

**COMMITTEE ON MANDATORY FEE ARBITRATION
THE STATE BAR OF CALIFORNIA**

AGENDA

**Friday, May 19, 2017
10:00 a.m. – 3:00 p.m.**

The State Bar of California
180 Howard Street, 4th Floor
San Francisco, CA 94105

OPEN SESSION

- I. Call for Public Comment (Migliaccio)
- II. Approval of Minutes of March 24, 2017 meeting (Attachment A, pp. 1-4) (All)
- III. Chair’s Report (Migliaccio)
- IV. Report from Presiding Arbitrator (Bacon)
- V. Report from the Office of Mandatory Fee Arbitration (Hull)
 - A. Office statistics (Attachment B, p. 5)
 - B. Schedule of Events (Attachment C, p. 6)
- VI. Business
 - A. Report from attendance at California Law Revision Commission (Attachment D, pp. 7-9) (Walsh)
 - B. Incorporation of Handbook information into training materials (Attachment E, pp. 10-35) (Straus, Buckner, Walsh)
 - C. Sample awards (Attachment F, pp. 36-60) (Straus)
 - D. Report re: appearance at Board meeting (Mark)
Excerpts from Governance in the Public Interest Task Force, Attachment G, pp. 61-77)
 - E. Education Subcommittee (Fish, Walsh, Duesdieker)
 - F. Arbitration Advisory on Interest (Mark, Fish)
 - G. Arbitration Advisory re: Costs (Mark, Buckner, Bacon)

Next committee meeting:

DATE: Friday, July 7, 2017
TIME: 10:00 a.m. – 3:00 p.m.
LOCATION: The State Bar of California
845 South Figueroa Street, 2nd Floor
Los Angeles, CA 90017
(213) 765-1000

**COMMITTEE ON MANDATORY FEE ARBITRATION
THE STATE BAR OF CALIFORNIA**

MINUTES

**Friday, March 24, 2017
10:00 a.m. – 3:00 p.m.**

The State Bar of California
180 Howard Street, 4th Floor
San Francisco, CA 94105

And

Conference Call: (855) 520-7605
Conference code: 6502212414

And

2336 Glastonbury road, Westlake Village, CA91361
402 W. Broadway, Ste. 1820, San Diego, CA 92101

Members Present: Nick Migliaccio (Chair), Mary Best (phone), Carole Buckner, George Duesdieker, Michael Fish, Brandon Krueger, Lee Hess (phone) Patrick Maloney, Joel Mark, Sharron McLawyer, Clark Stone, Lee Straus, Lorraine Walsh (Vice Chair) and Sally Williams.

Not Present: Ken Bacon

Staff Present: Doug Hull

The meeting was called to order at 10:15 a.m. by Chair Nick Migliaccio.

- I. Call for Public Comment
There were no requests for public comment.
- II. Approval of Minutes of January 27, 2017 meeting
The minutes were approved as attached.
- III. Chair's Report
Nick mentioned Joel's appearance at the Board of trustees meeting to address the letter to the California Law Revision Commission (see below). Lorraine will be in attendance at the next CLRC meeting.

Joel asked about the advisory on interest. Joel and Michael will bring it back at the May meeting.

Minutes March 24, 2016

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An advisory on costs is being developed by Carole, Ken and Joel. Joel will provide Carole with authorities from Dave Parker about costs.

Lee is working on sample awards for inclusion with the training.

IV. Report from Presiding Arbitrator
No report.

V. Report from the Office of Mandatory Fee Arbitration

A. Office statistics

Doug mentioned the modifications to the statistics. Simpler figures will be distributed at the next meeting. There was a discussion of the local bar reimbursements. There has been a decrease in the number of requested reimbursements statewide. It is unclear why that is.

There was a discussion of sending an e-blast to all arbitrators about their obligations related to MFA and their continued education about the program.

There was also discussion of presenting a one-hour CLE program on MFA to local bars. This program would be modeled after the 'good, bad, no ugly', originally prepared by Joel.

B. Schedule of Events

Attached to the agenda.

C. Update to Appointments Policy

Doug reported that the Board of Trustees approved the update to the modifications to the CMFA appointment policy.

D. Letter of California Law Revision Commission

Doug reported that Joel appeared at the March 9 Board meeting to present the item on the letter that the CMFA drafted to the CLRC regarding mediation confidentiality. The Board approved the letter unanimously.

VI. Business

A. Incorporation of Handbook information into training materials

Lee and Carole are still working on this project.

The committee expressed concern over 'handbooks' issued by local bar associations. This came about because of the *Baxter* case in Sonoma county. Doug will check out whether local bar programs have a 'handbook' that they give to arbitrators.

Carole commented on differences between the information in the handbook and the training materials. She mentioned the following items:

- Spelling out the factors in Rule 4-200
- True retainer v. advance deposit for fees
- T&R reference and Interlink
- More cites re: conflicts
- Burden of proof analysis (the information in the handbook is incorrect.)

Lee and Carole will finalize their review of the training materials and bring it to the CMFA in May. They may add a section on hedged contingency fees.

There was also discussion about adding information about medical liens, conflicting authority about modifications and unrepresented clients.

B. Education subcommittee

Michael presented information about the number of local bar programs currently in existence and where the CMFA has presented programs. He will work out a plan to make presentations throughout the state.

Carole mentioned the use of WebEx for presentations (and meetings). Something the committee may want to consider in the future (see next topic).

The committee voted to approved Michael's continued work on this topic.

Lorraine and George agreed to work with Michael on the issue of presentations.

C. Future of CMFA

The committee discussed the Governance in the Public Interest Task Force meeting where the CMFA was discussed (with no one from the committee or from staff present).

(http://calbar.granicus.com/MediaPlayer.php?view_id=3&clip_id=167 starting at about 10:15 mark.) Doug stated that the Task Force is looking at several committees and how they should be handled. Leah Wilson asked Doug to pull together a list of the work of the CMFA and break down the work by how they might be handled through the following means:

- Technology
- Staff
- Board
- CMFA

He will develop the list. Doug committed that change is coming. The CMFA will need to be responsive to the Leah's request.

Carole commented that the Task Force is conducting a deep dive into all committees. Stating that only in person trainings will work will not be considered responsive.

Lee commented that the CMFA brings a variety of perspectives and that should be brought to the Task Force's attention.

The Committee wanted to add the following items to the list presented by Doug:

- Local bar staff training
- Training of lay arbitrators
- Enforcement
-

Any presentations made to members of the Board need to emphasize our public protection component.

Carole commented the CMFA will provide valuable comment and advice to fee arbitrators when the new Rules of Professional Conduct are approved. The fee agreements will most likely need to be revised and trainings will need to be updated to incorporate the new/updated rules.

Joel will appear at the next Task Force meeting on April 24 to represent the CMFA.

The meeting adjourned at 2:05 p.m.

Next committee meeting:

DATE: Friday, May 19, 2017
TIME: 10:00 a.m. – 3:00 p.m.
LOCATION: The State Bar of California
180 Howard Street, 4th Floor
San Francisco, CA 94105
(415) 538-2000

**State Bar of California
Mandatory Fee Arbitration Program
2017**

Arbitration

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-To-Date	Year End 2016
Cases Open (Beginning of Month)	28	32	32	31										51
Fee Arbitration Requests	8	7	2	6									23	75
Arbitration Cases Closed	4	7	3	2									16	98
<i>Findings & Award Served</i>	2	3	2	0									7	71
<i>Cases Closed, No Award</i>	2	4	1	2									9	27
Cases Open (End of Month)	32	32	31	35										28
Phone Calls Handled	331	304	365	292									1292	3884

Enforcement

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-To-Date	Year End 2016
Cases Open (Beginning of Month)	64	61	58	55										89
Enforcement Requests Rec'd.	1	1	0	1									3	29
Orders Re Admin Penalties	2	0	0	0									2	5
Inactive Enrollment Motions Filed	0	0	0	0									0	12
Attorney Enrolled Inactive	1	0	0	1									2	7
Enforcement Cases Closed	4	4	3	4									15	54
<i>Cases Paid and Closed</i>	2	2	2	3									9	34
<i>Cases Closed (Other)</i>	2	2	1	1									6	20
Cases Open (End of Month)	61	58	55	52										64

Committee on Mandatory Fee Arbitration

Calendar of events

Date	Event	Type	Location	Participants
Friday, May 19, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 180 Howard Street, 4th Fl. DE San Francisco, CA 94105	All members
Wednesday, June 28, 2017 5:30 p.m. - 8:30 p.m.	Training	Basic	Long Beach Bar Association 3515 Linden Avenue Long Beach, CA 90807	Straus, Buckner, Maloney
Friday, July 7, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	The State Bar of California 845 South Figueroa Street, 2 F-G Los Angeles, CA 90017	All members
Thursday, August 24, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	TBD???	All members

DRAFT MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
APRIL 13, 2017
OAKLAND

A meeting of the California Law Revision Commission was held in Oakland on April 13, 2017.

Commission:

Present: Susan Duncan Lee, Chairperson
Thomas Hallinan, Vice Chairperson
Diane F. Boyer-Vine, Legislative Counsel
Damian Capozzola
Victor King
Jane McAllister
Crystal Miller-O'Brien

Absent: Assembly Member Ed Chau
Senator Richard D. Roth
Taras Kihiczak

Staff: Brian Hebert, Executive Director
Barbara Gaal, Chief Deputy Counsel
Kristin Burford, Staff Counsel
Steve Cohen, Staff Counsel
Victoria Matias, Secretary
Greg Gonzalez, Law Student Extern
Elisa Shieh, Law Student Extern

Other Persons:

Heather Anderson, Judicial Council of California
Robert Flack
Ron Kelly
Hon. David W. Long (ret.), California Judges Association
Phyllis G. Pollack, PGP Mediation
Lorraine Walsh, State Bar Mandatory Fee Arbitration Committee
John S. Warnlof, California Dispute Resolution Council

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2017 LEGISLATIVE PROGRAM

The Commission considered Memorandum 2017-11, discussing the Commission's 2017 Legislative Program. The Commission made the following decisions:

- The Commission accepted the amendments to AB 534 (Gallagher) that were set out in the memorandum and will revise its recommendation to use the amended language.
- The Commission accepted the amendment to AB 905 (Maienschein) that was set out in the memorandum, but will not revise its recommendation to use the amended language. The staff will prepare a draft of revised Comments, for Commission approval at a future meeting. (*Commissioner Boyer-Vine abstained. Commissioner Miller-O'Brien voted against the decision.*)

STUDY D-1300 — HOMESTEAD EXEMPTION: DWELLING

The Commission considered memorandum 2017-13, relating to the procedure used to approve the sale of a dwelling to satisfy a judgment creditor. The Commission decided to work further on a reform of the type described in the memorandum.

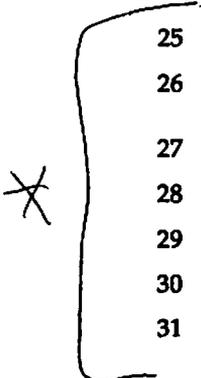
STUDY EM-560 — EMINENT DOMAIN: PRE-CONDEMNATION ACTIVITIES

The Commission considered memorandum 2017-14, relating to the statutory procedure for compensation of a property owner in connection with pre-condemnation activity. The Commission decided to work further on a reform of the type described in the memorandum. In preparing proposed legislation, the staff will also draft revisions to eliminate the use of gendered language.

STUDY K-402 — RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT

The Commission considered Memorandum 2017-19, which presents a partial draft of a tentative recommendation. The Commission also considered Memorandum 2017-20 and its First Supplement, which present new comments relating to this study.

The Commission made the following decisions:



1 **Format of Tentative Recommendation**

2 The three-part format used in the draft attached to Memorandum 2017-19 is
3 acceptable.

4 **Placement of *Lee v. Hanley* Quotations in Proposed Comment**

5 The revisions of the Comment to proposed Evidence Code Section 1120.5 that
6 are shown at the top of page 3 of Memorandum 2017-20 (inserting quotations
7 from *Lee v. Hanley*, 61 Cal. 4th 1225, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015)) are
8 acceptable.

9 **Types of Disputes in Which the New Exception Would Apply**

10 Proposed Evidence Code Section 1120.5 should be revised as follows:

11 **Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when**
12 **representing client in mediation context**

13 SEC. ____. Section 1120.5 is added to the Evidence Code, to read:

14 1120.5. (a) A communication or a writing that is made or
15 prepared for the purpose of, or in the course of, or pursuant to, a
16 mediation or a mediation consultation, is not made inadmissible, or
17 protected from disclosure, by provisions of this chapter if both of
18 the following requirements are satisfied:

19 (1) The evidence is relevant to prove or disprove an allegation
20 that a lawyer breached a professional requirement when
21 representing a client in the context of a mediation or a mediation
22 consultation.

23 (2) The evidence is sought or proffered in connection with, and
24 is used solely in resolving, one of the following:

25 (A) A complaint against the lawyer under the State Bar Act,
26 Chapter 4 (commencing with Section 6000) of the Business and
27 Professions Code, or a rule or regulation promulgated pursuant to
28 the State Bar Act.

29 (B) A cause of action for damages against the lawyer based
30 upon alleged malpractice.

31 (C) A dispute between a lawyer and client concerning fees,
32 costs, or both including a proceeding under the State Bar Act,
33 Chapter 4, Article 13-Arbitration of Attorneys' Fees, Business &
34 Professions Code Sections 6200-6206.

35 (b)

36 The staff should make conforming revisions in the corresponding Comment and
37 the preliminary part.

38 (*Commissioners King, McAllister, and Miller-O'Brien voted against this decision.*)

COMMITTEE ON MANDATORY FEE ARBITRATION

ARBITRATOR TRAINING

OUTLINE

I. Introductions

II. Program Overview and Relationship between State Bar and Local Bar Programs

- A. Under Bus. & Prof. Code §6200, effective 1979, the State Bar is required to arbitrate fee disputes.
 - 1. Attorney must give client notice of right to arbitration on State Bar approved form, available from local programs or State Bar website (www.calbar.ca.gov), before suing client for fees, costs or both.
 - 2. Client's right to arbitrate is waived if client (a) fails to request arbitration within thirty days of receipt of notice, Bus. & Prof. Code § 6201(a), (b) commences an action or files any pleading seeking judicial resolution of fee dispute or affirmative relief for malpractice, Bus. & Prof. Code § 6201(d), or (c) answers a complaint in the attorney's civil action for fees, Bus. & Prof. Code § 6201(b).
 - 3. Attorney and client may stipulate to arbitration after the client's waiver, Bus. & Prof. Code § 6201(e).
 - 4. Once arbitration is requested by the client, any filed action or other proceeding (including small claims court actions and other types of arbitration) commenced by the attorney are automatically stayed, with limited exceptions, e.g. writs of attachment and other provisional remedies, see Code of Civ. Proc. § 1281.8. Judicial Council form CM 180 is the required form for requesting the stay.
- B. The State Bar delegates the responsibility for fee arbitrations to local bar association programs to the maximum possible extent. The State Bar Committee on Mandatory Fee Arbitration, established in 1984, oversees attorney fee arbitration programs. Local bar arbitration programs must ensure that their rules of procedure comply with the "Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs".
- C. The local bar rules of procedure, which vary, are approved by State Bar Board of Trustees, entitling the local bar program to rely on the statutory immunity provision set forth in Bus. & Prof. Code § 6200(f).
 - 1. Arbitrator, mediator, program, directors and program staff have same immunity which attaches in judicial proceedings.

2. Includes immunity from liability for damages, from testifying in most proceedings, from being sanctioned by the court.
- D. Local bar arbitration programs have primary jurisdiction. State Bar arbitration program used only if:
1. No local bar program exists;
 2. Matter not within jurisdiction of local bar program; or
 3. Either party claims that he or she will not obtain a fair hearing under local bar program. Note: party may request removal to the State Bar from the local bar program based on a claim of unfairness at any time. Arbitration proceedings are stayed until there is a ruling on the removal request by the State Bar.
- E. State Bar, under Bus. & Prof. Code § 6203(d), has exclusive authority to assist clients with enforcement of a final award rendered by any approved fee arbitration program if client awarded a refund and attorney refuses to comply.
1. State Bar has authority to assess administrative penalties and place an attorney on inactive status for non-compliance.
 2. To avoid inactive status, attorney must show either:
 - a. Compliance with the award;
 - b. That he is not responsible for payment of the award; or
 - c. Financial inability to pay the award.
- F. Mediation
1. Since 1995, local bar programs and the State Bar may offer fee mediation services under approved minimum standards through the MFA program.
 2. Many of the larger local bar programs have active mediation programs.

III. Threshold Challenges to Jurisdiction

Although most challenges to jurisdiction are handled by the program, occasionally arbitrators are faced with jurisdictional objections that must be handled. If you have any questions about determining such challenges, please contact the program. Program advisories may address the issue.

- A. Court Ordered Fees
1. Bus. & Prof. Code § 6200(b) provides that there is no jurisdiction to

arbitrate fees paid where the fee “has been determined pursuant to statute or court order.”

2. The problem arises when attorneys’ fees have been assessed by a court against one side in litigation, such as under Civil Code §1717, but there has been no determination of the reasonableness of the fee as between the attorney and the recipient client.
3. In the absence of a court order arising from a proceeding where the client had a fair opportunity to contest the fee owing to his own counsel, the dispute is subject to mandatory fee arbitration. See Arbitration Advisory No. 1994-02 dated April 22, 1994.

B. Statute of Limitations as a Defense

1. Business and Professions Code Section 6206 provides that arbitration may not be commenced if the time for filing a civil action requesting the same relief would be barred under the appropriate statute of limitations.
2. Business and Professions Code Section 6206 includes an important exception which allows the client to commence fee arbitration after the statute of limitations would otherwise have expired, if it follows the filing of civil action by the attorney.
3. Bus. & Prof. Code § 6201(c) allows an automatic stay of any civil suit brought by an attorney if the client elects to arbitrate under the MFA program.
4. Business and Professions Code Section 6206 further provides that the running of the statute of limitations for an attorney to file a civil action for fees and/or costs is tolled or suspended from time arbitration is initiated until 30 days after mailing of the notice of award.
5. What statute(s) of limitation apply? It had been the position of the Committee on Mandatory Fee Arbitration that the one-year statute of limitations for actions against an attorney for any wrongful act or omission, other than actual fraud, arising in the performance of professional services did not apply to a client’s request for fee arbitration because MFAA arbitrations do not provide the same relief as a legal malpractice claim or an action for malpractice pled as a breach of contract. However, a 2015 decision by the California Supreme Court sheds light on the scope of Code of Civ. Proc. §340.6 and held that it may apply to a client’s claim for a refund of allegedly unearned fees from their attorney. (*Lee v Hanley* (2015) 61 Cal.4th 1225.) In *Lee*, which was not a fee arbitration case, the Supreme Court held that Code of Civ. Proc. §340.6 applies to all claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing

professional services and therefore may apply to a client's claim for the return of unearned fees. However, the Supreme Court held that Section 340.6 may not apply to a claim that an attorney converted client funds and that it does not apply to a garden-variety theft or a claim that does not require proof that the attorney violated a professional obligation. In the absence of future clarification of this issue by the Supreme Court or the Legislature it appears that the one-year limitations period under section 340.6 applies to the arbitration of attorney-client fee disputes under the MFAA where the nature of the dispute in any way involves the nature and propriety of the attorney's legal services, but it does not necessarily apply to claims that an attorney converted client funds, defrauded the client in a manner which impacts the attorney's right to recover fees or the amount thereof, or engaged in garden-variety theft of client funds. (See Arbitration Advisory 2016-01 "Statute of Limitations For Fee Arbitrations.")

6. Occasionally, Code of Civ. Proc. §352.1 may apply. It states that if a person with a fee dispute is incarcerated when the cause of action accrued, the time of that "disability" is added to the applicable limitations period, "not to exceed two years."

C. Effect on Mandatory Fee Arbitration of arbitration clause in fee agreement

1. Business & Professions Code §6200(c) provides that unless a client has agreed in writing to arbitration under the Mandatory Fee Arbitration Act, fee arbitration is voluntary for a client and mandatory for the attorney. But, where there is a written and otherwise enforceable clause in the fee agreement that the parties will submit to non-binding mandatory fee arbitration, fee arbitration is mandatory for both the client and the attorney. (See, Arbitration Advisory 1998-01 [Impact of Arbitration Clauses in Fee Agreements Upon Client's Right to Mandatory Fee Arbitration]; and Arbitration Advisory 2012-02 [Arbitration Agreements].)
 - a. The request and reply forms handled at the intake stage should indicate whether the parties want non-binding arbitration or agree to binding arbitration.
2. However, a pre-dispute agreement for binding mandatory fee arbitration is not enforceable as Business & Professions Code §6204(a) provides that an agreement that the arbitration award will be binding is effective only if it is made after the dispute over fees and costs arose. Since a fee agreement is made at the outset of the relationship (i.e., before a fee dispute has arisen), the client may nevertheless elect to proceed under the Mandatory Fee Arbitration statute even where there is a binding arbitration clause in the fee agreement. (See also, Arbitration Advisory 2008-01 [timing of Agreements to Binding Fee Arbitration] updated July 25, 2014.)

3. In 2009, the California Supreme Court clarified the relationship between a pre-existing contractual agreement to arbitrate fee disputes and non-binding MFA in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 45 Cal.4th 557 (2009). In *Schatz*, the client and the law firm entered into a fee agreement that included a provision for binding arbitration. After a fee dispute arose, the client elected non-binding MFA. The client rejected the non-binding award and requested trial de novo. However, the law firm sought to enforce the binding arbitration clause in the fee agreement. The Court agreed with the law firm and held that where a binding arbitration agreement existed, that agreement trumped the client's MFAA right to elect trial de novo in court following a non-binding MFA award; instead the parties would proceed based on the terms of their prior agreement to binding arbitration, or "arbitration de novo."

D. Jurisdictional Challenge based on Lack of Attorney-Client Relationship

1. MFA jurisdiction exists only if an attorney-client relationship existed, but the MFA statute does not itself confer jurisdiction on the arbitration panel to decide that issue. (*Glassman v. McNab* (2003) 112 Cal.App.4th 1593.)
2. There may be cases where a party credibly contends there was no relationship. For example, the client may have been billed for services by attorney without hiring the attorney. Or the attorney may claim that the person seeking fee arbitration is not the proper party.
3. "An insurance company paying the fees of "Cumis" counsel for the insured is not a proper party in a MFA fee arbitration challenging Cumis counsel's fees. Under *National Union Fire Insurance Company of Pittsburgh v. Stites* (1991) 235 Cal. App. 3d 1718, "arbitration pursuant to section 6200 et seq. is limited to fee disputes between attorneys and their clients."
4. To proceed, the parties must stipulate to confer the issue of jurisdiction to the panel to decide. Otherwise, the party seeking to invoke jurisdiction must apply to a superior court to make that determination.
5. Distinguish where the party requesting arbitration is not the client but paid fees or is liable to attorney for unpaid fees. Non-client payor is a proper party for fee arbitration as affirmed in *Wager v. Mizrayance* (1998) 67 Cal.App.4th 1187.
6. Without a stipulation or court order affirming jurisdiction, the award is subject to a court order vacating award if arbitrator is found to have exceeded authority. (See Arbitration Advisory No. 2005-01, dated January 21, 2005.)

IV. Considerations Before the Hearing and for Commencing the Hearing

Skit No. 1.

A. Arbitrator Selection

1. Notice of Arbitrator Appointment served by program, with no arbitrator background. Parties may request arbitrator to provide his/her resume, but there is no requirement that the arbitrator must provide this information.
2. Rules provide for either sole attorney arbitrator or three-member panel depending on dollar amount in dispute (usually \$10,000 but no more than \$25,000), comprised of two attorneys and lay person.
3. Client may request that attorney arbitrator on panel practice in area of either criminal or civil law depending on nature of client's underlying case. Bus. & Prof. Code §6200(e).

B. Appearance of bias

1. If the arbitrator believes he/she cannot render a fair and impartial award, he/she shall recuse himself/herself. He/she shall also recuse himself/herself if he/she:
 - a. has a financial interest in the fee arbitration;
 - b. has represented any party to the arbitration; or
 - c. has- practiced with any party to the arbitration.
2. The MFAA is exempt from the disclosure standards applicable to contractual arbitrations. CA Rule of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 3(b)(2)(C).
 - a. CCP §§1281.9 and 170.1 do not apply
 - b. See, *Benjamin, Weil & Mazur v. Kors* (2011) 195 Cal. Ap. 4th 40, fn. 10.
3. Disclosure does not require recusal. However, recusal is required if the arbitrator concludes the matter disclosed would adversely affect his/her ability to render a fair and impartial award.
4. Although exempt from contractual disclosure requires, always err on the side of broad disclosure. The parties need to believe they have received a fair and impartial hearing in deciding whether to accept the award.
 - a. The arbitrator needs to disclose all information that might cause a party to believe that the arbitrator -will be not impartial.

- b. The arbitrator needs to disclose if he/she has ~~any~~ connection with the attorney, client, potential witnesses, or any attorney representing the parties in the arbitration.
- c. If the case is accepted and something is then discovered suggesting grounds for recusal or appearance of bias, the arbitrator should send it back.
- d. If the arbitrator is ~~is~~ unsure, they need to call the local program staff.
- e. Disclose early on in the case and in writing to all parties with a copy to the program.
- f. Give the parties an opportunity to request your disqualification.
- g. if disclosure is made at the hearing, consider continuing the hearing to allow the parties an opportunity to reflect on the disclosure, especially if there is a pro per client.

If appearance of bias could be an issue, even if you believe you would be fair, the better rule is to disclose.

C. Preparation for the Hearing

1. Identifying the parties. The parties are the petitioner (usually the Client) and the respondent (usually the Attorney.) The parties are identified as such in the package you receive from the program administrator. If there are questions as to who the proper parties are, discuss those issues with the administrator. Under *National Union Fire Insurance Company of Pittsburgh v. Stites*, (1991) 235 Cal. App.3d 1718, “arbitration pursuant to section 6200 et seq. is limited to fee disputes between attorneys and their clients.” Pursuant to *Wager v. Mirzayance*, (1998) 67 Cal. App. 4th 1187, a 3rd party payor may be a proper party. *Wager* held that a father who retained an attorney to defend his son was entitled to notice of client’s right to arbitrate and to participate in arbitration, even though the father was an account debtor rather than a client.
2. Setting the hearing date and notice of hearing. Many programs have local rules with guidelines for the time periods within which hearings should be set and conducted. Within such rules, try to contact the parties for mutually convenient hearing dates and times. Arbitrators often set hearings in the late afternoon to fit the working schedules of the parties (and the arbitrator). It is good practice to send a letter or fax to both parties, with available dates and times, asking for their preferences and stating that, unless you receive an objection to any of the dates within a set time, you will set the hearing for one of those dates.
3. Taking control of the proceedings from the outset. This is also a good time

to ask the parties, if they have not already done so, to furnish you with the fee agreement, billing statements (if they are in issue), any other documents they may wish to rely on at the hearing, and any documents you would like to see. Tell each side to send the other side a copy of everything sent to you.

4. Shaping the issues. Read the petition, response and any accompanying materials as soon as you receive them. If you still do not have a good sense of what the dispute is about (e.g. is the client claiming that the attorney did not send bills, the bills were hard to decipher, the attorney charged more than a promised cap on fees, the attorney was inefficient or ineffective, the attorney failed to refund unearned fees), take the initiative now to ask the parties for clarification. Do not wait until the hearing to learn the nature of the dispute.
5. Sending a letter to the parties regarding timing of briefs and encouraging exchanges of evidence and documents. If the complexity of the case merits it, consider establishing target dates for submission and exchange of written statements setting forth each party's position and anticipated evidence, and for the exchange of such evidence before the hearing.
6. Continuances. Most program rules contain policies on continuances. Usually, granting a continuance is within the arbitrator's discretion. It is good practice to ask the party seeking the continuance to clear the continued date with the other side first. After the date has been cleared, the arbitrator should notify all parties of the continuance in writing.

D. Ex Parte communications

1. Ex parte communications create suspicion and should be avoided. See generally State Bar Rules of Professional Conduct, Rule 5-300(B).
2. No ex parte contact with arbitrators should be permitted except:
 - a. to schedule hearings or other administrative matters (including the issuance of subpoenas), or
 - b. in cases of emergency, or
 - c. in writing with copies to all (including arbitrating association).
3. Consider use of conference calls.
 - a. Who participates? If the entire panel and all sides are included, it's easier to arrange hearing dates and take care of other administrative pre-hearing business.
 - b. Who pays for the conference call?

E. Discovery

1. Limitations

- a. MFA program is intended to be speedy and to enable clients to participate without assistance of counsel. Permitting extensive discovery would be contrary to that intent.
- b. Bus. & Prof. Code § 6200 *et seq.* is silent re discovery. Check the local program rules. Most programs permit no pre-hearing discovery.
- c. The client file belongs to the client. The attorney may copy the file at his or her own expense. See, CPRC 3-700(D). However, informal exchange of documents should be encouraged.

2. Subpoenas

- a. Pursuant to statutory language, arbitrators may “compel,” by subpoena or subpoena *duces tecum*, the attendance of witnesses and the production of relevant documents. Bus. & Prof. Code § 6200(g)(3). As a practical matter, the arbitrator issues subpoenas, but only the appropriate civil court may truly compel attendance/enforcement upon application by a party. See Arbitration Advisory 2008-02 (“Authority to Compel Compliance with Third-Party Subpoenas”)
- b. Subpoenas or subpoenas *duces tecum* may issue upon a party’s request for good cause shown. Party requesting subpoenas obtain blank subpoena forms from the program or a judicial council form and -submit a complete subpoena to the arbitrator or program chair with a statement providing the rationale for the need for the subpoena. Check the rules re compliance with deadlines to request subpoenas and that subpoena form complies with Code of Civil Procedure § 2065 (notice of witness’ right to fee and mileage).
- c. Parties may -not issue their own subpoenas.

F. Arbitration in the absence of a panel member

1. A party who is entitled to a panel of three arbitrators cannot be compelled to accept a panel consisting of less.
2. Bus. & Prof. Code § 6200(e) provides for one or three arbitrators (and requires one non-lawyer arbitrator on a 3-member panel), thus impliedly prohibiting a two-arbitrator panel. Many local program rules explicitly prohibit the hearing from going forward with two arbitrators.
3. If parties agree **in writing**, the hearing may proceed with panel chair

acting as sole arbitrator. If the panel chair is not available, the attorney arbitrator can serve as the sole arbitrator. In no instance should the lay arbitrator serve as the sole arbitrator.

4. No matter what the parties may agree or the local rules permit, it is usually better to continue the hearing until all three arbitrators can attend. Otherwise, a party, particularly an unrepresented client, may claim to have felt coerced into proceeding with one arbitrator.

G. Role of the non-lawyer arbitrator

1. A 3-member panel must include one “lay member.” Bus. & Prof. Code § 6200(e)(1). A lay arbitrator is a person who has:
 - a. not been admitted to practice law;
 - b. not worked regularly for a public or private law practice (this includes paralegals, staff and law clerks);
 - c. not worked for a court or attended law school for any period of time. Guidelines & Minimum Standards No. 20. .
2. Lay arbitrator is not a “party arbitrator” (as often seen in medical malpractice and international commercial arbitrations) and should be neutral, just like the other two arbitrators.
3. One purpose of the non-lawyer arbitrator includes providing a valuable non-attorney perspective.
4. Lawyer arbitrators should always behave respectfully towards lay arbitrator.

H. Informality of the proceeding / Use of legal terminology

1. Fee arbitration hearings should be much less formal than judicial trials, and probably less formal than judicial arbitrations. However, the hearing should maintain an air of solemnity and be formal enough to provide clients confidence in the proceeding.
2. The level of formality to be observed is up to the arbitrator. Arbitrators should keep in mind the statutory purpose of providing a forum where clients can present their cases without legal representation.
3. Nonetheless, some level of formality helps the arbitrator to maintain control, and shows both sides they are playing by the same rules; and excessive informality may be perceived as bias, particularly by unrepresented clients.
4. The location should be the arbitrator’s office or other neutral place -never

the attorney's office. Consideration should be given to the participants' comfort (privacy, space, etc.). If you have the option, don't have the parties wait in the same reception area; there is often considerable hostility between them.

5. The fee arbitration program is designed so that clients can arbitrate without legal training or the assistance of counsel. Client may be intimidated by use of legal terminology and may be afraid to ask for clarification.
6. A client who doesn't understand the proceeding may believe there was bias and may be dissatisfied with the process.

I. Confidentiality of hearing

1. Bus. & Prof. Code § 6202 makes the attorney/client and work product privileges inapplicable in the arbitration (and in related proceedings, e.g. trial de novo, petition to confirm award, unless maintained by a third party payor (See Adv. 2007-02)). Disclosures at arbitration don't waive the privilege for other purposes.
2. Some local rules permit client to bring another person to hearing for advice or support, and may give arbitrator discretion to permit additional people. Distinguish support person from non-attorney advocate, which may raise issue of unauthorized practice of law.
3. Otherwise, arbitration hearings are confidential and closed, except for witnesses when testifying.
4. Local bar rules may permit interpreters and certified shorthand reporters to attend the hearing at the requesting party's expense.
5. If confidential information is disclosed during the course of the hearing, arbitrators should be cautious and limit the use of such confidential information in the award.
6. Award and arbitrator's determinations are not admissible and do not operate as *res judicata* or collateral estoppel in any other action or proceeding, including a subsequent legal malpractice action. (Bus. & Prof. Code § 6204(e).) (See also *Liska v. Arns Law Firm* (2004) 117 Cal.App.4th 275, 282-284.)

V. The Arbitration Hearing

Skit No. 2

A. Agreements to be bound

1. Fee arbitration is not binding--that is, all parties have an unconditional right to trial *de novo* or binding arbitration pursuant to the fee agreement. (*Schatz v. Allen Matkins et al* (2009) 45 Cal 4th 557) unless, after the dispute arises, they execute a written agreement to be bound. Thus, a “binding arbitration” clause in a retainer agreement, signed before the dispute arose, is unenforceable. Bus. & Prof. Code §6204(a). See Arbitration Advisory No. 2008-01 dated April 3, 2008.
 - a. Exception: A party who wilfully fails to appear at the arbitration hearing loses the right to trial *de novo*. Bus. & Prof. Code § 6204(a). Since court determines issue of wilful nonappearance, it is important that the arbitration award address the circumstances of a party’s nonappearance in sufficient detail.
2. Most non-binding arbitrations become binding automatically with the passage of time because many parties do not file for a trial *de novo*.
 - a. Arbitrators should take the same care with non-binding proceedings as with binding ones.
 - b. If parties believe that they have been treated fairly and understand (even if they do not agree with) the reasons for the decision, they are less likely to request a new trial.
3. Any agreement to be bound must be in writing and must have been made after the dispute arose. Usually this will occur when the parties complete the arbitration request and reply forms. Also, program may include, with the arbitrator package, a stipulation for parties to document an agreement to be bound if they do so agree at the hearing location before the taking of evidence begins.
4. Arbitrators must ascertain, before the taking of evidence begins, whether the arbitration is to be binding, but under no circumstances should the arbitrator pressure the parties into binding arbitration.
5. Once both parties have agreed to be bound, neither can withdraw from the agreement without mutual consent in writing.
6. Unless the parties settle or agree to withdraw from binding arbitration, neither party can withdraw from arbitration after both parties have agreed to be bound.

B. Settlement prior to award

1. Role of the arbitrator
 - a. The arbitrator is not a mediator. If parties wish to settle, they should do so outside the arbitrator’s presence. An arbitrator may

not participate or assist in settlement and shall not draft any settlement agreement reached by the parties. See Arbitration Advisory No. 2015-02 dated March 20, 2015.

- i) Potential loss of immunity for arbitrator, association, and its officers and employees
 - ii) If settlement is unsuccessful, parties, particularly the unrepresented client, will be more inclined to believe there was bias if they lose.
- b. Arbitrator may issue a stipulated award
- i) The award must meet the State Bar Minimum Standard and make clear the award was reached after settlement between the parties.
 - ii) Use the “Award Pursuant to Stipulation of Parties” form.
- c. Effect of settlement on enforcement of award
- i) Under Bus. & Prof. Code § 6203(d), State Bar can enforce an **award** when a client is given a refund. See paragraph 3.d below re stipulated award
 - ii) If settled without an award and settlement includes a refund to the client, client has no recourse through State Bar enforcement. Nor do the parties have the other post-arbitration remedies available under the Business and Professions Code.
- d. There are limits on a Stipulated Award
- i) The arbitrator may not issue a Stipulated Award if the arbitrator believes the settlement is unethical, illegal, or unconscionable. Allow the parties to remove the unethical terms; proceed with arbitration; or allow parties to dismiss the case in accordance with their settlement and the program’s rules
 - ii) Only matters properly before the arbitrator under the MFA can be entered as a Stipulated Award and enforced through the MFA Code. Arbitrator authority is expressly limited (B&P Code 6200 et. seq.) See B&P §6203(a) for a list of matters which cannot be included in a stipulated award

C. Oaths or affirmations of witnesses

1. Bus. & Prof. Code § 6200(g)(2) provides that arbitrators “may” administer oaths and affirmations.
2. Many local program rules require that testimony of witnesses be given under oath, administered by panel.
3. Oath should be similar to oaths given in court, e.g. “~~Do you~~You do swear (or affirm) that the testimony you give in this proceeding will be the truth, the whole truth, and nothing but the truth?”
4. Many local program rules permit testimony to be submitted by declaration. Some programs require trial by declaration when the amount in dispute is small.

D. Order of proceeding and burden of proof

1. Local rules usually provide no specific guidance; the issue of who has the burden of proof is left to the discretion of the arbitrator. (See Arbitration Advisory No. 1996-03 dated June 7, 1996).
2. No need to follow formal rules used at civil trials.
3. At the outset of the hearing (if not before), have the parties articulate the points of contention and agreement.
 - a. A few leading questions from the panel can save a lot of time and narrow the issues.
 - i) “Do you all concede that there was no written fee agreement?”
 - ii) Mr. Client, are you telling us that you do not disagree with the time shown on Ms. Attorney’s billings but believe that some of the time was not well spent?”
 - b. Be careful to explain that you are just narrowing the issues at this preliminary point and that you do not need a further response once you ascertain whether there is agreement on an issue.
4. Even though the client is usually the petitioner and the attorney is the respondent, most arbitrators require the party best able to produce evidence on a given issue to present that evidence and bear the burden of proof on it.
 - a. If the client raises an issue as to whether the attorney performed, the attorney should generally bear the burden of establishing his or her performance.

- b. Similarly, most arbitrators expect the attorney to establish what the agreement was (if any) between the parties and will hold the attorney responsible for not having an agreement or not being able to establish its content.
- c. If the issue is one of non-credit for payments made, the client should generally bear the burden of establishing payment.

E. Evidence

- 1. Stipulations are encouraged.
- 2. No formal rules of evidence apply.
- 3. Hearsay is not prohibited (see e.g., Code of Civ. Proc. §1282.2(d)).
- 4. Decision will be based on preponderance of the evidence.
- 5. Any evidence may be considered if it is of the type and character upon which ordinary people may rely in the ordinary course of serious affairs, regardless of the existence of any common law or statutory rules to the contrary.
- 6. Arbitrators have discretion to waive personal appearance, take testimony by telephone and accept exhibits and testimony by declaration under penalty of perjury.
- 7. Frequent ground for challenge of arbitration award is failure to accept relevant evidence. The better practice is to admit the evidence and give it the weight -the arbitrator believes is appropriate. Attorney/client and work product privileges do not prohibit disclosure of relevant communications or work product in fee arbitrations; such disclosure does not constitute waiver for any other purpose. Bus. & Prof. Code § 6202. See exception for third party payors, Arbitration Advisory 2007-02.
- 8. Exhibits and documents should be returned to parties who submitted them following submission of award. Handwritten notes or other materials prepared by any arbitrator for use in the hearing are to remain with the arbitrator or be destroyed.

F. Additional Consideration

- 1. Consider background, experience and relative sophistication of parties. In some cases, a party (especially likely to be the client) may be so unfamiliar with, or intimidated by, the proceedings that it affects that party's ability to provide meaningful evidence. Arbitrators should make every effort to make a full and fair review of the facts.

2. Factors which may have a bearing on determination of dispute re: attorney's obligations include:
 - a. Attorney's understanding of extent of legal knowledge or experience of client;
 - b. Whether ramifications of fee agreement or other documents to be signed by client were fully explained;
 - c. Whether itemized bill or written or oral explanation of charges given if requested;
 - d. Whether billings represent time reasonably spent on behalf of client, or reasonably necessary to achieve client's objectives;
 - e. Whether billings reflect charges which exceed maximum agreed by parties, and whether there was consent to additional charges.
3. Client's conduct may also be taken into consideration:
 - a. Whether client fully informed attorney as to facts which might affect outcome of case, or extent of fee to be charged.
 - b. Whether client sufficiently informed attorney of client's ability to pay.
 - c. Whether client made reasonable efforts to communicate with attorney about fee dispute, or amount of charges being incurred.
 - d. Whether client requested services beyond scope of fee estimate originally provided by attorney.

G. Arbitration with and without a written fee agreement

1. Is there an enforceable written agreement?
 - a. Legislation requiring a written fee agreement may affect the enforcement of the agreement.
 - i) Bus. & Prof. Code § 6147 generally requires a written fee agreement where the attorney represents the client on a contingent fee basis.
 - ii) Bus. & Prof. Code § 6148 requires a written fee agreement in certain cases not coming within § 6147 where fees and/or costs are expected to be more than \$1000, with specified exceptions including when services rendered in an emergency, when an agreement is implied because

similar services were previously rendered to and paid for by the client, and when the client is a corporation.

- iii) Bus. & Prof. Code § 6146 prescribes terms for retainer agreements in medical malpractice cases, limiting fees.
- iv) All three sections set specific requirements as to the content of the fee agreement and some of the procedures for the execution of the agreement.
- v) Sections 6147 and 6148 provide that a non-complying agreement is voidable at the option of the client, and the attorney is entitled to collect a reasonable fee.

vi) Hybrid fee agreements containing a contingent fee component cannot be enforced unless they comply with the requirements of Bus. & Prof. Code Section 6147. *Arnall v. Superior Court* -(2010) 190 Cal. App. 4th 360.

vi)vii) The requirements of Bus. & Prof. Code Section 6147 apply to modification of a contingent fee agreement. See *Fergus v. Songer* (2007) 150 Cal.App.4th 552; *Stroud v. Tunzi* (2008) 160 Cal.App.4th 377. If the modification was not in writing and did not satisfy all of the requirements of 6147, the attorney is not entitled to recover the contingent fee, but may be able to recover the reasonable value of services provided.

- b. The State Bar Rules of Professional Conduct provide assistance in judging the validity of a written fee agreement
 - i) Attorneys “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Rule 4-200(A).
 - (a) “Unconscionability” is generally determined based upon the facts and circumstances existing when the agreement was made. Rule 4-200(B).
 - (b) Rule 4-200(B) (1) - (11) sets forth factors to be considered in determining unconscionability.
 - ii) Fee agreements should be fair and reasonable and drafted in a manner which will be easily understood by the client. *Alderman v. Hamilton*, (1988) 205 Cal. App.3d 1033, 1037.
- c. To assess the enforceability of a written fee agreement, Arbitration Advisory No. 1993-02 dated November 23, 1993 suggests the

following approach:

- i) Begin with the contract formation issues, i.e. is the agreement valid and enforceable taking into account the usual contract considerations and the specific legislative requirements, if applicable to the attorney/client agreement?
 - ii) If it is otherwise valid and enforceable, are its terms, under the guidelines of Rule 4-200, “unconscionable?”
 - iii) Was the attorney’s performance under the agreement reasonable?
2. If there is no written fee agreement or if the written agreement is unenforceable, the attorney is generally entitled to a reasonable fee.
- a. See Arbitration Advisory No. 1998-03 updated March 20, 2015 for a comprehensive discussion of procedures to determine a reasonable fee.
 - b. In determining a reasonable fee, the criteria set forth in Rule 4-200(B) are the generally accepted criteria but the standard for their application is different (e.g., a fee of \$750 per hour may not be “unconscionable” when applying the criteria of Rule 4-200(B), but may well be viewed as “unreasonable” and reduced accordingly).

H. Reviewing the Agreement for Unconscionability

1. Attorneys “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” (Rule 4-200(A).) (See Arbitration Advisory No. 1998-03, updated March 20, 2015.)
 - a. “Unconscionability” is generally determined based upon the facts and circumstances existing when the agreement was made. (Rule 4-200(B).)
 - b. Rule 4-200(B) (1) - (11) sets forth factors to be considered in determining unconscionability.
 - c. Fee agreements should be fair and reasonable and drafted in a manner which will be easily understood by the client. (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037.)

I. True Non-Refundable Retainer Fees

1. A fee agreement providing for what has been called a “true” or “classic” retainer, which characterizes a payment as a “nonrefundable” fee or one

“earned upon receipt,” is enforceable only if the client has agreed that the amount was paid “solely for the purpose of ensuring the availability of the member.” (*Baranowski v. State Bar* (1979) 24 Cal.3d 153.)

2. Otherwise, where fees are subtracted from the retainer or the retention of attorney was not shown to secure solely the attorney’s availability, the fees are governed by Rule 3-700(D)(2), which requires that the attorney “[p]romptly refund any part of a fee paid in advance that has not been earned.” (See Arbitration Advisory 2011-01, dated January 28, 2011.)

J. Voiding the fee agreement

1. The failure of the attorney to enter into a proper written fee agreement may leave the client free to void the agreement. If the client exercises that option, the attorney is entitled to a reasonable fee only.
 - a. In practice, the more difficult issue can be whether an arbitrator, in the absence of any expression by the client, should raise the possibility that the agreement may not comply with the statute.
 - b. Some arbitrators will not void the agreement unless the client affirmatively raises the issue. Others will simply deem the client to have elected to void the agreement if to do so would result in a lesser fee. Bring the issue to the attention of the client, particularly if the client is not represented by counsel. See Arbitration Advisory No. 2012-01 dated February 1, 2012.
 - c. In dealing with this issue, the following additional considerations may be relevant:
 - i) A court may well raise *sua sponte* issues of illegality.
 - ii) Civil Code § 1608--contracts for illegal consideration are void.
 - iii) Civil Code § 1598--contracts which are wholly for an unlawful object are void.
 - iv) Civil Code § 1599-- contracts which have several objects are void as to the unlawful portion, e.g. separate out usurious interest from balance due on principal.
 - v) If the arbitrator voids the fee agreement, a *quantum meruit* award cannot exceed the contracted amount. *Cazares v. Saenz* (1989) 208 Cal.App.3d 279. *Chodos v. Borman* (2014 227 Cal.App.4th, 76)

K. Determining a Reasonable Fee

1. If there is no written fee agreement or if the written agreement is unenforceable and voidable, the attorney generally is entitled to a reasonable fee. The burden is on the attorney to demonstrate by a preponderance of the evidence the reasonableness of the fee.
2. See Arbitration Advisory No. 1998-03, updated March 20, 2015, for a comprehensive discussion of procedures to determine a reasonable fee.
 - a. In determining a reasonable fee, the criteria set forth in Rule 4-200(B) are the generally accepted criteria but the standard for their application is lower (e.g., a fee of \$750 per hour may not be “unconscionable” when applying the criteria of Rule 4-200(B), but may well be viewed as “unreasonable” and reduced accordingly).

L. Requirements for billing statements

1. Governed by Bus. & Prof. Code § 6148(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.” *Ibid.* See Arbitration Advisory No. 1995-02 dated June 9, 1995.
2. Bills for costs and expenses shall clearly identify nature and amount of costs and expenses incurred.
3. Bills must be provided to client no later than 10 days after client’s request; but client entitled to make such request no more than once every 30 days.
4. Failure to comply with these requirements renders fee agreement voidable at client’s option. If option exercised, attorney eligible to receive a reasonable fee. Bus. & Prof. Code § 6148(c).

M. Arbitration where there is malpractice or professional misconduct

1. Evidence relating to claims of malpractice and professional misconduct shall be admissible only to the extent that those claims bear upon the fees or costs to which the attorney is entitled. Bus. & Prof. Code § 6203(a). See Arbitration Advisory 2012-03 dated July 17, 2012.
 - a. Arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying any such claim. Bus. & Prof. Code §§ 6203(a) & 6200(b)(2).
 - b. Arbitrators may rule that the value of attorney’s services was lessened due to the way the case was handled, and reduce the fee. *Id.*
2. Conflicts of interest and other ethical violations

- a. Occasionally, an arbitration will reveal that the attorney undertook to represent the client under an impermissible conflict of interest or committed some other ethical violation. See California Rules of Professional Conduct, Rules 3-300, 3-310 & 3-600. See also Arbitration Advisory Nos. 1998-03 updated March 20, 2015 and No. 2012-03 dated July 17, 2012.
- b. California law suggests there must be a serious violation of the attorney's responsibilities before an attorney who violates an ethical rule is required to forfeit fees. See *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000.
- c. Care is required, however, for even severe ethical violations sufficient to invalidate a written fee arrangement may still not preclude fee recovery on a theory of quantum meruit or unjust enrichment. See *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1; *Estate of Falco*, (1987) 188 Cal.App.3d 1004; *Kallen v. Delug*, (1984) 157 Cal.App.3d 940.
- d. The attorney may be entitled to keep fees earned before the conflict arose, but may not be entitled to fees incurred after the violation occurred. See e.g. *David Welch Co. v. Erskine & Tully*, (1988) 203 Cal.App.3d 884.

N. Sanctions Against a Party

1. See Arbitration Advisory No. 2002-01 dated May 17, 2002.
2. Monetary sanctions for misconduct or egregious behavior of a party are not authorized or permissible.
3. Arbitrators may, however, impose non-monetary procedural sanctions, such as the exclusion of evidence, for violating a rule of procedure or an arbitrator's pre-hearing order to exchange documents. However, this type of non-monetary sanction should only be imposed with the utmost discretion against a party as a last resort to achieve fairness in the proceedings in the face of that party's willful and/or repeated disregard of procedural requirements, including an arbitrator's ruling.
 - a. As an alternative, consider making a credibility determination based on a party's failure to produce evidence that was reasonably expected to be produced. Evidentiary sanctions are disfavored and the exclusion of evidence may provide a ground for a court to vacate the award. (Code of Civil Procedure §1286.2(a)(5).)

VI. After the Hearing

A. Required award form

1. Specific form required. Use the Arbitration Checklist as a guide.
2. Necessary for enforcement purposes. It must be clear who is to pay and how much.
3. Form should be filled out completely and correctly. Make sure amounts add up and that they are consistent with information provided in the client's request. If amounts different, explain why in the "determination of questions submitted."
4. Determination of questions submitted
 - a. Very important to use this section to give the reasons for the decision.
 - b. Bus. & Prof. Code § 6203 requires arbitrators to include "a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy."
 - c. There should always be something in this section, even if only a short statement that there was a written fee agreement, the rate was not unconscionable and the services performed were reasonable and necessary.
 - d. If the attorney's fees are reduced, there should be a specific explanation of why the arbitrator did this. It may be helpful for future attorney/client relationships if the attorney knows why the arbitrator took a particular action.
 - e. If the arbitrator is awarding interest, the rate and basis of calculation should be included here.

B. Use of findings

1. Findings of fact, while not specifically required, should be made as they are helpful to parties in determining whether or not to seek judicial relief after arbitration.
2. The award should include findings as to the willfulness of a party's non-attendance at the hearing.
 - a. Willful non-attendance precludes that party's right to a trial de novo after arbitration. Bus. & Prof. Code § 6204.

- b. Only a court can make a final determination of willfulness. But, in making the determination, the court may consider the arbitrators' findings on the subject of a party's failure to appear.
3. With very limited exceptions, the findings and award are inadmissible in any subsequent proceeding and may not operate as res judicata or collateral estoppels. (Business & Professions Code §6204(e); *Liska v. Arns Law Firm* (2004) 117 Cal.App.4th 275, 282-284.) In discussing the limitation on the effect of MFA awards, the court in *Liska* explained that in order to maintain the informality and economy of the arbitration proceedings "both the client and the attorney must be assured that the consequences of the arbitration will extend no further." (*Liska*, supra at 287.)

C. Responsible attorney

1. Bus. & Prof. Code § 6203(d)) provides for possible administrative sanctions against an attorney, including involuntary inactive enrollment, for failing to comply with an award for a refund to a client of fees or costs previously paid.
2. Penalties and inactive enrollment cannot be applied to a law firm, only to individual attorneys. Therefore arbitrators must identify at least one individually responsible attorney.
3. Penalties may only be applied to an attorney who is "personally responsible for making or ensuring payment of the award." Bus. & Prof. Code § 6203(d)(2)(B). Arbitration Advisory No. 1994-04 dated August 19, 1994 gives guidance as to which attorney in a firm is the "responsible attorney."
 - a. There is an obvious need for specific and closely written determinations in the Award identifying the responsible attorney.
4. If parties understand the basis of the award, even if they do not agree with it, they will be less likely to ask for a new trial or for correction or vacation of the award. This is particularly important in non-binding matters.

D. Allocation of program filing fees

1. Recovery of filing fee may be allocated between parties at the arbitrator's discretion. Bus. & Prof Code § 6203(a). Such allocation should be specifically detailed in award so that parties can determine precise amount of filing fee to be remitted to the appropriate party.
 - a. Consider assessing filing fee against respondent party payable to the program if petitioner obtained a fee waiver if circumstances

warrant.

b. The prevailing party is not determinative of the reallocation of the filing fee.

2. Attorney's fees and other costs. The award shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the arbitration proceeding, notwithstanding any contract between the parties providing for such award of costs or attorney's fees. Bus. & Prof. Code § 6203(a).

E. Interest

1. See Arbitration Advisory No. 1993-01 dated July 30, 1993.

2. Pre-award interest may be awarded as part of an arbitration award if appropriate under Civil Code §3287.

3. Where the recovery is for a reasonable fee on a *quantum meruit* basis, pre-award interest is not available as the damages were not certain or capable of being made certain by calculation. Civil Code § 3287. *McComber v. State of California* (1967) 250 Cal. App 2d 391

4. If there is an enforceable written contract, and the rate is not unconscionable, it should be charged. Civil Code § 3289(a).

a. Attorney - client fee agreements can be subject to a wide range of state and federal regulation. See Arbitration Advisory No. 2001-01 dated May 31, 2001 for a discussion of the applicability of Truth In Lending and Unruh Act.

5. If interest is to be awarded and there is no agreement of the parties as to the rate to be charged (so-called "legal rate"), 10% per annum should be used. Civil Code § 3289(b).

6. Post Award Interest. Guidelines & Minimum Standards No. 16(c) states: "An award requiring a payment must also include interest in the amount of ten percent per annum from the 30th day after the service of the award."

F. Award

1. Read before you sign.

2. Each panel member is responsible for the content of the award.

3. Before signing, make sure that the award reflects your opinion and has the necessary findings to explain the panel's decision.

4. Discuss with the panel chair if you wish to add or change something on

the award.

5. ONLY FEE ARBITRATION STAFF SERVES THE AWARD!
6. Statute and rules require that a “Notice of Your Rights After Arbitration” form be served with award. Thus, service is incomplete without the form and it will have to be served again. If the arbitration is non-binding, the time within which to request the trial *de novo* starts anew when the award is served with the proper notice.

G. Dissenting opinions

1. A majority vote is sufficient for all decisions of the arbitrators, including the award. The award shall be signed by the arbitrators concurring therein.
2. Any arbitrator who disagrees with the majority of the panel is entitled to write a dissenting opinion.
3. Let Fee Arbitration staff and Panel Chair know immediately of intent to write dissent. Check local rules as to how dissenting opinion is to be handled.
4. The dissent must be filed within the same time required for the filing of the award.

H. Correction or Amendment of Awards

1. See Arbitration Advisory No. 2014-02 dated July 25, 2015.
2. Correction of award already served may be necessary to correct an error in the award not affecting the merits on the grounds set forth in Code Civ. Proc. § 1286.2. Correction may be made upon motion by a party within 10 days of service of the award, and arbitrator(s) must correct or deny correction within 30 days of service of award. (*Ibid.*)
3. Amendment of award already served may be necessary to include an issue relevant to the award inadvertently omitted or to correct an error pursuant to Code Civ. Proc. §1284. Amendment may be made upon motion by a party or *sua sponte*. (See Arbitration Advisory No. 2003-02, dated March 27, 2003.) (See also *Karton v. Segretto* (2009) 176 Cal.App.4th 1, 10, fn.14 [suggesting that party seeking amendment must first ask arbitrator to amend prior to invoking court’s jurisdiction seeking amendment]).
4. Timing: Amended or corrected awards should be made within 30 days following service of the award on the parties. Service of amended award commences new time period to request trial *de novo*.

I. Referrals to discipline

1. The requirement of confidentiality does not preclude referral to discipline.
 - a. Bus. & Prof. Code § 6202 provides safeguards with respect to client confidential matters involving the attorney-client and work product privileges.
 - b. The State Bar's Minimum Standards provide for confidentiality of privileged materials, but there is a specific exception for transmitting allegations of unethical conduct to the Office of the Chief Trial Counsel.
 2. If arbitrators wish to make a referral, it can be done by:
 - a. Following procedure set forth in local rules, or
 - b. Writing directly to the Intake Unit of the Office of the Chief Trial Counsel (unless the local rules commit this decision to the local program chair), or
 - c. Advising fee arbitration staff, who will send information on parties' and arbitrators' names and addresses, and award, if appropriate, to Intake.
 3. If warranted, Office of the Chief Trial Counsel will conduct an independent investigation of the allegations.
- J. Questions and answers

1 to Business and Professions Code Section 6200 *et seq.*, regarding the finality of non-binding
2 awards and the time limit on the right to a trial *de novo*.

3 All parties were sworn, testified, cross-examined and otherwise participated in the
4 Hearing.

5 **UNDISPUTED FACTS**

6 On January 29, 2013, Petitioner engaged Respondent to represent him in connection with
7 a vehicular accident on the 101 Freeway involving Petitioner and a third party that was driving an
8 18-wheeler, which struck Petitioner's vehicle, causing property damage and personal injury to
9 Petitioner (the "Accident"). Petitioner executed a written contingency fee agreement setting forth
10 the terms of the agreement between Petitioner and Respondent (the "Written Fee Agreement").
11 In the Written Fee Agreement, Petitioner agreed to pay Respondent an amount equal to forty
12 percent (40%) of any recovery obtained.

13 On March 27, 2015, Petitioner terminated Respondent's services in connection with the
14 Written Fee Agreement.

15 In June of 2015, Petitioner settled all of his claims in connection with the Accident and
16 received an all-in settlement amount of Seventeen Thousand Two Hundred Dollars (\$17,200).

17 Respondent's direct, out-of-pocket costs in connection with his representation of
18 Petitioner was Five Hundred Five Dollars (\$505), which consisted of the filing fee for a
19 complaint filed in Superior Court for Four Hundred Thirty-five Dollars (\$435) and two (2)
20 Thirty-five Dollar (\$35) charges for requesting hospital medical and billing records.

21 **CLAIM OF THE PARTIES**

22 While Petitioner acknowledges that Respondent rendered some services on Petitioner's
23 behalf during the course of the engagement, Petitioner claims that Respondent was not
24 responsive to attending to Petitioner's case, including, but not limited to, a year delay before a
25 lawsuit was filed in connection with the Accident. In addition, since Petitioner ended up settling
26 his own claims with XYZ Insurance after terminating Respondent's services, Petitioner is
27 requesting that he not be required to pay Respondent the full forty percent (40%) fee as set forth
28 in the Written Fee Agreement.
29

1 Respondent believes that he rendered the required services on Petitioner's behalf to the
2 best of his abilities and that the perceived delays were the unfortunate nature of negotiating with
3 an insurance carrier, which was further complicated when Petitioner's employer also filed a
4 claim for property damage to the vehicle Petitioner was driving and the equipment on the vehicle.
5 Respondent is requesting that Petitioner be required to pay Respondent forty percent (40%) of the
6 recovery obtained by Petitioner (i.e., Six Thousand Eight Hundred Eighty Dollars [\$6,880]), plus
7 costs in the amount of Five Hundred Five Dollars (\$505), for a total of Seven Thousand Three
8 Hundred Eight-five Dollars (\$7,385), as provide in the Written Fee Agreement.

9 10 **THE ISSUES**

11 The matters placed at issue by the Petition and the testimony of the parties, are the
12 following:

- 13 1. The nature of the written fee agreement between the parties.
- 14 2. The services performed by the Respondent and the reasonable attorney's fee due
15 Respondent, if any, in connection with the services rendered on Petitioner's behalf.

16 17 **NARRATIVE RATIONALE**

- 18 1. What was the nature of the written fee agreement between the parties?

19 On January 29, 2013, Petitioner and Respondent entered into the Written Fee Agreement.

20 Pursuant to Business and Professions Code §6147, for an attorney who contracts to
21 represent a client on a contingency fee basis, the contract for services must be in writing. At the
22 time the contract is entered into, the attorney shall provide a duplicate copy of the contract,
23 signed by both the attorney and the client, to the client. The written contract shall contain all of
24 the following:

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

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

1 (c) A statement as to what extent, if any, the client could be required to pay any
2 compensation to the attorney for related matters that arise out of their relationship not covered by
3 their contingency fee contract. This may include any amounts collected for the plaintiff by the
4 attorney.

5 (d) A statement that the fee is not set by law but is negotiable between attorney and
6 client.

7 (e) A statement that the rates set forth in that section are the maximum limits for the
8 contingency fee agreement, and that the attorney and client may negotiate a lower rate.

9 The Written Fee Agreement was never executed by Respondent. Ms. Grace testified that
10 she was certain that it was never signed by Respondent and Respondent had no independent
11 recollection of signing the Written Fee Agreement.

12 Under the statute, failure to comply with any provision of B&PC §6147 renders the
13 agreement voidable at the option of the client, and the attorney shall thereupon be entitled to
14 collect a reasonable fee. In this instance, the Respondent failed to execute the Written Fee
15 Agreement and follow the provisions of the statute. Without a fully-executed written agreement
16 between the parties, a valid and enforceable contract did not exist between the parties.

17 Therefore, even though the client did not specifically ask for the Written Fee Agreement to be
18 voided during the Hearing, given the defect in execution by Respondent and the fact that the
19 Petitioner filed this fee dispute, I find that that Written Fee Agreement is voided.

20 2. What were the services performed by the Respondent and the reasonable
21 attorney's fee due Respondent, if any?

22 Since there is no valid written fee agreement between the parties, in order to determine
23 the reasonable attorney's fee due Respondent, it is necessary to use the equitable doctrine of
24 *quantum meruit*, which is based on the concept that no one who benefits by the labor and materials
25 of another should be unjustly enriched thereby; under those circumstances, the law implies a
26 promise to pay a reasonable amount for the labor and materials furnished, even absent a specific
27 contract thereof.

1 The State Bar of California’s Committee on Mandatory Fee Arbitration’s Arbitration
2 Advisory 1998-03 entitled “Determination of a ‘Reasonable Fee,’” states, in part, on Page 11 the
3 following:

4 “9. A Reasonable Fee May Never Exceed the Contract Rate. ... In cases where there
5 is some evidence of the existence of an agreement, the reasonable fee will either be equal to or
6 less than the amount agreed, but shall never exceed that amount. [*Cazares v Saenz, supra*, 209
7 Cal.App. 3d at 289].”

8 If the Written Fee Agreement had been a valid and binding agreement between the
9 parties, the maximum amount Respondent would have been entitled to receive, even if
10 discharged from the case, would have been forty percent (40%) of any recovery, plus costs (i.e., a
11 total of Seven Thousand Three Hundred Eighty-five Dollars [\$7,385]).

12 Respondent was engaged by Petitioner on January 29, 2013, and discharged from
13 rendering any further services on March 27, 2015. Therefore, Respondent worked on Petitioner’s
14 case for two (2) years and three (3) months. Approximately three (3) months later, Petitioner
15 settled his claims in connection with the Accident. During the engagement, Respondent was in
16 active negotiations with XYZ Insurance, the insurance carrier for the individual that hit Petitioner
17 during the Accident, to try and settle Petitioner’s claims without filing a lawsuit on Petitioner’s
18 behalf. When those negotiations stalled about a year after the Accident, Respondent filed a
19 formal complaint/lawsuit on Petitioner’s behalf and commenced the standard course of action for
20 a personal injury matter filed in Superior Court, which included, but was not limited to,
21 discovery, form interrogatories and depositions.

22 Petitioner argued that Respondent was defective in his representation. Ms. Grace
23 acknowledged that some original documents were erroneously sent to XYZ Insurance in the
24 initial demand, which required Petitioner to recollect copies of some additional
25 documents/receipts. In addition, Respondent acknowledged that he was late for Petitioner’s
26 deposition by almost ninety (90) minutes, due to a family emergency.

27 Respondent rendered services on Petitioner’s behalf for two (2) years and three (3)
28 months. Petitioner testified that Respondent did not do anything significant on the case for a full
29 year and was non-responsive to requests for updates on Petitioner’s case. If Petitioner was so

1 dissatisfied with Respondent's handling of the case after the first year, why did the Petitioner
2 allow the Respondent to continue working on his behalf for what amounted to almost another
3 year-and-a-half?

4 While it was undisputed that there were some issues that occurred during the
5 representation for which Respondent was responsible (i.e., loss of original documents/receipts
6 and tardiness to a scheduled deposition), Respondent did render services on Petitioner's behalf
7 for what amounted to almost ninety percent (90%) of the time that Petitioner's claims were
8 outstanding with XYZ Insurance. In addition, based on Petitioner's demeanor and the testimony
9 of Ms. Grace, it appeared that Petitioner was a difficult client, who was upset with the litigation
10 process and wanted results to be quicker than they naturally happen in a lawsuit of this nature.

11 In addition, Petitioner's employer at the time, ABC Trucking Company, complicated
12 matters by filing their own claims against XYZ Insurance for recovery of damage to their truck
13 and equipment. When that claim was settled, but without regard for Petitioner's personal tools,
14 an additional layer of complexity was created, which Respondent was trying to resolve on
15 Petitioner's behalf.

16 A typical personal injury contingency fee contract will often provide for a one-third
17 contingency (i.e., 33 1/3%), which is routine and accepted. Factoring in the time Respondent
18 spent on Petitioner's case, the issues that occurred during the representation and the fact that the
19 claims settled merely three (3) months after Respondent's services were terminated, I find that
20 the reasonable fee due Respondent is thirty percent (30%) of the recovery amount, plus
21 Respondent's out-of-pocket costs.

22 23 **ALLOCATION OF FILING FEE**

24 Rule 36 of the Rules of Conduct permits the allocation of the arbitration filing fee paid by
25 Petitioner. However, the Rules of Conduct are silent as to when and how arbitration filing fees
26 should be allocated. Given the facts of this fee dispute, Petitioner and Respondent shall equally
27 bear the arbitration filing fee of Two Hundred Ten Dollars (\$210) (i.e., each party shall be
28 responsible for One Hundred Five Dollars [\$105]).
29

1 **AWARD**

2 The arbitrator finds that the total amount of fees and/or costs which could have been charged in
3 this matter: \$5,665.00

4 Of which the Petitioner is found to have paid \$0.00

5 In addition, the fee arbitration filing fee shall be allocated

6 Petitioner: \$105.00

7 Respondent: \$105.00

8 For a net amount of: \$5,770.00

9 Accordingly, the following non-binding award is made: Michael Client shall remit to
10 William Lawyer, Esq. Five Thousand Seven Hundred Seventy Dollars (\$5,770), plus interest in
11 the amount of ten percent (10%) per annum from the 30th day after the date of service of this
12 Award.

13 Signed this 24th day of March, 2016.

14 Respectfully submitted,

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17 Steve Smith, Esq.
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1 All parties were sworn, testified, cross-examined and otherwise participated in the
2 Hearing.

3 **UNDISPUTED FACTS**

4 On March 20, 2016, Petitioner engaged Respondent to represent her in connection with a
5 petition for dissolution of marriage. The parties executed a written agreement setting forth the
6 terms of their agreement (e.g., initial deposit, hourly fee rates, etc.) (the “Written Fee
7 Agreement”). Petitioner remitted to Respondent a refundable initial retainer in the amount of
8 Three Thousand Five Hundred Dollars (\$3,500).

9 From March 20, 2016 to July 16, 2016, Respondent actively participated and represented
10 Petitioner pursuant to the terms of the Written Fee Agreement. On or about May 9, 2016,
11 Respondent successfully received an order from the Court awarding Petitioner Fifteen Thousand
12 Dollars (\$15,000) in attorney’s fees, which was paid out of a community property IRA
13 Retirement Account. Despite multiple attempts by Respondent to meet and confer with
14 Petitioner on the remaining outstanding balance owed to Respondent, such meetings never took
15 place and Respondent ultimately substituted out of the case due to non-payment for services
16 rendered.

17
18 **CLAIM OF THE PARTIES**

19 Petitioner is requesting that she not be required to pay Respondent the balance owing on
20 her account in connection with fees and costs in the amount of Fourteen Thousand Four Hundred
21 Twenty Dollars Fifty Cents (\$14,420.50) and interest in the amount of One Thousand Four
22 Hundred Fifty Dollars Seven Cents (\$1,450.07) on the basis that Petitioner believes that
23 Respondent did more work than was necessary and Petitioner was not aware of the fees and costs
24 that were accumulating in connection with her case. Petitioner contends that Respondent could
25 have handled the matters that came up during his representation of Petitioner in a more efficient
26 manner, which would have resulted in lower legal fees and costs.

27 Respondent is requesting that Petitioner be required to pay Respondent Fourteen
28 Thousand Four Hundred Twenty Dollars Fifty Cents (\$14,420.50), which represents the
29 outstanding balance of the fees and costs incurred by Respondent in connection with

1 Respondent's representation of Petitioner, plus interest in the amount of One Thousand Four
2 Hundred Fifty Dollars Seven Cents (\$1,450.07). Respondent contends that Petitioner's
3 dissolution of marriage was anything but basic, but rather was incredibly complex and terribly
4 acrimonious, which led to additional pleadings, appearances and time expended in representing
5 Petitioner's interests and those of her small children.

7 **THE ISSUES**

8 The matters placed at issue by the Petition, Respondent's Attorney Reply and the
9 testimony of the parties, are the following:

- 10 1. The nature of the written fee agreement between the parties.
- 11 2. The services performed by the Respondent and the reasonable attorney's fee due
12 Respondent, if any.

14 **NARRATIVE RATIONALE**

- 15 1. What was the nature of the written fee agreement between the parties?

16 On March 20, 2016, Petitioner and Respondent entered into the Written Fee Agreement.

17 Pursuant to Business and Professions Code §6148, an attorney who contracts to represent
18 a client in which it is reasonably foreseeable that the total expense to a client, including
19 attorney's fees, will exceed one thousand dollars (\$1,000), the contract for services must be in
20 writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the
21 contract, signed by both the attorney and the client, to the client. The written contract shall
22 contain all of the following:

- 23 (a) Any basis of compensation including, but not limited to, hourly rates, statutory
24 fees or flat fees, and other standard rates, fees and charges applicable to the case.
- 25 (b) The general nature of the legal services to be provided to the client.
- 26 (c) The respective responsibilities of the attorney and the client as to the performance
27 of the contract.

1 The Written Fee Agreement and the actions of the parties complied with the statute and is
2 a valid and binding agreement on the parties. In addition, the parties stipulated at the Hearing
3 that neither party was contesting the validity of the Written Fee Agreement.

4 2. What were the services performed by the Respondent and the reasonable
5 attorney's fee due Respondent, if any?

6 Once Petitioner retained Respondent to represent her in the dissolution of marriage
7 proceedings against John Doe, her then-husband, Respondent provided the following legal
8 services on Petitioner's behalf, in addition to the expected legal services in connection with
9 Petitioner's petition for dissolution of marriage (e.g., mandatory settlement conferences,
10 responding to Petitioner's e-mails and phone calls, preparing form interrogatories, preparing
11 declarations, in-person meetings with Petitioner) :

- 12 • Prepared the Petition for Dissolution of Marriage.
- 13 • Successfully petitioned the Court for an Order granting Petitioner with exclusive
14 control of the family residence.
- 15 • Successfully petitioned the Court for an Order which sought to prevent John Doe
16 from consuming narcotics while caring for and driving around the minor children.
- 17 • Successfully defended John Doe's attempt to impute income to Petitioner, due to
18 the fact that she reduced her income in light of some health issues. Respondent
19 was successful in obtaining guideline pendent lite spousal support and not based
20 on a reduced amount.
- 21 • Successfully petitioned the Court for an Order to allow Petitioner control and
22 exclusive use of the community BMW.
- 23 • Successfully petitioned the Court for an Order for joinder of the community
24 retirement accounts so that John Doe would cease unilateral withdrawals.

25 Petitioner contends that even though monthly invoices were being mailed to the correct
26 address, she didn't receive them. Respondent pointed out that on May 9, 2016, in a declaration
27 signed by Petitioner to petition the Court to award Petitioner attorney's fees from a community
28 property IRA account, the invoices that Respondent had generated to date were part of the
29 petition, along with the then-current legal fees and costs that had been incurred to date.

1 Respondent argued that Petitioner was aware as of May 9, 2016, that fees and costs of almost
2 Thirteen Thousand Dollars (\$13,000) had accumulated since Respondent's initial engagement on
3 March 20, 2016.

4 Furthermore, Respondent argued that Petitioner was aware that he was rendering
5 extensive legal services on her behalf for quite a few issues at her direction, which were complex
6 and time consuming, due to the antagonistic nature of the divorce proceedings. Based on the
7 Written Fee Agreement, Petitioner was also aware that Respondent's hourly rate was Two
8 Hundred Ninety-five Dollars (\$295) per hour.

9 As an initial accommodation to Petitioner, Respondent did not charge for some of his
10 time and did not charge for certain administrative services (e.g., postage, copies or facsimiles).
11 In addition, there are instances where Respondent did not bill Petitioner for the minimum billing
12 time of .02 hours, but instead billed for .01 hours, which resulted in lower fees being charged to
13 Petitioner.

14 Respondent had an initial conversation with Petitioner about her mounting legal bill on
15 May 30, 2016 and then subsequently had additional follow-ups in June of 2016. Due to
16 Petitioner being nonresponsive to Respondent's request to bring her account current, ultimately
17 Respondent made the decision on or about July 16, 2016, to suspend working on Petitioner's
18 case due to non-payment for legal services and costs rendered on Petitioner's behalf. Ultimately,
19 Petitioner terminated the attorney-client relationship and engaged new counsel. Pursuant to
20 Paragraph 9 of the Written Fee Agreement, Respondent is entitled to interest on the unpaid
21 balance. Such calculation is attached hereto as Exhibit A and is calculated through the date of
22 this Award.

23 Petitioner acknowledged that Respondent rendered all of the legal services set forth in the
24 monthly invoices on her behalf and did so successfully. Other than testifying that she was
25 "shocked" at the rising costs, Petitioner was unable to point out any specific charge or service
26 that she felt was excessive or that she didn't ask Respondent to do on her behalf.

27 Given the nature of the dissolution of marriage between Petitioner and John Doe,
28 Respondent has provided evidence that he was sending Petitioner monthly billing statements;
29 provided, however, even if Petitioner didn't receive a statement for the month of March 2016 or

1 April 2016, by virtue of the petition for attorney's fees that Petitioner signed on May 9, 2016, she
2 was made aware of the legal fees and costs that were mounting in her case. In addition,
3 Petitioner was an active participant in all matters surrounding her case and for the series of
4 meetings and hearings that took place over the rest of May and June of 2016, and Petitioner
5 should have been aware that legal fees and costs were continuing to mount as Respondent
6 vigorously represented her, including agreeing to advance costs for an expert witness to prepare a
7 declaration on the effects of Hydrocodone. Furthermore, Respondent was continuing to send
8 Petitioner monthly statements by U.S. Mail and Electronic Mail. Petitioner's position that she
9 did not receive any of the billing statements sent by Respondent over the course of representation
10 is not credible.

11 Petitioner's divorce proceedings were not harmonious. Respondent expended a great
12 amount of time on Petitioner's case. As stated above, Respondent handled at least five (5)
13 significant matters that were outside the course of a normal, uncontested divorce proceeding.
14 Based on the various issues handled by Respondent, the fees and costs were reasonable and I find
15 that there was no excessive billing. Therefore, Respondent is entitled to the fees and costs that
16 were billed.

17 18 **ALLOCATION OF FILING FEE**

19 Rule 36 of the Rules of Conduct permits the allocation of the arbitration filing fee paid by
20 Petitioner. However, the Rules of Conduct are silent as to when and how arbitration filing fees
21 should be allocated. Given the facts of this fee dispute, Petitioner shall bear the entire cost of the
22 arbitration filing fee of One Thousand Fifty-two Dollars Sixty-seven Cents (\$1,052.67).

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1 **AWARD**

2 The arbitrator finds that the total amount of fees and/or costs which could have been charged in
3 this matter is: \$32,920.50

4 Of which the Petitioner is found to have paid \$18,500.00

5 In addition, the fee arbitration filing fee shall be allocated

6 Petitioner: \$1,052.67

7 Respondent: \$0.00

8 For a net amount of: \$14,420.50

9 Accordingly, the following binding award is made: Sally Client shall remit to William
10 Lawyer, Esq. Fourteen Thousand Four Hundred Twenty Dollars Fifty Cents (\$14,420.50), plus
11 interest in the amount of ten percent (10%) per annum from the 30th day after the date of service
12 of this Award.

13 Signed this 31st day of March, 2017.

14 Respectfully submitted,

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16 _____
17 Steve Smith, Esq.
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1 Business and Professions Code Section 6200 *et seq.* (“Rules of Conduct”), regarding the finality
2 of non-binding awards and the time limit on the right to a trial *de novo*.

3 All parties were sworn, testified, cross-examined and otherwise participated in the
4 Hearing.

5 **UNDISPUTED FACTS**

6 On July 6, 2011, Petitioner and Petitioner’s mother, Stacy Client (“Stacy”) jointly
7 retained the legal representation of Respondent in connection with various legal matters related
8 to a trust that had been created by Rebecca R. Hayes (“Hayes”) (the “Hayes Trust”), who was
9 Stacy’s grandmother and Petitioner’s great-grandmother. The Hayes Trust contained a subtrust
10 for which Petitioner and Stacy were the sole beneficiaries (the “Client Trust”). A legal
11 representation agreement dated July 6, 2011 was executed by Petitioner, Stacy and Respondent
12 (“Written Fee Agreement”). In addition, Respondent sent Petitioner and Stacy a letter dated July
13 6, 2011 in connection with the dual representation of co-beneficiaries (i.e., Petitioner and Stacy
14 by Respondent), which included a consent to the dual representation, that was executed by
15 Petitioner and Stacy (“Conflict Waiver”). It should be noted that Stacy is not a party to this
16 action, nor was she a witness at the Hearing.

17 On October 15, 2012, Respondent filed a Petition in the underlying matter before the
18 Court for an: (1) Order Compelling Trustee to Account and Report; (2) Breach of Fiduciary
19 Duty; (3) Recovery of Property Wrongfully Transferred; (4) Order to Fund the Client Sub-Trust;
20 (5) Appointment of Objective Trustee for Client Sub-Trust; (6) Determination of Damages; and
21 (7) Surcharge of Trustee (the “Petition Against Hayes Trust”). Only Stacy was listed as the
22 moving party in interest in connection with the Petition Against Hayes Trust.

23 On or about April 9, 2015, the parties participated in a Court ordered mediation in
24 connection with the Petition Against Hayes Trust. Petitioner and Stacy were present at the
25 mediation and were jointly represented by Respondent. During the mediation, Petitioner and
26 Stacy were unable to agree on a counter-proposal. On April 10, 2015, Respondent sent a letter to
27 Petitioner and Stacy advising them that an actual conflict of interest had arisen and that
28 Respondent would not be able to continue to represent both Petitioner and Stacy pursuant to Rule
29 3-310 of the California State Bar Rules of Professional Conduct (“Rule 3-310”). Petitioner

1 subsequently retained the legal services of Scott Robinson, Esq. and Respondent ultimately filed
2 on or about October 8, 2015, a motion to be relieved as counsel for Stacy, which was
3 subsequently granted by the Court.

4 On March 5, 2016, the Honorable Lesley D. Grey of the Superior Court signed an Order
5 Confirming and Approving Settlement of Petition, which included, among other things setting up
6 separate trusts for Petitioner and Stacy (the "Order"). Stacy has appealed the Order, which is
7 currently pending before the California Court of Appeals.

8 9 **CLAIM OF THE PARTIES**

10 Petitioner asserts that Respondent violated Rule 3-310 by not properly disclosing, in
11 writing, the actual and reasonably foreseeable adverse conflicts that existed between Petitioner
12 and Stacy before and/or at the time the representation began. Petitioner further asserts that had
13 Respondent discussed with Petitioner the option that existed under the Client Trust of petitioning
14 the Hayes Trust and Client's trustee, Henry Walsh, for control of the assets under the Client Trust
15 that she was entitled to direct reimbursement, that Petitioner would have exercised that right,
16 since Petitioner had a good relationship with Walsh at the time.

17 Respondent asserts that the disclosure given to Petitioner and Stacy was adequate
18 pursuant to the Conflict Waiver, and at the time Respondent was engaged by Petitioner and
19 Stacy, there existed no actual or known conflict between the parties, until such time as Petitioner
20 and Stacy could not agree on a counter-proposal during the Court-ordered mediation. Also,
21 Respondent asserts that pursuant to the Written Fee Agreement, Respondent is entitled to a
22 reasonable fee (i.e., quantum meruit) for the services Respondent rendered from the inception of
23 the representation to the ultimate withdrawal. Respondent argues that the Petition Against Hayes
24 Trust formed the basis upon which the Court ultimately issued the Order approving the
25 settlement of the parties which was the work product of Petitioner's new counsel, Mr. Rahn.
26 Finally, Respondent is requesting an award for attorney's fees and costs in the amount of Two
27 Hundred Thirty-six Thousand Five Hundred Eleven Dollars and Sixty-nine Cents (\$236,511.69)
28 for the representation of Petitioner and Stacy in the underlying action.
29

1 **THE ISSUES**

2 The matters placed at issue by the Petition, Respondent’s Reply and Counter-Claim to the
3 Petition and the testimony of the parties, are the following:

- 4 1. The nature of the Written Fee Agreement and the Conflict Waiver between the
5 parties; and
6 2. The services performed by the Respondent and the attorney’s fees and costs due
7 Respondent, if any.
8

9 **NARRATIVE RATIONALE**

10 1. What was the nature of the Written Fee Agreement and Conflict Waiver between
11 the parties?

12 On July 6, 2011, Petitioner and Respondent entered into the Written Fee Agreement.

13 Pursuant to Business and Professions Code §6147, an attorney who contracts to represent
14 a client on a contingency fee basis shall, at the time the contract is entered into, provide a
15 duplicate copy of the contract, signed by both the attorney and the client, to the client. The
16 written contract shall contain all of the following:

- 17 (a) A statement of the contingency fee rate that the client and attorney have agreed
18 upon;
19 (b) A statement as to how disbursements and costs incurred in connection with the
20 prosecution or settlement of the claim will affect the contingency fee and the
21 client’s recovery;
22 (c) A statement as to what extent, if any, the client could be required to pay any
23 compensation to the attorney for related matters that arise out of their relationship
24 not covered by their contingency fee contract. This may include any amounts
25 collected for the plaintiff by the attorney; and
26 (d) A statement that the fee is not set by law but is negotiable between attorney and
27 client.

28 The Written Fee Agreement set forth (i) Business and Professions Code §6147, (ii) the
29 contingency fee rate, (iii) how costs and compensation for related matters would be handled

1 between the parties, and (iv) among other provisions, included what would happen in the event
2 Respondent was discharged or withdrew from the representation.

3 The Written Fee Agreement complied with the statute and is a valid and binding
4 agreement on the parties.

5 On July 6, 2011, Petitioner and Respondent entered into the Conflict Waiver.

6 Rule 3-310 sets forth the requirements to avoid the representation of adverse interests in
7 the case of dual or joint representation. In this instance, since Respondent was going to be
8 representing Petitioner and Stacy, Respondent was required to abide by the provisions of Rule 3-
9 310.

10 Rule 3-310 requires that prior to the start of the representation, Respondent must
11 “disclose” to the clients the relevant circumstances surrounding the joint representation by
12 “informing” both parties of any “actual and reasonably foreseeable consequences” as a result of
13 the joint representation. The “disclosure” is required to be in writing to validate “informed
14 written consent” pursuant to Rule 3-310. Based on such disclosure, if it is deemed that the joint
15 representation proves that the parties are actually adverse to one another, the conflict of interest is
16 unwaivable since the attorney would be unable to provide competent representation to each
17 client.

18 Citing *Flatt v. Superior Court* (“*Flatt*”) (1994) 9 Cal.4th 275, the Court in *Great Lakes*
19 *Const., Inc. v. Burman* (“*Great Lakes*”) (2010) 186 Cal.App.4th 1347 at p. 1355 held that “joint
20 representation of parties with conflicting interests impairs each client’s legitimate expectation of
21 loyalty that his or her attorneys will devote their ‘entire energies to [their] client’s interests.’”
22 The Court in *Great Lakes*, continuing to cite *Flatt*, went on to say, “[u]nless there is informed
23 written consent, an attorney cannot represent two or more clients at the same time whose
24 interests conflict. In cases where an attorney concurrently represents two clients with conflicting
25 interests, the automatic-disqualification rule applies.” *Great Lakes, supra*, at p. 1356.

26 On July 6, 2011 Respondent sent Petitioner and Stacy a letter generically setting forth the
27 requirements of Rule 3-310. The second paragraph of Respondent’s July 6th letter stated,
28 “Because I am representing both of you as Co-Beneficiaries, the State Bar Ethics Rules require
29 that I tell you that a potential conflict of interest might arise that could prevent me from

1 continuing as the lawyer for both of you in the administration of the Rebecca R. Hayes
2 Revocable Trust (“Trust”). I recommend that each of you obtain your own attorney to represent
3 you with respect to the Trust administration and to review the documents prepared in connection
4 therewith. The documents may contain provisions which may result in conflicting interests and
5 goals between each of you. ... Each of you is entitled to my unbiased services and to all
6 knowledge that I have about the Trust administration. In short, I cannot represent one of you to
7 the detriment of the other. Therefore, should those differences of ideas about property
8 disposition or property rights occur and become, in my opinion, a problem, or if I believe it is
9 appropriate because I foresee a problem, then I shall be compelled to tell you that each of you is
10 entitled to an independent lawyer of your own choosing so that each of you gets an advocate for
11 your respective positions.”

12 Attached to Respondent’s July 6th letter to Petitioner and Stacy was a page labeled
13 “CONSENT,” which required Petitioner and Stacy to acknowledge various provisions of Rule 3-
14 310 and agree to the joint representation by Respondent.

15 Petitioner testified that she had never met Respondent in person prior to or during the
16 time when she agreed to retain Respondent to provide her and Stacy with legal services related to
17 the underlying action. Instead, on or about June 6, 2011, Petitioner received a telephone call
18 from Stacy indicating that Stacy wanted to engage the Respondent to represent them in
19 connection with the Client Trust and in order to proceed, Respondent would need to also
20 represent the Petitioner. Stacy proceeded to conference Respondent into the telephone
21 conversation with Petitioner. Petitioner further testified that Respondent never mentioned
22 anything related to any actual conflicts of interest that may have existed at the time or any
23 reasonably foreseeable conflicts of interest between Petitioner and Stacy. In addition, Petitioner
24 testified that Respondent never advised Petitioner that she had certain rights under the Second
25 Amendment to the Rebecca R. Hayes Revocable Trust, which would have allowed her to petition
26 for control of the assets of the Client Trust since she was past the age of twenty-five (25) at the
27 time she agreed to retain Respondent to represent her along with Stacy in the underlying action.

28 Respondent testified that Respondent did not believe any actual conflicts existed at the
29 commencement of the representation and found that Petitioner and Stacy’s interests were “very

1 much aligned.” Respondent also testified that prior to the start of the representation, Respondent
2 had read the various documents that made up the Hayes Trust and the Client Trust.

3 The Second Amendment to the Rebecca R. Hayes Revocable Trust stated, in pertinent
4 part, the following:

- 5 (a) “[T]his trust ... will be utilized for the benefit of both Stacy and Sally.”
- 6 (b) “After Sally attains twenty-five (25) years of age, the Family Trustee may appoint all
7 or any portion of the assets of the Client Trust to Sally at any time, and from time to
8 time.”
- 9 (c) “I have provided the Brand home and \$130,000 in cash to be used for Stacy’s and
10 Sally’s benefit.”
- 11 (d) “Subject to the power of appointment which the Family Trustee may exercise in favor
12 of Sally, Stacy and Sally are equal to one another in regard to their beneficial rights in
13 this Trust. One has no ascendancy over the other. If the two should separate, or Sally
14 decides to marry and live separately, then they will negotiate a fair deal between
15 themselves regarding their rights as beneficiaries of the Client Trust. Regardless of
16 how that works out, the Objective Trustee will keep Brand or its equivalent free of
17 encumbrances and available for the use of Stacy and Sally during Stacy’s lifetime or
18 in the event of Stacy’s early death, to the time Sally reaches 40 years of age.”
- 19 (e) “The Family Trustees shall have the power to appoint all or any part of the principal
20 of the Client Trust to Sally, exercisable at any time, or from time to time, after Sally
21 reaches 25 years of age. It is my expectation that Sally is not likely to be ready for the
22 responsibility of owning these assets. However, if the Family Trustees are convinced
23 that Sally is a very responsible person, and that Sally will preserve these assets for
24 Stacy’s use throughout the remainder of Stacy’s lifetime, the Family Trustees may
25 exercise this power. Sally must convince the Family Trustees that Sally is a
26 responsible person who can hold a job and can handle money, that she has the
27 maturity to be concerned with her mother’s welfare, and that she exhibits evidence of
28 personal responsibility for her mother’s well-being. If the Family Trustees, in their
29 best judgment, anticipate the (sic) Sally might conceivably, under any circumstances,

1 deny her mother equal access to the assets of the Client Trust, the Family Trustees
2 should decide not to shift the Client Trust's assets to Sally's control."

3 While there was evidence that the Second Amendment to the Rebecca R. Hayes
4 Revocable Trust may not have been properly executed by Hayes, at the time of the
5 commencement of the representation by Respondent, the Respondent had no reason to believe
6 that the Client Trust documents were anything but valid. Respondent testified that he had read
7 the Trust and the Client Trust documents prior to the commencement of the representation. If
8 that was true, then it should have been apparent that Petitioner and Stacy not only had an actual
9 conflict of interest at the time of the representation, but it was reasonably foreseeable that other
10 conflicts of interest would arise between the parties during the course of joint representation.

11 For example, Petitioner testified that Stacy had a mental disability that led to her inability
12 to communicate with others and not throw anything away (i.e., hoarding). As such, jointly
13 enjoying a residence with Petitioner and Petitioner's minor child at the time of representation
14 was not a possibility. Furthermore, given Stacy's inability to get along well with others, it was
15 reasonably foreseeable that given Petitioner and Stacy's rights under the Client Trust, differences
16 would eventually occur.

17 Petitioner had a right to ask the Family Trustee for control of all the assets in the Client
18 Trust, which was a right that Stacy did not have. Despite the fact that Petitioner and Stacy were
19 aligned in having the value of the Brand property put back into the Client Trust, exercising the
20 right by Petitioner to control those assets, whatever they may be, would have been an actual and
21 direct conflict of interest with Stacy.

22 Petitioner testified that had she known about this right, given the positive relationship that
23 she had with her uncle and Client Trust Trustee, Henry Walsh, at the time, she would have taken
24 steps to effectuate asking for control of the assets in the Client Trust.

25 Respondent's Conflict Waiver did not disclose any of these relevant circumstances
26 surrounding the representation by Respondent of Petitioner and Stacy, let alone any of the actual
27 or reasonably foreseeable conflicts between Petitioner and Stacy. Had Respondent conformed to
28 Rule 3-310, based on the testimony of the parties, the Panel believes that it would have been
29

1 apparent that an actual conflict of interest existed between Petitioner and Stacy that could not
2 have been waived, since each of them had conflicting interests in the Client Trust.

3 Similar to the facts in the matter before the Panel, in *Sheppard Mullin v. J-M*
4 *Manufacturing* (“*Sheppard*”) (2016) (198 Cal.Rptr.3d 253), the agreement included a boilerplate
5 waiver that included no information about any specific or actual conflicts. The Court in
6 *Sheppard* held that “[i]t strains credulity to suggest that the Agreement constituted ‘informed
7 written consent’ of actual conflicts to J-M, when in fact Sheppard Mullin was silent about any
8 conflict.” *Sheppard, supra*, 198 Cal. Rptr.3rd at p. 267.

9 Having found that Sheppard Mullin violated Rule 3-310, the Court went on to find that
10 such a violation rendered the parties’ agreement unenforceable, as “[a] contract must have a
11 lawful object or the contract is void.” *Sheppard, supra*, 198 Cal. Rptr.3rd at p. 270.

12 In light of the prevailing law and the testimony of the parties, the Panel finds that
13 Respondent failed to comply with Rule 3-310 of the State Bar of California’s Rules of
14 Professional Conduct as it relates to Respondent’s joint representation of Petitioner and Stacy.
15 Respondent failed to give the parties informed written consent to the joint representation as
16 required by Rule 3-310. Therefore, the Conflict Waiver is found to be invalidated and shall have
17 no effect. As such, the Written Fee Agreement shall also be invalidated and voided, given
18 Respondent’s failure to comply with Rule 3-310.

19 2. What were the services performed by the Respondent and the attorney’s fees and
20 costs due Respondent, if any?

21 Having found that the Written Fee Agreement and Conflict Waiver are void, what are the
22 attorney’s fees and costs due Respondent, if any, for the services rendered on Petitioner’s behalf?
23 In *Sheppard*, the Court found that a violation of Rule 3-310 precludes the attorney from receiving
24 compensation for services provided. The Court found that the breach of the duty of loyalty set
25 forth in Rule 3-310 was a violation of public policy and to find that the attorney was “nonetheless
26 entitled to its attorney fees as if no breach had occurred would undermine this same public
27 policy.” *Sheppard, supra*, 198 Cal. Rptr.3rd at p. 274.

28 Respondent has argued that it is entitled to fees under a quantum meruit theory. The
29 Court in *Sheppard* cited the case *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453 whereby “the

1 Supreme Court acknowledged that quantum meruit recovery had been denied in cases of ethical
2 violations. ... It observed that such cases ‘involved violations of a rule that proscribed the very
3 conduct for which compensation was sought, i.e., *the rule prohibiting attorneys from engaging in
4 conflicting representation or accepting professional employment adverse to the interests of a
5 client or former client without the written consent of both parties.*’” *Sheppard, supra*, 198 Cal.
6 Rptr.3rd at p. 274.

7 Moreover, in *Fair v. Bakhtiari* (“*Fair*”) (2011) 195 Cal.App.4th 1135, the Court held that
8 attorneys are not entitled to fees where the ethical violation is “one that pervades the whole
9 relationship.” The Court in *Fair* affirmed the trial court’s denial of quantum meruit recovery
10 where the attorney’s conduct “constituted not merely a technical rule violation, but the breach of
11 *Fair’s* fiduciary duty” to his clients. *Id.* at p. 1151, 195 Cal.App.4th 135.

12 Respondent was unable to represent the interests of both Petitioner and Stacy
13 simultaneously. As Petitioner testified, she believed that Respondent was really “representing
14 my Mom” and “never told me what my individual rights were” under the Client Trust.

15 Here, Respondent violated Rule 3-310 at the inception of the representation. The fact that
16 a subsequent actual conflict of interest became apparent during a mediation years later is
17 irrelevant. Given Respondent’s violation of Rule 3-310, the Panel finds that Respondent is not
18 entitled to any fees or costs under quantum meruit, or otherwise, in connection with the services
19 it performed for Petitioner in the underlying action.

20 21 **ALLOCATION OF FILING FEE**

22 Rule 36 of the Rules of Conduct permits the Panel to determine the allocation of the
23 arbitration filing fees paid by the parties in this action. Although the Rules of Conduct are silent
24 as to when and how arbitration filing fees should be allocated, given the facts of this fee dispute,
25 the Panel finds that Respondent shall bear the cost of the arbitration filing fee of Five Thousand
26 Dollars (\$5,000).

27 //

28 //

29 //

AWARD

The Panel finds that the total amount of fees and/or costs which could have been charged in the underlying matter is: \$0.00

Of which the Petitioner is found to have paid \$0.00

In addition, the fee arbitration filing fee shall be allocated

Petitioner: \$0.00

Respondent: \$5,000.00

For a net amount of: \$5,000

Accordingly, the following non-binding award is made: Respondent, William Lawyer, Esq., shall remit to Petitioner, Sally Client, Five Thousand Dollars (\$5,000), plus interest in the amount of ten percent (10%) per annum commencing on the 30th day after the date of service of this Award.

Signed this 7th day of April, 2017.

Respectfully submitted,

Steve Smith, Esq., Panel Chair

Jonathan Smith, Esq.

Bill Sypek



DATE: May 12, 2017

TO: Committee on Mandatory Fee Arbitration

FROM: Doug Hull

SUBJECT: Report of the Governance in the Public Interest Task Force

At a previous meeting, we discussed the Governance in the Public Interest Task Force's (GTF) review of the work of the CMFA. Joel Mark provided public comment to the GTF about the work of the CMFA on April 24, 2017.

Since that time, the GTF has forwarded a report for adoption to the State Bar Board of Trustees for adoption. The full report is quite lengthy and covers many other State Bar Committees (Committee on Professional Responsibility and Conduct, Client Security Fund Commission, Committee of Bar Examiners, etc).

To aid in your review of the considerations of the GTF as it relates the CMFA, I've attached the following excerpts of the report¹:

- Executive Summary
- Excerpt from Topic C – The Structure and Functioning of the State Bar Sub-entities and Board Committee (as it relates to the CMFA)
- Excerpt from Appendix D-Reduction in Sub-entities (as it relates to the CMFA)
- Excerpt from Appendix E-Public Comment (summary of Joel Mark's comments)
- Excerpt from Appendix I-Review of Sub-Entities: Background and Recommendations (as it relates to CMFA)
- Excerpt from Appendix M-List of State Bar of California Sub-Entities (as it relates to CMFA)

I've tried to provide context for each of the excerpts, but I may have missed some introductory language. Ultimately, the report recommends further study of the work of the CMFA (along with several other bar sub-entities). At this point, it seems that we will be hearing from the Board regarding the study.

¹ The full report can be found at: <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000017508.pdf>

Report of the Governance in the Public Interest Task Force

May 15, 2017



The State Bar of California

180 Howard Street | San Francisco, CA 94105
Tel. 415-538-2221 | www.calbar.ca.gov



Governance in the Public Interest Task Force Members:

Jim Fox

President of the Board of Trustees

Renee LeBran

Public trustee appointed by the Governor

Richard Ramirez

Public trustee appointed by the Speaker of the Assembly

Joanna Mendoza

District 3 elected attorney trustee

Sean Selegue

District 1 elected attorney trustee

Alan Steinbrecher

Supreme Court appointed attorney trustee

Mark Broughton

Supreme Court appointed attorney trustee

State Bar of California Staff to Governance in the Public Interest Task Force:

Elizabeth Parker

Executive Director

Leah Wilson

Chief Operating Officer

Sarah Cohen

Attorney, Office of General Counsel

Francisco Gomez

Director, Executive Office Programs

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EXECUTIVE SUMMARY

Created in 1927, the State Bar of California has been the subject of repeated reviews and efforts at reform for nearly four decades. Recognizing that years of reports and recommendations had resulted in little actual reform, the Legislature created the Governance in the Public Interest Task Force (Task Force) in 2010. Under the enabling statute, Business and Professions Code section 6001.2, a body originally statutorily composed of 11 members of the Board of Trustees was tasked to deliver a report directly to the Supreme Court, the Governor and the Legislature, making “recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys.” The Task Force’s first report was issued in 2011, identifying critical areas of needed governance reform. Many recommendations identified in that report are now embodied in the State Bar’s governing law, including renaming the Board of Governors to the Board of Trustees, adding Supreme Court appointed trustees to the Board, creating new electoral districts based on appellate court district boundary lines, reducing Board size, adopting open meeting requirements, and revising the State Bar’s statutory directive to make public protection paramount.

Thereafter, the Task Force statute was repealed and replaced. The new statute reduced the size of the Task Force to seven members and directed the Task Force to make suggestions to the Board of Trustees regarding the strategic plan and other issues as requested by the Legislature, in addition to fulfilling its original mandate. This third Task Force Report is designed to serve as a capstone of the series; in particular, it is intended to build on and complete the work of the second Task Force Report issued in 2016. Together the changes recommended in all three reports, some already well underway, are redesigning the State Bar and providing a road map for its reform.

Unlike the initial 2011 Task Force Report, which focused exclusively on traditional governance issues, the 2016 and 2017 Task Force members interpreted their mandate for developing reform recommendations to extend beyond the singular matter of State Bar governance. They saw governance as inextricably linked to, and dependent upon, the structure and operations of the State Bar as an organization. To be effective, organizational design must address all three. Yet good organizational design, standing alone, is not sufficient to create lasting change. Rather, a continuing commitment of Board and staff leadership to reform is critical.



With these ideas in mind, the 2016 Task Force Report highlighted nine reform issues for attention:

1. Perception and Reality of an Ineffectively Managed Discipline System.
2. Inadequate Definitions of the Bar's Public Protection Mission.
3. Proliferation of Activities: Lack of Organizational Coherence leading to 'Mission Creep.'
4. A Conflicting Hybrid Governance Structure.
5. Confused Reporting Relations Hindering Accountability.
6. Proliferation of Committees, Boards and Commissions and Over Reliance on Volunteers.
7. Restricted Separate Funding Sources, Creating Cultural and Procedural Obstacles to Financial and Organizational Management.
8. Inadequate Development and Support for Human Resources.
9. Inadequate Resources to Satisfy Statutory Backlog Definitions.

A unifying theme behind many of the foregoing concerns was the need to develop a 'single enterprise' approach to managing all State Bar functions in order to address structural and operational confusion. The Board of Trustees agreed and directed that a single set of administrative rules and procedures, appropriate for a regulatory body, be applied to all State Bar functions in the future. This has produced a more coherent operational model and will improve the State Bar's overall function and ability to support its core public protection functions.

Although not an explicit recommendation in the 2016 Task Force Report, implementation of a single enterprise approach to managing the State Bar has provided an additional rationale for the most significant structural reform in the State Bar's ninety year history: the proposed separation of its 16 Sections as contemplated in Senate Bill 36 (the 2018 fee bill). As the 2016 Task Force Report made clear, the current structure combining two distinct organizational and operational designs has posed a continuing problem for effective management of the State Bar. Correcting this problem will move the State Bar forward in achieving a more efficient, centrally managed organization.

Discussion of the possible Sections' departure coincided with the beginning of the 2017 Task Force work and thus became an important consideration in its deliberations. Equally important, earlier fee bill proposals to reduce the size of the State Bar's Board of Trustees by eliminating six elected trustee positions moved closer to reality with the introduction of the 2018 fee bill. Together these two potential structural changes motivated the 2017 Task Force work, creating greater urgency to design a 'new' State Bar of California.

The 2017 Task Force began its work by developing an agenda around three themes, designed to capture work remaining from the 2016 Task Force Report and to consider the needs of the organization if the Legislature were to approve the departure of the Sections and significantly reduce the size of the Board. The first theme entailed creating a mission statement that would define the State Bar's public protection responsibilities. A working mission statement was drafted early in the process, but not finalized until the last meeting to ensure that the Task Force's mission statement recommendation captured the most well-developed thinking about the State Bar's purpose and function. That process produced the following mission statement, which the 2017 Task Force recommends for the Board's consideration:

The State Bar of California's mission is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and the promotion of efforts for greater access to, and inclusion in, the legal system.

In discussing its second topic on board governance changes, the 2017 Task Force was mindful of proposals contained in the unsuccessful 2017 fee bills, as well as recommendations made in the 2016 Task Force Report. In the end, its recommendations largely track those now introduced in the 2018 fee bill. Accordingly, the 2017 Task Force embraced renaming the Board leadership positions as Chair and Vice Chair, with appointment by the Supreme Court; eliminating trustee elections; and, extending trustee terms of office to four years. Additionally, the 2017 Task Force recommended that the Board be reduced in size to 17 members, converting four formerly elected positions to appointments by the Supreme Court, both Legislative Houses and the Governor; that consideration be given to a mechanism for appointing vacancies left open overlong; and that the position of Treasurer, a vestige of the State Bar's associational structure, be eliminated.

Discussion about the third 2017 Task Force topic, the role of sub-entities and volunteers, and the structure of Board Committees, created special demands. The 2017 Task Force recognized that to understand the changes needed to correct past problems and ensure that the 'new' State Bar is structured successfully in light of both the possible departure of the Sections and a significant change in Board size, a deep review of all of the State Bar's functional areas would be needed. The 2017 Task Force was clear that a smaller board would inevitably face significant challenges, thanks to the State Bar's great size, complexity and functional diversity. Thus understanding the State Bar's complicated structure became an important focus.

In its review process, the 2017 Task Force learned that the State Bar of California is the world's largest 'unified' bar, combining both regulatory and membership functions, and has a highly unusual structure when compared to other sister bar organizations. Unlike other bar



organizations, the State Bar operates with a completely professionalized discipline system, which reports directly to a governing board, rather than chief executive officer; is subject to an oversight structure governed jointly by the Supreme Court and both Legislative Houses; and is responsible for a comprehensive set of licensing, regulation, discipline and educational activities, many contained in a growing body of statutory directives.

The 2017 Task Force recognized the importance of identifying ways to improve the oversight and management of the State Bar. Its functional review of all State Bar operational areas made clear that the State Bar historically has been asked to do far more than manage its core responsibilities of attorney discipline, licensing and regulation alone. The resulting organizational structure and management systems have become unusually complex as new responsibilities have been added over time. Similarly the State Bar's fund accounting financial system, which has not been upgraded in years, has strained to accommodate mushrooming programmatic activity and statutory requirements. To manage its growing number of activities, without adding resources, the Bar has relied on an increasing number of volunteers operating through sub-entities.

Efforts to address this problem of organizational sprawl and entropy were set in motion by recommendations in the 2016 Task Force Report. They are expected to result in a significant reduction in both sub-entities and Board appointed volunteers even before implementation of the 2017 Task Force Report recommendations. In 2011-2012, there were 46 mainly Board-created sub-entities operating within the State Bar under the Board's direct oversight, supported by approximately 700 volunteers. Implementation of the 2016 Task Force Report recommendations, designed to address the identified problem of a proliferation of committees, now along with the possible departure of the Sections, will reduce the number of sub-entities operating within the State Bar under the Board's direct oversight to 12, and the number of associated volunteers to approximately 200. This reduction in sub-entities and volunteers will create a more manageable oversight workload for the Board and a stronger organizational structure.

Even so, more remains to be done, including further study of a broad range of advisory committees to the sub-entities and their additional use of volunteers. The 2017 Task Force Report has made an important contribution to this work by providing a detailed analysis of the various sub-entities and identifying those which should be prioritized for future study by the Board and its Committees. These include the *Committee of Bar Examiners*, *Law School Council*, *California Board of Legal Specialization*, *Client Security Fund*, *Committee on Mandatory Fee Arbitration*, *Lawyer Assistance Program Oversight Committee*, *Access to Justice and Diversity Related Sub-Entities*, and the *Committee on Professional Liability Insurance*. In sum, the 2017 Task Force has laid the groundwork for the Board to continue this review effort and, taking advantage of a revised Board Committee structure, 'right-size' the work of these volunteers and sub-entities, so that appropriate Board oversight and control become a reality.

Finally, the 2017 Task Force noted that for maximum effectiveness, the State Bar's management structure should be aligned with Board Committee structure, so that the Board can effectively exercise its oversight responsibility. The Task Force also determined that the Board should engage in ongoing continuous improvement assessment and review. Recommendations to improve trustee training and incorporate leadership development, succession planning and management structure review into the Board Committee work plan were developed to advance these principles. This work, which will require the joint effort of Board and senior management, was noted as most appropriate for the Executive Committee (ExCom). With this recommendation, the 2017 Task Force Report joins the 2016 Report in underscoring the need to develop the most important asset of the State Bar of California: its human resources. To navigate the way forward will require continued attention to maintaining reform-minded leadership at the Board and senior management level, as noted in both the 2016 and 2017 Task Force Reports.

DRAFT

Recommendation B.2: The Board of Trustees should adopt a new trustee orientation program;²⁰ develop an Admissions Day similar in purpose to Discipline Day; incorporate an educational component into each Board meeting; and create a training and orientation calendar to ensure that each incoming group of trustees receives timely training on all significant aspects of the Bar and its functioning.

Recommendation B.3: The Board of Trustees should adopt a trustee skills matrix to highlight the Board of Trustees' existing expertise as well as any talent deficits to assist both the Board itself and appointing authorities in trustee and officer selection and development.²¹

TOPIC C – THE STRUCTURE AND FUNCTIONING OF THE STATE BAR SUB-ENTITIES AND BOARD COMMITTEES

Topic C includes two categories: State Bar sub-entities, made up of Board members, appointees and volunteers, and variously created by Board action alone or in combination with external stakeholders, whether by Court rule or statute; and Board Committees, composed exclusively of trustees. For purposes of this Report, we have divided Topic C into two parts, C-1, State Bar Sub-Entity Structure and Functioning, and C-2, Board Committee Structure and Functioning. The related recommendations follow this organization.

Recommendation C.1(a): The Board of Trustees, either as a body or by referral to Board Committees for initial analysis and study, should consider the following questions about the role and structure of all State Bar sub-entities to ensure that:

1. The Board understands what each sub-entity does;
2. The Board has the information it needs to oversee properly and evaluate adequately the effectiveness of each sub-entity's function; and
3. The Board focuses the sub-entities on their policy-making role, segregating out administrative work for delegation to staff.

²⁰ See Appendix G, New Trustee Orientation Training Modules.

²¹ See Appendix H-1, Draft Trustee Skills Matrix. See also Appendix H-2, Trustee Skills Inventory Survey.

- Would best practice, judged against the approaches of other states, suggest that the State Bar's function should be limited to certifying entities meeting established standards to administer legal specialization certification programs rather than administering such a program directly; if so, is the best structure for performing this function through CBLIS or delegation to State Bar staff?
- Given that Supreme Court Rule 9.35 requires only that the State Bar establish and administer a program for certifying legal specialists, could the legal specialization certification function be performed by State Bar staff with the assistance of consultants instead of by CBLIS?

CLIENT SECURITY FUND COMMISSION (CSF)

- Should consideration be given to making the CSF Commission a subcommittee of the RAD Committee, to clarify both its reporting relationship and the Board's oversight responsibility?
- Would there be benefits in cost savings and performance, by bringing certain CSF Commission work in-house to be performed by staff?
- Could the CSF Commission be reduced in size if its workload were decreased and the Commission's structure realigned with its remaining responsibilities?

COMMITTEE ON MANDATORY FEE ARBITRATION (MFA)

- Is there a risk that some local voluntary bar associations may decide that they can no longer support the MFA process and, if so, what would be the impact on the State Bar and its staffing?
- Would there be a benefit to bringing in-house more of the Committee's administrative work, so as to free up the volunteers for more useful deployment of their subject matter expertise; if so, would a reduction in the size of the Committee be possible to realign its structure with its remaining responsibilities?

LAWYER ASSISTANCE PROGRAM (LAP) OVERSIGHT COMMITTEE

- Do the statutory prescriptions governing LAP hinder full integration of this program area into the State Bar and inhibit proper oversight by the Board of Trustees?
- Should the LAP program area be retained within the State Bar, or should consideration be given to repositioning the program outside the State Bar?
- Assuming the Board of Trustees and the Legislature determine that LAP should remain within the State Bar, what should be the relationship between the Board of

APPENDIX D

Non-Governing Standing Committees

- | | |
|---|--|
| 28. <i>Alternative Dispute Resolution</i> | Terminated by Board; Responsibility transferred to Litigation Sec. |
| 29. <i>Federal Courts</i> | Terminated by Board; Responsibility transferred to Litigation Sec. |
| 30. <i>Appellate Courts</i> | Terminated by Board; Responsibility transferred to Litigation Sec. |
| 31. <i>Administration of Justice</i> | Terminated by Board; Responsibility transferred to Litigation Sec. |

Other

- | | |
|--|--|
| 32. <i>California Young Lawyers Assn</i> | Move to new Sections entity by 2018 fee bill |
| 33. <i>Com Group Liability Insurance</i> | Terminated by Board (eff. 5/31/17); new Sections entity area |

Remaining Sub-Entities

Administration of Justice

1. *CA Com Access to Justice* (merged with *Com Delivery of Legal Services*)
2. *Legal Services Trust Fund Com*
3. *Council on Access and Fairness*
4. *Com on Judicial Nominees Evaluation*
5. *Judicial Nominations Evaluations Review Com*

Prevention and Remediation

6. *Lawyer Assistance Program Oversight Com*
7. *Com on Mandatory Fee Arbitration*
8. *Client Security Fund Com*
9. *Com Professional Liability Insurance*

Licensing/Admissions¹

10. *Com of Bar Examiners*

Ethics/Competence²

11. *Com Professional Responsibility & Conduct*

Legal Specialization

12. *CBLs*

¹ Not included on this list is the *Law School Council*, which functions as an advisory body to the *Com of Bar Examiners*.

² Not included on this list is the second *Com for Revision of Rules of Professional Conduct*, as the main of their work – the overhaul of the Rules of Professional Conduct – was completed on March 31, 2017. Only a skeletal body has been retained for the duration of the Supreme Court's review and approval process.

APPENDIX E

March 8, 2017: Topic C – Structure and Functioning of the State Bar Sub-Entities and the Board of Trustees’ Committees

Written Public Comment: None

Oral Public Comment: Kelli Evans, Senior Director, Office of Legal Services of the State Bar of California

Summary: In a brief presentation to the Task Force, Ms. Evans talked about the access to justice sub-entities, which are supported by the Office of Legal Services staff. Ms. Evans discussed the role played by the *California Commission on Access to Justice*, in particular, in supporting policy and program development designed to increase access to justice for all Californians.

April 10, 2017: Identification of Open Items (telephonic meeting)

Written Public Comment: None

Oral Public Comment: None

April 24, 2017: Resolution and Finalization of Open Items

Written Public Comment:

- (1) April 19, 2017, letter from Justice Norman L. Epstein to President Jim Fox regarding the Witkin Medal (attached)

Oral (by telephone) Public Comment: Joel Mark, Member, former Presiding Arbitrator and former Chair of Committee on Mandatory Fee Arbitration

Summary: Mr. Mark advised the Task Force of the value of utilizing the expertise of members of the *Committee on Mandatory Fee Arbitration* who have developed and modified training materials; updated and tracked arbitration awards; made public comment on and tracked changes in the law; monitored pending legislation and court cases; and prepared proposed legislation to conform to case authorities. Additionally, Mr. Mark noted that the Committee continues to train local bar staff; reviews and updates program materials (notices, sample fee agreement forms, guidelines, etc.); reviews and recommends approval of local bar rule changes; and updates case summaries. Mr. Mark stated that this is all substantive work requiring acquired expertise and intimate familiarity with law, rules and practices.

APPENDIX I

timeliness of payments to applicants with qualifying claims. The Task Force notes that the Board does not set CSF funding, which is mandated by statute, but that further work should be done to communicate the need for increased CSF funding.

Recommendation: Refer to the RAD Committee for further study, as outlined above.

Committee on Mandatory Fee Arbitration (MFA)

Background: Fee disputes are the source of many disciplinary complaints; as a result, the Supreme Court considers the State Bar's MFA program to be an appropriate part of the State Bar's comprehensive discipline system. The State Bar's MFA program alleviates the burden on the court system by providing an alternative forum for resolution of fee disputes at the client's request. Ninety percent of cases that go to arbitration are resolved in that forum.

Concerns were raised regarding the risk that some local voluntary bar associations may decide they are no longer able to support the MFA program, and the effect that would have on State Bar staffing. Also, while the MFA program is a critical component of the State Bar's discipline system, questions arose as to the size and scope of the Committee, especially as related to the distribution of work between the Committee and MFA program staff.

The Committee is responsible for reviewing policies on fee arbitrations, assisting local bar association arbitration programs, issuing advisories, and evaluating and proposing legislation. Some of this work is dependent on the unique skills and abilities of Committee members who are often experts in the field of arbitration. Other aspects of the work, however, may be more administrative in nature, suitable for delegation to State Bar staff. A staff review of Committee functional responsibilities indicates that the following tasks may be appropriate for staff, as opposed to the Committee, to perform:

- Modification of training materials
- Updating arbitration awards
- Making public comment on and tracking changes in the law
 - tracking changes in case and statutory law
 - monitoring pending legislation and court cases
 - preparing proposed legislation to conform to case authorities
- Training of local bar staff
- Enforcement of awards
- Updating program materials (notices, sample fee agreement forms, guidelines, etc.)
- Local bar rule changes
- Updating case summaries

The Task Force recommends that RAD study this program area further, conferring with Committee members, staff and stakeholders as appropriate. The above description of potentially delegable work, already completed by staff, will offer a starting point. Depending on the portion

APPENDIX I

of current work the Committee ultimately will continue to handle, a further review of the required structure and size of the Committee should also be undertaken.

Recommendation: Refer to the RAD Committee for further study, as outlined above.

Lawyer Assistance Program (LAP) Oversight Committee

Background: In providing comprehensive and confidential assistance to attorneys who abuse alcohol or drugs or suffer from mental illness, LAP helps attorneys address problems with potential negative impact on client representation. The program serves the following four distinct populations:

- Attorneys who voluntarily self-refer into the program.
- Attorneys referred into the program from the disciplinary system.
- Applicants for admission referred into the program from the Committee of Bar Examiners as part of the moral character approval process (currently not covered by statute, they must be funded from non-LAP sources).⁵
- Applicants for admission who voluntarily self-refer into the program to avoid problems in the moral character approval process proactively by addressing substance abuse or mental illness issues lest they interfere in obtaining a license to practice law.

LAP relies on State Bar staff who are licensed clinicians to assess and develop case plans for participants. The LAP Oversight Committee may establish one or more three-member Evaluation Committees in northern and southern California, each consisting of a physician, clinician and a local State Bar member experienced in recovery. Evaluation Committees are authorized to accept or deny applications for admission to LAP; to determine completion of the program; and to terminate individuals from the program. The State Bar contracts with licensed medical health professionals in northern and southern California to facilitate weekly group meetings and monitor the recovery of participants. Notwithstanding the statutory role performed by the Oversight Committee in overseeing the operations of this program, the Board performs its own oversight role, which historically has been limited in scope. The Board appoints half of the 12 Oversight Committee members, who regularly report to the Board. On March 12, 2017, the Board approved the Oversight Committee's three-year strategic plan pursuant to Workforce Planning recommendations.⁶

Two issues emerged in Task Force discussions. The first centered on whether LAP is appropriately situated within the State Bar. The program goal is not in doubt, but the State Bar

⁵ The State Bar hopes to change the LAP statutory scheme to permit funding of applicants for admission.

⁶ Immediately after the Task Force's discussion about LAP, the Oversight Committee presented a three-year Strategic Plan to RAD, focused on outreach (particularly to law schools and recent graduates), education, messaging and efficacy. The Oversight Committee agreed to develop a timeline for implementing the strategic plan and also agreed that physical separation from the State Bar could help to increase participation.

APPENDIX M

The State Bar of California Sub-Entities

Committee Name	Program Area	State Bar Org	Oversight Committee	Charge [Per Board Book, statutes, State Bar Rules and other like source/reference materials]	Creating Authority	# of Appointees	Appointing Authority	Funding	Status	Notes
Committee on Administration of Justice	N/A	N/A	N/A	Established in 1933, this committee is a diverse group of attorneys concerned with aspects of civil procedure, court rules and administration, rules of evidence, and other matters having an impact on the administration of justice in the civil courts. The charge of the committee is as follows: (a) Analyze, report to BOT and comment as authorized by the BOT on proposed court rules, legislation and other proposals affecting the committee's subject area. (b) Draft proposals relating to its area of concern for consideration by the BOT. (c) Perform such other functions relevant to the committee's subject area as the BOT may from time to time assign.	BOT	36	BOT		Terminated by BOT action. Responsibility transferred to Litigation Section. It is the State Bar's expectation that the new Sections entity will take this work with them.	
Committee on Alternative Dispute Resolution	N/A	N/A	N/A	Established in 1997, this committee is a diverse group of attorneys and public members with expertise or an interest in Alternative Dispute Resolution (ADR), including ADR neutrals, consumers of ADR services and those who reflect the experience and expertise of State Bar Sections. The charge of the committee is as follows: (a) Analyze, report to BOT and comment as authorized by BOT on proposed court rules, legislation and other proposals affecting the committee's subject area. (b) Draft proposals relating to ADR for consideration by BOT. (c) Identify issues concerning the relationship of ADR to the practice of law, the administration of justice and improving access to justice. (d) Plan and administer educational programs relating to ADR. (e) Encourage attorneys involved in ADR to become active participants in State Bar. (f) Perform such other functions relevant to the committee's subject area as BOT may from time to time assign.	BOT	21	BOT		Terminated by BOT action. Responsibility transferred to Litigation Section. It is the State Bar's expectation that the new Sections entity will take this work with them.	
Committee on Appellate Courts	N/A	N/A	N/A	Established in 1970 and made a standing committee in 1973, this committee is a diverse group of attorneys drawn from such sources as law firms, solo practitioners, defense and prosecution offices handling criminal appeals, appellate court research staff, and law school faculty. The subject area of the committee concerns appellate court operation and appellate practice. In furtherance of the administration of justice, the charge of the committee is as follows: (a) Analyze, report to BOT and comment as authorized by BOT on proposed court rules, legislation and other proposals affecting the committee's subject area. (b) Draft proposals relating to its area of concern for consideration by BOT. (c) Plan and administer educational programs designed to foster improvement in appellate practice and awareness of issues affecting the committee's subject area. (d) Perform such other functions relevant to the committee's subject area as BOT may from time to time assign.	BOT	16	BOT		Terminated by BOT action. Responsibility transferred to Litigation Section. It is the State Bar's expectation that the new Sections entity will take this work with them.	
Committee on Federal Courts	N/A	N/A	N/A	Established in 1949, this committee's charge is as follows: (a) Generally enhance the lines of communication between the Federal Bench in California and the State Bar, including the attorney discipline system. (b) Bring to the attention of the Federal Bench in California State Bar issues that have an impact on Federal Court practice in California. (c) Make the BOT aware of Federal Court issues that may have an impact on the State Bar. (d) Review and make recommendations on proposals that affect California Federal Court practice and the Federal Courts in California. (e) Make recommendations to improve legal services in California's Federal Courts. (f) Organize and sponsor educational programs on Federal Court practice. (g) Perform such other functions relevant to the committee's subject area as BOT may from time to time to assign.	BOT	15	BOT		Terminated by BOT action. Responsibility transferred to Litigation Section. It is the State Bar's expectation that the new Sections entity will take this work with them.	
Committee on Mandatory Fee Arbitration	Prevention and Remediation	State Bar Court Administrator	RAD	The Mandatory Fee Arbitration (MFA) program provides an informal, confidential, low-cost forum for resolving fee disputes. MFA includes a network of local programs sponsored by 41 participating county bar associations. Most fee arbitrations are conducted through local bar association programs. The State Bar provides fee arbitration only in the absence of a local program. The committee, established in 1985, is tasked with reviewing policy and making policy recommendations; assisting local bar association arbitration programs; issuing advisories to assist arbitrators and developing uniform approaches; evaluating and proposing legislation.	BOT	16	BOT	General Funds	Comp: Attorneys; 1 Arbitrator; 3-5 Public. California Supreme Court in <i>in re Attorney Discipline System</i> observed that fee disputes are at the core of many disciplinary complaints and held that the costs of mandatory fee arbitration should be funded as component part of the disciplinary system.	