THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

ARBITRATION ADVISORY 2024-01

Replaces and Supersedes Arbitration Advisory 1993-02

SUMMARY

Under applicable California law, where a written fee agreement is required under California Business and Professions Code[1] sections 6147, 6148,[2] or related sections (a "complying agreement"), and such a written agreement does not exist, the applicable standard of review is the "reasonable fee" or "lodestar" standard.[3] On the other hand, where the parties have entered into a complying agreement, under applicable California case law, the fee agreement determines the amount that is recoverable, even if it may be more than what would be recoverable under the reasonable fee or lodestar standard.

As the Court of Appeal held in *Pech v. Morgan* (2021) 61 Cal.App.5th 841, 846 [276 Cal.Rptr.3d 97] (hereafter *Pech*), "when an attorney sues a client for breach of a valid and enforceable fee agreement, the amount of recoverable fees must be determined *under the terms of the fee agreement*, even if the agreed upon fee exceeds what otherwise would constitute a reasonable fee under the familiar lodestar analysis." (Original italics.) This is unless the fee agreement is found to be unconscionable, or where the implied covenant of good faith and fair dealing may be found to have been breached by, among other things, whether unnecessary or duplicative services have been performed or the attorney failed to use "reasonable care, skill, and diligence in performing his or her contractual obligations." (*Id.* at pp. 846, 852.)

The apparent rationale for the decision in *Pech* is that the parties should be permitted to contract for a fee higher than a "reasonable fee" under the "lodestar" standard where circumstances make such an agreement appropriate. The holding in *Pech* is that such a contract should be enforceable in accordance with its terms provided that the attorney's performance is in accordance with the standards articulated in *Pech*.

---

[1] All references to sections are to the Business and Professions Code unless otherwise stated.

[2] Section 6148 has several exceptions where a writing is not required, including in the case of a corporation.

[3] See Arbitration Advisory 1998-03 [updated March 20, 2015].

DISCUSSION

First, there is no question that a complying agreement does not operate to remove a matter from the jurisdiction of the fee arbitration statutes. A fee dispute involving a complying agreement is to be arbitrated under the statutory scheme despite the existence of a written fee agreement.

Second, the standard of review to be applied when analyzing a written fee agreement is a combination of the principles of contract law and the 13-factor test for unconscionability under California Rules of Professional Conduct,[4] rule 1.5, and not a determination of a "reasonable fee" under the "lodestar" analysis. To apply a "reasonableness" standard of review to the terms of a complying agreement would eliminate the difference between instances where the attorney has entered into a written fee agreement with their client and those where the attorney has failed to do so (and thus is limited to a "reasonable fee").

Thus, once it has been established that an otherwise enforceable written fee agreement is in existence, the higher standard of unconscionability should be applied to the terms of the written fee agreement. For example, where the contract rate may call for $600 per hour while the prevailing hourly rate charged by similarly experienced attorneys for similar work in the community is less than $600 per hour, the arbitrator should apply the $600 rate under the terms agreed upon by the parties' written contract unless, taking into consideration the factors listed in rule 1.5, the arbitrator finds that the $600 hourly rate is unconscionable.[5]

Accordingly, the first question that should be answered by the arbitrators is whether, applying the principles of contract law as well as taking into consideration the fiduciary duty of the lawyer to his or her client, the fee agreement is valid and enforceable.

If the arbitrators determine that the written fee agreement is voidable pursuant to one of the applicable Business and Professions Code sections, then the standard of review is a "reasonable fee" as provided in section 6148, subdivision (c) as if no written fee agreement existed.

If the arbitrators find that the written fee agreement is valid and enforceable under the principles of contract law, then the arbitrators should engage in three additional steps in reviewing the terms of the agreement.

The first additional step is a determination whether the written contract is unconscionable under the 13-factor test in rule 1.5. In this analysis, cases such as *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 [39 Cal.Rptr.2d 506] have held that "[un]conscionability has both a 'procedural' and a 'substantive' aspect. The former involves (1) 'oppression,' which refers to an inequality of

---

[4] All references to rules are to the California Rules of Professional Conduct unless otherwise stated.

[5] By this numerical example, the Committee does not intend to express an opinion on (a) whether these example hourly rates either are reasonable or unconscionable or (b) any difference between a reasonable rate and a contract rate may or may not render the latter rate unconscionable. Rather, these are matters that arbitrators must determine for themselves as may be appropriate under the evidence presented at the hearing.

bargaining power giving no meaningful choice to the weaker or (2) the 'surprise' of a contractual term hidden in a printed contract . . . . 'Substantive' unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by circumstances under which the contract was made. . . . Presumably, both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable." Accordingly, the arbitrator must apply this standard to be satisfied that the client's consent is truly "informed."

The second additional step, assuming the arbitrators find that the written contract is valid and enforceable and that the terms, while not necessarily reasonable, are not unconscionable, then the arbitrators' analysis should be a review of the attorney's performance under the implied covenant of good faith and fair dealing. This analysis includes reviewing whether the attorney used reasonable care, skill, and diligence in performing the duties required of the attorney under the contract, that reasonable billing judgment was used by the attorney, that unnecessary, duplicative, or unproductive time is not charged to the client, and that the attorney has not performed services that were required as a result of the attorney's negligence or some lack of ordinary skill or diligence.

The third additional step is that the arbitrators consider the issue of any malpractice or violation of the Rules of Professional Conduct by the attorney during the representation.

In cases where malpractice or a breach of the Rules of Professional Conduct may be found, section 6203, subdivision (a) provides: "Evidence relating to claims of malpractice and professional conduct shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators may not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney."

In addition, in *Sheppard, Mullin, Richter & Hampton LLP v. J-M Mfg. Co., Inc.* (2018) 5 Cal.5th 59, 88-96 [233 Cal.Rptr.3d 378], (hereafter *Sheppard, Mullin*), the Supreme Court held that in certain cases where there has been a violation of the Rules of Professional Conduct, the written contract may be found to be void, in which case the attorney may be entitled to no fee or, depending upon the egregiousness of the breach, entitled to recover the reasonable value of his or her services under the "reasonable fee" standard discussed in Arbitration Advisory 1998-03 (last updated March 20, 2015), among other considerations articulated in *Sheppard, Mullin*.

CONCLUSION

Where the fee dispute is found to be governed by an enforceable written contract that complies with applicable Business and Professions Code sections, and is not unconscionable or tainted by some breach of the covenant of good faith and fair dealing or a violation of the Rules of Professional Conduct, then the dispute shall be determined under terms of the written fee agreement, even if the agreed upon fee exceeds what otherwise would constitute a "reasonable fee" under the familiar "lodestar" analysis.

This advisory is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.