

HAWAII STATE BAR ASSOCIATION
ATTORNEY-CLIENT RELATIONS COMMITTEE
RULES FOR THE MEDIATION/ARBITRATION OF FEE DISPUTES

RULE 1.0. PURPOSE.

1.1. In order to provide a low-cost procedure for the resolution of fee and fee-related disputes between attorneys and their clients, the Hawaii State Bar Association ("HSBA") Attorney-Client Relations Committee adopts the following rules and procedures for the mediation/arbitration of attorney-client fee disputes.

RULE 2.0 COMMITTEE.

2.1. There shall be a HSBA Attorney-Client Relations Committee ("Committee") which shall consist of not less than twelve (12) members.

2.2. The President of the HSBA, with the approval of the HSBA Board, shall annually appoint the chair and any co-chairs of the Committee. Such individuals shall serve for a term of one (1) year, and may be reappointed for no more than three consecutive terms, absent exceptional circumstances. The chair shall appoint the remaining committee members and any vice-chair(s) of the Committee, as may be deemed necessary.

2.3. The HSBA Executive Director shall appoint a Committee Liaison from the HSBA staff.

2.4. Attorney Committee members shall be members in good standing of the HSBA. Each Committee member shall be appointed for a term of one (1) year and may be reappointed for no more than three consecutive terms, absent exceptional circumstances. The term of any member which expires while mediation or arbitration is pending in which he/she is involved shall be extended until such matter is concluded.

2.5. The members of the Committee shall be selected to provide representation from as broad a spectrum of the bar and non-legal community as practicable.

RULE 3.0. JURISDICTION.

3.1. The Committee may take jurisdiction over any disagreement concerning the fees or costs for legal services rendered by a lawyer who is licensed to practice law in the State of Hawaii. The Committee will only take jurisdiction over fee disputes where the complaint is initiated by the client. The Committee will not take jurisdiction over disputes where the complaint is initiated by the attorney, although the attorney may recommend to the client that the matter be submitted to the Committee for resolution.

3.2. The Committee may in its discretion take jurisdiction over other non fee-related disputes.

3.3. Disputes over which a court has exclusive jurisdiction to fix the fee, or in which a fee is fixed or approved by a court or statute, are specifically excluded from the Committee's jurisdiction.

3.4. The Committee may in its discretion refuse any matter where the client has filed a Complaint with the Office of Disciplinary Counsel; and may terminate proceedings at any time with respect to any claim which appears to involve a violation of the Code of Professional Responsibility.

RULE 4.0. PROCEDURE FOR PROCESSING FEE COMPLAINTS.

4.1. A client who contacts the HSBA and alleges a dispute or disagreement involving a legal fee shall be referred to the Committee's Liaison.

4.2. The Liaison shall instruct the client to submit a signed written petition to the Committee in the form of Appendix A to these Rules, setting forth all pertinent information necessary to determine whether the claim falls within the scope of the Committee's jurisdiction.

4.3. The written petition shall be forwarded by the Liaison to the chair or co-chair who shall determine whether the complaint is within the jurisdiction of the Committee.

4.4. Petitions determined by the chair/co-chair as not within the jurisdiction of the Committee shall be rejected with a brief explanation for the rejection.

4.5. If the petition is accepted for processing, the Liaison will obtain from the client a signed waiver of the attorney-client privilege ("waiver"). No dispute will be mediated or arbitrated without such a waiver.

4.6. After the signed waiver is received, the Liaison shall forward a copy of the petition and waiver and a copy of these rules (or an abbreviated version thereof) to the respondent attorney, with a request for the attorney's written response. If the attorney agrees to submit the dispute to the program, he/she shall forward his/her written response to the HSBA within fifteen (15) days thereafter. The written response shall confirm that the attorney agrees to submit the dispute to mediation; a brief summary of the circumstances of the dispute and of the claimed reasonableness of the fee; and a suggested resolution of the dispute. The written response should also indicate whether the attorney is willing to submit the dispute to binding arbitration, providing the client also agrees.

4.7. Upon receipt of the attorney's written response, the Liaison shall refer the matter to a member of the Committee (hereafter also referred to as "Mediator" or "Arbitrator") to resolve the controversy in accordance with the procedures set forth below.

4.8. If at any time the member determines that he/she cannot ethically and unbiasedly serve as a Mediator or Arbitrator, he/she shall immediately so notify the Liaison, who shall forthwith appoint another member to resolve the dispute.

4.9. After examining the petition and response, the member assigned shall: (1) contact the client and attorney by telephone and/or letter regarding the member's appointment; (2) determine whether the parties desire mediation or arbitration and, if binding arbitration is selected by the parties, ensure that each party acknowledges in writing his agreement thereto; and (3) select a date, time and place for the mediation/arbitration.

4.10. The date of the mediation or arbitration hearing shall be set as soon as practicable, taking into consideration the schedules of the parties and the member assigned.

RULE 5.0. MEDIATION.

5.1. Mediation is an informal, non-binding form of alternative dispute resolution. The Mediator shall act as an intermediary between the client and attorney and attempt to assist them in reaching their own settlement, but the Mediator does not have authority to render a decision.

5.2. If mediation is selected by the parties, they shall be advised by the Mediator or through these rules that the Mediator cannot take legal action on behalf of either side; that neither party is under any legal obligation to follow the recommendations of the Mediator; that either party is free to seek a judicial determination of the matter in dispute; and that both parties are free to seek legal representation at any time.

5.3. The parties to the mediation may be represented by counsel at their own expense; however, the informal nature of the mediation is to be preserved at all times.

5.4. The legal rules of evidence shall be relaxed during the mediation and all relevant information shall be considered and weighed by the Mediator.

5.5. Except in unusual circumstances, the Mediator shall meet with the parties in person or by conference call. However, the mediation proceedings shall not be recorded or transcribed. The Mediator will otherwise conduct all proceedings in his/her discretion. Insofar as practicable, the Mediator will schedule and hold the initial meeting with the parties within 30 days after receipt of the complaint from the Liaison.

5.6. At any time during the mediation process, and as may be required or appropriate in the circumstances, the Mediator may refer all or part of the matter to the Office of Disciplinary Counsel.

5.7. If the Mediator is unable to resolve the dispute within fourteen (14) days after the commencement of the mediation, the Mediator shall return the entire file and prepare a brief report to the Liaison containing his/her findings and recommendations or a statement that the dispute has been unresolved. Copies of the report will be furnished to the client and attorney and the matter will be closed, unless the parties agree to binding arbitration as provided in Rule 6 below.

5.8. Mediation proceedings shall be confidential. Any records, reports or documents relating to it are open to the parties, their respective representatives and designated HSBA Committee staff members, but shall not be open to the public or other third parties. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding:

- (a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
- (b) admissions made by the other party in the course of the mediation proceedings;
- (c) proposals made or views expressed by the mediator; and
- (d) the fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

RULE 6.0. ARBITRATION

6.1. The client and attorney may choose to submit any fee dispute to arbitration. If the parties choose arbitration, they shall be bound by the decision of the Arbitrator, unless the decision is set aside by the Circuit Court on appeal. A party may apply to the court for an order confirming the arbitration award or decision without any further evidentiary proceedings. The arbitration award or decision may be enforced in the same manner as a Court Judgment, as provided in Rule 8 below.

6.2. A dispute may be submitted to arbitration only with the written consent of both parties.

6.3. All fee disputes submitted to arbitration shall be heard and determined by one Arbitrator, unless the Committee, in its sole discretion, directs that a greater number of arbitrators be appointed. If more than one Arbitrator is used, all decisions or awards shall be made by a majority of the panel.

6.4. The Liaison shall ensure that the Arbitrator has no financial, personal or other interest in the outcome of the arbitration.

6.5. The Arbitrator shall at all times be neutral and impartial.

6.6. At any time before the hearing, any party may seek to disqualify the Arbitrator. An arbitrator who believes that he/she cannot render a fair and impartial decision or who believes that there is an appearance that he/she cannot render a fair and impartial decision, shall disqualify himself/herself. All requests to disqualify the Arbitrator shall be referred to the Committee's chair/co-chair for resolution.

6.7. The parties to arbitration may be represented by counsel; however, the informal nature of the arbitration is to be preserved at all times.

6.8. At the outset of the proceedings, the Arbitrator should ask for written statements from the parties clarifying the issues to be decided by the arbitration. If the parties cannot agree on the issues, the matter shall be referred to the Committee for further handling.

6.9. At any time during the arbitration process, and as may be required or appropriate in the circumstances, the Arbitrator may refer all or part of the matter to the Office of Disciplinary Counsel.

6.10. Arbitration proceedings shall be confidential. Any records, reports or other documents relating to it are open to the parties, their respective representatives and designated HSBA Committee staff members, but shall not be open to the public or other third parties unless otherwise permitted by law.

6.11. All arbitration proceedings will be held at a place and time convenient for the parties and selected by the Arbitrator. The Arbitrator shall provide written notice of the date, time and place of the arbitration hearing at least fourteen (14) days prior to the actual hearing. The Arbitrator may in his/her discretion schedule a pre-hearing conference.

6.12. If both parties agree in writing to waive the hearing and make a written submission of the evidence, the Arbitrator shall provide each party reasonable time to present his/her case in writing and to respond to the assertions of the other. If the Arbitrator, after reviewing the written submissions concludes that a hearing is necessary, such a hearing will be convened; otherwise, a decision shall be rendered on the basis of the submissions.

6.13. There shall be no direct communication between the parties and the Arbitrator other than at the hearing and any pre-hearing, unless the parties and the Arbitrator agree otherwise.

6.14. The Arbitrator's award or decision shall be made in writing and returned to the Liaison with the entire file within thirty (30) days after the conclusion of the hearing. Copies of the award will be forwarded to the parties by the Liaison.

RULE 7.0. ARBITRATION HEARING AND PRE-HEARING PROCEDURES.

7.1. Insofar as practical, the rules and regulations of the American Arbitration Association with respect to the conduct of hearings in commercial arbitration cases shall apply to the arbitration hearing.

7.2. The Arbitrator shall have no subpoena power concerning attendance of witnesses or production of documents.

7.3. The parties to the arbitration are entitled to present evidence and cross-examine witnesses appearing at the hearing.

7.4. The parties may offer such evidence as is relevant and material to the dispute. The Arbitrator shall be the judge of the materiality and relevancy of the evidence offered; conformity to the legal rules of evidence shall not be required.

7.5. Upon request of any party, or in the discretion of the Arbitrator, the testimony of witnesses is to be given under oath administered by the Arbitrator.

7.6. If any party to an arbitration who has been notified of the hearing date fails to appear at the hearing, the Arbitrator may either postpone the hearing or proceed with the hearing and determine the controversy upon the evidence produced at the hearing.

7.7. The hearing and all other proceedings shall otherwise be conducted in the discretion of the Arbitrator.

7.8. The award shall be in writing signed by the Arbitrator. It shall state the amount of the award, if any, and the terms of payment, if applicable, and may set forth any additional comments the Arbitrator may wish to make.

7.9. With the exception of the award itself, all records, documents and files pertaining to the arbitration shall not be open to the public or any person not involved in the dispute, except with the consent of the parties or as may be required by law.

7.10. In the event of the death or incompetency of a party to the hearing prior to the close of the hearing, the proceeding shall be abated without prejudice to either party to proceed in a court of proper jurisdiction to seek such relief as may be warranted. In the event of death or incompetency of a party after the close of the hearing but prior to a decision, the decision rendered shall be binding upon the heirs, administrators or executors of the deceased and on the estate or guardian of the incompetent.

RULE 8.0. ENFORCEMENT OF ARBITRATION AWARD.

8.1. In any case in which both the client and the attorney agreed to binding arbitration, any award rendered may be enforced by any court of competent jurisdiction, as provided by Chapter 658A of the Hawaii Revised Statutes.

8.2. If the Arbitrator determines that the participating attorney who signed a consent to binding arbitration is not entitled to any fee or is required by the award to return all or any portion of a fee previously paid, service of a copy of such award on said lawyer shall:

- (a) Require a rebate of any amount found to be due to the client; and
- (b) Terminate all claim and interest of the participating lawyer against the participating client or clients in respect to the disputed fee.

8.3. If the award shall be in favor of an attorney who consented to binding arbitration, it shall fix the amount to which he/she is found to be entitled. Payment of that amount shall:

- (a) Constitute a complete satisfaction of all claims and interest of the participating attorney against the participating client in respect to the subject matter of the arbitration; and
- (b) Terminate all right of such attorney to retain possession of any documents, records or other properties of such client or clients pertaining to the subject matter of the arbitration then held under claim of attorney's lien or for other reasons.

RULE 9.0. ADMINISTRATIVE FEE.

9.1. A non-refundable administrative fee will be paid to the HSBA for any dispute that is submitted to and accepted by the program for mediation or arbitration. This fee will be \$100 for any mediation and \$150 for any arbitration. The fee is payable in full by the respondent after the parties are notified of the assignment of the dispute to a mediator/arbitrator. The expenses of any witnesses at the mediation or arbitration shall be paid by

the party producing the witness. All other expenses shall be borne equally by the parties unless they agree otherwise.

RULE 10.0. PRESERVATION OF RECORDS.

10.1. The Liaison shall maintain permanent records of all matters processed by the Committee and the disposition thereof, as he/she may be directed by the Executive Director. This paragraph shall not be construed to require the permanent retention of correspondence, memoranda, transcripts or other similar documents which underlie the final disposition of the matter by the Committee.

10.2. The Liaison may dispose of all records and documents relating to a dispute within one (1) year after the date of the Committee's decision.

RULE 11.0. REPEALING CLAUSE.

11.1 These rules supersede and repeal all prior Hawaii Bar Association Rules for Mediation/Arbitration of Fee Disputes.

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