

## ARBITRATION AWARD CHECKLIST

This one-page checklist enumerates matters that may have to be determined in preparing a fee arbitration award covering all pertinent issues. Instructions and references to additional helpful materials are provided on the following pages.

- \_\_\_ **Step 1.** Correctly state the full names of the parties and individual responsible attorney(s). If the existence of an attorney-client relationship is disputed, attach the parties' stipulation to submit the issue to arbitration.
- \_\_\_ **Step 2.** If a party failed to appear, make findings on willfulness.
- \_\_\_ **Step 3.** Indicate whether binding or non-binding arbitration, and attach a signed stipulation form, if applicable.
- \_\_\_ **Step 4.** If the defense of the Statute of Limitations has been raised, is the claim barred? If no, go to **Step 5**; if yes, award 0 on the barred claim and go to **Step 13**.
- \_\_\_ **Step 5.** Is there a valid fee agreement (and billings if B&P 6148 applies)? If yes, go to **Step 6**. If no, go to **Step 10**.
- \_\_\_ **Step 6.** Calculate the amount fees and costs billed per agreement.
- \_\_\_ **Step 7.** Are the agreed fees unconscionable? If no, go to **Step 8**. If yes, go to **Step 10**.
- \_\_\_ **Step 8.** Deduct the appropriate amount, if any, for unnecessary or unauthorized services and costs and any fees or costs claimed for fee arbitration and other collection from client.
- \_\_\_ **Step 9.** If any of the services were negligently performed, adjust the fees to reflect the value of such negligently performed services. Do not award damages or use them as an offset.
- \_\_\_ **Step 10.** Calculate reasonable fees and costs in cases where there is no valid fee agreement or such agreement provides for unconscionable fees.
- \_\_\_ **Step 11.** Did attorney commit a serious violation of the Rules of Professional Conduct or otherwise act unethically or illegally charge fees? If yes, determine effect on fees and costs.
- \_\_\_ **Step 12.** Deduct for payments/credits on account.
- \_\_\_ **Step 13.** Allocate the arbitration filing fee, at the discretion of arbitrator(s).
- \_\_\_ **Step 14.** Calculate balance due to attorney or client, including any allowed interest.
- \_\_\_ **Step 15.** Write and sign award and any dissent, deciding all issues submitted. Send award to Program for review and transmission to parties with proof of service and notice of rights.

## ARBITRATION AWARD INSTRUCTIONS and REFERENCES

Fee arbitrations succeed in finally resolving disputes without litigation when the parties perceive that the arbitrator(s) acted fairly in deciding their case and rendering a comprehensive, intelligible award. Even a party who is dissatisfied with the amount awarded may choose not to seek a trial following a non-binding arbitration if that party perceives that the arbitrator(s) truly listened to his or her position and determined the dispute in a reasoned manner in accordance with the evidence and applicable law. These instructions are intended to assist you in achieving the desired result.

### Step 1. Names of Parties and Identification of Responsible Attorney(s).

Be sure that the client and attorneys are correctly named, taking into account marriages and restoration of former names on dissolution of marriage, correct corporate and partnership firm names, and other details needed in any subsequent litigation over the fee dispute. Also, B&P 6203(d) provides for enforcement of an award in favor of a client by placing the non-paying individual responsible attorney(s) on involuntary inactive status. This is not a partnership or corporation, but the bar member(s) personally responsible for making or ensuring payment of the refund. See Fee Arbitration Advisory 1994-04. If the existence of the attorney-client relationship is disputed, any award is subject to being vacated unless the parties stipulate to submitting that issue to arbitration. See Arbitration Advisory 2005-01. Attach the original of any such stipulation to the award.

### Step 2. Findings on Willfulness of Non-Appearance of Party at Arbitration Hearing.

A party may not request trial de novo after non-binding arbitration if that party willfully failed to appear at the arbitration hearing noticed under the rules of the Program. B&P 6204(a) provides that it is the court that determines willfulness, but in making that determination, “the court may consider any findings made by the arbitrators on the subject of a party’s failure to appear.” B&P 6203(c) also provides that a party who did not appear at an arbitration hearing shall not be entitled to attorney’s fees or costs even if he or she is the prevailing party obtaining court confirmation, correction or vacation of the award. Therefore, set forth in the award what notice was given and any information known regarding the non-appearance of the party.

### Step 3. Indicate Whether Binding or Non-Binding Arbitration, and Attach Any Stipulation.

B&P 6204(a) provides that a fee arbitration is binding only when the parties have so agreed in writing after the dispute arose. Often the writings will be the request for arbitration and reply, but occasionally the agreement for binding arbitration is reached at the commencement of the hearing, in which case the

agreement must be reduced to a writing signed by the parties, and the original should be attached to the award.

Step 4. Statute of Limitations.

B&P 6206 provides that an arbitration shall not be commenced if a civil action requesting the same relief would be barred by the statute of limitations, unless the client requests arbitration after the attorney has filed a civil action. Arbitration Advisory 2011-02 discusses the applicable limitations periods, and recommends not determining whether the claim is barred unless a party raises it as a defense, as is the case in civil actions. If the claim is barred, the claimant is denied a recovery, and the arbitrator(s) will need to determine whether any allocation of the filing fee should be made.

Step 5. Is There a Valid Fee Agreement?

All contingent fee agreements are required by B&P 6147 to be in writing, and with a few exceptions, all other fee agreements with non-corporate clients must be in writing if the fees are expected to exceed \$1,000, per B&P 6148. That section also sets standards for billings. If the requirements for written fee agreements and billings are not met, the agreement is voidable at the option of the client. The arbitrator(s) should treat the agreement as voided by the client if it results in a lower fee. See Arbitration Advisory 2012-01 on voidability of fee agreements. If there was no fee agreement, or the writing requirements were not met, the attorney is only entitled to an award of a reasonable fee, and proceed to paragraph 10 below. See Arbitration Advisories 1993-02 for discussion of the requirements of written fee agreements and 1995-02 for a discussion of billing requirements.

Step 6. Determining Fees and Costs Under Valid Fee Agreement.

When the arbitrator(s) find that a valid fee agreement exists, and the fees are not unconscionable, the attorney will ordinarily be entitled to fees and costs charged per the agreement. See Arbitration Advisory 1993-02 on the standard of review when a valid fee agreement exists. Examine billings and any settlement statements to determine whether the fees and costs charged conform to the terms of the agreement. Discrepancies arise with some frequency when the attorney's billing rate goes up during the representation, or the attorney charges staff services as costs contrary to the agreement. Arbitration Advisory 1995-02 discusses billing requirements of B&P 6148(b), and Advisory 2003-01 provides helpful insights in detection of bill-padding practices.

Step 7. Unconscionable Fees.

Rule 4-200(A) of the Rules of Professional Conduct (RPC) states that an attorney “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” To be unconscionable, a fee must be so far beyond the realm of reasonableness that it shocks the conscience. Subpart (B) of Rule 4-200 requires consideration of all the facts and circumstances existing at the time the agreement is entered into, except where the parties expect that the fee will be affected by later events, and lists eleven factors to be considered, among others. If the fee is unconscionable, the attorney is nonetheless entitled to recover a reasonable fee, as discussed in paragraph 10. If only part of the fee is unconscionable, the agreed fee for the remainder of the fee may be awarded and reasonable fees awarded for the portion of the services for which the agreed fee is unconscionable.

Step 8. Deducting for Unnecessary or Unauthorized Services and Costs and Fee Arbitration and Other Collection From Client.

The attorney should be denied compensation for unrequested services beyond the scope of the agreed representation or for services and costs that were not reasonably necessary to the proper representation of the client. Subsection (c) of B&P 6203 provides that neither party may recover costs or attorney’s fees in a fee arbitration award for preparation for or participation in the arbitration proceeding, except for the filing fee.

Step 9. Adjustment for Professional Negligence in Performance of Services.

B&P 6203 states that evidence relating to claims of malpractice and professional misconduct are “admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled”, but no affirmative relief in the form of damages or offset can be awarded for injuries claimed to have resulted from the malpractice or professional misconduct. If you find malpractice did occur, you may determine that there was a reduced value, or no value for the services, and adjust the fees accordingly, but no other consequential damages resulting from the negligence may be considered in fee arbitration.

Step 10. Determining Reasonable Fees When There is no Valid Agreement.

If there is no valid fee agreement, or the writing and billing requirements of B&P 6147 or 6148 have not been satisfied, the attorney is nonetheless entitled to a quantum meruit award for the reasonable value of the services rendered, but not to exceed the compensation due under a written agreement subject to being voided by the client. The factors to consider in making an award of reasonable compensation are spelled out in Fee Arbitration Advisory 1998-03. The

arbitrator(s) will deny compensation for unnecessary service and costs, and services and costs incurred in the arbitration or other collection efforts against the client, as discussed in paragraph 8, and take into account any professional negligence in valuing the services rendered, as discussed in paragraph 9.

Step 11. Serious Violation of Rules of Professional Conduct or Statutes or Illegal Fees.

The attorney should be denied compensation for any activity in serious violation of the Rules of Professional Conduct or statutes regulating the practice of law. Representing the client while having an impermissible conflict of interest leads to a denial of all fees while the conflict exists. The arbitrator(s) will need to determine the extent that other violations were serious and led to fees and costs being charged to the client, and what should be disallowed. See paragraph 7 above for consideration unconscionable fees. If the attorney has charged or collected a fee which an attorney is entitled to receive only by court order, such as fees for representing a minor, probate fiduciary, or workers' compensation claimant, then compensation should be denied without prejudice to obtaining the required court order. In some circumstances, such as medical malpractice cases, maximum fees are prescribed by statute, and the amount of any claim exceeding the limit should be denied.

Step 12. Deduct for Payments/Other Credits.

Be sure that the attorney has properly credited the client for payments on account and any other credits the attorney may have agreed to in the course of the representation.

Step 13. Allocation of Arbitration Filing Fee.

B&P 6203(a) gives the arbitrator(s) the discretionary authority to allocate the filing fee between the parties. No standard is given, but in practice the allocation is based on the extent to which the payor's claim is found to be supported and the basis of the award. That section provides that no award should be made for other costs or attorney's fees incurred in preparation for and participation in the arbitration, even if the fee agreement provides for an award of such costs and fees.

Step 14. Determine Balance Due Attorney or Client, Including Any Interest.

The arbitrator(s) should carefully calculate the amount due to the attorney or client taking into account the debits and credits set forth above. B&P 6203(a) expressly provides that the arbitrator(s) may award "a refund of unearned fees, cost, or both previously paid to the attorney." The fee arbitration statutes make no mention of awarding interest accrued before the award, but the practice is to

award them if a party would be entitled to such an award in a civil action on the claim. The issue is thoroughly discussed in Arbitration Advisories 1993-01 and 2001-01.

Step 15. Write and Sign Award, and Any Dissent, Deciding All Issues Submitted, and Send Award to Program.

B&P 6203(a) requires that the arbitration award be in writing signed by the arbitrators concurring in it, and that it include “a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy.”

On the other hand, B&P 6202 provides that confidential communications are admissible at the arbitration hearing, but such disclosures are not deemed a waiver of the confidentiality of such information for other purposes. Therefore, you must avoid disclosing privileged attorney-client communications in the award because they may become public in post-arbitration proceedings.

Any dissent should also be in a writing signed by the dissenting arbitrator, and delivered to the parties with the award, as provided in paragraph 15. The arbitration award is usually made following the format of a statement of decision in a civil action, including:

- 1) a caption showing the name of the arbitration forum, the names of the parties, and any case number assigned to the arbitration;
- 2) an introductory paragraph showing the date(s), time(s) and place(s) of the hearings, the notice given for the hearing, and the names of the arbitrator(s), parties, witnesses who testified, and any other persons in attendance. If a party fails to appear, it should include a statement of the facts concerning the willfulness of the non-appearance and whether permission was given by the arbitrators in advance;
- 3) a statement of any agreed facts to which the parties have stipulated in writing or orally in the course of the hearing, and the remaining issues to be determined;
- 4) a statement of the factual findings and conclusions, covering all issues submitted. It is usually stated as what the arbitrator(s) found by a preponderance of the evidence, avoiding directly accusing a party of lying; and
- 5) the award itself, which should include the following language, as appropriate:

The Hearing Panel finds that the total amount of fees, or costs, or both, that should have been charged in this matter are: \$ \_\_\_\_\_

of which Client is found to have paid: \$ \_\_\_\_\_

Subtotal \$ \_\_\_\_\_

In addition, the fee arbitration filing fee of \$ \_\_\_\_\_ as paid by \_\_\_\_\_ shall be allocated:

Client: \$ \_\_\_\_\_  
Attorney \$ \_\_\_\_\_

Pre-award interest  is not award  
 is awarded in the amount of \$ \_\_\_\_\_

for a net amount of: \$ \_\_\_\_\_

Accordingly, the following award is made:

a) Client, \_\_\_\_\_, shall pay Attorney, \_\_\_\_\_, \$ \_\_\_\_\_ plus interest in the amount of ten percent per annum from the 30<sup>th</sup> day after the date of service of this award.

OR

b) Attorney, \_\_\_\_\_, shall pay Client, \_\_\_\_\_, \$ \_\_\_\_\_ plus interest in the amount of ten percent per annum from the 30<sup>th</sup> day after the date of service of this award.

OR

c) Nothing further shall be paid by either attorney or client/non-client.

The individual responsible attorney(s) is/are \_\_\_\_\_.

Send the original signed award and any dissent to the Program for review and transmission to the parties with a proof of service per B&P 6203(a) and notice of post-arbitration rights. The arbitrator(s) should not undertake to serve the award to the parties.