

TOTAL = 4 S = 0
 SM = 3
 O = 1

**Draft Opinion 2022-0XB – Determination of a “Reasonable” Fee
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Comment	COPRAC Response
1	Seinfeld, Ben (18892319)	N	SM	Attorneys have a clear advantage over clients in that they have greater knowledge of the law and how to take advantage of it. They can clearly abuse clients and mislead them. An attorney can tell a client over the phone that they are not going to charge them for their services and then send them a \$5k bill for their time. They will claim that it is Quantum meruit, but also violate CA Bus & Prof Code § 6148 (2022). They are required to get a fee agreement then their services are expected to be over \$1k. Attorneys should not be able to bill clients for time that was administered prior to a fee agreement, unless it was a circumstance that required expediency. Billing a client 6 weeks after first contact for \$5k does not qualify as expediency.	
2	OCBA (Zabat-Fran) (19069900)	Y	SM	We recognize that the majority of Interim 2022- 0XB remains unchanged from Arbitration Advisory 1998-03 and that the revisions to it are intended to address two relatively recent cases (Pech v. Morgan (2021) 61 Cal.App.5th 841 and Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc. (2018) 6 Cal.5th 59) and changes to rule 1.5 of the Rules of the Professional Conduct. Because Interim	

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				<p>2022-0XB addresses only the determination of a reasonable fee when there is no enforceable contract and the Pech case involves determination of a fee only where there is an enforceable written agreement, citation to that case... .. in the first paragraph of the Analysis seems superfluous and may confuse the reader, who may believe the case has some application to the determination of a fee under Interim 2022-0XB when, in fact, it would not. Interim 2022-0XB accurately and adequately addresses the additional factors to be considered as set forth in the Sheppard Mullin case and rule 1.5(b)(1) and (2). One point of clarification may be helpful, however, with respect to the discussion of the principal holding of Sheppard Mullin, which is that an attorney’s ethical breaches may void a fee agreement and thereby impact the ability of the attorney to collect a fee and/or the amount of that fee. The advisory discusses how a reasonable fee is determined when a fee agreement “has been voided” (pp. 1 and 2) or “is voided” (p. 11) due to ethical breaches, but it is not clear how the written fee</p>	

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				<p>agreement actually gets voided on those grounds. Unlike a failure to comply with Business & Professions Code §§ 6147 and 6148, which gives clients an option to void the noncompliant fee agreement, the determination of whether an ethical breach voids a fee agreement is not at the client's option. We are not suggesting that this already lengthy Interim 2022-0XB go through all of the factors that should be considered when determining whether to void a fee agreement for ethical breaches, but this advisory should at least mention that the factors relevant to determining whether a fee agreement is void for ethical breaches is beyond the scope of the advisory. As written, however, the advisory... .. suggests that the agreement would already be “voided” by the time it gets to the fee arbitrators, but this would not ordinarily be the case because if a court had adjudicated voidability, the mandatory fee arbitration program would generally not have jurisdiction to proceed. Finally, a minor point, but the title Interim 2022- 0XB states that it is Former Arbitration Advisory 1993-03, but in fact it would be Former</p>	

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				Arbitration Advisory 1998-03. We appreciate COPRAC's consideration of our comments and suggestions.	
3	Consumer Attorneys of CA (Serna) (19088549)	Y	O	The Consumer Attorneys of California respectfully submits these comments in opposition to proposed arbitration advisory interim No. 2022-0XB. In summary, we do believe this proposal is contrary to existing law and does not reflect the reality of the contingency fee practice. As stated in the summary: An arbitrator is sometimes called upon to determine the amount of reasonable fees to be awarded to an attorney. This situation arises most commonly when the attorney has failed to obtain a written agreement with the client, or when the written agreement between the parties does not comply with the requirements of Business and Professions Code sections 6147 or 6148.1 In such cases the agreement is voidable at the option of the client, and the attorney is limited to a “reasonable” fee. Where the fee contract fully complies with the statutory requirements sections 6147 through 6148, and is otherwise enforceable, the arbitrators should enforce the contract; however, they still may consider the value of the services to the client as affected by	

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				<p>inefficiencies, quality of the services or the attorney’s performance. (See Arbitration Advisory 1993-02, Standard of Review in Fee Dispute Where There is a Written Fee Agreement, dated November 23, 1993.) Additional factors must be considered where an attorney seeks an award of a reasonable fee after the written fee agreement has been voided for the attorney’s breach of an ethical duty. This arbitration advisory explores the factors which are applicable in determining the amount of such a “reasonable” fee.</p> <p>We are concerned that the proposed guidance to arbitrators directing that they should consider the 'non-binding' ABA Rule 1.5 standard will interfere with contingency fee representation by ill-advisedly inserting a non-California ethics rule that has previously been rejected for use in California disciplinary cases (see Proposed Rule 1.5 [4-200] Fees for Legal Services Synopsis of Public Comments) into California’s well-settled law regarding the review of the validity of contingency fee contracts in a fee arbitration.</p> <p>California’s standard for the review of contingent fee contracts outside of the ethics disciplinary system is well-settled</p>	

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				<p>in existing statute and case law. California law already sets out California’s guidelines and includes a thorough discussion of the application of Rule 4-200(B) (now Rule 1.5) of the State Bar Rules of Professional Conduct in determining the enforceability of a fee contract.</p> <p>The standard for reviewing contingency fee validity and enforceability was discussed by the court in Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir. 1979) at 875:</p> <p>"In these circumstances, the contract between Telex and Brobeck was not so unconscionable that 'no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.' Swanson v. Hempstead, 64 Cal. App. 2d 681, 688, 149 P.2d 404, 407 (1944). This is not a case where one party took advantage of another's ignorance, exerted superior bargaining power, or disguised unfair terms in small print. Rather, Telex, a multi-million corporation, represented by able counsel, sought to secure the best attorney it could find to prepare its petition for certiorari, insisting on a contingent fee contract."</p>	

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				<p>California’s standard of review was again upheld in <i>McProud v. Siller</i> (In re CWS Enters., Inc.), 870 F.3d 1106 (9th Cir. 2017) at 1120-21:</p> <p>"No sensible attorney would undertake to represent a client at his usual hourly rate in these circumstances—where the client had been litigating for decades, had no money to pay, and had a history of declining to pay his lawyers and suing them for malpractice, the case was likely to take all or most of the lawyer's time for the next several years, and the lawyer could get paid—if at all—only if he won. A ‘reasonable’ fee must be reasonable for the lawyer as well as the client."</p> <p>We believe California law and precedent should provide the guidance for arbitrators and it would be a mistake to incorporate language explicitly referencing the previously rejected out of state ABA 1.5 'reasonableness' definition for the review of an otherwise valid California contingency contracts. Doing so would be contrary to California law, destabilize the attorney-client relationship, encourage 'after the fact' fee disputes, and provide no real benefit to California consumers. Further, it appears the proposal does</p>	

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				not reflect or acknowledge the realities of the contingency fee practice. Case value depends on a variety of unknown factors such as the sophistication of the insurance adjuster, the difficulty and time spent in addressing lien issues, the likability of the client, any incentives by the defense lawyers to delay the case, which judge is appointed, and whether medical professionals cooperate, to name a few. Despite claims to the contrary, the proposed analysis does indeed judge by hindsight. CAOC respectfully requests rejection of this proposal.	
4	Herbert E Glick Trust (Miles) (19089499)	Y	SM	An arbitrator is sometimes called upon to determine the amount of reasonable fees to be awarded to an attorney in the event of legal fee dispute. This situation arises most commonly when the attorney has failed to obtain a written agreement with the client, or when the written agreement between the parties does not comply with the requirements of Business and Professions Code sections 6147 or 6148.1. In such cases the agreement is voidable at the option of the client, and the attorney is limited to a “reasonable” fee. It has been to my experience that Arbitration over a legal fee dispute,	

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				<p>utilizing either retired judges and or attorneys, places the legal fee disputing party at an inherent disadvantage, as if a prejudicial judgement has already been rendered against the party. A crude analogy would be having all shoplifters of 7-ELEVEN convenience stores adjudicated for their alleged crimes by 7-ELEVEN store managers. Statistics suggest that 59% of lawyers report regular late payments from clients and only 86% collect what they bill. Considering these significant percentages, it has been to my experience that arbitration and or even with the courts, the average legal fee disputing party (usually referred to as “Mr. or Mrs. Green” which is code for nonpaying clients in the legal profession) is at a prejudicial disadvantage when attempting to seek legal resolution of a legal fee dispute.</p> <p>RECOMMENDATION</p> <p>Where practical, and possibly at the discretion of the legal fee disputing party, should have the option of bringing in a non-attorney mediator (as long as there is no legal opinions being made by said mediator) in addition to the mediator who is an attorney. In many instances, legal fee disputes are more about mathematics and equities</p>	

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				<p>then law.</p> <p>Cal. Bus. & Prof. Code § 6148 Where the fee contract fully complies with the statutory requirements sections 6147 through 6148, and is otherwise enforceable, the arbitrators should enforce the contract; however, they still may consider the value of the services to the client as affected by inefficiencies, quality of the services or the attorney’s performance. 6148 in my view is primarily useless in its present form, as it excludes corporations from utilizing this important tool to protect corporate consumers of legal services from billing abuse by attorneys. There is to my knowledge, no statistic or relevant data that would remotely suggest that individuals are harmed more often than corporations as it relates to legal fee disputes. Yes, perhaps one can make the argument that typically individuals have less resources than corporations to protect themselves from legal fee disputes, and thus, some legal mechanism is required to “level the playing field,” however, the facts are that 81% (about 33-million companies in the U.S.) have no employees and as such are considered “small.” However, the most significant omission in 6148 is perhaps the single</p>	

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				<p>most important tool necessary to address legal fee billing abuse; hourly time records purportedly used to make a notation as to the time an attorney spends on a matter. Whether such entries of time worked are digital, written on a yellow legal pad, entered into a diary or iPhone, or verbally recorded, there should be a record of the time an attorney spent on behalf of their client. Denying a client a clear, concise, and unambiguous description of how to access their attorney time records is perhaps the single most egregious omission in 6148 to trigger the right for the client to set a “reasonable fee.” Cal. Bus. & Prof. Code § 6148 (b) (b) <i>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. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses.</i> The above referenced section is the only portion of 6148 that suggests that “the basis thereof” could be inferred as time records. Yet any attorney of average</p>	

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				<p>ability could easily argue that this provision could apply to the legal services agreement where this information would be provided, or even in their billing statement. To further demonstrate the real world impact of this issue, I am presently a defendant in a legal fee dispute lawsuit. Prior to the lawsuit being filed, I requested copies of the attorney’s “time sheets or records of his time supporting the billing for their legal fees.” I further referred in my communication with the attorney in question the following: The California State Bar states as follows; “<i>A client is entitled to a copy of his or her entire file in the attorney’s possession including, but not limited to: (a) all time sheets or time records relating to the services performed by the attorney in the matter in which the fee dispute arose; (b) all statements or billings, client ledger cards, bookkeeping and/or computer records relating to the matter in which the fee dispute arose; and (c) a copy of any written fee agreement or other contract for payment of legal services relating to the matter in which the fee dispute arose.</i>” The attorney in question responded: “Please note that there are no “timesheets” etc., other</p>	

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				<p><i>than the bills I have submitted to you. Our process is to digitally input time into a program called “ebility” and then the same time entries are made into an invoice. You have already been provided all the billings, but there are only three invoices. What else do you exactly need? I am happy to provide them to you to the extend I am required by law.”</i> eBillity TimeTracker is a software program that the attorney in question used and has the capability to provide individual reports of an attorney’s recorded time on a legal matter, without divulging other client information.. RECOMMENDATION</p> <p>When an attorney acknowledges there are no “timesheets” etc., other than bills submitted and or refuses to provide any form of time records of their alleged time worked on a matter, it should invoke the 6148 remedy, whereas the client can set a reasonable fee (quantum meruit), whether a client is an individual or corporation. WHEN WILL DETERMINATION OF A REASONABLE FEE BE REQUIRED When there is fraud present in a legal fee billing, the entire billing received by the client is in serious doubt. Referring again to my own personal experience, please consider this example. An</p>	

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				<p>attorney offers to provide summary research of a public company that may enter into a contract with their client. The attorney writes a 75-word summary of the public company and records nearly 3- hours of their time to do so. Yet, using a simple search online, it was discovered by the client that 53- words of that summary were directly plagiarized from a Wikipedia posting online. In high school or colleges, a “similarity” test of 15% or more would constitute a failed grade for that submitted written effort. In this case, the similarity test exceeds 70% on the submission provided by the attorney in question. Approximately 3-hours was billed by the attorney in question at \$350 per hour for said research amounting to a total fee of \$945.00. RECOMMENDATION When there is fraud present in a legal fee billing, the entire billing received by the client should be in question and trigger the 6148 provision of the client establishing a reasonable fee (quantum meruit). CONSIDERATIONS SPECIFIC TO HOURLY FEES Completely absent in your Proposed Arbitration Advisory Interim No. 2022-0XB, is any reference to the practice of “block billing.” Since block billing has the potential of, among</p>	

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				<p>other things, camouflaging Non-compensable tasks, many judges, fee arbitrators, and commentators regard its persistent and egregious use with suspicion, and some consider the practice a violation of Business and Profession Code §6148(b). The court in <i>Heritage Pacific Financial v. Monroy</i>, (2013) 215 Cal.App.4th 972, 1010 held “trial courts retain discretion to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not.” Previously, the court in <i>Bell v. Vista Unified School Dist.</i>, (2001) 82 Cal.App.4th 672, 689, held that “the trial court should exercise its discretion in assigning a reasonable percentage to the entries, or simply cast them aside” if counsel “cannot further define his billing entries” In an article written by M. Leigh, M. Schroeder, and D. Wolf in the November 1997 issue of “U.S. Business Litigation,” the authors opined that block billing is “almost universally disapproved.” Gerald F. Phillips, a Los Angeles-based mediator, arbitrator, and billing expert, explains that the practice “is disapproved because it allows a lawyer to conceal the time spent on each task and prevents the determination of whether individual</p>	

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				tasks were performed within a reasonable time.” (See Phillips, “Reviewing A Law Firm’s Billing Practices,” The Professional Lawyer, Fall 2001, p. 11-12.) Mr. Phillips is not alone in his sentiments. Alexander S. Polsky, the late neutral at JAMS (Orange, CA), had echoed Mr. Phillips’s concerns as well as opined it violates statutory billing mandates to be obeyed by lawyers: “This type of activity clearly violates [Business and Professions] Code section 6148’s requirement that all bills rendered to a client shall clearly state "the basis thereof." The principal is unable to review the method of determination of attorney’s fees and costs as required by the code.” Case in point is my current legal fee dispute whereas I was billed 14.5 hours in the amount of \$8,700 for "Complete preparation of further revised lease; Telephone conference and Email correspondence with client" yet there was no specific line item breakdown of each service within the "service summary" description. Nor was there any detail provided by the attorney in question after repeated requests. RECOMMENDATION When there is block billing in a legal fee billing, the entire billing received by the	

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				<p>client should be in question and trigger the 6148 provision of the client establishing a reasonable fee (quantum meruit). To believe that an attorney who utilizes “block billing” may have had a temporary “lapse of judgement” regarding that particular section of the billing and the rest is perfectly appropriate would be considered unrealistic to a reasonable person. FEE LIMIT NOTICE IN LEGAL SERVICES AGREEMENTS, RECOMMENDATION</p> <p>Best business practices thrive with mutual boundaries between the parties. Good fences make good neighbors. Consideration should be made that such a mechanism be required to be inserted into legal services agreements that require an attorney to provide a written notice to client once a certain billing amount has exceeded a mutually agreed threshold. This mechanism will inform all parties of a potential “runaway train of legal fees” that may be on its way. Further, legal fee services that are delayed by the attorney and are sent in excess of the agreed billing cycle as stated in the legal services agreement should be subject to the 6148 rule of quantum meruit rule, to be determined by the client, whether an individual or</p>	

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				<p>corporation. ARBITRATION JUDGEMENTS AGAINST ATTORNEYS On a previous matter involving a legal fee dispute, where I was a not a party to the matter, the arbitrator awarded me my legal costs for my defense when opposing counsel named me as a party. When the law firm (a professional corporation) prevailed on the matter that was heard and received their award payment for its fees, said law firm dissolved their firm, which left my award unpaid. RECOMMENDATION An arbitrator’s award ruling against an attorney in a legal fee dispute, whether said attorney is acting as an individual or through a corporation, said attorney should remain personally responsible for said award (whether converted to a judgement or not). CONCLUSION Never in recent history of the United States has there ever been a moment where public confidence in the judicial system has declined to such an extent. The biggest issue: <i>“Corruption in the Judicial System. Corruption undermines the core of the administration of justice, generating a substantial obstacle to the right to an impartial trial, and severely undermining the population’s trust in the judiciary.”</i> The one common denominator in the entire Judicial</p>	

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				System is that all of the primary actors are attorneys. The State Bar Of California is the first line of defense, has both a fiduciary obligation to protect consumers of legal services in this state, and an opportunity to lead the nation in establishing concrete, crystal clear and protective measures to ensure the honest dealings between clients and attorneys. Full disclosure and transparent practices between clients and attorneys will serve to encourage a meaningful engagement between the parties. Hopefully, our efforts will benefit clients and attorneys going forward that will avoid some of the unnecessary challenges and abuses as described herein. Thank you for your consideration.	

Public Comment - AA 2022-0XB

Commenting on behalf of an organization	Yes
Professional Affiliation	Consumer Attorneys of CA
Name	Jacqueline Serna
City	Sacramento
State	California
Email address	jserna@caoc.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	State_bar_CAOC_Comment_7.18.24_.pdf (191 KB)



CONSUMER ATTORNEYS OF CALIFORNIA

SEEKING JUSTICE FOR ALL

PRESIDENT
KATHRYN STEBNER

CEO • CHIEF LOBBYIST
NANCY DRABBLE

LEGISLATIVE DIRECTOR
NANCY PEVERINI

DEPUTY LEGISLATIVE DIRECTOR
JACQUELINE SERNA

SENIOR LEGISLATIVE COUNSEL
SAVEENA TAKHAR

POLITICAL DIRECTOR
LEA-ANN TRATTEN

July 18, 2024

TO: STATE BAR OF CALIFORNIA

FR: CONSUMER ATTORNEYS OF CALIFORNIA
ADVOCATE CONTACTS: NANCY PEVERINI AND JACQUIE SERNA

RE: **Proposed Arbitration Advisory Interim No. 2022-0XB (Determination of a “Reasonable” Fee) OPPOSE**

The Consumer Attorneys of California respectfully submits these comments in opposition to proposed arbitration advisory interim No. 2022-0XB. In summary, we do believe this proposal is contrary to existing law and does not reflect the reality of the contingency fee practice. As stated in the summary:

An arbitrator is sometimes called upon to determine the amount of reasonable fees to be awarded to an attorney. This situation arises most commonly when the attorney has failed to obtain a written agreement with the client, or when the written agreement between the parties does not comply with the requirements of Business and Professions Code sections 6147 or 6148.1 In such cases the agreement is voidable at the option of the client, and the attorney is limited to a “reasonable” fee. Where the fee contract fully complies with the statutory requirements sections 6147 through 6148, and is otherwise enforceable, the arbitrators should enforce the contract; however, they still may consider the value of the services to the client as affected by inefficiencies, quality of the services or the attorney’s performance. (See Arbitration Advisory 1993-02, Standard of Review in Fee Dispute Where There is a Written Fee Agreement, dated November 23, 1993.) Additional factors must be considered where an attorney seeks an award of a reasonable fee after the written fee agreement has been voided for the attorney’s breach of an ethical duty. This arbitration advisory explores the factors which are applicable in determining the amount of such a “reasonable” fee.

We are concerned that the proposed guidance to arbitrators directing that they should consider the 'non-binding' ABA Rule 1.5 standard will interfere with contingency fee representation by ill-advisedly inserting a non-California ethics rule that has previously been rejected for use in California disciplinary cases (see Proposed Rule 1.5 [4-200] Fees for Legal Services Synopsis of Public Comments) into California’s well-settled law regarding the review of the validity of contingency fee contracts in a fee arbitration. California’s standard for the review of contingent fee contracts outside of the ethics disciplinary system is well-settled in existing statute and case law. California law already sets out California’s guidelines and includes a thorough discussion of the application of

LEGISLATIVE DEPARTMENT

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Rule 4-200(B) (now Rule 1.5) of the State Bar Rules of Professional Conduct in determining the enforceability of a fee contract.

The standard for reviewing contingency fee validity and enforceability was discussed by the court in Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir. 1979) at 875:

"In these circumstances, the contract between Telex and Brobeck was not so unconscionable that 'no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.' Swanson v. Hempstead, 64 Cal. App. 2d 681, 688, 149 P.2d 404, 407 (1944). This is not a case where one party took advantage of another's ignorance, exerted superior bargaining power, or disguised unfair terms in small print. Rather, Telex, a multi-million corporation, represented by able counsel, sought to secure the best attorney it could find to prepare its petition for certiorari, insisting on a contingent fee contract."

California's standard of review was again upheld in McProud v. Siller (In re CWS Enters., Inc.), 870 F.3d 1106 (9th Cir. 2017) at 1120-21:

"No sensible attorney would undertake to represent a client at his usual hourly rate in these circumstances—where the client had been litigating for decades, had no money to pay, and had a history of declining to pay his lawyers and suing them for malpractice, the case was likely to take all or most of the lawyer's time for the next several years, and the lawyer could get paid—if at all—only if he won. A 'reasonable' fee must be reasonable for the lawyer as well as the client."

We believe California law and precedent should provide the guidance for arbitrators and it would be a mistake to incorporate language explicitly referencing the previously rejected out of state ABA 1.5 'reasonableness' definition for the review of an otherwise valid California contingency contracts. Doing so would be contrary to California law, destabilize the attorney-client relationship, encourage 'after the fact' fee disputes, and provide no real benefit to California consumers.

Further, it appears the proposal does not reflect or acknowledge the realities of the contingency fee practice. Case value depends on a variety of unknown factors such as the sophistication of the insurance adjuster, the difficulty and time spent in addressing lien issues, the likability of the client, any incentives by the defense lawyers to delay the case, which judge is appointed, and whether medical professionals cooperate, to name a few. Despite claims to the contrary, the proposed analysis does indeed judge by hindsight.

CAOC respectfully requests rejection of this proposal.

Public Comment - AA 2022-0XB

Commenting on behalf of an organization	Yes
Professional Affiliation	Trustee, HEG Trust
Name	Loren Miles
City	Encino
State	California
Email address	lmiles@ma-ad.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Please review my letter attached herein.</p> <p>Sincerely,</p> <p>HEG Trust Loren Miles Trustee</p>
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	The_State_Bar_Of_California_Proposed_Arbitration_Advisory_Interim_No._2022-0XB_RE_Arbitration_Advisory_1993-03_Public_Comment_HEG_Trust_19_July_2024.pdf (348 KB)

Public Comment - AA 2022-0XB

Commenting on behalf of an organization	Yes
Professional Affiliation	Orange County Bar Association
Name	Christina Zabat-Fran
City	Newport Beach
State	California
Email address	jmazo@ocbar.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>July 15, 2024</p> <p>Office of Professional Competence, Planning and Development State Bar of California 180 Howard Street San Francisco, California 94105-1639</p> <p>Re: Proposed Arbitration Advisory Interim No. 2022-0XB (Determination of a “Reasonable” Fee)</p> <p>Dear Sir/Madam:</p> <p>The Orange County Bar Association (OCBA) appreciates the opportunity to provide the following comments concerning Proposed Arbitration Advisory Interim No. 2022-0XB (Determination of a “Reasonable” Fee) (“Interim 2022-0XB”).</p> <p>Founded over 100 years ago, the OCBA has approximately 7,000 members, making it one of the largest voluntary bar associations in</p>

California and the nation. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political learnings, has approved these comments prepared by the OCBA Professionalism and Ethics Committee.

We recognize that the majority of Interim 2022-0XB remains unchanged from Arbitration Advisory 1998-03 and that the revisions to it are intended to address two relatively recent cases (Pech v. Morgan (2021) 61 Cal.App.5th 841 and Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc. (2018) 6 Cal.5th 59) and changes to rule 1.5 of the Rules of the Professional Conduct.

Because Interim 2022-0XB addresses only the determination of a reasonable fee when there is no enforceable contract and the Pech case involves determination of a fee only where there is an enforceable written agreement, citation to that case...

... in the first paragraph of the Analysis seems superfluous and may confuse the reader, who may believe the case has some application to the determination of a fee under Interim 2022-0XB when, in fact, it would not.

Interim 2022-0XB accurately and adequately addresses the additional factors to be considered as set forth in the Sheppard Mullin case and rule 1.5(b)(1) and (2). One point of clarification may be helpful, however, with respect to the discussion of the principal holding of Sheppard Mullin, which is that an attorney's ethical breaches may void a fee agreement and thereby

impact the ability of the attorney to collect a fee and/or the amount of that fee. The advisory discusses how a reasonable fee is determined when a fee agreement “has been voided” (pp. 1 and 2) or “is voided” (p. 11) due to ethical breaches, but it is not clear how the written fee agreement actually gets voided on those grounds. Unlike a failure to comply with Business & Professions Code §§ 6147 and 6148, which gives clients an option to void the noncompliant fee agreement, the determination of whether an ethical breach voids a fee agreement is not at the client’s option. We are not suggesting that this already lengthy Interim 2022-0XB go through all of the factors that should be considered when determining whether to void a fee agreement for ethical breaches, but this advisory should at least mention that the factors relevant to determining whether a fee agreement is void for ethical breaches is beyond the scope of the advisory. As written, however, the advisory...

... suggests that the agreement would already be “voided” by the time it gets to the fee arbitrators, but this would not ordinarily be the case because if a court had adjudicated voidability, the mandatory fee arbitration program would generally not have jurisdiction to proceed.

Finally, a minor point, but the title Interim 2022-0XB states that it is Former Arbitration Advisory 1993-03, but in fact it would be Former Arbitration Advisory 1998-03.

We appreciate COPRAC’s consideration of our comments and suggestions.

Christina Zabat-Fran

2024 President

ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.

[Proposed_Arbitration_Advisory_Interim_No._2022-OXB.pdf \(830 KB\)](#)



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July 15, 2024

Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Re: Proposed Arbitration Advisory Interim No. 2022-0XB
(Determination of a "Reasonable" Fee)

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ORANGE COUNTY BAR ASSOCIATION

A handwritten signature in cursive script that reads "Christina Zabat-Fran".

Christina Zabat-Fran
2024 President

Public Comment - AA 2022-0XB

Commenting on behalf of an organization	No
Name	Ben Seinfeld
City	Encino
State	California
Email address	benseinfeld@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Attorneys have a clear advantage over clients in that they have greater knowledge of the law and how to take advantage of it. They can clearly abuse clients and mislead them. An attorney can tell a client over the phone that they are not going to charge them for their services and then send them a \$5k bill for their time. They will claim that it is Quantum meruit, but also violate CA Bus & Prof Code § 6148 (2022). They are required to get a fee agreement then their services are expected to be over \$1k. Attorneys should not be able to bill clients for time that was administered prior to a fee agreement, unless it was a circumstance that required expediency. Billing a client 6 weeks after first contact for \$5k does not qualify as expediency.</p> <p>I am happy to talk about this issue further as necessary.</p>