ARBITRATION ADVISORY

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PRESERVATION OF CLIENT CONFIDENCES IN ARBITRATIONS INVOLVING PARTIES OTHER THAN THE CLIENT

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INTRODUCTION

In *Wager v. Mirzayance* (1998) 67 Cal.App.4th 1187, the court held that the Mandatory Fee Arbitration ("MFA") statutes require an attorney to deliver a Notice of Client's Right to Arbitration form to a non-client who may have contracted to pay for or guaranteed the payment of an attorney's fees prior to filing an action against such person to collect unpaid fees. Effective July 20, 2007, the State Bar's Board of Governors approved revised paragraph 13 of the State Bar Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards") to comply with the decision in the *Wager* case. The Board emphasized that, while a non-client may be entitled to pursue mandatory fee arbitration with or without the consent of the client, an attorney's duties under Business and Professions Code section 6068(e) to protect client confidences and secrets are not abrogated in such arbitrations.

This Advisory discusses several issues that are unique to non-client MFA arbitrations. Most importantly, while the MFA Committee believes that the great majority of non-client arbitrations will not require the revelation of client confidences and secrets, it is up to the arbitrator to ensure that client confidences and secrets are not compromised in non-client arbitrations. This Advisory discusses how arbitrators can respond when an actual or claimed conflict arises between the attorney's duties to protect client confidences and secrets and the attorney's need to defend or prosecute the fee arbitration with information that may be subject to these duties. Further, this Advisory explains that, when the complete resolution of the dispute is impossible without the unconsented revelation of client confidences or secrets, the fee arbitration must be dismissed. Finally, this Advisory discusses two additional issues that are unique to non-client arbitrations: client requests to participate and possible allocation of the award.

DISCUSSION

In response to the *Wager* decision, the State Bar's Board of Governors approved revised paragraph 13 of the Minimum Standards as follows:

> 13. "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 programs shall adopt procedures to insure that such notice has been sent to the client".

Paragraph 13 now permits arbitrations between attorneys and non-clients to go forward without requiring the client's signature on the request form, provided the required notice has been sent to the client. Thus, MFA arbitrators may be confronted with non-client arbitrations where the client is not present and has not expressly consented to the filing of the arbitration proceeding.[1] In handling such non-client arbitrations, arbitrators must be mindful of a number of issues unique to these proceedings.

1. <u>Duty to Protect Client Confidences and Secrets</u>

In adopting the language of Paragraph 13 that an arbitration between an attorney and a non-client does not abrogate the attorney's duties to preserve client confidences and secrets, the Board of Governors has made it clear that it considers Business and Professions Code section 6202 inapplicable in non-client party arbitrations or in any other way relieves the attorney of his or her duties under Business and Professions Code section 6068(e) to preserve client confidences and secrets. Additionally, a client's consent to a non-client fee arbitration (e.g., signing the arbitration request form) is not the same as the client's express consent to the disclosure of client confidences and secrets. Unless there is an express written consent from the client to the disclosure of client confidences and secrets, the attorney remains under the duty to preserve client confidences and secrets even when the client has consented to the non-client fee arbitration.

It is the MFA Committee's experience that in most non-client arbitration cases, resolution of the fee dispute between the non-client and the attorney will not require the revelation of any client confidences. In many cases, the evidence needed to resolve the dispute will not be

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[1] In accordance with revised Paragraph 13, the MFA Committee is recommending to local programs that they provide the required notice to clients of third-party arbitrations directly. And, in most cases, it can be expected that the client will either consent to the arbitration either at the outset or in response to the notice. There will be proceedings, however, where the client cannot be reached or will refuse consent. It is in these proceedings that the arbitrator must be sensitive to the conflict the attorney may face where he or she believes that he or she cannot both preserve client confidences and secrets and adequately present his or her case in the fee arbitration.

confidential, such as billing statements, non-privileged correspondence, testimony about the time expended and the tasks accomplished, etc. In other cases, the third party may be someone who is already within the ambit of the privilege such as a family member or other person who may have been present during some or all of the privileged communications, or someone as to whom the privilege may have been waived as to some or all of the privileged communications such as someone who is already aware of the status of the proceedings or who may have received a copy of the fee agreement or the billing statements at issue [*See, e.g., Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 346]. In such cases, there may be no conflict between the attorney's duties to the client and the attorney's need to present the case to the arbitrator.

In cases where there is a claimed or apparent direct conflict between the attorney's duties to preserve client confidences and secrets and the attorney's need to present his or her case, the arbitrator must be sensitive to this conflict and resolve it in a manner that does not permit or require the revelation of client confidences and secrets. Guidance in this area is found in two decisions, *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190-1191 and *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 467.

In *General Dynamics*, the Supreme Court stated that "trial courts can and should apply an array of *ad hoc* measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege." While not all of the suggestions of the Court in *General Dynamics* are appropriate in a MFA arbitration, among the "measures" mentioned was *in camera* inspections and testimony. Such *in camera* proceedings can be employed by the arbitrator to review foundational issues relating to circumstances suggesting the evidence claimed to be privileged may not be privileged. The arbitrator may not, however, require *in camera* disclosure of the substance of the communication in order to rule on the claim of privilege [*See*, Evid. Code § 915].

In addition, the arbitrator may recess the proceedings to permit or require the parties to ask the client for consent to reveal the evidence that the attorney otherwise would be required to withhold. This could involve an agreement that the non-client is a "person who (is) present to further the interest of the client in the consultation" [*Benge v. Superior Court, supra*], and thus the disclosure would not be "deemed a waiver of the confidential character of such matters for any other purpose" [Bus. & Prof. Code § 6202].

In considering whether to request such consent, however, the arbitrator and the attorney must be mindful of the inherent conflict facing the attorney where disclosure may be helpful to the attorney's case in the fee arbitration but harmful to the client in other contexts. Thus, if such consent is sought, only the informed written consent of the client should be accepted [*See, e.g.,* Los Angeles County Bar Association Formal Ethics Opinion 519 (2007)]. Further, only confidential information that may be relevant to the arbitration proceeding may be disclosed [*See*, Evid. C. § 958]. If the client is present at the arbitration, whether as a party or simply as a non-party participant, the client's consent can be obtained more readily. However, client participation is not the same as consent to the revelation of client confidences. The participating client retains the right to object to the revelation of client confidences. And, if consent to revelation is given orally during the proceedings, the arbitrator must be satisfied that it is freely and knowingly given before accepting the attorney's testimony about the communication.

Additionally, the arbitrator may explore other methods of resolving the dispute without considering evidence claimed to be privileged. In assessing the reasonableness of attorneys' fees,

the arbitrator has wide discretion. The arbitrator's decision may be based upon expert testimony [*Kurland v. Simmons* (1954) 126 Cal.App. 2d 79; *Kanner v. Globe Bottling Co.* (1969) 273 Cal.App. 2d 559], the experience and training of the arbitrator without expert testimony [*City of Los Angeles v. Los Angeles-Inyo Farms* (1933) 134 Cal.App. 268], contrary to expert testimony [*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618], without evidence of time records [*Weber v. Langholz* (1995) 39 Cal.App.4th 1578], or without any testimony or evidence at all [*Hedden v. Valdeck* (1937) 9 Cal.2d 631]. Thus, the arbitrator well may be able to fully resolve a dispute over the reasonableness of an attorney's fees without the need to consider privileged communications between the attorney and the client, such as from the billing statements.

There will be cases, however, where it will not be possible for the arbitrator to fully resolve the fee dispute without having to consider evidence that is claimed to be privileged or a client confidence or secret that the attorney is duty-bound not to disclose. Such cases might include whether the claimed need to perform disputed services was an instruction or other communication from the client. What both *General Dynamics* and *Solin* instruct in such cases is that when the arbitrator concludes after considering all possible alternative measures that the dispute "is incapable of complete resolution without breaching the attorney-privilege (or without revealing client confidences and secrets without the client's consent), the (fee arbitration) may not proceed" and dismissal is required [*Solin v. O'Melveny & Myers, supra*].

2. <u>Other Issues that May Arise in Non-Client Arbitrations</u>

Two additional issues must be anticipated in non-client arbitrations. First, in some non-client arbitrations the client may request to participate, either as a party or as a non-party participant. Where such participation is requested, the arbitrator must accommodate the client's participation in all aspects of the proceedings, including scheduling, requests for continuances, notice of the hearing, etc.

Second, where the client chooses to participate as a party and claims a refund, the arbitrator will have to take care in making sure that any refund ordered goes to the person who actually paid or otherwise legally may be entitled to a refund of the disputed charges.