

Fee Arbitration Hearing: What To Expect Before, During and After

*(adapted from the California State Bar
"Preparing for the Fee Arbitration Hearing")*

I. Introduction

A request has been made to arbitrate a fee dispute between you and your attorney. This information is to help you prepare for the arbitration hearing by answering some commonly asked questions about the process.

What will be decided in the fee arbitration?

The issues to be decided in the fee arbitration are limited. The arbitrator will decide the amount of fees and costs, if any, you owe the lawyer, or, whether you should receive a refund from the lawyer.

Who can answer my questions?

Questions should be directed to the San Diego Country Bar Association – Fee Arbitration Program at (619) 231-0781 or via e-mail at arbitration@sdcba.org. Unless the matter is urgent, the arbitrator assigned to hear your dispute should not be called. (See below on how to communicate with the arbitrators.)

Are we allowed to settle the fee dispute before the arbitration hearing?

Yes. Parties are encouraged to discuss the dispute prior to arbitration and to try to settle it informally. Fee disputes sometimes occur because the lawyer and client have stopped communicating with each other. Sometimes, discussing the dispute may lead to early settlement.

\$75.00 of the initial filing fee shall be non-refundable. To qualify for any refund, written notice of settlement and/or dismissal must be mailed to the SDCBA Fee Arbitration Committee as follows: If notice that the matter is settled or dismissed is received after filing, but before assignment to an arbitrator or a panel or a mediator, the Association shall retain 25% of the filing fee above the nonrefundable \$75.00. If notice that the matter is settled and/or dismissed is received after assignment to an arbitrator (or panel) or mediator, but no hearing has been scheduled, the Association shall retain 50% of the filing fee above the non-refundable \$75.00. If a hearing has been scheduled and written notice of the settlement and/or dismissal is received by the Association at least five (5) days prior to the scheduled hearing, the Association shall retain 75% of the filing fee above the non-refundable \$75.00. No refunds shall be made if

written notice of the settlement and/or dismissal is received less than five (5) days prior to the scheduled hearing.

Any refund shall be made to the party who paid the filing fee.

What does the arbitrator use as a basis for making a decision?

The arbitrator makes a decision based on any documents and testimony presented. One of the first items the arbitrator will look at is whether there is a written fee agreement. (See question below to learn if your case required a written fee agreement.) If there is a written agreement, the parties should submit a copy of the agreement to the arbitrator. In most instances, lawyers are required to use written fee agreements. If they do not, however, they are still entitled to a reasonable fee. The arbitrator will also consider the testimony of the parties, the billing statements, and other relevant evidence presented.

The arbitrator may consider , among other things, how difficult the case was and the skill needed by the lawyer to handle it; whether the lawyer was prevented from taking other cases because he or she was hired by you; how much the case was worth and what the final results were; any circumstances or time limitations that may have required that the lawyer spend additional hours; the lawyer's experience and ability; the time the lawyer spent on the case; and, whether you understood and agreed to the fee arrangement.

II. Fee Agreements

What does the arbitrator look at if there is a written fee agreement?

If there is a written fee agreement, the arbitrator may consider whether the agreement is valid and whether the terms of the agreement (for example, the hourly fee) should be upheld. You should review the fee agreement before the hearing to determine if it answers your questions about the lawyer's charges. If the arbitrator determines the agreement to be valid and that you understood the agreement, the arbitrator will generally use the terms of the agreement as a basis for making the decision. The arbitrator also looks at the lawyer's "performance" in deciding the amount of the fee. For example, did the lawyer spend too much time on a specific task, or did the lawyer make mistakes that required extra time to fix? You should review the lawyer's bills and performance and decide whether, based on these factors, you believe the fee is too high. You should be prepared to point out specific items that support your belief.

What if a written fee agreement was required by law, but you were not provided with a written fee agreement?

If your case was not a contingency case AND it was reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing. If the lawyer did not use a written fee agreement, but was required to by law, the arbitrator will consider the terms of any oral agreement and whether they were reasonable. For example, if you orally agreed to pay the lawyer \$300 per hour, but the arbitrator believes that \$300 is not reasonable, the arbitrator may assess a reduced hourly fee. Or, if you orally agreed to a minimum fee per telephone call, even if the actual time spent on the call was less, and the arbitrator believes this is a reasonable practice, those charges will be enforced.

What if the fee agreement was oral and a written agreement was not required?

If the fee agreement was oral, and a written fee agreement was not required, the arbitrator will decide what you and the attorney intended as the terms of your agreement. For example, the arbitrator will determine the agreed upon hourly rate and any other fees or costs. You should be prepared to present any evidence that supports your claim, whether that evidence is in the form of written documents or a witness who was present when you discussed the fee with your attorney.

What if the fee agreement does not comply with the law?

If the fee agreement fails to comply with the law, you may "void" or reject it, but the lawyer may still be entitled to receive a reasonable fee. So, as discussed below, you must still be prepared to present a case to the arbitrator with the specific reasons why you believe the fee charged is not reasonable. You may present evidence of what a reasonable fee should be.

III. Preparing for The Hearing

What is the role of the arbitrator?

The arbitrator is a neutral decision maker, who considers the evidence presented by all parties and makes a decision on the lawyer's fees. The arbitrator cannot represent either the lawyer or the client in the dispute. Nor does the arbitrator typically independently investigate or gather evidence to support either side's position. The arbitrator must make the decision based on the evidence given by the parties.

What does the arbitrator expect from the parties?

The arbitrator will expect the parties to be fully prepared to explain and support their positions on the value of the lawyer's services and to have all documents and witnesses organized and ready at the hearing. The arbitrator will not expect you to act like a lawyer, but he or she will

expect your case to be presented in an organized and efficient manner. Any documents not submitted with your initial Arbitration Application and Statement of Facts must be submitted no later than fourteen (14) calendar days before the hearing to guarantee they are considered at the hearing. If you bring new documents to the hearing that were not submitted more than 14 days in advance, it is within the arbitrator's discretion whether to allow the materials into evidence.

May I communicate with the arbitrator?

You should not communicate with the arbitrator before or after the hearing, except on procedural issues such as scheduling the hearing and issuing subpoenas. Never discuss the merits of your case with the arbitrator outside of the hearing. You will be given a chance to explain your side of the story at the hearing while the lawyer is present so that the lawyer may respond to each issue you raise.

If you have to communicate in writing with the arbitrator, *you must send copies of all letters and any attachments to the attorney whose fees you are disputing.*

What documents should I submit and how should I organize them?

You may want to consider submitting the lawyer's billing statements, evidence of your payments to the lawyer (for example, copies of cancelled checks), the written fee agreement (if there was one), and any other letters or documents that support your claim. You should have your documents organized in the order in which you plan to present them. Putting them in order by date is one common way to do this. If you bring new documents that were not submitted at least fourteen (14) calendar days before the hearing, you must bring copies for the arbitrator(s) and attorney. Note that the arbitrator has discretion whether to allow those new documents into evidence.

What if I have witnesses?

First, you should decide whether the witnesses have important information related directly to your fee dispute with the lawyer. For example, if the witness was with you when you and the lawyer made or changed your agreement, then the witness may have important information relevant to your fee dispute, and you might want to have that person available to testify at the hearing. You should tell the arbitrator and the attorney whose fees you are disputing that you expect to call witnesses and arrange your presentation so that the witnesses can be easily included.

If you have an important witness who does not want to come to the hearing, you may be able to order that person to attend with a subpoena. You should contact the San Diego Country Bar Association – Fee Arbitration Program at (619) 231-0781 or via e-mail

at arbitration@sdcba.org to find out how this is done. You should also contact the program if you have any problems scheduling a witness. While it is always better to bring witnesses to the hearing, you may present their testimony and evidence in writing instead. It is up to the arbitrator to decide how much weight to give a witness's testimony.

How do I organize my presentation?

You should think carefully about why you believe the lawyer's fees are too high and focus your presentation on specific reasons for this belief. For example, if you think the lawyer charged more for telephone calls than the fee agreement allowed, you should be prepared to refer to the clause in the agreement that was violated. If you believe the lawyer did not effectively provide services, you should refer to specific examples that show how the lawyer failed to do what was promised. You may want to put your arguments and reasons in organized notes to yourself to be sure that you do not leave out any important points at the hearing.

IV. The Arbitration Hearing

Who can come with me to the hearing?

Upon request of the client, the arbitrator will determine whether an additional person(s) will be permitted to attend. These people are subject to the confidentiality of the arbitration proceeding.

How formal is the hearing?

The arbitration hearing is typically informal, although evidence is usually taken under oath. The hearing will be closed to the public and will not be transcribed or recorded. Arbitration hearings may be held in a conference room in the arbitrator's office or at the bar association. Generally, only the arbitrator, you, the lawyer, and maybe witnesses will be in the room. You do not need to be represented by a lawyer. However; you may choose to have a lawyer represent you if you wish.

What happens at the hearing?

The arbitrator has the authority to decide how the arbitration hearing should proceed. You may be asked to present your case first. You will be allowed to discuss the fee agreement and the reasons why you dispute the lawyer's fees.

You may also introduce relevant documents, such as written fee agreements and copies of the lawyer's bills. Note that any documents submitted less than fourteen (14) calendar days before the hearing may not be allowed. The arbitrator has the discretion whether to admit evidence that was required to be exchanged before the hearing but was not exchanged.

Your presentation should be simple, factual, and directly related to the issue of lawyer's fees. Usually, this is also the time when you would present any witnesses to help prove your case. After you have fully presented your case, the lawyer will have a chance to ask you and your witness(es) questions.

The lawyer may also make his or her presentation and present any witnesses. You will have an opportunity to ask relevant questions to the lawyer and his/her witness after the lawyer has fully presented his or her case. To avoid interrupting the lawyer's presentation, you may want to take notes so that you can remember any points with which you disagree.

The arbitrator may ask questions at any time. Sometimes the arbitrator will ask questions while you (or the lawyer) are presenting your case if clarification is needed.

After all the evidence has been presented, you and the lawyer are permitted to summarize your case. Comments during your summary should focus on why the lawyer's fees may be reasonable or unreasonable under the circumstances of your case. They should address only the evidence presented.

At all times during the hearing, both sides should avoid making personal attacks, making references to anything outside the lawyer-client relationship, or discussing matters based only on speculation or assumption.

V. The Arbitration Award

What is the award?

The award is the decision of the arbitrator will indicate if it is binding or non-binding, will include a determination of all questions submitted to the arbitrator, and will specify whether you owe money to the lawyer, whether the lawyer owes money to you or whether neither of you owes any money. In the final calculation, the arbitrator can include whether the filing fees should be allocated between the parties.

When will I receive the award?

You should expect to receive an award in the mail about 30 days after the hearing.

What can I do after I receive the award?

When you receive the arbitration award, you will also receive information about your options after arbitration. This is called the **Notice of Your Rights After Arbitration**. The Notice should

answer most questions you have regarding your rights. Pay close attention to the deadlines in the Notice.

Can I contact the arbitrator after the hearing?

Unless you have been directed to do so by the arbitrator, **you should not contact or send any correspondence to the arbitrator after the hearing has concluded.** You may contact the San Diego County Bar Association – Fee Arbitration Program at at (619) 231-0781 or via e-mail at arbitration@sdcba.org with any further questions.