



STATE BAR OF MONTANA
FEE ARBITRATION PROGRAM

ARBITRATOR'S GUIDELINES

PRE-HEARING MATTERS

The arbitrators should immediately upon receipt review the Petition and Arbitration Agreement signed by the parties and notify the State Bar of any potential or perceived conflict of interest or other basis for disqualification. The State Bar will notify the parties; if either party objects to the arbitrator, an alternate will be appointed. An arbitrator may also decline for personal reasons or because of time commitments, i.e. a heavy trial schedule, etc., in which case an alternate arbitrator will be appointed by the State Bar, according to the Rules.

A pre-hearing conference may be scheduled at the discretion of the chair.

THE ARBITRATION HEARING

If requested by either party, a hearing should be scheduled within 90 days of the date the arbitration board has been selected and confirmed. The board chair may, however, postpone the hearing from time to time for good cause shown or on the chair's own determination.

The board chair should begin the hearing with an explanation of the objectives of fee arbitration:

- The goal of the arbitration is to determine what is a fair and reasonable fee for the services rendered by the attorney and, if applicable, the fairness of out-of-pocket expenses incurred.
- The board has no authority to reduce a fee for losses allegedly due to legal malpractice or unethical conduct of the attorney, although evidence of such conduct may be considered in determining whether the fees charged were reasonable.
- Both sides will have adequate opportunity to present their positions, but the panel will seek to keep discussion limited to matters which help to illustrate the reasonableness of the fee.

The chair should also explain the process:

- The Petitioner presents his/her case first, after which the Respondent is allowed to question the Petitioner directly or by relaying questions to the chair. The arbitrators may then ask additional questions they deem relevant.
- The Respondent then presents his/her case, using the same process.
- Each party will have the opportunity to make closing remarks without restating the evidence.
- All issues regarding procedure and the relevance and materiality of evidence are decided by the chair.
- If either party requests testimony be given under oath, the chair is authorized to administer such oaths to parties and witnesses.
- The parties should be reminded of the gravity of the matter and the importance of candor and truthfulness, as the testimony is under oath.

- The hearing is private and confidential, as are all of the documents on file. No documents may be disclosed without agreement of the parties or as order by a Court or disciplinary authority.
- If either party requests the hearing be recorded, that party is in charge of hiring a court reporter or providing other means for recording the hearing. The transcript of the hearing may not be disclosed to anyone other than the parties and the arbitrators, except with the consent of all parties.

ARBITRATORS' RESPONSIBILITIES

Be prepared. Review and analyze in advance of the hearing, the Petition and any other material submitted prior to the hearing.

Be familiar with the Fee Arbitration Rules, especially Rule 8.1, and the purpose of arbitration.

It is not your responsibility to decide matters of legal malpractice or ethical conduct. Nevertheless, information about the attorney's conduct may be offered at the hearing and may be considered in determining the reasonableness of the fee.

Be attentive and courteous to the parties. Although the hearing is intended to be informal, it is not to be taken lightly. Arbitrators should avoid any conduct that would make them appear predisposed to one party or the other, including excessive familiarity with the attorney. The chair is responsible for assuring appropriate decorum in the proceeding.

Remember that the client and the lay arbitrator may not be familiar with legal terms and jargon. Use language that all parties can understand and explain any special terms.

Allow the parties, particularly clients, an adequate opportunity to present whatever evidence they feel is necessary for the panel's understanding of their position. Arbitration hearings are intended to be informal and relatively brief. However, clients are generally not trained in presenting evidence and examining witnesses and may find it difficult to conduct a direct and precise case.

If either party is represented by counsel, remind counsel that the proceeding is informal and examination of witnesses need not follow the format of a trial.

Do not discuss the case with anyone other than the other panel members or State Bar staff.

GUIDELINES FOR THE DECISION

Was there a written fee agreement or an express fee contract? If yes, determine the terms and whether services were provided according to the terms. If not in writing, the terms may have to be determined from the testimony of the parties or from extrinsic evidence. Please note Rule 1.5 of the Montana Rules of Professional Conduct.

If the contract was implied or lacked critical terms, the obligation of the board is to determine what services were reasonably contemplated by the parties and what a reasonable fee is for those services.

Determine the extent to which agreed or contemplated services were performed and the reasonable value of those services under all the circumstances.

In an hourly fee case, the amount of time spent by the attorney is a major factor in determining a reasonable fee. Learning the law governing the matter or time spent giving emotional support to the client, or any other “non-legal” services were rendered and charged for by the attorney, did the client understand they would be charged for the service? If not, is it appropriate under the circumstances for the attorney to charge for the services?

A contingent fee agreement in a personal injury case that is not in writing is voidable by the client. The attorney is nevertheless entitled to a reasonable fee for services performed. The board shall consider customary practice in the community in determining a reasonable fee. Similarly, an attorney in a contingency fee case who is discharged prior to conclusion of the matter is entitled to a reasonable fee for services, if the client recovers on the claim and the attorney was not discharged for misconduct. A reasonable fee in such circumstances is not necessarily calculated on the attorney’s usual hourly rate; it should not exceed the amount of the agreed contingent fee.

Costs and expenses are normally the responsibility of the client in addition to fees for legal services. The board should determine whether the award will include costs and expenses for which the client is responsible and state those terms separately.

FACTORS RELEVANT TO THE REASONABLENESS OF A FEE

These factors are not exhaustive, and no single factor is controlling:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- The likelihood, if apparent to the client, that acceptance of the case will preclude the attorney from other employment;
- The fee customarily charged in that locality for similar legal services;
- The amount involved and the results obtained;
- The time limitations imposed by the client or by the circumstances;
- The nature and length of the professional relationship with the client;
- The experience, reputation and ability of the attorney performing the services;
- Whether the fee is fixed or contingent.

FORM OF DECISION/AWARD

The Decision, also referred to as an “award” is decided by a majority vote of the board. The decision must be in writing and signed by all the arbitrators who concur in the award. Minority or dissenting opinions are not allowed. The decision shall state the amount

awarded and to whom, any terms of payment imposed by the board or agreed by the parties, and an “explanation of the reasons” for the award.

The Decision should be issued as soon as possible after the hearing is concluded, but in no case shall it be submitted later than twenty (20) days after the hearing is concluded, unless circumstances prevent the chair from providing a written decision signed by at least two of the arbitrators. In that event, the chair should inform the State Bar of the circumstances and a date when the decision can be expected.

The written decision, signed by at least two of the three arbitrators is forwarded to the State Bar, who then forwards the original to the Petitioner and a copy to the Respondent.

Non-Binding vs. Binding Arbitration

If both parties agreed to “binding” arbitration when signing the Arbitration Agreement, the decision of the arbitrators is final.

If either party to the arbitration requested “non-binding” arbitration, the losing party has thirty days to file an action in a court of law or the decision becomes binding.