

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

**AGENDA**

**Friday, July 7, 2017  
10:00 a.m. – 3:00 p.m.**

The State Bar of California  
845 South Figueroa Street  
2FG, 2<sup>nd</sup> Floor  
Los Angeles, CA 90017

And

201 California Street, 17th Floor  
San Francisco, CA 94111

And

55 Fruit Street, Suite 3B  
Boston, MA 02114

And

Via conference call  
(855) 520-7605 Conference code: 6502212414

**OPEN SESSION**

- |      |   |          |
|------|---|----------|
| I.   | Call for Public Comment   | (Walsh)  |
| II.  | Approval of Minutes of May 19, 2017 meeting (Attachment A, pp. 1-3) | (All)    |
| III. | Chair's Report  | (Walsh)  |
| IV.  | Report from Presiding Arbitrator                                    | (Bacon)  |
| V.   | Report from the Office of Mandatory Fee Arbitration                 | (Hull)   |
|      | A. Office statistics (Attachment B, p. 4)                           |          |
|      | B. Schedule of Events (Attachment C, p. 5)                          |          |
| VI.  | Business  |          |
|      | A. Sample awards (Attachment D, pp. 6-13)                           | (Straus) |

Agenda July 7, 2017  
Page 1

- B. Education Subcommittee
  - i. Proposed outline for Advance Fee Arbitration Training (Attachment E, pp. 14-27) (Walsh)
- C. Arbitration Advisory on Interest (Mark, Fish)
- D. Arbitration Advisory re: Costs (Mark, Buckner, Bacon)
- E. Update on Mediation Confidentiality statute released for Public Comment (Attachment F, pp. 28-31) (Walsh)
- F. Other Business

Next committee meeting:

DATE: Thursday, August 24, 2017  
TIME: 10:00 a.m. – 3:00 p.m.  
LOCATION: San Diego County Bar Association  
Bayview Room  
401 West A Street  
San Diego, CA 92101  
(619) 765-1000

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

**MINUTES**

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

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

Members Present: Lorraine Walsh (Vice Chair), Ken Bacon, Carole Buckner, Lee Hess, Patrick Maloney, Joel Mark, Sharron McLawyer, Lee Straus and Sally Williams.

Not Present: Nick Migliaccio, Mary Best, George Duesdieker, Michael Fish, Brandon Krueger, Clark Stone

Staff Present: Doug Hull

The meeting was called to order at 10:10 a.m. by Vice Chair Lorraine Walsh.

- I. Call for Public Comment  
There were no requests for public comment.
- II. Approval of Minutes of March 24, 2017 meeting  
The minutes were approved with one change. Mark Schreiber was added to the list of members in attendance.
- III. Chair's Report  
Lorraine commented that she was chairing since Nick is unavailable. Her items for reporting occurred later in the agenda.
- IV. Report from Presiding Arbitrator  
Ken reported he signed two motions for inactive enrollment recently. He also mentioned that he was dismissed from the Marilyn Scheer litigation.
- V. Report from the Office of Mandatory Fee Arbitration
  - A. Office statistics  
Doug presented the simpler statistics. There was a question about enforcement closures and what "other" meant. Doug will find out. (The answer is that when attorneys get disbarred, the MFA program loses jurisdiction to enforce a matter when an attorney is disbarred, therefore the case is closed.)

Minutes May 19, 2017

Page 1

- B. Schedule of Events  
Attached to the agenda.

VI. Business

- A. Report from attendance at California Law Revision Commission
- B. Incorporation of Handbook information into training materials
- C. Sample awards

D. Report re: appearance at Board meeting  
Joel reported on his phone presentation to the Governance in the Public Interest Task Force. Doug provided the committee with an excerpt of the Task Force Report (attached to the agenda). The report will be provided to the Board of Trustees. The recommendation will be for the Board to conduct a further study of the work for the CMFA. More to come on this.

E. Education Subcommittee  
Michael was not there but provided a report in writing to the director:

“While I have not met or connected with my fellow committee members, a review of the materials previously proved at our last CMFA meeting, (reflecting educational programs provided over the past number of years, reflects a lack of currency and advanced training over the past 3 years.

Additionally, we should consider adding “How to Write an Award” to our Advanced Training Program.

I propose that we schedule no less than one program per month as we go forward and that for the time being we travel to those areas to provide live educational programs.

The following County Programs are, in my opinion, in need of training:

- Contra Costa (Basic & Advanced)
- Fresno (Basic & Advanced)
- Inyo (Basic & Advanced)
- Kern (Basic & Advanced)
- Los Angeles (Basic)
- Antelope Valley (Basic & Advanced)
- Beverly Hills (Basic & Advanced)
- Glendale (Basic & Advanced)
- Long (Basic & Advanced)
- San Fernando Valley (Basic & Advanced)
- San Gabriel (Basic & Advanced)
- Santa Monica (Basic & Advanced)

•Marin	(Basic & Advanced)
•Mono	(Basic & Advanced)
•Monterey	(Advanced)
•Napa	(Basic & Advanced)
•Nevada	(Basic & Advanced)
•Orange	(Basic & Advanced)
•Placer	(Basic & Advanced)
•Riverside	(Advanced)
•Desert	(Basic & Advanced)
•Sacramento	(Basic & Advanced)
•San Bernardino	(Basic & Advanced)
•San Diego	(Basic & Advanced)
•San Diego – North	(Basic & Advanced)
•San Francisco	(Basic & Advanced)
•San Luis Obispo	(Basic & Advanced)
•San Mateo	(Basic & Advanced)
•Palo Alto	(Basic & Advanced)
•Santa Barbara	(Basic & Advanced)
•Santa Clara	(Basic)
•Solano	(Basic & Advanced)
•Sonoma	(Basic & Advanced)
•Sutter	(Basic & Advanced)
•Tulare	(Basic & Advanced)
•Ventura	(Basic & Advanced)
•Yuba	(Basic & Advanced)

As to those counties with no program, we should consider providing training to develop local arbitrators for the State Bar MFA program.”

- F. Arbitration Advisory on Interest  
This will come back at the next meeting
- G. Arbitration Advisory re: Costs  
This will come back at the next meeting.

The meeting adjourned at 12:30 p.m.

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, 2<sup>nd</sup> Floor  
 Los Angeles, CA 90017  
 (213) 765-1000

**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	35									51
Fee Arbitration Requests	8	7	2	6	4								27	75
Arbitration Cases Closed	4	7	3	2	6								22	98
<i>Findings &amp; Award Served</i>	2	3	2	0	4								11	71
<i>Cases Closed, No Award</i>	2	4	1	2	2								11	27
Cases Open (End of Month)	32	32	31	35	33									28
Phone Calls Handled	331	304	365	292	304								1596	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	52									89
Enforcement Requests Rec'd.	1	1	1	1	3								7	29
Orders Re Admin Penalties	2	0	0	0	1								3	5
Inactive Enrollment Motions Filed	0	0	0	0	2								2	12
Attorney Enrolled Inactive	1	0	0	1	1								3	7
Enforcement Cases Closed	4	4	3	4	0								15	54
<i>Cases Paid and Closed</i>	2	2	2	3	0								9	34
<i>Cases Closed (Other)</i>	2	2	1	1	0								6	20
Cases Open (End of Month)	61	58	55	52	55									64

**Committee on Mandatory Fee Arbitration**

**Calendar of events**

<b>Date</b>	<b>Event</b>	<b>Type</b>	<b>Location</b>	<b>Participants</b>
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
Wednesday, August 23, 2017	Training	Advanced	San Diego County Bar Association Bayview Room 401 West A St #1100 San Diego, CA 92101	???
Thursday, August 24, 2017 10:00 a.m. - 3:00 p.m.	CMFA Meeting	Meeting	San Diego County Bar Association Bayview Room 401 West A St #1100 San Diego, CA 92101	All members

\_\_\_\_\_ **BAR ASSOCIATION**  
**MANDATORY FEE ARBITRATION**

In the Matter of the Fee Arbitration Between:	)	Case Number X-XXX-XX-XX
	)	
SALLY SMITH	)	
Applicant	)	
	)	
v.	)	<b>FEE ARBITRATION</b>
	)	<b>FINDINGS AND AWARD</b>
WILLIAM LAWYER, ESQ.	)	
Respondent	)	
	)	

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**INTRODUCTION**

**Identification of Parties**

The Applicant Sally Smith is the Client and was present. Applicant was represented by herself.

The Respondent William Lawyer, Esq. is the Attorney and was present.

Also present was: N/A

**Binding/Non-Binding**

The arbitration is Binding.

**Responsible Attorney**

Pursuant to Business and Professions code 6203(d), the responsible attorney in this matter is:  
William Lawyer, Esq.

**Arbitration Hearing**

A fee arbitration hearing between Applicant and Respondent was held on May 1, 2017 before a single arbitrator: Steve Smith, Esq., Sole Arbitrator.

### **Fee Incurred and Amount in Dispute**

- |   |             |
|---|-------------|
| 1. The amount that the Client claims should have been charged:                        | \$18,500.00 |
| 2. The amount that the Attorney claim should have been charged:                       | \$32,920.50 |
| 3. The amount that the Client has paid the attorney:                                  | \$18,500.00 |
| 4. If there was a written fee agreement, under the agreement, what fees were charged: | \$32,920.50 |
| 5. Amount of the filing fee:  | \$1,052.67  |

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### **Statement of Facts/Issues in Dispute**

On March 20, 2016, Applicant engaged Respondent to represent her in connection with a petition for dissolution of marriage. The parties executed a written agreement setting forth the terms of their agreement (e.g., initial deposit, hourly fee rates, etc.) (the “Written Fee Agreement”). Applicant remitted to Respondent a refundable initial retainer in the amount of Three Thousand Five Hundred Dollars (\$3,500). In addition, Applicant paid Respondent a total of Fifteen Thousand Dollars (\$15,000) over the course of the representation.

From March 20, 2016 to July 16, 2016, Respondent actively participated and represented Applicant pursuant to the terms of the Written Fee Agreement. Despite multiple attempts by Respondent to meet and confer with Applicant on the remaining outstanding balance owed to Respondent, such meetings never took place and Respondent ultimately substituted out of the case due to non-payment for services rendered.

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

Respondent is requesting that Applicant be required to pay Respondent Fourteen Thousand Four Hundred Twenty Dollars Fifty Cents (\$14,420.50), which represents the outstanding balance of the fees and costs incurred by Respondent in connection with Respondent’s representation of Applicant. Respondent contends that Applicant’s dissolution of

marriage was anything but basic, but rather was incredibly complex and terribly acrimonious, which led to additional pleadings, appearances and time expended in representing Applicant's interests and those of her small children.

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

1. The nature of the Written Fee Agreement between the parties.
2. The services performed by the Respondent and the additional fees and costs due Respondent, if any.

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## **FINDINGS**

### **Statement, Stipulations, Reasoning and Determination of Questions Submitted**

#### **[Business and Professions Code Section 6203(a)]**

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

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

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

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

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

2. What were the services performed by the Respondent and are any additional fees and costs due Respondent?

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

- Prepared the Petition for Dissolution of Marriage.
- Successfully petitioned the Court for an Order granting Applicant with exclusive control of the family residence.
- Successfully petitioned the Court for an Order which sought to prevent John Smith from consuming narcotics while caring for and driving around the minor children.
- Successfully defended John Smith's attempt to impute income to Applicant, due to the fact that she reduced her income in light of some health issues. Respondent was successful in obtaining guideline pendent lite spousal support and not based on a reduced amount.
- Successfully petitioned the Court for an Order to allow Applicant control and exclusive use of the community BMW 325i automobile.
- Successfully petitioned the Court for an Order for joinder of the community retirement accounts so that John Smith would cease unilateral withdrawals.

Applicant contends that even though monthly invoices were being mailed to the correct address, she didn't receive them. Respondent pointed out that on or about May 9, 2016, in a declaration signed by Applicant in connection with documents submitted to the Court in connection with the dissolution of marriage proceedings, the invoices that Respondent had generated to date were part of the declaration. As such, Respondent argued that Applicant was aware on or about May 9, 2016, that fees and costs of almost Ten Thousand Dollars (\$10,000) had accumulated since Respondent's initial engagement on March 20, 2016, which were over and above the Eighteen Thousand Five Hundred Dollars (\$18,500) in fees and costs that Applicant had previously paid in connection with Respondent's services on Applicant's behalf.

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

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

Respondent had an initial conversation with Applicant about her mounting legal bill on May 30, 2016 and then subsequently had additional follow-ups in June of 2016. Due to Applicant being nonresponsive to Respondent's request to bring her account current, ultimately Respondent made the decision on or about July 16, 2016, to suspend working on Applicant's case due to non-payment for legal services and costs rendered on Applicant's behalf. Shortly thereafter, Respondent substituted out of the case due to non-payment for services rendered.

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

Given the nature of the dissolution of marriage between Applicant and John Smith, Respondent has provided evidence that he was sending Applicant monthly billing statements; provided, however, even if Applicant didn't receive a statement for the month of March 2016 or April 2016, by virtue of the documents filed with the Court on or about May 9, 2016, she was made aware of the legal fees and costs that were mounting in her case. In addition, Applicant was an active participant in all matters surrounding her case and for the series of meetings and hearings that took place over the rest of May and June of 2016. Applicant should have been aware that legal fees and costs were continuing to mount as Respondent vigorously represented her, including agreeing to advance costs for an expert witness to prepare a declaration on the effects of Hydrocodone. Furthermore, Respondent was continuing to send Applicant monthly statements by U.S. Mail and Electronic Mail. Applicant's position that she did not receive any of the billing statements sent by Respondent over the course of representation was found to be unpersuasive.

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

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## AWARD

The sole arbitrator finds that the total amount of fees, costs or both which should have been charged in this matter is: \$32,920.50

Of which the client is found to have paid: \$18,500.00

Subtotal: \$14,420.50

Pre-award Interest is not awarded.

The filing fee was paid to the Program by Client.

The filing fee is allocated: Client \$1,052.67

Attorney \$0.00

**ACCORDINGLY, the following award is made:**

- Client Sally Client shall pay to Attorney William Lawyer, Esq. the sum of \$14,420.50,
  - plus interest in the amount of 10% per annum from the 30<sup>th</sup> day after the date of mailing of this award
  - Client shall pay to the State Bar of California, the filing fee of: \$1,052.67
- Nothing further shall be paid by either the \_\_\_\_\_ or the attorney.

This award is:

- Binding.** Either party may convert said award into a judgment pursuant to the provisions of Section 6200 and following of the Business and Professions Code and/or Section 1280 and following of the Code of Civil Procedure of the State of California.
- Non-Binding.** Pursuant to Section 6203(b) of the Business and Professions Code of the State of California, said award shall become binding within thirty (30) days of mailing of notice of this award unless within such time one of the parties hereto seeks judicial review by filing appropriate pleadings to such affect in any abated action or by commencing an action in a court having jurisdiction. **NOTE: FAILURE TO ACT WITHIN 30 DAYS OF MAILING OF NOTICE OF AWARD WILL CONVERT A NON-BINDING TO A BINDING AWARD.**

Steve Smith, Esq.	_____	May 15, 2017
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated
If a panel, the additional arbitrators:		
Arbitrator Name (Print)	_____	Dated
	Arbitrator Name (Signature)	
Arbitrator Name (Print)	_____	Dated
	Arbitrator Name (Signature)	

**REMINDER: The Findings and Award *must* be sent to the MFA program administering the arbitration. *Do not* send it directly to the parties. The MFA Program will serve a copy of this findings and award on the parties and a photocopy will be returned to the arbitrator(s). Thank you.**

## **ADVANCED FEE ARBITRATION TRAINING-HOW TO WRITE AN AWARD**

### I. Overview-Why Is it Important to Write an Enforceable Award

Fee arbitrations under the Mandatory Fee Arbitration program succeed in resolving disputes without litigation when the parties perceive the arbitrator(s) acted fairly in deciding their case and prepare a comprehensive award. Even a party who is dissatisfied with the amount awarded may choose not to reject it and seek a de novo hearing following non-binding arbitration if that party believes the arbitrator(s) listened to his or her position and determined the dispute in a reasoned manner in accordance with the evidence and applicable law. This advanced program on how to write an award is designed to assist you to achieve that desired result.

### II. Stipulated Award When the Parties Settle Their Fee Dispute Prior to Arbitrator Taking Evidence

You may encounter a case where the parties are able to reach a settlement before you take evidence. If that happens you may issue a Stipulated Award. Below is a list of its requirements and limitations:

- a. The award must meet the State Bar Minimum Standards and ensure it was reached after the settlement between the parties.
- b. You must use the State Bar approved form "Award Pursuant to Stipulation of Parties". SEE FORM ATTACHED.
- c. The arbitrator may not issue the award if the arbitrator believes the settlement is unethical, illegal, or unconscionable.
- d. Only matters properly before the arbitrator under the MFA can be entered as a Stipulated Award and

enforced under the MFA statute. See B&P Section 6203(a) for a list of matters which cannot be included in a Stipulated Award.

e. Effect of Settlement on Enforcement of Stipulated Award-Under B&P Section 6203(d), the State Bar can enforce an award when a client is awarded a refund. If the case is settled and the client obtains a refund and there is no Stipulated Award, the State Bar cannot assist the Client with enforcement. Moreover, under the Business and Professions Code the parties have no other post-arbitration remedies.

### III. The Basics Steps to Follow for a Well-Written Award After Hearing

Use State Bar Required Form-SEE FORM ATTACHED. The form is in Word Format and it is fillable. If you need to add text and cannot find a field to do so, the form can be unlocked with the following command in MS Word: Developer/Protect Document/Restrict Formatting and Editing/Stop Protection. Below is a list of the required Steps for its preparation:

Step Number One-Identification of the Parties-Correctly state the full names of the parties who appeared at the hearing and if an attorney represented a party. If a party failed to appear, recite the factual findings of willfulness which the Court can later use to make the legal finding. Willfull non-attendance will preclude that party's right to a hearing de novo after arbitration under B&P Code Section 6204.

Step Number Two-Binding or Non-binding Arbitration- indicate whether the parties agreed to binding or non-binding arbitration and attach a signed Stipulation form if necessary.

Step Number Three-Who is the Responsible Attorney-Under Business & Professions Code Section 6203(d) you must list a responsible attorney so the State Bar can enforce the award against the correct attorney which includes involuntary inactive enrollment for failure to refund the client fees, costs or both. Penalties and inactive enrollment cannot be applied to a law firm, only to individual attorneys. See Arbitration Advisory No. 1994-04 for guidance on how to determine who is the responsible attorney.

Step Number Four-Arbitration Hearing-List when the hearing occurred and who served as the sole arbitrator or who were the members of the three person panel and identify the chair of the panel.

Step Number Five-Fees Incurred and Amount in Dispute-Fill in the amount the client should have been charged, the amount the client has paid, if there was a written fee agreement, the amount that was charged under the agreement and the amount of the filing fee paid to the program. Usually all of this information is contained in the Request for Fee Arbitration which either the client or attorney prepared and submitted to the program. The program should have sent you this information and if not you should request a copy prior to the arbitration hearing.

Step Number Six-Statement of Facts/Issues in Dispute-a statement of the facts should be included as they frame the issues in dispute. In reciting the facts, keep the description of the events neutral and not argumentative. You should also provide a list of the issues in dispute. For example, are the parties disputing the amount the client paid, or is there a dispute over whether there is a valid enforceable written fee agreement.

Step Number Seven-Findings-Under B&P Section 6203(a) you are required to issue an award with findings that

determine "all questions submitted". In this section you should cite the applicable law and make findings concerning the issues in dispute. Avoid criticizing a party or making an accusation that you find a party has "lied" or is "not credible" since this may form the basis for rejecting the award if they feel offended by the language you use. Although your findings and award are not admissible in any subsequent proceeding and may not operate as res judicata or collateral estoppel (See *Liska v. The Arns Law Firm* (2004) 117 Cal. App. 4th 275) the award may be attached as an exhibit on a Motion to Vacate or Set Aside and therefore the language you use should be neutral and professional.

Step Number Eight-The Award-In this Section you must make the mathematical calculations listing the total amount of fees, costs or both which should have been charged. For example if you find the attorney double billed the client, you will make the necessary deductions. If you find the attorney made an error and missed a filing deadline then you will adjust the fees and costs related to the particular error. If you find the client still owes the attorney any sums you will list the amount(s). You will also list how much the client has paid the attorney and then issue a subtotal. You also can award pre-judgment interest under Civil Code Section 3287. Finally, under this section you must list who paid the filing fee and its amount. You can allocate the fee to the attorney or client or determine they are each responsible for payment of a portion of it. Remember that the prevailing party is not determinative of the reallocation of the filing fee and use your discretion based on the evidence adduced at the hearing.

Step Number Nine-Final Amounts in Award/Post Award Interest/Binding vs. Non-binding-in this Section make your finding if the attorney is to receive an award; if the client is to receive a refund or if nothing further should be paid by either the attorney or client. If you

determined that a payment must be made by either the attorney or client, the MFA Guidelines and Minimum Standards No. 16(c) provides that the award must include 10% interest per annum from the 30th day after service of the award. Finally check the box whether the award is binding or non-binding.

Step Number Ten-Proof read and Sign the Award-since the award contains numbers and payment amounts double check your math and proof read to ensure it is correct. Then sign the award (or if there is a three person panel, obtain the concurrence of at least one other panelist)On a three person panel, a panelist who does not agree with the majority can prepare a dissenting opinion. The dissent must be prepared and signed in the same time required for service of the award.

Step Number Eleven-DO NOT SERVE THE AWARD-Return the signed original award to the program staff member who is responsible for its service. The Chair of the MFA program will review the award and ensure it complies with all the statutory requirements. In cases where it does not comply or there is a math error, the award will be returned to you for correction before it is served.

Step Number Twelve-sit back, relax, and take pride in the volunteer work you have performed for a valuable program which impacts all attorneys licensed to practice in the State of California.

IV. SAMPLE AWARDS-"THE GOOD, THE BAD & THE UGLY"-attached are sample awards which demonstrate well prepared and poorly prepared awards.

**AWARD OF THE \_\_\_\_\_ FEE ARBITRATION PROGRAM  
PURSUANT TO STIPULATION OF THE PARTIES**

In the matter of the arbitration between: .

\_\_\_\_\_  
Client

Case No. \_\_\_\_\_

\_\_\_\_\_  
Attorney

**INTRODUCTION**

This matter was assigned to the undersigned Panel Chair/was not assigned to a Panel Chair and this award is therefore signed by the Program Chair. The Petitioner was/was not represented by counsel, [TYPE NAME HERE]. The Respondent was/was not represented by counsel, [TYPE NAME HERE]. The parties entered into a written stipulated award to resolve their dispute which is the subject of this arbitration and submitted their stipulated award for incorporation in a binding fee arbitration award of this Program. **GOOD CAUSE APPEARING THEREFORE:**

**AWARD**

The STIPULATED AWARD attached hereto is incorporated herein by this reference, its terms and conditions are approved and made part of this binding award, and the parties are directed to perform its executory terms, all with the same force and effect as a binding award of this Program after an arbitration hearing.

\_\_\_\_\_  
Arbitrator Name (Print)

\_\_\_\_\_  
Arbitrator Name (Signature)

\_\_\_\_\_  
Dated

OR

\_\_\_\_\_  
Program Chair (Print)

\_\_\_\_\_  
Program Chair (Signature)

\_\_\_\_\_  
Dated

**REMINDER:** The award *must* be sent to the \_\_\_\_\_ Mandatory Fee Arbitration Program. **DO NOT** send it directly to the parties. The MFA Program will serve a copy of this award on the parties, and a photocopy will be sent to the arbitrator(s). Thank you.

**STIPULATED AWARD**

[USE THIS FORM WHERE THE PARTIES ARE SETTling THEIR MATTER AFTER A HEARING HAS BEEN SET OR AT THE TIME OF HEARING]

1. The Parties agree that the total amount of fees, costs or both that should have been charged in this matter are: \$ \_\_\_\_\_  
Of which the client has paid: \$ \_\_\_\_\_  
The subtotal of fees still owed attorney or of any refund due client is: \$ \_\_\_\_\_

2. The Parties agree that pre-award interest  
[ ] shall be awarded in the amount of \$ \_\_\_\_\_  
[ ] shall not be awarded

3. The Parties agree that the arbitration filing fee of \$ \_\_\_\_\_  
Which was paid by \_\_\_\_\_ shall be allocated:  
Client: \$ \_\_\_\_\_  
Attorney: \$ \_\_\_\_\_

4. The Parties agree that the net amount due to attorney or to client is \$ \_\_\_\_\_  
5. Accordingly, the Parties agree that the following payment shall be made:

(a) Client, \_\_\_\_\_ shall pay attorney, \_\_\_\_\_  
\$ \_\_\_\_\_

OR

(b) Attorney, \_\_\_\_\_ shall refund client, \_\_\_\_\_  
\$ \_\_\_\_\_

The individual responsible attorney(s) is/are \_\_\_\_\_

OR

(c) Nothing further shall be paid by either attorney or client.

6. Payment terms, if any: \_\_\_\_\_

7. The Parties have read and understand the terms and conditions of this agreement and intend to be bound by this Stipulated Arbitration Award.

8. If any party to this agreement is an entity the individual executing this agreement represents that he or she has full authority and consent to enter into this agreement on behalf of such entity.

9. This is intended to be a fully integrated agreement that may not be modified other than in a writing signed by all parties.

\_\_\_\_\_  
Party Name (Print)

\_\_\_\_\_  
Signature of Party

\_\_\_\_\_  
Dated

\_\_\_\_\_  
Party Name (Print)

\_\_\_\_\_  
Signature of Party

\_\_\_\_\_  
Dated

ENTER NAME OF PROGRAM  
MANDATORY FEE ARBITRATION

In the Matter of the Fee Arbitration Between: ) Case Number [REDACTED]  
 )  
 [REDACTED] )  
 Applicant )  
 )  
 v. ) FEE ARBITRATION  
 ) FINDINGS AND AWARD  
 [REDACTED] )  
 Respondent )  
 )

INTRODUCTION

Identification of Parties - STEP # 1

The Applicant [REDACTED] is the [REDACTED] and [REDACTED] present. [REDACTED]

The [REDACTED] is the [REDACTED] and [REDACTED] present. [REDACTED]

[REDACTED]

[REDACTED]

Binding/Non-Binding - STEP # 2

The arbitration is [REDACTED]

[REDACTED]

Responsible Attorney - STEP # 3

Pursuant to Business and Professions code 6203(d), the responsible attorney in this matter is: [REDACTED]

[REDACTED]

[REDACTED]

Arbitration Hearing - STEP # 4

A fee arbitration hearing between [REDACTED] and [REDACTED] was held on [REDACTED] before [REDACTED], [REDACTED]

[REDACTED]

**Fee Incurred and Amount in Dispute** - STEP # 5

1. The amount that the [REDACTED] [REDACTED] should have been charged: [REDACTED]
2. The amount that the [REDACTED] [REDACTED] should have been charged: [REDACTED]
3. The amount that the [REDACTED] has paid the attorney: [REDACTED]
4. If there was a written fee agreement, under the agreement, what fees were charged: [REDACTED]
5. Amount of the filing fee: [REDACTED]

[REDACTED]  
/  
/

**Statement of Facts/Issues in Dispute** - STEP # 6

Enter Statement here  
/  
/

**FINDINGS**

**Statement, Stipulations, Reasoning and Determination of Questions Submitted**

[Business and Professions Code Section 6203(a)] - STEP # 7

Enter Findings here  
/  
/

AWARD - STEP # 8

The [REDACTED] finds that the total amount of fees, costs or both which should have been charged in this matter is: [REDACTED]

Of which the client is found to have paid: [REDACTED]

Subtotal: [REDACTED]

Pre-award Interest [REDACTED] [REDACTED]

The filing fee was paid to the Program by [REDACTED]

The filing fee [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**ACCORDINGLY, the following award is made:**

[redacted] shall pay to [redacted] the sum of [redacted],  
 plus interest in the amount of 10% per annum from the 30<sup>th</sup> day after the date of mailing of this award

[redacted] shall pay to the State Bar of California, the filing fee of: [redacted]

Nothing further shall be paid by either the [redacted] or the attorney.

[redacted]

This award is:

**Binding.** Either party may convert said award into a judgment pursuant to the provisions of Section 6200 and following of the Business and Professions Code and/or Section 1280 and following of the Code of Civil Procedure of the State of California.

**Non-Binding.** Pursuant to Section 6203(b) of the Business and Professions Code of the State of California, said award shall become binding within thirty (30) days of mailing of notice of this award unless within such time one of the parties hereto seeks judicial review by filing appropriate pleadings to such affect in any abated action or by commencing an action in a court having jurisdiction. **NOTE: FAILURE TO ACT WITHIN 30 DAYS OF MAILING OF NOTICE OF AWARD WILL CONVERT A NON-BINDING TO A BINDING AWARD.**

[redacted]

Arbitrator Name (Print) \_\_\_\_\_ Arbitrator Name (Signature) \_\_\_\_\_ Dated \_\_\_\_\_

If a panel, the additional arbitrators:

Arbitrator Name (Print) \_\_\_\_\_ Arbitrator Name (Signature) \_\_\_\_\_ Dated \_\_\_\_\_

Arbitrator Name (Print) \_\_\_\_\_ Arbitrator Name (Signature) \_\_\_\_\_ Dated \_\_\_\_\_

~~SAMPLE~~ STEP # 9

ACCORDINGLY, the following award is made:

- Client Fred MacMurray shall pay to Attorney Gene Autry the sum of \$14,750.00,
- plus interest in the amount of 10% per annum from the 30<sup>th</sup> day after the date of mailing of this award
- shall pay to the State Bar of California, the filing fee of:
- Nothing further shall be paid by either the \_\_\_\_\_ or the attorney.

This award is:

- Binding.** Either party may convert said award into a judgment pursuant to the revisions of Section 6200 and following of the Business and Professions Code and / or Section 1280 and following of the Code of Civil Procedure of the State of California.
- Non-Binding.** Pursuant to Section 6203(b) of the Business and Professions Code of the State of California, said award shall become binding within thirty (30) days of mailing of notice of this award unless within such time one of the parties hereto seeks judicial review by filing appropriate pleadings to such affect in any abated action or by commencing an action in a court having jurisdiction. **NOTE: FAILURE TO ACT WITHIN 30 DAYS OF MAILING OF NOTICE OF AWARD WILL CONVERT A NON-BINDING TO A BINDING AWARD.**

PAGE 4 - SIGNATURES - STEP # 10

AWARD (cont.)

Arbitrator Name (Print)	_____	
	Arbitrator Name (Signature)	Dated
Arbitrator Name (Print)	_____	
	Arbitrator Name (Signature)	Dated
Arbitrator Name (Print)	_____	
	Arbitrator Name (Signature)	Dated

The signature block for the arbitrators.

Arbitrator Name (Print)	_____	
	Arbitrator Name (Signature)	Dated
Arbitrator Name (Print)	_____	
	Arbitrator Name (Signature)	Dated
Arbitrator Name (Print)	_____	
	Arbitrator Name (Signature)	Dated

This form will automatically populate the names of the arbitrators based on information provided above.

Fill in the dates here.

*SAMPLE*

Moe Howard	_____	July 4, 2013
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated
Larry Fine	_____	July 4, 2013
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated
Curly Howard	_____	July 4, 2013
Arbitrator Name (Print)	Arbitrator Name (Signature)	Dated

STEP # 11

**REMINDER: The Findings and Award *must* be sent to the MFA program administering the arbitration. *Do not* send it directly to the parties. The MFA Program will serve a copy of this findings and award on the parties and a photocopy will be returned to the arbitrator(s). Thank you.**

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-2  
PALO ALTO, CA 94303-4739  
650-494-1335



NEWS RELEASE  
June 22, 2017  
*For Immediate Release*

Contact: Barbara Gaal  
Chief Deputy Counsel  
650-494-1335

## Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

### Request for Public Comment

The California Law Revision Commission seeks public comment on its tentative recommendation on the relationship between mediation confidentiality and attorney malpractice and other misconduct.

The Commission tentatively recommends the creation of a new exception to mediation confidentiality. The proposed new exception is designed to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims. The exception would be narrow, with limitations designed to help protect the confidentiality expectations of mediation participants.

Part I of the tentative recommendation summarizes the Commission's research for this study, including the extensive background work requested by the Legislature. Part II explains the Commission's preliminary conclusions, which are the basis for the proposed legislation presented in Part III of the report.

The tentative recommendation is lengthy (158 pp.), but most of it consists of the research findings (Part I). The explanation and presentation of the Commission's proposal (Parts II and III) are relatively short. See pp. 133-48.

The tentative recommendation is available from the California Law Revision Commission, 4000 Middlefield Road, Room D-2, Palo Alto, CA 94303-4739. The tentative recommendation is also available on the Commission's website at <[www.clrc.ca.gov/K402.html](http://www.clrc.ca.gov/K402.html)>.

Comments can be in any format. They can be emailed to <[bgaal@clrc.ca.gov](mailto:bgaal@clrc.ca.gov)> or mailed to the address shown above.

The Commission often substantially revises its recommendations as a result of public comment. To receive timely consideration, comments should be submitted by **September 1, 2017**.

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## SUMMARY OF TENTATIVE RECOMMENDATION

Mediation is a popular, widely-used dispute resolution technique, in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement. Many sources maintain that robust, uninhibited discussions are crucial to effective mediation.

To promote such discussions, existing law makes mediation communications and writings confidential and generally precludes the use or disclosure of a mediation communication or writing in a subsequent noncriminal case. This gives mediation participants some degree of assurance that what they say in a mediation will not later come back to hurt them.

Occasionally, however, a mediation participant alleges that the participant's attorney committed malpractice or engaged in other misconduct during a mediation. The law protecting mediation communications and writings might impede a court in evaluating such a claim and rendering a just decision.

By resolution (2012 Cal. Stat. res. ch. 108), the Legislature directed the Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct ...." The Legislature asked the Commission to address "the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation ...."

The Legislature also instructed the Commission to consider certain Evidence Code provisions and their predecessors, the availability and propriety of contractual waivers, the law in other jurisdictions (including the Uniform Mediation Act and other statutory acts), scholarly commentary, judicial decisions in California and elsewhere, and any data regarding the impact of differing confidentiality rules on the use of mediation. The Legislature authorized the Commission to "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."

Part I of this report summarizes the Commission's research for this study, including its work on the matters requested by the Legislature. Part II explains the Commission's preliminary conclusions, which are the basis for the proposed legislation presented in Part III of the report.

Based on its review of the relevant law, policy considerations, and empirical evidence, the Commission tentatively recommends the creation of a new exception to mediation confidentiality. The proposed new exception is designed to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

This recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

PART III. PROPOSED LEGISLATION

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

3 SEC. \_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

4 1120.5. (a) A communication or a writing that is made or prepared for the  
5 purpose of, or in the course of, or pursuant to, a mediation or a mediation  
6 consultation, is not made inadmissible, or protected from disclosure, by provisions  
7 of this chapter if all of the following requirements are satisfied:

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

11 (2) The evidence is sought or proffered in connection with, and is used pursuant  
12 to this section solely in resolving, one or more of the following:

13 (A) A disciplinary proceeding against the lawyer under the State Bar Act,  
14 Chapter 4 (commencing with Section 6000) of the Business and Professions Code,  
15 or a rule or regulation promulgated pursuant to the State Bar Act.

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

18 (C) A dispute between the lawyer and client concerning fees, costs, or both,  
19 including, but not limited to, a proceeding under Article 13 (commencing with  
20 Section 6200) of Chapter 4 of the Business and Professions Code.

21 (3) The evidence does not constitute or disclose a writing of the mediator  
22 relating to a mediation conducted by the mediator.

23 (b) If a mediation communication or writing satisfies the requirements of  
24 subdivision (a), only the portion of it necessary for the application of subdivision  
25 (a) may be admitted or disclosed. Admission or disclosure of evidence under  
26 subdivision (a) does not render the evidence, or any other mediation  
27 communication or writing, admissible or discoverable for any other purpose.

28 (c) In applying this section, a court may, but is not required to, use a sealing  
29 order, a protective order, a redaction requirement, an in camera hearing, or a  
30 similar judicial technique to prevent public disclosure of mediation evidence,  
31 consistent with the requirements of the First Amendment to the United States  
32 Constitution, Sections 2 and 3 of Article I of the California Constitution, Section  
33 124 of the Code of Civil Procedure, and other provisions of law.

34 (d) Upon filing a complaint or a cross-complaint that includes a cause of action  
35 for damages against a lawyer based on alleged malpractice in the context of a  
36 mediation or a mediation consultation, the plaintiff or cross-complainant shall  
37 serve the complaint or cross-complaint by mail, in compliance with Sections 1013  
38 and 1013a of the Code of Civil Procedure, on all of the mediation participants  
39 whose identities and addresses are reasonably ascertainable. This requirement is in

1 addition to, not in lieu of, other requirements relating to service of the complaint  
2 or cross-complaint.

3 (e) No mediator shall be competent to provide evidence pursuant to this section,  
4 through oral or written testimony, production of documents, or otherwise, as to  
5 any statement, conduct, decision, or ruling, occurring at or in conjunction with a  
6 mediation that the mediator conducted, except as to a statement or conduct that  
7 could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the  
8 subject of investigation by the State Bar or Commission on Judicial Performance,  
9 or (d) give rise to disqualification proceedings under paragraph (1) or (6) of  
10 subdivision (a) of Section 170.1 of the Code of Civil Procedure.

11 (f) Nothing in this section is intended to alter or affect Section 703.5.

12 (g) Nothing in this section is intended to affect the extent to which a mediator is,  
13 or is not, immune from liability under existing law.

14 **Comment.** Section 1120.5 is added to promote attorney accountability in the mediation  
15 context, while also enabling an attorney to defend against a baseless allegation of mediation  
16 misconduct. It creates an exception to the general rule that makes mediation communications and  
17 writings confidential and protects them from admissibility and disclosure in a noncriminal  
18 proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid  
19 unnecessary impingement on the policy interests served by mediation confidentiality.

20 Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a  
21 professional capacity. More precisely, the exception applies "when the merits of the claim will  
22 necessarily depend on proof that an attorney violated a professional obligation — that is, an  
23 obligation the attorney has *by virtue of* being an attorney — in the course of providing  
24 professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536  
25 (2015) (emphasis in original); see also *id.* at 1239. "Misconduct does not 'aris[e] in' the  
26 performance of professional services ... merely because it occurs during the period of legal  
27 representation or because the representation brought the parties together and thus provided the  
28 attorney the opportunity to engage in the misconduct." *Id.* at 1238. The exception applies only  
29 with respect to alleged misconduct of an attorney acting as an advocate, not with respect to  
30 alleged misconduct of an attorney-mediator.

31 Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a  
32 mediation or a mediation consultation. This would include misconduct that allegedly occurred at  
33 *any* stage of the mediation process (encompassing the full span of mediation activities, such as a  
34 mediation consultation, a face-to-face mediation session with the mediator and all parties present,  
35 a private caucus with or without the mediator, a mediation brief, a mediation-related phone call,  
36 or other mediation-related activity). The determinative factor is whether the misconduct allegedly  
37 occurred in a mediation context, not the time and date of the alleged misconduct.

38 Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of  
39 mediation evidence in specified circumstances to prove *or* disprove allegations against an  
40 attorney.

41 To be admissible or subject to disclosure under this section, however, mediation evidence must  
42 be relevant and must satisfy the other stated requirements. To safeguard the interests underlying  
43 mediation confidentiality, that is a stricter standard than the one governing a routine discovery  
44 request. *Cf.* Code Civ. Proc. § 2017.010 ("Unless otherwise limited by order of the court in  
45 accordance with this title, any party may obtain discovery regarding any matter, not privileged,  
46 that is relevant to the subject matter involved in the pending action or to the determination of any  
47 motion made in that action, if the matter either is itself admissible in evidence *or appears*  
48 *reasonably calculated to lead to the discovery of admissible evidence.*" (emphasis added).)

49 Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies: