ARBITRATION ADVISORY

2008-01

TIMING OF AGREEMENTS TO BINDING FEE ARBITRATION

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INTRODUCTION

Business and Professions Code section 6204(a) provides that "the parties may agree in writing to be bound by the award of arbitrators appointed pursuant to this article at any time after the dispute over fees, costs, or both, has arisen." The State Bar's Committee on Mandatory Fee Arbitration (CMFA) also has concluded that an agreement to be bound by an arbitration award must be made, if at all, prior to the commencement of the taking of evidence at the Mandatory Fee Arbitration (MFA) hearing. This interpretation is reflected in the State Bar's Model Rules of Procedure for Fee Arbitrations adopted by the State Bar program and a growing majority of local bar programs.

This Advisory addresses when and under what circumstances the parties may change the arbitration from non-binding to binding or from binding to non-binding. It advises that any change from non-binding to binding must be in writing. It advises that changes in election from non-binding to binding or from binding to non-binding should never be permitted once the taking of evidence has commenced. Finally, this Advisory strongly recommends that local bar MFA programs, administrators and arbitrators remain completely neutral on the issue of whether the arbitration is binding or non-binding in order to avoid undue influence or the perception of undue influence.

DISCUSSION

All MFA awards are non-binding unless both parties agree in writing that the award is to be binding. Business & Professions Code section 6204(a) provides that the parties may agree in writing to be bound under MFA "…at any time after the dispute over fees, costs, or both, has arisen." Model Rule 5.1 of the State Bar's Model Rules of Procedure

for Fee Arbitrations (Model Rules) confirms the statutory requirement that agreements to be bound under MFA must be in writing and must be made after the fee dispute has arisen. In addition, Model Rule 5.1 provides: "Such agreement shall be made prior to the taking of evidence at the hearing." Where an agreement has been made for binding arbitration, the Model Rules also provide that arbitration cannot be changed from binding to non-binding except by "…written agreement signed by all parties before the taking of evidence" [Model Rule 6.4]. The Model Rules, approved by the State Bar Board of Trustees, have been adopted by a growing number of local bar associations.

When an MFA is initiated, the parties are required to complete arbitration request and reply forms supplied by the program. The parties are requested to indicate their choice of non-binding or binding arbitration on each form. If all parties indicate their consent to binding arbitration on their respective forms, the arbitration will be binding. Conversely, if any one party indicates on their respective form that non-binding arbitration is requested, the arbitration will proceed as non-binding. In addition, if the respondent fails to submit a reply form, the arbitration will also proceed as non-binding regardless of the option selected by the requesting party.

Also, Rule 3.508(C) of the Rules of the State Bar of California states that a party who initiates a request for binding arbitration may submit a written election for non-binding arbitration instead if the respondent has not replied; has not agreed to binding arbitration in the reply; or has replied and agreed to binding arbitration but sought to materially increase the amount in dispute, provided the election is sent to the State Bar within 10 days of receipt of the reply.

After the forms are submitted, the parties may still agree that the arbitration will be binding rather than non-binding but only if both parties so agree in writing. If one party chooses binding arbitration when initially submitting the request form but the respondent indicates non-binding on the reply form, the initiator's offer of binding arbitration is considered effectively rejected by the respondent and the matter will proceed as non-binding arbitration. If the respondent subsequently elects binding arbitration and attempts to rely on the requesting party's initial election for binding arbitration, the arbitration will not become binding unless both parties subsequently agree in writing to accept binding arbitration.

In addition, any change of election from non-binding to binding or from binding to non-binding must be made, if at all, before the commencement of the taking of evidence at the hearing. Once the taking of evidence commences, the arbitrator or panel should not entertain any agreement or attempt to change the proceeding from non-binding to binding or from binding to non-binding.

It is appropriate for the arbitrator or panel to confirm the parties' respective choices as reflected in their forms at the commencement of the hearing and before any evidence is taken. It is strongly recommended, however, that arbitrators refrain from any further discussion with the parties about whether the arbitration will be binding or non-binding and

that they remove themselves from any discussion the parties may have regarding this election.

The arbitrator or panel also should be mindful that an unrepresented client may not understand the significance of binding versus non-binding arbitration and ask for assistance. In that instance, the arbitrator or panel should provide factual information to educate the client. It is imperative, however, that the arbitrator or panel not express or suggest a personal preference about a party's decision to accept or reject either binding or non-binding arbitration. Even when parties are represented by counsel, the arbitrator or panel's expression or suggestion of a preference in many instances will either actually improperly influence a party to accept binding arbitration or will lead to claims of coercion after the hearing or after service of the award.

Despite these clear requirements, the CMFA has learned of instances where the arbitrator or panel has either suggested that there be a change from non-binding to binding arbitration *sua sponte* or entertained a party's request that there be a change from non-binding to binding arbitration. Sometimes this occurs at the commencement of the hearing. In one matter, the attorney wanted to change from non-binding to binding arbitration at the time of the hearing and the panel ordered the hearing to be binding based upon the client's request for binding arbitration as indicated on his initial request form, although the attorney had initially rejected that election and the client was no longer amenable to binding arbitration. The client deferred to the panel's interpretation at the time but later complained to the State Bar. The CMFA is also aware of other cases where the arbitrator or panel has provided a party with the opportunity to, or suggested, that the parties should change from non-binding to binding arbitration during the hearing or after the hearing had concluded.

If one party initially elected non-binding arbitration but now wishes to change that election before the taking of evidence at the hearing, the matter must remain non-binding unless all other parties then agree in writing to binding arbitration. When one party previously agreed to binding but the other party chose non-binding, the party who initially agreed to binding has a right to proceed with non-binding arbitration and cannot be required to adhere to his or her initial election. For such an arbitration to become binding, both parties must again state their agreement to binding arbitration in writing.

In addition, once the hearing commences and evidence is taken, the parties should not be permitted to change their election from non-binding to binding or to withdraw from an agreement for binding arbitration. To permit such changes would impugn the neutrality and fairness of the arbitration and frequently result in claims by parties that the changes were the result of undue influence or coercion. If the arbitration proceeds as non-binding, parties who desire binding arbitration may simply forego their rights to request a trial de novo and the award will become binding by operation of law 30 days following service of the award.

CONCLUSION

Agreements to binding arbitration are permitted if made in writing after a fee dispute arises and before the commencement of the taking of evidence at the hearing. Such agreements may not be based upon an initial election for binding arbitration if it was not accepted by the other party when submitting his or her reply form. Only a subsequent agreement made by all the parties in writing will be sufficient to convert a non-binding arbitration to a binding arbitration. Further, once the taking of evidence has commenced, the arbitrator or panel must not entertain any agreement to change the proceeding from non-binding to binding or from binding to non-binding arbitration.

Additionally, MFA programs, administrators and fee arbitrators must remain neutral on the issue of whether the arbitration will proceed as non-binding or binding. Arbitrators should be careful not to suggest binding arbitration or to attempt to persuade the parties to make an agreement for binding arbitration if the parties have not previously agreed in writing to binding arbitration.