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

PROPOSED ARBITRATION ADVISORY INTERIM NO. 2022-0XB
(FORMER ARBITRATION ADVISORY 1998-03)
DETERMINATION OF A "REASONABLE" FEE

INTRODUCTION

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

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

ANALYSIS

1. When Will Determination of a Reasonable Fee be Required

Absent a statutorily compliant written fee agreement[2], an arbitrator will be required to determine whether a reasonable fee may arise in the following circumstances:

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

---

[1] All statutory references are to the Business and Professions Code unless otherwise indicated.

[2] 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.)

(2) Where there is a fee agreement, but it does not comply with statutory requirements and is voidable (Bus. & Prof. Code, §§ 6147–6148);

(3) Where services were performed but there was no definitive agreement as to fees (i.e., quasi-contract/quantum meruit cases);

(4) Where the attorney's billing statements fail to comply with section 6148, subdivision (b);

(5) Where there is to be a division of contingent fees between successive attorneys (i.e., a contingency fee attorney has withdrawn with good cause or is discharged by a client prior to deriving a recovery, and there is a later recovery) (*Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]);

(6) Where a disqualified attorney may be entitled to recovery for services on an unjust enrichment theory for services performed prior to their removal (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1 [60 Cal.Rptr.2d 207]; *Estate of Falco* (1987) 188 Cal.App.3d 1004 [233 Cal.Rptr. 807]);

(7) Where the estate or heirs of a deceased attorney are entitled to be paid for the reasonable value of services rendered by the deceased attorney prior to their death (Rule Prof. Conduct, rule 5.4(a)(1))[3];

(8) Where the fee contract terms are ambiguous, vague, construed against the drafter of the contract, or there are unconscionable terms or other contractual defects affecting enforcement of the agreement; or

(9) Where the fee agreement has been voided for the attorney's breach of an ethical duty (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.* (2018) 6 Cal.5th 59 [237 Cal.Rptr.3d 424] (*Sheppard Mullin*)).

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

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

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

[3] All further references to rule are to the Rules of Professional Conduct unless otherwise indicated.

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

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

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

3. Factors Which Affect Determination of a Reasonable Fee

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

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

a. Statutory Principles to Consider

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

b. The Rules of Professional Conduct prohibit the charging of an "illegal or unconscionable fee." (rule 1.5.) California's rule 1.5 unconscionability standard sets

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

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

(1) Whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee;

(2) Whether the lawyer has failed to disclose material facts;

(3) The amount of the fee in proportion to the value of the services performed;

(4) The relative sophistication of the lawyer and the client;

(5) The novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(6) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(7) The amount involved and the results obtained;

(8) The time limitations imposed by the client or by the circumstances;

(9) The nature and length of the professional relationship with the client;

(10) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(11) Whether the fee is fixed or contingent;

(12) The time and labor required; and

(13) Whether the client gave informed consent to the fee.

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

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

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

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

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

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

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

c. Malpractice Considerations

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

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

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

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

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

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

d. The Community Standard

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

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

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

e. Considerations Specific to Hourly Fees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

g. Considerations Specific to Contingency Fee Cases

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

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

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

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

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

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

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

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

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

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

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

There are numerous cases that affirm the availability of a disgorgement remedy for attorney conduct which is serious or willful. (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].) These cases hold that the remedy should not be available where the attorney's conduct caused no damage (*Slovensky*), where the offense was not serious or willful (*Pringle*), where the remedy was not proportionate to the conduct (*Frye*) or where the services and fees subject to disgorgement arose before the offending conduct (*Jeffry* and *Cal Pak Delivery*).

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

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

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

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

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

i. A Reasonable Fee May Never Exceed the Contract Rate

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

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

EXAMPLES OF REASONABLE FEE ANALYSIS

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

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

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

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

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

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

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

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

Questions that the arbitrator should ask would include the following:

(1) Were the services provided by the attorney necessary, reasonable, and efficient, or excessive, duplicative, and inefficient?

(2) Did the attorney competently accomplish the client's goals?

(3) Did the client receive a benefit from the services commensurate to the amount of compensation sought by the attorney?

(4) Did the client have a reasonable expectation as to the fee that would be charged, and if so, what rate and amount?

(5) Did the client have any understanding as to the approximate amount of time which would be incurred?

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

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

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

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

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

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

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

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

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

(1) The attorney's experience and level of expertise, which may justify a higher rate than other attorneys engaged in practice in the community;

(2) The complexity of the matter in which the services were performed, which may warrant a determination by the arbitrator that more than one attorney needed to be assigned to a particular task. This is especially true where there may be urgent time constraints or a significant amount of research and evidentiary material to be assembled in a short period of time;

(3) The length of the relationship between attorney and client, which may be relevant to the issue of client's knowledge of attorney's billing practices, and client's acceptance of attorney's assignment of multiple personnel to various tasks;

(4) The client's level of sophistication, informed consent, and whether there was any discussion of estimates, which may be relevant to client's knowledge that the task was complicated and would involve assignment of multiple personnel; and

(5) Whether the case presented novel issues or novel questions of law, which may warrant the necessity for additional personnel to be assigned to research tasks, and for additional expenses of a broader research base of out-of-state authorities, and for creative "think tank" sessions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Similarly, Attorney's fee agreement provides for certain tasks to be performed at a fixed or flat fee, 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

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

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

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

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

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

CONCLUSION

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

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

This arbitration advisory is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory 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 to0020the 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.)

4.8. 2022-0XB
3-14-25 Meeting
Open Session

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

PROPOSED ARBITRATION ADVISORY INTERIM NO. 2022-0XB
(FORMER ARBITRATION ADVISORY 19983-03)
DETERMINATION OF A "REASONABLE" FEE

INTRODUCTION

An arbitrator is sometimes called upon to determine the amount of reasonable fees to be awarded to ann attorney. This situation arises most commonly when the attorney has failed to obtain a written agreement with the client, or when the written agreement between the parties does not comply with the requirements of Business and Professions Code sections 6147 or 6148.[1] In such cases the agreement is voidable at the option of the client, and the attorney is limited to a "reasonable" fee. Where the fee contract fully complies with the statutory requirements sections 6147 through 6148, and is otherwise enforceable, the arbitrators should enforce the contract; however, they still may consider the value of the services to the client as affected by inefficiencies, quality of the services or the attorney's performance. (See Arbitration Advisory 1993-022024-01, Standard of Review in Fee Dispute Where There is a Written Fee Agreement, dated November 23, 1993.) Additional factors must be considered where an attorney seeks an award of a reasonable fee after the written fee agreement has been voided for the attorney's breach of an ethical duty.

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

ANALYSIS

1. When Will Determination of a Reasonable Fee be Required

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].) Absent a statutorily compliant written fee agreement[2], an arbitrator will be required to determine whether a reasonable fee may arise in the following circumstances:

---

[1] All statutory references are to the Business and Professions Code unless otherwise indicated.

[2] 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.)

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

(2) Where there is a fee agreement, but it does not comply with statutory requirements and is voidable (Bus. & Prof. Code, §§ 6147–6148);

(3) Where services were performed but there was no definitive agreement as to fees (i.e., quasi-contract/quantum meruit cases);

(4) Where the attorney's billing statements fail to comply with section 6148, subdivision (b);

(5) Where there is to be a division of contingent fees between successive attorneys (i.e., a contingency fee attorney has withdrawn with good cause or is discharged by a client prior to deriving a recovery, and there is a later recovery) (*Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]);

(6) Where a disqualified attorney may be entitled to recovery for services on an unjust enrichment theory for services performed prior to their removal (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1 [60 Cal.Rptr.2d 207]; *Estate of Falco* (1987) 188 Cal.App.3d 1004 [233 Cal.Rptr. 807]);

(7) Where the estate or heirs of a deceased attorney are entitled to be paid for the reasonable value of services rendered by the deceased attorney prior to their death (Rule Prof. Conduct, rule 5.4(a)(1))[3];

(8) Where the fee contract terms are ambiguous, vague, construed against the drafter of the contract, or there are unconscionable terms or other contractual defects affecting enforcement of the agreement; or

(9) Where the fee agreement has been voided for the attorney's breach of an ethical duty (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.* (2018) 6 Cal.5th 59 [237 Cal.Rptr.3d 424] (*Sheppard Mullin*)).

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

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

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

[3] All further references to rule are to the Rules of Professional Conduct unless otherwise indicated.

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

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

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

3. Factors Which Affect Determination of a Reasonable Fee

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

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

a. Statutory Principles to Consider

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

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

b. The Unconscionability Factors

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

(1) Whether the lawyer engaged in fraud or overreaching in negotiating or settling the fee;

(2) Whether the lawyer has failed to disclose material facts;

(3) The amount of the fee in proportion to the value of the services performed;

(4) The relative sophistication of the ~~member~~ lawyer and the client;

(5) The novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(6) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(7) The amount involved and the results obtained;

(8) The time limitations imposed by the client or by the circumstances;

(9) The nature and length of the professional relationship with the client;

(10) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(11) Whether the fee is fixed or contingent;

(12) The time and labor required; and

(13) Whether the client gave informed consent to the fee.

The most relevant of the rule 1.5 factors are items (~~1~~3) comparison of fee charged to value received; (~~8~~10) the experience, reputation, and ability of the ~~attorney~~lawyer or lawyers performing the services; and (13~~1~~) the informed consent of the client to the fee. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002 [39 Cal.Rptr.2d 506].) Informed consent generally requires that the client's consent be obtained after the client has been fully informed of the relevant facts and circumstances, or is otherwise aware of them. The client must be sufficiently aware of the terms and conditions of the fee arrangement so as to make an informed decision.

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

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

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

Not surprisingly, the factors considered under rule 1.5(b) are generally identical to the factors considered in analyzing the reasonableness of a fee. Cases which address a determination of reasonable fees in the context of awarding fees to the adverse party have consistently relied upon similar factors to those listed above. (See, e.g., *Glendora Community Redevelopment Agency v. Demeter* (1989~~9~~4) 155 Cal.App.3d 465, 474 [202 Cal.Rptr. 389]; *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1062 [235 Cal.Rptr. 813]; *Stokus v. Marsh* (1990) 217 Cal.App.3d 647 [266 Cal.Rptr. 90]; *Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682 [214 Cal.Rptr. 461]; *La Mesa-Springs Valley School District v. Otsuka* (1962) 57 Cal.2d 309 [19 Cal.Rptr. 479]; *Martino v. Denevi* (1986) 182 Cal.App.3d 553 [227 Cal.Rptr. 354].)

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

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

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

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

c. Malpractice Considerations

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

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

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

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

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

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

d. The Community Standard

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

In a small community where hourly rates average $~~1~~250–~~2~~300/hour, it may be highly unusual or excessive for an attorney to charge $~~4~~600/hour. Such a rate may not be considered excessive in a major metropolitan area. In analyzing the weight to be given to a community standard, the arbitrator must also consider whether the attorney's higher rate is justified by reputation, by specialized experience in a complex field of practice, or by the client's informed consent to the rate, as well as other rule 1.5(b) factors.

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

e. Considerations Specific to Hourly Fees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

g. Considerations Specific to Contingency Fee Cases

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

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

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

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

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

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

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

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

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

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

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

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

There are numerous cases that affirm the availability of a disgorgement remedy for attorney 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].)

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

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

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

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

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

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

i. A Reasonable Fee May Never Exceed the Contract Rate

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

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

EXAMPLES OF REASONABLE FEE ANALYSIS

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

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

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

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

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

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

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

Questions that the arbitrator should ask would include the following:

(1) Were the services provided by the attorney necessary, reasonable, and efficient, or excessive, duplicative, and inefficient?

(2) Did the attorney competently accomplish the client's goals?

(3) Did the client receive a benefit from the services commensurate to the amount of compensation sought by the attorney?

(4) Did the client have a reasonable expectation as to the fee that would be charged, and if so, what rate and amount?

(5) Did the client have any understanding as to the approximate amount of time which would be incurred?

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

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

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

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

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

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

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

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

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

(1) The attorney's experience and level of expertise, which may justify a higher rate than other attorneys engaged in practice in the community;

(2) The complexity of the matter in which the services were performed, which may warrant a determination by the arbitrator that more than one attorney needed to be assigned to a particular task. This is especially true where there may be urgent time constraints or a significant amount of research and evidentiary material to be assembled in a short period of time;

(3) The length of the relationship between attorney and client, which may be relevant to the issue of client's knowledge of attorney's billing practices, and client's acceptance of attorney's assignment of multiple personnel to various tasks;

(4) The client's level of sophistication, informed consent, and whether there was any discussion of estimates, which may be relevant to client's knowledge that the task was complicated and would involve assignment of multiple personnel; and

(5) Whether the case presented novel issues or novel questions of law, which may warrant the necessity for additional personnel to be assigned to research tasks, and for additional expenses of a broader research base of out-of-state authorities, and for creative "think tank" sessions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Similarly, Attorney's fee agreement provides for certain tasks to be performed at a fixed or flat fee, 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

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

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

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

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

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

CONCLUSION

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

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

This arbitration advisory is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory 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 to0020the 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.)