

# COMMITTEE ON MANDATORY FEE ARBITRATION

## ARBITRATOR TRAINING

### OUTLINE

#### I. Introductions

#### II. Program Overview and Relationship between State Bar and Local Bar Programs

- A. Under Bus. & Prof. Code §6200, effective 1979, the State Bar is required to arbitrate fee disputes.
  - 1. Attorney must give client notice of right to arbitration on State Bar approved form, available from local programs or State Bar website ([www.calbar.ca.gov](http://www.calbar.ca.gov)), before suing client for fees, costs or both.
  - 2. Client's right to arbitrate is waived if client (a) fails to request arbitration within thirty days of receipt of notice, Bus. & Prof. Code § 6201(a), (b) commences an action or files any pleading seeking judicial resolution of fee dispute or affirmative relief for malpractice, Bus. & Prof. Code § 6201(d), or (c) answers a complaint in the attorney's civil action for fees, Bus. & Prof. Code § 6201(b).
  - 3. Attorney and client may stipulate to arbitration after the client's waiver, Bus. & Prof. Code § 6201(e).
  - 4. Once arbitration is requested by the client, any filed action or other proceeding (including small claims court actions and other types of arbitration) commenced by the attorney are automatically stayed, with limited exceptions, e.g. writs of attachment and other provisional remedies, see Code of Civ. Proc. § 1281.8. Judicial Council form CM 180 is the required form for requesting the stay.
- B. The State Bar delegates the responsibility for fee arbitrations to local bar association programs to the maximum possible extent. The State Bar Committee on Mandatory Fee Arbitration, established in 1984, oversees attorney fee arbitration programs. Local bar arbitration programs must ensure that their rules of procedure comply with the "Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs".
- C. The local bar rules of procedure, which vary, are approved by State Bar Board of Trustees, entitling the local bar program to rely on the statutory immunity provision set forth in Bus. & Prof. Code § 6200(f).
  - 1. Arbitrator, mediator, program, directors and program staff have same immunity which attaches in judicial proceedings.

2. Includes immunity from liability for damages, from testifying in most proceedings, from being sanctioned by the court.
- D. Local bar arbitration programs have primary jurisdiction. State Bar arbitration program used only if:
1. No local bar program exists;
  2. Matter not within jurisdiction of local bar program; or
  3. Either party claims that he or she will not obtain a fair hearing under local bar program. Note: party may request removal to the State Bar from the local bar program based on a claim of unfairness at any time. Arbitration proceedings are stayed until there is a ruling on the removal request by the State Bar.
- E. State Bar, under Bus. & Prof. Code § 6203(d), has exclusive authority to assist clients with enforcement of a final award rendered by any approved fee arbitration program if client awarded a refund and attorney refuses to comply.
1. State Bar has authority to assess administrative penalties and place an attorney on inactive status for non-compliance.
  2. To avoid inactive status, attorney must show either:
    - a. Compliance with the award;
    - b. That he is not responsible for payment of the award; or
    - c. Financial inability to pay the award.
- F. Mediation
1. Since 1995, local bar programs and the State Bar may offer fee mediation services under approved minimum standards through the MFA program.
  2. Many of the larger local bar programs have active mediation programs.

### **III. Threshold Challenges to Jurisdiction**

Although most challenges to jurisdiction are handled by the program, occasionally arbitrators are faced with jurisdictional objections that must be handled. If you have any questions about determining such challenges, please contact the program. Program advisories may address the issue.

- A. Court Ordered Fees
1. Bus. & Prof. 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 No. 1994-02 dated April 22, 1994.

#### B. Statute of Limitations as a Defense

1. Business and Professions Code Section 6206 provides that arbitration may not be commenced if the time for filing a civil action requesting the same relief would be barred under the appropriate statute of limitations.
2. Business and Professions Code Section 6206 includes an important exception which allows the client to commence fee arbitration after the statute of limitations would otherwise have expired, if it follows the filing of civil action by the attorney.
3. Bus. & Prof. Code § 6201(c) allows an automatic stay of any civil suit brought by an attorney if the client elects to arbitrate under the MFA program.
4. Business and Professions Code Section 6206 further provides that the running of the statute of limitations for an attorney to file a civil action for fees and/or costs is tolled or suspended from time arbitration is initiated until 30 days after mailing of the notice of award.
5. What statute(s) of limitation apply? It had been the position of the Committee on Mandatory Fee Arbitration that the one-year statute of limitations for actions against an attorney for any wrongful act or omission, other than actual fraud, arising in the performance of professional services did not apply to a client’s request for fee arbitration because MFAA arbitrations do not provide the same relief as a legal malpractice claim or an action for malpractice pled as a breach of contract. However, a 2015 decision by the California Supreme Court sheds light on the scope of Code of Civ. Proc. §340.6 and held that it may apply to a client’s claim for a refund of allegedly unearned fees from their attorney. (*Lee v Hanley* (2015) 61 Cal.4th 1225.) In *Lee*, which was not a fee arbitration case, the Supreme Court held that Code of Civ. Proc. §340.6 applies to all claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing

professional services and therefore may apply to a client's claim for the return of unearned fees. However, the Supreme Court held that Section 340.6 may not apply to a claim that an attorney converted client funds and that it does not apply to a garden-variety theft or a claim that does not require proof that the attorney violated a professional obligation. In the absence of future clarification of this issue by the Supreme Court or the Legislature it appears that the one-year limitations period under section 340.6 applies to the arbitration of attorney-client fee disputes under the MFAA where the nature of the dispute in any way involves the nature and propriety of the attorney's legal services, but it does not necessarily apply to claims that an attorney converted client funds, defrauded the client in a manner which impacts the attorney's right to recover fees or the amount thereof, or engaged in garden-variety theft of client funds. (See Arbitration Advisory 2016-01 "Statute of Limitations For Fee Arbitrations.")

6. Occasionally, Code of Civ. 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."

C. Effect on Mandatory Fee Arbitration of arbitration clause in fee agreement

1. Business & Professions Code §6200(c) provides that unless a client has agreed in writing to arbitration under the Mandatory Fee Arbitration Act, fee arbitration is voluntary for a client and mandatory for the attorney. But, where there is a written and otherwise enforceable clause in the fee agreement that the parties will submit to non-binding mandatory fee arbitration, fee arbitration is mandatory for both the client and the attorney. (See, Arbitration Advisory 1998-01 [Impact of Arbitration Clauses in Fee Agreements Upon Client's Right to Mandatory Fee Arbitration]; and Arbitration Advisory 2012-02 [Arbitration Agreements].)
  - a. The request and reply forms handled at the intake stage should indicate whether the parties want non-binding arbitration or agree to binding arbitration.
2. However, a pre-dispute agreement for binding mandatory fee arbitration is not enforceable as Business & Professions Code §6204(a) provides that an agreement that the arbitration award will be binding is effective only if it is made after the dispute over fees and costs arose. Since a fee agreement is made at the outset of the relationship (i.e., before a fee dispute has arisen), the client may nevertheless elect to proceed under the Mandatory Fee Arbitration statute even where there is a binding arbitration clause in the fee agreement. (See also, Arbitration Advisory 2008-01 [timing of Agreements to Binding Fee Arbitration] updated July 25, 2014.)

3. In 2009, the California Supreme Court clarified the relationship between a pre-existing contractual agreement to arbitrate fee disputes and non-binding MFA in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 45 Cal.4th 557 (2009). In *Schatz*, the client and the law firm entered into a fee agreement that included a provision for binding arbitration. After a fee dispute arose, the client elected non-binding MFA. The client rejected the non-binding award and requested trial de novo. However, the law firm sought to enforce the binding arbitration clause in the fee agreement. The Court agreed with the law firm and held that where a binding arbitration agreement existed, that agreement trumped the client's MFAA right to elect trial de novo in court following a non-binding MFA award; instead the parties would proceed based on the terms of their prior agreement to binding arbitration, or "arbitration de novo."

D. Jurisdictional Challenge based on Lack of Attorney-Client Relationship

1. MFA jurisdiction exists only if an attorney-client relationship existed, but the MFA statute does not itself confer jurisdiction on the arbitration panel to decide that issue. (*Glassman v. McNab* (2003) 112 Cal.App.4th 1593.)
2. There may be cases where a party credibly contends there was no relationship. For example, the client may have been billed for services by attorney without hiring the attorney. Or the attorney may claim that the person seeking fee arbitration is not the proper party.
3. "An insurance company paying the fees of "Cumis" counsel for the insured is not a proper party in a MFA fee arbitration challenging Cumis counsel's fees. Under *National Union Fire Insurance Company of Pittsburgh v. Stites* (1991) 235 Cal. App. 3d 1718, "arbitration pursuant to section 6200 et seq. is limited to fee disputes between attorneys and their clients."
4. To proceed, the parties must stipulate to confer the issue of jurisdiction to the panel to decide. Otherwise, the party seeking to invoke jurisdiction must apply to a superior court to make that determination.
5. Distinguish where the party requesting arbitration is not the client but paid fees or is liable to attorney for unpaid fees. Non-client payor is a proper party for fee arbitration as affirmed in *Wager v. Mizrayance* (1998) 67 Cal.App.4th 1187.
6. Without a stipulation or court order affirming jurisdiction, the award is subject to a court order vacating award if arbitrator is found to have exceeded authority. (See Arbitration Advisory No. 2005-01, dated January 21, 2005.)

#### IV. Considerations Before the Hearing and for Commencing the Hearing

##### Skit No. 1.

##### A. Arbitrator Selection

1. Notice of Arbitrator Appointment served by program, with no arbitrator background. Parties may request arbitrator to provide his/her resume, but there is no requirement that the arbitrator must provide this information.
2. Rules provide for either sole attorney arbitrator or three-member panel depending on dollar amount in dispute (usually \$10,000 but no more than \$25,000), comprised of two attorneys and lay person.
3. Client may request that attorney arbitrator on panel practice in area of either criminal or civil law depending on nature of client's underlying case. Bus. & Prof. Code §6200(e).

##### B. Appearance of bias

1. If the arbitrator believes he/she cannot render a fair and impartial award, he/she shall recuse himself/herself. He/she shall also recuse himself/herself if he/she:
  - a. has a financial interest in the fee arbitration;
  - b. has represented any party to the arbitration; or
  - c. has practiced with any party to the arbitration.
2. The MFAA is exempt from the disclosure standards applicable to contractual arbitrations. CA Rule of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 3(b)(2)(C).
  - a. CCP §§1281.9 and 170.1 do not apply
  - b. See, *Benjamin, Weil & Mazur v. Kors* (2011) 195 Cal. Ap. 4<sup>th</sup> 40, fn. 10.
3. Disclosure does not require recusal. However, recusal is required if the arbitrator concludes the matter disclosed would adversely affect his/her ability to render a fair and impartial award.
4. Although exempt from contractual disclosure requires, always err on the side of broad disclosure. The parties need to believe they have received a fair and impartial hearing in deciding whether to accept the award.
  - a. The arbitrator needs to disclose all information that might cause a party to believe that the arbitrator will be not impartial.

- b. The arbitrator needs to disclose if he/she has any connection with the attorney, client, potential witnesses, or any attorney representing the parties in the arbitration.
- c. If the case is accepted and something is then discovered suggesting grounds for recusal or appearance of bias, the arbitrator should send it back.
- d. If the arbitrator is unsure, they need to call the local program staff.
- e. Disclose early on in the case and in writing to all parties with a copy to the program.
- f. Give the parties an opportunity to request your disqualification.
- g. if disclosure is made at the hearing, consider continuing the hearing to allow the parties an opportunity to reflect on the disclosure, especially if there is a pro per client.

If appearance of bias could be an issue, even if you believe you would be fair, the better rule is to disclose.

### C. Preparation for the Hearing

1. Identifying the parties. The parties are the petitioner (usually the Client) and the respondent (usually the Attorney.) The parties are identified as such in the package you receive from the program administrator. If there are questions as to who the proper parties are, discuss those issues with the administrator. Under *National Union Fire Insurance Company of Pittsburgh v. Stites*, (1991) 235 Cal. App.3d 1718, “arbitration pursuant to section 6200 et seq. is limited to fee disputes between attorneys and their clients.” Pursuant to *Wager v. Mirzayance*, (1998) 67 Cal. App. 4th 1187, a 3rd party payor may be a proper party. Wager held that a father who retained an attorney to defend his son was entitled to notice of client’s right to arbitrate and to participate in arbitration, even though the father was an account debtor rather than a client.
2. Setting the hearing date and notice of hearing. Many programs have local rules with guidelines for the time periods within which hearings should be set and conducted. Within such rules, try to contact the parties for mutually convenient hearing dates and times. Arbitrators often set hearings in the late afternoon to fit the working schedules of the parties (and the arbitrator). It is good practice to send a letter or fax to both parties, with available dates and times, asking for their preferences and stating that, unless you receive an objection to any of the dates within a set time, you will set the hearing for one of those dates.
3. Taking control of the proceedings from the outset. This is also a good time

to ask the parties, if they have not already done so, to furnish you with the fee agreement, billing statements (if they are in issue), any other documents they may wish to rely on at the hearing, and any documents you would like to see. Tell each side to send the other side a copy of everything sent to you.

4. Shaping the issues. Read the petition, response and any accompanying materials as soon as you receive them. If you still do not have a good sense of what the dispute is about (e.g. is the client claiming that the attorney did not send bills, the bills were hard to decipher, the attorney charged more than a promised cap on fees, the attorney was inefficient or ineffective, the attorney failed to refund unearned fees), take the initiative now to ask the parties for clarification. Do not wait until the hearing to learn the nature of the dispute.
5. Sending a letter to the parties regarding timing of briefs and encouraging exchanges of evidence and documents. If the complexity of the case merits it, consider establishing target dates for submission and exchange of written statements setting forth each party's position and anticipated evidence, and for the exchange of such evidence before the hearing.
6. Continuances. Most program rules contain policies on continuances. Usually, granting a continuance is within the arbitrator's discretion. It is good practice to ask the party seeking the continuance to clear the continued date with the other side first. After the date has been cleared, the arbitrator should notify all parties of the continuance in writing.

D. Ex Parte communications

1. Ex parte communications create suspicion and should be avoided. See generally State Bar Rules of Professional Conduct, Rule 5-300(B).
2. No ex parte contact with arbitrators should be permitted except:
  - a. to schedule hearings or other administrative matters (including the issuance of subpoenas), or
  - b. in cases of emergency, or
  - c. in writing with copies to all (including arbitrating association).
3. Consider use of conference calls.
  - a. Who participates? If the entire panel and all sides are included, it's easier to arrange hearing dates and take care of other administrative pre-hearing business.
  - b. Who pays for the conference call?



E. Discovery

1. Limitations

- a. MFA program is intended to be speedy and to enable clients to participate without assistance of counsel. Permitting extensive discovery would be contrary to that intent.
- b. Bus. & Prof. Code § 6200 *et seq.* is silent re discovery. Check the local program rules. Most programs permit no pre-hearing discovery.
- c. The client file belongs to the client. The attorney may copy the file at his or her own expense. See, CPRC 3-700(D). However, informal exchange of documents should be encouraged.

2. Subpoenas

- a. Pursuant to statutory language, arbitrators may “compel,” by subpoena or subpoena *duces tecum*, the attendance of witnesses and the production of relevant documents. Bus. & Prof. Code § 6200(g)(3). As a practical matter, the arbitrator issues subpoenas, but only the appropriate civil court may truly compel attendance/enforcement upon application by a party. See Arbitration Advisory 2008-02 (“Authority to Compel Compliance with Third-Party Subpoenas”)
- b. Subpoenas or subpoenas *duces tecum* may issue upon a party’s request for good cause shown. Party requesting subpoenas obtain blank subpoena forms from the program or a judicial council form and submit a complete subpoena to the arbitrator or program chair with a statement providing the rationale for the need for the subpoena. Check the rules re compliance with deadlines to request subpoenas and that subpoena form complies with Code of Civil Procedure § 2065 (notice of witness’ right to fee and mileage).
- c. Parties may not issue their own subpoenas.

F. Arbitration in the absence of a panel member

1. A party who is entitled to a panel of three arbitrators cannot be compelled to accept a panel consisting of less.
2. Bus. & Prof. Code § 6200(e) provides for one or three arbitrators (and requires one non-lawyer arbitrator on a 3-member panel), thus impliedly prohibiting a two-arbitrator panel. Many local program rules explicitly prohibit the hearing from going forward with two arbitrators.
3. If parties agree **in writing**, the hearing may proceed with panel chair

acting as sole arbitrator. If the panel chair is not available, the attorney arbitrator can serve as the sole arbitrator. In no instance should the lay arbitrator serve as the sole arbitrator.

4. No matter what the parties may agree or the local rules permit, it is usually better to continue the hearing until all three arbitrators can attend. Otherwise, a party, particularly an unrepresented client, may claim to have felt coerced into proceeding with one arbitrator.

G. Role of the non-lawyer arbitrator

1. A 3-member panel must include one “lay member.” Bus. & Prof. Code § 6200(e)(1). A lay arbitrator is a person who has:
  - a. not been admitted to practice law;
  - b. not worked regularly for a public or private law practice (this includes paralegals, staff and law clerks);
  - c. not worked for a court or attended law school for any period of time. Guidelines & Minimum Standards No. 20. .
2. Lay arbitrator is not a “party arbitrator” (as often seen in medical malpractice and international commercial arbitrations) and should be neutral, just like the other two arbitrators.
3. One purposes of the non-lawyer arbitrator includes providing a valuable non-attorney perspective.
4. Lawyer arbitrators should always behave respectfully towards lay arbitrator.

H. Informality of the proceeding /Use of legal terminology

1. Fee arbitration hearings should be much less formal than judicial trials, and probably less formal than judicial arbitrations. However, the hearing should maintain an air of solemnity and be formal enough to provide clients confidence in the proceeding.
2. The level of formality to be observed is up to the arbitrator. Arbitrators should keep in mind the statutory purpose of providing a forum where clients can present their cases without legal representation.
3. Nonetheless, some level of formality helps the arbitrator to maintain control, and shows both sides they are playing by the same rules; and excessive informality may be perceived as bias, particularly by unrepresented clients.
4. The location should be the arbitrator’s office or other neutral place -never

the attorney's office. Consideration should be given to the participants' comfort (privacy, space, etc.). If you have the option, don't have the parties wait in the same reception area; there is often considerable hostility between them.

5. The fee arbitration program is designed so that clients can arbitrate without legal training or the assistance of counsel. Client may be intimidated by use of legal terminology and may be afraid to ask for clarification.
6. A client who doesn't understand the proceeding may believe there was bias and may be dissatisfied with the process.

#### I. Confidentiality of hearing

1. Bus. & Prof. Code § 6202 makes the attorney/client and work product privileges inapplicable in the arbitration (and in related proceedings, e.g. trial de novo, petition to confirm award, unless maintained by a third party payor (See Adv. 2007-02).). Disclosures at arbitration don't waive the privilege for other purposes.
2. Some local rules permit client to bring another person to hearing for advice or support, and may give arbitrator discretion to permit additional people. Distinguish support person from non-attorney advocate, which may raise issue of unauthorized practice of law.
3. Otherwise, arbitration hearings are confidential and closed, except for witnesses when testifying.
4. Local bar rules may permit interpreters and certified shorthand reporters to attend the hearing at the requesting party's expense.
5. If confidential information is disclosed during the course of the hearing, arbitrators should be cautious and limit the use of such confidential information in the award.
6. Award and arbitrator's determinations are not admissible and do not operate as *res judicata* or collateral estoppel in any other action or proceeding, including a subsequent legal malpractice action. (Bus. & Prof. Code § 6204(e).) (See also *Liska v. Arns Law Firm* (2004) 117 Cal.App.4<sup>th</sup> 275, 282-284.)

## V. The Arbitration Hearing

### Skit No. 2

#### A. Agreements to be bound

1. Fee arbitration is not binding--that is, all parties have an unconditional right to trial *de novo* or binding arbitration pursuant to the fee agreement. (*Schatz v. Allen Matkins et al* (2009) 45 Cal 4th 557) 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. Bus. & Prof. Code §6204(a). See Arbitration Advisory No. 2008-01 dated April 3, 2008.
  - a. Exception: A party who wilfully fails to appear at the arbitration hearing loses the right to trial *de novo*. Bus. & Prof. Code § 6204(a). Since court determines issue of wilful nonappearance, it is important that the arbitration award address the circumstances of a party’s nonappearance in sufficient detail.
2. Most non-binding arbitrations become binding automatically with the passage of time because many parties do not file for a trial *de novo*.
  - a. Arbitrators should take the same care with non-binding proceedings as with binding ones.
  - b. 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.
3. 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. Also, program may include, with the arbitrator package, a stipulation for parties to document an agreement to be bound if they do so agree at the hearing location before the taking of evidence begins.
4. Arbitrators must ascertain, before the taking of evidence begins, whether the arbitration is to be binding, but under no circumstances should the arbitrator pressure the parties into binding arbitration.
5. Once both parties have agreed to be bound, neither can withdraw from the agreement without mutual consent in writing.
6. Unless the parties settle or agree to withdraw from binding arbitration, neither party can withdraw from arbitration after both parties have agreed to be bound.

B. Settlement prior to award

1. Role of the arbitrator
  - a. The arbitrator is not a mediator. If parties wish to settle, they should do so outside the arbitrator’s presence. An arbitrator may

not participate or assist in settlement and shall not draft any settlement agreement reached by the parties. See Arbitration Advisory No. 2015-02 dated March 20, 2015.

- i) Potential loss of immunity for arbitrator, association, and its officers and employees
  - ii) If settlement is unsuccessful, parties, particularly the unrepresented client, will be more inclined to believe there was bias if they lose.
- b. Arbitrator may issue a stipulated award
- i) The award must meet the State Bar Minimum Standard and make clear the award was reached after settlement between the parties.
  - ii) Use the “Award Pursuant to Stipulation of Parties” form.
- c. Effect of settlement on enforcement of award
- i) Under Bus. & Prof. Code § 6203(d), State Bar can enforce an **award** when a client is given a refund. See paragraph 3.d below re stipulated award
  - ii) If settled without an award and settlement includes a refund to the client, client has no recourse through State Bar enforcement. Nor do the parties have the other post-arbitration remedies available under the Business and Professions Code.
- d. There are limits on a Stipulated Award
- i) The arbitrator may not issue a Stipulated Award if the arbitrator believes the settlement is unethical, illegal, or unconscionable. Allow the parties to remove the unethical terms; proceed with arbitration; or allow parties to dismiss the case in accordance with their settlement and the program’s rules
  - ii) Only matters properly before the arbitrator under the MFA can be entered as a Stipulated Award and enforced through the MFA Code. Arbitrator authority is expressly limited (B&P Code 6200 et. seq.) See B&P §6203(a) for a list of matters which cannot be included in a stipulated award

C. Oaths or affirmations of witnesses

1. Bus. & Prof. Code § 6200(g)(2) provides that arbitrators “may” administer oaths and affirmations.
2. Many local program rules require that testimony of witnesses be given under oath, administered by panel.
3. Oath should be similar to oaths given in court, e.g. “Do you swear (or affirm) that the testimony you give in this proceeding will be the truth, the whole truth, and nothing but the truth?”
4. Many local program rules permit testimony to be submitted by declaration. Some programs require trial by declaration when the amount in dispute is small.

D. Order of proceeding and burden of proof

1. Local rules usually provide no specific guidance; the issue of who has the burden of proof is left to the discretion of the arbitrator. (See Arbitration Advisory No. 1996-03 dated June 7, 1996).
2. No need to follow formal rules used at civil trials.
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 panel can save a lot of time and narrow the issues.
    - i) “Do you all concede that there was no written fee agreement?”
    - ii) Mr. Client, are you telling 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.
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.

E. Evidence

- 1. Stipulations are encouraged.
- 2. No formal rules of evidence apply.
- 3. Hearsay is not prohibited (see e.g., Code of Civ. Proc. §1282.2(d)).
- 4. Decision will be based on preponderance of the evidence.
- 5. Any evidence may be considered if it is of 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.
- 6. Arbitrators have discretion to waive personal appearance, take testimony by telephone and accept exhibits and testimony by declaration under penalty of perjury.
- 7. Frequent ground for challenge of arbitration award is failure to accept relevant evidence. The better practice is to admit the evidence and give it the weight the arbitrator believes is appropriate. 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. Bus. & Prof. Code § 6202. See exception for third party payors, Arbitration Advisory 2007-02.
- 8. 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.

F. Additional Consideration

- 1. 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.

2. Factors which may have a bearing on determination of dispute re: attorney's obligations include:
  - a. Attorney's understanding of 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 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.
3. 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 being incurred.  
  
Whether client requested services beyond scope of fee estimate originally provided by attorney.

G. Arbitration with and without a written fee agreement

1. Is there an enforceable written agreement?
  - a. Legislation requiring a written fee agreement may affect the enforcement of the agreement.
    - i) Bus. & Prof. Code § 6147 generally requires a written fee agreement where the attorney represents the client on a contingent fee basis.
    - ii) Bus. & Prof. Code § 6148 requires a written fee agreement in certain cases not coming within § 6147 where fees and/or costs 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.

- iii) Bus. & Prof. 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 agreement and some of the procedures for the execution of the agreement.
  - 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) Hybrid fee agreements containing a contingent fee component cannot be enforced unless they comply with the requirements of Bus. & Prof. Code Section 6147. *Arnall v. Superior Court* (2010) 190 Cal. App. 4<sup>th</sup> 360.
- 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.
  - 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.
- c. To assess the enforceability of a written fee agreement, Arbitration Advisory No. 1993-02 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?
- 2. If there is no written fee agreement or if the written agreement is unenforceable, the attorney is generally entitled to a reasonable fee.
  - a. See Arbitration Advisory No. 1998-03 updated March 20, 2015 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 different (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).

#### H. Reviewing the Agreement for Unconscionability

- 1. Attorneys “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” (Rule 4-200(A).) (See Arbitration Advisory No. 1998-03, updated March 20, 2015.)
  - 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.
  - c. 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.)

#### I. True Non-Refundable Retainer Fees

- 1. A 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.)

2. Otherwise, where fees are subtracted from the retainer or the retention of attorney was not shown to secure solely the attorney’s availability, the fees are 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 2011-01, dated January 28, 2011.)

J. 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. Bring the issue to the attention of the client, particularly if the client is not represented by counsel. See Arbitration Advisory No. 2012-01 dated February 1, 2012.
  - c. In dealing with this issue, the following additional 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.
    - v) If the arbitrator voids the fee agreement, a *quantum meruit* award cannot exceed the contracted amount. *Cazares v. Saenz* (1989) 208 Cal.App.3d 279. *Chodos v. Borman* (2014 227 Cal.App.4<sup>th</sup>, 76)

K. Determining a Reasonable Fee

1. If there is no written fee agreement or if the written agreement is

unenforceable and voidable, the attorney generally is entitled to a reasonable fee. The burden is on the attorney to demonstrate by a preponderance of the evidence the reasonableness of the fee.

2. See Arbitration Advisory No. 1998-03, updated March 20, 2015, for a comprehensive discussion of procedures to determine a reasonable fee.
  - a. 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).

L. Requirements for billing statements

1. Governed by Bus. & Prof. 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 No. 1995-02 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 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 exercised, attorney eligible to receive a reasonable fee. Bus. & Prof. Code § 6148(c).

M. 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. Bus. & Prof. Code § 6203(a). See Arbitration Advisory 2012-03 dated July 17, 2012.
  - a. Arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying any such claim. Bus. & Prof. Code §§ 6203(a) & 6200(b)(2).
  - b. Arbitrators may rule that the value of attorney’s services was lessened due to the way the case was handled, and reduce the fee. *Id.*
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 Nos. 1998-03 updated March 20, 2015 and No. 2012-03 dated July 17, 2012.
- 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.
- c. Care is required, however, for even severe ethical violations sufficient to invalidate a written fee arrangement may still not preclude fee recovery on a 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 attorney may be entitled to keep fees earned before the conflict arose but may not be entitled to fees incurred after the violation occurred. See e.g. *David Welch Co. v. Erskine & Tully*, (1988) 203 Cal.App.3d 884.

N. Sanctions Against a Party

1. See Arbitration Advisory No. 2002-01 dated May 17, 2002.
2. Monetary sanctions for misconduct or egregious behavior of a party are not authorized or permissible.
3. Arbitrators may, however, impose non-monetary procedural sanctions, such as the exclusion of evidence, for violating a rule of procedure or an arbitrator's pre-hearing order to exchange documents. However, this type of non-monetary sanction should only be imposed with the utmost discretion against a party as a last resort to achieve fairness in the proceedings in the face of that party's willful and/or repeated disregard of procedural requirements, including an arbitrator's ruling.
  - a. As an alternative, consider making a credibility determination based on a party's failure to produce evidence that was reasonably expected to be produced. Evidentiary sanctions are disfavored and the exclusion of evidence may provide a ground for a court to vacate the award. (Code of Civil Procedure §1286.2(a)(5).)

## **VI. After the Hearing**

### **A. Required award form**

1. Specific form required. Use the Arbitration Checklist as a guide.
2. Necessary for enforcement purposes. It must be clear who is to pay and how much.
3. Form should be filled out completely and correctly. Make sure amounts add up and that they are consistent with information provided in the client's request. If amounts different, explain why in the "determination of questions submitted."
4. Determination of questions submitted
  - a. Very important to use this section to give the reasons for the decision.
  - b. Bus. & Prof. Code § 6203 requires arbitrators to include "a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy."
  - c. There should always be something in this section, even if only a short statement that there was a written fee agreement, the rate was not unconscionable and the services performed were reasonable and necessary.
  - d. If the attorney's fees are reduced, there should be a specific explanation of why the arbitrator did this. It may be helpful for future attorney/client relationships if the attorney knows why the arbitrator took a particular action.
  - e. If the arbitrator is awarding interest, the rate and basis of calculation should be included here.

### **B. Use of findings**

1. Findings of fact, while not specifically required, should be made as they are helpful to parties in determining whether or not to seek judicial relief after arbitration.
2. The award should include findings as to the willfulness of a party's non-attendance at the hearing.
  - a. Willful non-attendance precludes that party's right to a trial de novo after arbitration. Bus. & Prof. Code § 6204.

- b. Only a court can make a final determination of willfulness. But, in making the determination, the court may consider the arbitrators' findings on the subject of a party's failure to appear.
3. With very limited exceptions, the findings and award are inadmissible in any subsequent proceeding and may not operate as res judicata or collateral estoppels. (Business & Professions Code §6204(e); *Liska v. Arns Law Firm* (2004) 117 Cal.App.4th 275, 282-284.) In discussing the limitation on the effect of MFA awards, the court in *Liska* explained that in order to maintain the informality and economy of the arbitration proceedings "both the client and the attorney must be assured that the consequences of the arbitration will extend no further." (*Liska*, supra at 287.)

C. Responsible attorney

1. Bus. & Prof. Code § 6203(d)) provides for possible administrative sanctions against an attorney, including involuntary inactive enrollment, for failing to comply with an award for a refund to a client of fees or costs previously paid.
2. Penalties and inactive enrollment cannot be applied to a law firm, only to individual attorneys. Therefore arbitrators must identify at least one individually responsible attorney.
3. Penalties may only be applied to an attorney who is "personally responsible for making or ensuring payment of the award." Bus. & Prof. Code § 6203(d)(2)(B). Arbitration Advisory No. 1994-04 dated August 19, 1994 gives guidance as to which attorney in a firm is the "responsible attorney."
  - a. There is an obvious need for specific and closely written determinations in the Award identifying the responsible attorney.
4. If parties understand the basis of the award, even if they do not agree with it, they will be less likely to ask for a new trial or for correction or vacation of the award. This is particularly important in non-binding matters.

D. Allocation of program filing fees

1. Recovery of filing fee may be allocated between parties at the arbitrator's discretion. Bus. & Prof Code § 6203(a). Such allocation should be specifically detailed in award so that parties can determine precise amount of filing fee to be remitted to the appropriate party.
  - a. Consider assessing filing fee against respondent party payable to the program if petitioner obtained a fee waiver if circumstances

warrant.

b. The prevailing party is not determinative of the reallocation of the filing fee.

2. Attorney's fees and other costs. The award shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the arbitration proceeding, notwithstanding any contract between the parties providing for such award of costs or attorney's fees. Bus. & Prof. Code § 6203(a).

E. Interest

1. See Arbitration Advisory No. 1993-01 dated July 30, 1993.

2. Pre-award interest may be awarded as part of an arbitration award if appropriate under Civil Code §3287.

3. Where the recovery is for a reasonable fee on a *quantum meruit* basis, pre-award interest is not available as the damages were not certain or capable of being made certain by calculation. Civil Code § 3287. *McComber v. State of California* (1967) 250 Cal. App 2d 391

4. If there is an enforceable written contract, and the rate is not unconscionable, it should be charged. Civil Code § 3289(a).

a. Attorney - client fee agreements can be subject to a wide range of state and federal regulation. See Arbitration Advisory No. 2001-01 dated May 31, 2001 for a discussion of the applicability of Truth In Lending and Unruh Act.

5. If interest is to be awarded and there is no agreement of the parties as to the rate to be charged (so-called "legal rate"), 10% per annum should be used. Civil Code § 3289(b).

6. Post Award Interest. Guidelines & Minimum Standards No. 16(c) states: "An award requiring a payment must also include interest in the amount of ten percent per annum from the 30<sup>th</sup> day after the service of the award."

F. Award

1. Read before you sign.

2. Each panel member is responsible for the content of the award.

3. Before signing, make sure that the award reflects your opinion and has the necessary findings to explain the panel's decision.

4. Discuss with the panel chair if you wish to add or change something on



the award.

5. ONLY FEE ARBITRATION STAFF SERVES THE AWARD!
6. Statute and rules require that a “Notice of Your Rights After Arbitration” form be served with award. Thus, service is incomplete without the form and it will have to be served again. If the arbitration is non-binding, the time within which to request the trial *de novo* starts anew when the award is served with the proper notice.

G. Dissenting opinions

1. A majority vote is sufficient for all decisions of the arbitrators, including the award. The award shall be signed by the arbitrators concurring therein.
2. Any arbitrator who disagrees with the majority of the panel is entitled to write a dissenting opinion.
3. Let Fee Arbitration staff and Panel Chair know immediately of intent to write dissent. Check local rules as to how dissenting opinion is to be handled.
4. The dissent must be filed within the same time required for the filing of the award.

H. Correction or Amendment of Awards

1. See Arbitration Advisory No. 2014-02 dated July 25, 2015.
2. Correction of award already served may be necessary to correct an error in the award not affecting the merits on the grounds set forth in Code Civ. Proc. § 1286.2. Correction may be made upon motion by a party within 10 days of service of the award, and arbitrator(s) must correct or deny correction within 30 days of service of award. (*Ibid.*)
3. Amendment of award already served may be necessary to include an issue relevant to the award inadvertently omitted or to correct an error pursuant to Code Civ. Proc. §1284. Amendment may be made upon motion by a party or *sua sponte*. (See Arbitration Advisory No. 2003-02, dated March 27, 2003.) (See also *Karton v. Segretto* (2009) 176 Cal.App.4th 1, 10, fn.14 [suggesting that party seeking amendment must first ask arbitrator to amend prior to invoking court’s jurisdiction seeking amendment]).
4. Timing: Amended or corrected awards should be made within 30 days following service of the award on the parties. Service of amended award commences new time period to request trial *de novo*.

I. Referrals to discipline

1. The requirement of confidentiality does not preclude referral to discipline.
    - a. Bus. & Prof. Code § 6202 provides safeguards with respect to client confidential matters involving the attorney-client and work product privileges.
    - b. The State Bar's Minimum Standards provide for confidentiality of privileged materials, but there is a specific exception for transmitting allegations of unethical conduct to the Office of the Chief Trial Counsel.
  2. If arbitrators wish to make a referral, it can be done by:
    - a. Following procedure set forth in local rules, or
    - b. Writing directly to the Intake Unit of the Office of the Chief Trial Counsel (unless the local rules commit this decision to the local program chair), or
    - c. Advising fee arbitration staff, who will send information on parties' and arbitrators' names and addresses, and award, if appropriate, to Intake.
  3. If warranted, Office of the Chief Trial Counsel will conduct an independent investigation of the allegations.
- J. Questions and answers