

Fee Dispute Committee and Attorney Liens: Efficient Methods to Getting Paid

BY ALEX G. LEVEQUE, ESQ.

As a friend and colleague recently and astutely stated, “Every time we don’t get paid constitutes a theft of time from our families and friends.” For most private practitioners, our time is our commodity and should accordingly be treated as precious; it is the one thing we cannot create more of. Even when we take proactive steps to mitigate against the risk of not getting paid for our time (e.g., “evergreen” retainers, monthly invoices, and tempering client expectations), fee disputes with clients are unfortunately inevitable at some point in our careers.

Most fee and billing disputes are resolved informally by the attorney taking the proverbial haircut.¹ There are, however, circumstances where impasses are reached. It is not unreasonable, for example, for an attorney to refuse a discount when there is no reason for a discount other than an unsupported demand. Similarly, it is not unreasonable for a client to withhold payment of a bill if the attorney has not provided an adequate summary of the work performed. When such impasses have been reached, both attorneys and clients have remedies. Of

course, a lawsuit can be filed for breach of contract – a remedy that is about as appealing as another round of COVID lockdowns. A lawsuit against a client is an expensive time-suck and invites a malpractice counterclaim and a phone call to your insurance carrier.

Fortunately, we have some alternatives in Nevada to get disputes resolved without having to go to the mattresses with your client. This article covers two methods:

- 1) Summary adjudication of an attorney’s lien; and
- 2) Arbitration through the State Bar of Nevada’s Fee Dispute Committee (FDC).

Summary Adjudication of Retaining and Charging Liens

In situations where you represent a client in a litigated proceeding, you should always first evaluate whether your fee dispute can be summarily resolved by the court under Nevada Revised Statute 18.015. A common misconception is that charging liens for outstanding attorneys’ fees are the only attorney liens that can be adjudicated by courts. The typical scenario for resolution of a charging lien is where a client is about ready to receive money in a lawsuit and the attorney seeks to have his or her fees paid from that money before the client obtains possession of it. In that instance, it is incumbent on the attorney to timely and properly perfect their lien and file a motion under NRS 18.015(6) before the money or other property is released.²

But that is not the only scenario where a court has jurisdiction to reduce an attorney’s contractual claim for fees to judgment. In *Fredianelli v. Fine Carman Price*, 133 Nev. 586, 402 P.3d 1254 (2017), the Nevada Supreme Court affirmed that the 2013 amendments to NRS 18.015 permit an attorney to seek adjudication of a *retaining lien* in the proceeding where the attorney represented the client. A retaining lien, unlike a charging lien, is a right to withhold a client’s file and other property in the attorney’s

possession. What this means is that if you are still in possession of the client's file or other property (e.g., funds in your client's trust account), you can assert a retaining lien on the same and file a motion to adjudicate the amount of the lien, which can result in a personal money judgment against the client. While the procedural steps for asserting, perfecting, and seeking adjudication of a retaining lien are no different from a charging lien; such steps are a fraction of the work otherwise required to initiate and resolve a separate civil action against the client for breach of contract.

If Adjudication of an Attorney Lien is Not Available, Arbitration Through the Fee Dispute Committee Should Be Your Next Avenue

The Fee Dispute Committee (FDC) offers two options for attorneys and clients to seek resolution of their dispute: mediation and arbitration; both are offered at no cost to the parties and are served by volunteer FDC members. Mediation is essentially a non-binding settlement conference. Arbitration, on the other hand, provides for the resolution of a fee dispute "where the parties agree to be bound by the decision of an arbitrator or arbitration panel."³ The fee dispute procedure is, admittedly, a little confusing when trying to ascertain when it is optional, when it is mandatory, and whether the claim will be submitted to mediation or arbitration. Hopefully, the following will resolve some of the confusion.

Every fee dispute submitted to the FDC for resolution starts when an attorney or client files a "Petitioner's Agreement for Arbitration of Fee Dispute." This is a form document that can be downloaded from the state bar's website at <https://nvbar.org/disputing-a-lawyers-fee/petitioners/>. By filing a petition, the petitioner agrees to binding arbitration. Filing a petition, however, does not guarantee binding arbitration on the responding party. The responding party can submit a binding arbitration agreement or elect to file a response only, in which case the dispute is assigned to mediation. There are two exceptions: (1) if the responding party is the attorney

and has been the subject of three or more disputes within the past two years; and (2) if there is a contractual agreement between the attorney and the client to submit to binding arbitration.⁴ Even if arbitration is mandatory, the parties can stipulate to first attempt mediation before submitting to arbitration.

Rules and Benefits of Arbitration

There are some jurisdictional issues and requirements to be aware of. The FDC and parties to a fee dispute are required to abide by the State Bar of Nevada Fee Dispute Arbitration Committee Rules of Procedure, which can be found here: <https://nvbar.org/disputing-a-lawyers-fee/arbitrators/>. The following are, in my opinion, the most important to know:

Statutes of Limitation

Statutes of limitation apply, and the FDC has no jurisdiction to adjudicate a fee dispute if the claim was made after the expiration of the applicable statute of limitation unless waived with the consent of the respondent.⁵

Amount in Controversy

The FDC has no jurisdiction over claims for less than \$250 and in excess of the mandatory arbitration limit identified in Nevada Arbitration Rule 3(A), which is currently \$50,000, exclusive of interest and costs.⁶

Pending Proceedings

The FDC does not have jurisdiction if there is already a pending proceeding where the fee dispute is at issue (unless the issue of fees is requested by that court to be handled by the FDC).⁷

No Jurisdiction to Resolve Legal Malpractice or Ethical Grievances

The FDC is prohibited from resolving claims based upon alleged malpractice or professional misconduct.⁸ A client, therefore, cannot counterclaim

or assert as an affirmative defense legal malpractice or violations of the Nevada Rules of Professional Conduct. In that same vein, an attorney cannot seek any sort of declaratory relief from the FDC that he or she acted ethically or did not deviate from any applicable standards of care. In fact, the FDC Rules of Procedure expressly provide that arbitration "shall in no way preclude a Disciplinary Board from investigating the conduct of the attorney involved for potential violation of the [Rules of Professional Conduct]".⁹

Good Faith

All parties are required to participate in good faith. If an appointed mediator finds that the attorney failed to participate in good faith during the mediation, the attorney may be referred to the Office of Bar Counsel.¹⁰

Procedure and Evidence

A single arbitrator – always an attorney – is appointed in cases where the amount in controversy is \$10,000 or less.¹¹ A three-member arbitration panel is appointed when the amount in controversy exceeds \$10,000. Regardless of whether they are the petitioner or the respondent, the attorney bears the burden to prove, by the preponderance of the evidence, that the fees charged are reasonable. Nevada Rule of Professional Conduct 1.5 is the legal standard for reasonableness.¹² The rules of evidence are relaxed with the weight of evidence given greater consideration than the admissibility of evidence. A written decision is required to be submitted within 30 days after the close of the arbitration hearing.¹³

Enforceability of Decision and Appellate Rights

An arbitration award may be enforced by any court of competent jurisdiction. Generally, there are no rights to appeal an arbitration award. There are, however, three narrow exceptions where a party can appeal to the FDC's

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Executive Council: (1) when an arbitrator failed to be disqualified pursuant to a valid exercise of a peremptory challenge or due to bias; (2) when the arbitrator failed to materially and substantially comply with the Rules of Procedure; and (3) when an arbitrator commits actual fraud during the proceedings.¹⁴

Not surprisingly, the FDC's caseload dropped significantly during the pandemic. Within the last few months, however, an increasing number of fee disputes have been filed. But even with the recent increase, it still only takes on average about four months from the date of filing to resolution: all the more reason to put those bar dues to work and get back some of your time.

ENDNOTES:

1. Michael S. LeBoff, Five Tips for Handling Costly Fee Disputes, American Bar Association Practice Points, November 18, 2020.
2. See e.g. *Leventhal v. Black & LoBello*, 129 Nev. 472, 305 P.3d 907 (2013) (holding that all four requirements of NRS 18.015 must be met for the court to adjudicate and enforce a charging lien, including a timely assertion of the lien before the case is completely concluded).
3. See State Bar of Nevada Dispute Arbitration Committee Rules of Procedure, at Rule I(A).
4. *Id.*, at Rules IV(B)(2), and V(A).
5. *Id.*, at Rule III(B).
6. *Id.*, at Rule III(C).
7. *Id.*
8. *Id.*
9. *Id.*, at Rule III(D).
10. *Id.*, at Rule V(E).
11. *Id.*, at Rule VII(B).
12. *Id.*, at Rule VII(E).
13. *Id.*, at Rule VIII(B)(2)(c).
14. *Id.*, at Rule IX.

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