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

The State Bar of California

OPEN SESSION
AGENDA ITEM
4.5 SEPTEMBER 2024
BOARD OF TRUSTEES

DATE: **September 19, 2024**

TO: **Members, Board of Trustees**

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

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

EXECUTIVE SUMMARY

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

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

RECOMMENDED ACTION

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

DISCUSSION

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

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

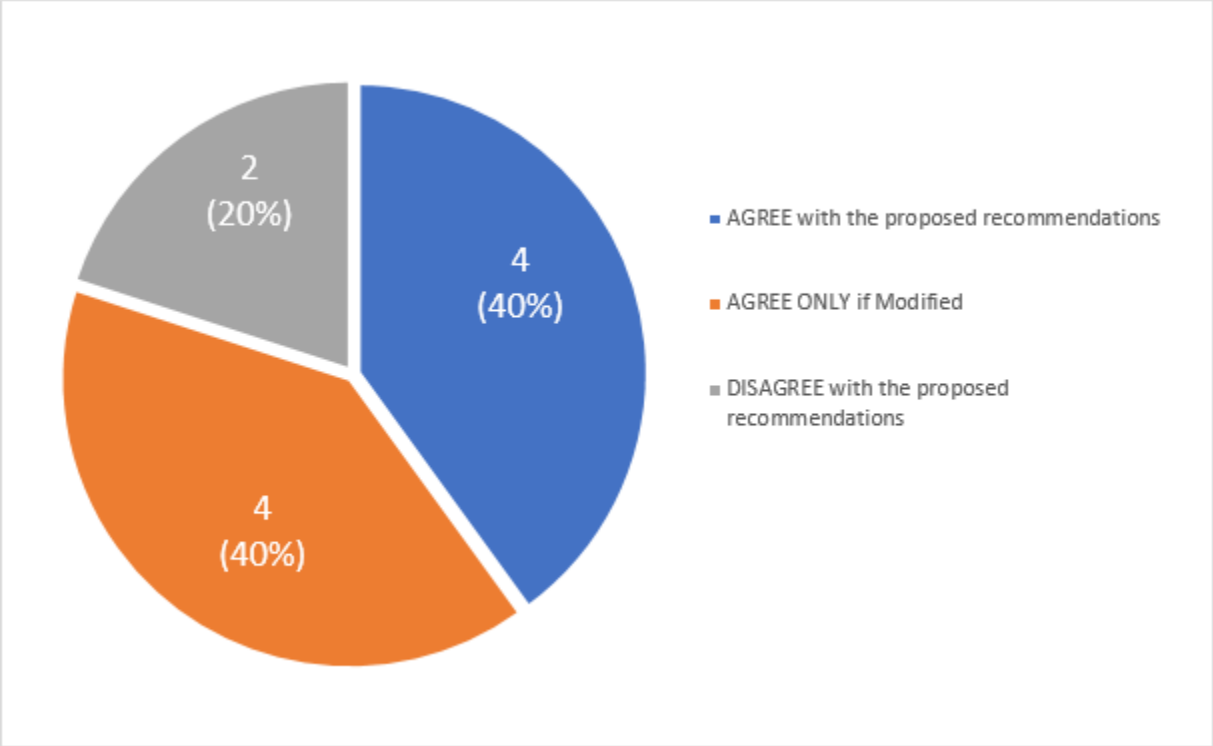
1. The agreement's terms to ensure the agreed upon fee is not unconscionable under Rule of Professional Conduct 1.5; and
2. The attorney's performance under the terms of the agreement, accounting for the implied covenant of good faith and fair dealing, and applying a reasonableness standard regarding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

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

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

Public Comment

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



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

The public comments are provided as Attachment C.

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

PREVIOUS ACTION

None

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 3. Protect the Public by Regulating the Legal Profession

RESOLUTIONS

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

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

ATTACHMENTS LIST

A. Arbitration Advisory 2024-01 – Clean

B. Arbitration Advisory 2024-01 – Redline Comparison to Arbitration Advisory 1993-02

C. Full Text of the Public Comments

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

ARBITRATION ADVISORY 2024-01

SUMMARY

Under applicable California law, where a written fee agreement is required under California Business and Professions Code[1] sections 6147, 6148,[2] or related sections (a "complying agreement"), and such a written agreement does not exist, the applicable standard of review is the "reasonable fee" or "lodestar" standard.[3] On the other hand, where the parties have entered into a complying agreement, under applicable California case law, the fee agreement determines the amount that is recoverable, even if it may be more than what would be recoverable under the reasonable fee or lodestar standard.

As the Court of Appeal held in *Pech v. Morgan* (2021) 61 Cal.App.5th 841, 846 [276 Cal.Rptr.3d 97] (hereafter *Pech*), "when an attorney sues a client for breach of a valid and enforceable fee agreement, the amount of recoverable fees must be determined *under the terms of the fee agreement*, even if the agreed upon fee exceeds what otherwise would constitute a reasonable fee under the familiar lodestar analysis." (Original italics.) This is unless the fee agreement is found to be unconscionable, or where the implied covenant of good faith and fair dealing may be found to have been breached by, among other things, whether unnecessary or duplicative services have been performed or the attorney failed to use "reasonable care, skill, and diligence in performing his or her contractual obligations." (*Id.* at pp. 846, 852.)

The apparent rationale for the decision in *Pech* is that the parties should be permitted to contract for a fee higher than a "reasonable fee" under the "lodestar" standard where circumstances make such an agreement appropriate. The holding in *Pech* is that such a contract should be enforceable in accordance with its terms provided that the attorney's performance is in accordance with the standards articulated in *Pech*.

DISCUSSION

First, there is no question that a complying agreement does not operate to remove a matter from the jurisdiction of the fee arbitration statutes. A fee dispute involving a complying agreement is to be arbitrated under the statutory scheme despite the existence of a written fee agreement.

Second, the standard of review to be applied when analyzing a written fee agreement is a combination of the principles of contract law and the 13-factor test for unconscionability under

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[1] All references to sections are to the Business and Professions Code unless otherwise stated.

[2] Section 6148 has several exceptions where a writing is not required, including in the case of a corporation.

[3] See Arbitration Advisory 1998-03 [updated March 20, 2015].

California Rules of Professional Conduct,[4] rule 1.5, and not a determination of a "reasonable fee" under the "lodestar" analysis. To apply a "reasonableness" standard of review to the terms of a complying agreement would eliminate the difference between instances where the attorney has entered into a written fee agreement with their client and those where the attorney has failed to do so (and thus is limited to a "reasonable fee").

Thus, once it has been established that an otherwise enforceable written fee agreement is in existence, the higher standard of unconscionability should be applied to the terms of the written fee agreement. For example, where the contract rate may call for $600 per hour while the prevailing hourly rate charged by similarly experienced attorneys for similar work in the community is less than $600 per hour, the arbitrator should apply the $600 rate under the terms agreed upon by the parties' written contract unless, taking into consideration the factors listed in rule 1.5, the arbitrator finds that the $600 hourly rate is unconscionable.[5]

Accordingly, the first question that should be answered by the arbitrators is whether, applying the principles of contract law as well as taking into consideration the fiduciary duty of the lawyer to his or her client, the fee agreement is valid and enforceable.

If the arbitrators determine that the written fee agreement is voidable pursuant to one of the applicable Business and Professions Code sections, then the standard of review is a "reasonable fee" as provided in section 6148, subdivision (c) as if no written fee agreement existed.

If the arbitrators find that the written fee agreement is valid and enforceable under the principles of contract law, then the arbitrators should engage in three additional steps in reviewing the terms of the agreement.

The first additional step is a determination whether the written contract is unconscionable under the 13-factor test in rule 1.5. In this analysis, cases such as *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 [39 Cal.Rptr.2d 506] have held that "[un]conscionability has both a 'procedural' and a 'substantive' aspect. The former involves (1) 'oppression,' which refers to an inequality of bargaining power giving no meaningful choice to the weaker or (2) the 'surprise' of a contractual term hidden in a printed contract . . . . 'Substantive' unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by circumstances under which the contract was made. . . . Presumably, both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable." Accordingly, the arbitrator must apply this standard to be satisfied that the client's consent is truly "informed."

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[4] All references to rules are to the California Rules of Professional Conduct unless otherwise stated.

[5] By this numerical example, the Committee does not intend to express an opinion on (a) whether these example hourly rates either are reasonable or unconscionable or (b) any difference between a reasonable rate and a contract rate may or may not render the latter rate unconscionable. Rather, these are matters that arbitrators must determine for themselves as may be appropriate under the evidence presented at the hearing.

The second additional step, assuming the arbitrators find that the written contract is valid and enforceable and that the terms, while not necessarily reasonable, are not unconscionable, then the arbitrators' analysis should be a review of the attorney's performance under the implied covenant of good faith and fair dealing. This analysis includes reviewing whether the attorney used reasonable care, skill, and diligence in performing the duties required of the attorney under the contract, that reasonable billing judgment was used by the attorney, that unnecessary, duplicative, or unproductive time is not charged to the client, and that the attorney has not performed services that were required as a result of the attorney's negligence or some lack of ordinary skill or diligence.

The third additional step is that the arbitrators consider the issue of any malpractice or violation of the Rules of Professional Conduct by the attorney during the representation.

In cases where malpractice or a breach of the Rules of Professional Conduct may be found, section 6203, subdivision (a) provides: "Evidence relating to claims of malpractice and professional conduct shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators may not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney."

In addition, in *Sheppard, Mullin, Richter & Hampton LLP v. J-M Mfg. Co., Inc.* (2018) 5 Cal.5th 59, 88-96 [233 Cal.Rptr.3d 378], (hereafter *Sheppard, Mullin*), the Supreme Court held that in certain cases where there has been a violation of the Rules of Professional Conduct, the written contract may be found to be void, in which case the attorney may be entitled to no fee or, depending upon the egregiousness of the breach, entitled to recover the reasonable value of his or her services under the "reasonable fee" standard discussed in Arbitration Advisory 1998-03 (last updated March 20, 2015), among other considerations articulated in *Sheppard, Mullin*.

CONCLUSION

Where the fee dispute is found to be governed by an enforceable written contract that complies with applicable Business and Professions Code sections, and is not unconscionable or tainted by some breach of the covenant of good faith and fair dealing or a violation of the Rules of Professional Conduct, then the dispute shall be determined under terms of the written fee agreement, even if the agreed upon fee exceeds what otherwise would constitute a "reasonable fee" under the familiar "lodestar" analysis.

This 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 member of the State Bar.

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

ARBITRATION ADVISORY ~~1993-02~~2024-01

~~**STANDARD OF REVIEW IN FEE DISPUTES WHERE THERE IS A WRITTEN FEE AGREEMENT**~~

~~**November 23, 1993**~~

SUMMARY

~~The State Bar's Committee on Mandatory Fee Arbitration has, from time to time, received inquiries regarding the standard of review to be used when arbitrating a matter in which the attorney and client have entered into a written fee agreement. This issue has been under discussion by the Committee over a period of time, and the purpose of this advisory is to set forth the Committee's analysis of an appropriate standard of review in such circumstances.~~

Under applicable California law, where a written fee agreement is required under California Business and Professions Code[1] sections 6147, 6148,[2] or related sections (a "complying agreement"), and such a written agreement does not exist, the applicable standard of review is the "reasonable fee" or "lodestar" standard.[3] On the other hand, where the parties have entered into a complying agreement, under applicable California case law, the fee agreement determines the amount that is recoverable, even if it may be more than what would be recoverable under the reasonable fee or lodestar standard.

As the Court of Appeal held in *Pech v. Morgan* (2021) 61 Cal.App.5th 841, 846 [276 Cal.Rptr.3d 97] (hereafter *Pech*), "when an attorney sues a client for breach of a valid and enforceable fee agreement, the amount of recoverable fees must be determined *under the terms of the fee agreement*, even if the agreed upon fee exceeds what otherwise would constitute a reasonable fee under the familiar lodestar analysis." (Original italics.) This is unless the fee agreement is found to be unconscionable, or where the implied covenant of good faith and fair dealing may be found to have been breached by, among other things, whether unnecessary or duplicative services have been performed or the attorney failed to use "reasonable care, skill, and diligence in performing his or her contractual obligations." (*Id.* at pp. 846, 852.)

The apparent rationale for the decision in *Pech* is that the parties should be permitted to contract for a fee higher than a "reasonable fee" under the "lodestar" standard where circumstances make such an agreement appropriate. The holding in *Pech* is that such a contract

[1] All references to sections are to the Business and Professions Code unless otherwise stated.

[2] Section 6148 has several exceptions where a writing is not required, including in the case of a corporation.

[3] See Arbitration Advisory 1998-03 [updated March 20, 2015].

should be enforceable in accordance with its terms provided that the attorney's performance is in accordance with the standards articulated in *Pech*.

DISCUSSION

~~California Business and Professions Code section 6148 makes it clear that where a written fee agreement is otherwise required under the terms of the statute, and such a written agreement does not exist, the attorney may only recover a reasonable fee. The Committee has been unable to identify a similarly clear standard of review embodied in either statutory or case law where the parties have entered into a written fee agreement. A question has even been raised as to whether such a matter may be arbitrated under the arbitration statutes.~~

~~In an effort to bring some uniformity to the conduct of arbitration throughout the state, the Committee on Mandatory Fee Arbitration has undertaken to fully examine the issues of whether such matters are subject to arbitration and, if so, the standard of review to be applied in determining an award.~~

First, there ~~appears to be~~is no question that a ~~matter otherwise subject to~~ complying agreement does not operate to remove a matter from the jurisdiction of the fee arbitration ~~under the provisions of Business and Professions Code section 6200 et. seq.~~statutes. A fee dispute involving a complying agreement is to be arbitrated under the statutory scheme despite the existence of a written fee agreement. ~~Conversely, the existence of a written fee agreement does not operate to remove a matter from the jurisdiction of the fee arbitration statutes.~~

Second, the ~~Committee has concluded that the~~ standard of review to be applied when analyzing a written fee agreement is a combination of the principles of contract law and ~~Rule 1.5 (formerly Rule 4-200) of the~~the 13-factor test for unconscionability under California Rules of Professional Conduct ~~pertaining to illegal or unconscionable fees.~~,[4] rule 1.5, and not a determination of a "reasonable fee" under the "lodestar" analysis. ~~The first question that should be answered by the arbitrators is whether, applying principles of contract law, as well as taking into consideration the fiduciary duty of a lawyer to his or her client, the fee agreement is valid and enforceable. If the arbitrators determine that the fee agreement is not valid or enforceable, then the standard of review is a reasonable fee as provided in Business and Professions Code section 6148 as if no written fee agreement existed. If the arbitrators find that the written fee agreement is valid and enforceable under principles of contract law, the arbitrators should engage in a two-step process by reviewing the terms of the agreement separate from the attorney's performance under the terms of the agreement.~~

~~The terms of the written fee agreement should be reviewed under the standard of unconscionability as discussed in Rule 1.5 of the Rules of Professional Conduct.~~ To apply ~~the~~a "reasonableness" standard of review to the terms of a ~~written fee~~complying agreement would eliminate the difference between instances where the attorney has entered into a written fee agreement with ~~his or her~~their client~~,~~ and those where the attorney has failed to do so (and

[4] All references to rules are to the California Rules of Professional Conduct unless otherwise stated.

thus is limited to a "reasonable fee ~~under section 6148. In order to distinguish between those situations where a~~ ").

Thus, once it has been established that an otherwise enforceable written fee agreement is in existence, ~~and those where there is no such agreement,~~ the higher standard of unconscionability should be applied to the terms of the written fee agreement. For example, ~~the arbitrators may find that the~~where the contract rate may call for $600 per hour while the prevailing hourly rate charged by similarly experienced attorneys for similar work in the community is less than $~~400~~600 per hour, ~~and, if the issue were the determination of a "reasonable fee", the arbitrators would choose that amount as the hourly rate. If, however, a valid written contract between lawyer and client provides for an hourly rate of $400.00, the arbitrators should use~~the arbitrator should apply the $600 rate under the terms agreed upon by the parties' written contract unless, taking into consideration the factors listed in ~~Rule~~rule 1.5 ~~of~~, the ~~Rules of Professional Conduct the arbitrators find~~arbitrator finds that the $~~400.00~~600 hourly rate is unconscionable. ~~If the agreed upon rate produces an unconscionable result, a reasonable standard should be applied to the ultimate fee on the theory that the written agreement between the parties is not enforceable.~~[15]

Accordingly, the first question that should be answered by the arbitrators is whether, applying the principles of contract law as well as taking into consideration the fiduciary duty of the lawyer to his or her client, the fee agreement is valid and enforceable.

If the arbitrators determine that the written fee agreement is voidable pursuant to one of the applicable Business and Professions Code sections, then the standard of review is a "reasonable fee" as provided in section 6148, subdivision (c) as if no written fee agreement existed.

If the arbitrators find that the written fee agreement is valid and enforceable under the principles of contract law, then the arbitrators should engage in three additional steps in reviewing the terms of the agreement.

The first additional step is a determination whether the written contract is unconscionable under the 13-factor test in rule 1.5. In this analysis, cases such as *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 [39 Cal.Rptr.2d 506] have held that "[un]conscionability has both a 'procedural' and a 'substantive' aspect. The former involves (1) 'oppression,' which refers to an inequality of bargaining power giving no meaningful choice to the weaker or (2) the 'surprise' of a contractual term hidden in a printed contract . . . . 'Substantive' unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by circumstances under which the contract was made. . . . Presumably, both procedural and

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[15] By this numerical example, ~~we do~~the Committee does not intend to express an opinion on (a) whether these example hourly rates ~~are~~ either are reasonable or unconscionable or~~,~~ (b) ~~whether the relationship~~any difference between ~~"~~a reasonable~~" and "unconscionable" is more or less than 20% or even that there is a percentage relationship between "reasonable" and "~~ rate and a contract rate may or may not render the latter rate unconscionable.~~"~~ Rather, these are matters that the~~ arbitrators must determine for themselves as may be appropriate under the evidence presented at the hearing.

substantive unconscionability must be present before a contract or clause will be held unenforceable." Accordingly, the arbitrator must apply this standard to be satisfied that the client's consent is truly "informed."

~~Assuming that~~The second additional step, assuming the arbitrators ~~have found~~find that the written ~~fee agreement~~contract is valid and enforceable~~,~~ and that the terms, while not necessarily reasonable, are not unconscionable, then the arbitrators' analysis should be a review of the attorney's performance under the ~~terms of the agreement. In every contract, there is an~~ implied covenant of good faith and fair dealing. ~~While parties may include in a contract any terms not deemed unconscionable (for example, $400 per hour), the client has the right to expect that the attorney's performance of the contract will be in good faith and in a professional manner.~~

~~Hence, a "reasonableness" standard should be applied in reviewing the attorney's performance under the written fee agreement. This would include~~This analysis includes reviewing whether the attorney used reasonable care, skill, and diligence in performing the duties required of the attorney under the contract, that reasonable billing judgment was used by the attorney, that unnecessary, duplicative, or unproductive time is not charged to the client, and that the attorney has not performed services that were required as a result of the ~~attorney's~~attorney's negligence or some lack of ordinary skill or diligence. ~~This is not an exhaustive list, but merely representative of the type of performance issues that may arise during the arbitration.~~

The third additional step is that the arbitrators consider the issue of any malpractice or violation of the Rules of Professional Conduct by the attorney during the representation.

In cases where malpractice or a breach of the Rules of Professional Conduct may be found, section 6203, subdivision (a) provides: "Evidence relating to claims of malpractice and professional conduct shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators may not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney."

In addition, in *Sheppard, Mullin, Richter & Hampton LLP v. J-M Mfg. Co., Inc.* (2018) 5 Cal.5th 59, 88-96 [233 Cal.Rptr.3d 378], (hereafter *Sheppard, Mullin*), the Supreme Court held that in certain cases where there has been a violation of the Rules of Professional Conduct, the written contract may be found to be void, in which case the attorney may be entitled to no fee or, depending upon the egregiousness of the breach, entitled to recover the reasonable value of his or her services under the "reasonable fee" standard discussed in Arbitration Advisory 1998-03 (last updated March 20, 2015), among other considerations articulated in *Sheppard, Mullin*.

CONCLUSION

Where the fee dispute is found to be governed by an enforceable written contract that complies with applicable Business and Professions Code sections, and is not unconscionable or tainted by some breach of the covenant of good faith and fair dealing or a violation of the Rules of Professional Conduct, then the dispute shall be determined under terms of the written fee agreement, even if the agreed upon fee exceeds what otherwise would constitute a "reasonable fee" under the familiar "lodestar" analysis.

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~~The Committee hopes that the foregoing answers some of the questions that have arisen regarding the appropriate standard of review so that arbitrations may be conducted on a uniform basis throughout the state. Please keep in mind that the foregoing is not an official opinion of the State Bar, but merely reflects the conclusions of many hours of thought, research and discussion among the Committee members over an extended period of time.~~

ATTACHMENT C

Comment #	Name or Organization	Attorney or Public Member?	Position (A/AM/ D/NP)[1]	Public comments
1	Anonymous	n/a	A	
2	Lee L. Blackman	Attorney member	AM	I am an attorney in active status in California and an MFA program arbitrator and mediator – and a Committee Vice-Chair -- of the Los Angeles County Bar Association's Attorney Client Arbitration and Mediation Service. The proposed Advisory fairly captures the appropriate approach to testing fees and costs billed under a retainer agreement where the client is sophisticated enough to know that the terms of the engagement are negotiable and where the client has made an informed decision to accept a fee structure that may result in charges that are higher than other lawyers in the community might bill because of factors like the lawyer's special experience, expertise, success, or commanding standing in the community; the amount in controversy or the sophistication of the issues in the matter; or other similar considerations. The Advisory does not explicitly suggest, however, that arbitrators ought to be satisfied, before giving force to a fee agreement that results in a higher fees than would generally be considered reasonable for a comparable matter in the relevant community, that a client who has agreed to pay such a premium has done so knowingly and because of the client's judgment that the circumstances are sufficient to justify anticipated fees that are or may turn out to be higher than would otherwise be determined to be reasonable. Stated alternatively, in a case where the client has agreed to a fee structure resulting in larger than generally accepted fees for ostensibly similar work, if the evidence does not demonstrate that the client's consent to the unusually high fee structure was genuinely "informed", the arbitrator should perform the more rigorous reasonable fee assessment to determine the amount the lawyer could properly bill for its services. While this view of the proper scope of review of fee agreements with unusually high rates is arguably implicit in the language of the proposed Advisory suggesting that arbitrators are to evaluate whether

[1] A = Agree with proposal; AM = Agree if modified; D = Disagree with proposal; NP = No position on proposal

Comment #	Name or Organization	Attorney or Public Member?	Position (A/AM/ D/NP)[1]	Public comments
				the agreed fee structure is procedurally or substantively unconscionable, it would nevertheless be appropriate for the Advisory – perhaps in the form of a footnote to the unconscionability discussion – to remind arbitrators that, in deciding whether the client's consent to the fee structure was "informed", arbitrators should consider whether the lawyer informed the client (or whether the client otherwise knew) that the fee structure was negotiable, that third parties might judge the fees billed under the selected structure to be higher than the rates or charges generally billed in the community for comparable work, and that the lawyer selected the fee structure as a result of the lawyer's judgment that the nature of the matter and/or the lawyer's special expertise justified the particular rate or fee structure.
3	Maralee Nelder	n/a	A	
4	Anahid Agemian	Attorney member	AM	Paragraph 2, before "(Original italics.)" - ... where a breach of the covenant of good faith and fair dealing may be found." Otherwise, the sentence states that there was a breach of a breach. ("where a breach of the covenant of good faith and fair dealing may be found to have been breached.") Paragraph 2 it is "unconscionable or " then in paragraph 3 it seems to imply that it is "unconscionable" and (not or) a breach of the covenant. The correct reading is "and" pursuant to Pech. "To be enforceable, the fee agreement cannot be unconscionable. And ..." "Discussion": 1. complying fee agreement? - must comply with the MFA 2. "when analyzing a fee agreement" it should be "when analyzing a complying fee agreement" Pech states that when the agreement is found not to be unconscionable, NO reasonableness analysis is made.

Comment #	Name or Organization	Attorney or Public Member?	Position (A/AM/ D/NP)[1]	Public comments
				"The trial correctly held" that reasonableness analysis is not required where the fee is specified in the contract. (Pech) The advisory seems confused and does not seem to support the conclusion.
5	California Lawyers Association	Attorney member	AM	See Attached Comment
6	Anonymous	Attorney member	D	In the thirty years I've belonged to the California State Bar, it's never provided me with anything of value in return for my membership dues. Moreover, the State Bar has provided little value to the general public, either, and has completely fallen down in its duty to protect the public from unscrupulous shysters like Tom Girardi. Instead, the State Bar has ENABLED Girardi and his ilk to victimize their clients. This sort of slipshod, negligent performance merits no increase in membership fees. If anything, the membership fees should be REDUCED.
7	Kaelee Gifford	n/a	D	
8	Karen L. Landau	Attorney member	A	As a fee arbitrator, I think this advisory is a useful statement of applicable law that would be helpful to arbitrators in particular.
9	April Washington	Public Member	A	I want to sue the Judy Justice show for misleading me. I was told I would get pay for my lawyer fees, filing fees, and my car. I did sign a contract. I had a real case and the judge didn't look at my case. She simply waved me off her show like I was contagious. My case was first in criminal court. My youngest daughter (Calista) was charged with simple battery for allegedly cutting her sister. Once we finished that then we went to California for the Judy Justice show. Well she had the case wrong. I was suing for my car, money and for an attorney.
10	Susan Lea	N/A	AM	The biggest problem I have seen with written " fee" agreements is that ambiguous language is intentionally used to allow the lawyer to keep and retain the initial fees required from the client, and in the past the BAR has allowed the lawyer to steal thousands and thousands of dollars from clients

Comment #	Name or Organization	Attorney or Public Member?	Position (A/AM/ D/NP)[1]	Public comments
				because the lawyer was able to require a $5000 retainer, do $1000 of work, and just keep the $4000 difference. Despicable. Theft.