The Placer County Bar Association has had a State Bar approved Fee Arbitration Program for many years, but by the questions asked many attorneys are not familiar with how the program works.

A client has a statutory right to compel an attorney to arbitrate disputes over fees, whether paid or unpaid, whether a deposit was refundable or a true retainer (rare these days), and whether or not the attorney has filed a suit to collect the fees. The details can be found at www.placerbar.org, under "Complaints" and "Fee Arbitration Program." No matter how good the result or the attorney-client relationship, most attorneys will end up in fee arbitration at some point.

PCBA's arbitration program maintains a list of trained arbitrators. At this time they are all attorneys but due to State Bar changes we may soon add lay arbitrators, to serve on three-person panels in the case of large disputes. PCBA recently sponsored a training seminar and a number of new arbitrators should be added to our list soon. This is important because given the size of the legal community in Placer County, it is necessary to have enough trained attorneys to handle the ever increasing number of fee dispute filings.

Three points seem to be news to people:

(1) Even a "nonbinding" arbitration award automatically becomes binding unless it is timely challenged after 30 days.

(2) Malpractice *can* be argued in fee arbitration, to the extent the malpractice affects the billings. A billing entry for a motion or pleading that should not have been filed (e.g., was frivolous, or incompetently done) is an unreasonable charge which the arbitrator will likely disallow. In theory, if a reasonably competent attorney would have told the client not to file a case, *all* billings in the case could be found to be unreasonable. In some cases expert testimony is taken during the arbitration on the question of malpractice, but usually the arbitrator applies her or his judgment to the question. Having said this, the arbitration process is at best an imperfect venue for malpractice claims. They should be addressed through the separate State Bar process or a malpractice suit.

(3) Lack of a written fee agreement where such an agreement was required (which is most of the time) limits the lawyer to a "reasonable" fee. (Bus. & Prof. Code, § 6148, subd. (c).) The specific factors defining what is a "reasonable" fee are provided by State Bar Committee on Mandatory Fee Arbitration Advisory No. 98-03, available at www.calbar.org. Generally speaking, there is no contract recovery in such cases and the arbitrator must evaluate the total hours spent, a reasonable hourly rate for the specific tasks (often not the billed rate) and the result obtained. Further, because no pre-award interest can be recovered in such cases because until the "reasonable" fee is determined no sum certain was ever due. (*Johnson v. Marr* (1935) 8 Cal.App.2d 312, 314-315.) Recently, the State Bar updated its model written fee agreements, which are available for free at www.calbar.org.

If the client asks for arbitration the attorney must submit (although she or he need not submit to *binding* arbitration). The converse is not true, but there are some cases where an attorney might want to invoke fee arbitration rather than submitting an unpaid account to collection, or filing a collection suit. Additionally, the attorney must afford the client a Notice of Right to Fee Arbitration 30 days before going to court.

Most disputes submitted to the program fall within the $7,500 small claims limit, but arbitration may still be a better forum for the lawyer and the client, for several reasons.

First, the hearing is scheduled by the arbitrator at a time reasonably convenient to the parties.

Second, the hearing and the award are confidential.

Third, the arbitrator issues a reasoned decision in writing, not just a dollar figure.

Fourth, the arbitration can be in any amount.