

Draft Letter to California Law Revision Commission on Mediation Confidentiality and Attorney Malpractice

VIA EMAIL ONLY-bgaal@clrc.ca.gov

Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission

Dear Ms. Gaal:

As members of the State Bar Committee on Mandatory Fee Arbitration, we respond to the request in the Commission's Memorandum 2016-58. In the Memorandum at page 25, the Staff requested comments on whether the exception to mediation confidentiality in the draft legislation (proposed Evidence Code Section 1120.5) should apply to attorney-client fee disputes.

Our Committee was established in 1984 and oversees 29 approved local bar association programs and the State Bar's program. The Committee ensures that all programs follow the *Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs* adopted by the State Bar Board of Trustees. The Committee also has the responsibility for training volunteer attorneys and laypersons throughout the State to serve as arbitrators in mandatory fee arbitrations; drafts and publishes Arbitration Advisories on the State Bar website to educate arbitrators and programs on mandatory fee arbitration rules; and reviews statutes and case law concerning issues relating to mandatory fee arbitrations. Members of the Committee have served as voluntary arbitrators in countless mandatory fee arbitrations throughout the years.

If the Commission decides to recommend to the legislature that an exception to mediation confidentiality be created, our Committee believes the exception should apply to disputes between an attorney and client concerning fees, costs, or both, including proceedings under the State Bar Act, Chapter 4, Article 13-Arbitration of Attorneys fees as set forth in Business and Professions Code Sections 6200-6206.

On page 18 of the Commission's Memorandum 2016-58, this issue was framed as follows: "Whether the exception should apply in a dispute relating to an attorney-client fee agreement, not just in a State Bar disciplinary proceeding and a legal malpractice case." In reviewing Memorandum 2016-58, it appears the Commission intends to only apply the proposed exception in a legal malpractice case or in a State Bar disciplinary proceeding. (Memorandum, p. 19, 24-25)

The draft minutes of the Commission's December 1, 2016 meeting also state: "Proposed Evidence Code Section 1120.5(a)(2) in the Discussion Draft is satisfactory. No revisions of it are needed to address attorney-client fee disputes." The Commission's conclusion appears to be based, at least in part, on *Lee v. Hanley*, 61 Cal. 4th 1225 (2015), and the concept that "*some but not all attorney-client fee disputes are legal malpractice claims*, at least within the meaning of the provision commonly referred to as the statute of limitations for legal malpractice." (Memorandum 2016-58, page 24, emphasis in original.)

The question of whether an attorney-client fee dispute (by itself) is also a legal malpractice claim is separate from the question of evidence that is admissible in the attorney-client fee dispute. If the proposed exception to mediation confidentiality is created, we believe the exception should apply to disputes between an attorney and client concerning fees, costs, or both ("attorney-client fee disputes"). These proceedings – even though they are not by themselves legal malpractice cases or disciplinary proceedings – can involve claims of legal malpractice or professional misconduct that take place in the context of a mediation or mediation consultation. Moreover, under Business & Professions Code Section 6203(a), which is part of the Mandatory Fee Arbitration Act: "Evidence relating to claims of malpractice and professional misconduct, shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim."

Based on this statute, the fee arbitrator may decide the value of the attorneys services were lessened and can reduce the claimed fees, costs or both, based upon evidence of malpractice or professional misconduct presented in the fee arbitration and in no other proceeding. In fact, under Business & Professions Code Section 6201(d)(2), a client's right to request or maintain arbitration under the Mandatory Fee Arbitration Act is waived if the client commences an action seeking "[a]ffirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct."

In the committee's experience with attorney-client fee disputes, arbitrators have been presented with cases involving allegations of legal malpractice or professional misconduct occurring in mediations. For example, there can be claims the attorney made a legally significant error when the attorney induced the client to settle for a lower amount, the attorney agreed to modify the written fee agreement and lower the fee and then reneged, the attorney agreed to resolve liens in the case and then failed to settle with the lienholder, the attorney agreed to absorb all the costs incurred and then required the client to pay all costs out of his or her share of the settlement, or the attorney failed to explain the tax ramifications of the proposed settlement. Under existing law, in these and similar cases, the arbitrator is not able to consider evidence concerning communications made in preparation for or in the course of a mediation or mediation consultation in order to making findings and the award.

As required under proposed Evidence Code Section 1120.5(a)(1), this evidence would be "relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation." If attorney-client fee disputes are not included in the proposed legislation, an anomalous situation would be created whereby evidence would be admissible in a legal malpractice case or a State Bar disciplinary proceeding, but the *identical* evidence would not be admissible in the context of an attorney-client fee dispute, notwithstanding Business & Professions Code Section 6203(a). We believe there is no sound basis for drawing that distinction. Therefore, if an exception to mediation confidentiality is to be created, we propose the draft legislation include attorney-client fee disputes as a third category in which the exception would apply. The language we propose is set forth below in paragraph (C).

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

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

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

ADD paragraph (C)

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

We thank you for the opportunity to provide these comments and hope they will benefit the Commissions' study.

Disclaimer

This position is only that of the State Bar of California's Standing Committee on Mandatory Fee Arbitration. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Sincerely yours,

For the Committee on Mandatory Fee Arbitration
Lorraine M. Walsh, Vice-Chair