

ARBITRATION ADVISORY

2012-01

VOIDABILITY OF FEE AGREEMENTS

Replaces and Supercedes Arbitration Advisory 1996-04

January 27, 2012

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INTRODUCTION

During the course of a fee arbitration hearing, it may appear to the arbitrators that the attorney has not complied with the requirements of Business and Professions Code Section 6147 or 6148. When such a determination is made, the fee agreement is voidable at the option of the client. If the client elects to void the agreement, the attorney may not recover the contract fee. However, the attorney is entitled to a reasonable fee. Often the client is unaware of the right to void the agreement and the consequences of such an election. The question is whether and to what extent the arbitrators should inform the client of the option to void the fee agreement and the consequences of such an election.

DISCUSSION

A. Requirements for Contingent Fee Contracts

Business & Professions Code Section 6147 sets forth the *minimum* requirements for most contingent fee contracts.¹ Business & Professions Code Section 6147 requires that the contract must: (a) be in writing, signed by both attorney and client, and, that upon execution, the attorney must provide the client with a duplicate copy, signed by the attorney and the client [B&P 6147(a)]; (b) contain a statement of the contingency fee rate that the client and attorney have agreed upon [B&P 6147(a)(1)]; (c) state how costs and disbursements will affect the client's recovery and the attorney's total fee [B&P 6147(a)(2)]; (d) disclose the extent, if any, to which the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract [B&P 6147(a)(3)]; (e) contain a statement that the fee is not set by law but is negotiable between attorney and client, unless the claim is subject to the provisions of Section 6146 [B&P 6147(a)(4)]; and (f) state that if the claim is subject to the provisions of Section 6146 the rates set forth in that section are the

¹ B&P §6147 does not apply to contingency fee contracts for the recovery of workers' compensation benefits and contingent fee contract regarding claims between merchants are governed by B&P §6147.5.

maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

The requirement that a contingent fee agreement must include a statement that the fee is negotiable and that it is not set by law cannot be waived and applies even where the client knows the fees are negotiable. (*Fergus v. Songer* (2007) 150 CA4th 552, 570.) However, as long as the statement is provided in the agreement, there is no requirement that the parties actually negotiate the contingent fee rate.

Subsequent modifications of the contingent fee agreement also must comply with section 6147. (*Fergus v. Songer* (2007) 150 Cal. App.4th 552, 570; *Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 382 [modifications of original fee agreement are subject to provisions of section 6147 and voidable because they lacked the required statement that the contingency fee is negotiable, as well as other required recitals].)

B. Requirements for Hourly Fee Agreements

Fee agreements for hourly fees and costs anticipated to exceed \$1,000.00 must ordinarily be in writing, and contain information regarding the hourly rate, other standard rates, fees and charges applicable to the case, the general nature of the legal services to be provided, and the respective responsibilities of the attorney and client as to performance of the contract. (Business and Professions Code Section 6148(a).)

However, a written fee agreement is not required in the following situations: (a) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical [B&P §6148(d)(1)]; (b) The attorney has previously provided services of the same general kind and was paid for them by the client. [B&P §6148(d)(2)]; (c) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required. [B&P §6148(d)(3)]; and (d) If the client is a corporation. [B&P §6148(d)(4).]

Business and Professions Code Section 6148 also requires that all bills for services rendered by an attorney must clearly state the basis, including the amount, rate, basis of calculation, or other method of determination of fees and costs. It further provides that bills must be provided to the client no later than 10 days following the client's request, but the client is entitled to make such requests no more than once every 30 days.

C. Effect of Failure to Comply with Statutory Requirements

Under Sections 6147(b) and 6148(c), failure to comply with these provisions renders the fee agreement voidable at the client's option. (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 932 [If there was no written contract between client and law firm that represented client in settlement negotiations, then the agreement between the parties was voidable at client's option, and the firm is only entitled to collect a reasonable fee]; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 [Promissory note allegedly executed by former clients in connection with balance due for services rendered by law firm, which exceeded \$1,000, was unenforceable where note did not contain hourly rate and other standard rates, fees, and charges applicable; Where services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie for *quantum meruit*]; *Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 385 [Failure of a contingency fee agreement to contain "a statement that

the fee is not set by law but is negotiable between attorney and client,” renders the agreement voidable by the client]; *Fergus v. Songer* (2007) 150 Cal. App.4th 552, 558-559 [Contingency fee agreement, for attorney's representation of judgment creditor with respect to collection of judgment, was voidable at option of judgment creditor, such that attorney's recovery of fees would be based on reasonable attorney fee, where agreement did not comply with statutory requirement that a contingency fee agreement must include statement that the fee is not set by law but is negotiable between attorney and client].)

If the client elects to void the fee agreement, the attorney is entitled to a reasonable fee. However, if it appears that the attorney has not complied with Sections 6147 or 6148, but it is not clear whether the client has voided the agreement, arbitrators may wish to clarify this issue at the time of the hearing and, if appropriate, make an independent evaluation of the value of services performed.

ANALYSIS

This Advisory should be read in conjunction with the Arbitration Advisory 1993-02 "Standards of Review in Fee Disputes Where There is a Written Agreement" and Arbitration Advisory 1995-02 "Standards for Attorney Fee Billing Statements." Advisory 1993-02 includes the suggestions that, when the arbitrator is presented with a written fee agreement, the first step in the analysis should be to determine whether it is enforceable under basic elements of contract law and whether it complies with Business and Professions Code Section 6147 or 6148. Advisory 1995-02 recommends that arbitrators should also examine billing statements for compliance with Business and Professions Code Section 6148(b) and determine whether the fee agreement can be voided under that section. In making those determinations, the arbitrator may question the parties to obtain information pertaining to the attorney's compliance with the requirement of the Business and Professions Code. Arbitrators have their own styles of conducting arbitration proceedings; some may be more aggressive in their questioning of witnesses, while other may adopt a more passive approach. Arbitrators may use their discretion in how they choose to elicit relevant testimony.

If the arbitrators determine that the fee agreement is not in accordance with the requirements of Business and Professions Code Sections 6147 or 6148, or that the attorney has not otherwise complied with any provisions of Section 6148, including the failure to render complete or timely billings, then they must decide whether and in what manner the client has exercised the right to void the agreement. Some arbitrators believe that they should advise the parties of the client's option under the Business and Professions Code to void the agreement, request the parties to provide evidence of the reasonable value of the attorney's services, and advise the client that the reasonable fee may be more or less than the contract fee. Other arbitrators believe that they should do nothing and void the agreement only if the client independently makes the election, while others take the position that they should do nothing and deem the client to have made the election only if voiding the agreement would result in a lesser fee to the attorney.

RECOMMENDATION

While the Committee recognizes that there are different approaches, the Committee recommends an approach which it believes is consistent with the statutory language of Business and Professions Code Sections 6147 and 6148 and which will result in more consistent and fair handling of fee arbitration cases throughout the state. In developing this approach, the

Committee has made the following assumptions:

An attorney should not be rewarded for failing to comply with statutes by being awarded a fee in excess of the contract fee. Therefore, a "reasonable fee" under Business and Professions Code Sections 6147 or 6148, should never exceed the contract fee. (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287 [withdrawing attorney entitled to lesser of fair value of lawyer's services or contractual fee pro rated for services actually performed].)

Because the client's maximum exposure is the contract fee, the client will always make the election to void the contract.

The client's objection to the fee and the request to arbitrate constitute the client's election to void the agreement.²

With these assumptions in mind, once the arbitrator has determined that the attorney has not complied with the provisions of Business and Professions Code Sections 6147 or 6148, the arbitrator may consider the agreement voided and determine a reasonable fee that is no greater than the contract fee. This approach preserves the arbitrator's neutrality, while providing the parties with a reasoned result based on general principles of contract law and the public policy underlying the fee arbitration statutes. However, before making a determination to consider the fee agreement voided, the arbitrator should evaluate whether voiding the agreement would result in the client's fee arbitration claim being barred by the two year statute of limitations. (See, *Iverson, Yoakum, Pampiano & Hatch v. Berwald* case (1999) 76 Cal.App.4th 990, 996 [Where services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for *quantum meruit*; the statute of limitations for *quantum meruit* claims is two years (see Code Civ. Proc., §339)].)

² The statutes do not prescribe the time or manner in which the election must be made ("Failure to comply with any provision of this section renders the agreement voidable at the option of the client.."); thus, it is consistent with the statutory framework for an arbitrator to find that the client has exercised the option by the act of objecting to the fee if the arbitrator also finds that there has been a failure by the attorney to comply with any provision of Section 6147 or 6148