ARBITRATION ADVISORY

1993-02

STANDARD OF REVIEW IN FEE DISPUTES WHERE THERE IS A WRITTEN FEE AGREEMENT

November 23, 1993

The State Bar's Committee on Mandatory Fee Arbitration has, from time to time, received inquiries regarding the standard of review to be used when arbitrating a matter in which the attorney and client have entered into a written fee agreement. This issue has been under discussion by the Committee over a period of time, and the purpose of this advisory is to set forth the Committee's analysis of an appropriate standard of review in such circumstances.

California Business and Professions Code section 6148 makes it clear that where a written fee agreement is otherwise required under the terms of the statute, and such a written agreement does not exist, the attorney may only recover a reasonable fee. The Committee has been unable to identify a similarly clear standard of review embodied in either statutory or case law where the parties have entered into a written fee agreement. A question has even been raised as to whether such a matter may be arbitrated under the arbitration statutes.

In an effort to bring some uniformity to the conduct of arbitration throughout the state, the Committee on Mandatory Fee Arbitration has undertaken to fully examine the issues of whether such matters are subject to arbitration and, if so, the standard of review to be applied in determining an award.

First, there appears to be no question that a matter otherwise subject to arbitration under the provisions of Business and Professions Code section 6200 et. seq. is to be arbitrated under the statutory scheme despite the existence of a written fee agreement. Conversely, the existence of a written fee agreement does not operate to remove a matter from the jurisdiction of the fee arbitration statutes.

Second, the Committee has concluded that the standard of review to be applied when analyzing a written fee agreement is a combination of principles of contract law

and Rule 1.5 (formerly Rule 4-200) of the Rules of Professional Conduct pertaining to illegal or unconscionable fees.

The first question that should be answered by the arbitrators is whether, applying principles of contract law, as well as taking into consideration the fiduciary duty of a lawyer to his or her client, the fee agreement is valid and enforceable. If the arbitrators determine that the fee agreement is not valid or enforceable, then the standard of review is a reasonable fee as provided in Business and Professions Code section 6148 as if no written fee agreement existed. If the arbitrators find that the written fee agreement is valid and enforceable under principles of contract law, the arbitrators should engage in a two-step process by reviewing the terms of the agreement separate from the attorney's performance under the terms of the agreement.

The terms of the written fee agreement should be reviewed under the standard of unconscionability as discussed in Rule 1.5 of the Rules of Professional Conduct. To apply the "reasonableness" standard of review to the terms of a written fee agreement would eliminate the difference between instances where the attorney has entered into a written fee agreement with his or her client, and those where the attorney has failed to do so and is limited to a reasonable fee under section 6148. In order to distinguish between those situations where a written fee agreement is in existence, and those where there is no such agreement, the higher standard of unconscionability should be applied to the terms of the written fee agreement.

For example, the arbitrators may find that the prevailing hourly rate charged by similarly experienced attorneys for similar work in the community is less than $400 per hour, and, if the issue were the determination of a "reasonable fee", the arbitrators would choose that amount as the hourly rate. If, however, a valid written contract between lawyer and client provides for an hourly rate of $400.00, the arbitrators should use the terms agreed upon by the parties unless, taking into consideration the factors listed in Rule 1.5 of the Rules of Professional Conduct the arbitrators find that the $400.00 hourly rate is unconscionable. If the agreed upon rate produces an unconscionable result, a reasonable standard should be applied to the ultimate fee on the theory that the written agreement between the parties is not enforceable.[1]

Assuming that the arbitrators have found that the written fee agreement is valid and enforceable, and that the terms, while not necessarily reasonable, are not unconscionable, then the arbitrators should review the attorney's performance under the terms of the agreement. In every contract, there is an implied covenant of good faith and fair dealing. While parties may include in a contract any terms not deemed unconscionable (for example, $400 per hour), the client has the right to expect that the attorney's performance of the contract will be in good faith and in a professional manner.

Hence, a "reasonableness" standard should be applied in reviewing the attorney's performance under the written fee agreement. This would include reviewing whether the attorney

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[1] By this numerical example, we do not intend to express an opinion on (a) whether these hourly rates are either reasonable or unconscionable or, (b) whether the relationship between "reasonable" and "unconscionable" is more or less than 20% or even that there is a percentage relationship between "reasonable" and "unconscionable." Rather, these are matters that the arbitrators must determine for themselves.

used reasonable care, skill and diligence in performing the duties required of the attorney under the contract, 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. This is not an exhaustive list, but merely representative of the type of performance issues that may arise during the arbitration.

The Committee hopes that the foregoing answers some of the questions that have arisen regarding the appropriate standard of review so that arbitrations may be conducted on a uniform basis throughout the state. Please keep in mind that the foregoing is not an official opinion of the State Bar, but merely reflects the conclusions of many hours of thought, research and discussion among the Committee members over an extended period of time.