Kenneth Bacon
MASTAGNI HOLSTEDT, A.P.C.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2020

Mandatory fee arbitration

HOW IT WORKS AND WHY IT CAN BE A VALUABLE RISK-MANAGEMENT TOOL FOR ATTORNEYS

Disputes over legal fees are a common source of legal-malpractice claims. One leading source suggests that disputes between attorneys and clients over legal fees contribute to approximately twenty percent of all legal-malpractice claims. (Mallen & Smith, *Legal Malpractice* (2020 ed.) Section 1.5.) A 1973 special committee of the American Bar Association observed that "disputes concerning fees are universally recognized as constituting the most serious problem in the relationship between the Bar and the public." The State Bar of California also recognized this issue and sought to create a mechanism for arbitrating disputes over legal fees and costs before they develop into fee disputes in the civil courts.

The Mandatory Fee Arbitration Act ("MFAA") was enacted in 1979 to provide a low-cost alternative to the court system to expeditiously resolve attorney-client fee disputes, and to alleviate the disparity in bargaining power in attorney fee disputes, by creating an effective, inexpensive and speedy remedy which does not necessitate that the client hire a separate attorney. (Business & Professions Code ["B&P"]) §§ 6200 et seq.; *Manatt, Phelps, Rothenberg & Tunney v. Lawrence* (1984) 151 Cal.App.3d 1165, 1174-1175.)

Mandatory Fee Arbitration ("MFA") is a separate and distinct "closed system" which has its own rules and limitations. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 984.) The MFA system is administered by the State Bar, but the vast majority of fee arbitrations are handled through local bar association programs. Under the program, the State Bar and local bar associations impanel arbitrators to hear disputes between clients and their attorneys over the amount of fees and/or costs charged. The client's participation is voluntary, unless the parties have an enforceable provision in their fee agreement for non-binding mandatory fee arbitration. (B&P § 6200, subd. (c).) MFA is mandatory for the attorney if requested by client even if the fee agreement between the parties requires that fees disputes be submitted to private contractual arbitration. (B&P §6200, subd. (c); *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 562.)

The State Bar has many resources regarding MFA on its website, including Arbitration Advisories which address many issues which arise in fee arbitrations. While the advisories are intended to assist fee arbitrators, they are also a valuable resource for attorneys and clients participating in a fee arbitration. The arbitration advisories are available on the State Bar's website (http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/ Mandatory-Fee-Arbitration/Arbitration- Advisories). The State Bar also has fee arbitration forms, instructions, sample fee agreement forms and other MFA resources available on its website.

Although attorneys often express concern that MFA may be a waste of time because it is generally non-binding, or because they believe they will not get a fair hearing, the reality is that MFA can be a valuable risk-management tool. The benefits of MFA are varied, including that it is confidential, speedier and less costly than litigation, less formal than court proceedings, counsel is optional, it stays pending litigation, and it reduces the chance of a malpractice claim.

The confidentiality afforded by MFA is one of its main benefits since, unlike litigation, MFA does not take place in a public forum. Both attorneys and clients may benefit from the confidentiality available through fee arbitration as the client maintains his or her confidential information, while the attorney can avoid the potential reputational harm of fighting a client in public over billing practices and their handling of the client's case.

A 2012 study by the State Bar Committee on Mandatory Fee Arbitration showed that about 90% of non-binding fee arbitrations resulted in the dispute being resolved without a request for trial de novo. As MFA has a proven track record of resolving fee disputes, attorney should view MFA as a valuable risk management tool to resolve fee disputes before they spiral into a malpractice claim or complaint to the State Bar.

What types of disputes are covered by MFA?

The MFAA only applies to disputes between an attorney and client regarding fees, costs or both. However, a non-client who has agreed to pay the client's legal bills or guaranteed the payment of an attorney's fees (i.e., a third-party payor) is also entitled to arbitrate fee disputes. (*Wager v. Mirzayance* (1998) 67 Cal.App.4th 1187, 1190-1191; State Bar Rules of Procedure for Mandatory Fee Arbitration ["State Bar Rules"] Rules 3.500(B)(3) and 3.530(a)(1).)

MFA does not apply in the following circumstances: (1) fee disputes between attorneys; (2) where the fee or cost to be paid by the client has been determined pursuant to statute or court order; (3) where services were not rendered in California in any material part by an attorney who maintains no office in California. (B&P § 6200(b); State Bar Rule 3.503.)

Can a client raise alleged malpractice or professional misconduct in MFA?

Yes, but a client cannot recover damages for alleged malpractice in MFA proceedings. Business & Professions Code section 6203, subdivision (a) provides that evidence relating to claims of malpractice and professional misconduct shall be admissible in arbitrations conducted under the MFAA, but only to the extent that those claims bear upon the fees or costs to which the attorney is entitled. (See, Arbitration Advisory 2012-03 [Handling Legal Malpractice Claims and Ethical Issues During Arbitration].) In other words, the question in MFA arbitrations involving malpractice claims is whether the attorney's acts or omissions affected the value of the services to the client. If so, the fee may be adjusted, but the arbitrator cannot award damages for the alleged malpractice or professional misconduct.

See Bacon, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2020

Attorneys should not be skeptical about MFA because evidence of alleged malpractice or professional misconduct is admissible. MFA proceedings are confidential and the award is not admissible in evidence and does not operate as collateral estoppel or res judicata in any other proceeding. (B&P § 6204, subd. (e); *Liska v. Arns Law Firm* (2004) 117 Cal.App.4th 275, 286-287, [in order to maintain the informality and economy of the arbitration proceedings fee, arbitration awards are not admissible in evidence and do not operate as collateral estoppel or res judicata in any other proceeding].) MFA can therefore provide a confidential, relatively inexpensive and low-risk forum to vet a client's potential malpractice claim.

What effect does an arbitration clause in a fee agreement have on MFA?

A provision in an attorney-client fee agreement for binding arbitration does not preclude a client's right to non-binding fee arbitration under the MFAA. The MFAA constitutes a separate and distinct arbitration scheme and the statute provides that the parties may only agree to binding MFA *after* the dispute over fees has arisen. (B&P § 6204(a); *Schatz, supra* 45 Cal.4th at 564-565; *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 53; State Bar Rule 3.508(A).) Accordingly, the client must first be given opportunity to request mandatory fee arbitration notwithstanding the existence of a private arbitration clause. (See, Arbitration Advisory 2012-02.)

However, after non-binding MFA has been completed, either party can require that the fee dispute be submitted to binding arbitration in accordance with an arbitration clause in the fee agreement in lieu of trial de novo in court (i.e., arbitration de novo). (*Schatz, supra* 45 Cal.4th at 562, 574-575; Arbitration Advisory 2012-02.)

While MFA is generally voluntary for the client, a fee agreement may include a provision requiring that the client agree to non-binding MFA. (B&P § 6200, subd. (c).) If such a clause exists in the fee agreement, it is enforceable and MFA will be mandatory for both parties.

Is there a statute of limitations for MFA claims?

Like civil actions, MFA actions are subject to statutes of limitations. (B&P § 6206 - MFA may not be commenced if a civil action requesting the same relief would be barred by any applicable statute of limitations.) There is a limited, but important, exception to this rule, allowing arbitration to be commenced by a client, after the statute of limitations would otherwise have expired, if it follows the filing of a civil action by the attorney.

Until 2016, it had been the opinion of the State Bar Committee on Mandatory Fee Arbitration that the one-year statute of limitations for professional liability actions set forth in Code of Civil Procedure section 340.6 did not apply to MFA because damages for legal malpractice are not available in MFA proceedings. However, a 2015 decision of the California Supreme Court shed light on the scope of Code of Civil Procedure section 340.6 and held that it may apply to a client's claim for a refund of allegedly unearned fees from their attorney. (*Lee v. Hanley* (2015) 61 Cal.4th 1225.)

While the Supreme Court's decision in *Lee* did not refer to MFA, the Committee on Mandatory Fee Arbitration concluded that the Court's rationale indicated that the one-year limitations period under section 340.6 may apply to arbitration of attorney-client fee disputes under the MFAA where the nature of the dispute in any way involves the nature and propriety of the attorney's legal services. The Committee concluded that in the absence of clarification of this issue by the Supreme Court or the Legislature, the one-year limitations period under section 340.6 may apply to the arbitration of attorney-client fee disputes under the MFAA. (See, Arbitration Advisory 2016-01[Statute of Limitations for Fee Arbitrations].) However, the Committee concluded that because the statute of limitations is an affirmative defense, it must be affirmatively raised in the attorney's response or it is waived.

How does MFA work?

Notice of client's right to fee arbitration

An attorney who decides to pursue recovery of fees or costs from a client must give the client a written notice of their right to MFA before or with service of summons of a civil action or prior to or at the commencement of any non-MFAA arbitration. (B&P § 6201, subd. (a).) The written notice must be given on the mandatory Notice of Client's Right To Fee Arbitration form. (State Bar Rule 3.501(B).)

The notice of the client's right to MFA can only be given after an actual fee dispute has arisen. (*Huang v. Cheng* (1998) 66 Cal.App.4th 1230, 1234-1235 [notice of right to MFA effective only after actual fee dispute arises; mailing of notice of right to arbitration with bill for final services not proper because notice provided before any fee dispute arose].) An attorney's failure to give the required notice is grounds for dismissal of a lawsuit filed by the attorney to collect fees/costs. (B&P § 6201, subd. (a); State Bar Rule 3.501(C).)

Request for arbitration and waiver

Upon receipt of the Notice, the client has 30 days to file a request for fee arbitration with a county bar program, along with a filing fee, or with the State Bar if no local bar program has jurisdiction. (State Bar Rule 3.505(A) and (B)(1).) The client waives the right to MFA if they fail to file the request within the 30-day period, if they initiate a civil action against the attorney or if they file a responsive pleading in an action filed by the attorney. (B&P § 6201, subds. (a), (d); State Bar Rule 3.502.)

The 30-day deadline for a client to request fee arbitration runs from the date the Notice of Client's Right to Fee Arbitration form is *received* by the client. (B&P § 6201, subd. (a).) To avoid issues regarding the date of receipt, attorneys should consider serving the notice by certified mail or some other form of delivery which establishes when the notice was received by the client.

Even if the client waives their right to MFA, the parties may stipulate to set aside the waiver and proceed with arbitration. (B&P § 6201, subd. (e).)

See Bacon, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2020

In light of the many benefits of MFA, attorneys should consider stipulating to fee arbitration even when the client waived their right to arbitration.

An attorney may also initiate arbitration by filing an attorney's Request to Arbitrate form. Because mandatory fee arbitration is voluntary for the client, before an arbitration requested by an attorney can proceed, the client must expressly agree in writing to arbitrate.

Where is the request for arbitration filed?

The request for arbitration should be filed with the bar association in the county where a substantial portion of the legal services were performed or where the attorney maintains an office. (State Bar Rule 3.505(A).) If the local bar association does not have a fee arbitration program, the request may be filed directly with the State Bar.

Stay of civil action and/or private arbitration and tolling of the legal malpractice statute of limitations

A client's timely request for MFA stays all pending legal actions regarding fees or costs, including mediation and arbitration before any private provider or tribunal, until the MFA arbitration proceeding is concluded. (B&P §6201, subd. (c); State Bar Rule 3.511.) California Rules of Court, Rule 3.650(a) and (b)(3) imposes a duty on the party who causes the stay to "immediately" serve on other parties who appeared in the case and file with the court a notice of the stay. Judicial Council form CM-180 "Notice of Stay of Proceedings" must be used to give the notice of stay.

Effective January 1, 2020, a client's timely request for fee arbitration will also toll the statute of limitations to file an action for legal malpractice until 30 days after receipt of an award, or notice that the arbitration is otherwise terminated, whichever occurs first. (Code Civ. Proc., § 340.6, subd. (a)(5).)

Binding or non-binding arbitration

MFA is non-binding unless all parties agree to binding arbitration in writing after the fee dispute arises. (See, Arbitration Advisory 2008-01 [Timing of Agreement to Binding Fee Arbitration].) However, an award can become binding by law after the passage of 30 days from service of the award if neither party has filed to reject the award. (B&P § 6203, subd. (b) and 6204, subd. (a); State Bar Rule 3.508.)

Attorney's reply

After the client submits a completed request for arbitration, the program will notify the attorney, who then has 30 days to submit a reply to the request for arbitration. (State Bar Rule 3.531.) The attorney's reply is the first opportunity for the attorney to respond to the client's claims. Be sure to carefully review the allegations in the client's request, respond to each claim, and provide documents to support your position. If there are any defenses to the client's claim, such as the statute of limitations, waiver, or lack of an attorney-client relationship, those should also be addressed in the reply.

Arbitrator selection, disclosure and party challenges

In MFA proceedings, the program assigns the arbitrator or arbitration panel consisting of two lawyers and one layperson. The client can request the appointment of an attorney arbitrator whose area of practice is civil law if the fee dispute relates to a civil matter, or one whose practice is criminal law if the dispute relates to a criminal matter, but the parties do not get to select the arbitrators.

MFA program rules provide that a party may disqualify one arbitrator without cause, typically by providing written notice to the program within 15 days of service of the Notice of Arbitrator Assignment. (See, e.g., State Bar Rule 3.537(A).) Parties also have an unlimited number of challenges for cause.

If an appointed arbitrator believes that she or he cannot render a fair or impartial decision, or believes that there could be an appearance of bias that she or he cannot render an impartial decision, the arbitrator will disqualify herself or himself. However, the disclosure requirements set forth in Code of Civil Procedure section 1281.9 for arbitrators in arbitrations conducted under the California Arbitration Act do not apply to arbitrations under the MFAA. (See, California Rule of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 3(b)(2)(C); *Benjamin, Weil & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 59 fn. 10; Arbitration Advisory 2015-01.)

Preparation for the hearing

Just as with litigation in court or contractual arbitration, preparation is key for a successful MFA arbitration. The arbitrator may contact the parties to address pre-hearing issues such as the date and manner for exchange of documents.

Although briefs are not required (unless requested by the arbitrator or panel) service and filing of an arbitration hearing brief should be seriously considered by each party. If a party intends to submit exhibits, they should be organized, and sufficient copies should be made for the arbitrator or panel and the other party. For the ease of the arbitrators, and to put on an effective case, exhibits should be tabbed and organized in exhibit binders.

Attorneys should have a copy of their fee agreement and be prepared to show that the fee agreement complies with the statutory requirements, including the requirement that a duplicate copy of the fully executed fee agreement was provided to the client at the time the contract was entered into. (See, B&P §§ 6147 and 6148.)

If a party intends to call witnesses, be sure to let them know the hearing date and time and make arrangements for them to attend the hearing. Requests for a continuance based on a witness not being available are frowned upon, especially where the party is not able to show diligence in securing the witnesses' attendance.

Disputes regarding contingent fees

Most fee disputes between plaintiff's personal injury attorneys and their clients involve contingent-fee agreements. While clients occasionally claim that a contingent-fee rate is unconscionable, most MFA disputes regarding contingent-fee agreements involve the following issues: (1) whether the agreement complied with statutory requirements of B&P § 6147; (2) whether the attorney is entitled to a fee after withdrawing from the case; (3) the amount of the contingent fee the attorney may recover after being

See Bacon, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2020

discharged by the client. (See, Arbitration Advisory 1997-03 [Fee Arbitration Issues Involving Contingency Fees].)

Attorneys who handle cases on a contingent-fee basis should be familiar with the provisions of B&P section 6147. If the fee agreement does not comply with all of the requirements of section 6147, the agreement may be voided at the option of the client, and then the attorney is entitled to only the reasonable value of her or his services. (B&P § 6147, subd. (b.) Modifications of a contingent fee agreement also must comply with section 6147. (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 382.)

If an attorney withdraws from the case after partial performance, entitlement to recover a fee will depend on the circumstances of the withdrawal. If the withdrawal is without good cause, the attorney is not entitled to recover fees for services performed. (*Hensel v. Cohen* (1984) 155 Cal.App.3d 563, 568-569; *Estate of Falco v. Decker* (1987) 188 Cal.App.3d 1004, 1014.) However, if the attorney had good cause for withdrawal, the attorney may be entitled to recover for the reasonable value of their services rendered prior to the withdrawal. (*Estate of Falco*, *supra* at 1015-1016; *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 496-497.)

Where an attorney is discharged by the client after partial performance, the attorney may recover in quantum meruit for the reasonable value of the services provided prior to the discharge. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790-792.) Even when the attorney is entitled to recover the reasonable value of services after being discharged by the client or withdrawing with cause, the contingency still controls. Thus, if the client loses the case and does not achieve a recovery, the attorney is not entitled to a fee because the contingent event did not occur. (*Fracasse supra* at 792.) In addition, if the case has not been resolved, then the attorney's claim for quantum meruit is not ripe and MFA should be dismissed or abated until the contingency occurs.

In each of the foregoing circumstances, the attorney should be prepared to demonstrate the reasonable value of the services provided. (See, Arbitration Advisory 1998-03 [Determination of a Reasonable Fee].) In determining a reasonable fee, MFA arbitrators will consider the factors set forth in Rule of Professional Conduct 1.5(b), so attorneys should be familiar with those factors. One of the most significant factors in determining a reasonable fee is the amount of time spent. (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287-89.) While time records are not necessarily required, it is a good practice for contingent fee attorneys to keep accurate records of their time as they may otherwise have difficulty meeting the burden of proof regarding a reasonable fee.

The hearing

MFA hearings are less formal than court proceedings or contractual arbitration, and technical rules of evidence do not apply. The MFA program is designed so that clients can arbitrate without legal training or the assistance of counsel. The level of formality is up to the arbitrator, but MFA arbitrators are trained to bear in mind the statutory purpose of providing a forum where clients can present their cases without legal representation.

Each side will be allowed to present their case and call witnesses, but local rules usually provide no specific guidance on who has the burden of proof. Rather, allocation of the burden of proof is left to the discretion of the arbitrator, depending upon who has greater access to sources of proof. (Arbitration Advisory No. 1996-03 [Burden of Proof in Fee Arbitrations Burden of Proof in Fee Arbitrations].) As in civil cases, in MFA the sufficiency of evidence for a particular claim or position is based upon a preponderance.

The attorney-client and work product privileges do not apply in MFA proceedings between attorneys and their clients. (B&P § 6202.) However, where the arbitration involves a third-party payor, and the client does not participate in the arbitration, absent the client's written consent to disclosure of confidential information, a fee arbitration with a non-client is not intended to abrogate the attorney's duty to maintain client confidences and secrets, unless such disclosure is otherwise permitted by law. (See Arbitration Advisory No. 2007-02.)

The award

The arbitrators will hear all pertinent evidence and arguments regarding the fee dispute, and then make appropriate findings and issue a written award. The award will be served by the program along with a form entitled Notice of Your Rights After Fee Arbitration. Business & Professions Code section 6203 requires arbitrators to include "a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy." The award will include a determination of either the amount the client owes the attorney, the amount the attorney must refund the client, or a finding that nothing else is owed by either party.

The award may include an allocation of the filing fee. However, the award cannot include attorney's fees and other costs incurred in connection with the MFA proceeding, even if the fee agreement includes a provision for prevailing party attorney's fees. (B&P § 6203, subd. (a).)

What happens after the award is served?

If the award is non-binding, either party may reject the award and request a trial de novo in court, or a private arbitration pursuant to an arbitration clause in the fee agreement, within 30 days of service of the award. (B&P § 6204, subd. (a); *Schatz*, *supra* 45 Cal.4th 557, 562 [a private arbitration may substitute for a court trial de novo following non-binding MFA].) But beware, if a trial or arbitration de novo is not requested within the 30 days by either party, the award automatically becomes binding. (B&P § 6203, subd. (b).)

The 30-day period for requesting trial de novo runs from the date notice of the arbitration award is served. The 30-day period is not extended where the award is served by mail. However, if the 30th day falls on a weekend or legal holiday, a trial de novo request is timely so long as it is filed on the next day that is not a weekend

See Bacon, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2020

or holiday. (*McAvoy v. Harvey L. Lerer, Inc.* (1995) 35 Cal.App.4th 1128, 1131-1132 [one-day extension because 30th day fell on Sunday].)

The right to reject a non-binding award may also be lost where a party willfully fails to appear at the arbitration hearing. (B&P § 6204, subd. (a); State Bar Rule 3.543(B).)

A final award may be confirmed by a court and entered as a judgment. The award will accrue interest at the legal rate of 10% per annum from the 30th day after service of the award.

The MFAA provides that when an attorney has been ordered to refund attorney's fees to the client, the client may seek assistance from the State Bar if the attorney fails to comply with the award. (B&P § 6203, subd. (d); State Bar Rules 3.560-3.566.)

Tips for a successful MFA

The best way to deal with MFA is to be proactive in taking steps to avoid it altogether. Some of the best ways not to have a fee dispute with a client in the first place include always having a detailed and understandable written fee agreement with the client at the outset. As the representation progresses, it also is essential for the attorney to communicate with the client often and honestly, including responding to all questions, managing expectations, and reporting on and explaining events that affect the representation, especially bad news.

If a dispute does arise despite the attorney's best efforts to keep the client fully informed about the matter and all relevant billing issues, then the second-best way for avoiding MFA is to be realistic about the dispute, and about the practical aspects of fee disputes in general. Suing a client can mean that, at best, the attorney has to put in the time to earn the fee a second time with no additional benefit and, at worst, can become the proverbial lightning rod for a malpractice claim. Fee disputes should be approached with a minimum of emotion and a maximum dose of common sense and reasonableness.

Attorneys can increase their chances of a successful MFA outcome primarily by embracing the process and participating in it openly and constructively. This includes thorough preparation and presenting clear and concise arguments and documentation in support of the fee claim. This also includes demonstrating respect for the client throughout the process, as nothing serves to support a client's claim that the attorney failed to openly communicate with the client during the underlying representation as much as an attorney who comes to MFA showing similar disrespect for the client's issues and concerns, no matter how off base they otherwise may appear.

When an award is served, attorneys should carefully assess the award and decide whether the result is something they can live with, or whether they want to risk the time and expense of further litigation and a likely malpractice claim if they reject the award. If the attorney is awarded fees, but the amount is less then they claimed, does the difference outweigh the risks of further litigation? Attorneys should realistically assess their odds of winning a lawsuit, the value of their time spent pursuing the action, and consider the amount of their professional liability insurance deductible which they will have to pay in the likely event of a malpractice cross-complaint by the client.

If the lawyer is ordered to refund "unearned" fees to the client, does the amount of the refund justify the time, expense and risks of a trial de novo? If not, attorneys may want to consider accepting the award and thereby securing a final resolution of the fee dispute. However, attorneys should be sure to promptly pay the refund; otherwise the client can request assistance from the State Bar in enforcing the award.

Conclusion

Don't be afraid to try MFA as it may save you time, money, and greatly reduce exposure to potential malpractice claims.

Kenneth E. Bacon is a senior counsel in the Civil Litigation Department of Mastagni Holstedt, A.P.C. *in Sacramento and in-house risk management and ethics counsel for the firm. Mr. Bacon is certified as a specialist in legal malpractice law by the State Bar of California Board of Legal Specialization. He also serves as Presiding Arbitrator of the State Bar Mandatory Fee Arbitration Program and as Chair of the Sacramento County Bar Association Mandatory Fee Arbitration Program. Mr. Bacon is also a member of the State Bar Committee on Professional Responsibility and Conduct (COPRAC).*

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2020

See ?, Next Page