator (or even the entire panel) without providing any reason.[21] If such an objection is made, a new

arbitrator is appointed "to replace each arbitrator objected to, which selection shall be binding upon the party having previously objected."[22]

The parties are required to make available to the arbitrator "all relevant records pertaining to the dispute" including any fee agreement, retention letter and billing statements.[23] This required disclosure is designed to eliminate the need for discovery requests, consistent with the informal nature of fee arbitration.[24] The arbitrator does have the discretion to "authorize additional discovery procedures or may limit discovery" and also may grant extensions of time.[25]

The Hearing

The hearing "shall be held promptly" and, in any event, within 90 days after receipt by the arbitrator of the petition and agreement.[26] The parties must receive at least 15 days' advance written notice of the date, time and location of the hearing.[27] The notice informs the parties of their right "to present witnesses and documentary evidence and to be represented by counsel."[28] Absent a stipulation by the parties, or a finding of a more convenient forum, the venue for the hearing is in the Arizona county (1) where the services were provided or (2) where the parties contracted for the services.[29]

The issue to be resolved at the hearing is limited to "whether the fees charged were reasonable for the work that was performed," and, if costs are disputed, "the reasonableness of costs."[30] The arbitrator's decision is based on general contract principles and is limited to the information "set forth in the petition, the respondent's response, other written submissions by the parties, and the testimony and written evidence presented at the hearing."[31]

The arbitrator *does not* rule on the ethical propriety of the fee charged, which is beyond the scope of the Fee Arbitration Program. The only ethical consideration by the arbitrator is to review the factors set forth in Ethical Rule 1.5(a)[32] to determine whether the fee charged was reasonable for the services performed. Those factors are:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent.[33]

Hearings are informal, with the arbitrator presiding and determining the procedures to be used.[34] Although subject to change at the arbitrator's discretion, the order of presentation generally consists of opening statements, petitioner's presentation of evidence, respondent's presentation of evidence, petitioner's rebuttal evidence and closing arguments. Conformity to the rules of evidence is not required, although the arbitrator determines the relevance and materiality of evidence.[35] All testimony is given under oath and any party or witness may testify telephonically.[36]

In cases between a client and an attorney, the attorney has the burden to show the reasonableness of the fee.[37] In all other cases, the burden of proof is on the petitioner.[38] In all cases, the standard of proof is more probable than not.[39] Although the presumption is that the hearing is not recorded, a party upon proper notice and at its own expense may have the hearing recorded or transcribed.[40] If a properly noticed party fails to appear at the hearing without good cause, the hearing may proceed and the arbitrator may make an award based on the filings and the evidence received at the hearing.[41]

The Award and Its Enforcement

The award is issued within 20 days after a hearing before a sole arbitrator and 40 days after a hearing before a three-member panel.[42] The award must be in writing, signed by at least one arbitrator, and include the following:

1. "a preliminary statement reciting the jurisdictional factors;"

2. "a brief statement of the dispute;"

3. "the findings of fact, including a determination of the reasonableness of the fee" (and costs if applicable); and

4. "the award."[43]

The arbitrator may not award attorneys' fees or costs incurred in the arbitration, but where appropriate, interest may be awarded "consistent with Arizona law."[44]

The arbitrator delivers the original award to the State Bar's Fee Arbitration Program Coordinator who, in turn, serves the award on the parties.[45] There is no right of appeal or reconsideration within the Fee Arbitration Program and service of the award on the parties terminates all claims between the parties "in the subject matter of the arbitration" and all rights

(including liens) the attorney may have in the client's property "that is not awarded to the attorney in the award."[46] Although the award is publicly available, other documents involved in the arbitration are not available to the public but may be made available to the Discipline Department and certain other State Bar programs and any court asked to confirm or set aside the award.[47]

When looking at recent awards issued over several months, about half of the time the fees are reduced. In the other half of the awards, the fees are sustained. Significantly, the average time from filing a petition to issuance of the award is from seven to nine months.

Parties have 30 days "from the date upon which a copy of the award is mailed to them to comply with the award."[48] Neither the State Bar, the Fee Arbitration Committee nor the arbitrator is involved with enforcement of the award. Ordinarily, the parties voluntarily comply with the award—with the non-prevailing party paying, or refunding, the amount awarded to the prevailing party—making more formal enforcement proceedings unnecessary. Payment of the award constitutes "a complete satisfaction of all claims arising out of the subject matter of the arbitration."[49]

On occasion, a party does not comply with an award. In that case, an award "may be enforced by the Superior Court of the County in which the arbitration hearing was held"[50] by filing a civil action to confirm the award under Arizona's Uniform Arbitration Act.[51] "Any objections or modifications to the award may be raised" in such a judicial proceeding.[52] The unjustified refusal to comply with an unchallenged or otherwise final award may subject an attorney to disciplinary action.[53]

Conclusion

The State Bar's Fee Arbitration Program offers an informal, inexpensive and quick way to resolve attorney fee disputes. The Fee Arbitration Program presents an attractive non-public way to promptly resolve disputes implicating the attorney-client relationship. To date, the results suggest that the program works. With a substantial number of fee-arbitration proceedings each year, the number of awards favoring the client seem to equal the number of awards favoring the attorney. As they have for decades, the volunteer State Bar Fee Arbitration Committee members and volunteer attorney and lay arbitrators will continue to attempt to improve this worthwhile program and continue to provide this valuable public service.

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ENDNOTES:

1. ABA Commission on Evaluation of Disciplinary Enforcement ("McKay Commission") (1992).
2. ABA Standing Committee on Lawyer's Responsibility for Client Protection Model Rules for Fee Arbitration (1995).
3. *See* www.azbar.org.
4. State Bar of Arizona Fee Arbitration Committee Rules of Arbitration of Fee Disputes (hereinafter "Rule ___") Rule II(A)(1)-(4). This article incorporates changes to these Rules approved by the State Bar Board of Governors in October and December 1998.
5. Rule II(B)(1).
6. Rule II(B)(2)-(6).
7. Rule II(C).
8. Rule IV(A).
9. *Id.*
10. *See* www.azbar.org/Discipline/feearb1098_form.pdf.
11. Rule IV(C).
12. *Id.*
13. Rule IV(B)(1).
14. Rule IV(B)(5), (6)&(7).
15. Rule V(B).
16. *Id.*
17. *Id.*
18. Rule V(A).
19. Rule V(E).
20. Rule V(D). For convenience, this article refers to a sole arbitrator and a three-member panel as an "arbitrator."
21. Rule V(D).
22. *Id.*
23. Rule IV(B)(6).
24. Rule IV(E) Committee Comment.
25. Rule IV(E) & (F).
26. Rule VII(A).
27. Rule VI(B).
28. *Id.*
29. Rule VI(A). Arbitrators are chosen geographically in accordance with this same Rule. Rule V(C).
30. Rule III(A) (citing Ariz. R. Sup. Ct. 42 Ethical Rule 1.5).
31. Rule III(B); *accord Moseley v. Brewer*, 139 Ariz. 540, 541, 679 P.2d 563, 564 (Ct. App. 1984) (noting "that the written petition to arbitrate determines the powers of the arbitrators and the rules of procedure that they are required to follow").
32. Ariz. R. Sup. Ct. 42 Ethical Rule 1.5(a).
33. *Id.*
34. Rule VI(F).
35. *Id.*
36. Rule VI(E) & (K). Upon stipulation of the parties, the arbitrator may determine the controversy based on the file without a hearing. Rule VI(J). Although the proceedings are informal, the oath and obligation to present unadulterated evidence are the same

as in formal judicial proceedings. *See State v. Self*, 135 Ariz. 374, 661 P.2d 224 (Ct. App. 1983) (affirming perjury and evidence tampering convictions arising out of fee arbitration hearing).

37. Rule VI(F).
38. *Id.*
39. *Id.*
40. Rule VI(D). If deemed "necessary to having the hearing recorded," the arbitrator also may do so in certain circumstances. Rule VI(D).
41. Rule VI(H). If a member of a three-member panel is not present, the parties may agree to have one lawyer member of the panel serve as the sole arbitrator but "[i]n no event" can a hearing proceed with two members of the panel acting as arbitrators. Rule VI(G).
42. Rule VII(A).
43. Rule VII(B).
44. *Id.*
45. Rule VII(C).
46. Rule VIII(B).
47. Rule VIII(D).
48. Rule VII(D).
49. Rule VIII(C).
50. Rule VIII(E).
51. Rule VII(D) (citing A.R.S. §§ 12-1501-1518).
52. Rule VII(D).
53. *In re Rubenstein*, 178 Ariz. 550, 875 P.2d 783 (1994).