

ORANGE COUNTY BAR ASSOCIATION
MANDATORY FEE ARBITRATION COMMITTEE

Post Office Box 6130, Newport Beach, California 92658

Telephone: 949-440-6700 Facsimile: 949-440-6710

In the Matter of the Arbitration of

Melissa Wolfenbarger

PETITIONER

and

Derek Riley, Esq

RESPONDENT

OCBA CASE NO.: NV-017-6360

ARBITRATION AWARD

Recitals and Findings:

1. Attorney: Derek Riley, Esq, ☒ was present ☐ was not present and
☒ was not represented by counsel ☐ was represented by Attorney: _____
2. Client: Melissa Wolfenbarger ☒ was present ☐ was not present and
☒ was not represented by counsel ☐ was represented by Attorney: _____
3. Total Amount in Dispute per Petition: \$ 5775.00
4. This arbitration is ☒ Advisory only ☐ Binding (pursuant to ☐ pleadings ☐ written stipulation dated: _____)
5. Pursuant to ☒ notice dated February 1, 2018 ☐ stipulation dated _____,
the arbitration hearing was held on March 9, 2018, at the following location:
Orange County Bar Association
4101 Westerly Place
Newport Beach, CA 92660
6. The hearing of this matter was held before ☒ a single arbitrator ☐ a three arbitrator panel.
7. ☐ Attorney ☐ Client failed to appear at the arbitration hearing.
The failure to appear was ☐ willful ☐ not willful ☐ no finding on this issue.
8. A Statement of Decision of the issues presented in this arbitrated dispute is attached.

Award:

Arbitration Filing Fee

- a. Total filing fee (see Petition): \$ 288.75
- ☒ filing fee prepaid by Client ☐ filing fee prepaid by Attorney

Attorney Fees, Costs and Interest Charges

- b. Total attorneys' fees and costs that should have been charged: \$ 3,625.00
- c. Pre-Award interest is ☐ is not ☒ awarded to Attorney in amount of: + \$ 0.00
- d. **Total Attorney Fees, Costs and Interest Charges** (item "b" plus item "c") \$ 3,625.00
(insert amount of item "b" PLUS amount of item "c" at item "d")

Client Payments and Credits

- e. Amounts paid to Attorney by or for the benefit of Client: \$ 6,625.00
- f. Amount of filing fee prepaid by Client: + \$ 288.75
- g. Portion of filing fee Client should pay: - \$ 0.00
- h. Pre-Award interest is ☒ is not ☐ awarded to Client in amount of: + \$ 583.56
- i. **Total Client Payments and Credits** (item "e" plus item "f" minus item "g" plus item "h") \$ 7,497.31
(insert amount of item "e" PLUS amount of item "f" MINUS amount of item "g" PLUS amount of item "h" at item "i")

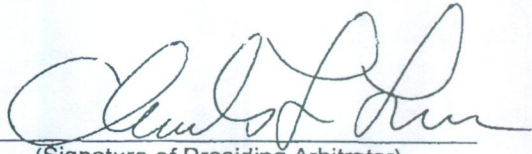
Payments, Refunds and Adjustments

- j. Neither Attorney nor Client shall make any further payment or refund to the other. ☐
(Check box "j" only if amount of item "d" and amount of item "i" are equal)
- k. Attorney shall **refund** to Client: (item "i" minus item "d") \$ 3,872.31
(Complete item "k" only if amount of item "d" is less than amount of item "i")
- Payment of this award shall be by the following **responsible attorney(s)**:
- (1) Attorney: Derek Riley, Esq SBN 230933
- (2) Attorney: SBN
- l. Client(s) shall **pay** to Attorney: (item "d" minus item "i") \$ _____
(Complete item "l" only if amount of item "d" is greater than amount of item "i")

Dated: April 6, 2018

Charles L. Larson, Esq.

(Name of Presiding Arbitrator)


(Signature of Presiding Arbitrator)

(Name of Panel Arbitrator)

(Signature of Panel Arbitrator)

(Name of Panel Arbitrator)

(Signature of Panel Arbitrator)

ARBITRATION AWARD
STATEMENT OF DECISION
Wolfenbarger v. Riley
OCBA Case No.: NV-017-6360

I. Background and Appearances

The arbitration was conducted on March 9, 2018 at the offices of the Orange County Bar Association, 4101 Westerly Place, Newport Beach, CA 92660. The sole arbitrator who heard the matter was Charles L. Larson, Esq. The arbitration convened at approximately 2:00 p.m. in accordance with the Notice of Hearing. The hearing lasted approximately one and one-half hours.

At the hearing, Petitioner, Melissa Wolfenbarger and Respondent Attorney, Derek Riley, Esq, were both present, Ms. Wolfenbarger appearing telephonically. Neither party was represented by counsel. John Thomas Lemon appear telephonically as a witness for Ms. Wolfenbarger. No other parties were present. The parties were sworn and testified and evidence was submitted.

Ms. Wolfenbarger is referred to in many, if not most, of the submitted documents as Melissa Amagrande as her name changed due to marriage subsequent to the representation on which this arbitration is based.

Upon completion of the hearing the matter stood submitted.

II. Relief Requested

Petitioner Wolfenbarger seeks a refund of \$5775.00 of a total of \$6625.00 paid to Respondent Attorney Riley. Respondent Attorney Riley argues that the underlying case included a complex custody matter on which he spent substantial time and that the value of the services provided actually exceeds what he has been paid and that Petitioner should be entitled to no refund.

III. Facts & Contentions

A. Petitioner, Melissa Wolfenbarger

Petitioner states that she did enter into a fee agreement with Respondent and that he paid the initial deposit of \$2,500 required by the retainer agreement.

She also states that prior to entering into the fee agreement, she paid respondent, on a limited scope basis, \$600.00 for paperwork and then \$250 for an appearance. Additionally, she paid \$275 in costs for a subpoena subsequent to the fee agreement.

Petitioner also states that when the matter become more complex and it appeared that there would actually be a trial over custody and move away that she paid an additional retainer to

Respondent. Although Respondent requested \$5,000.00 she was only able to come up with \$3,000, but agreed to raise the other \$2,000.00 and pay it as soon as possible.

Petitioner stated that subsequent to the payment of the \$3,000 respondent had only minimal communication with her and she began to lose confidence, finally discharging him and hiring new counsel on May 31, 2016. Thereafter, she requested that the \$3,000 deposit be returned. At that time, Respondent did not argue over the validity of the request and only stated that he did not have the money to repay her.

Mr. Lemon also testified on Petitioner's behalf. Respondent attorney objected to Mr. Lemon being allowed to testify as he contended that proper notice of the witness had not been given. The arbitrator allowed the testimony but finds it to be cumulative and unnecessary to the decision.

B. Respondent, Derek Riley, Esq.

Respondent states that he initially agree to provide assistance to Ms. Wolfenbarger in a limited scope arrangement as she did not have a great deal of money with which to pay attorney's fees. For this limited scope work, he was paid \$600.00 for paperwork and then \$250 for an appearance. Additionally, he received \$275 in costs for a subpoena. The fee agreement was entered into when the matter became a contested custody battle. At the time of time the fee agreement was entered into he received \$2,500 from Ms. Wolfenbarger. Then, when it appeared the matter was going to go to trial, he requested another \$5,000 of which he was paid \$3,000.

Respondent concedes that he did not keep accurate billing records nor send bills in a timely fashion. However, he produced what he contends to be a conservative estimate of the work he did on the project based on a reconstruction of the time spent.

IV. Discussion

A. Enforceability of the Written Fee Agreement.

This case involves a written fee agreement. Neither party disputes the existence or the contents of the agreement. Therefore the standard of review as described in Arbitration Advisory¹ 93-02 will be applied.

Under this advisory, the Arbitrator must first decide whether the fee agreement is valid and enforceable. To be valid and enforceable, the agreement must comply with California Business and Professions Code Section 6148 and must not violate Rule 4-200 of the Rules of Professional Conduct regarding illegal or unconscionable fees.

The contract clearly states the basis for compensation in compliance with Section 6148(a)(1), the nature of the legal services - Section 6148(a)(2), and the responsibilities of the attorney and the clients - Section 6148(a)(3). The attorney's rate at \$200 per hour was not challenged and is well within the billing range of attorneys in Orange County, and in fact on the low end.

¹ The Arbitration Advisories referred to herein are the opinions of the Committee on Mandatory Fee Arbitration of the State Bar of California. Further information and copies of these Advisories may be found on the website of the State Bar of California.

The fee agreement is enforceable and the performance of the parties will be judged by the terms of the agreement.

B. Work Prior to the Retainer Agreement

Neither party appeared to be in dispute over the work done prior to the retainer agreement and Petitioner was sufficiently satisfied with the work that she subsequently hired Respondent to represent her. Therefore the Respondent was paid \$850.00 in fees which are not in dispute.

C. Billings

Respondent attorney presented billing records that he conceded were prepared specifically for the arbitration hearing. These entries were generic in nature, repetitive and without supporting details. Arbitration Advisory 2016-02, regarding the review of billings, provides:

Furthermore, generalized time entries such as "research issues", "review file", "attention to file", "discovery", "prepare for trial", "trial prep", and other similar general statements are not specific enough to let the client know what was done. If a lawyer uses such non-specific task descriptions, *it may be appropriate for the arbitrator to place on the lawyer the burden of clarifying what was actually done to assess whether the generalized time entries are actually compensable and appropriate.*

[emphasis added]

Given the inadequacy and untimeliness of the billing records, the Arbitrator cannot value the work based on the contractual terms, and must look to additional factors.

D. Value of Attorney's Work.

Because the billing records were not created in accordance with the contract the arbitrator is left with the problem of divining the value of services actually provided. Respondent attorney contends that the value of the work he performed in a contested move-away case exceeds the amount of money that he was paid. However, this is not the only problem. In the absence of timely and accurate billing or specific documentation, the Arbitrator may look to what the attorney intentionally or negligently led their client to believe. [Arbitration Advisory 1998-03 "Client expectations, if reasonable, are certainly a factor to be considered by the arbitrator in making a determination"]

Petitioner testified that at the time she made the additional \$3000.00 payment it was her understanding that it was all to be applied to future work. Her willingness to make the payment and, in fact, her testimony at the hearing support a finding that the work to that point was of value and that she believed the initial funds to have been exhausted at that point

However, the weight of the evidence does not support the contention that Petitioner expected any of the \$3,000.00 to be used to cover existing bills. Nor do the contemporaneous communications between the parties suggest that Respondent felt otherwise. The communications might support the contention that Respondent believed he had some billable time since the payment of the \$3,000.00. However, no billings for those charges were provided prior to Petitioner's filing of the fee arbitration.

Because there is no contemporaneous billing and it does not appear that any work of value was done subsequent to the payment of the \$3,000.00, the Arbitrator finds the value of the work performed to be the sum of the payments made prior to the execution of the fee agreement, the \$2,500 previously paid and understood to be exhausted at the time of Petitioner's making the additional payment, and the fee for the subpoena.

E. Trust Account

Petitioner raised the issue that the \$3,000.00 should have been deposited into Respondent Attorney's client trust account. Unlike the often-used (and highly-questionable²) language that the initial retainer is considered earned upon payment, the fee agreement here merely authorizes the deposit of the unearned retainer into the Respondent's general account. It does not appear that such a waiver would be authorized by Rule of Professional Conduct 4-100. The fee agreement is silent on the treatment of subsequent deposits and the communications between the Petitioner and Respondent do not support the contention that Respondent believed the funds were entirely earned. Therefore the failure to deposit at least some portion of the second payment, if not all of the payments, in the attorney's general account would appear to be improper.

The Arbitrator does not find this potential violation of the Rules of Professional Conduct would affect the representation in such a way as to result in the denial of otherwise properly-earned fees. However, interest is awarded on unearned fee from the date of deposit. [*Matthew v. State Bar* (1989) 49 Cal.3d 784, 792]

V. Arbitration Award

Based on the above, the Arbitrator finds in favor of Petitioner Melissa Wolfenbarger and against Respondent Derek Riley, Esq. The total value of the services performed is \$ 3,625.00. Petitioner has paid \$ 6,625.00 towards the balance due, leaving an overpayment of \$ 3,000.00. As of May 31, 2016, the refund due is \$ 3,000.00 which Attorney shall pay to Client. Simple interest at 10% is awarded on this balance from April 28, 2016 in the amount of \$583.56.

Respondent's failure to properly maintain billing records or to return an unearned fee appearing to be the primary cause of the arbitration hearing, Respondent shall bear the arbitration fee.

² Some fee agreements provide for a "minimum" or a "nonrefundable" fee. A fee is minimum or nonrefundable only if it is a "true" retainer. In the absence of such an arrangement, a prepayment for actual services to be rendered in the future is, in fact, an advance deposit or a prepaid fee. Entitling such fee as a "true" retainer, "minimum" or "nonrefundable" will not control – the actual purpose of the payment and how it is treated controls. *Matthew v. State Bar* (1989) 49 Cal.3d 784, 791 (discipline imposed for failing to return unearned "nonrefundable" retainers). Unless the fee is actually a "true" or "classic" retainer, any unearned portion of that fee must be returned to the client at the end of the representation. California Rules of Professional Conduct rule 3-700(D)(2); *In re Matter of Lais* (1998) 3 Cal. State Bar Ct. Rptr. 987