

ARBITRATION ADVISORY

2012-02

ARBITRATION AGREEMENTS

Replaces and Supercedes Arbitration Advisory 2004-01

March 16, 2012

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INTRODUCTION

In recent years, an increasing number of attorney-client retainer agreements contain language providing that disputes between the attorney and the client shall be submitted to binding arbitration. Obviously such agreements, entered into at the commencement of the attorney-client relationship, precede the occurrence of a dispute regarding attorney's fees or costs. Some arbitration clauses specifically reference disputes regarding fees or costs, while others purport to deal globally with all attorney-client disagreements.

This Advisory addresses the effect of such arbitration clauses on the Mandatory Fee Arbitration program set forth in Business & Professions Code §6200 ("MFA").

DISCUSSION

Attorneys and clients may enter into valid and enforceable agreements requiring binding arbitration of both legal malpractice and fee dispute claims at the initiation of their relationship. [Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102]. Nonetheless, such binding arbitrations agreements do not extinguish a client's right to non-binding MFA under Business & Professions Code § 6200. [Benjamin, Weill & Mazer v. Kors (2011) 195 CA4th 40, 53.] Instead, the client retains the right to non-binding MFA prior to contractual arbitration. If the client commences non-binding MFA, it is mandatory for the attorney to participate. [Business & Professions Code § 6200 (c)]. If, on the other hand, the attorney requests non-binding MFA, the client may voluntarily elect to participate, but is not required to do so. However, where the client and attorney previously entered into a written agreement requiring non-binding MFA, either party may commence non-binding MFA, and both parties are obligated to participate. [Business & Professions Code § 6200 (c)]

Mandatory Fee Arbitration is non-binding (meaning the parties may thereafter proceed to trial de novo or arbitration if a prior arbitration agreement exists) unless, after the fee dispute arises, the parties agree to binding Mandatory Fee Arbitration or if one of the parties fails to request trial de

novo or arbitration under a prior contractual agreement within 30 days after the award was served. [Business & Professions Code § 6204(a)(b) and (c)]. An agreement in writing to binding arbitration of fee claims entered into at the commencement of the attorney-client relationship, or any time before a fee dispute arises, does not create binding Mandatory Fee Arbitration; the agreement for binding arbitration must be executed after the dispute arises. Following the non-binding MFA, either party is free to exercise the rights set forth in the prior agreement to arbitrate the dispute in another forum.

If the parties agree that a Mandatory Fee Arbitration is binding, no further arbitration (or trial de novo) on the fee claims is permitted. Even where there exists a prior agreement for separate binding arbitration of a fee dispute, the later agreement for binding MFA extinguishes that right once the MFA occurs.

Where either party commences a binding arbitration proceeding prior to non-binding MFA, the arbitration will be stayed if non-binding MFA is commenced within 30 days of the client's receipt of the form entitled Notice of Client's Right to Arbitration. [Business & Professions Code §6201(a) and (c); *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 45 Cal.4th 557 (2009); 1997 Amendment to Business & Professions Code §6200 et seq.]

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), and overruled *Alternative Systems, Inc. v. Carey*, (1998) 67 Cal.App.4th 1034. 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. Because the MFA was non-binding, the client thereafter sought trial de novo of his claims, pursuant to the MFAA rules and the statute. The law firm instead sought to enforce the arbitration obligation written into the retainer agreement. The Court agreed with the law firm and held that where a binding arbitration agreement existed, following the non-binding MFA the parties would not be permitted trial de novo in court; instead the parties would proceed based on the terms of their prior agreement to binding arbitration, or "arbitration de novo." The Court held that the California Arbitration Act provided a clear right for clients and attorneys to enter into binding contractual arbitration that would be enforced following non-binding MFA.

CONCLUSION

Following *Schatz*, where a pre-existing binding arbitration agreement exists, if the client elects non-binding MFA, or the attorney requests it and the client agrees, the parties will proceed first to non-binding MFA. Thereafter, either party may enforce the original binding arbitration agreement provided that one of the parties commences the arbitration by filing a demand for arbitration within 30 days after the award was served. [*Greenberg Glusker Fields Claman & Machtinger LLP v. Rosenson* (2012) 203 Cal.App.4th 688, 694.] The prior agreement will not make the MFA binding, unless, after the dispute arises, both parties affirm in writing that the MFA will be binding, obviating the need for a later arbitration following MFA.