

June 2010

Nevada



County

Bar Association Journal

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PRESIDENT'S MESSAGE

By Peter Bronson



On May 26th, our Bar Association presented a terrific MCLE luncheon program, at a great new venue (Goomba's Italian Restaurant in Grass Valley). Nicholas Briscoe of Economic Valuation Consultants spoke on the economic damage issues that can arise in a wide variety of civil cases.

Sadly, only ten people attended – and four of those ten were NCBA executive committee members. Our challenge remains: How do we expand our offerings and – without resorting to bribery or hostages – persuade more Nevada County lawyers that it would be worthwhile for them to participate in our activities? In my last President's Message (April 2010), I invited you – our members – to tell us what it is that you would like your bar association to do. Would you be interested in programs not just on substantive areas of the law but also on such topics as law office management or how to use social Internet sites such as LinkedIn and Facebook? Would you like more social events – mixers, outings, etc.? Are there community service projects you would like to see the NCBA consider undertaking? I asked that you communicate your ideas to any Executive Committee member, or just contact me at (530) 432-0851 or at pbronson@pbronsonlaw.com.

I regret to say that I did not receive a single response to my attempt at outreach. I am too much of an optimist to conclude that the legal community simply is not interested in having an effective local bar association. But I am too much of a realist to accept the adage that "if we build it, they will come"; the attendance figures suggest otherwise.

So I would like to repeat, shamelessly and abjectly, my call for participation and involvement. What the Association can accomplish depends on support and communication from its members. We have a talented and accomplished bar here in Nevada County; we can do great things with our collective efforts.

Executive Committee Meeting

June 17, 2010 at 12 noon at the law library

Save the Date

MCLE LUNCHEON

Wednesday, July 28, 2010

Presentation is an introduction to collaborative law and procedure in the areas of: family law; business/partnership law and general civil cases.

IMPORTANT DIGITAL COPIER SECURITY ALERT

All digital copiers have a hard drive, which keeps a copy of everything. When you get rid of the copier, all that personal client information is still there for anyone to see (tax returns, account statements, deeds, social security numbers, police reports, etc.). Apparently there's a big market for used copiers. There is a fix, but it costs about \$500. More information can be viewed at <http://www.cbsnews.com/video/watch/>

PROVERBIAL LESSONS FROM A STATE BAR SUSPENDER

By Jill A. Sperber

When people learn about my line of work, they smile. Most chortle with pleasure. These people are always non-lawyers. You see, I help suspend lawyers who fail to pay a fee arbitration award requiring a refund to the client.

The less amusing reality is that serious consequences await noncompliant lawyers under California's statutory scheme for State Bar enforcement of unpaid fee arbitration awards requiring a refund of attorney's fees or costs to the client. The State Bar Court will enroll an attorney on involuntary inactive status (non-disciplinary administrative suspension) until the award is paid. (Bus. & Prof. Code section 6203(d).)¹

Demonstrating that a little knowledge is (often) a dangerous thing, in the vast majority of unpaid fee arbitration awards against lawyers which cross my desk, some lawyers make grave procedural errors, thwarting their attempt to prevent the arbitration award from becoming final. Let's consider these mistakes, for our educational purposes here, to be the result of bona fide misunderstandings by those lawyers of post-fee arbitration procedure.

¹ A lawyer may avoid State Bar enforcement of an unpaid arbitration award only by showing either: 1) he or she is not personally responsible for repayment or 2) an inability to pay the award, even in monthly installments. (Bus. & Prof. Code §6203(d)(2)(B).)



PROVERBIAL LESSONS *continued*

“Losing” a Fee Arbitration Award is a Relative Term.

Mandatory fee arbitration is designed to provide a neutral forum for clients and attorneys to resolve their disputes over attorney’s fees and costs outside of court in a more informal, speedier, and less costly manner than litigation. Most fee arbitrations are either binding by agreement of the parties or become binding by law after the passage of 30 days from service of the award if neither party has filed for a new trial. (Bus. & Prof. Code §6203(b).) For the most part, the mandatory fee arbitration program successfully resolves many attorney fee disputes without litigation.

Should a lawyer lose in fee arbitration, this could mean several things: 1) the lawyer is awarded attorney’s fees, but less than the amount claimed; 2) the lawyer keeps what has already been paid, but is awarded no additional fees from the client; or 3) the lawyer must refund “unearned” fees (or costs or both) to the client. The lawyer will need to assess whether losing in fee arbitration is something that he or she can live with, or whether the potential gains of litigation to pursue the fee dispute outweigh the risks presented. Some of the risks go beyond pure financial considerations-airing a fee dispute against a client will be of public record. Protecting one’s credibility with the court and reputation in the local legal community are additional factors to consider.

On occasion, parties initiate post-fee arbitration litigation. Given the potential consequences facing lawyers for nonpayment of a fee arbitration award, however nominal², careful attention should be paid to one’s post-fee arbitration rights and responsibilities. Following mandatory fee arbitration, either party can file an action for a trial de novo following non-binding arbitration or a petition to vacate the award following binding arbitration. For a trial de novo to proceed, the action must at least be timely. For a petition to vacate, filing and service must be both timely and based upon one or more of the limited grounds required by statute.

A Minefield for the Misguided.

While many lawyers eventually pay a final and binding fee arbitration award requiring a refund to the client, others don’t or won’t pay. That’s where I come in. When the State Bar steps in to enforce an unpaid award that has become final and binding, some lawyers will try to challenge the award, albeit belatedly or incorrectly.

Flawed challenges block enforcement of the award only temporarily. Inevitably, they create more downsides for the unsuccessful lawyer. Litigation encourages the client to seek a judgment confirming the award (assuming it is made within the four year statute of limitations (C.C.P. §1288).) A judgment confirming the award is often higher than the original arbitration award: it may include prevailing party’s attorney fees and costs, as well as post-award interest. The judgment amount is what the State Bar enforces if it remains unpaid. (Bus. & Prof. Code §6203(d).) Apart from State Bar enforcement, a judgment

confirming the award carries the same enforcement remedies available to a civil judgment creditor. (C.C.P. §1287.)

Based on the procedural blunders I’ve seen, I share with you the following “pearls” for correctly challenging a fee arbitration award in court.

1. If you are unhappy with a non-binding award, you must walk the walk.

There is no crying in fee arbitration. If you wish to reject a non-binding fee arbitration award, you must do so something, and do so promptly. To prevent a nonbinding award from becoming binding, you must file an action in court within 30 days of the date of service of the award. Filing an action in small claims court is simple because Judicial Council form SC-101 [Attorney Fee Dispute After Arbitration] constitutes the action attached to form SC-100.

For claims in superior court, however, you must file and serve an actual lawsuit, even if you are seeking only declaratory relief (rejection of award but no money damages are sought) and attach optional Judicial Council form ADR-104[Rejection of Award and Request for Trial after Attorney-Client Fee Arbitration.] If you wait past 30 days, the award becomes binding by operation of law. (Bus. & Prof. Code §6203(b).)

2. If you blow it, own it.

There is no C.C.P. 473 relief available for excusable error if you miss the 30th day to file an action to reject a non-binding fee arbitration award. *Maynard v. Brandon* (2005) 36 Cal.4 th 364. If you miss the deadline, don’t try to cover up by filing something else, such as a petition to vacate the award, unless you plan to prove one of the limited grounds set forth in C.C.P§ 1286.2.

² The record for the smallest unpaid award resulting in the involuntary inactive enrollment of an attorney by the State Bar is \$387.

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Treasurers Report



Income from January to May 1, 2010 was \$8,410 from membership dues and fundraising activities. Operating expenses from January through May were \$4,130 and include postage and printing, website maintenance, and professional and administrative services.

The Association’s account balance is \$10,830. There are 107 current members and 3 associate members.

We have collected \$925 in Law Library donations this year and we will be writing a check to the law library this month. Thank you for your generosity.



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seeking in terms of relief, your litigation may take place in a court other than the one that has jurisdiction over the amount of the award. When filing an action for a new trial after non-binding fee arbitration, “the amount of money in controversy” determines which court has jurisdiction. (Bus. & Prof. Code §6204(c).) For a petition to vacate, in contrast, “the amount of the arbitration award” controls. (Bus. & Prof. Code §6203(b).) Another nuance is that the former small claims court limit of \$5,000 still applies to post-fee arbitration litigation. (C.C.P. §116.220(a)(4).) The statute was never amended to apply the current \$7,500 jurisdictional limit for claims by natural persons to post-fee arbitration cases.

6. As in life, be wary of getting punked.

Assess the financial risk of not “prevailing” in court. You could end up owing more money than the fee arbitration award requires. In mandatory fee arbitration, an award of prevailing party fees and costs is prohibited, notwithstanding a pre-existing agreement between the parties for same. (Bus. & Prof. Code 6203(a).) However, in post-fee arbitration litigation, all bets are off.

The statutes specifically provide for a judicial award of attorney’s fees and costs to the prevailing party. After a trial de novo following non-binding arbitration, the party seeking the trial is the prevailing party only if he or she “... obtains a judgment more favorable than that provided by

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PROVERBIAL LESSONS *continued*

3. An idle lawsuit is the devil’s workshop.

After a lawsuit for a new trial has been filed following non-binding fee arbitration to prevent the award from becoming binding, the lawyer may fail to prosecute or will voluntarily dismiss the action. The courts have not looked kindly on such “mischievous lawyering.” They will treat a voluntary or court ordered dismissal of a de novo action as an effective repudiation of the initial request to reject the award, resulting in a final and binding arbitration award. *Corell v. Law Firm of Fox and Fox* (2005) 129 Cal. App.4th 531.

4. Deliver the goods.

You will have a more leisurely 100 days from service of the award to file and serve a petition to vacate. (C.C.P. § 1288.) Judicial Council forms SC-101 in small claims court and ADR -103 [Petition after Attorney-Client Fee Dispute Arbitration Award] in superior court are available. Unlike a request for a trial, a petition to vacate an award must be based on very limited grounds, such as arbitrator corruption, fraud, or misconduct, substantial prejudice to the party by failing to grant a continuance where good cause existed to postpone the hearing or hear evidence material to the dispute, or failure of the arbitrator to disqualify himself or herself when required to do so. (C.C.P. §1286.2.) These narrow grounds are generally difficult to prove, and deliberately so, since the courts rarely second guess an arbitrator’s rulings.

Before filing your petition to vacate, Grasshopper, summon your most Zen-like state and ask yourself: can I actually demonstrate one of the limited grounds or is this angst really about something else?

5. Look before you leap.

Determining which court has jurisdiction after fee arbitration can be tricky. Depending on what you are



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Judicial Officers Nevada City Branch

- Department I: Judge Heidelberger
- Department II: Judge Dowling
- Department III: Judge McManus
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- Department V: Commissioner Thomsen
- Department VI: Presiding Judge Anderson

Truckee Branch

- Dept. A: Judge Anders Holmer
- Dept. B: Commissioner Thomsen

PROVERBIAL LESSONS *continued*

the arbitration award.” (Bus. & Prof. Code § 6204(d).) For post-binding arbitration, the party obtaining judgment confirming, correcting or vacating the award is the prevailing party. (Bus. & Prof. Code §6203(c).)

7. He who fails to update his State Bar address of record shall not cast stones over lack of notice.

The fee arbitration program’s rules of procedure providing for service require that the lawyer will be served by mail at his or her address listed with the official membership records of the State Bar. Before basing a challenge on your purported lack of notice of the arbitration hearing or that you moved and never received the award, ensure that your official State Bar membership address of record was current at the time of service.

If the court determines that your failure to appear for the arbitration hearing was willful, you will not be entitled to prevailing party attorney’s fees and costs even upon vacation of the award. (Bus. & Prof. Code §6203(c)).

8. If you play, you may need to pay.

When a final and binding award requires a refund of unearned fees and/or costs to the client, the lawyer should promptly pay it. You will avoid formal enforcement proceedings by the State Bar and the client.

The value of a final resolution with a former client over a fee dispute? Priceless.

Jill A. Sperber is an attorney employed as the Director of the State Bar’s Office of Mandatory Fee Arbitration, providing mandatory fee arbitration and enforcement of award services, overseeing the state’s 44 local bar association programs, and staffing the State Bar’s Committee on Mandatory Fee Arbitration.

ADR Section:

We are taking a break from meetings for now. Please contact Rosemary at (530) 265-3062 or rmetrailler@metrailler.com with any questions or suggestions for future programs.

Do you have an article or news of interest?

Submit to Helen Cavanaugh
Helen.cavanaugh@nevadacountycourts.com



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