

Committee on Mandatory Fee Arbitration
Fee Arbitrator Training

LEGAL ISSUES

YOU MAY HAVE TO DECIDE
AT THE ARBITRATION HEARING

August 2007

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Information compiled from the Committee on Mandatory Fee
Arbitration State Bar of California Mandatory Fee Arbitration Program
August 2005 Arbitrator Training Outline and CCCBA Rules of
Procedure

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Disputes Concerning Non-Clients

- **Revised 9/20/07 ROP 2(b)**

The request for arbitration may be made by

- (i) a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs ("non-client"), or
- (ii) the attorney claiming entitlement to fees against a non-client.

A fee arbitration between an attorney and a non-client is not intended to abrogate the requirement that the attorney exercise independence of professional judgment on behalf of the client or the protection of client confidences and secrets. Absent the client's written consent to disclosure of confidential information, a fee arbitration with a non-client is not intended to abrogate the attorney's duty to maintain client confidences and secrets, unless such disclosure is otherwise permitted by law. Absent the client's signature on the request for arbitration, when an arbitration with a non-client is initiated, notice of the request must be sent to the client by first class mail at the client's last known address. The program shall adopt procedures to insure that such notice has been sent to the client.

Disputes Concerning Non-Clients

- **PROGRAM PROCEDURES:**
 - When a non-client files for arbitration without the client's signature on the request, the program will send a letter to the client asking if they want to sign the request as a party, institute their own request for arbitration, or just attend the hearing. This information will be provided to the arbitrator upon assignment.
 - If the client chooses to make their own claim, the arbitrations will be consolidated for hearing before the same fee arbitrator or arbitration panel.
 - If you have questions, please contact the Fee Arbitration Coordinator.
- **REFER TO ARBITRATION ADVISORY 07-02** dated July 20, 2007
PRESERVATION OF CLIENT CONFIDENCES IN ARBITRATIONS INVOLVING PARTIES OTHER THAN THE CLIENT for a discussion of how to handle issues that may arise under this circumstance.

Agreements to be Bound

1. Fee arbitration is not binding – that is, all parties have an unconditional right to trial de novo **unless, after the dispute arises**, they execute a written agreement to be bound. **Thus, a “binding arbitration” clause in a retainer agreement, signed before the dispute arose, is unenforceable.** [B&P Code §6204(a)]
 - a. Exception: A party who willfully fails to appear at the arbitration hearing loses the right to trial de novo. Since court determines issue of willful nonappearance, it is important that the arbitration award address the circumstances of a party’s nonappearance in sufficient detail.

Agreements to be Bound

2. Any agreement to be bound must be in writing and must have been made after the dispute arose. Usually this will occur when the parties complete the arbitration request and reply forms.
3. Arbitrators must ascertain, before the taking of evidence begins, whether the arbitration is to be binding.
 - You may ask the parties if they wish to agree to binding arbitration before you start taking evidence. If they agree, have them sign and date the “Agreement for Binding Arbitration” form and include the form with your award.
4. Arbitrators should be wary of allowing parties to agree to binding arbitration after taking of evidence begins.

Agreements to be Bound

5. Once both parties have agreed to be bound, neither can withdraw from the agreement.
6. If a party wishes to withdraw from a binding arbitration and the matter has not been settled, all parties must agree to the matter being withdrawn. If the arbitration is non-binding, or there is no prior written fee agreement between the parties requiring fee arbitration, a request for arbitration may be withdrawn by the party requesting arbitration. [ROP 3(e)(2)]
7. Most non-binding arbitration become binding automatically with the passage of time (30 days) because many parties do not file for a trial de novo.
 - Arbitrators should take the same care with non-binding proceedings as with binding ones.
 - If parties believe that they have been treated fairly and understand (even if they do not agree with) the reasons for the decision, they are less likely to request a new trial.

Order of Proceeding & Burden of Proof

1. The issue of who has the burden of proof is left to the discretion of the arbitrator. For guidance, [see Arbitrator Advisory 96-03 dated June 7, 1996.](#)
 - CCCBA ROP 5(i) “The parties shall present their proof in a manner determined by the Panel Chair.”
2. No need to follow formalistic rules used at civil trials.

Order of Proceeding & Burden of Proof

3. At the outset of the hearing (if not before), have the parties articulate the points of contention and agreement.
 - a. A few leading questions from the arbitrator/panel can save a lot of time to narrow the issues.
 - i) “Do you all concede that there was not written fee agreement?”
 - ii) “Mr. Client, are you telling me/us that you do not disagree with the time shown on Ms. Attorney’s billings but believe that some of the time was not well spent?”
 - b. Be careful to explain that you are just narrowing the issues at this preliminary point and that you do not need a further response once you ascertain whether there is agreement on an issue.

Order of Proceeding & Burden of Proof

4. Even though the client is usually the petitioner and the attorney is the respondent, most arbitrators require the party best able to produce evidence on a given issue to present that evidence and bear the burden of proof on it.
 - a. If the client raises an issue as to whether the attorney performed, the attorney should generally bear the burden of establishing his or her performance.
 - b. Similarly, most arbitrators expect the attorney to establish what the agreement was (if any) between the parties and will hold the attorney responsible for not having an agreement or not being able to establish its content.
 - c. If the issue is one of non-credit for payments made, the client should generally bear the burden of establishing payment.

Evidence

1. Stipulation and admissions are encouraged.
2. Hearsay is permitted [CCP §1282.2(d)].
3. Decision will be based on preponderance of the evidence.
4. Any evidence may be considered if it is the type and character upon which ordinary people may rely in the ordinary course of serious affairs, regardless of the existence of any common law or statutory rules to the contrary.

Evidence

Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary.

Evidence relating to claims of malpractice or professional misconduct, whether or not the client was actually harmed, shall be admissible but only to the extent that those claims bear upon fees, costs, or both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages, offset or otherwise, for injuries underlying any such claim. Nothing in this section shall be construed to prevent the arbitrators from awarding a refund of unearned fees, costs, or both, previously paid to the attorney by the client.

[CCCBA ROP 5 (b)]

Evidence

6. Consider background, experience and relative sophistication of parties. In some cases, a party (especially likely to be the client) may be so unfamiliar with, or intimidated by, the proceedings that it affects that party's ability to provide meaningful evidence. Arbitrators should make every effort to make a full and fair review of the facts.
7. Parties may waive personal appearance and submit testimony and exhibits by declaration under penalty of perjury.

Evidence

8. Factors which may have a bearing on determination of dispute re: attorney's obligations include:
 - a. Attorney's understanding and extent of legal knowledge or experience of client;
 - b. Whether ramifications of fee agreement or other documents to be signed by client were fully explained.
 - c. Whether itemized bill or written or oral explanation of charges were given if requested;
 - d. Whether billings represent time reasonably spent on behalf of client, or reasonably necessary to achieve client's objectives;
 - e. Whether billings reflect charges which exceed maximum agreed by parties, and whether there was consent to additional charges.

Evidence

9. Client's conduct may also be taken into consideration.
 - a. Whether client fully informed attorney as to facts which might affect outcome of case, or extent of fee to be charged.
 - b. Whether client sufficiently informed attorney of client's ability to pay.
 - c. Whether client made reasonable efforts to communicate with attorney about fee dispute, or amount of charges be incurred.
 - d. Whether client requested services beyond scope of fee estimate originally provided by attorney.

Evidence

10. Attorney/client and work product privileges do not prohibit disclosure of relevant communications or work product in fee arbitrations; such disclosure does not constitute waiver for any other purpose. [B&P Code §6202]

11. Exhibits and documents should be returned to parties who submitted them following submission of award. Handwritten notes or other materials prepared by any arbitrator for use in the hearing are to remain with the arbitrator or be destroyed.
 - Any party who has submitted exhibits or documents to the panel shall, upon service of the award, make arrangements to retrieve them.

 - If no arrangements have been made within 60 days the exhibits or documents will be destroyed. [ROP 6(f)]

Arbitration With or Without a Written Fee Agreement

1. Is there an enforceable written fee agreement?
 - a. Legislation requiring a written fee agreement will invalidate any agreements not in writing and will make non-complying written agreements *voidable*.
 - i) B & P Code § 6147 generally requires a written fee agreement where the attorney represents the client on a contingent fee basis.
 - ii) B & P Code § 6148 requires a written fee agreement in certain cases not coming within § 6147 where fee are expected to be more than \$1000, with specified exceptions including when services rendered in an emergency, when an agreement is implied because similar services were previously rendered to and paid for by the client, and when the client is a corporation.

Arbitration With or Without a Written Fee Agreement

- iii) B & P Code § 6146 prescribes terms for retainer agreements in medical malpractice cases, limiting fees.
- iv) All three sections set specific requirements as to the content of the fee agreements and some of the procedures for the execution of the agreements.
- v) Sections 6147 and 6148 provide that a non-complying agreement is voidable at the option of the client, and the attorney is entitled to collect a reasonable fee.
- vi) In September 1999, the Bar Association of San Francisco issued Opinion # 1999-1, which suggests that a fee agreement for both an hourly rate and a contingent fee may be permissible.

Arbitration With or Without a Written Fee Agreement

b. The State Bar Rules of Professional Conduct provide assistance in judging the validity of a written fee agreement.

i) Attorneys “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.”

Rule 4-200(A)

(a) “Unconscionability” is generally determined based upon the facts and circumstances existing when the agreement was made. Rule 4-200(B)

(b) Rule 4-200(B) (1)-(11) sets forth factors to be considered in determining unconscionability.

Arbitration With or Without a Written Fee Agreement

i) Fee agreement providing for what has been called a “true” or “classic” retainer, which characterizes a payment as a “nonrefundable” fee or one “earned upon receipt”, is enforceable only if the client has agreed that the amount was paid “solely for the purpose of ensuring the availability of the member.”

Baranowski v. State Bar, (1979) 24 Cal.3d 153. Otherwise it is governed by Rule 3-700(D)(2), which requires that the attorney “[p]romptly refund any part of a fee paid in advance that has not been earned.” See *Arbitration Advisory 01-02*, dated May 16, 2001.

ii) Fee agreements should be fair and reasonable and drafted in a manner which will be easily understood by the client. *Alderman v. Hamilton*, (1988) 205 Cal. App.3d 1033 1037.

Arbitration With or Without a Written Fee Agreement

c. To assess the enforceability of a written fee agreement, **Arbitration Advisory 93-02 dated November 23, 1993** suggests the following approach:

i) Begin with the contract formation issues, i.e. is the agreement valid and enforceable taking into account the usual contract considerations and the specific legislative requirements, if applicable to the attorney/client agreement?

ii) If it is otherwise valid and enforceable, are its terms, under the guidelines of Rule 4-200, “unconscionable?”

iii) Was the attorney’s performance under the agreement reasonable?

Arbitration With or Without a Written Fee Agreement

2. If there is no written fee agreement or if the written fee agreement is unenforceable, the attorney is generally entitled to a reasonable fee.
 - a. **See Arbitration Advisory 98-03 dated June 23, 1998** for a comprehensive discussion of procedures to determine a reasonable fee.
 - b. In determining a reasonable fee, the criteria set forth in Rule 4-200(B) are the generally accepted criteria but the standard for their application is lower (e.g., a fee of \$750 per hour may not be “unconscionable” when applying the criteria of Rule 4-200(B), but may well be viewed as “unreasonable” and reduced accordingly.
 - c. For additional materials regarding the determination of a reasonable fee, see A.B.A. Code DR 2-106(B); *Glendora Community Redev. Agency v. Demeter* (1984) 155 cal.App.3d 465, 474; *Stokus v. Marsh*, (1990) 217 Cal.App.3d 647; *Bruckman v. Parliament Escrow Corp.*, 91987) 190 Cal.App.3d 1051, 1062.

Voiding the Fee Agreement

1. The failure of the attorney to enter into a proper written fee agreement may leave the client free to void the agreement. If the client exercises that option, the attorney is entitled to a reasonable fee only.
 - a. In practice, the more difficult issue can be whether an arbitrator in the absence of any expression by the client, should raise the possibility that the agreement may not comply with the statute.
 - b. Some arbitrators will not void the agreement unless the client affirmatively raises the issue. Others will simply deem the client to have elected to void the agreement if to do so would result in a lesser fee. Many arbitrators will bring the issue to the attention of the client, particularly if the client is not represented by counsel.
See Arbitration Advisory 96-04 dated September 13, 1996.

Voiding the Fee Agreement

c. In dealing with this issue, the following considerations may be relevant:

- i) A court may well raise sua sponte issues of illegality.
- ii) Civil Code §1608 – contracts for illegal consideration are void.
- iii) Civil Code §1598 – contracts which are wholly for an unlawful object are void.
- iv) Civil Code §1599 – contracts which have several objects are void as to the unlawful portion, e.g. separate out usurious interest from balance due on principal.

Requirements for Billing Statements

1. Governed by B & P Code §6148(b). “All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney’s fees and costs.” *Ibid.* See **Arbitration Advisory 95-02 dated June 9, 1995.**
2. Bills for costs and expenses shall clearly identify nature and amount of costs and expenses incurred.
3. Bills must be provided to client no later than 10 days after client’s request; but client is entitled to make such request no more than once every 30 days.
4. Failure to comply with these requirements renders fee agreement voidable at client’s option. If option is exercised, attorney eligible to receive a reasonable fee. B & P Code §6148(c).

Arbitration where there is Malpractice or Professional Misconduct

1. Evidence relating to claims of malpractice and professional misconduct shall be admissible only to the extent that those claims bear upon the fees or costs to which the attorney is entitled. B & P Code § 6203(a).
 - a. Arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying any such claim. B & P Code § 6203(a) & § 6200(b)(2).
 - b. Arbitrators may rule that the value of attorney's services was lessened due to the way case was handled, and reduce fee. *Id.*

Arbitration where there is Malpractice or Professional Misconduct

2. Conflicts of interest and other ethical violations.
 - a. Occasionally, an arbitration will reveal that the attorney undertook to represent the client under an impermissible conflict of interest or committed some other ethical violation. See California Rules of Professional Conduct, Rules 3-300, 3-310 & 3-600. **See also Arbitration Advisory 98-03 dated June 23, 1998.**
 - b. California law suggests there must be a serious violation of the attorney's responsibilities before an attorney who violates an ethical rule is required to forfeit fees. See *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000.

Arbitration where there is Malpractice or Professional Misconduct

- c. Care is required, however, for even severe ethical violations sufficient to invalidate a written fee arrangement may still not preclude fee recovery on the theory of quantum meruit or unjust enrichment. See *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1; *Estate of Falco*, (1987) 188 Cal.App.3d 1004; *Kallen v. Delug*, (1984) 157 Cal.App.3d 940.
- d. The apparent rule is that the attorney may be entitled to keep fees earned before the conflict arose but must disgorge all fees charged and paid after the violation occurred. See e.g. *David Welch Co. v. Erskine & Tully*, (1988) 203 Cal.App.3d 884.

Court-Ordered Fees

1. B & P Code § 6200(b) provides that there is no jurisdiction to arbitrate fees paid where the fee “has been determined pursuant to statute or court order.”
2. The problem arises when attorneys’ fees have been assessed by a court against one side in litigation, such as under Civil Code § 1717, but there has been no determination of the reasonableness of the fee as between the attorney and the recipient client.
3. In the absence of a court order arising from a proceeding where the client had a fair opportunity to contest the fee owing to his own counsel, the dispute is subject to mandatory fee arbitration. **See Arbitration Advisory 94-02 dated April 22, 1994.**

Statute of Limitations as a Defense

1. See Arbitration Advisories 96-02 dated June 7, 1996 and 98-01 dated January 16, 1998.
2. Although Code of Civil Proc. § 340.6 [statute of limitation on attorney malpractice] may seem to apply, it does not because it deals with claims of professional negligence, not fee disputes.
3. B & P Code § 6201(c) allows an automatic stay of any civil suit brought by an attorney if the client elects to arbitrate under the MSF program.
4. B & P Code § 6206 tolls any applicable statute of limitations while an MFA arbitration is being conducted.

Statute of Limitations as a Defense

5. Nevertheless, an MFA arbitration remains subject to any applicable statute of limitations such as Code of Civil Proc. § 339 (two years on an oral contract) or Code of Civil Proc. § 337 (four years on a written contract, book account or account stated).
6. Occasionally, Code of Civil Proc. § 352.1 may apply. It states that if a person with a fee dispute is incarcerated when the cause of action accrued, the time of that “disability” is added to the applicable limitations period, “not to exceed two years.”

Effect of Mandatory Fee Arbitration Program of Private Arbitration Clauses in Fee Agreements

1. Amendments to B & P Code §§ 6200 & 6203(a) have extended the right to arbitration and automatic stay provisions of the B & P Code to fee disputes where there is a written and otherwise enforceable arbitration clause in the retainer agreement. **See Arbitration Advisory 98-01 dated January 16, 1998.**
 - a. A client may elect to stay an arbitration proceeding involving fees which has been initiated in another forum if a timely request is made for Mandatory Fee Arbitration, B & P Code §§ 6201(a) & (b).
 - b. An agreement that the arbitration award will be binding is effective **ONLY** if made *after the dispute over fees and/or costs has arisen*. B & P Code § 6204(a).

Effect of Mandatory Fee Arbitration Program of Private Arbitration Clauses in Fee Agreements

2. Thus, where there is a binding arbitration clause in the fee agreement, the client may elect to proceed under the Mandatory Fee Arbitration statute with right of court trial *de novo*, or agree after the dispute has arisen to waive that right and to proceed with the binding private contractual arbitration. *Alternative Systems, Inc. v. Carey* (1998) 67 Cal.App.4th 1034.

Sanctions Against a Party

1. See Arbitration Advisory 02-01 dated May 17, 2002.
2. Monetary sanctions for misconduct or egregious behavior of a party are not authorized or permissible.
3. As a last resort to achieve fairness at the hearing, procedural sanctions, such as exclusion of evidence for willful failure to comply with pre-hearing requirement to exchange documents, may be appropriate. In contrast, sanctions such as basing the decision on a party's conduct at the hearing or excluding a party from testifying are not authorized or permissible.