

**ARBITRATION ADVISORY 2020-0XA (replacing 1993-01)****AWARDS OF INTEREST BY THE ARBITRATOR****INTRODUCTION**

Points of view or opinions expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not been adopted or endorsed by the State Bar's Board of Trustees and do not constitute the official position or policy of the State Bar of California.

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 [pre-award] 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)). Accordingly, the availability of interest in arbitration is governed by the same legal principles that govern the award of interest in a court proceeding.

The basic standards governing the availability of pre-judgment interest are as follows. "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.).

While a client may obtain pre-award interest whenever it meets the statutory standard, an attorney may not ethically charge interest or impose late charges on past-due fees and costs unless the client has given its informed consent to the charging of interest and to the rate of interest to be charged. [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 Informal.Opn. 1970-1; San Diego Bar Ass'n Form.Opn. 1983-1;]

Normally, that consent will be given in the fee agreement or an amendment thereto. [Note, the Restatement does not condition the right to recover on the client's informed consent.]

## 2. May pre-award 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. Accordingly, even in the absence of a written agreement providing for pre-award interest, the client may recover interest whenever the principal amount owed to the client is readily ascertainable—that is, “certain, or capable of being made certain by calculation” within the meaning of Civil Code Section 3287 [*Collins v. City of Los Angeles* (2012) 205 Cal. App. 4<sup>th</sup> 140, 150-151; *Macomber v. State of California* (1967) 250 Cal.App.2d 391, 400]. This test “is not an easy one to apply.” [*Marine Terminals Corp. v. Paceco, Inc.* (1983) 145 Cal.App.3d 991, 995]. The basic rule though, is that if principal amount owed to the client can be calculated from the terms of the contract itself for from other evidence, such as invoices or statements rendered by the attorney, and does not depend on the resolution of factual disputes concerning the amount owed, interest should be awarded. [*Collins v. City of Los Angeles, supra*, at 150-151; *Macomber v. State of California, supra*, at 401].

The lawyer's right to recover pre-award interest, in contrast, does depend on there being a statutorily complying written contract providing for the attorney to recover pre-award interest and specifying the rate. If a lawyer satisfies the requirement that the attorney has a contract with the client which provides for pre-award interest, then the lawyer may recover pre-award interest even though the client disputes liability, so long as the amount sought by the attorney (whether reflected in the terms of the contract or the lawyer's bills or otherwise) are sufficient to render the amount sought reasonably certain and capable of calculation. [*Collins v. City of Los Angeles, supra*, at 150-151 (Damages are certain or capable of being made certain by calculation, or ascertainable, for purposes of Civil Code Section 3287 if the defendant actually knows the amount of damages or could calculate that amount from information reasonably available to the defendant).]. [QUESTION: what if a portion of the fee is disputed and another portion is not. Interest is due on the undisputed portion, no? Should this advisory say that?]

In contrast, where the amount of damages is unliquidated, disputed, and depends on the fact-finders' resolution of conflicting evidence, pre-award interest is not available. Thus, where the lawyer's or client's right to recover is based upon the outcome of 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 client presents evidence supporting 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)]. [Query: can the lawyer recover a 10% rate without an agreement that specifies the rate of interest to be charged or is it enough for the contract to say that the Attorney shall be entitled to prejudgment/pre-award interest in accord with applicable law?]

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); see also Formal Opinion 1980-53, supra. 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. The date of breach may also vary depending on when the bills are presented to the client. For instance, if the engagement letter provides for interest from the date of the invoice, but the attorney’s practice is to send the invoice 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. In calculating interest, the obligation should bear simple interest unless the parties have agreed that interest should be compound.

To calculate pre-award interest on an award bearing simple 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 foregoing 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

## CLEAN

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.

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

### 4. Post Award Interest

Unlike the foregoing considerations regarding pre-award interest, an award of post-award simple interest is required on all awards, in the amount of the statutory rate of interest on all judgments which commences accruing from the 30<sup>th</sup> day after service of the award. The requirement to award post-award interest in all cases serves two important purposes. First, it represents fair compensation to the prevailing party for the failure of the other party to pay the award promptly. Second, where the award requires the attorney to make a refund of some or all of the fee already paid, the award of post-award interest provides a valuable tool to the State Bar and the client when enforcement procedures become appropriate under B&P Code section 6203(d). (Code of Civil Procedure § 685.010, Minimum Standard 16.)

## CONCLUSION

Consistent with California law, the arbitrator(s) may award clients pre-award interest from the date of breach through the date of the Award in all cases in cases where damages are readily ascertainable. An award of pre-award interest to the attorney requires both that the attorney meet the statutory standard and that the attorney prove a contract in which the client has consented to the charging of interest and the rate to be charged. When the determination of the principal amount owed requires the resolution of disputed issues of fact, then interest is unavailable on the disputed portion of the principal, [but the lawyer or client may recover interest on any undisputed portion.] Unless the written agreement provides for compounding of interest, the obligation should only bear simple interest. The interest rate should be 10% (or the then applicable statutory rate) unless there is a written agreement which provides otherwise and, in such circumstance, the written contract rate should apply, unless the interest charged is illegal or unconscionable. Both lawyer and client are entitled to statutory post award interest on the amount of any award in their favor.

## Main document changes and comments

**Page 1: Comment [SSO1]** Sall Spencer Office 2/13/2020 2:31:00 PM

LACBA 370 implies this, “client consent to the interest charge should be obtained”. I think this implies not just the concept of interest, but the specific rate. San Diego 1983-1 refers to the client’s informed consent to “the charge” which I think would require consent to the actual rate in order to be informed consent. So I am comfortable with stating that the rate must be agreed, too (as SB inquired).

**Page 2: Comment [SSO2]** Sall Spencer Office 2/13/2020 4:34:00 PM

I suggest we remove the reference to the restatement. SB is correct, and the restatement is not very insightful, it says that in the absence of contract, the attorney’s entitlement to interest is determined by other law. I’m not sure that advances the ball much.

**Page 2: Comment [KEB3]** Kenneth E. Bacon 2/13/2020 4:55:00 PM

Why not cite COPRAC ethics opinion 1980-53 here?

Also cite Parker v. Maier Brewing Co. (1960) 180 Cal.App.2d 630, 634-635 [Where there is no express contract and the action is in quantum meruit to recover the reasonable value of services rendered, prejudgment interest is not recoverable]

**Page 2: Comment [KEB4]** Kenneth E. Bacon 2/13/2020 4:59:00 PM

I agree with Brandon’s comment, plus I think this is too much in the weeds for an arbitration advisory

**Page 2: Comment [SSO5]** Sall Spencer Office 2/13/2020 3:14:00 PM

This is a complex question for which I have not yet found any authority on point. Perhaps we should discuss as a committee.

**Page 2: Comment [SSO6]** Sall Spencer Office 2/13/2020 3:41:00 PM

While conceptually intriguing, I am hesitant to go down this road in an arb advisory. First, I think it is an unclear question of substantive law (at least unclear to me), and second, I am concerned about how it would be applied in MFA. For example, if an attorney bills monthly, but the client only disputes certain billings – and the client prevails – may the attorney obtain pre award interests as to each undisputed monthly bill, but not as to the months which were reduced? See: A legal dispute concerning the defendant's liability or the proper measure of damages, however, does not render damages unascertainable. (Olson v. Cory, supra, 35 Cal.3d at p. 402, 197 Cal.Rptr. 843, 673 P.2d 720; Uzyel, supra, 188 Cal.App.4th at p. 919, 116 Cal.Rptr.3d 244.)

**Page 3: Comment [SSO7]** Sall Spencer Office 2/13/2020 3:35:00 PM

Here too, I have found no authority yet on point. My sense is that specifying a rate, or stating “the legal rate” is required. What do others think?

**Page 3: Comment [KEB8]** Kenneth E. Bacon 2/13/2020 5:02:00 PM

I’m not aware of authority on point, but I think the answer is no. First, without specifying a rate, it would be ambiguous and that would be construed against the attorney. Also, it may not comply with B&P 6148 or 6147. Per COPRAC Opinion 1980-53 and San Diego Opinion 1983-1, the client’s consent to being charged interest must be informed, and I fail to see how that would be informed if the rate is not specified.

**Page 4: Comment [KEB9]** Kenneth E. Bacon 2/13/2020 5:18:00 PM

The original advisory 1993-01 had a section here entitled “What happens in circumstances where there is a written fee agreement which provides for interest at a rate other than 10% per annum.” I’m not sure where along this process that got removed, but it seems like something which should be included unless we are of the opinion that interest in excess of 10% is per se improper or unconscionable.

**Page 4: Comment [KEB10]** Kenneth E. Bacon 2/13/2020 5:20:00 PM

The original advisory cited State of California v. Day (1946) 76 Cal.App.2d 536, 544, for the general rule that interest may not be computed on accrued interest (i.e., compounded) unless by special statutory provision or by stipulation of the parties.

Page 4: Comment [SSO11]	Sall Spencer Office	2/13/2020 3:36:00 PM
-------------------------	---------------------	----------------------

Not sure whether to include this.

Page 4: Comment [KEB12]	Kenneth E. Bacon	2/13/2020 5:16:00 PM
-------------------------	------------------	----------------------

I don't know that this is a correct statement of the law. We need to either confirm this is proper or remove this from advisory.