

PREPARING FOR FEE ARBITRATION

A Guide for Clients

Introduction

❖ *What is Fee Arbitration?*

The Fee Arbitration program is designed as an informal method to resolve fee disputes between Montana lawyers and their clients. It is governed by the Montana Supreme Court's Rules on Arbitration of Fee Disputes. Arbitration is voluntary and not binding unless both the client and attorney agree to binding arbitration at the outset.

Arbitration should not be used to delay payment of fees for which the client has no genuine dispute.

Arbitrators have no authority to award damages, or to reduce a fee to compensate for alleged malpractice or negligence on the part of an attorney.

Appointment of Arbitrators

❖ *Who are the arbitrators?*

The Arbitrators are attorneys and other professional people solicited by the State Bar, through its Board of Trustees and staff. Each dispute is reviewed by three arbitrators. There is always one attorney and one non-attorney on the panel. The third person depends on the luck of the draw, based on the numbering sequence set out in the Rules.

❖ *What if I have concerns about an arbitrator's fairness?*

You may challenge three arbitrators without stating a reason. Additional challenges must be supported by a specific reason. Challenges are generally denied if the only reason given is along the lines of "all the lawyers in this area stick together." If you believe a prospective arbitrator cannot be fair in your case, you must give a specific explanation of your reason.

If three arbitrators cannot be found in the judicial district where the lawyer practices, the State Bar staff may choose a proposed panel from another district. In that case, any hearing will be held in the district where the arbitrators reside.

❖ *Who is in charge of the arbitration?*

The State Bar will appoint a panel "Chair". The panel chair is responsible for scheduling (with assistance from the State Bar) and conducting any hearing, and for ruling on any issues involving the presentation of evidence.

Scheduling the Hearing

❖ *When and where is the hearing held?*

The State Bar will set the date and location for the hearing. You may be asked about your availability. Please respond to any requests from the panel chair promptly. The hearing is to be held within 90 days after the arbitrators are appointed, whenever possible. However, due to the unavailability of arbitrators at certain times, it may take longer to schedule a hearing. If you intend to be represented by a lawyer at the hearing, be sure to let the panel chair know so that your lawyer's schedule can be taken into consideration.

Hearings are usually held in the office of the panel chair, but other locations, such as the local courthouse, may be used.

❖ *Do I have to appear in person?*

With the consent of the State Bar and for good cause shown, you may participate in the hearing by telephone, although this is not recommended. In the alternative, you may also submit the dispute on written statements and supporting documents, without a personal appearance.

Preparing for the Hearing

❖ *Do I need to know any special rules?*

Arbitration hearings are intended to be informal. You will not be expected to know technical rules of evidence or procedure, and the arbitrators may consider any information they believe is helpful in resolving the dispute.

❖ *How do I prepare for the hearing?*

Send copies of documents you want the arbitrators to consider to the State Bar Office, preferably with your Fee Arbitration Petition. You will need to make four (4) copies of all documents you want reviewed, one for each arbitrator and one for the opposing party. If not included with your Petition, you should make sure that all documents you want considered are sent to the arbitrators and opposing party no less than ten (10) days before the date of the hearing.

At the very least, you should provide copies of any written fee agreement with the lawyer or any correspondence confirming the agreement, and copies of billing statements received from the lawyer that contain the disputed amounts.

❖ *What should I say at the hearing?*

Prepare your arguments in advance. You may find it helpful to make notes or prepare a written outline of your position. While the proceedings are informal, you will be expected to state your position as clearly and concisely as possible. If there are documents to support your position, have them in order and marked in some way to help you identify which documents relate to which point you are making.

❖ *Can the arbitrators help me?*

The arbitrators cannot help you decide what evidence to present or how to do it. If you are unsure about what you need to say or how to present your case, you may wish to consult with an attorney of your choice.

At the Hearing

❖ *What is the procedure for making my case?*

The panel chair presides over the hearing and decides any questions about procedure or evidence. If you are the petitioner, you will present your position first. You may do that using documents, questioning witnesses, or just by explaining your objections to the lawyer's fees. After you have presented your case, the lawyer has an opportunity to respond.

Each party may cross-examine the other party's witnesses. You may call the lawyer as a witness in the presentation of your case; the lawyer may question you in the presentation of his or her response. The testimony of witnesses will be given under oath.

The arbitrators may also ask questions of you or the lawyer. They do this to clarify the facts and to make sure that they have all the information they need to make a fair decision.

You should present your position clearly and concisely. Avoid arguing about matters that don't affect the fees charged. Remember that except in a contingent fee case, your obligation for fees is not dependent on the outcome of the case.

❖ *Can I have a lawyer at the hearing?*

You may wish to be represented at the hearing by a lawyer. If so, you do so at your own expense. That is, the legal fees for being represented in arbitration cannot be awarded to you even if you prevail in the arbitration.

❖ *Can I be represented by someone else at the hearing?*

A friend or relative may accompany you at the hearing. Except in the most unusual cases, that person cannot present your case for you, but may help you in the organization and presentation of your position. The panel chair will

determine the extent to which another person may participate in your case.

❖ *Are accommodations available if I have a disability?*

If you have a disability for which you would like accommodation at the hearing, contact the panel chair or the State Bar Office.

❖ *What if I don't show up for the hearing*

If you fail to appear for a scheduled hearing, the arbitrators may decide the case based on the available evidence.

The Arbitration Award

❖ *What are the arbitrators deciding?*

The purpose of arbitration is to determine whether the fees charged were reasonable under the circumstances. This generally begins with a determination of the existence and nature of the fee agreement between the parties. If there was no written fee agreement, the arbitrators will look at other evidence to determine if there was an oral agreement and, if so, its terms.

When the terms of a fee agreement are determined, the arbitrators then look at whether the services provided by the lawyer were reasonable and necessary. What is reasonable and necessary will be different in each case depending on such things as the complexity of the matter, the degree to which it is contested, the skill and expertise of the lawyer, time constraints imposed by the client or others, and any special circumstances that existed. For additional specific information, see Rule 8.1 of the Rules on Arbitration of Fee Disputes.

❖ *What if my lawyer and I didn't have an agreement about fees?*

In the absence of an express agreement for fees, a lawyer is generally entitled to be paid for the reasonable value of services performed. In order to establish the reasonable value of the services, the arbitrators will consider, in addition to the factors mentioned above, fees charged by other lawyers of similar experience in the community for similar services.

In addition to determining the reasonableness of the legal fees, the arbitrators may also determine the reasonableness of any costs charged by the lawyer. The arbitrators can also decide whether you should pay interest on outstanding amounts.

❖ *What if I think my lawyer committed malpractice?*

Arbitrators cannot award damages or reduce the fees owed to compensate you for a loss caused by alleged malpractice. However, the arbitrators may consider evidence of the quality of the representation in determining whether the fees charged were reasonable.

❖ *What will the arbitrators decide?*

Depending upon the circumstances, the arbitrators may decide that you owe additional fees, that no additional fees are owed, or that you are entitled to a refund from the lawyer of fees already paid.

The party in whose favor the award is rendered is the “prevailing party.” If you petitioned successfully for a reduction in fees owed or for a refund of fees previously paid, you will be the prevailing party. You may also be the prevailing party if the lawyer petitioned for a determination of fees owed, but is required to refund some or all of what has been paid.

❖ *How will I know what the arbitrators decide?*

The decision of the arbitrators is made by majority vote and is to be put in writing and delivered to the parties. The written award is submitted to the State Bar Office, where it is reviewed to

ensure conformity with the requirements for written awards. The State Bar Office will send the original award to the prevailing party; a certified copy will be sent to the other party.

Filing the Award in Court

❖ *How can I enforce my award?*

If the arbitration award is or becomes binding on the parties, the prevailing party to whom money is owed under the arbitration award may file the award with the appropriate court (generally in the county where the party lives or works). There may be a filing fee for filing an arbitration award. A copy of the papers filed with the court must also be served on or delivered to the other party and the court must receive proof of such service or delivery.

The State Bar cannot help you with filing your award with the court. If you have questions that the court staff cannot answer, you should consult an attorney for assistance. An available free resource can be found on the web, at:

www.montanalawhelp.org, under “Consumer Law”. Other resources are available through your local court system’s small claims court.