

VIRGINIA STATE BAR
FEE DISPUTE RESOLUTION PROGRAM



PROGRAM RULES

and

**GUIDELINES FOR PARTICIPANTS,
ARBITRATORS and MEDIATORS**

Program Rules

1. Virginia Code – Applicable Law

- a. Mediation. The Mediation Statutes, Virginia Code sections 8.01-581.21 through -581.26, govern mediations conducted through the Fee Dispute Resolution Program.
- b. Arbitration. The Uniform Arbitration Act, Virginia Code sections 8.01-581.01 through -581.16, governs fee arbitration proceedings.

2. Informal Nature of Proceedings

Consistent with the goal of encouraging clients to utilize the Fee Dispute Resolution Program, mediation sessions and arbitration hearings are informal in nature. They are conducted without strict observance of either the Rules of Civil Procedure or the Rules of Evidence.

3. Jurisdiction – The Power to Decide

- a. Circuit Committees for the Resolution of Fee Disputes (“CCRFDs”) are empowered to resolve disputes over fees or costs paid, charged or claimed for legal services rendered by a member of the Virginia State Bar when the parties to the dispute agree to mediate or arbitrate, either by written contract or request for arbitration signed by all parties, unless (i) a court or another CCRFD has already taken jurisdiction to determine and award a reasonable fee; (ii) the case involves fees charged or other conduct in violation of the Virginia Rules of Professional Conduct; or (iii) the dispute is overly complex or exhibits protracted hearing characteristics.
- b. When, in the course of processing a fee dispute complaint, conduct that may violate the Virginia Rules of Professional Conduct is discovered, a lawyer-arbitrator, the CCRFD chair or a lawyer-mediator shall be required to follow the reporting requirements of Rule of Professional Conduct 8.3. Under RPC 8.3, lawyer-arbitrators must report unethical conduct, but lawyer-mediators may not do so without the parties’ written waiver of confidentiality unless the conduct occurs during the mediation proceeding. See Virginia Code section 8.01-581.22. Non-lawyers have no reporting requirements. If a report of the alleged misconduct is made in accordance with said Rule, the dispute resolution proceedings may, in the discretion of the CCRFD chair, be stayed during the pendency of any deliberation of the issue by the appropriate disciplinary authority. If the disciplinary authority determines that there has been no violation of the Rules of Professional Conduct, then the matter shall be referred back to the CCRFD.

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4. Venue – The Place to Decide

Venue lies in the circuit where the attorney maintains a principal office, where the attorney performed a substantial amount of the legal services or where the parties otherwise agree. If the parties cannot agree on venue, then there is no mutual assent to mediation or to an arbitration proceeding, and the file is closed.

5. Case Administration

- a. CCRFD Committee Chair. The CCRFD chair administers the fee dispute resolution process. This includes initiating and supervising case filing, advising the parties of the availability of mediation and arbitration services, identifying potential mediators, assembling arbitration panels, assigning cases to panels, arranging times and places for hearings and ensuring compliance by the panels with the time constraints imposed by the program rules. To prepare for arbitration, the CCRFD chair may require certain pre-hearing disclosures from the parties, pre-hearing production of documents and witness lists. The CCRFD chair also responds to party requests submitted before a panel or sole arbitrator is appointed or after an arbitration award is issued.
- b. Mediator or Co-Mediators. The mediator or co-mediators are responsible for contacting the parties, scheduling and conducting mediation sessions.
- c. Panel Chair or Sole Arbitrator. The panel chair or sole arbitrator is responsible for issuing hearing subpoenas, authorizing depositions if necessary to perpetuate testimony, ruling on motions for continuances, and considering and disposing generally of any other motion, application or request that may arise after his appointment. Any reference herein to the panel chair or to the arbitration panel shall be deemed to constitute a reference to the sole arbitrator as the context requires.

6. Commencement of the Fee Dispute Resolution Process

- a. Generally. Upon inquiry from either an attorney or a client (who becomes the “Petitioner”), the CCRFD chair provides that party with the Fee Dispute Resolution Program Rules and Guidelines for Participants, Mediators and Arbitrators, and the Agreement To Participate form. When the Petitioner returns the completed Agreement To Participate form and the \$20.00 administrative fee the CCRFD chair contacts the other party (the “Respondent”) and provides the same documents to the Respondent. Upon receipt of the completed Agreement To Participate form from the Respondent, the CCRFD chair will identify potential mediators if the parties have agreed to mediate. If they have not agreed to mediate, but have agreed to arbitrate, then the CCRFD chair may proceed to

appoint the arbitrator or arbitrators and schedule an arbitration hearing. When the Respondent has agreed to participate in the Program and has returned the completed Agreement to Participate form, a copy of the form shall be provided to the Petitioner by the CCRFD Chair.

- b. Conciliation. If, prior to the receipt of an Agreement To Participate form signed by both parties, the CCRFD chair determines that conciliation of the dispute is possible or if the parties jointly request such assistance, the CCRFD chair may conciliate the dispute. If such conciliation results in an agreement, the file is closed. If the conciliation does not result in an agreement, the CCRFD chair may continue the resolution process by assisting the parties in setting up a mediation session or an arbitration hearing.
- c. Effect of Formal Commencement of Process. As soon as the CCRFD chair receives the administrative fee and the Agreement To Participate forms fully executed by both parties and indicating an agreement to arbitrate, the arbitration process is formally commenced. If one party attempts to withdraw from the program at this point, the Agreement To Arbitrate may be enforced in a court proceeding to compel arbitration. In mediation, however, because the process is voluntary throughout, the parties may terminate their mediation at any time until both parties sign the mediated agreement that memorializes their settlement.

7. Mediation

During the process of filing a case with the Fee Dispute Resolution Program, the CCRFD chair will inform the parties about the possibility of using mediation to resolve their dispute. Mediation is an informal dispute resolution process in which an impartial third person, the mediator, seeks to facilitate communication between the parties to a fee dispute and, without deciding the issues or imposing a solution on the parties, enable them to reach a mutually agreeable resolution to their dispute. Mediation is a confidential and voluntary process. If such mediation results in an agreement, the file is closed. If the mediation does not result in an agreement, the CCRFD chair may proceed to schedule the case for arbitration, if the parties agree.

8. Appointment of Mediators to Fee Dispute Resolution Program

- a. Each CCRFD chair shall determine the size of the mediation panel for his Circuit Committee for the Resolution of Fee Disputes.

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- b. The mediators selected to serve on the panel shall be certified pursuant to Guidelines for the Training and Certification of Court-Referred Mediators approved by the Judicial Council of Virginia and shall complete an orientation program established by the Fee Dispute Resolution Program.
- c. The CCRFD chairs shall seek to appoint qualified lawyer and non-lawyer mediators to the panel. Applicants who submit a form prescribed by the Committee will be considered for appointment to the panel on the basis of their certification, training, experience and references.
- d. The mediators on the panel shall not charge a fee for their services.
- e. No person shall serve as a mediator in any fee dispute in which that person (i) has a financial or personal interest in the outcome of the mediation or the subject matter of the dispute; (ii) has a bias regarding any of the parties or their attorneys; or (iii) is unable to serve due to time constraints. Certified mediators must abide by the Standards of Ethics and Professional Responsibility for Certified Mediators, and certified attorney-mediators must also abide by the Virginia Rules of Professional Conduct.

9. Commencement of the Mediation Process

- a. The parties shall be informed of the availability of mediation at the time a fee dispute is referred to the Fee Dispute Resolution Program of the Virginia State Bar. The Agreement To Participate form shall inform the parties of the availability of mediation as a dispute resolution option. Either party may initiate mediation. A party wanting to mediate a fee dispute, must sign the Agreement To Participate form. On that form, the amount of the fee in controversy and a concise explanation of the party's views may be provided. The Agreement To Participate form must be sent to the CCRFD chair in the locality where arbitration has already been requested or, when arbitration has not yet been requested, in a proper venue (as described in Rule 4) along with a \$20.00 administrative fee. If mediation is initiated after the administrative fee for arbitration has been paid, the administrative fee for mediation shall be waived.
- b. Upon receipt from the Petitioner of the completed Agreement To Participate form indicating a willingness to mediate, the CCRFD chair shall provide the Respondent with the Agreement To Participate form.

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- c. The matter shall proceed to mediation only if the CCRFD chair receives the endorsed Agreement To Participate form from the Respondent, also indicating a willingness to mediate, within 15 days. If the Respondent declines to participate either affirmatively or by failing to respond, the CCRFD chair will notify the Petitioner and close the file or refer the case back to arbitration as appropriate.

10. Steps in the Mediation Process

- a. Because mediation is a voluntary program, the CCRFD chair cannot refer the matter to mediation to resolve the dispute unless both the attorney and the client agree.
- b. If both the attorney and client agree to mediate, the CCRFD chair will send both parties a list of certified mediators on the Circuit Committee's panel. Complete profile forms on these mediators may be found on the website of the Supreme Court of Virginia, http://www.courts.state.va.us/drs/searchable_mediator_directory.html. The mediation will be conducted using a co-mediation model (a pair of mediators), with each party having the opportunity to assist in selecting a mediator. Each party must, within 5 days of being notified of the agreement to mediate, choose three mediators from the list and rank such party's first, second and third choices. The CCRFD chair will contact the identified mediators, beginning with the first choice of each party, to determine if each mediator is available and to ensure that there are no conflicts of interest with either of the parties. The CCRFD chair will appoint mediators in the event that all three choices of a party are unable to provide mediation services. The mediators will not be informed as to who selected them. In addition, if the parties prefer to work with a single mediator as opposed to co-mediators and can agree on a single mediator, they should so inform the CCRFD chair.
- c. The CCRFD chair will identify the two mediators to the parties within 15 days after receipt of the parties' mediator selections. The mediators will then schedule a mediation session for a date no later than 30 days after their appointment and at a time and place convenient for the parties.
- d. The mediators may choose to conduct a pre-mediation conference call with the parties. The mediators may also request each party to submit a short written statement of the dispute before the mediation.

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- e. The parties must attend all of the mediation sessions. Telephone and shuttle mediations, when both parties cannot physically be present for the mediation, may be arranged by agreement of the parties or in the discretion of the mediators. Except for good cause shown, the mediators shall terminate the mediation if either party does not attend a mediation session.
- f. The right to counsel, as set forth in Fee Dispute Resolution Program Rule 23, applies at all stages of the mediation process, including but not limited to the right to have a lawyer review any agreement reached before it is signed.
- g. At the initial mediation session, both the attorney and client provide an explanation of the dispute from their perspectives. This gives both sides an opportunity to hear the other side's concerns and provides the mediators an overview of the dispute. This sharing of information shall be done in an informal and respectful manner.
- h. The mediators may, in their discretion, meet individually with each party to explore the facts and issues fully. This allows each party to air any further frustrations or concerns privately. Information shared in this caucus setting will be deemed to be confidential unless the party informs the mediators that they may share it with the other side.
- i. The mediators will try to understand what the underlying needs and interests of the parties are, help sort out what went wrong, clear up misunderstandings, encourage collaborative problem solving and find common ground.
- j. The mediators may go back and forth several times between the parties or may conduct the mediation entirely in a joint session. If an agreement is reached, the mediators will prepare a proposed draft of the mediated agreement. The final agreement is not confidential, unless the parties agree in writing that it should remain confidential.
- k. The outcome of the mediation will be reported by the mediators to the CCRFD chair on a form indicating only that the parties have or have not reached an agreement. If no agreement is reached, the parties may end their participation in the Program unless they have already agreed to arbitrate, which agreement remains binding.

11. Confidentiality of Mediation Process

All memoranda, work product and other materials contained in the case files of a mediator are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake and scheduling a mediation is confidential. A written mediation agreement is not confidential, unless the parties otherwise agree in writing. Exceptions to confidentiality are listed in Virginia Code section 8.01-581.22, including but not limited to a situation in which mediation communications are sought or offered to prove or disprove a claim or complaints of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation. The reporting requirements as described in Rule 3.b. of this Fee Dispute Resolution Program shall apply throughout the mediation process.

12. Effect of Mediated Agreement

Mediation agreements are enforceable as contracts under Virginia Code section 8.01-581.25.

13. Agreement To Arbitrate

Each party must provide a concise statement of his or her position in the matter, including the amount claimed or in controversy, in the Agreement To Arbitrate. Parties are discouraged from including with this initial submission any other documents since full disclosure will be required during the arbitration process.

14. Respondent's Refusal To Participate

If the Respondent declines to participate, the CCRFD chair notifies the Petitioner and closes the file. The CCRFD chair will normally close a file if the Respondent is silent for 15 days. This deadline may, however, be extended or modified by the CCRFD chair, and the file should not be closed without some effort by the CCRFD chair to contact the Respondent by telephone or in writing.

15. Discovery

Pre-hearing depositions shall be allowed only for the perpetuation of testimony. No other pre-hearing discovery is permitted, but documents and other tangible

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things upon which each party intends to rely either in his case-in-chief or in rebuttal must be produced to each panel member and to opposing parties (or to their attorneys if such have appeared) no later than 10 days before the hearing date. Requests to authorize depositions shall be made to the panel chair.

16. Selection of Arbitrators

- a. Single Arbitrator. If the amount in controversy is \$5,000 or less, the case is usually referred to a sole lawyer arbitrator, but the sole arbitrator may, by agreement of the parties, be a non-lawyer. Upon a request by either party, the CCRFD chair may appoint a three-arbitrator panel.
- b. Arbitration Panel. For matters in excess of \$5,000, the CCRFD chair shall assemble a three-person panel from among the members of the Circuit Committee and designate one person as panel chair for that particular proceeding. All three-arbitrator panels shall consist of at least one lawyer and at least one non-lawyer. Whenever possible, the CCRFD chair should select at least one arbitrator who has experience in the substantive area of the law involved in the arbitration if, in the sole discretion of the CCRFD chair, such experience would be particularly useful to the determination of the issues.
- c. Objections to Arbitrator Selection. Parties to the arbitration process shall be provided with the names of the arbitrators with the notice of hearing. Objections to individual panel members must be made within 10 days of notice but in no event later than 12 days before the hearing date. Removal of an arbitrator is within the sole discretion of the CCRFD chair for good cause shown. Once a hearing is convened, objections to an arbitrator are waived.

17. Scheduling

The panel chair must schedule the arbitration hearing for a date no later than 45 days after his appointment. The CCRFD chair has the duty and responsibility to coordinate with the parties and the arbitration panel members prior to noticing the hearing. A hearing may be scheduled on notice of at least 20 days. The panel chair, in his sole discretion, shall grant postponements only upon a showing of good cause. If a party refuses to cooperate in good faith in scheduling a hearing, the CCRFD chair or, if already appointed, the panel chair may, if the Respondent is uncooperative, set the hearing with the requisite notice and deny any motion for continuance or, if the Petitioner is uncooperative, dismiss the matter with prejudice as to arbitration.

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18. Notice of Hearing

Notice of hearing shall be served on each party (or on such party's attorney if one has appeared) personally or by regular USPS mail or email, as requested on the Agreement To Arbitrate form (or at an updated address submitted in writing by such party), but any party may waive the formalities of notice by acceptance via an appropriate written form.

19. Waiver of Evidentiary Hearing

An evidentiary hearing may be waived by consent of all parties. If the hearing is waived, the parties shall submit their contentions in writing, along with their exhibits, to each of the members of the arbitration panel. The panel chair then has 10 business days from receipt of all of the parties' submissions to convene or confer with the other panel members and to issue an award.

20. Absence of Party or Arbitrator

- a. Party. The fee arbitration hearing may proceed in the absence of a party who fails, after notice, to attend or to obtain a continuance or postponement from the panel chair. An award may not be entered by default. Record evidence is required to support the award regardless of the non-attendance of any party or parties at the hearing.
- b. Arbitrator. If one or more panel members are not present at the designated time and place, a panel hearing may proceed only with the express consent of the parties to fewer than three members. If any panel member is unable to serve at any other time while the arbitration is pending, but prior to the issuance of an award, the CCRFD chair is entitled to appoint a substitute panel member. This substitute arbitrator will thereafter review the record to the extent one exists. If the proceedings were not recorded, the substitute arbitrator's review must consist of an examination of the evidence already admitted and an oral summary of the proceedings by the panel chair followed by argument of the parties.

21. Presentation of Evidence

The panel chair shall require all parties and witnesses to swear or affirm that they will testify truthfully before hearing their testimony. The panel chair may request opening statements and prescribe the order of proof. All parties have the right to the full presentation of any evidence they deem pertinent to the resolution of the dispute. Any party may secure the attendance of witnesses or production of

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records by the issuance of arbitration subpoenas pursuant to Virginia Code section 8.01-581.06.

22. Closing of Hearing

At the conclusion of the hearing the panel chair is procedurally required to inquire of all parties whether they have any further evidence to submit in whatever form. The hearing may be closed only when both sides have responded negatively. The panel members will deliberate in private after the closing of the hearing.

23. Right to Counsel

Any party has an absolute right to representation by counsel (duly admitted and in good standing to practice law in the Commonwealth of Virginia) at such party's own expense at any time during the Fee Dispute Resolution Program process.

24. The Record

Any party has the right to secure the services of a court reporter to record the hearing proceedings; however, costs therefore must be borne by the party who arranges for the appearance of the reporter or requests that a transcript be prepared. The parties may stipulate to recording any proceedings by tape recorder or other electronic means. Unless the parties agree to an extension of time for transcript preparation and issuance of an award, the transcript, if one is to be prepared, must be prepared and delivered on an expedited basis since the arbitrators have only 10 business days to prepare the written award. The arbitrators' copy of any transcript is open to inspection by all parties.

25. Arbitration Award

- a. Deadline. Unless the parties agree to an extension of time for transcript preparation as set forth in the preceding rule, the panel must issue a written ruling (award) within 10 business days after the close of the hearing or the submission of documents in cases where the evidentiary hearing is waived. The CCRFD chair may extend this deadline for cause, or the parties may jointly agree to an extension.
- b. Form and Content. The arbitration panel's decision is expressed in a written award, signed by all the arbitrators. The award shall include a brief explanation of the basis for the decision. In the case of a panel, the majority vote

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constitutes the enforceable award. Unless the Agreement To Arbitrate provides otherwise, the arbitrators are empowered to grant any lawful relief in the award, including specific performance, except as limited by Rule 27.b. herein.

- c. Reopening Hearing after Award is Signed. A hearing may not be reopened after an award is signed except upon consent of all parties, together with the concurrence of the panel chair.
- d. Setting Aside, Modifying or Correcting Award. The only grounds for setting aside, modifying or correcting an arbitration award are those embodied in Virginia Code sections 8.01-581.010 through -581.011.

26. Confidentiality

All records, documents, files and transcripts or other recordings of proceedings pertaining to fee arbitration that remain in the custody of the CCRFD chair are available to parties and their counsel upon request, but the requesting party shall bear the costs, if any, to the CCRFD chair of providing such records.

27. Costs

- a. Generally. Each party shall bear his or her own arbitration costs and expenses unless otherwise assessed in the arbitration award.
- b. Attorney's Fees. The determination of the entitlement to and amount of attorney's fees incurred in connection with the fee dispute arbitration is the sole province of the circuit court upon application for confirmation of the arbitration award.

GUIDELINES FOR PARTICIPANTS, MEDIATORS AND ARBITRATORS

A. Substantive Issues in Fee Disputes

The factors listed below provide helpful information for FDRP participants in preparing to resolve their disputes, for mediators, and especially for arbitrators. In determining their awards, arbitrators may consider all pertinent factors, including the intention and understanding of the parties at the time the representation was undertaken. Among the factors to be considered are the following:

1. The time and labor required, the novelty, complexity and difficulty of the questions involved and the skill required for proper legal representation;
2. The likelihood that the acceptance of the engagement would preclude other employment by the lawyer;
3. The customary fee or rate charged in the community;
4. The monetary or other stakes involved in the matter;
5. The time constraints of the representation;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, diligence and ability of the lawyer, as well as the skill, expertise or efficiency of effort reflected in the actual services rendered;
8. Whether the fee agreement was fixed or contingent;
9. Whether the lawyer provided an adequate explanation to the client of the fee arrangement at the outset of the representation;
10. Whether the fee arrangement was in writing;
11. The promptness of the billing;
12. The experience of the client in obtaining legal services;
13. Whether an estimate of the total fee was given and, if so, how close the final bill was to that estimate;
14. The extent to which the lawyer and others in the lawyer's office have documented their time spent on the matter; and

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15. The results obtained by the lawyer.

An advantage to the fee dispute resolution program is that an award can be rendered without any actual expert testimony supporting the reasonableness or unreasonableness of the fee. Fee arbitration hearings routinely proceed without expert witnesses. Of course, there is no prohibition against using an expert witness if a party believes it would be helpful to the presentation of the case.

B. Preparation and Documentation

There is no substitute for adequate preparation to ensure an effective fee arbitration presentation. Arbitrators may be volunteers, but they are committed to a diligent and conscientious fact-finding process. All arbitrators go through a screening process prior to their appointment by the President of the Virginia State Bar. Because of their demonstrated commitment, most arbitrators are receptive to pre-hearing briefs or factual summaries, particularly if the panel chair has not required any pre-hearing disclosures. An excellent arbitration aid is a hearing notebook distributed to each arbitrator assigned to the dispute. **A notebook may not be warranted for a case in which pre-hearing discovery has been required** or in a routine one, but its assistance value increases as the stakes of an arbitration rise or as the factual scenario becomes more complicated. Such a notebook would contain the principal documentary evidence a party wants considered at the hearing. Helpful items to include in a notebook are the documentation reflecting the fee agreement, representative work product, a chronology of the attorney-client relationship, billing rates for the attorneys involved and summaries of the time devoted to the engagement. Either party may want to call the arbitrators' attention to pertinent correspondence or other forms of communications between the attorney and client if they are important to the professional relationship. If the engagement resulted in a large volume of work product, then a summary or annotated index of the work should be considered for pre-hearing submission to the arbitrators. It is axiomatic that a copy of any hearing notebook or similar pre-hearing submission should be provided to the opposing party or counsel at the same time it is provided to the arbitrators. The exchange of such materials several days in advance of the hearing is encouraged as a means of expediting the hearing. The panel chair may require such an exchange.

Because of the emphasis of most arbitrators on the lodestar method of calculating the reasonableness of fees, the most critical documents for the arbitrators are the attorney's time and billing records. The attorney who has a written fee agreement, who has generated and maintained fully itemized time and billing records and who had a demonstrated practice of reviewing the invoices and

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remitting them regularly goes into arbitration with a strong presumption that the fee charged is reasonable. Still, an analysis of the time and billing records by the arbitrators can be greatly facilitated by foresight and careful organization. An effective arbitration presentation by either party organizes and uses these records to demonstrate particular points. Summaries and compilations from these records are invaluable to the arbitrators. For example, an attorney may justify a large number of hours over a time line showing that a number of crucial depositions were taken and defended that month. Similarly, a client may demonstrate excessiveness by tabulating the total hours spent by junior attorneys on a case and further breaking the hours down by type of service rendered (i.e., legal research or conferences with other attorneys) to show inefficient duplication of effort. A well-conceived arbitration presentation organized along these lines can be very effective.

A brief explanation of the arbitrators' customary analytical process may be helpful to a practitioner's determination of the mode and order of proof at the hearing. The arbitrators' first task is to determine the existence and terms of a fee agreement. When there is a reasonably clear written agreement, the arbitrators will generally be unreceptive to a contested effort by either side to vary the written terms or to prove inconsistent side agreements or understandings. In the face of a written fee agreement, arbitrators are traditionally reluctant to give credence to such contentions as "the initial retainer was a flat fee," "the attorney promised that fees would not exceed a set amount," or "the client agreed to pay a bonus for a successful result." Sometimes, there may be an ambiguity as to whether the client agreed or understood that the attorney would charge for time in providing emotional support, consolation or other non-legal assistance. This type of problem is usually encountered in domestic relations cases. In these not infrequent situations, the arbitrators are expected to examine whether the attorney always intended to charge for that time and whether the client understood, or reasonably should have understood, that such time would be billed. Absent a clear written contract, arbitrators prefer to resolve preliminary questions concerning the scope of the engagement or agreement on an objective basis. Thus, the arbitrators will tend to place heavy reliance on documentary evidence and the parties' course of performance in making a determination. The arbitrators do, however, have the authority to decide whether there was an express oral contract and, if so, the terms thereof.

After establishing the terms of the contract, the next task of the arbitrators is to evaluate the performance by the attorney. A finding of substantial performance of the representation or engagement will result in an award of the contractual fees. If the attorney has not substantially performed the contemplated representation, the arbitrators will make the fee determination based as much as possible on the agreed terms of the engagement contract and the degree of services rendered.

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The arbitrators are also empowered to act even in the absence of an express written or oral fee agreement. The arbitrators may determine whether fees are due pursuant to an implied contract if there was any suggestion or implicit understanding as to legal representation, regardless of lack of certainty on the point. In those cases, the arbitrators weigh the testimony and evidence and find what services were necessarily contemplated by the parties and place a reasonable value on those services. This determination is based on the extent of the services actually rendered and the fair value of the representation.

C. Protocol

There are two major protocol points that should be strictly observed in all mediation sessions and arbitration hearings. First, the parties should bear in mind at all times that the mediators and arbitrators are volunteering a considerable amount of time and expertise in order to fairly and ably resolve the dispute. They should be accorded every courtesy and consideration for their effort. Out of respect for the arbitrators' donation of their time, parties to arbitration should strive to confine their presentations to those facts necessary to establish entitlement or disentanglement to fees. Petty bickering and personal acrimony do not advance the merits of any party's case. An overly contentious party is also less likely to be effective during mediation or arbitration.

The second point of protocol involves respect for the fee dispute resolution program and its underlying purposes. The fee dispute resolution program establishes a uniform system to provide a realistic alternative for clients to receive a fair review of their complaints about legal fees. This important goal is severely undermined when an attorney involved in a mediation or arbitration proceeding expresses obvious familiarity and collegiality with respect to an attorney mediator or arbitrator. Even the use of a first name can be enough to sabotage a client's confidence in the fairness and impartiality of the dispute resolution proceeding. This behavior is totally unacceptable at a mediation session or an arbitration hearing. The relations between attorney parties and attorney mediators or arbitrators must be as formal and dignified as circumstances permit. The effectiveness of the fee dispute resolution program depends on abiding by this hearing protocol. A properly conducted mediation or a properly administered hearing should result in a participant who is satisfied with the fairness of the proceeding and who is, therefore, likely to view the fee dispute resolution program as a legitimate means for resolving fee disputes. More fundamental, a properly administered hearing should result in a client who is also satisfied with the fairness of the system and the promptness of the resolution of the dispute.