



The State Bar of California

OPEN SESSION AGENDA ITEM 4.5 SEPTEMBER 2024 BOARD OF TRUSTEES

DATE: September 19, 2024

TO: Members, Board of Trustees

FROM: Erika Doherty, Program Director, Office of Professional Competence
Christina Gates, Senior Program Analyst, Office of Professional Competence

SUBJECT: Arbitration Advisory 2024-01 (Superseding Arbitration Advisory 1993-02):
Standard of Review in Fee Disputes Where There is a Written Fee Agreement
– Request for Approval for Publication

EXECUTIVE SUMMARY

In 1993, the Committee on Mandatory Fee Arbitration issued Arbitration Advisory 1993-02: Standard of Review in Fee Disputes Where There is a Written Fee Agreement. In 2021, the Second District Court of Appeal in *Pech v. Morgan* (2021) 61 Cal.App.5th 841 concluded that the committee's advisory provided a sound standard for review, establishing case precedent that adopted the committee's standard for adjudicating an attorney's claim against a client for breach of a valid fee agreement. This agenda item seeks approval for publication of proposed Arbitration Advisory 2024-01 to supersede Arbitration Advisory 1993-02. Arbitration Advisory 2024-01, as updated by the Committee on Professional Responsibility and Conduct (COPRAC)¹ would replace Arbitration Advisory 1993-02 to now incorporate the *Pech v. Morgan* decision.

¹ Pursuant to the recommendation of the 2017 Task Force on Governance in the Public Interest and the Board of Trustees' Appendix I review, the Board of Trustees retired the Committee on Mandatory Fee Arbitration and transferred the function of drafting arbitration advisories to COPRAC. The purpose of an arbitration advisory is to provide guidance to arbitrators regarding disputes or issues that may arise in connection with mandatory fee arbitrations. The Board's resolution that transferred the responsibility for drafting arbitration advisories to COPRAC adopted the task force's report and recommendation that would "allow arbitration advisories to be developed and disseminated using the State Bar's process for disseminating ethics opinions."

RECOMMENDED ACTION

This agenda item seeks approval for the publication of proposed Arbitration Advisory 2024-01: Standard of Review in Fee Disputes Where There is a Written Fee Agreement to supersede Arbitration Advisory 1993-02.

DISCUSSION

The Committee on Mandatory Fee Arbitration issued Arbitration Advisory 1993-02, which addressed the standard of review in fee disputes where there is a written fee agreement. In 2021, the case *Pech v. Morgan* (2021) 61 Cal.App.5th 841, 846 (hereafter *Pech*) held that the standard of review as advised by the committee was “the appropriate standard for adjudicating an attorney's claim against a client for breach of a valid fee agreement.” (*Id.* at p. 853.)

In adopting the standards set forth in Arbitration Advisory 1993-02, the court in *Pech* adopted the following two-step analysis to review:

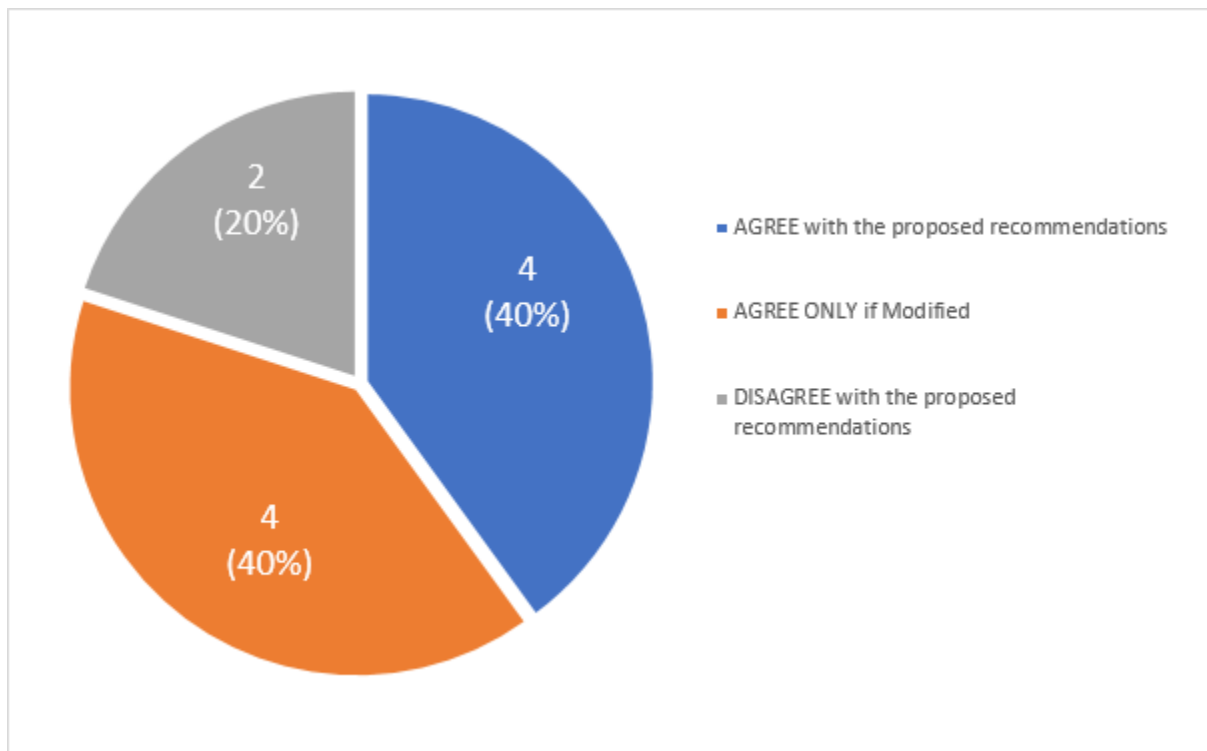
1. The agreement's terms to ensure the agreed upon fee is not unconscionable under Rule of Professional Conduct 1.5; and
2. The attorney's performance under the terms of the agreement, accounting for the implied covenant of good faith and fair dealing, and applying a reasonableness standard regarding said performance.

Based on the decision in *Pech*, COPRAC, which is now responsible for drafting arbitration advisories, created Arbitration Advisory 2024-01, which is largely an update to and would supersede Arbitration Advisory 1993-02, to incorporate the holding in *Pech*. Prior to being finalized for publication, while the opinion was still in development and out for public comment, it was designated as proposed Arbitration Advisory Interim No. 2022-0XA.

The full text of the proposed advisory is provided as Attachment A.

Public Comment

There were ten public comments received in the 90-day public comment period: nine individual commenters and the California Lawyers Association Ethics Committee. Four comments (40 percent) support the advisory, four comments (40 percent) agreed with the advisory if modified, and two (20 percent) oppose the advisory. Seven of the ten commenters provided public comments; however, only four of those comments related to the substance of the proposed arbitration advisory.



Overall, those commenters who provided feedback on the advisory, in addition to indicating their position on it, provided nonsubstantive revisions that were mostly accepted by the committee incorporated into the advisory. Additionally, one commenter indicated support for the advisory, stating, “as a fee arbitrator, the advisory is a useful statement of applicable law that would be helpful to fee arbitrators, in particular.” None indicated opposition to the substance of the advisory.

The public comments are provided as Attachment C.

Following consideration of the public comment received, and incorporation of some of the commenter feedback, at the June 21, 2024, meeting, COPRAC approved the advisory for submission to the Board, sitting as RAD, for formal publication. COPRAC requests that the Board approve the publication of Arbitration Advisory 2024-01.

PREVIOUS ACTION

None

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 3. Protect the Public by Regulating the Legal Profession

RESOLUTIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur, it is:

RESOLVED, that the Board of Trustees, sitting as the Regulation and Discipline Committee recommends that the Board of Trustees approves the publication of Arbitration Advisory 2024-01, attached hereto as Attachment A.

ATTACHMENTS LIST

- A.** Arbitration Advisory 2024-01 – Clean
- B.** Arbitration Advisory 2024-01 – Redline Comparison to Arbitration Advisory 1993-02
- C.** Full Text of the Public Comments