



Rev. 05/18/2018

**STATE BAR OF ARIZONA
FEE ARBITRATION PROGRAM
RULES OF ARBITRATION OF FEE DISPUTES**

As promulgated by the Fee Arbitration Program and adopted by the Board of Governors of the State Bar of Arizona ("State Bar"). The most current version of these Rules shall be the governing Rules for State Bar Fee Arbitration matters, regardless of when the Petition for Fee Arbitration was filed.

I. PURPOSE; APPLICABILITY OF ARIZONA REVISED UNIFORM ARBITRATION ACT; COMPOSITION OF THE PROGRAM; DUTIES.

- A. The purpose of the State Bar of Arizona Fee Arbitration Program ("the Program") is to provide a forum for the binding arbitration of Fee Disputes. The State Bar of Arizona Fee Arbitration Program is available to all parties who agree to be bound by the Award.
- B. Parties who agree to participate in this program expressly waive the requirements of Arizona's Revised Uniform Arbitration Act, A.R.S. §§ 12-3001 to -3029, to the extent permitted by A.R.S. § 12-3004 except as specifically provided herein.
- C. The Program shall consist of volunteer arbitrators appointed by the president of the State Bar. The president shall designate one member as chair and one member as vice chair of the Program.
- D. All volunteer arbitrators of the Fee Arbitration Program shall be trained in accordance with the Program's Procedural Guidelines and may hear Fee Dispute matters after such training.

II. DEFINITIONS; SIGNATURES.

- A. Definitions:
 - 1. **Agreement to Arbitrate or Agreement:** The approved State Bar form signed by all Parties consenting to arbitration of a Fee Dispute.
 - 2. **Arbitrator:** A member of the State Bar appointed to serve as the disinterested person to hear a Fee Dispute and determine judgment, or a non-lawyer layperson appointed to serve on a Fee Arbitration panel.
 - 3. **Lawyer:** A person admitted to the practice of law in the State of Arizona, or any person who appears, participates, or otherwise engages in the practice of law in

the State of Arizona over whom the Program has jurisdiction pursuant to the Rules of the State Bar.

4. **Award:** The final written determination of the Arbitrator(s) in a Fee Dispute.
 5. **Client:** Any party who enters into an agreement with a Lawyer for legal services and/or advice.
 6. **Fee Dispute:** A disagreement between a client and the Lawyer charging the fees, or between two Lawyers, regarding the reasonableness of legal fees and/or expenses arising out of a representation concerning or involving an Arizona legal matter.
 7. **Fee Agreement:** Any agreement between a Lawyer (and/or law firm) and Client, and/or a Lawyer and third-party payer, regarding fees and expenses for legal services and/or advice. May also be called a retainer letter, retention letter, retainer agreement, employment letter or agreement, advance deposit letter or agreement, or other terms commonly used by lawyers to denote such an agreement.
 8. **Fee Arbitration Program Coordinator (“Program Coordinator”):** The staff person or designee of the State Bar responsible for administering the State Bar Fee Arbitration Program.
 9. **File:** The Program’s documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, regardless of physical form or characteristics, relating to a specific Fee Arbitration matter.
 10. **Party:** The Client, Lawyer, the Lawyer's assignee, legally recognized representative and/or any third person or entity who has been joined by the Client or Lawyer in the Fee Dispute, including the law firm that collected the fee.
 11. **Petition:** A written request for Fee Arbitration on the form approved by the Program and the State Bar.
 12. **Petitioner:** The party requesting Fee Arbitration.
 13. **Procedural Guidelines:** The guidelines promulgated by the Executive Working Group and Program Coordinator.
 14. **Respondent:** The party with whom the Petitioner has a Fee Dispute.
 15. **Rules:** The Rules of Arbitration of Fee Disputes as promulgated by the Program and adopted by the Board of Governors of the State Bar.
- B. Signatures on any submission may be provided by faxed, scanned, or other electronic means.

II. JURISDICTION OF THE PROGRAM.

A. The Program's jurisdiction includes the Arbitration of Fee Disputes:

1. Between and among Lawyers when the fee arrangement arose, where both Parties agree to be bound by executing an Agreement to Arbitrate in the form provided by the State Bar of Arizona;
2. Between a Client and his/her Lawyer, where both Parties agree to be bound by executing an Agreement to Arbitrate;
3. Between a Lawyer licensed to practice in Arizona when the Client-Lawyer relationship that gave rise to the fee dispute began and a third Party who has paid or agreed to pay the Lawyer's fees, only if the Client joins as a co-Petitioner or co-Respondent, as the case may be, and all Parties agree to be bound by executing an Agreement to Arbitrate;
4. Between a Client and the law firm to which the fee in dispute may be owed or has been paid, where all Parties agree to be bound by executing an Agreement to Arbitrate. In such case, Agreements to Arbitrate must be executed by any Lawyer of the firm with authority to bind the firm;
5. Where ordered by a court of competent jurisdiction; or
6. As a result of any disciplinary investigation or proceeding conducted pursuant to the Rules of the Arizona Supreme Court, including diversion agreements between a respondent and the State Bar or orders of the Attorney Discipline Probable Cause Committee, Presiding Disciplinary Judge, or a Hearing Panel.

Comment:

- 1) *The State Bar Fee Arbitration Program has jurisdiction over only the reasonableness of fees as defined by ER 1.5. For example, the Program has no jurisdiction to arbitrate liens filed by third parties against awards being held in lawyer trust accounts under ER 1.15.*
- 2) *A dispute over the reasonableness of the fees must exist between the Client and the Lawyer for the matter to qualify for Fee Arbitration. The State Bar Fee Arbitration Program is not to be used by Parties as a collection agency.*
- 3) *Lawyers admitted pro hac vice to the State Bar are subject to the Program's jurisdiction.*
- 4) *A lawyer's responsibility to his or her client does not end when they leave a firm's employment. Lawyers responsible for performing work for a client remain responsible and may be called upon as a witness in a Fee Dispute matter.*

B. Except as ordered by a court of competent jurisdiction, the Program will not have jurisdiction over a Fee Dispute:

1. If any Party declines to execute the Agreement to Arbitrate in the form provided by the State Bar.
2. If there already has been a determination made as to the validity of the fee;

3. If an action on the dispute is pending in another forum, unless the action has been expressly stayed to allow the Parties participate in the Program;
 4. If the dispute is in the nature of a compulsory counter-claim that could have been raised in another proceeding;
 5. In the absence of a stipulation of the Parties, if the Petition is filed more than three years after the Lawyer-Client relationship has been terminated or the final billing has been received by the Client, whichever is longer; or
 6. If the amount in controversy is less than \$500.
- C. Any member of the Program, or staff to the Program, may decline jurisdiction in a particular case where the interests of justice would be served by dismissal or where Fee Arbitration is unlikely to lead to a resolution of the Fee Dispute.

III. SCOPE OF THE FEE ARBITRATION HEARING.

- A. The issue before an Arbitrator, in accordance with ER 1.5, Rule 42, Ariz. R. Sup. Ct., is whether the fees charged were reasonable for the work that was performed. If disputed, the Arbitrator also may determine the reasonableness of expenses.
- B. The issues regarding reasonableness of fees and expenses will be limited to those set forth in the Petition, the Respondent's response, other written submissions by the Parties, and the testimony and written evidence presented at the hearing.

IV. STARTING THE ARBITRATION: PETITION-AGREEMENT-RESPONSE.

- A. Arbitration proceedings must be initiated by filing a signed Petition for Arbitration and Agreement to Arbitrate with the State Bar office in Phoenix. The Petition and the Agreement must be in the form provided by the State Bar.
- B. The Parties' signatures on the Agreement must constitute:
 1. An avowal that the Parties have attempted to resolve the dispute and are unable to do so, or have a reasonable belief that such an effort would be useless.
 2. An agreement to hold harmless from suit the State Bar and its employees, the volunteer arbitrators of the Program, the Arbitrator, and all others participating in good faith in the arbitration proceedings.
 3. An acknowledgment that the Award of the Arbitrator is final and binding upon the Parties and that such Award may be enforced by any court of competent jurisdiction.

4. An agreement to keep the State Bar apprised of any change in address and other contact information occurring subsequent to filing the Petition. A failure to keep the State Bar so apprised will be deemed waiver of notice of hearing.
 5. An agreement that said dispute will be heard and determined by the Program in accordance with the Rules of Arbitration of Fee Disputes, copies of which have been delivered to and read by each of the Parties and which Rules expressly are accepted.
 6. An agreement to submit to the Arbitrator, the State Bar of Arizona Fee Arbitration Program Coordinator, and the opposing Party, no later than ten (10) days prior to the hearing, all relevant records pertaining to the dispute, including but not limited to the Fee Agreement, all billings, and all documents to be introduced into evidence at the hearing directly related to the Fee Dispute.
 7. An avowal that no civil litigation or arbitration regarding this Fee Dispute has been filed or if a civil suit or arbitration was filed, it has been dismissed or stayed.
 8. An agreement to arbitrate the dispute to conclusion, absent a subsequent written agreement signed by all Parties, agreeing to dismiss the dispute.
 9. An agreement that a Lawyer Party will not charge fees and/or expenses for participation in a Fee Arbitration.
 10. An avowal by the Lawyer that he/she has an ethical obligation to appear if he/she has signed the Agreement to Arbitrate. Any Lawyer who signs the Agreement to Arbitrate can and does obligate the firm to participate in the Fee Arbitration.
 11. An avowal by the Lawyer that he/she has the authority to bind the firm to participation in Fee Arbitration if appearing on behalf of the firm.
- C. Upon receipt of the forms initiating a Fee Arbitration, the State Bar office must forward to the Respondent a copy of the Petition and Agreement. The State Bar office will request that the Respondent sign and return a copy of the Agreement. Respondent may also file a response to the Petition. A failure to return the Agreement within twenty (20) days from the date of the transmittal letter from the State Bar will be construed as a declination to arbitrate. Upon receipt of the Agreement and response, the State Bar office will forward a copy of each to the Petitioner. If an Agreement is not timely received, the matter must be dismissed and the Petitioner(s) notified of the dismissal.
- D. Parties are responsible for providing two (2) copies of their responses, replies, or other documentary evidence in sole arbitrator matters and four (4) copies in panel matters.

- E. The State Bar office must forward a copy of the complete File to the appointed Arbitrator.
- F. The Arbitrator, in his/her sole discretion, may authorize additional discovery procedures or may limit discovery.

Comment:

The use of discovery procedures in Fee Dispute arbitration is discouraged and should be granted only in the extraordinary case where the fee is of some magnitude and after consideration of whether the Parties are represented by counsel.

- G. A member of the Fee Arbitration Program, staff to the Program, or the Arbitrator may grant extensions for any act required by these rules.

V. SELECTION OF THE ARBITRATION PANEL; OBJECTIONS TO PANEL MEMBERS.

- A. In an arbitration proceeding where the amount in controversy is more than \$20,000, any Party may request in the Agreement that the matter be heard by a Fee Arbitration panel of three (3) persons. If such a request is made, the Program Coordinator or the Chair of the panel must appoint three (3) persons to serve as an arbitration panel. The panel must consist of two (2) members of the State Bar and one (1) layperson. One of the Lawyers on the panel must be designated as the panel chair. Absent such a request, the Program Coordinator must appoint one (1) member of the State Bar to serve as the sole arbitrator.
- B. In an arbitration proceeding where the amount in controversy is \$20,000 or less, the Program Coordinator shall appoint one (1) member of the State Bar to serve as the sole Arbitrator.

Comment:

Parties are advised that if a panel is requested, the arbitration process will likely require additional time to accommodate recruiting panel members, coordinating the three arbitrators' and the Parties' schedules, and setting the hearing date, as well as additional time necessary to prepare and issue the Award.

- C. When practicable, arbitrators will be chosen in the same Arizona county in which services were performed, or in which either Client or payer resides, the law firm has an office, or the lawyer works, in accordance with Rule VI.A.

Comment:

The Arbitrator can reside in the county, travel to the county, hold a telephonic hearing, or have the Parties stipulate for the Arbitrator to determine the matter based on paper submissions. See VI.J.

- D. The appointed Arbitrator shall advise all Parties of his or her appointment by notice served personally or by first class mail. Within ten (10) days following personal service or date of mailing the notice, any Party to the proceedings may file with the State Bar office in Phoenix an objection to the appointment of any of the Arbitrator(s). Upon

notice of an objection, a new Arbitrator must be selected to replace each Arbitrator objected to, which selection is binding upon the Party previously having objected.

Comment:

The list of laypersons from which Arbitration panel members may be chosen should be as broad-based as possible. Every layperson who actually serves as an Arbitrator should participate in training per the Procedural Guidelines and will be given a copy of ER 1.5, Rule 42, Ariz. R. Sup. Ct., which sets forth the factors to be considered in determining the reasonableness of a fee.

VI. VENUE OF HEARING; CONDUCT OF HEARING; RIGHT TO PRESENT EVIDENCE; RIGHT TO COUNSEL; NOTICE OF HEARING; RIGHT TO RECORD HEARINGS; EFFECT OF FAILURE TO APPEAR; POSTPONEMENT.

- A. In the absence of a stipulation of the Parties to the contrary, or a finding by the Arbitrator of a more convenient forum, the venue of the hearing must be: 1) the county in Arizona where the services were performed; or 2) the county in Arizona where the Parties contracted for the services.
- B. The Arbitrator must set a date, time, and location for the hearing and must notify the Parties by personal service delivery, email with all Parties' consent, or by first class mail. The notice must be delivered or mailed not less than fifteen (15) days before the hearing unless the Arbitrator and all Parties agree on a shorter period. In the notice of the hearing, the Parties must be informed of their right to present witnesses and documentary evidence and to be represented by counsel.
- C. Emailing the notice to the email address provided by the Parties with the consent of all Parties, or mailing of the notification of hearing by first class mail to the last known address of the Parties, will constitute notice. A Party's appearance at a scheduled hearing shall constitute a waiver of any deficiency in the notice of the hearing.
- D. Any Party to the arbitration may make arrangements to have the hearing recorded by a court reporter at the Party's own expense, provided notice is given to the opposing Party and the Arbitrator at least three (3) days prior to the scheduled hearing. In the event a hearing is recorded, the requesting Party must provide necessary equipment as required by the Arbitrator. Any Party to the arbitration is entitled to acquire at his/her own expense a copy of the reporter's transcript of the testimony by making arrangements directly with the reporter. When no Party to the arbitration requests that the hearing be recorded and the Arbitrator deems it necessary to have the hearing recorded, a court reporter may be employed for such purpose if authorized by the chair of the Program in consultation with the CEO/Executive Director of the State Bar.
- E. At the time and place set for the hearing, the Arbitrator, immediately prior to commencement of the hearing, must advise the Parties of the option to engage in settlement discussions. The Arbitrator with the consent of all Parties may facilitate the settlement discussions. If no settlement is reached, the Arbitrator will proceed with the hearing. In the event settlement is reached, the Arbitrator must prepare an

Award setting forth the terms of the Parties' agreement including without limitation the amount to which each Party is entitled, if any, the time in which such amounts are to be paid and any other terms agreed to by the Parties. The Award issued pursuant to this rule may, upon compliance with applicable process, be enforced by any court of competent jurisdiction.

- F. The Arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing. A subpoena must be served in the manner for service of subpoenas in a civil action and enforced in the manner for enforcement of subpoenas in a civil action.
- G. The testimony of witnesses must be given under oath. The Arbitrator must administer oaths to witnesses.
- H. The Arbitrator must preside at the hearing and must determine questions of procedure and the relevancy and materiality of the evidence offered. He/she must exercise all powers relating to the conduct of the hearing. Conformity to the legal rules of evidence is not required. In cases between Clients and Lawyers, the burden of proof by a preponderance of the evidence as to the reasonableness of the fee is on the Lawyer. In all other cases, the burden of proof is on the Petitioner.
- I. If at the time set for the hearing all Arbitrators are not present, the hearing must be postponed unless the Parties agree that the hearing may proceed with one Lawyer member of the panel as the sole Arbitrator. A hearing must not be conducted by or proceed with two (2) members of the panel acting as Arbitrators, or with a layperson acting as sole Arbitrator.
- J. If any Party to an arbitration who has been duly notified fails to appear at a scheduled hearing without good cause as determined by the Arbitrator, the Arbitrator may proceed with the hearing and determine the controversy upon the evidence produced. Any Award rendered will have the same force and effect as if all Parties personally attended.
- K. Upon request of a Party for good cause, or upon the Arbitrator's own determination, the Arbitrator may postpone or adjourn the hearing from time to time as necessary.
- L. Upon stipulation of the Parties to waive a hearing, the Arbitrator may determine the controversy solely on the basis of the File, or by a conference telephone call, the expense of which must be borne by the respective Parties.
- M. If the Parties settle the matter before appearing at the arbitration hearing, the Arbitrator must notify the Program Coordinator within ten (10) days of the settlement.
- N. Any Party and any witness may testify telephonically.

Comment:

It is generally not necessary to introduce Lawyer work product as evidence in the Fee Arbitration hearing; the Fee Arbitration Program is not a forum to address malpractice claims. If the volume of

work produced is an issue, it can be demonstrated by bringing the necessary documents to the hearing, but not submitting them as exhibits. The Parties are cautioned not to submit originals to the State Bar; the opposing Parties or the Arbitrator. The State Bar and the Arbitrator are not responsible for any lost original documents.

VII. RENDITION; FORM; SERVICE OF ARBITRATION AWARD; SETTLEMENTS; COMPLIANCE; OBJECTIONS.

- A. The hearing must be held promptly, but not longer than ninety (90) days after receipt by the Arbitrator of the Agreement. The sole Arbitrator should render the Award within twenty (20) days after the close of the hearing. A panel must render its Award by majority vote within forty (40) days after the close of the hearing. The foregoing time limits are not jurisdictional.
- B. Awards must be in pleading format: on lined, numbered paper, and signed by at least one Arbitrator. The Award must include: 1) a preliminary statement reciting the jurisdictional factors; 2) a list of all persons present at the hearing; 3) a brief statement of the dispute, the amount charged, and the amount paid; 4) the findings of fact, including a determination of the reasonableness of the fee; and 5) the monetary relief if any, stating a specific sum and exactly which Party receives that sum. Where appropriate, an award of interest may be made consistent with Arizona law. The Arbitrator may not award attorney's fees or expenses incurred in the arbitration.

Comment:

All matters which go to hearing must result in a written Award. The Award must be written by at least one Arbitrator and not authored by the Parties. However, an Award for a matter settled at hearing may incorporate a Settlement Agreement, which must be signed by all Parties and the Arbitrator, and included as an attachment to the Award, to ensure that the Settlement Agreement becomes enforceable if the Award is filed and converted into a judgment. Arbitrators are encouraged to provide sufficient analysis and facts in the Award to explain the reasoning behind the Award.

- C. The original Award must be forwarded only to the Phoenix office of the State Bar for review and processing. The State Bar staff will send the Award to the Parties.
- D. The Parties have thirty (30) days from the date upon which a copy of the Award is mailed to them to comply with the Award. If the Parties fail to comply with the Award within that time, the Award may be judicially confirmed pursuant to Arizona's Revised Uniform Arbitration Act, A.R.S. §§ 12-3001 to -3029. Any objections or modifications to the Award may be raised only through this procedure.

VIII. RELIEF GRANTED BY AWARD; APPLICATION TO COURT; CONFIDENTIALITY; ENFORCEABILITY OF AWARD; LAWYER NON-COMPLIANCE WITH AWARD.

- A. The Award must state the amount to which each Party is entitled, if any.
- B. Service of the Award on the Parties will terminate: 1) all claims and interests of the Parties against one another in the subject matter of the arbitration; and 2) all rights of

the Lawyer to retain possession of any property of the Client pertaining to the subject matter of the arbitration that is not awarded to the Lawyer in the Award.

- C. Payment of the amount awarded will constitute a complete satisfaction of all claims arising out of the subject matter of the arbitration.
- D. Confidentiality:
 - 1. Except as provided below, all records, documents, Files, proceedings, and hearings pertaining to arbitration of any Fee Dispute under these rules shall be confidential and not be open to the public.
 - 2. All records, documents, Files, proceedings, and hearings pertaining to arbitration of any Fee Dispute under these rules must be open:
 - a. to any court seeking to confirm or set aside such Award;
 - b. to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the Fee Arbitration Program to disclose such information; and
 - c. to the State Bar's Lawyer Regulation Office, the Law Office Management Assistance Program, the Member Assistance Program, and the Board of Legal Specialization.
 - 3. At the sole discretion of the assigned Fee Arbitrator or the chair of a Fee Arbitration Panel, a non-lawyer Party may be accompanied to the hearing by a non-lawyer who shall not provide legal assistance to the non-lawyer Party.
 - 4. A Fee Arbitrator, Fee Arbitration Panel Member, Fee Arbitration Program Member, or Fee Arbitration Program Coordinator must reveal such information from the File to the extent they reasonably believe necessary to prevent a party from committing any criminal act, especially one that they believe is likely to result in death or substantial bodily harm.
 - 5. Awards
 - a. All information pertaining to Awards shall be confidential and exempt from public disclosure except the following: Names of Parties; date and location of hearings; amount in dispute; and disposition.
 - b. The State Bar shall retain all original Awards in accordance with the State Bar's file retention policy.
 - 6. Arbitrators are encouraged to retain their arbitration Files for a period of two years after issuance of the Award.
- E. Any binding Award may be enforced by the superior court of the county in which the arbitration hearing was held.
- F. If a Lawyer fails to comply with the Award within thirty (30) days from the date the Award is mailed to the Parties, in the absence of a timely filed objection, such failure will result in a referral to the Lawyer Regulation Office for Disciplinary Investigation.

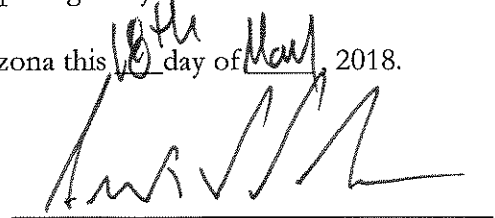
IX. ARBITRATION OF FEE DISPUTES BETWEEN AND AMONG LAWYERS.

- A. The Program will accept jurisdiction of disputes between and among Lawyers only when all parties agree to be bound by the Award.
- B. The Arbitrator may determine whether the fee in dispute should be divided and, if so, in what proportion.

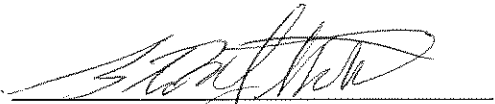
X. COMMUNICATION BETWEEN THE PARTIES AND ARBITRATOR.

The Parties and Arbitrators are to communicate in writing and to avoid oral communication (i.e., telephone calls), if possible. Arbitrators are advised to have an associate or an administrative assistant handle scheduling problems. All written communication to and from the Arbitrators should be copied to all Parties, their counsel, if any, and the State Bar. Ex parte communication must be reported promptly to the opposing Party.

Amended by the Board of Governors of the State Bar of Arizona this 18th day of May, 2018.



Alex Vakula, President
State Bar of Arizona



Steven M. Guttell, Chair
State Bar of Arizona Fee Arbitration
Program

Rules Amended on May 18, 2018

ER 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer
- (3) the fee customarily charged in the locality for similar legal services
- (4) the amount involved and the results obtained
- (5) the time limitations imposed by the client or by the circumstances
- (6) the nature and length of the professional relationship with the client
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services and
- (8) the degree of risk assumed by the lawyer.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing before the fees or expenses to be billed at higher rates are actually incurred. The requirements of this subsection shall not apply to:

- (1) court-appointed lawyers who are paid by a court or other governmental entity, and
- (2) lawyers who provide pro bono short-term limited legal services to a client pursuant to ER 6.5.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance

to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof

(2) a contingent fee for representing a defendant in a criminal case or

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the representation;

(2) the client agrees, in a writing signed by the client, to the participation of all the lawyers involved and the division of fees and responsibilities between lawyers; and

(3) the total fee is reasonable.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. When the scope of the representation changes, in a material way, the lawyer should notify the client about the changes in writing. In a new client-lawyer relationship, however, a written understanding as to fees and expenses must be promptly established. Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule, including consideration of the degree of risk assumed by the lawyer at the outset of the representation. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider all of the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See ER 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to ER 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of ER 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Disclosure of Refund Rights for Certain Prepaid Fees

[7] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. A nonrefundable fee or an earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. The agreement as

to when a fee is earned affects whether it must be placed in the attorney's trust account, see ER 1.15, and may have significance under other laws such as tax and bankruptcy. But the reasonableness requirement and application of the factors in paragraph (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation (e.g., factor (a)(2) might justify the entire fee), nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of the entitlement to a refund based upon application of the factors set forth in paragraph (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it would be advisable for lawyers to maintain contemporaneous time records for all representations undertaken on any flat fee basis.

Division of Fee

[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers if the division is in proportion to the services performed by each lawyer or all lawyer assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be completely and diligently completed. See ERs 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).

[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes Over Fees

[10] The State Bar of Arizona has established an arbitration procedure for the resolution of fee disputes. Each lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.