

1                                   **THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON**  
2                                   **PROFESSIONAL RESPONSIBILITY AND CONDUCT**

3  
4                                   **PROPOSED ARBITRATION ADVISORY INTERIM NO. 2022-0XB**  
5                                   **(FORMER ARBITRATION ADVISORY 1998-03)**  
6                                   **DETERMINATION OF A “REASONABLE” FEE**

7  
8   **INTRODUCTION**

9   An arbitrator is sometimes called upon to determine the amount of reasonable fees to be  
10 awarded to an attorney. This situation arises most commonly when the attorney has failed to  
11 obtain a written agreement with the client, or when the written agreement between the parties  
12 does not comply with the requirements of Business and Professions Code sections 6147 or 6148.<sup>1</sup>  
13 In such cases the agreement is voidable at the option of the client, and the attorney is limited to a  
14 “reasonable” fee. Where the fee contract fully complies with the statutory requirements sections  
15 6147 through 6148, and is otherwise enforceable, the arbitrators should enforce the contract;  
16 however, they still may consider the value of the services to the client as affected by inefficiencies,  
17 quality of the services or the attorney’s performance. (See Arbitration Advisory 2024-01, Standard  
18 of Review in Fee Dispute Where There is a Written Fee Agreement.) Additional factors must be  
19 considered where an attorney seeks an award of a reasonable fee after the written fee agreement  
20 has been voided for the attorney’s breach of an ethical duty.

21 This arbitration advisory explores the factors which are applicable in determining the amount of  
22 such a “reasonable” fee.

23   **ANALYSIS**

24   **1.       When Will Determination of a Reasonable Fee be Required**

25   Absent a statutorily compliant written fee agreement<sup>2</sup>, an arbitrator will be required to determine  
26 whether a reasonable fee may arise in the following circumstances:

- 27           (1)       Where no written fee agreement exists, and one was required by law (Bus. & Prof.  
28                   Code, §§ 6147–6148);

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise indicated.

<sup>2</sup> Where an arbitrator determines that the dispute is governed by the existence of a statutorily compliant written contract, “the amount of the recoverable fees will be determined under the terms of the fee agreement even if the agreed upon fee may exceed what otherwise would constitute a reasonable fee under the familiar lodestar analysis.” (*Pech v. Morgan* (2021) 61 Cal.App.5th 841, 846 [276 Cal.Rptr.3d 97]; see also Arbitration Advisory 2024-01.)

- 29 (2) Where there is a fee agreement, but it does not comply with statutory  
 30 requirements and is voidable (Bus. & Prof. Code, §§ 6147–6148);
- 31 (3) Where services were performed but there was no definitive agreement as to fees  
 32 (i.e., quasi-contract/quantum meruit cases);
- 33 (4) Where the attorney’s billing statements fail to comply with section 6148, subdivision  
 34 (b);
- 35 (5) Where there is to be a division of contingent fees between successive attorneys  
 36 (i.e., a contingency fee attorney has withdrawn with good cause or is discharged by  
 37 a client prior to deriving a recovery, and there is a later recovery) (*Fracasse v. Brent*  
 38 (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]);
- 39 (6) Where a disqualified attorney may be entitled to recovery for services on an unjust  
 40 enrichment theory for services performed prior to their removal (*Cal Pak Delivery,*  
 41 *Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1 [60 Cal.Rptr.2d 207]; *Estate*  
 42 *of Falco* (1987) 188 Cal.App.3d 1004 [233 Cal.Rptr. 807]);
- 43 (7) Where the estate or heirs of a deceased attorney are entitled to be paid for the  
 44 reasonable value of services rendered by the deceased attorney prior to their death  
 45 (Rule Prof. Conduct, rule 5.4(a)(1))<sup>3</sup>;
- 46 (8) Where the fee contract terms are ambiguous, vague, construed against the drafter  
 47 of the contract, or there are unconscionable terms or other contractual defects  
 48 affecting enforcement of the agreement; or
- 49 (9) Where the fee agreement has been voided for the attorney’s breach of an ethical  
 50 duty (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company,*  
 51 *Inc.* (2018) 6 Cal.5th 59 [237 Cal.Rptr.3d 424] (*Sheppard Mullin*)).

52 **2. Attorney has the Burden of Proof to Establish a Reasonable Fee**

53 When a client’s challenge raises the requirement of determining a reasonable fee, the burden of  
 54 establishing entitlement to the amount of the charged fee is upon the attorney. (See Arbitration  
 55 Advisory 1996-03 (1996) Burden of Proof in Fee Arbitrations.)

56 Fee agreements are required to be fair and drafted in a manner the clients should reasonably be  
 57 able to understand. (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037 [252 Cal.Rptr. 845].)  
 58 Attorneys have a professional responsibility to ensure that fee agreements are neither  
 59 unreasonable nor written in a manner that may discourage clients from asserting any rights they  
 60 may have against their attorney. (Los Angeles County Bar Assn. Formal Opn. No. 489 (1997); see

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<sup>3</sup> All further references to rule are to the Rules of Professional Conduct unless otherwise indicated.

61 also *Ojeda v. Sharp Cabrillo Hospital* (1992) 8 Cal.App.4th 1, 17 [10 Cal.Rptr.2d 230].) The burden  
 62 of proof is upon the attorney to show that his dealings with the client in all respects were fair. The  
 63 attorney must satisfy the court as to the justness of a claim for compensation. (*Clark v. Millsap*  
 64 (1926) 197 Cal. 765, 785 [242 P. 918].) Where the contract between attorney and client has been  
 65 made during the existence of the attorney-client relationship, the burden is cast upon the attorney  
 66 to show that the transaction was fair and reasonable, and no advantage was taken. (*Priester v.*  
 67 *Citizens Nat. Bank* (1955) 131 Cal.App.2d 314, 321 [280 P.2d 835].)

68 In cases involving statutory awards of attorney’s fees, it is clear that the party seeking the award  
 69 has the burden of establishing that the fees incurred were reasonably necessary, and reasonable  
 70 in amount. (*Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 816 [5 Cal.Rptr.2d  
 71 770].)

72 One of the most significant factors in determining a reasonable fee is the amount of time spent.  
 73 (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287–289 [256 Cal.Rptr. 209].) Thus, an attorney who  
 74 fails to keep adequate time records, or uses the questionable practice of “lumping” time or “block  
 75 billing” may have difficulty meeting the burden of proof. The practice of block billing will also  
 76 violate section 6148, subdivision (b), where applicable, if the client cannot reasonably ascertain  
 77 the time and rate for particular tasks. It is appropriate for the arbitrator to allocate the burden of  
 78 proof to the attorney to fairly establish the reasonable need for the services, the amount of time  
 79 spent and to prove the reasonable fee.

### 80 **3. Factors Which Affect Determination of a Reasonable Fee**

81 Whether a fee is reasonable, unreasonable, or unconscionable is often a matter of degree and  
 82 involves the assessment of a multiplicity of factors which are discussed below. Consideration  
 83 should be given to each factor. The ultimate conclusion is left to the reasonable judgment of the  
 84 arbitrator.

85 The Committee has formulated a list of relevant questions which may provide some guidance to  
 86 an arbitrator in a reasonable fee case. The questions are set forth in Appendix A to this Advisory,  
 87 and are designed to trigger appropriate areas of inquiry and analysis. Obviously, the issues raised  
 88 in the Appendix A questions will not be relevant to every case, but it is recommended that  
 89 arbitrators consider them in the course of conducting a reasonable fee analysis.

#### 90 **a. Statutory Principles to Consider**

91 The statutory provisions of Business and Professions Code sections 6146 through 6148 and  
 92 applicable case law will limit an attorney to a reasonable fee in many instances. Arbitrators must  
 93 be familiar with the statutory requirements of these sections. The current statutory provisions are  
 94 set forth in Appendix B.

95 **b.** The Rules of Professional Conduct prohibit the charging of an “illegal or  
 96 unconscionable fee.” (rule 1.5.) California’s rule 1.5 unconscionability standard sets

97 a higher bar for finding fee violations compared to the American Bar Association  
 98 Model Rules of Professional Conduct (ABA Model Rules), rule 1.5 and many other  
 99 jurisdictions, which expressly limit attorney’s fees to a standard of reasonableness.  
 100 **Historically, California's rule 4-200, which has since been replaced by rule 1.5,**  
 101 **contained factors similar to ABA Model Rule 1.5 for assessing the reasonableness of**  
 102 **lawyer fees. Both California's former rule 4-200 and current rule 1.5 include factors**  
 103 **such as the amount involved in the case, the results obtained, and the experience**  
 104 **and ability of the lawyer, which align with the ABA's standards. While California case**  
 105 **law should be the primary authority when evaluating the unconscionability of fee**  
 106 **agreements, ABA Model Rule 1.5 provides a useful framework and additional**  
 107 **perspective.****The Unconscionability Factors**

108 The determination of a reasonable fee should always include careful consideration of factors listed  
 109 in rule 1.5(b). Under rule 1.5(b), unconscionability is determined on the facts and circumstances  
 110 existing at the time that the agreement is entered into, in consideration of the following factors:

- 111 (1) Whether the lawyer engaged in fraud or overreaching in negotiating or setting the  
 112 fee;
- 113 (2) Whether the lawyer has failed to disclose material facts;
- 114 (3) The amount of the fee in proportion to the value of the services performed;
- 115 (4) The relative sophistication of the lawyer and the client;
- 116 (5) The novelty and difficulty of the questions involved, and the skill requisite to  
 117 perform the legal service properly;
- 118 (6) The likelihood, if apparent to the client, that the acceptance of the particular  
 119 employment will preclude other employment by the lawyer;
- 120 (7) The amount involved and the results obtained;
- 121 (8) The time limitations imposed by the client or by the circumstances;
- 122 (9) The nature and length of the professional relationship with the client;
- 123 (10) The experience, reputation, and ability of the lawyer or lawyers performing the  
 124 services;
- 125 (11) Whether the fee is fixed or contingent;
- 126 (12) The time and labor required; and
- 127 (13) Whether the client gave informed consent to the fee.

128 The most relevant of the rule 1.5 factors are items (3) comparison of fee charged to value  
129 received; (10) the experience, reputation, and ability of the lawyer or lawyers performing the  
130 services; and (13) the informed consent of the client to the fee. (*Shaffer v. Superior Court* (1995)  
131 33 Cal.App.4th 993, 1002 [39 Cal.Rptr.2d 506].) Informed consent generally requires that the  
132 client's consent be obtained after the client has been fully informed of the relevant facts and  
133 circumstances, or is otherwise aware of them. The client must be sufficiently aware of the terms  
134 and conditions of the fee arrangement so as to make an informed decision.

135 A fee that is unconscionable is necessarily unreasonable and cannot be allowed. It is in the  
136 arbitrator's discretion to decide whether the unconscionability is so extreme as to warrant complete  
137 denial of a fee or whether the fee should be adjusted and allowed on a quantum meruit basis to  
138 avoid unjust enrichment to the client.

139 An unconscionable fee is difficult to define, prompting comments like: "I don't know how to define  
140 it, but I know it when I see it." An unconscionable fee is one which is "so exorbitant and wholly  
141 disproportionate to the services performed as to shock the conscience." (*Goldstone v. State Bar*  
142 (1931) 214 Cal. 490, 498 [6 P.2d 513].)

143 Other jurisdictions have held that a lawyer's fee is clearly excessive when, after a review of the  
144 facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee  
145 exceeds a reasonable fee. (*In the Matter of Swartz* (Ariz. 1984) 141 Ariz. 266, 271 [686 P.2d 1236].)

146 Not surprisingly, the factors considered under rule 1.5(b) are generally identical to the factors  
147 considered in analyzing the reasonableness of a fee. Cases which address a determination of  
148 reasonable fees in the context of awarding fees to the adverse party have consistently relied upon  
149 similar factors to those listed above. (See, e.g., *Glendora Community Redevelopment Agency v.*  
150 *Demeter* (1984) 155 Cal.App.3d 465, 474 [202 Cal.Rptr. 389]; *Bruckman v. Parliament Escrow Corp.*  
151 (1987) 190 Cal.App.3d 1051, 1062 [235 Cal.Rptr. 813]; *Stokus v. Marsh* (1990) 217 Cal.App.3d 647  
152 [266 Cal.Rptr. 90]; *Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682 [214 Cal.Rptr. 461]; *La Mesa-*  
153 *Springs Valley School District v. Otsuka* (1962) 57 Cal.2d 309 [19 Cal.Rptr. 479]; *Martino v. Denevi*  
154 (1986) 182 Cal.App.3d 553 [227 Cal.Rptr. 354].)

155 An attorney's fee that is high is not the same as an unconscionable fee (*Aronin v. State Bar of*  
156 *California* (1990) 52 Cal.3d 276 [276 Cal.Rptr. 160]), but a high fee may be found to be an  
157 unreasonable fee. The difference between the two perhaps is best illustrated by the following  
158 example: A billing rate of \$500 per hour, if provided for in a fully compliant written fee agreement  
159 may not be unconscionable under rule 1.5(b), but where there has been no compliance with  
160 statutory requirements, and the client has exercised the right to void the agreement, such a billing  
161 rate may indeed be found to be unreasonable under all the circumstances including community  
162 standards (rates charged by others in the community), and it may be reduced accordingly. This is  
163 because arbitrators have wide latitude in dealing with an unconscionable contract provision.

164 Under Civil Code section 1670.5, if the court as a matter of law finds a contract or any clause of a  
 165 contract to be unconscionable at the time it was made, the court may refuse to enforce the  
 166 contract, or it may enforce the remainder of the contract without the unconscionable clause, or it  
 167 may so limit the application of any unconscionable clause as to avoid any unreasonable result.

168 **c. Malpractice Considerations**

169 Where malpractice is alleged in a section 6200 fee arbitration, evidence of malpractice may not be  
 170 presented to support a claim for damages because the arbitrator has no jurisdiction to award  
 171 damages or offset for malpractice injuries. (Bus. & Prof. Code § 6200, subd. (b)(2).) However,  
 172 evidence relating to claims of malpractice and professional misconduct is admissible to the extent  
 173 that it may bear upon the fees, costs, or both to which the attorney may be entitled. (Bus. & Prof.  
 174 Code § 6203, subd. (a).) Accordingly, malpractice must be considered in determining the value of  
 175 the attorney’s services, and the fee may be reduced accordingly.

176 In the context of litigation an attorney’s negligent act or omission may be fatal to the case, i.e., the  
 177 failure to timely file the complaint within the statute of limitations, or the failure to file opposition  
 178 to a dispositive motion, resulting in summary judgment or dismissal. If the attorney’s negligent  
 179 conduct has caused damages to the client, the arbitrator is not permitted to award damages to  
 180 the client, or to allow an offset against fees for damages incurred by the client. However, if the  
 181 negligent conduct has caused the loss of the client’s entire claim(s), it is likely that the services  
 182 were without value to the client.

183 In cases where the attorney’s error does not defeat the client’s entire claim, the attorney may  
 184 have billed the client for the cost of correcting his or her negligent conduct. An example of this  
 185 might be the attorney’s failure to timely respond to discovery resulting in law and motion  
 186 proceedings, a waiver of objections which could have been asserted, or an award of sanctions.  
 187 The attorney may have then diligently prosecuted corrective actions, such as a motion for relief  
 188 from waiver of objection, and billed the client for all of the corrective action costs.

189 The arbitrator may not award damages or offset, but may consider whether fees should be  
 190 disallowed or reduced for services performed by the attorney to correct his or her own errors. The  
 191 arbitrator may also consider whether the attorney’s services which were negligent provided no  
 192 value or lesser value than what was billed. The amount billed may be adjusted based upon  
 193 whether the client received reasonable value if the services were ineffective or produced no  
 194 benefit.

195 Expert testimony is not required to support a claim of malpractice in an arbitration proceeding.  
 196 The arbitrator is not required to determine whether the attorney’s conduct was above or below  
 197 the standard of care. The arbitrator’s determination of the reasonable value of the services  
 198 requires an assessment of the quality of the attorney’s performance. It does not require a  
 199 determination of whether there was negligence, causation, or damages so no expert testimony is  
 200 required.

201 The issue in the arbitration is whether the attorney's acts or omissions affect the *value* of the  
202 services *to the client*. If so, the fee may be adjusted. Any damages for that malpractice are  
203 beyond the purview of the arbitration and must be left to another forum.

204 **d. The Community Standard**

205 If the fees charged by the attorney are disproportionately high compared with similar services  
206 performed in the legal marketplace where the contested services are performed, then such fee  
207 may be considered unreasonable. Rates and charges on par with similar charges for similar  
208 services performed by other attorneys in the community with similar experience may be  
209 considered reasonable. (*Shaffer v. Superior Court, supra*, 33 Cal.App.4th 993, 1002–1003.)

210 In a small community where hourly rates average \$250–300/hour, it may be highly unusual or  
211 excessive for an attorney to charge \$600/hour. Such a rate may not be considered excessive in a  
212 major metropolitan area. In analyzing the weight to be given to a community standard, the  
213 arbitrator must also consider whether the attorney's higher rate is justified by reputation, by  
214 specialized experience in a complex field of practice, or by the client's informed consent to the  
215 rate, as well as other rule 1.5(b) factors.

216 The internal cost or profit margin of the attorney providing the services, however, is not relevant  
217 to a determination of their value. (*Shaffer v. Superior Court, supra*, 33 Cal.App.4th 993, 1002–  
218 1003.) Thus, it is not proper to consider the amount paid by a law firm to its associates or contract  
219 attorneys to determine whether the billed is reasonable. Attorneys' fees for hours spent should be  
220 awarded based on quality of the work done, the benefit it produces for the client, and the  
221 community, not the cost of heating and lighting the office where the work was performed. (*Id.* at  
222 p. 1002; *Margolan v. Regional Planning Commission of Los Angeles County* (1982) 134 Cal.App.3d  
223 999 [185 Cal.Rptr. 145].)

224 **e. Considerations Specific to Hourly Fees**

225 The primary inquiry in hourly rate matters is the quality and necessity of the services and a  
226 comparison of their cost with what would be charged for such services by other attorneys in the  
227 community who have similar experience and ability. (*Shaffer v. Superior Court, supra*, 33  
228 Cal.App.4th 993, 1002–1003.)

229 A lawyer's customary hourly rate can be evaluated by comparison to that rate charged by others in  
230 the legal community with similar experience. (*Cazares v. Saenz, supra*, 208 Cal.App.3d 279.) The  
231 number of hours expended by a lawyer can also be evaluated in light of how long it would have  
232 taken other attorneys to perform the same tasks. After consideration of these factors,  
233 adjustments can be made to the hourly rate and number of hours expended and this should yield  
234 a reasonable value of the work completed. (*Id.* at p. 279.)

235 The determination of a reasonable fee also involves consideration of the adequacy of the  
236 attorney's time records. (*Margolan v. Regional Planning Commission of Los Angeles County* (1982)

237 134 Cal.App.3d 999 [185 Cal.Rptr. 145]; *Martino v. Denevi, supra*, 182 Cal.App.3d 553.)  
 238 Information crucial to determining a reasonable fee in an hourly context thus would include  
 239 whether the attorney-maintained records showing the number of hours worked, billing rates,  
 240 types of issues dealt with, and appearances made on the client's behalf. (*Martino v. Denevi, supra*,  
 241 182 Cal.App.3d 553.) This is a performance-based analysis in which the arbitrator looks not only at  
 242 the quantity of time spent but the quality of the time as well.

243 Failure to maintain adequate time and billing records, or failure of the billing statements to clearly  
 244 show the amount, rate, basis for the calculation, or other method of determining the fees and  
 245 costs charged, in addition to being a potential violation of section 6148, subdivision (b), may  
 246 require the arbitrator(s) to disallow some or all of the claimed charges based upon the inadequacy  
 247 of the evidence supporting them. Additionally, time records should be scrutinized for such  
 248 matters as duplication of services and excessive services in determining the reasonableness of the  
 249 overall fee claimed by the attorney. (*Margolan v. Regional Planning Com. of Los Angeles County*,  
 250 *supra*, 134 Cal.App.3d 999; *Martino v. Denevi, supra*, Cal.App.3d 553.)

251 The nature of the matter and the amount at issue should be considered, such as in the case of *Levy*  
 252 *v. Toyota Motor Sales, U.S.A. Inc., supra*, 4 Cal.App.4th 807, where the attorneys requested  
 253 \$137,459 in connection with a lemon law case over a vehicle which had a value of \$22,000. The  
 254 court rejected the request and reduced attorneys' fees to \$30,000.

255 A reasonable fee analysis in an hourly rate case should generally include the following procedures:

- 256 i. Determine the hourly rate. If the rate is set forth in a valid agreement, and the  
 257 rate is not unconscionable, the arbitrator should give great weight to the rate  
 258 selected by the parties;
- 259 ii. If the contract rate is unconscionable, or if there is no enforceable written  
 260 agreement, the arbitrator will determine a reasonable hourly rate considering  
 261 all of the factors in rule 1.5, including the community standard;
- 262 iii. The billing statements should be carefully reviewed for double billing, duplication  
 263 of effort, flat or fixed time charges (where not specifically authorized), unilateral  
 264 rate increases, billing errors, etc.; and
- 265 iv. The attorney's hours may be adjusted by the arbitrator for time that is duplicate,  
 266 improper or of no reasonable value to the client. The resulting number of hours  
 267 will be multiplied by the reasonable hourly rate to determine the reasonable fee.

268 Rate increases are improper unless provided in a valid contract and properly noticed to the client.  
 269 (*Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572–1573 [1 Cal.Rptr.2d 531].)  
 270 Fixed or minimum time charges (i.e., four hours for any court appearance) are impermissible  
 271 unless clearly disclosed and specified in a valid fee agreement. (ABA Formal Opn. No. 03-379  
 272 (2003); Cal. State Bar Formal Opn. No. 1996-147 (1996); Los Angeles County Bar Assn. Ethics Opn.

273 No. 479 (1994).) Such charges should not be allowed if the effect is to compound the attorney's  
274 hourly rate (i.e., one attorney covers three appearances in one morning and bills four hours to  
275 each of these clients). Such a billing practice may be fraudulent unless it has been disclosed to the  
276 client and there is an agreement that the attorney may bill the same hours to multiple clients. In  
277 such cases, the arbitrator should closely examine whether the client has given informed consent.

278 **f. Cases Which are Prosecuted "as a Matter of Principle"**

279 The arbitrator may be faced with a case where the fee sought to be charged grossly exceeds the  
280 recovery derived, resulting in the client receiving little or no financial benefit. Sometimes this  
281 occurs in cases where the client asks the attorney to prosecute or defend a case "as a matter of  
282 principle." Such matters are inherently uneconomical. The decision in such cases may turn on  
283 whether the client gave informed consent (i.e., with knowledge of the likelihood that fees may  
284 exceed results). Fees may be adjusted in such cases, where appropriate.

285 **g. Considerations Specific to Contingency Fee Cases**

286 The issues which arise in fee disputes involving contingency fees are the subject of a separate  
287 Arbitration Advisory entitled "Fee Arbitration Issues Involving Contingency Fees." (Cal. Arb.  
288 Advisory No. 1997-03 (1997).)

289 Applying the factors in rule 1.5(b), the courts have upheld contingency fee awards where a  
290 complying written contract exists even though the attorney may receive compensation which  
291 exceeds the reasonable value of his or her services if an hourly rate had been applied. ( See  
292 *Franklin v. Appel* (1992) 8 Cal.App.4th 875 [10 Cal.Rptr.2d 759] (fee award which was equivalent of  
293 \$1,184 per hour was affirmed on appeal); see also *Cazares v. Saenz, supra*, 208 Cal.App.3d 279.)  
294 The rationale for this is that the lawyer on a contingency fee contract receives nothing unless the  
295 plaintiff obtains a recovery. Further, the fee is contingent only on the amount recovered. As such,  
296 the lawyer runs the risk that even if successful, the amount recovered will yield a percentage fee  
297 which does not provide adequate compensation. (*Cazares v. Saenz, supra*, 208 Cal.App.3d 279.)  
298 Further, there is a delay in the attorney receiving the fee until conclusion of the case. The lawyer,  
299 in effect, finances the case for the client during the pendency of the lawsuit.

300 It has been held that a one-third contingency was not unconscionable even though the defendant  
301 lost by default, where the parties could not ascertain that defendant would have defaulted, and  
302 the services might have required a contested trial and possible appeal (*Setzer v. Robinson* (1962)  
303 57 Cal.2d 213, 218 [18 Cal.Rptr. 524].) The reasonableness of the contingent fee is to be judged  
304 not by hindsight but by the "situation as it appeared to the parties at the time the contract was  
305 entered into." (*Youngblood v. Higgins* (1956) 146 Cal.App.2d 350 [303 P.2d 637].)

306 A personal injury contingency fee contract will often provide for a one-third contingency. This is  
307 routine and commonly accepted. But if the attorney settles the case with the adjuster after three  
308 phone calls and two hours of work, the fee may appear to be unreasonable or even  
309 unconscionable considering all factors. The focus should be on whether the terms can be

310 considered unfair or inequitable. ( See *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.*  
311 (2010) 187 Cal.App.4th 1405, 1420–1421 [114 Cal.Rptr.3d 781].) The fees should not involve fraud  
312 or overreaching by the attorney. (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402 [49 P.2d 832].)

313 Further, there seems little doubt that if the attorney possessed some special knowledge or  
314 information that they would be required to disclose at the time the contingency fee contract was  
315 signed (rule 1.4; Bus. & Prof. Code, § 6068, subd. (d)), the attorney’s failure to disclose it could  
316 render the contingency fee contract unfairly obtained. For example, if the attorney knows (or has  
317 good reason to believe) that the potential defendant has a \$100,000 insurance policy and their  
318 experience either with the defendant or their insurer makes the attorney confident that the policy  
319 would be paid quickly when facing a multi-million dollar liability, it would be unfair for the  
320 attorney to take a one-third contingency without disclosing that foreknowledge to the prospective  
321 client. On the other hand, if the attorney was sought out by the prospective client for their  
322 reputation and foreknowledge and the agreement at one-third was reached after full disclosure to  
323 the client, there would seem to be little reason to deny the attorney the benefit of their bargain.

324 The determination of reasonableness must necessarily consider the relevant facts, the  
325 unconscionability factors referenced above, based on rule 1.5(b), and the circumstances known to  
326 the parties at the time. A case with severe injuries and immensely strong settlement value may not  
327 be contingent at all where it is likely that the recovery will be quickly derived through an insurance  
328 carrier without litigation and such event is predictable to a virtual certainty. The unconscionability  
329 implications of such an arrangement may weigh heavily in the reasonable fee analysis.

330 The question arises in cases where there is an oral contingent fee agreement that does not comply  
331 with section 6147, and whether the attorney’s fee then is limited to a reasonable fee determined  
332 by reference to the attorney’s hourly rate. In most of these cases, the attorney should be  
333 permitted to recover a contingent fee either at the contract rate, or at some lesser but reasonable  
334 percentage (taking into consideration community standards) because of the economic  
335 considerations attendant to taking the case on a contingent basis. (*Cazares v. Saenz, supra*, 208  
336 Cal.App.3d 279.) Accordingly, under a quantum meruit theory, the attorney should not necessarily  
337 be limited to recovering an hourly rate on whatever time has been spent on the case, but instead,  
338 in the absence of unconscionability should be entitled to an amount reflecting the value of the  
339 contingency factors as well as the delay in receiving payment for the services (i.e., the contingent  
340 rate in the contract or some lesser but reasonable percentage of the recovery). (*Id.*)

341 The agreed contingent fee percentage is the ceiling for the attorney’s recovery. For example, if  
342 the attorney and the client verbally agree to a twenty-five percent contingency, but the agreement  
343 was never reduced to writing, the arbitrator cannot award a thirty percent contingency. That  
344 amount may be reasonable for the services performed but cannot be awarded because it exceeds  
345 the agreed rate, which sets a ceiling. The attorney may not use the occasion of a noncompliant  
346 written contingent fee agreement to obtain a fee higher than the contingent fee called for in the  
347 agreement. (*Cazares v. Saenz, supra*, 208 Cal.App.3d 279.)

348           **h.       When the Attorney May be Required to Refund Fees or May Not be Entitled to**  
 349           **Fees as a Result of An Ethical Breach**

350       Occasionally, an arbitration will reveal circumstances where the attorney agreed to represent a  
 351       client under an impermissible conflict of interest or committed some other serious ethical  
 352       violation. In those cases, an attorney may be required to disgorge some or all of the fees which the  
 353       client already paid that were derived from conduct that is an ethical breach, and/or may not be  
 354       entitled to recover in quantum meruit.

355       There are numerous cases that affirm the availability of a disgorgement remedy for attorney  
 356       conduct which is serious or willful. (See, e.g., *Hance v. Super Store Industries* (2020) 44 Cal.App.5th  
 357       676 [257 Cal.Rptr.3d 761]; *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co.,*  
 358       *Inc.* (2018) 6 Cal.5th 59 [237 Cal.Rptr.3d 424]; *Lofton v. Wells Fargo Home Mortgage* (2014) 230  
 359       Cal.App.4th 1050 [179 Cal.Rptr.3d 254]; *Rodriguez v. Disner* (9th Cir. 2012) 688 F.3d 645; *In re*  
 360       *Occidental Financial Group, Inc.* (9th Cir. 1994) 40 F.3d 1059; *Pringle v. La Chappelle* (1999) 73  
 361       Cal.App.4th 1000 [87 Cal.Rptr.2d 90]; *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518 [49  
 362       Cal.Rptr.3d 60]; *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221],  
 363       *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6 [136 Cal.Rptr. 373]; and *Cal Pak Delivery v. United Parcel*  
 364       *Service, Inc.* (1997) 52 Cal.App.4th 1 [60 Cal.Rptr.2d 207].) These cases hold that the remedy  
 365       should not be available where the attorney’s conduct caused no damage (*Slovensky*), where the  
 366       offense was not serious or willful (*Pringle*), where the remedy was not proportionate to the  
 367       conduct (*Frye*) or where the services and fees subject to disgorgement arose before the offending  
 368       conduct (*Jeffry* and *Cal Pak Delivery*).

369       The determination of whether the attorney breached his or her ethical duties is left to the  
 370       discretion of the arbitrator with the caveat that an attorney should not be financially rewarded for  
 371       serious or willful unethical conduct.

372       Similarly, whether an attorney whose fee agreement is voided due to an ethical breach is entitled  
 373       to quantum meruit recovery is a matter of discretion to be exercised in light of all the  
 374       circumstances, such as the gravity and timing of the violation, its willfulness, its effect on the value  
 375       of the lawyer's work for the client, any other threatened or actual harm to the client, the  
 376       adequacy of other remedies, and whether the breach was intentional, negligent, or without fault.  
 377       (*Sheppard Mullin, supra*, 6 Cal.5th 59, 94–96.) **The determination of whether an agreement is void**  
 378       **requires a detailed legal analysis, potentially involving court proceedings, where evidence of the**  
 379       **breach and its impact on the agreement is presented and evaluated. While *Sheppard Mullin***  
 380       **addresses the voiding of fee agreements due to ethical breaches, the actual process by which a**  
 381       **fee agreement is voided is beyond the scope of this advisory.**

382       When an attorney seeks fees in quantum meruit that it is unable to recover under the contract  
 383       because they have breached an ethical duty to their client, the burden of proof on these or other  
 384       factors lies with the attorney. To be entitled to any measure of recovery, the attorney must show  
 385       that the violation was neither willful nor egregious, and they must show that their conduct was

386 not so potentially damaging to the client as to warrant a complete denial of compensation. The  
387 client is under no obligation to present evidence that it was injured. (*Sheppard Mullin, supra*, 6  
388 Cal.5th 59.)

389 Before awarding any compensation, the arbitrator must be satisfied that the award does not  
390 undermine incentives for compliance with the Rules of Professional Conduct. Absent exceptional  
391 circumstances, the contractual fee will not serve as an appropriate measure of quantum meruit  
392 recovery. (*Sheppard Mullin, supra*, 6 Cal.5th 59 at p. 458.) Although the attorney may be entitled to  
393 some compensation for their work, their ethical breach will ordinarily require them to relinquish  
394 some or all the profits for which they negotiated. (*Shaffer v. Superior Court, supra*, 33 Cal.App.4th  
395 993, at pp. 1002–1003.) In contrast to the discussion in Section 3.d, under a *Sheppard Mullin*  
396 analysis, the internal cost of providing the services may be relevant to a determination of their  
397 value. (*Ibid.*)

398 **i. A Reasonable Fee May Never Exceed the Contract Rate**

399 If there is evidence of the existence of a fee agreement, whether oral or written, fixed, hourly, or  
400 contingent, the basic rule is that the reasonable fee may never exceed the fee which was agreed  
401 upon. This is based upon the premise that the attorney should not be rewarded for failing to  
402 comply with the requirements of sections 6147 through 6148 by allowing a fee greater than the  
403 amount the attorney negotiated for and expected to receive. In cases where there is some  
404 evidence of the existence of an agreement, the reasonable fee will either be equal to or less than  
405 the amount agreed, but shall never exceed that amount. (See *Cazares v Saenz, supra*, 209 Cal.App.  
406 3d 279, 289.)

407 Beyond that basic rule, the determination of a reasonable fee is largely within the exercise of  
408 reasonable discretion of the arbitrator.

409 **EXAMPLES OF REASONABLE FEE ANALYSIS**

410 Some of the procedures which should be applied by arbitrators to determine a reasonable fee are  
411 best demonstrated by several examples.

412 **Example One:** Attorney is asked by client to render services which are performed, without any  
413 discussion of compensation. Attorney then invoices client for 15 hours of legal services at \$350  
414 per hour. Client objects to both the rate and the amount, and fee arbitration results.

415 The attorney's theory of recovery is in quantum meruit, as an implied contract for the reasonable  
416 value of the attorney's services. There is no need to address the voidability of the contract under  
417 section 6148, because there was no agreement as to terms.

418 This is a pure reasonable value analysis in which the arbitrator does not need to consider the  
419 intent of the parties as to a rate of compensation, since there was no such discussion. The proper

420 way to analyze such a determination of compensation would be to look at the attorney's actual  
 421 performance considering what was requested and required by the client's needs.

422 In addition to the above analysis, the arbitrator must also weigh the rule 1.5 factors. One of the  
 423 key factors under these circumstances would include an analysis of the novelty and difficulty of the  
 424 services performed, and whether there was any particular expertise required of the attorney. The  
 425 arbitrator would need to consider the hourly rate typically charged by this attorney for these types  
 426 of services, and also consider a community standard of what is typically charged by other  
 427 attorneys in the community who possess similar reputation, skill, and talents in the same field of  
 428 practice.

429 If the attorney seeks to charge \$350 per hour in a community where rates typically do not exceed  
 430 \$200 an hour, that factor must be considered by the arbitrator, in addition to whether the subject  
 431 attorney's expertise and specialty warrant a rate substantially different than that charged by other  
 432 practitioners in the community. This would involve the arbitrator weighing the novelty and  
 433 difficulty of the task, the necessity for a specialist, the knowledge and experience of the attorney,  
 434 and a comparison of the rates sought to be charged by the particular attorney with rates charged  
 435 by equally experienced attorneys elsewhere in the community. Consideration should be given to  
 436 whether this task required a specialist, or could have been performed by a lesser qualified  
 437 attorney had that issue been discussed with the client. This brings into play the client's  
 438 sophistication and prior experience with legal service relationships.

439 One factor for the arbitrator to keep in mind is that it was within the attorney's power, and it was  
 440 the attorney's legal obligation under section 6148 to document a fee arrangement and to specify  
 441 the rate to be charged, especially if it was reasonably foreseeable to exceed \$1,000. The attorney  
 442 should not be rewarded for failure to comply with those statutory requirements. It is the  
 443 attorney's duty to define the scope of the relationship and the understanding regarding  
 444 compensation.

445 Questions that the arbitrator should ask would include the following:

- 446 (1) Were the services provided by the attorney necessary, reasonable, and efficient, or  
 447 excessive, duplicative, and inefficient?
- 448 (2) Did the attorney competently accomplish the client's goals?
- 449 (3) Did the client receive a benefit from the services commensurate to the amount of  
 450 compensation sought by the attorney?
- 451 (4) Did the client have a reasonable expectation as to the fee that would be charged,  
 452 and if so, what rate and amount?
- 453 (5) Did the client have any understanding as to the approximate amount of time which  
 454 would be incurred?

455 (6) Was an estimate provided? If so, how does the fee sought to be charged compare  
456 with the estimate? Is there any reason to believe that the attorney's services  
457 required extraordinary effort or talent to justify a fee in excess of rates customarily  
458 charged by other attorneys in the community?

459 The arbitrator should carefully go through each of the factors described above to determine what  
460 impact each factor may have upon the analysis and gather sufficient information from the parties  
461 to arrive at a determination of a fair and reasonable fee. The paramount concern in this analysis is  
462 fairness to both parties considering all of the factors.

463 **Example Two:** Attorney and client reach an agreement as to an hourly rate for services to be  
464 performed, and terms of payment. The contract, however, fails to comply with section 6148, in  
465 that the client has not been given a signed copy as required by section 6148, subdivision (a). The  
466 penalty for noncompliance is that the agreement becomes voidable at the option of the client.

467 Attorney performs hourly services with some duplication of efforts, some assignment of  
468 inexperienced personnel, and uses client's case as a training ground for two associates. The fees  
469 become very high, and client terminates the attorney. A fee dispute follows, in which the client  
470 requests fee arbitration.

471 At the hearing, the arbitrator construes the client's request for arbitration to constitute a request to  
472 void the fee agreement, thereby entitling the attorney only to a reasonable fee. The arbitrator must  
473 determine the fee without regard to the contract terms. However, the rate established by the  
474 contract sets an outside limit upon the determination of the reasonable fee, because it would be  
475 improper to reward the attorney for failing to comply with the statutory requirements.

476 In this example, the arbitrator will be required to perform an intensive review of the services  
477 performed by each professional for whom time records are submitted. The arbitrator will need to  
478 look at duplication of efforts and inefficiencies caused by assignment of multiple personnel, some  
479 of whom were not fully trained, to work on various aspects of the case. The arbitrator must be  
480 sensitive to issues such as over billing, duplication of effort, and inefficiencies of services  
481 performed. The arbitrator is entitled to consider a quality-based analysis of whether the client  
482 received fair value both in terms of the benefit derived from the services performed, as well as the  
483 quality of the work produced by each professional. In determining whether the client's goals were  
484 satisfied, it is appropriate for the arbitrator to consider the results obtained.

485 The quality of representation becomes a significant factor in some cases. If the arbitrator  
486 determines that an attorney's negligence caused the client to lose a valuable right, the arbitrator  
487 may not award damages, but may consider whether the quality of performance affects the fee to  
488 which the attorney is entitled. For example, if the attorney billed \$8,000 to prepare a complaint  
489 which was filed untimely and the client lost valuable rights, there is serious doubt that the client  
490 has received the value of the services performed. In that situation, it is appropriate to adjust the  
491 fee commensurate to the real value to the client. In aggravated cases, the services may have no

492 value at all to the client, in which case an award of no fee may be appropriate. Like every other  
 493 contract, an attorney’s fee contract carries an implied covenant of good faith and fair dealing in  
 494 which timely performance is expected, and the client is entitled to a reasonable level of efficiency.  
 495 The failure to satisfy the attorney’s duty to communicate and to perform in a timely and  
 496 competent manner may well affect the attorney’s entitlement to a fee. (See Arbitration Advisory  
 497 2016-02 (2016) Analysis of Potential Bill Padding and Other Billing Issues.)

498 As in all cases, the analysis in this example will include a review of the rule 1.5 factors. The factors  
 499 which would appear to be most significant in this example would include the following:

- 500 (1) The attorney’s experience and level of expertise, which may justify a higher rate  
 501 than other attorneys engaged in practice in the community;
- 502 (2) The complexity of the matter in which the services were performed, which may  
 503 warrant a determination by the arbitrator that more than one attorney needed to  
 504 be assigned to a particular task. This is especially true where there may be urgent  
 505 time constraints or a significant amount of research and evidentiary material to be  
 506 assembled in a short period of time;
- 507 (3) The length of the relationship between attorney and client, which may be relevant  
 508 to the issue of client’s knowledge of attorney’s billing practices, and client’s  
 509 acceptance of attorney’s assignment of multiple personnel to various tasks;
- 510 (4) The client’s level of sophistication, informed consent, and whether there was any  
 511 discussion of estimates, which may be relevant to client’s knowledge that the task  
 512 was complicated and would involve assignment of multiple personnel; and
- 513 (5) Whether the case presented novel issues or novel questions of law, which may  
 514 warrant the necessity for additional personnel to be assigned to research tasks, and  
 515 for additional expenses of a broader research base of out-of-state authorities, and  
 516 for creative “think tank” sessions.

517 Where there is evidence of bill padding or charging the client with unnecessary training expense,  
 518 the arbitrator must take those ethical issues into consideration. In extreme cases, where the  
 519 attorney has sought to charge an unconscionable fee or has engaged in unethical practices which  
 520 are inconsistent with the character of the legal profession, the arbitrator has the discretion to  
 521 reduce the fee accordingly, or even to determine that no fee at all should be awarded. This latter  
 522 result should be applied only in rare cases of extreme ethical misconduct.

523 The practice structure of many law firms involves the assignment of one or more partners and  
 524 several associates to complex litigation matters. This structure is used both to train personnel as  
 525 well as to divide tasks among the litigation team to ensure the most efficient use of resources.  
 526 This team approach to complex litigation is commonly accepted, especially by clients who are  
 527 experienced in litigation, and the use of that approach does not in itself lead to excessive or

528 unnecessary billing. The arbitrator must analyze the overall complexity of the work, the degree of  
 529 necessity for assignment of multiple personnel, and the efficiencies or inefficiencies of the services  
 530 performed. In complex cases, this can be a very time-consuming task and would involve detailed  
 531 review of the billing materials offered by the parties.

532 There is no set formula which the arbitrator can be expected to follow. The overriding consideration  
 533 is to reach a fair conclusion and one which provides reasonable compensation to the attorney, if  
 534 entitled.

535 **Example Three:** Attorney is consulted by client with respect to a business dispute involving a  
 536 creditor seeking payment from client on an unpaid obligation. Attorney quotes an hourly rate of  
 537 \$200 per hour (which is average in the community). Attorney obtains a written agreement which  
 538 fully complies with section 6148. Attorney receives an advanced fee of \$2,500, which is deposited  
 539 to attorney's trust account, to be applied against fees and costs as billed, in accordance with the  
 540 agreement.

541 The attorney performs services promptly and with reasonable efficiency. After the usual pre-  
 542 litigation posturing, attorney files an answer to the complaint filed by the creditor. Thereafter, the  
 543 case is promptly settled on terms which are acceptable to the client.

544 Attorney has not sent a bill to the client during the 2 and one-half months since the inception of  
 545 representation. Client has demanded a bill. Attorney fails to provide the billing within the ten days  
 546 allowed section 6148, subdivision (b). When client receives the bill, client is shocked at the  
 547 amount. Client protests that she had no idea that the bill would exceed \$6,000 for such a short  
 548 period of representation. Client commences fee arbitration and asserts:

549 (1) She was not provided any estimate and had no idea the fee could possibly be  
 550 so large;

551 (2) She was not adequately informed of the litigation process and the time which  
 552 would be incurred; and

553 (3) She does not have the money to pay.

554 The violation of section 6148, subdivision (b) entitles the client to void the contract and limit the  
 555 attorney to a reasonable fee. The client does not make any allegation that the attorney's services  
 556 were negligent. To the contrary, the client believes the attorney was prompt, efficient and did  
 557 what the attorney was expected to do. The client simply had no idea it would cost that much. The  
 558 arbitrator perceives client's complaints to be an expression of legitimate concern, and not merely  
 559 an effort to escape payment.

560 In this example, the rule 1.5 factors must be considered, but do not necessarily provide adequate  
 561 guidance to the arbitrator. The fundamental issue in this dispute is whether the attorney had a  
 562 duty to explain to the client the probable course of the dispute, and to prepare the client for

563 anticipated fees and expenses which would be incurred. Although the client professes an inability  
564 to pay, that does not necessarily provide any grounds for reduction of the fee charged.

565 The arbitrator must review the billing statements and make a determination as to the propriety of  
566 the amount of time spent, the calculation of the fee and the value derived by the client. The  
567 arbitrator must also consider whether the attorney's lack of communication rises to such a level as  
568 to warrant a reduction to an amount which was within the reasonable expectations of the client.  
569 (Rule 1.4.) Client expectations, if reasonable, are certainly a factor to be considered by the  
570 arbitrator in making a determination.

571 This is not to suggest that a fee should be reduced simply because there was not a complete  
572 disclosure of anticipated fees and costs, or an estimate provided. Those may be significant factors  
573 where the client is unsophisticated but would tend to be not a factor at all if the client is extremely  
574 sophisticated or an experienced consumer of legal services.

575 **Example Four:** Client is involved in an automobile accident and retains a personal injury attorney  
576 on a contingent fee basis. The contingency fee contract provides for a standard one-third of the  
577 recovery obtained, with the attorney to advance costs. The fee agreement fails to satisfy certain  
578 elements of the statutory requirements and is subject to being voided by the client.

579 The attorney quickly ascertains that the potential defendant is uninsured and has limited assets.  
580 The attorney promptly negotiates a settlement of \$100,000 policy limits with the client's insurance  
581 carrier under the uninsured motorist provisions. Client has severe personal injuries. The attorney  
582 makes the settlement after several telephone calls and a few hours of work on the file. Attorney  
583 decides it is not worth pursuing the uninsured driver, and so advises the client. Attorney takes a  
584 contingent fee recovery of \$33,333.

585 This fact pattern raises considerable ethical issues. Was the fee arrangement contingent at all?  
586 Was the result highly predictable and should it have been known to the attorney under the  
587 circumstances? This example also raises questions of whether the fee is unconscionable  
588 considering the limited amount of services which would be necessary. An experienced attorney  
589 may know that this result is predictable, while the typical client would have no idea. Several cases  
590 in other jurisdictions have held that even the standard contingent fee may be unconscionable  
591 based upon the facts, where a quick settlement is predictable without the need for active  
592 litigation. No reported cases have yet reached this conclusion in California, but there is an  
593 emerging trend in other jurisdictions to look closely at contingent fees derived without substantial  
594 efforts.

595 In the above example, it may not be appropriate for the arbitrator simply to adjust the fee to a  
596 reasonable hourly rate multiplied by the number of hours spent. The arbitrator must analyze  
597 whether the attorney took on some level of true contingency risk, such as the obligation to  
598 advance costs, the obligation to carry the case to a conclusion, the risk that there would be no  
599 compensation at all, the inherent level of uncertainty that comes with every contingency case, and

600 the delay in obtaining payment. The arbitrator may decide to award a reasonable contingent fee  
601 that is based upon some lesser percentage. In the alternative, the arbitrator may determine that  
602 the fee arrangement was so unconscionable, and made in such bad faith, that the attorney may be  
603 entitled to no fee at all, or to a reduction of the fee. These are extremely difficult choices which  
604 can only be decided by the arbitrator after careful review of the facts and circumstances, on a  
605 case-by-case basis.

606 **Example Five:** This example will address issues of value billing or flat fee billing based upon use of  
607 pre-existing work product.

608 Some attorneys routinely do work which involves repetition of pre-existing work product, such as  
609 revocable trusts, partnership agreements, LLC operating agreements, and similar transactional  
610 materials in which services performed for the new client may utilize materials developed in the  
611 course of the attorney's prior experience and work done for prior clients.

612 By way of example, for the attorney to prepare an LLC operating agreement from scratch may  
613 involve 15 or 20 hours of services, whereby utilizing a form agreement in the attorney's files, the  
614 project may take only 1 or 2 hours to customize the pre-existing text to the current requirements  
615 of the client. In response to this situation, some attorneys bill such projects on a flat fee basis  
616 (i.e., \$5,000 flat fee to form an LLC, \$3,000 flat fee for marital revocable trust, etc.).

617 Some attorney's contracts provide for an hourly rate which then may be adjusted upon the  
618 attorney's determination of value, which is sometimes referred to as value billing. An example of  
619 this may be where the attorney spends 45 minutes on a telephone call which saves the client  
620 \$500,000. The attorney then elects to bill the client \$10,000 for the phone call, while the time  
621 incurred at the attorney's hourly rate would be less than \$300. This billing is based upon the  
622 attorney's assessment of the value derived by the client, which may be contrary to the client's  
623 assessment, especially where the client expects to be billed based on time spent.

624 In the reasonable fee analysis, value billing and flat fee arrangements can be particularly suspect  
625 because they are not necessarily reflective of the amount of time spent by the attorney at a  
626 reasonable hourly rate. Value billing and flat fee arrangements do not involve the contingency fee  
627 factors, such as risk of the contingency and delay in receiving payment, which warrant fees in  
628 excess of a reasonable hourly rate in contingency cases. On the other hand, in flat fee cases there  
629 is certainly some value to the client even if the attorney uses a previously drafted form.

630 The determination of a reasonable fee in the context of a value billing case or a flat fee case  
631 necessarily must involve consideration of the unconscionable fee factors in rule 1.5. Particular  
632 weight must be given to the community standard for what is charged by other attorneys of similar  
633 experience in the community under similar circumstances. Great weight must also be given to the  
634 value derived by the client, and the client's informed consent to the fee. Of particular concern is  
635 whether the client understood that the attorney would have the discretion to set a value for the

636 services after the fact, or whether the client understood that they would be charged a flat fee for  
637 services performed, even if it took the attorney only a nominal amount of time.

638 The most critical element is that of the client's informed consent, after full disclosure to the client  
639 of the issues. The client's consent cannot be truly informed unless the client is aware that the  
640 attorney will exercise his or her discretion to place a value on the services, without regard to the  
641 hourly rate or the actual time incurred.

642 Another factor to be carefully considered in value billing is whether the attorney's determination  
643 of the fair value is truly fair and represents the exercise of reasonable discretion considering the  
644 attorney's fiduciary duties to the client, or whether the amount assessed is excessive, arbitrary, or  
645 capricious. There is virtually no authority in California dealing with the propriety of value billing  
646 arrangements.

647 **Example Six:** This example will address issues of value billing that permits bonuses based on  
648 discretionary adjustments.

649 Attorney and client entered into an hourly engagement reflected in a fee agreement that provides  
650 specific hourly rates and the following language:

651         The firm's billing rate is subject to adjustment from time to time based on factors  
652         which may include: the responsibility assumed; the novelty and difficulty of the legal  
653         problem involved; the benefit resulting to you as the Client; and any unforeseen  
654         circumstances arising in the course of the representation. Any adjustments to the  
655         billing rates charged which are based on these factors will be made in the firm's sole  
656         discretion.

657 This is another example of value billing that raises a variety of ethical concerns. One might also  
658 question whether a clause that allows one party sole discretion to set the price paid by the other  
659 party would be enforceable under general principles of contract law. Among the obvious issues  
660 raised is whether this provision complies with the informed consent factor expressed in rule 1.5.  
661 This provision alone does not disclose how the firm's billing rate would be adjusted based on the  
662 various factors listed. It is thus "substantively suspect [since] it reallocates the risks of the bargain  
663 in an objectively unreasonable or unexpected manner." (*Cotchett, Pitre & McCarthy, supra*, 187  
664 Cal.App.4th 1405, 1405.) Might the client expect that the rate would go down? Probably not, but  
665 the client should be reasonably informed concerning the potential amount of upward adjustment  
666 that might occur in relation to hypothetical but reasonably predictable circumstances and the  
667 significance of the sole discretion provision.

668 For example, if the client were billed at hourly rates before adjustment of \$1,000, but got a  
669 \$100,000 benefit, the firm could explain that the result could be an adjustment bringing the  
670 amount billed to \$10,000. However, it seems unlikely that any estimate would be found to be  
671 credible when based on the firm's sole discretion.

672 Furthermore, in this context, the firm’s ability to make adjustments to billing rates in its sole  
 673 discretion may implicate rule 1.8.1. Rule 1.8.1 applies to prohibit a lawyer from entering into a  
 674 transaction with a client in which the lawyer obtains a pecuniary interest adverse to a client,  
 675 without assuring the transaction is fair, and fully disclosed in writing, and unless the client is given  
 676 a reasonable opportunity to seek the advice of independent counsel. The firm’s future ability to  
 677 adjust its billing rates in its sole discretion permits it to make decisions that foreseeably create an  
 678 adverse pecuniary interest within the purview of rule 1.8.1. Moreover, since there is no  
 679 reasonable way to determine the extent of the adverse interest, it is questionable that such a  
 680 provision is fair to the client in the absence of the required disclosures.

681 Finally, this provision may also be found to violate section 6147, since it is based on the firm’s sole  
 682 discretion and is triggered by future, contingent events. The prospect of a future adjustment may  
 683 be seen to represent a de facto contingency enhanced fee. In this instance, the contingency is  
 684 whatever the firm decides, in its sole discretion. If so found to be subject to section 6147, the  
 685 provision’s complete failure to comply with the strict terms of section 6147, including, but not  
 686 limited to, the omission of a maximum agreed upon contingency rate and a statement that the fee  
 687 was negotiable, would render it subject to being voided at the client’s election. Even judged by the  
 688 statutory standards for hourly engagements as reflected in section 6148, it is doubtful that such a  
 689 provision would comply with basis of compensation in section 6148, subdivision (a)(1).

690 **Example Seven:** This example will address issues of billing based on pre-set fixed or minimum fees  
 691 for particular activities.

692 Attorney’s fee agreement contains a provision that certain specific activity will be billed at  
 693 minimum 6-minute increments regardless of the amount of time actually required by the specific  
 694 activity. For example:

Telephone calls	0.3
Reviewing email	0.2
Sending emails	0.2
Attending depositions	2.5

695 Similarly, Attorney’s fee agreement provides for certain tasks to be performed at a fixed or flat fee,  
 696 regardless of the time actually required by the specific activity. For example:

Court appearances:	1.5
Propounding Form Interrogatories:	0.5
Answer to Complaint:	4.0

697 In reasonable fee analysis, a minimum fee and flat fee for specified activity can be suspect if they  
 698 are not reflective of the amount of time spent by the attorney at a reasonable hourly rate for such  
 699 tasks. A telephone call billed at a minimum of 0.3 (18 minutes) might actually take less time.  
 700 Similarly, reviewing a single email, billed at 0.2 (12 minutes), could easily take less time. In either  
 701 instance, the rule 1.5 unconscionable fee factors should be applied to determine whether the fees

702 charge reflect a reasonable fee for the services actually performed. If the Attorney may routinely  
703 bill 0.3 for ordinary calls in which substantive information is exchanged, but does not bill for brief  
704 calls lasting less than 2 minutes, the minimum 0.3 for the calls actually billed can be viewed as a  
705 reasonable and appropriate accommodation for that particular practice.

706 Minimum fees are problematic because they may not reasonably reflect the amount of time  
707 actually spent in connection with the particular activity. However, minimum fees, especially if  
708 reflected in an executed retainer agreement, may adequately disclose to the client and provide  
709 evidence that the client understands the type and amount of particular services to be provided by  
710 the minimum fee. Further, so long as the Attorney does not bill the client based on the minimum  
711 fee by stacking the minimum fees in a manner that collectively exceeds the reasonable fee in  
712 accord with the community for the services actually performed, the rule 1.5 unconscionable fee  
713 factors can be avoided.

714 Flat fees by comparison, more easily may be seen as beneficial to the client. A charge of 1.5 (90  
715 minutes) for a court appearance may reflect the amount of time that the attorney typically takes  
716 travelling to and appearing at a particular hearing. It could also include preparation for the  
717 hearing. On the other hand, billing 0.5 (30 minutes) for preparing form interrogatories, which  
718 usually take substantially less time and can be prepared by a paralegal or secretary with  
719 abbreviated supervision or review by the attorney, might actually exceed the amount of time  
720 actually spent in connection with the preparation of form interrogatories.

721 However, such fees, when fully disclosed in advance, provide the client an opportunity to decide  
722 and agree that the client wants the particular services to be performed at the price offered, and to  
723 understand that such fees may reflect a reasonable fee based on the services to be performed and  
724 an appropriate advance estimate of an appropriate fee when considering various factors, including  
725 for example, the use of previously drafted forms, a particular expertise of the attorney, travel  
726 related issues or legitimate value billing, based on exigency, a requirement that the attorney  
727 devote time exclusively to the services for the particular client, or value or bonus billing.  
728 Whatever the basis, the fact that the fee is disclosed in advance and agreed to by the client before  
729 the work is performed generally satisfies concerns raised by rule 1.5 or the attorney's duty of  
730 candor under section 6068, subdivision (d).

### 731 **CONCLUSION**

732 While the foregoing may not be a complete recitation of all the considerations which may be  
733 applicable to the setting of a reasonable fee in all cases, it may be used as a guide regarding the  
734 factors which should be considered and how they might be applied generally. In each case the  
735 inquiry will be fact specific. Each case requires the arbitrator to apply his or her individual  
736 judgment and reasonable discretion, with a view toward achieving fundamental fairness.

737 Arbitrators are encouraged to examine the materials in the attached Appendices.

738 This arbitration advisory is issued by the Standing Committee on Professional Responsibility and  
739 Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the  
740 State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory  
741 responsibilities, or any licensee of the State Bar.

**APPENDIX A**  
**RELEVANT QUESTIONS FOR REASONABLE FEE ANALYSIS**

- (1) Did the attorney do what the client requested? Did the attorney accomplish the client's goals (and was it reasonably possible to do so?)
- (2) Were the services provided by the attorney necessary, reasonable, and efficient, or excessive, duplicative, and inefficient?
- (3) Were the results obtained by the attorney generally considered successful, or within the reasonable expectations of the parties?
- (4) Did the client receive a benefit from the services commensurate to the amount of compensation sought by the attorney? Did the client receive fair value for the services performed?
- (5) Did the client have a reasonable expectation of a fee that would be charged, and if so, what rate and amount? Is the fee charged substantially more or less than the reasonable expectations of the parties?
- (6) Did the client have any understanding as to the approximate amount of time which would be incurred?
- (7) Was an estimate provided? If so, how does the fee sought to be charged compare with the estimate?
- (8) What are the prevailing hourly rates in the legal community in which the services were performed?
- (9) Did this representation involve peculiar expertise, beyond the capabilities of an average attorney?
- (10) Is there any reason to believe that the attorney's services or the complexity of the matter required extraordinary effort or talent to justify a fee in excess of rates customarily charged by other attorneys in the community?
- (11) Was this representation particularly contentious, or involve extraordinary services which would warrant an enhancement over the community standard?
- (12) Was the client kept reasonably informed during the representation of the services being performed and the charges incurred?

- (13) Were regular billing statements sent to the client?
- (14) Did the billing statements provide adequate detail and comply with Business and Professions Code 6148(b)?
- (15) Did the attorney adequately communicate with the client regarding the strategies, legal options, and choices which impacted the amount of the fee?
- (16) Were there communications difficulties between attorney and client (rule 1.4)?
- (17) Was there any conduct, act, or omission of the attorney which affected the outcome of the representation in a negative way? Is there any professional misconduct which affects the value of or entitlement to the fee?
- (18) Did such act or omission deny to the client the benefit of competent legal representation for which the attorney was retained?
- (19) Was the attorney's conduct professional? Did the attorney comply with the ethical standards of the profession?
- (20) Did the attorney complete the project? Was the project abandoned?
- (21) Was the client required to retain another attorney to accomplish the client's goals?
- (22) Were the client's overall fees or expenses increased by the necessity to discharge the attorney or retain other counsel?
- (23) Did the client impose conditions which made it more difficult or time consuming for the attorney to render the requested services? Was the client difficult, unreasonable, or demanding?
- (24) Was the amount of fee or the time incurred affected by the personalities of the adverse party or its counsel?
- (25) Was the tenor of the litigation particularly contentious (i.e., "scorched earth" or "take no prisoners" litigation)? If so, who was responsible for that?
- (26) How long have the attorney and client done business with each other?
- (27) Did the client have reason to know the attorney's billing practices and procedures, such that the client was not surprised?

- (28) Was the client adequately informed of the litigation process and the projected fees or expenses which might be incurred?

**APPENDIX B**

**Bus. & Prof. Code, § 6146**

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(1) Twenty-five percent of the dollar amount recovered if the recovery is pursuant to settlement agreement and release of all claims executed by all parties thereto prior to a civil complaint or demand for arbitration being filed.

(2) Thirty-three percent of the dollar amount recovered if the recovery is pursuant to settlement, arbitration, or judgment after a civil complaint or demand for arbitration is filed.

(3) If an action is tried in a civil court or arbitrated, the attorney representing the plaintiff or claimant may file a motion with the court or arbitrator for a contingency fee in excess of the percentage stated in paragraph (2), which motion shall be filed and served on all parties to the action and decided in the court's discretion based on evidence establishing good cause for the higher contingency fee.

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health

facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(Added by Stats. 1975; Amended by Stats. 1975, 2nd Ex. Sess., ch. 2, effective September 24, 1975, operative December 12, 1975; Stats. 1981, ch. 714; Stats. 1987, ch. 1498.), Stats. 2022, Ch. 17, Sec. 2 (AB 35) Effective January 1, 2023.)

**Bus. & Prof. Code, § 6147**

(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(3) A statement as to what extent, if any, 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. This may include any amounts collected for the plaintiff by the attorney.

(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

(d) This section shall become operative on January 1, 2000. (Added by Stats. 1993, ch. 982. Amended by Stats. 1994, ch. 479; Stats. 1996, ch. 1104, operative January 1, 2000.)

**Bus. & Prof. Code, § 6148**

(a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following:

- (1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- (2) The general nature of the legal services to be provided to the client.
- (3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(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. 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. Upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. The client is entitled to make similar requests at intervals of no less than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they shall be described and estimated.

(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

(e) This section applies prospectively only to fee agreements following its operative date.

(f) This section shall become operative on January 1, 2000. (Added by Stats. 1993, ch. 982. Amended by Stats. 1994, ch. 479; Stats. 1996, ch. 1104, operative January 1, 2000.)

1 THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON  
2 PROFESSIONAL RESPONSIBILITY AND CONDUCT

3  
4 PROPOSED ARBITRATION ADVISORY INTERIM NO. 2022-0XB  
5 (FORMER ARBITRATION ADVISORY 199~~8~~3-03)  
6 DETERMINATION OF A "REASONABLE" FEE  
7

8 INTRODUCTION

9 An arbitrator is sometimes called upon to determine the amount of reasonable fees to be  
10 awarded to an attorney. This situation arises most commonly when the attorney has failed to  
11 obtain a written agreement with the client, or when the written agreement between the parties  
12 does not comply with the requirements of Business and Professions Code sections 6147 or 6148.<sup>1</sup>  
13 In such cases the agreement is voidable at the option of the client, and the attorney is limited to a  
14 "reasonable" fee. Where the fee contract fully complies with the statutory requirements sections  
15 6147 through 6148, and is otherwise enforceable, the arbitrators should enforce the contract;  
16 however, they still may consider the value of the services to the client as affected by inefficiencies,  
17 quality of the services or the attorney's performance. (See Arbitration Advisory ~~1993-02~~2024-01,  
18 Standard of Review in Fee Dispute Where There is a Written Fee Agreement, ~~dated November 23,~~  
19 ~~1993~~.) Additional factors must be considered where an attorney seeks an award of a reasonable  
20 fee after the written fee agreement has been voided for the attorney's breach of an ethical duty.

21 This arbitration advisory explores the factors which are applicable in determining the amount of  
22 such a "reasonable" fee.

23 ANALYSIS

24 1. When Will Determination of a Reasonable Fee be Required

25 ~~Where an arbitrator determines that the dispute is governed by the existence of a statutorily~~  
26 ~~compliant written contract, "the amount of the recoverable fees will be determined under the~~  
27 ~~terms of the fee agreement even if the agreed upon fee may exceed what otherwise would~~  
28 ~~constitute a reasonable fee under the familiar lodestar analysis." (Pech v. Morgan (2021) 61~~  
29 ~~Cal.App.5th 841, 846 [276 Cal.Rptr.3d 97].) Absent a statutorily compliant written fee agreement<sup>2</sup>,~~  
30 an arbitrator will be required to determine whether a reasonable fee may arise in the following  
31 circumstances:

<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise indicated.

<sup>2</sup> Where an arbitrator determines that the dispute is governed by the existence of a statutorily compliant written contract, "the amount of the recoverable fees will be determined under the terms of the fee agreement even if the agreed upon fee may exceed what otherwise would constitute a reasonable fee under the familiar lodestar analysis." (Pech v. Morgan (2021) 61 Cal.App.5th 841, 846 [276 Cal.Rptr.3d 97]; see also Arbitration Advisory 2024-01.)

- 32 (1) Where no written fee agreement exists, and one was required by law (Bus. & Prof.  
33 Code, §§ 6147–6148);
- 34 (2) Where there is a fee agreement, but it does not comply with statutory  
35 requirements and is voidable (Bus. & Prof. Code, §§ 6147–6148);
- 36 (3) Where services were performed but there was no definitive agreement as to fees  
37 (i.e., quasi-contract/quantum meruit cases);
- 38 (4) Where the attorney’s billing statements fail to comply with section 6148, subdivision  
39 (b);
- 40 (5) Where there is to be a division of contingent fees between successive attorneys  
41 (i.e., a contingency fee attorney has withdrawn with good cause or is discharged by  
42 a client prior to deriving a recovery, and there is a later recovery) (*Fracasse v. Brent*  
43 (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]);
- 44 (6) Where a disqualified attorney may be entitled to recovery for services on an unjust  
45 enrichment theory for services performed prior to their removal (*Cal Pak Delivery,*  
46 *Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1 [60 Cal.Rptr.2d 207]; *Estate*  
47 *of Falco* (1987) 188 Cal.App.3d 1004 [233 Cal.Rptr. 807]);
- 48 (7) Where the estate or heirs of a deceased attorney are entitled to be paid for the  
49 reasonable value of services rendered by the deceased attorney prior to their death  
50 (Rule Prof. Conduct, rule 5.4(a)(1))<sup>3</sup>;
- 51 (8) Where the fee contract terms are ambiguous, vague, construed against the drafter  
52 of the contract, or there are unconscionable terms or other contractual defects  
53 affecting enforcement of the agreement; or
- 54 (9) Where the fee agreement has been voided for the attorney’s breach of an ethical  
55 duty (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company,*  
56 *Inc.* (2018) 6 Cal.5th 59 [237 Cal.Rptr.3d 424] (*Sheppard Mullin*)).

57 **2. Attorney has the Burden of Proof to Establish a Reasonable Fee**

58 When a client’s challenge raises the requirement of determining a reasonable fee, the burden of  
59 establishing entitlement to the amount of the charged fee is upon the attorney. (See Arbitration  
60 Advisory 1996-03 (1996) Burden of Proof in Fee Arbitrations.)

61 Fee agreements are required to be fair and drafted in a manner the clients should reasonably be  
62 able to understand. (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037 [252 Cal.Rptr. 845].)  
63 Attorneys have a professional responsibility to ensure that fee agreements are neither

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<sup>3</sup> All further references to rule are to the Rules of Professional Conduct unless otherwise indicated.

64 unreasonable nor written in a manner that may discourage clients from asserting any rights they  
 65 may have against their attorney. (Los Angeles County Bar Assn. Formal Opn. No. 489 (1997); see  
 66 also *Ojeda v. Sharp Cabrillo Hospital* (1992) 8 Cal.App.4th 1, 17 [10 Cal.Rptr.2d 230].) The burden  
 67 of proof is upon the attorney to show that his dealings with the client in all respects were fair. The  
 68 attorney must satisfy the court as to the justness of a claim for compensation. (*Clark v. Millsap*  
 69 (1926) 197 Cal. 765, 785 [242 P. 918].) Where the contract between attorney and client has been  
 70 made during the existence of the attorney-client relationship, the burden is cast upon the attorney  
 71 to show that the transaction was fair and reasonable, and no advantage was taken. (*Priester v.*  
 72 *Citizens Nat. Bank* (1955) 131 Cal.App.2d 314, 321 [280 P.2d 835].)

73 In cases involving statutory awards of attorney’s fees, it is clear that the party seeking the award  
 74 has the burden of establishing that the fees incurred were reasonably necessary, and reasonable  
 75 in amount. (*Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 816 [5 Cal.Rptr.2d  
 76 770].)

77 One of the most significant factors in determining a reasonable fee is the amount of time spent.  
 78 (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287–289 [256 Cal.Rptr. 209].) Thus, an attorney who  
 79 fails to keep adequate time records, or uses the questionable practice of “lumping” time or “block  
 80 billing” may have difficulty meeting the burden of proof. The practice of block billing will also  
 81 violate section 6148, subdivision (b), where applicable, if the client cannot reasonably ascertain  
 82 the time and rate for particular tasks. It is appropriate for the arbitrator to allocate the burden of  
 83 proof to the attorney to fairly establish the reasonable need for the services, the amount of time  
 84 spent and to prove the reasonable fee.

85 **3. Factors Which Affect Determination of a Reasonable Fee**

86 Whether a fee is reasonable, unreasonable, or unconscionable is often a matter of degree and  
 87 involves the assessment of a multiplicity of factors which are discussed below. Consideration  
 88 should be given to each factor. The ultimate conclusion is left to the reasonable judgment of the  
 89 arbitrator.

90 The Committee has formulated a list of relevant questions which may provide some guidance to  
 91 an arbitrator in a reasonable fee case. The questions are set forth in Appendix A to this Advisory,  
 92 and are designed to trigger appropriate areas of inquiry and analysis. Obviously, the issues raised  
 93 in the Appendix A questions will not be relevant to every case, but it is recommended that  
 94 arbitrators consider them in the course of conducting a reasonable fee analysis.

95 **a. Statutory Principles to Consider**

96 The statutory provisions of Business and Professions Code sections 6146 through 6148 and  
 97 applicable case law will limit an attorney to a reasonable fee in many instances. Arbitrators must  
 98 be familiar with the statutory requirements of these sections. The current statutory provisions are  
 99 set forth in Appendix B.

100 The Rules of Professional Conduct prohibit the charging of an “illegal or unconscionable fee.” (rule  
 101 1.5.) California’s rule 1.5 unconscionability standard sets a higher bar for finding fee violations  
 102 compared to the American Bar Association Model Rules of Professional Conduct (ABA Model  
 103 Rules), rule 1.5 ~~While not binding in California, arbitrators should consider that the American Bar~~  
 104 ~~Association Model Rules of Professional Conduct (ABA Model Rules),~~ and many other jurisdictions,  
 105 which expressly limit attorney’s fees to a standard of reasonableness. ~~Rule 1.5 of the ABA Model~~  
 106 ~~Rules lists the factors for a reasonable fee and they are virtually identical to the~~  
 107 ~~“unconscionability” factors in California rule 1.5.~~ Historically, California’s rule 4-200, which has  
 108 since been replaced by rule 1.5, contained factors similar to ABA Model Rule 1.5 for assessing the  
 109 reasonableness of lawyer fees. Both California’s former rule 4-200 and current rule 1.5 include  
 110 factors such as the amount involved in the case, the results obtained, and the experience and  
 111 ability of the lawyer, which align with the ABA’s standards. While California case law should be the  
 112 primary authority when evaluating the unconscionability of fee agreements, ABA Model Rule 1.5  
 113 provides a useful framework and additional perspective.

114 **b. The Unconscionability Factors**

115 The determination of a reasonable fee should always include careful consideration of factors listed  
 116 in rule 1.5(b). Under rule 1.5(b), unconscionability is determined on the facts and circumstances  
 117 existing at the time that the agreement is entered into, in consideration of the following factors:

- 118 (1) Whether the lawyer engaged in fraud or overreaching in negotiating or settling the  
 119 fee;
- 120 (2) Whether the lawyer has failed to disclose material facts;
- 121 (3) The amount of the fee in proportion to the value of the services performed;
- 122 (4) The relative sophistication of the ~~member~~ lawyer and the client;
- 123 (5) The novelty and difficulty of the questions involved, and the skill requisite to  
 124 perform the legal service properly;
- 125 (6) The likelihood, if apparent to the client, that the acceptance of the particular  
 126 employment will preclude other employment by the lawyer;
- 127 (7) The amount involved and the results obtained;
- 128 (8) The time limitations imposed by the client or by the circumstances;
- 129 (9) The nature and length of the professional relationship with the client;
- 130 (10) The experience, reputation, and ability of the lawyer or lawyers performing the  
 131 services;

- 132 (11) Whether the fee is fixed or contingent;  
 133 (12) The time and labor required; and  
 134 (13) Whether the client gave informed consent to the fee.

135 The most relevant of the rule 1.5 factors are items (13) comparison of fee charged to value  
 136 received; (810) the experience, reputation, and ability of the ~~attorney~~ lawyer or lawyers  
 137 performing the services; and (134) the informed consent of the client to the fee. (*Shaffer v.*  
 138 *Superior Court* (1995) 33 Cal.App.4th 993, 1002 [39 Cal.Rptr.2d 506].) Informed consent generally  
 139 requires that the client’s consent be obtained after the client has been fully informed of the  
 140 relevant facts and circumstances, or is otherwise aware of them. The client must be sufficiently  
 141 aware of the terms and conditions of the fee arrangement so as to make an informed decision.

142 A fee that is unconscionable is necessarily unreasonable and cannot be allowed. It is in the  
 143 arbitrator’s discretion to decide whether the unconscionability is so extreme as to warrant complete  
 144 denial of a fee or whether the fee should be adjusted and allowed on a quantum meruit basis to  
 145 avoid unjust enrichment to the client.

146 An unconscionable fee is difficult to define, prompting comments like: “I don’t know how to define  
 147 it, but I know it when I see it.” An unconscionable fee is one which is “so exorbitant and wholly  
 148 disproportionate to the services performed as to shock the conscience.” (*Goldstone v. State Bar*  
 149 (1931) 214 Cal. 490, 498 [6 P.2d 513].)

150 Other jurisdictions have held that a lawyer’s fee is clearly excessive when, after a review of the  
 151 facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee  
 152 exceeds a reasonable fee. (*In the Matter of Swartz* (Ariz. 1984) 141 Ariz. 266, 271 [686 P.2d 1236].)

153 Not surprisingly, the factors considered under rule 1.5(b) are generally identical to the factors  
 154 considered in analyzing the reasonableness of a fee. Cases which address a determination of  
 155 reasonable fees in the context of awarding fees to the adverse party have consistently relied upon  
 156 similar factors to those listed above. (See, e.g., *Glendora Community Redevelopment Agency v.*  
 157 *Demeter* (1989) 155 Cal.App.3d 465, 474 [202 Cal.Rptr. 389]; *Bruckman v. Parliament Escrow*  
 158 *Corp.* (1987) 190 Cal.App.3d 1051, 1062 [235 Cal.Rptr. 813]; *Stokus v. Marsh* (1990) 217 Cal.App.3d  
 159 647 [266 Cal.Rptr. 90]; *Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682 [214 Cal.Rptr. 461]; *La*  
 160 *Mesa-Springs Valley School District v. Otsuka* (1962) 57 Cal.2d 309 [19 Cal.Rptr. 479]; *Martino v.*  
 161 *Denevi* (1986) 182 Cal.App.3d 553 [227 Cal.Rptr. 354].)

162 An attorney’s fee that is high is not the same as an unconscionable fee (*Aronin v. State Bar of*  
 163 *California* (1990) 52 Cal.3d 276 [276 Cal.Rptr. 160]), but a high fee may be found to be an  
 164 unreasonable fee. The difference between the two perhaps is best illustrated by the following  
 165 example: A billing rate of \$500 per hour, if provided for in a fully compliant ~~written~~ written fee  
 166 agreement may not be unconscionable under rule 1.5(b), but where there has been no compliance  
 167 with statutory requirements, and the client has exercised the right to void the agreement, such a

168 billing rate may indeed be found to be unreasonable under all the circumstances including  
 169 community standards (rates charged by others in the community), and it may be reduced  
 170 accordingly. [This is because](#)

171 ~~A~~arbitrators have wide latitude in dealing with an unconscionable contract provision.

172 Under Civil Code section 1670.5, if the court as a matter of law finds a contract or any clause of a  
 173 contract to be unconscionable at the time it was made, the court may refuse to enforce the  
 174 contract, or it may enforce the remainder of the contract without the unconscionable clause, or it  
 175 may so limit the application of any unconscionable clause as to avoid any unreasonable result.

176 **c. Malpractice Considerations**

177 Where malpractice is alleged in a section 6200 fee arbitration, evidence of malpractice may not be  
 178 presented to support a claim for damages because the arbitrator has no jurisdiction to award  
 179 damages or offset for malpractice injuries. [\(Bus. & Prof. Code § 6200, subd. \(b\)\(2\).\)](#) However,  
 180 evidence ~~of relating to claims of~~ malpractice [and professional misconduct](#) is admissible ~~and must~~  
 181 ~~be received~~ to the extent that it may bear upon the fees, costs, or both to which the attorney may  
 182 be entitled. (Bus. & Prof. Code ~~§§ 6200, subd. (b)(2) &~~ 6203, subd. (a).) Accordingly, malpractice  
 183 must be considered in determining the value of the attorney’s services, and the fee may be  
 184 reduced accordingly.

185 In the context of litigation an attorney’s negligent act or omission may be fatal to the case, i.e., the  
 186 failure to timely file the complaint within the statute of limitations, or the failure to file opposition  
 187 to a dispositive motion, resulting in summary judgment or dismissal. If the attorney’s negligent  
 188 conduct has caused damages to the client, the arbitrator is not permitted to award damages to  
 189 the client, or to allow an offset against fees for damages incurred by the client. However, if the  
 190 negligent conduct has caused the loss of the client’s entire claim(s), it is likely that the services  
 191 were without value to the client.

192 In cases where the attorney’s error does not defeat the client’s entire claim, the attorney may  
 193 have billed the client for the cost of correcting his or her negligent conduct. An example of this  
 194 might be the attorney’s failure to timely respond to discovery resulting in law and motion  
 195 proceedings, a waiver of objections which could have been asserted, or an award of sanctions.  
 196 The attorney may have then diligently prosecuted corrective actions, such as a motion for relief  
 197 from waiver of objection, and billed the client for all of the corrective action costs.

198 The arbitrator may not award damages or offset, but may consider whether fees should be  
 199 disallowed or reduced for services performed by the attorney to correct his or her own errors. The  
 200 arbitrator may also consider whether the attorney’s services which were negligent provided no  
 201 value or lesser value than what was billed. The amount billed may be adjusted based upon  
 202 whether the client received reasonable value if the services were ineffective or produced no  
 203 benefit.

204 Expert testimony is not required to support a claim of malpractice in an arbitration proceeding.  
 205 The arbitrator is not required to determine whether the attorney's conduct was above or below  
 206 the standard of care. The arbitrator's determination of the reasonable value of the services  
 207 requires an assessment of the quality of the attorney's performance. It does not require a  
 208 determination of whether there was negligence, causation, or damages so no expert testimony is  
 209 required.

210 The issue in the arbitration is whether the attorney's acts or omissions affect the *value* of the  
 211 services *to the client*. If so, the fee may be adjusted. Any damages for that malpractice are  
 212 beyond the purview of the arbitration and must be left to another forum.

213 **d. The Community Standard**

214 If the fees charged by the attorney are disproportionately high compared with similar services  
 215 performed in the legal marketplace where the contested services are performed, then such fee  
 216 may be considered unreasonable. Rates and charges on par with similar charges for similar  
 217 services performed by other attorneys in the community with similar experience may be  
 218 considered reasonable. (*Shaffer v. Superior Court, supra*, 33 Cal.App.4th 993, 1002–1003.)

219 In a small community where hourly rates average \$~~1250–2300~~/hour, it may be highly unusual or  
 220 excessive for an attorney to charge \$~~4600~~/hour. Such a rate may not be considered excessive in a  
 221 major metropolitan area. In analyzing the weight to be given to a community standard, the  
 222 arbitrator must also consider whether the attorney's higher rate is justified by reputation, by  
 223 specialized experience in a complex field of practice, or by the client's informed consent to the  
 224 rate, as well as other rule 1.5(b) factors.

225 The internal cost or profit margin of the attorney providing the services, however, is not relevant  
 226 to a determination of their value. (*Shaffer v. Superior Court, supra*, 33 Cal.App.4th 993, 1002–  
 227 1003.) Thus, it is not proper to consider the amount paid by a law firm to its associates or contract  
 228 attorneys to determine whether the ~~profit margin billed~~ is reasonable. Attorneys' fees for hours  
 229 spent should be awarded based on quality of the work done, the benefit it produces for the client,  
 230 and the community, not the cost of heating and lighting the office where the work was performed.  
 231 (*Id.* at p. 1002; *Margolan v. Regional Planning Commission of Los Angeles County* (1982) 134  
 232 Cal.App.3d 999 [185 Cal.Rptr. 145].)

233 **e. Considerations Specific to Hourly Fees**

234 The primary inquiry in hourly rate matters is the quality and necessity of the services and a  
 235 comparison of their cost with what would be charged for such services by other attorneys in the  
 236 community who have similar experience and ability. (*Shaffer v. Superior Court, supra*, 33  
 237 Cal.App.4th 993, 1002–1003.)

238 A lawyer's customary hourly rate can be evaluated by comparison to that rate charged by others in  
 239 the legal community with similar experience. (*Cazares v. Saenz, supra*, 208 Cal.App.3d 279.) The

240 number of hours expended by a lawyer can also be evaluated in light of how long it would have  
 241 taken other attorneys to perform the same tasks. After consideration of these factors,  
 242 adjustments can be made to the hourly rate and number of hours expended and this should yield  
 243 a reasonable value of the work completed. (*Id.* at p. 279.)

244 The determination of a reasonable fee also involves consideration of the adequacy of the  
 245 attorney's time records. (*Margolan v. Regional Planning Commission of Los Angeles County* (1982)  
 246 134 Cal.App.3d 999 [185 Cal.Rptr. 145]; *Martino v. Denevi, supra*, 182 Cal.App.3d 553.)  
 247 Information crucial to determining a reasonable fee in an hourly context thus would include  
 248 whether the attorney-maintained records showing the number of hours worked, billing rates,  
 249 types of issues dealt with, and appearances made on the client's behalf. (*Martino v. Denevi, supra*,  
 250 182 Cal.App.3d 553.) This is a performance-based analysis in which the arbitrator looks not only at  
 251 the quantity of time spent but the quality of the time as well.

252 Failure to maintain adequate time and billing records, or failure of the billing statements to clearly  
 253 show the amount, rate, basis for the calculation, or other method of determining the fees and  
 254 costs charged, in addition to being a potential violation of section 6148, subdivision (b), may  
 255 require the arbitrator(s) to disallow some or all of the claimed charges based upon the inadequacy  
 256 of the evidence supporting them. Additionally, time records should be scrutinized for such  
 257 matters as duplication of services and excessive services in determining the reasonableness of the  
 258 overall fee claimed by the attorney. (*Margolan v. Regional Planning Com. of Los Angeles County*,  
 259 *supra*, 134 Cal.App.3d 999; *Martino v. Denevi, supra*, Cal.App.3d 553.)

260 The nature of the matter and the amount at issue should be considered, such as in the case of *Levy*  
 261 *v. Toyota Motor Sales, U.S.A. Inc., supra*, 4 Cal.App.4th 807, where the attorneys requested  
 262 \$137,459 in connection with a lemon law case over a vehicle which had a value of \$22,000. The  
 263 court rejected the request and reduced attorneys' fees to \$30,000.

264 A reasonable fee analysis in an hourly rate case should generally include the following procedures:

265 i. Determine the hourly rate. If the rate is set forth in a valid agreement, and the  
 266 rate is not unconscionable, the arbitrator should give great weight to the rate  
 267 selected by the parties;

268 ii. If the contract rate is unconscionable, or if there is no enforceable written  
 269 agreement, the arbitrator will determine a reasonable hourly rate, considering  
 270 all of the factors in rule 1.5, including the community standard;

271 iii. The billing statements should be carefully reviewed for double billing, duplication  
 272 of effort, flat or fixed time charges (where not specifically authorized), unilateral  
 273 rate increases, billing errors, etc.; and

274           iv.       The attorney’s hours may be adjusted by the arbitrator for time that is duplicate,  
 275                   improper or of no reasonable value to the client. The resulting number of hours  
 276                   will be multiplied by the reasonable hourly rate to determine the reasonable fee.

277       Rate increases are improper unless provided in a valid contract and properly noticed to the client.  
 278       (*Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572–1573 [1 Cal.Rptr.2d 531].)  
 279       Fixed or minimum time charges (i.e., four hours for any court appearance) are impermissible  
 280       unless clearly disclosed and specified in a valid fee agreement. (ABA Formal Opn. No. 03-379  
 281       (2003); Cal. State Bar Formal Opn. No. 1996-147 (1996); Los Angeles County Bar Assn. Ethics Opn.  
 282       No. 479 (1994).) Such charges should not be allowed if the effect is to compound the attorney’s  
 283       hourly rate (i.e., one attorney covers three appearances in one morning and bills four hours to  
 284       each of these clients). Such a billing practice may be fraudulent unless it has been disclosed to the  
 285       client and there is an agreement that the attorney may bill the same hours to multiple clients. In  
 286       such cases, the arbitrator should closely examine whether the client has given informed consent.

287           **f.       Cases Which are Prosecuted “as a Matter of Principle”**

288       The arbitrator may be faced with a case where the fee sought to be charged grossly exceeds the  
 289       recovery derived, resulting in the client receiving little or no financial benefit. Sometimes this  
 290       occurs in cases where the client asks the attorney to prosecute or defend a case “as a matter of  
 291       principle.” Such matters are inherently uneconomical. The decision in such cases may turn on  
 292       whether the client gave informed consent (i.e., with knowledge of the likelihood that fees may  
 293       exceed results). Fees may be adjusted in such cases, where appropriate.

294           **g.       Considerations Specific to Contingency Fee Cases**

295       The issues which arise in fee disputes involving contingency fees are the subject of a separate  
 296       Arbitration Advisory entitled “Fee Arbitration Issues Involving Contingency Fees.” (Cal. Arb.  
 297       Advisory No. 1997-03 (1997).)

298       Applying the factors in rule 1.5(b), the courts have upheld contingency fee awards where a  
 299       complying written contract exists even though the attorney may receive compensation which  
 300       exceeds the reasonable value of his or her services if an hourly rate had been applied. ( See  
 301       *Franklin v. Appel* (1992) 8 Cal.App.4th 875 [10 Cal.Rptr.2d 759] (fee award which was equivalent of  
 302       \$1,184 per hour was affirmed on appeal); see also *Cazares v. Saenz, supra*, 208 Cal.App.3d 279.)  
 303       The rationale for this is that the lawyer on a contingency fee contract receives nothing unless the  
 304       plaintiff obtains a recovery. Further, the fee is contingent only on the amount recovered. As such,  
 305       the lawyer runs the risk that even if successful, the amount recovered will yield a percentage fee  
 306       which does not provide adequate compensation. ( *Cazares v. Saenz, supra*, 208 Cal.App.3d 279.)  
 307       Further, there is a delay in the attorney receiving the fee until conclusion of the case. The lawyer,  
 308       in effect, finances the case for the client during the pendency of the lawsuit.

309       It has been held that a one-third contingency was not unconscionable even though the defendant  
 310       lost by default, where the parties could not ascertain that defendant would have defaulted, and

311 the services might have required a contested trial and possible appeal (*Setzer v. Robinson* (1962)  
 312 57 Cal.2d 213, 218 [18 Cal.Rptr. 524].) The reasonableness of the contingent fee is to be judged  
 313 not by hindsight but by the “situation as it appeared to the parties at the time the contract was  
 314 entered into.” (*Youngblood v. Higgins* (1956) 146 Cal.App.2d 350 [303 P.2d 637].)

315 A personal injury contingency fee contract will often provide for a one-third contingency. This is  
 316 routine and commonly accepted. But if the attorney settles the case with the adjuster after three  
 317 phone calls and two hours of work, the fee may appear to be unreasonable or even  
 318 unconscionable considering all factors. The focus should be on whether the terms can be  
 319 considered unfair or inequitable. ( See *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.*  
 320 (2010) 187 Cal.App.4th 1405, 1420–1421 [114 Cal.Rptr.3d 781].) The fees should not involve fraud  
 321 or overreaching by the attorney. (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402 [49 P.2d 832].)

322 Further, there seems little doubt that if the attorney possessed some special knowledge or  
 323 information that they would be required to disclose at the time the contingency fee contract was  
 324 signed (rule 1.4; Bus. & Prof. Code, § 6068, subd. (d)), the attorney’s failure to disclose it could  
 325 render the contingency fee contract unfairly obtained. For example, if the attorney knows (or has  
 326 good reason to believe) that the potential defendant has a \$100,000 insurance policy and their  
 327 experience either with the defendant or their insurer makes the attorney confident that the policy  
 328 would be paid quickly when facing a multi-million dollar liability, it would be unfair for the  
 329 attorney to take a one-third contingency without disclosing that foreknowledge to the prospective  
 330 client. On the other hand, if the attorney was sought out by the prospective client for their  
 331 reputation and foreknowledge and the agreement at one-third was reached after full disclosure to  
 332 the client, there would seem to be little reason to deny the attorney the benefit of ~~his~~their  
 333 bargain.

334 The determination of reasonableness must necessarily consider the relevant facts, the  
 335 unconscionability factors referenced above, based on rule 1.5(b), and the circumstances known to  
 336 the parties at the time. A case with severe injuries and immensely strong settlement value may not  
 337 be contingent at all where it is likely that the recovery will be quickly derived through an insurance  
 338 carrier without litigation and such event is predictable to a virtual certainty. The unconscionability  
 339 implications of such an arrangement may weigh heavily in the reasonable fee analysis.

340 The question arises, in cases where there is an oral contingent fee agreement ~~which-that~~ does not  
 341 comply with section 6147, and whether the attorney’s fee then is limited to a reasonable fee  
 342 determined by reference to the attorney’s hourly rate. In most of these cases, the attorney should  
 343 be permitted to recover a contingent fee either at the contract rate, or at some lesser but  
 344 reasonable percentage (taking into consideration community standards) because of the economic  
 345 considerations attendant to taking the case on a contingent basis. (*Cazares v. Saenz, supra*, 208  
 346 Cal.App.3d 279.) Accordingly, under a quantum meruit theory, the attorney should not necessarily  
 347 be limited to recovering an hourly rate on whatever time has been spent on the case, but instead,  
 348 in the absence of unconscionability should be entitled to an amount reflecting the value of the

349 contingency factors as well as the delay in receiving payment for the services (i.e., the contingent  
 350 rate in the contract or some lesser but reasonable percentage of the recovery). (*Id.*)

351 The agreed contingent fee percentage is the ceiling for the attorney’s recovery. For example, if  
 352 the attorney and the client verbally agree to a twenty-five percent contingency, but the agreement  
 353 was never reduced to writing, the arbitrator cannot award a thirty percent contingency. That  
 354 amount may be reasonable for the services performed but cannot be awarded because it exceeds  
 355 the agreed rate, which sets a ceiling. The attorney may not use the occasion of a noncompliant  
 356 written contingent fee agreement to obtain a fee higher than the contingent fee called for in the  
 357 agreement. (*Cazares v. Saenz, supra*, 208 Cal.App.3d 279.)

358 **h. When the Attorney May be Required to Refund Fees or May Not be Entitled to**  
 359 **Fees as a Result of An Ethical Breach**

360 Occasionally, an arbitration will reveal circumstances where the attorney agreed to represent a  
 361 client under an impermissible conflict of interest or committed some other serious ethical  
 362 violation. In those cases, an attorney may be required to disgorge some or all of the fees which the  
 363 client already paid that were derived from conduct that is an ethical breach, and/or may not be  
 364 entitled to recover in quantum meruit.

365 There are numerous cases that affirm the availability of a disgorgement remedy for attorney  
 366 conduct which is serious or willful. ~~The cases which discuss the disgorgement remedy include~~ ([See, e.g., \*Hance v. Super Store Industries\* \(2020\) 44 Cal.App.5th 676 \[257 Cal.Rptr.3d 761\]; \*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.\* \(2018\) 6 Cal.5th 59 \[237 Cal.Rptr.3d 424\]; \*Lofton v. Wells Fargo Home Mortgage\* \(2014\) 230 Cal.App.4th 1050 \[179 Cal.Rptr.3d 254\]; \*Rodriguez v. Disner\* \(9th Cir. 2012\) 688 F.3d 645; \*In re Occidental Financial Group, Inc.\* \(9th Cir. 1994\) 40 F.3d 1059; \*Pringle v. La Chappelle\* \(1999\) 73 Cal.App.4th 1000 \[87 Cal.Rptr.2d 90\]; \*Slovensky v. Friedman\* \(2006\) 142 Cal.App.4th 1518 \[49 Cal.Rptr.3d 60\]; \*Frye v. Tenderloin Housing Clinic, Inc.\* \(2006\) 38 Cal.4th 23 \[40 Cal.Rptr.3d 221\], \*Jeffry v. Pounds\* \(1977\) 67 Cal.App.3d 6 \[136 Cal.Rptr. 373\]; and \*Cal Pak Delivery v. United Parcel Service, Inc.\* \(1997\) 52 Cal.App.4th 1 \[60 Cal.Rptr.2d 207\].](#))

376 These cases hold that the remedy should not be available where the attorney’s conduct caused no  
 377 damage (*Slovensky*), where the offense was not serious or willful (*Pringle*), where the remedy was  
 378 not proportionate to the conduct (*Frye*) or where the services and fees subject to disgorgement  
 379 arose before the offending conduct (*Jeffry* and *Cal Pak Delivery*).

380 The determination of whether the attorney breached his or her ethical duties is left to the  
 381 discretion of the arbitrator with the caveat that an attorney should not be financially rewarded for  
 382 serious or willful unethical conduct.

383 Similarly, whether an attorney whose fee agreement is voided due to an ethical breach is entitled  
 384 to quantum meruit recovery is a matter of discretion to be exercised in light of all the

385 circumstances, such as the gravity and timing of the violation, its willfulness, its effect on the value  
 386 of the lawyer's work for the client, any other threatened or actual harm to the client, the  
 387 adequacy of other remedies, and whether the breach was intentional, negligent, or without fault.  
 388 (*Sheppard Mullin, supra*, 6 Cal.5th 59, 94–96.) The determination of whether an agreement is void  
 389 requires a detailed legal analysis, potentially involving court proceedings, where evidence of the  
 390 breach and its impact on the agreement is presented and evaluated. While *Sheppard Mullin*  
 391 addresses the voiding of fee agreements due to ethical breaches, the actual process by which a  
 392 fee agreement is voided is beyond the scope of this advisory.

393 When an attorney seeks fees in quantum meruit that it is unable to recover under the contract  
 394 because they have breached an ethical duty to their client, the burden of proof on these or other  
 395 factors lies with the attorney. To be entitled to any measure of recovery, the attorney must show  
 396 that the violation was neither willful nor egregious, and they must show that their conduct was  
 397 not so potentially damaging to the client as to warrant a complete denial of compensation. The  
 398 client is under no obligation to present evidence that it was injured. (*Sheppard Mullin, supra*, 6  
 399 Cal.5th 59.)

400 Before awarding any compensation, the arbitrator must be satisfied that the award does not  
 401 undermine incentives for compliance with the Rules of Professional Conduct. Absent exceptional  
 402 circumstances, the contractual fee will not serve as an appropriate measure of quantum meruit  
 403 recovery. (*Sheppard Mullin, supra*, 6 Cal.5th 59 at p. 458.) Although the attorney may be entitled to  
 404 some compensation for their work, their ethical breach will ordinarily require them to relinquish  
 405 some or all the profits for which they negotiated. (*Shaffer v. Superior Court, supra*, 33 Cal.App.4th  
 406 993, at pp. 1002–1003.) In contrast to the discussion in Section [3.d](#), under a *Sheppard Mullin*  
 407 analysis, the internal cost of providing the services may be relevant to a determination of their  
 408 value. (*Ibid.*)

#### 409 **i. A Reasonable Fee May Never Exceed the Contract Rate**

410 If there is evidence of the existence of a fee agreement, whether oral or written, fixed, hourly, or  
 411 contingent, the basic rule is that the reasonable fee may never exceed the fee which was agreed  
 412 upon. This is based upon the premise that the attorney should not be rewarded for failing to  
 413 comply with the requirements of sections 6147 through 6148 by allowing a fee greater than the  
 414 amount the attorney negotiated for and expected to receive. In cases where there is some  
 415 evidence of the existence of an agreement, the reasonable fee will either be equal to or less than  
 416 the amount agreed, but shall never exceed that amount. (See *Cazares v Saenz, supra*, 209 Cal.App.  
 417 3d 279, 289.)

418 Beyond that basic rule, the determination of a reasonable fee is largely within the exercise of  
 419 reasonable discretion of the arbitrator.

#### 420 **EXAMPLES OF REASONABLE FEE ANALYSIS**

421 Some of the procedures which should be applied by arbitrators to determine a reasonable fee are  
422 best demonstrated by several examples.

423 **Example One:** Attorney is asked by client to render services which are performed, without any  
424 discussion of compensation. Attorney then invoices client for 15 hours of legal services at \$350  
425 per hour. Client objects to both the rate and the amount, and fee arbitration results.

426 The attorney's theory of recovery is in quantum meruit, as an implied contract for the reasonable  
427 value of the attorney's services. There is no need to address the voidability of the contract under  
428 section 6148, because there was no agreement as to terms.

429 This is a pure reasonable value analysis in which the arbitrator does not need to consider the  
430 intent of the parties as to a rate of compensation, since there was no such discussion. The proper  
431 way to analyze such a determination of compensation would be to look at the attorney's actual  
432 performance considering what was requested and required by the client's needs.

433 In addition to the above analysis, the arbitrator must also weigh the rule 1.5 factors. One of the  
434 key factors under these circumstances would include an analysis of the novelty and difficulty of the  
435 services performed, and whether there was any particular expertise required of the attorney. The  
436 arbitrator would need to consider the hourly rate typically charged by this attorney for these types  
437 of services, and also consider a community standard of what is typically charged by other  
438 attorneys in the community who possess similar reputation, skill, and talents in the same field of  
439 practice.

440 If the attorney seeks to charge \$350 per hour in a community where rates typically do not exceed  
441 \$200 an hour, that factor must be considered by the arbitrator, in addition to whether the subject  
442 attorney's expertise and specialty warrant a rate substantially different than that charged by other  
443 practitioners in the community. This would involve the arbitrator weighing the novelty and  
444 difficulty of the task, the necessity for a specialist, the knowledge and experience of the attorney,  
445 and a comparison of the rates sought to be charged by the particular attorney with rates charged  
446 by equally experienced attorneys elsewhere in the community. Consideration should be given to  
447 whether this task required a specialist, or could have been performed by a lesser qualified  
448 attorney had that issue been discussed with the client. This brings into play the client's  
449 sophistication and prior experience with legal service relationships.

450 One factor for the arbitrator to keep in mind is that it was within the attorney's power, and it was  
451 the attorney's legal obligation under section 6148 to document a fee arrangement and to specify  
452 the rate to be charged, [especially if it was reasonably foreseeable to exceed \\$1,000](#). The attorney  
453 should not be rewarded for failure to comply with those statutory requirements. It is the  
454 attorney's duty to define the scope of the relationship and the understanding regarding  
455 compensation.

456 Questions that the arbitrator should ask would include the following:

- 457 (1) Were the services provided by the attorney necessary, reasonable, and efficient, or  
458 excessive, duplicative, and inefficient?
- 459 (2) Did the attorney competently accomplish the client's goals?
- 460 (3) Did the client receive a benefit from the services commensurate to the amount of  
461 compensation sought by the attorney?
- 462 (4) Did the client have a reasonable expectation as to the fee that would be charged,  
463 and if so, what rate and amount?
- 464 (5) Did the client have any understanding as to the approximate amount of time which  
465 would be incurred?
- 466 (6) Was an estimate provided? If so, how does the fee sought to be charged compare  
467 with the estimate? Is there any reason to believe that the attorney's services  
468 required extraordinary effort or talent to justify a fee in excess of rates customarily  
469 charged by other attorneys in the community?

470 The arbitrator should carefully go through each of the factors described above to determine what  
471 impact each factor may have upon the analysis and gather sufficient information from the parties  
472 to arrive at a determination of a fair and reasonable fee. The paramount concern in this analysis is  
473 fairness to both parties considering all of the factors.

474 **Example Two:** Attorney and client reach an agreement as to an hourly rate for services to be  
475 performed, and terms of payment. The contract, however, fails to comply with section 6148, in  
476 that the client has not been given a signed copy as required by section 6148, subdivision (a). The  
477 penalty for noncompliance is that the agreement becomes voidable at the option of the client.

478 Attorney performs hourly services with some duplication of efforts, some assignment of  
479 inexperienced personnel, and uses client's case as a training ground for two associates. The fees  
480 become very high, and client terminates the attorney. A fee dispute follows, in which the client  
481 requests fee arbitration.

482 At the hearing, the arbitrator construes the client's request for arbitration to constitute a request to  
483 void the fee agreement, thereby entitling the attorney only to a reasonable fee. The arbitrator must  
484 determine the fee without regard to the contract terms. However, the rate established by the  
485 contract sets an outside limit upon the determination of the reasonable fee, because it would be  
486 improper to reward the attorney for failing to comply with the statutory requirements.

487 In this example, the arbitrator will be required to perform an intensive review of the services  
488 performed by each professional for whom time records are submitted. The arbitrator will need to  
489 look at duplication of efforts and inefficiencies caused by assignment of multiple personnel, some  
490 of whom were not fully trained, to work on various aspects of the case. The arbitrator must be

491 sensitive to issues such as over billing, duplication of effort, and inefficiencies of services  
492 performed. The arbitrator is entitled to consider a quality-based analysis of whether the client  
493 received fair value both in terms of the benefit derived from the services performed, as well as the  
494 quality of the work produced by each professional. In determining whether the client's goals were  
495 satisfied, it is appropriate for the arbitrator to consider the results obtained.

496 The quality of representation becomes a significant factor in some cases. If the arbitrator  
497 determines that an attorney's negligence caused the client to lose a valuable right, the arbitrator  
498 may not award damages, but may consider whether the quality of performance affects the fee to  
499 which the attorney is entitled. For example, if the attorney billed \$8,000 to prepare a complaint  
500 which was filed untimely and the client lost valuable rights, there is serious doubt that the client  
501 has received the value of the services performed. In that situation, it is appropriate to adjust the  
502 fee commensurate to the real value to the client. In aggravated cases, the services may have no  
503 value at all to the client, in which case an award of no fee may be appropriate. Like every other  
504 contract, an attorney's fee contract carries an implied covenant of good faith and fair dealing in  
505 which timely performance is expected, and the client is entitled to a reasonable level of efficiency.  
506 The failure to satisfy the attorney's duty to communicate and to perform in a timely and  
507 competent manner may well affect the attorney's entitlement to a fee. (See Arbitration Advisory  
508 2016-02 (2016) Analysis of Potential Bill Padding and Other Billing Issues.)

509 As in all cases, the analysis in this example will include a review of the rule 1.5 factors. The factors  
510 which would appear to be most significant in this example would include the following:

- 511 (1) The attorney's experience and level of expertise, which may justify a higher rate  
512 than other attorneys engaged in practice in the community;
- 513 (2) The complexity of the matter in which the services were performed, which may  
514 warrant a determination by the arbitrator that more than one attorney needed to  
515 be assigned to a particular task. This is especially true where there may be urgent  
516 time constraints or a significant amount of research and evidentiary material to be  
517 assembled in a short period of time;
- 518 (3) The length of the relationship between attorney and client, which may be relevant  
519 to the issue of client's knowledge of attorney's billing practices, and client's  
520 acceptance of attorney's assignment of multiple personnel to various tasks;
- 521 (4) The client's level of sophistication, informed consent, and whether there was any  
522 discussion of estimates, which may be relevant to client's knowledge that the task  
523 was complicated and would involve assignment of multiple personnel; and
- 524 (5) Whether the case presented novel issues or novel questions of law, which may  
525 warrant the necessity for additional personnel to be assigned to research tasks, and  
526 for additional expenses of a broader research base of out-of-state authorities, and  
527 for creative "think tank" sessions.

528 Where there is evidence of bill padding or charging the client with unnecessary training expense,  
529 the arbitrator must take those ethical issues into consideration. In extreme cases, where the  
530 attorney has sought to charge an unconscionable fee or has engaged in unethical practices which  
531 are inconsistent with the character of the legal profession, the arbitrator has the discretion to  
532 reduce the fee accordingly, or even to determine that no fee at all should be awarded. This latter  
533 result should be applied only in rare cases of extreme ethical misconduct.

534 The practice structure of many law firms involves the assignment of one or more partners and  
535 several associates to complex litigation matters. This structure is used both to train personnel as  
536 well as to divide tasks among the litigation team [to ensure the most efficient use of resources](#).  
537 This team approach to complex litigation is commonly accepted, especially by clients who are  
538 experienced in litigation, and the use of that approach does not in itself lead to excessive or  
539 unnecessary billing. The arbitrator must analyze the overall complexity of the work, the degree of  
540 necessity for assignment of multiple personnel, and the efficiencies or inefficiencies of the services  
541 performed. In complex cases, this can be a very time-consuming task and would involve detailed  
542 review of the billing materials offered by the parties.

543 There is no set formula which the arbitrator can be expected to follow. The overriding consideration  
544 is to reach a fair conclusion and one which provides reasonable compensation to the attorney, if  
545 entitled.

546 **Example Three:** Attorney is consulted by client with respect to a business dispute involving a  
547 creditor seeking payment from client on an unpaid obligation. Attorney quotes an hourly rate of  
548 \$200 per hour (which is average in the community). Attorney obtains a written agreement which  
549 fully complies with section 6148. Attorney receives an advanced fee of \$2,500, which is deposited  
550 to attorney's trust account, to be applied against fees and costs as billed, in accordance with the  
551 agreement.

552 The attorney performs services promptly and with reasonable efficiency. After the usual pre-  
553 litigation posturing, attorney files an answer to the complaint filed by the creditor. Thereafter, the  
554 case is promptly settled on terms which are acceptable to the client.

555 Attorney has not sent a bill to the client during the 2 and one-half months since the inception of  
556 representation. Client has demanded a bill. Attorney fails to provide the billing within the ten days  
557 allowed section 6148, subdivision (b). When client receives the bill, client is shocked at the  
558 amount. Client protests that she had no idea that the bill would exceed \$6,000 for such a short  
559 period of representation. Client commences fee arbitration and asserts:

560 (1) She was not provided any estimate and had no idea the fee could possibly be  
561 so large;

562 (2) She was not adequately informed of the litigation process and the time which  
563 would be incurred; and

564 (3) She does not have the money to pay.

565 The violation of section 6148, subdivision (b) entitles the client to void the contract and limit the  
566 attorney to a reasonable fee. The client does not make any allegation that the attorney's services  
567 were negligent. To the contrary, ~~she~~ the client believes the attorney was prompt, efficient and did  
568 what ~~he~~ the attorney was expected to do. ~~She~~ The client simply had no idea it would cost that  
569 much. The arbitrator perceives client's complaints to be an expression of legitimate concern, and  
570 not merely an effort to escape payment.

571 In this example, the rule 1.5 factors must be considered, but do not necessarily provide adequate  
572 guidance to the arbitrator. The fundamental issue in this dispute is whether the attorney had a  
573 duty to explain to the client the probable course of the dispute, and to prepare the client for  
574 anticipated fees and expenses which would be incurred. Although the client professes an inability  
575 to pay, that does not necessarily provide any grounds for reduction of the fee charged.

576 The arbitrator must review the billing statements and make a determination as to the propriety of  
577 the amount of time spent, the calculation of the fee and the value derived by the client. The  
578 arbitrator must also consider whether the attorney's lack of communication rises to such a level as  
579 to warrant a reduction to an amount which was within the reasonable expectations of the client.  
580 (Rule 1.4.) Client expectations, if reasonable, are certainly a factor to be considered by the  
581 arbitrator in making a determination.

582 This is not to suggest that a fee should be reduced simply because there was not a complete  
583 disclosure of anticipated fees and costs, or an estimate provided. Those may be significant factors  
584 where the client is unsophisticated but would tend to be not a factor at all if the client is extremely  
585 sophisticated or an experienced consumer of legal services.

586 **Example Four:** Client is involved in an automobile accident and retains a personal injury attorney  
587 on a contingent fee basis. The contingency fee contract provides for a standard one-third of the  
588 recovery obtained, with the attorney to advance costs. The fee agreement fails to satisfy certain  
589 elements of the statutory requirements and is subject to being voided by the client.

590 The attorney quickly ascertains that the potential defendant is uninsured and has limited assets.  
591 The attorney promptly negotiates a settlement of \$100,000 policy limits with the client's insurance  
592 carrier under the uninsured motorist provisions. Client has severe personal injuries. The attorney  
593 makes the settlement after several telephone calls and a few hours of work on the file. Attorney  
594 decides it is not worth pursuing the uninsured driver, and so advises the client. Attorney takes a  
595 contingent fee recovery of \$33,333.

596 This fact pattern raises considerable ethical issues. Was the fee arrangement contingent at all?  
597 Was the result highly predictable and should it have been known to the attorney under the  
598 circumstances? This example also raises questions of whether the fee is unconscionable  
599 considering the limited amount of services which would be necessary. An experienced attorney  
600 may know that this result is predictable, while the typical client would have no idea. Several cases

601 in other jurisdictions have held that even the standard contingent fee may be unconscionable  
602 based upon the facts, where a quick settlement is predictable without the need for active  
603 litigation. No reported cases have yet reached this conclusion in California, but there is an  
604 emerging trend in other jurisdictions to look closely at contingent fees derived without substantial  
605 efforts.

606 In the above example, it may not be appropriate for the arbitrator simply to adjust the fee to a  
607 reasonable hourly rate multiplied by the number of hours spent. The arbitrator must analyze  
608 whether the attorney took on some level of true contingency risk, such as the obligation to  
609 advance costs, the obligation to carry the case to a conclusion, the risk that there would be no  
610 compensation at all, the inherent level of uncertainty that comes with every contingency case, and  
611 the delay in obtaining payment. The arbitrator may decide to award a reasonable contingent fee  
612 that is based upon some lesser percentage. In the alternative, the arbitrator may determine that  
613 the fee arrangement was so unconscionable, and made in such bad faith, that the attorney may be  
614 entitled to no fee at all, or to a reduction of the fee. These are extremely difficult choices which  
615 can only be decided by the arbitrator after careful review of the facts and circumstances, on a  
616 case-by-case basis.

617 **Example Five:** This example will address issues of value billing or flat fee billing based upon use of  
618 pre-existing work product.

619 Some attorneys routinely do work which involves repetition of pre-existing work product, such as  
620 revocable trusts, partnership agreements, LLC operating agreements, and similar transactional  
621 materials in which services performed for the new client may utilize materials developed in the  
622 course of the attorney's prior experience and work done for prior clients.

623 By way of example, for the attorney to prepare an LLC operating agreement from scratch may  
624 involve 15 or 20 hours of services, whereby utilizing a form agreement in the attorney's files, the  
625 project may take only 1 or 2 hours to customize the pre-existing text to the current requirements  
626 of the client. In response to this situation, some attorneys bill such projects on a flat fee basis  
627 (i.e., \$5,000 flat fee to form an LLC, \$3,000 flat fee for marital revocable trust, etc.).

628 Some attorney's contracts provide for an hourly rate which then may be adjusted upon the  
629 attorney's determination of value, which is sometimes referred to as value billing. An example of  
630 this may be where the attorney spends 45 minutes on a telephone call which saves the client  
631 \$500,000. The attorney then elects to bill the client \$10,000 for the phone call, while the time  
632 incurred at the attorney's hourly rate would be less than \$300. This billing is based upon the  
633 attorney's assessment of the value derived by the client, which may be contrary to the client's  
634 assessment, especially where the client expects to be billed based on time spent.

635 In the reasonable fee analysis, value billing and flat fee arrangements can be particularly suspect  
636 because they are not necessarily reflective of the amount of time spent by the attorney at a  
637 reasonable hourly rate. Value billing and flat fee arrangements do not involve the contingency fee

638 factors, such as risk of the contingency and delay in receiving payment, which warrant fees in  
639 excess of a reasonable hourly rate in contingency cases. On the other hand, in flat fee cases there  
640 is certainly some value to the client even if the attorney uses a previously drafted form.

641 The determination of a reasonable fee in the context of a value billing case or a flat fee case  
642 necessarily must involve consideration of the unconscionable fee factors in rule 1.5. Particular  
643 weight must be given to the community standard for what is charged by other attorneys of similar  
644 experience in the community under similar circumstances. Great weight must also be given to the  
645 value derived by the client, and the client's informed consent to the fee. Of particular concern is  
646 whether the client understood that the attorney would have the discretion to set a value for the  
647 services after the fact, or whether the client understood that they would be charged a flat fee for  
648 services performed, even if it took the attorney only a nominal amount of time.

649 The most critical element is that of the client's informed consent, after full disclosure to the client  
650 of the issues. The client's consent cannot be truly informed unless the client is aware that the  
651 attorney will exercise his or her discretion to place a value on the services, without regard to the  
652 hourly rate or the actual time incurred.

653 Another factor to be carefully considered in value billing is whether the attorney's determination  
654 of the fair value is truly fair and represents the exercise of reasonable discretion considering the  
655 attorney's fiduciary duties to the client, or whether the amount assessed is excessive, arbitrary, or  
656 capricious. There is virtually no authority in California dealing with the propriety of value billing  
657 arrangements.

658 **Example Six:** This example will address issues of value billing that permits bonuses based on  
659 discretionary adjustments.

660 Attorney and client entered into an hourly engagement reflected in a fee agreement that provides  
661 specific hourly rates and the following language:

662           The firm's billing rate is subject to adjustment from time to time based on factors  
663           which may include: the responsibility assumed; the novelty and difficulty of the legal  
664           problem involved; the benefit resulting to you as the Client; and any unforeseen  
665           circumstances arising in the course of the representation. Any adjustments to the  
666           billing rates charged which are based on these factors will be made in the firm's sole  
667           discretion.

668 This is another example of value billing that raises a variety of ethical concerns. One might also  
669 question whether a clause that allows one party sole discretion to set the price paid by the other  
670 party would be enforceable under general principles of contract law. Among the obvious issues  
671 raised is whether this provision complies with the informed consent factor expressed in rule 1.5.  
672 This provision alone does not disclose how the firm's billing rate would be adjusted based on the  
673 various factors listed. It is thus "substantively suspect [since] it reallocates the risks of the bargain  
674 in an objectively unreasonable or unexpected manner." (*Cotchett, Pitre & McCarthy, supra*, 187

675 Cal.App.4th 1405, 1405.) Might the client expect that the rate would go down? Probably not, but  
 676 the client should be reasonably informed concerning the potential amount of upward adjustment  
 677 that might occur in relation to hypothetical but reasonably predictable circumstances and the  
 678 significance of the sole discretion provision.

679 For example, if the client were billed at hourly rates before adjustment of \$1,000, but got a  
 680 \$100,000 benefit, the firm could explain that the result could be an adjustment bringing the  
 681 amount billed to \$10,000. However, it seems unlikely that any estimate would be found to be  
 682 credible when based on the firm’s sole discretion.

683 Furthermore, in this context, the firm’s ability to make adjustments to billing rates in its sole  
 684 discretion may implicate rule 1.8.1. Rule 1.8.1 applies to prohibit a lawyer from entering into a  
 685 transaction with a client in which the lawyer obtains a pecuniary interest adverse to a client,  
 686 without assuring the transaction is fair, and fully disclosed in writing, and unless the client is given  
 687 a reasonable opportunity to seek the advice of independent counsel. The firm’s future ability to  
 688 adjust its billing rates in its sole discretion permits it to make decisions that foreseeably create an  
 689 adverse pecuniary interest within the purview of rule 1.8.1. Moreover, since there is no  
 690 reasonable way to determine the extent of the adverse interest, it is questionable that such a  
 691 provision is fair to the client in the absence of the required disclosures.

692 Finally, this provision may also be found to violate section 6147, since it is based on the firm’s sole  
 693 discretion and is triggered by future, contingent events. The prospect of a future adjustment may  
 694 be seen to represent a de facto contingency enhanced fee. In this instance, the contingency is  
 695 whatever the firm decides, in its sole discretion. If so found to be subject to section 6147, the  
 696 provision’s complete failure to comply with the strict terms of section 6147, including, but not  
 697 limited to, the omission of a maximum agreed upon contingency rate and a statement that the fee  
 698 was negotiable, would render it subject to being voided at the client’s election. Even judged by the  
 699 statutory standards for hourly engagements as reflected in section 6148, it is doubtful that such a  
 700 provision would comply with basis of compensation in section 6148, subdivision (a)(1).

701 **Example Seven:** This example will address issues of billing based on pre-set fixed or minimum fees  
 702 for particular activities.

703 Attorney’s fee agreement contains a provision that certain specific activity will be billed at  
 704 minimum 6-minute increments regardless of the amount of time actually required by the specific  
 705 activity. For example:

Telephone calls	0.3
Reviewing email	0.2
Sending emails	0.2
Attending depositions	2.5

706 Similarly, Attorney’s fee agreement provides for certain tasks to be performed at a fixed or flat fee,  
 707 regardless of the time actually required by the specific activity. For example:

Court appearances:	1.5
Propounding Form Interrogatories:	0.5
Answer to Complaint:	4.0

708 In reasonable fee analysis, a minimum fee and flat fee for specified activity can be suspect if they  
 709 are not reflective of the amount of time spent by the attorney at a reasonable hourly rate for such  
 710 tasks. A telephone call billed at a minimum of 0.3 (18 minutes) might actually take less time.  
 711 Similarly, reviewing a single email, billed at 0.2 (12 minutes), could easily take less time. In either  
 712 instance, the rule 1.5 unconscionable fee factors should be applied to determine whether the fees  
 713 charge reflect a reasonable fee for the services actually performed. If the Attorney may routinely  
 714 bill 0.3 for ordinary calls in which substantive information is exchanged, but does not bill for brief  
 715 calls lasting less than 2 minutes, the minimum 0.3 for the calls actually billed can be viewed as a  
 716 reasonable and appropriate accommodation for that particular practice.

717 Minimum fees are problematic because they may not reasonably reflect the amount of time  
 718 actually spent in connection with the particular activity. However, minimum fees, especially if  
 719 reflected in an executed retainer agreement, may adequately disclose to the client and provide  
 720 evidence that the client understands the type and amount of particular services to be provided by  
 721 the minimum fee. Further, so long as the Attorney does not bill the client based on the minimum  
 722 fee by stacking the minimum fees in a manner that collectively exceeds the reasonable fee in  
 723 accord with the community for the services actually performed, the rule 1.5 unconscionable fee  
 724 factors can be avoided.

725 Flat fees by comparison, more easily may be seen as beneficial to the client. A charge of 1.5 (90  
 726 minutes) for a court appearance may reflect the amount of time that the attorney typically takes  
 727 travelling to and appearing at a particular hearing. It could also include preparation for the  
 728 hearing. On the other hand, billing 0.5 (30 minutes) for preparing form interrogatories, which  
 729 usually take substantially less time and can be prepared by a paralegal or secretary with  
 730 abbreviated supervision or review by the attorney, might actually exceed the amount of time  
 731 actually spent in connection with the preparation of form interrogatories.

732 However, such fees, when fully disclosed in advance, provide the client an opportunity to decide  
 733 and agree that the client wants the particular services to be performed at the price offered, and to  
 734 understand that such fees may reflect a reasonable fee based on the services to be performed and  
 735 an appropriate advance estimate of an appropriate fee when considering various factors, including  
 736 for example, the use of previously drafted forms, a particular expertise of the attorney, travel  
 737 related issues or legitimate value billing, based on exigency, a requirement that the attorney  
 738 devote time exclusively to the services for the particular client, or value or bonus billing.  
 739 Whatever the basis, the fact that the fee is disclosed in advance and agreed to by the client before

740 the work is performed generally satisfies concerns raised by rule 1.5 or the attorney's duty of  
741 candor under section 6068, subdivision (d).

742 **CONCLUSION**

743 While the foregoing may not be a complete recitation of all the considerations which may be  
744 applicable to the setting of a reasonable fee in all cases, it may be used as a guide regarding the  
745 factors which should be considered and how they might be applied generally. In each case the  
746 inquiry will be fact specific. Each case requires the arbitrator to apply his or her individual  
747 judgment and reasonable discretion, with a view toward achieving fundamental fairness.

748 Arbitrators are encouraged to examine the materials in the attached Appendices.

749 This arbitration advisory is issued by the Standing Committee on Professional Responsibility and  
750 Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the  
751 State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory  
752 responsibilities, or any licensee of the State Bar.

**APPENDIX A  
RELEVANT QUESTIONS FOR REASONABLE FEE ANALYSIS**

- (1) Did the attorney do what the client requested? Did the attorney accomplish the client's goals (and was it reasonably possible to do so?)
- (2) Were the services provided by the attorney necessary, reasonable, and efficient, or excessive, duplicative, and inefficient?
- (3) Were the results obtained by the attorney generally considered successful, or within the reasonable expectations of the parties?
- (4) Did the client receive a benefit from the services commensurate to the amount of compensation sought by the attorney? Did the client receive fair value for the services performed?
- (5) Did the client have a reasonable expectation of a fee that would be charged, and if so, what rate and amount? Is the fee charged substantially more or less than the reasonable expectations of the parties?
- (6) Did the client have any understanding as to the approximate amount of time which would be incurred?
- (7) Was an estimate provided? If so, how does the fee sought to be charged compare with the estimate?
- (8) What are the prevailing hourly rates in the legal community in which the services were performed?
- (9) Did this representation involve peculiar expertise, beyond the capabilities of an average attorney?
- (10) Is there any reason to believe that the attorney's services or the complexity of the matter required extraordinary effort or talent to justify a fee in excess of rates customarily charged by other attorneys in the community?
- (11) Was this representation particularly contentious, or involve extraordinary services which would warrant an enhancement over the community standard?
- (12) Was the client kept reasonably informed during the representation of the services being performed and the charges incurred?

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- (13) Were regular billing statements sent to the client?
- (14) Did the billing statements provide adequate detail and comply with Business and Professions Code 6148(b)?
- (15) Did the attorney adequately communicate with the client regarding the strategies, legal options, and choices which impacted the amount of the fee?
- (16) Were there communications difficulties between attorney and client (rule 1.4)?
- (17) Was there any conduct, act, or omission of the attorney which affected the outcome of the representation in a negative way? Is there any professional misconduct which affects the value of or entitlement to the fee?
- (18) Did such act or omission deny to the client the benefit of competent legal representation for which the attorney was retained?
- (19) Was the attorney's conduct professional? Did the attorney comply with the ethical standards of the profession?
- (20) Did the attorney complete the project? Was the project abandoned?
- (21) Was the client required to retain another attorney to accomplish the client's goals?
- (22) Were the client's overall fees or expenses increased by the necessity to discharge the attorney or retain other counsel?
- (23) Did the client impose conditions which made it more difficult or time consuming for the attorney to render the requested services? Was the client difficult, unreasonable, or demanding?
- (24) Was the amount of fee or the time incurred affected by the personalities of the adverse party or its counsel?
- (25) Was the tenor of the litigation particularly contentious (i.e., "scorched earth" or "take no prisoners" litigation)? If so, who was responsible for that?
- (26) How long have the attorney and client done business with each other?
- (27) Did the client have reason to know the attorney's billing practices and procedures, such that the client was not surprised?

- (28) Was the client adequately informed of the litigation process and the projected fees or expenses which might be incurred?

**APPENDIX B**

**Bus. & Prof. Code, § 6146**

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(1) Twenty-five percent of the dollar amount recovered if the recovery is pursuant to settlement agreement and release of all claims executed by all parties thereto prior to a civil complaint or demand for arbitration being filed.

(2) Thirty-three percent of the dollar amount recovered if the recovery is pursuant to settlement, arbitration, or judgment after a civil complaint or demand for arbitration is filed.

(3) If an action is tried in a civil court or arbitrated, the attorney representing the plaintiff or claimant may file a motion with the court or arbitrator for a contingency fee in excess of the percentage stated in paragraph (2), which motion shall be filed and served on all parties to the action and decided in the court's discretion based on evidence establishing good cause for the higher contingency fee.

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health

facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(Added by Stats. 1975; Amended by Stats. 1975, 2nd Ex. Sess., ch. 2, effective September 24, 1975, operative December 12, 1975; Stats. 1981, ch. 714; Stats. 1987, ch. 1498.), Stats. 2022, Ch. 17, Sec. 2 (AB 35) Effective January 1, 2023.)

**Bus. & Prof. Code, § 6147**

(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(3) A statement as to what extent, if any, 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. This may include any amounts collected for the plaintiff by the attorney.

(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

(d) This section shall become operative on January 1, 2000. (Added by Stats. 1993, ch. 982. Amended by Stats. 1994, ch. 479; Stats. 1996, ch. 1104, operative January 1, 2000.)

**Bus. & Prof. Code, § 6148**

(a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following:

- (1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- (2) The general nature of the legal services to be provided to the client.
- (3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(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. 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. Upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. The client is entitled to make similar requests at intervals of no less than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they shall be described and estimated.

(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

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(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

(e) This section applies prospectively only to fee agreements following its operative date.

(f) This section shall become operative on January 1, 2000. (Added by Stats. 1993, ch. 982. Amended by Stats. 1994, ch. 479; Stats. 1996, ch. 1104, operative January 1, 2000.)