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ARBITRATION ADVISORY

2019-0XA (replacing 1993-01)

AWARDS OF INTEREST BY THE ARBITRATOR

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INTRODUCTION

This is intended to summarize existing law and to provide guidance on the awarding of interest as part of the fee arbitration award (the "Award"), including when interest may be awarded.

ANALYSIS

1. May interest be awarded as part of the Award? Yes.

Business & Professions Code ("B&PC") sections 6200-6206 provide for the arbitration of fee disputes between attorneys and their clients. Attorneys are required to arbitrate fee disputes when timely requested by the client [B&PC §6200(c)]. The arbitrator(s) may resolve all disputes concerning fees, costs or both.

The fee arbitration statutes do not mention an award of interest. However, they likewise do not preclude an award of interest. The statutes specify circumstances when fee arbitration is not available (for instance, when fees are awarded pursuant to statute or court order - B&PC section 6200(b)(3)) and preclude the recovery of certain types of damages (for instance, attorneys' fees cannot be awarded to either party - B&PC §6203(a)).

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . ." [Civil Code § 3287(a)] "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, *with interest thereon*." [Civil Code § 3302] (Italics added.).

An attorney may ethically charge interest and impose late charges on past-due fees and costs., [Cal. State Bar Form.Opn. 1980-53; ABA Form.Opn. 388 (1974); Los Angeles Bar Ass'n

Form.Opns. 370 (1978) & 374 (1978) & 499 (1999) (interest on costs); Bar Ass'n of San Francisco Form.Opn. 1970-1; San Diego Bar Ass'n Form.Opn. 1983-1; Rest.3d Law Governing Lawyers § 38, Comment “h”]

2. May interest be awarded regardless of the existence of a written contract?

The client’s right to recover interest for breach of contract is not predicated on the existence of a written contract. When there is no written agreement, interest shall only be awarded to the client when the principal amount is readily ascertainable within the meaning of Civil Code Section 3287 [*Macomber v. State of California* (1967) 250 Cal.App.2d 391, 400]. As long as the principal amount owing can be calculated from statements rendered by the attorney, interest should be awarded [*Macomber v. State of California, supra*, at 401].

The same is true even if the client disputes the fees. As long as there is a statutorily complying written contract providing for the attorney to recover pre-award interest, and the bills are reasonably accurate in compliance with B&PC section 6148(b), and are sufficient to apprise the client of the amount the attorney seeks to recover, then the damages are readily ascertainable [*Marine Terminals Corp. v. Paceco, Inc.* (1983) 145 Cal.App.3d 991, 998], and then the attorney may recover pre-award interest.

Where the proceeding is a “reasonable fee” analysis, almost always the amount owing is not and cannot be ascertainable until the arbitrator(s) determine the reasonable value of the attorney’s services. Similarly, where the arbitrator(s) may make any significant reduction in the amount the attorney claims is owing, the value of the final fee is only ascertained after the outcome of the hearing is known. In these situations, no pre-award interest may be included in the award to either party because the amount owing only will become “ascertainable” when the award is issued. (Civil Code § 3287 (a).)

3. What rate of pre-award interest should be used and how should it be calculated?

When there is no written agreement which specifies a statutory rate of interest, the arbitrators shall award simple interest at the rate of 10% per annum on the amount of the award (or the then applicable statutory rate if different) from the date of breach [CCP § 3289(b)].

When there is a written agreement that specifies the rate of interest, then the rate set forth in the contract shall apply [Civil Code § 3289(a)]. However, the rate of interest charged or late penalty imposed must not be illegal or amount to an “unconscionable” fee. [See, CRPC 4-200(A). As of November 1, 2018, the new rule is CRP 1.5]

Pre-award interest should be awarded from the date of breach through the date of the Award [CCP § 3289]. The date of breach is a question of fact primarily based on when the obligation was due. Frequently, the written fee agreement will provide when the obligation is due or on what date a breach is deemed to occur.

In calculating interest, the better practice is that the obligation shall bear simple interest only.

Another relevant area of inquiry is when the bills are presented to the client. For instance, if the engagement letter provides for interest from the date of the bills, but the attorney's office practice is to send the bills to the client on some later date, then the calculation cannot begin until the later date. Additionally, the burden is on the attorney to establish the relevant dates for this calculation.

To calculate pre-award interest, simply use the following formula:

$$(\text{Amount of Award}) \times (\text{Applicable Interest Rate}) \div (365) \times (\text{Number of Days elapsed between the Date of Breach and the date the Award is signed}).$$

Example 1: Assume that the facts in a fee dispute demonstrate that a client failed to timely pay \$5,000 (Amount of Award) since March 1 (Date of Breach) and that the valid and enforceable fee agreement states that any unpaid balance shall accrue 5% simple interest (Applicable Interest Rate). Further assume that the arbitration award is to be signed on December 1 of the same year (Date of Award). From the forgoing facts, the equation would look like this.

$$\$5,000 (\text{The amount of the Award}) \times .05 (\text{number value of } 5\%) \div 365 (\text{days in a year}) \times 275 (\text{the number of days elapsed between the date of breach on March 1 and the date the award is signed on December 1}) = \$188.36 (\text{Amount of Pre-Award Interest}).$$

Example 2: Assume that the facts of a fee dispute demonstrate that the client is entitled to pre-award interest for some amount wrongfully withheld by the attorney. For example, assume that in a personal injury case, the gross contingency fee agreement states that the attorney shall be paid 30% of any settlement obtained before trial, or 40% of any settlement or judgment obtained after trial actually starts. Now assume that the case settles two months before the first trial date for \$100,000 and that on March 1, 2016 the attorney declares that notwithstanding the terms of the fee agreement, he is entitled to a \$40,000 fee, and deposits the disputed \$10,000.00 in his trust account pending resolution of the client's fee dispute. Assume further, that the facts of the resulting arbitration demonstrate that the attorney wrongfully withheld the \$10,000.00 (Amount of Award) since March 1, 2016 (Date of Breach). Also assume that the applicable legal interest rate on the date of the breach was 10% (*See* Civil Code §3289(b) (Applicable Interest Rate). Lastly, assume that the arbitration award is to be signed on June 1, 2017 (Date of Award). From the forgoing facts, the equation would look like this.

$$\$10,000 (\text{The amount of the Award}) \times .10 (\text{number value of } 10\%) \div 365 (\text{days in a year}) \times 457 (\text{the number of days elapsed between the date of breach on March 1, 2016 and the date the award is signed on June 1, 2017}) = \$1,252.05 (\text{Amount of Pre-Award Interest}).$$

4. Post Award Interest

Unlike the foregoing considerations regarding pre-award interest, an award of post-award interest is required on all awards, in the amount of the statutory rate of interest on all judgments and which will commence accruing from the 30th day after service of the award. The requirement to award post-award interest in all cases serves two important purposes. First, it represents fair

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128 compensation to the prevailing party for the failure of the other party to pay the award promptly.
129 Second, where the award requires the attorney to make a refund of some or all of the fee already
130 paid, the award of post-award interest provides a valuable tool to the State Bar and the client when
131 enforcement procedures become appropriate under B&P Code section 6203(d). (Code of Civil
132 Procedure § 685.010, Minimum Standard 16.)
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CONCLUSION

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136 In any civil action based on a contract (express or implied) the prevailing party is generally
137 entitled to recover interest from the date the underlying debt became due until either entry of
138 judgment or the date paid. Nothing in the fee arbitration statutes limit the awarding of interest.
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141 Therefore, the arbitrator(s) may award interest from the date of breach through the date of the
142 Award in all cases to the client and in some cases to the attorney, provided all the foregoing elements
143 are present. Unless the written agreement provides for compounding of interest, the obligation
144 should only bear simple interest. The interest rate should be 10% (or the then applicable statutory
145 rate) unless there is a written agreement which provides otherwise and, in such circumstance, the
146 written contract rate should apply, unless the interest charged is illegal or unconscionable.
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