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# A STRATEGIC APPROACH TO FEE ARBITRATION IN CALIFORNIA

By Gideon Grunfeld



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You may not be able to avoid a fee dispute with a client. But too often attorneys take a seat-of-the-pants approach with respect to fee disputes. They decide what to do after the fee dispute has arisen. In so doing, attorneys needlessly reduce their chances of prevailing in the fee dispute, and increase the chances that they will run afoul of one of the numerous deadlines and rules that govern fee disputes in California. As with other aspects of your practice, taking a strategic approach to fee disputes will help you keep more of your money and keep you out of trouble with the courts and the ethics police. This article will help show you how.

The primary fee arbitration statute is set forth in sections 6200-6206 of the Business and Professions Code. This statute, which is often referred to as the Mandatory Fee Arbitration Act (“MFAA” or “Act”) was enacted in the mid-1970s at the urging of the Board of Governors of the California State Bar. The purpose of the statute was to address what was perceived to be a prime source of conflict between attorneys and clients. The MFAA is a consumer protection statute that is designed to provide procedural protections to clients. The MFAA’s procedural rules, which were last amended in August 2006, are promulgated by the State Bar of California. <http://calbar.ca.gov/calbar/pdfs/MFA/feearbrules.pdf>. Disputes under the MFAA are administered through local bar associations. The State Bar’s website identifies the local bar associations that have approved fee arbitration programs. See [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10166&id=2035](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10166&id=2035). Because these programs have different jurisdictional requirements, and charge different filing fees, you should determine which local fee arbitration programs are most likely to apply to you.

The MFAA’s scope is narrow. By its terms, it applies only to “disputes concerning fees, costs, or both, charged for professional services by members of the State Bar or by members of the bar of other jurisdictions.” Section 6200(a) (unless otherwise noted, all statutory references are to the California Business and Professions Code). The MFAA does not apply to “[c]laims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.” Section 6200(b)(2).

The MFAA provides both for the mediation and the arbitration of fee disputes. It defines mediation as “a voluntary consensual process, based on direct negotiations between the attorney and his or her client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration or other proceedings.” Section 6200(h). Mediation is voluntary for both the attorney and the client. See Section 6200(c).

The MFAA’s provisions regarding the arbitration of fee disputes need to be read in conjunction with the provisions of the California Arbitration Act (“CAA”) (Code Civ. Proc., § 1280 *et seq.*). The California Arbitration Act applies to a wide array of issues that the parties agree to resolve by arbitration. This includes provisions asserting that fee disputes be arbitrated. By contrast, the MFAA only applies to fee disputes, and its provisions can apply independently of an agreement between the attorney and client.

The MFAA can therefore trump certain provisions that the client and attorney agreed to in the fee agreement. For example, arbitration under the MFAA is voluntary for the client, but is mandatory for the attorney if the client

decides to arbitrate the fee dispute. Thus, even in the absence of a provision in the fee agreement, a client can force the attorney to participate in the MFAA's arbitration process. *See* section 6200(c). In addition, under the MFAA, an arbitrator cannot award attorney's fees to the prevailing party in the arbitration even if the fee agreement provides for an arbitration clause and the payment of fees and costs to the prevailing party. *See* Section 6203(a) ("The [arbitration] award shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding, notwithstanding any contract between the parties providing for such an award or costs or attorney's fees.") *See also* Section 6203(c) ("Neither party to the arbitration may recover costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding with the exception of the filing fee paid.").

Moreover, unlike arbitration governed by the California Arbitration Act, under the Mandatory Fee Arbitration Act, the attorney and the client have the right to seek a *de novo* trial following the arbitration decision—even if the fee agreement provided for arbitration of fee disputes. *See Alternative Systems, Inc. v. Carey* (1998) 67 Cal. App. 4th 1034 (holding that the Mandatory Fee Arbitration Act supersedes a retainer agreement's binding arbitration clause when the client opts for the MFAA procedure); *see also Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2007) 53 Cal. Rptr. 3d 173; \_\_\_ Cal. App. 4th \_\_\_ (holding that that the decision in *Alternative Systems* remains good law).

The MFAA also contains important notice and waiver provisions for both the attorney and client. After a fee dispute arises, the attorney should send a notice informing the client of their rights under the MFAA. The form of the notice to be sent to clients was amended effective April 1, 2007. You can obtain it from the State Bar website and from many local bar associations. *See* [http://calbar.ca.gov/calbar/pdfs/MFA/MFA\\_notice\\_client\\_right.pdf](http://calbar.ca.gov/calbar/pdfs/MFA/MFA_notice_client_right.pdf). The notice must inform clients that they have 30 days to initiate a request to start arbitration under the MFAA. "The client's failure to request arbitration within 30 days after receipt of notice from the attorney shall be deemed a waiver of the client's right to arbitration" under the MFAA. Section 6201(c); *see also Ervin, Cohen & Jessup, LLP v. Kassel* (2007), 2007 WL 466282 (Cal. App. 2 Dist. 2007), \_\_\_ Cal. App. 4th \_\_\_

(holding that the binding arbitration agreement in the fee agreement be enforced because the client waived its right to the protections of the MFAA by not seeking MFAA arbitration within 30 days).

The MFAA also identifies additional ways in which clients can waive the protections of the statute. Most notably, clients waive their rights by filing a malpractice action or other action seeking affirmative relief against the attorney. *See* Section 6200(d) ("A client's right to request or maintain arbitration under the provisions of this article is waived by the client commencing an action or filing any pleading seeking either of the following: (1) Judicial resolution of a fee dispute to which this article applies. (2) Affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.") *See also Aguilar v. Lerner*, (2004) 32 Cal. 4th 974, 979 (holding that client waived rights under the MFAA by filing a malpractice suit against the attorney).

**EVEN IN THE ABSENCE OF A PROVISION  
IN THE FEE AGREEMENT, A CLIENT CAN  
FORCE THE ATTORNEY TO PARTICIPATE  
IN THE MANDATORY FEE ARBITRATION  
ACT'S ARBITRATION PROCESS.**

A timely notice also preserves the attorney's ability to maintain a suit seeking recovery of unpaid fees. *See* Section 6201(a) ("Failure to give this notice shall be a ground for the dismissal of the action or other proceeding."). Courts have ruled, however, that they have discretion not to dismiss the lawyer's action, and that such dismissal is not mandatory even if the attorney fails to provide the required notice. *See, e.g., Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal. App. 4th 1076 (holding that the dismissal of attorney's suit seeking enforcement of promissory note for unpaid fees was not mandatory where the attorney failed to provide

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notice, and client waited until the eve of trial to assert its intent to arbitrate the dispute under the MFAA).

If the attorney provides notice to the client and then files an action seeking to recover unpaid fees, the client must seek MFAA arbitration before it files an answer to the lawyer's complaint. If the client seeks arbitration under the MFAA, the lawyer's lawsuit for fees will be stayed. *See* Section 6201(c). But if the client files an answer to the action seeking payment of unpaid fees, that is deemed to waive the client's rights to the arbitration proceedings under the MFAA. *See* section 6201(b) ("[F]ailure to so request arbitration prior to the filing of an answer or equivalent response shall be deemed a waiver of the client's right to arbitration under the provisions of this article if notice of the client's right to arbitration was given [to the client].").

The MFAA also imposes deadlines relating to the commencement of the *de novo* trial following the arbitration. Following receipt of the arbitrator's decision, the parties have 30 days to initiate the *de novo* trial. And even if the parties agree to make the arbitration non-binding, the arbitration nonetheless becomes binding if neither party seeks a *de novo* trial within 30 days of the receipt of the arbitration decision. *See Maynard v. Brandon* (2005) 36 Cal. 4th 364 (rejecting law firm's argument that inadvertent error was sufficient to cure its failure to request a trial within 30 days of an MFAA arbitration).

In contrast to arbitration under the MFAA, attorney's fees may be available to the prevailing party for costs and fees associated with the *de novo* trial. *See* Section 6204(d) ("The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorneys' fees and costs incurred in the trial after arbitration, which allowance shall be fixed by the court.").

If your fee dispute is arbitrated or tried pursuant to the MFAA, and a final judgment is entered requiring you to return fees, it is crucial that you comply with that order. Not only can the client seek to enforce this judgment, so can the State Bar. Specifically, the State Bar may enforce the judgment by fining you and placing you on inactive status until you have paid the judgment. *See* Section 6203(d). Given that being on inactive status would essentially prohibit you from practicing law on behalf of any client, the penalty for failing to comply with a judgment rendered pursuant to the MFAA is severe.

**Fee Arbitration Checklist**

In light of the intricate interplay between the requirements of the MFAA, the provisions of the California Arbitration Act, actions by lawyers to recover fees, and actions by clients alleging malpractice, the following checklist may help you maneuver these complicated waters more smoothly.

- Decide how you would prefer to resolve fee disputes with clients (mediation, binding and non-binding arbitration, or litigation).
- If you are inclined to arbitrate fee disputes, identify which local bar association's fee arbitration programs (and related fees) are likely to govern any relevant dispute, and include a fee arbitration provision in your fee agreement.
- After a fee dispute arises with a client, provide the client with the notice required by the State Bar. Monitor and document whether the client requests an MFAA arbitration within 30 days.
- If you decide to file a suit seeking recovery of your unpaid fees, monitor and document whether the client files an answer to your complaint before seeking MFAA arbitration.
- If you do participate in an MFAA arbitration, make clear in your written submissions that you are not waiving your rights under the lawsuit you filed to recover fees.
- Once you receive a decision from the MFAA arbitrator, decide within 30 days whether you want to seek a trial *de novo*. Monitor whether the client seeks such a trial.
- During a *de novo* trial (or subsequent appeal), keep track of your costs and fees because they may be recoverable if you are deemed to be the prevailing party.
- If a final judgment is rendered against you in the MFAA proceeding, comply with the judgment promptly. This will avoid having the State Bar impose fines and place you on inactive status.

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