



# The State Bar of California

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**OPEN SESSION  
AGENDA ITEM  
MAY 2021  
REGULATION AND DISCIPLINE COMMITTEE III.B**

**DATE:** May 13, 2021

**TO:** Members, Regulation and Discipline Committee

**FROM:** Andrew Tuft, Supervising Attorney, Office of Professional Competence

**SUBJECT:** Arbitration Advisory 2021-01: Request for Approval for Publication

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## **EXECUTIVE SUMMARY**

This agenda item seeks Board Committee on Regulation and Discipline (RAD) approval for the publication of proposed Arbitration Advisory Opinion 2021-01 developed by the Committee on Professional Responsibility and Conduct (COPRAC).

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## **BACKGROUND**

Pursuant to the recommendation of the 2017 Task Force on Governance in the Public Interest and the Board of Trustees' Appendix I review, the Board of Trustees retired the Committee on Mandatory Fee Arbitration and transferred the function of drafting arbitration advisories to COPRAC.<sup>1</sup> The purpose of an arbitration advisory is to provide guidance to arbitrators regarding disputes or issues that may arise in connection with mandatory fee arbitrations. The Board's resolution that transferred the responsibility for drafting arbitration advisories to COPRAC adopted the task force's report and recommendation that would "allow arbitration advisories to be developed and disseminated using the State Bar's process for disseminating ethics opinions."<sup>2</sup>

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<sup>1</sup> Board of Trustees' resolution, September 2018.

<sup>2</sup> *Id.* COPRAC's process for developing and disseminating ethics opinions is governed by Board resolutions. These resolutions are collected in a committee manual titled "Guidelines for Committee Operations."

In addition to drafting arbitration advisories, COPRAC is charged with developing the State Bar's nonbinding, advisory ethics opinions.<sup>3</sup> Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure, which provides that once COPRAC has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the subsequent RAD meeting for decision.<sup>4</sup>

## **DISCUSSION**

This agenda item requests approval for the publication of proposed Arbitration Advisory 2021-01. Prior to being finalized for publication, while the opinion was still in development and out for public comment, it was designated as proposed Arbitration Advisory Interim No. 2020-0XB.

Proposed Arbitration Advisory Interim No. 2021-01 addresses issues related to disputes concerning an attorney's charges for costs and expenses. The amended advisory was drafted by COPRAC, and at its meeting on October 23, 2020, in accordance with COPRAC's procedures, the committee approved the opinion for a 90-day public comment circulation.<sup>5</sup>

The full text of the proposed advisory is provided as Attachment A. The advisory summarizes existing law to provide guidance to Mandatory Fee Arbitration arbitrators on disputes over costs and expenses that may arise occasionally in connection with MFA arbitrations.

## **PUBLIC COMMENT**

Three individuals submitted public comments. These comments are provided as Attachment B.

Carol Langford submitted two separate comments each raising a similar concern. Ms. Langford does not believe the arbitration advisory should permit an attorney to charge for overhead or administrative expenses, even when conditioned upon disclosure and client consent. COPRAC believes that the arbitration advisory accurately reflects current authorities on this topic, which find that in the absence of a contrary disclosure to the client in advance of the engagement, a lawyer's overhead expenses are included in the lawyer's fee and may not be charged to the

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<sup>3</sup> The nonbinding nature of an ethics opinion is stated in every published opinion as each one includes the following statement: "This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although nonbinding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility (See, e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

Each published arbitration advisory will include the following statement, which is similar: "This arbitration advisory is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar."

<sup>4</sup> See Board Resolutions, July 1979, December 2004, and November 2016.

<sup>5</sup> See Board Resolution, December 2004.

client as an additional cost. (See, ABA Form. Opn. 93-379; San Diego County Bar Assoc. Ethics Opn. No. 2013-3; *Rest.3d Law Governing Lawyers* § 38(3)(a); and *Tuft et al.*, Cal. Practice Guide: Professional Responsibility (The Rutter Group 2017) Ch. 5-E, § 5:550. When read in its entirety, COPRAC believes that the arbitration advisory makes clear that such costs “should be examined for necessity, reasonableness, disclosure, method of calculation, and the reasonable expectations of the client.” However, COPRAC has revised the section of the advisory identified by Ms. Langford. The section now emphasizes that although an attorney may recover expenses for items traditionally viewed as overhead when they are clearly disclosed in the fee agreement and agreed to by the client, such expenses must be reasonable under the circumstances.

Robert Burns submitted a comment in which he raised some of the following. First, he recommended that the secretarial and staff paragraph be “further parsed to reflect whether merely regular in type (which might be hired ad hoc for a client) or regularly a part of general overhead.” Second, Mr. Burns observed that the messenger services paragraph states “such charges may not be reasonable where the need for such delivery services arises from the attorney’s procrastination or inattention,” and he requests such a limitation be placed in other sections of the advisory. Finally, he recommended a legislative change to require either mandatory disclosures to clients about the potential for large expert witness fees or a cap on such fees. COPRAC has not made any revisions in response to these observations. First, the committee decided to maintain the arbitration advisory’s focus on when existing secretarial or staff overtime may be charged to the client as a cost. Whether and how an attorney may hire extra staff or secretarial assistance, when necessary for a particular client, is a separate issue that this arbitration advisory does not address. Second, the law in this area frequently employs a reasonableness standard—and the statement that charging a cost necessary to make up for, or correct, an attorney’s procrastination or inattention—is just one example of unreasonableness. This example is not intended as a necessary requirement for a finding of unreasonableness in any particular section of the arbitration advisory; adding continual references to the same example was deemed unnecessary. Finally, no revision to the arbitration advisory was made in response to the suggestion that a legislative change in this area should be undertaken as this was outside the scope of COPRAC’s work.

Raymond Ryan submitted a comment expressing concern that the “opinion” does not offer clarification of the issues raised by the topic of overhead as a billable cost. He cites, as reference for a discussion of whether an attorney may charge a client for certain costs, to San Diego County Bar Association Ethics Committee Formal Opn. No. 2013-3. COPRAC agrees that the San Diego County Bar Association opinion provides helpful guidance and analysis concerning this topic. The arbitration advisory cites to that opinion numerous times and incorporates concepts from it. COPRAC noted that this is an arbitration advisory, not an ethics opinion, and the two authorities serve different functions. As noted above, the purpose of an arbitration advisory is to summarize existing law and provide guidance to arbitrators concerning what they may consider when clients dispute their attorney’s charges for costs and expenses. COPRAC did not make any revisions in response to Mr. Ryan’s comment because they believe the advisory accurately reflects current law and provides an appropriate framework for arbitrators to address the issues presented.

At its meeting on February 26, 2021, following consideration of all the public comment received, COPRAC approved the arbitration advisory for submission to RAD for formal publication. The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approves the publication of Arbitration Advisory 2021-01.

### **FISCAL/PERSONNEL IMPACT**

None

### **AMENDMENTS TO RULES OF THE STATE BAR**

None

### **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

### **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: None

### **RECOMMENDATIONS**

**Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Regulation and Discipline Committee; following publication for public comment and consideration of the comments received, and upon the recommendation of the State Bar Standing Committee on Professional Responsibility and Conduct, approves the publication of Arbitration Advisory 2021-01, attached hereto as Attachment A.

### **ATTACHMENT(S) LIST**

- A.** Arbitration Advisory 2021-01
- B.** Full Text of Public Comments

**THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT**

**ARBITRATION ADVISORY 2021-01**

**INTRODUCTION**

California Business and Professions Code sections 6200-6206 confers jurisdiction upon Mandatory Fee Arbitration (MFA) arbitrators to consider and make awards concerning disputes over fees, costs, or both, that are charged to a client in connection with professional services rendered by an attorney. The purpose of an arbitration advisory is to provide guidance to MFA arbitrators regarding disputes or issues that may arise in connection with MFA arbitrations.

This arbitration advisory is intended to summarize existing law and to provide guidance to Mandatory Fee Arbitration arbitrators on disputes over costs and expenses that may arise from time to time in connection with MFA arbitrations.

**DISCUSSION**

**A. Key Authorities**

The following California statutes, rules, and ethics opinions provide guidance regarding the obligations and duties of an attorney to a client regarding billing for costs and expenses during the course of the representation:

California Rule of Professional Conduct 1.5

Business and Professions Code section 6148 (billing for costs in hourly fee cases)

Business and Professions Code section 6147 (billing for costs in contingency cases)

San Diego County Bar Association Legal Ethics Opinion 2013-3

Los Angeles County Bar Association Formal Ethics Opinion 391

In addition, non-California ethics opinions that are cited below can provide secondary guidance but are not binding authority upon California practitioners. ABA Formal Opinion No. 93-379 (1993) Billing for Professional Fees, Disbursements and Other Expenses provides a detailed discussion on costs which can be billed to a client and the difference between costs and attorney overhead expenses. The ABA's opinion was endorsed by the State Bar Court in *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838.

## **B. General Considerations:**

### **1. Contractual Interpretation**

The right of an attorney to charge a client for costs and expenses generally is a matter of contract, express or implied. Consequently, the arbitrator should first look to the written fee agreement, if one exists, to determine the parties' agreement concerning costs and expenses. The initial agreement is generally considered an arm's-length transaction, where the presumption of overreaching does not apply. See, generally, *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]; *Baron v. Mare* (1975) 47 Cal.App.3d 304 [120 Cal.Rptr. 675].

Provisions governing the lawyer's right to charge and collect for fees, costs, and expenses are evaluated based upon conditions foreseeable at the time they are made, must be explained fully to the client at the outset and must be fair and reasonable. See, generally, *Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033 [252 Cal.Rptr. 845]; *In re County of Orange* (C.D.Cal. 1999) 241 B.R. 212, 221 [4 Cal. Bankr. Ct. Rep. 117]. As the State Bar Court has explained:

Generally, an engagement agreement between a client and an attorney is construed as a reasonable client would construe it. (*Rest.3d Law Governing Lawyers* § 38, com. (d); see also *Lane v. Wilkins* (1964) 229 Cal.App.2d 315, 323 [40 Cal.Rptr. 309] [in construing contracts between attorneys and clients concerning compensation, construction should be adopted that is most favorable to the client as to the intent of the parties].) Moreover, "it is well established that any ambiguities in attorney-client fee agreements are construed in the client's favor and against the attorney." (*In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668, 676; see also *S.E.C. v. Interlink Data Network of Los Angeles, Inc.* (9th Cir. 1996) 77 F.3d 1201, 1205.)

*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944; see also *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569 [1 Cal.Rptr.2d 531]. *In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668.

Initial disclosure of the basis for charges for costs and expenses, in addition to how fees are to be calculated, fosters communication that will promote the attorney-client relationship. The relationship similarly will be benefitted if the billing statements for services explicitly reflect the basis for the charges so that the client understands how the fee bill was determined. (ABA Formal Opinion No. 93-379 (1993); see also, Bus. & Prof. Code, §§ 6147(a)(2) and 6148(b).)

Even in the absence of a specific agreement as to costs and expenses in the fee agreement, or a formal written fee agreement, the attorney has the implied authority to charge for costs and expenses that are necessary, reasonable, and fair. See, Civil Code section 2319 ["An agent has authority . . . to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of the agency."]. Thus, absent specific client instructions not to incur a particular cost or expense, the arbitrator's review will be only as to the necessity, reasonableness and fairness, or the possible unconscionability of the disputed cost or expense item.

## **2. Statutory Requirements**

Agreements to charge fees and costs in a non-contingent fee matter must comply with Business and Professions Code section 6148. Subsection (b) sets forth statutory requirements for what must be included in a bill and provides that the cost and expense portion of the bill “shall clearly identify the costs and expenses incurred and the amount of the costs and expenses.”

Agreements in contingent fee cases are governed by Business and Professions Code section 6147. Subsection (a)(2) provides that the agreement shall include: “A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client’s recovery.”

Business and Professions Code sections 6147(b) and 6148(c) provide that the failure of the lawyer’s bills to clearly identify the costs and expenses incurred may also render the fee agreement voidable at the option of the client.

## **3. Other General Considerations**

It generally is held that in the absence of agreement to the contrary, an attorney may not charge a client for normal overhead expenses associated with properly maintaining, staffing and equipping an office, including the expense of maintaining a library (*Rest.3d Law Governing Lawyers* § 38(3)(a); ABA Formal Opinion No. 93-379 (1993); San Diego County Bar Association Ethics Opinion No. 2013-3, at pp. 3-5.) The reasoning is that when a client has engaged an attorney to provide professional services for a fee (whether calculated on the basis of the number of hours expended, a flat fee, a contingent percentage of the amount recovered or otherwise) the reasonable expectation of the client would be that charges for general office overhead are included in the attorney’s fee. Thus, in the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the attorney’s overhead costs in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the attorney is making for professional services. (San Diego County Bar Association Ethics Opinion No. 2013-3, at p. 4; ABA Formal Opinion No. 93-379 (1993); see, also, *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 [endorsing ABA Formal Opinion No. 93-379; *In re Tom Carter Enterprises, Inc.* (C.D.Cal. 1985) 55 B.R. 548.) Thus, with respect to items traditionally viewed as overhead, unless the agreement is clear that such expenses will be charged, and only when reasonable under the circumstances, the attorney should not be able to recover them. (San Diego County Bar Association Ethics Opinion No. 2013-3 at p. 5; *Rest.3d Law Governing Lawyers* § 38(3)(a).)

On the other hand, “the attorney may recoup costs and expenses reasonably incurred in connection with the client’s matter for services performed in house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services so long as the charge reasonably reflects the lawyer’s actual cost for the services rendered.” (San Diego County Bar Association Ethics Opinion No. 2013-3, at p. 5 (citing ABA Formal Opinion No. 93-179).) As discussed more particularly below, recoverable in-house

costs and expenses include items such as photocopying, postage and messenger costs, long-distance phone charges, travel and parking, computer research charges. Even when the agreement does clearly encompass such expenses, they remain subject to scrutiny for necessity, reasonableness and fairness, whether they are billed periodically to the client or charged against the client's recovery under a contingent fee contract. See, generally, Tuft et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2017) Ch. 5-E, § 5:550-5:552 [citing several opinions on this topic].

When charging for costs and expenses, the charges must reasonably reflect the attorney's actual cost for the services rendered or billed. The attorney may not add a profit element or mark-up on top of such actual cost, except where the client gives informed written consent to such profit element. ABA Formal Opinion No. 93-379 (1993). See also *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838; and the San Diego County Bar Association Ethics Opinion No. 2013-3, at pp. 5-6.

### **C. Charges for Specific Costs and Expenses**

**Percentage of Fees Administrative Charges:** One way some attorneys have sought to recoup costs incurred in the representation of a client without providing an itemized billing for costs is to charge the client an additional percentage amount, above the agreed upon fee, to reflect such costs. There is no direct California authority regarding the propriety of charging an administrative fee in lieu of itemized billing of in-house expenses. In *Kroff*, the State Bar Court noted that whether lawyers ethically may charge a flat periodic fee or lump sum to cover disbursements "is a matter of some controversy." The court stated that such charges may be valid if the client has given informed consent to arrangement and it does not result in an unreasonable charge to the client. (*In the Matter of Kroff, supra*, at 13.)

While no California ethics opinions has addressed the propriety of an administrative fee in lieu of an itemized bill for in-house costs and expenses, ethics opinions from other states are split on the issue. (See, e.g., Va. LE Op. 1056 (1988) [approving a 4% overhead charge based upon the amount of the fee pursuant to a written fee agreement in matters not involving litigation]; Arizona State Bar Formal Ethics Opinion No. 94-10 [a lawyer may charge a percentage surcharge in lieu of billing actual expenses and costs if agreed to in writing, approximating the actual costs, and the amount charged is reasonable]; but see Florida Bar Staff Opinion No. 30989 (2012) [a 4% administrative charge may not be imposed for each file even if it is disclosed in the client's contract as it would be impossible for each client to give truly informed consent to a cost average or administrative fee/charge without knowing the actual cost amount for all clients].)

In the bankruptcy context, courts have disallowed claims by counsel for reimbursement of in-house expenses calculated by utilizing a percentage of the total fee. (See, e.g., *In re Command Services Corp.* (Bankr N.D.N.Y. 1988) 85 B.R. 230, 234 ["Only fully documented, actual, out-of-pocket expenses will be reimbursed; the Court cannot condone, for whatever reason, a percentage method to establish actual and necessary expenses within the meaning of Code § 330(a)(a)."]; *In re Williams* (N.D.Cal 1989) 102 B.R. 197, 198-199 ["As a matter of law, the



Court finds that an expense is not “actual,” and therefore not reimbursable under section 330(a)(2), to the extent that it is based on any sort of guesswork, formula, or pro rata allocation. Concrete documentation, in the form of receipts and invoices, is therefore necessary to support any application for reimbursement.”].)

Any such agreement should be scrutinized for unconscionability pursuant to California Rule of Professional Conduct 1.5, such as where it can be established that the administrative charges are unduly high due to the size of the bill unrelated to the actual overhead consumed in support of the billed fees.

**Travel and Parking:** Normally, where the engagement reasonably requires the attorney to travel on behalf of the client in the course of the representation the client can reasonably expect to be billed as a disbursement the reasonable amount of the airfare, taxicabs, meals while traveling, parking and hotel room. ABA Formal Opinion No. 93-379 (1993); see also, Code of Civil Procedure section 1033.5(C) [travel expenses to attend depositions as an allowable item of costs in litigation]. But see, e.g., *In re Tom Carter Enterprises, Inc.* (C.D.Cal. 1985) 55 B.R. 548 [parking is considered general overhead not recoverable from a bankruptcy estate].

**Business luncheons and meals:** These are considered general overhead and are not recoverable from a bankruptcy estate. See, e.g., *In re Tom Carter Enterprises, Inc.* (C.D.Cal. 1985) 55 B.R. 548; see, also, *In re Maruko Inc.* (S.D.Cal. 1993) 160 B.R. 633; [in house luncheons among attorney staff alone are considered overhead]. Where requested and approved by the client, such luncheon expenses may be charged to the client. However, meal expenses incurred while traveling for depositions, out-of-town travel on a case may be a proper cost charged to the client. (ABA Formal Opinion No. 93-379, at p. 7; *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 541 [115 Cal.Rptr.3d 42] [analyzing recovery of meal expenses as an item of recoverable costs under Code of Civil Procedure section 1033.5]; but see, *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 72 [100 Cal.Rptr.3d 152] [distinguishing between local meal expenses and meals incurred while traveling].)

**Secretarial and staff:** Regular secretarial services are normally considered general overhead and are not recoverable from a bankruptcy estate. See, e.g., *In re Tom Carter Enterprises, Inc.* (C.D.Cal. 1985) 55 B.R. 548. However, if secretarial overtime was incurred because of an emergency or time exigency related to the client’s case, then such costs may be billed to the client as a cost. (San Diego County Bar Association Ethics Opinion No. 2013-3, at pp. 7-8.) Other staff overtime is also generally considered part of general attorney overhead, except where actions of the client or the nature of the case may require extraordinary overtime.

**Messenger Services:** Such charges may be billed where the needs of the matter or of the client legitimately and reasonably require the service and where the client may agree in advance to such charges. San Diego County Bar Association Ethics Opinion No. 2013-3; ABA Formal Opinion No. 93-379 (1993). However, such charges may not be reasonable where the need for such delivery services arises from the attorney’s procrastination or inattention.

**Computer Assisted Legal Research (CALR):** Billing for CALR is not a settled issue as courts are split on whether some portion of electronic research expenses should be considered overhead costs that are not charged to the client. (See, e.g., *Cairns v. Franklin Mint Co.* (C.D.Cal 2000) 115 F.Supp.2d 1185, 1189.) There is a school of thought that holds that CALR is overhead, particularly as is the case more and more where the attorney's "library" is predominately electronic, and the attorney or law firm has a fixed-fee contract with the service provider. Another school of thought holds that CALR is billable to the client; and, such charges specifically have been found to be recoverable from a bankruptcy estate. See, *In re Maruko Inc.* (S.D.Cal. 1993) 160 B.R. 633; *In re Tom Carter Enterprises, Inc.* (C.D.Cal. 1985) 55 B.R. 548. In San Diego County Bar Association Ethics Opinion No. 2013-3, the Committee, applying ABA Formal Opinion No. 93-379 as endorsed by the State Bar Court in *Kroff*, concluded that an attorney could legitimately charge a client the actual direct cost of CALR.

In light of developing law in this area, at a minimum, the arbitrator should first confirm whether such charges have been agreed to by the client in advance. The next area of inquiry will be the reasonableness of the charge. If the charge is based on the firm's actual cost, it may be billed to the client as a cost in connection with the representation. Some providers offer "pro-forma" invoices for such charges, but these are not usually the actual amount charged to the firm relative to each client. Thus, where such charges are passed along to the client, the arbitrator should inquire as to the methodology used to assure that the charges were reasonably allocated among all clients using such services for the month or other billing period. Again, the arbitrator should determine whether the client knowingly and voluntarily agreed to pay any profit, markup or extra charge for CALR. Finally, the arbitrator should consider the mathematical unfairness, if any, where, for example, the attorney pays \$1,000 per month for the services and one client is the only client using the service for the month. Under such circumstances, charging the client the full \$1,000 for a small amount of CALR may be improper and potentially unconscionable.

**Photocopying:** The attorney and the client may agree in advance that, for example, photocopying will be charged at \$0.15 per page. However, the question arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. Under those circumstances the attorney is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., a fair percentage of the salary of a photocopy machine operator). See, ABA Formal Opinion No. 93-379 (1993); San Diego County Bar Association Ethics Opinion No. 2013-3. Discrete or large photocopying projects specific to a client's representation may generally be charged to the client, especially where there is some need for such services and where the client agrees in advance. On the other hand, where a large photocopying project may be completed by an outside provider at a page rate less than the general page rate agreed upon by the attorney and client at the outset of the representation, the attorney may want to consider retaining an outside service (subject to client confidentiality safeguards) to complete the project and bill the client only for the actual cost of the project charged by the outside provider.

**Long Distance Calls:** Long-distance telephone charges incurred in a client's case have generally been considered a cost which can be charged to the client, as opposed to an overhead expense, especially if the fact that an attorney will charge the cost of long-distance calls is included in the fee agreement. (See, ABA Formal Opinion No. 93-379 (1993); San Diego County Bar Association Ethics Opinion No. 2013-3.) However, given the current state of telephonic communication through cell phones or internet phone services (VoIP), long distance calls may not be considered reasonably necessary and should not be billed as separate expenses. An exception would be where the call charge is for an attorney's out-of-contract call (such as international calls may be) or part of a video conference or involving multiple parties where the attorney will be billed in addition to the attorney's general telephone cost.

**Process Service:** It is appropriate to bill the client for such charges where provided by an outside service. See, e.g., *In re Tom Carter Enterprises, Inc.* (C.D.Cal. 1985) 55 B.R. 548. Where such service is provided by in-house employees, the charge to the client should be no more than the reasonable cost to the attorney measured by a reasonable percentage of the employee's overall salary.

**Witness Fees:** These fees are expenses that properly may be charged to the client. (See, e.g., *In re Tom Carter Enterprises, Inc.* (C.D.Cal. 1985) 55 B.R. 548; *Ojeda v. Sharp Cabrillo Hospital* (1992) 8 Cal.App.4th 1, 8 [10 Cal.Rptr.2d 230] ["Traditionally, the costs associated with a lawsuit have included items such as transcript, filing, service and jury fees and hourly compensation paid to experts who serve as witnesses or consultants."].)

In the context of Mandatory Fee Arbitration proceedings, disputes regarding witness fees typically relate to the cost of expert witnesses. Clients are often surprised by the amount of expert fees incurred in their case. The client's responsibility for potential expert witness fees as a cost incurred in a case are often set forth in the fee agreement. Thus, an arbitrator should first review the provisions of the fee agreement where there is a dispute regarding expert witness fees charged to the client. If the fee agreement does not include a provision regarding expert witness fees, in litigation matters the hiring of experts is usually within the attorney's implied authority and may be billed to the client.

**Filing & Other Court Fees:** Filing fees and other court charges including mandatory e-filing charges are recoverable as costs. Discretionary court costs may require the agreement of the client, but an attorney generally has broad implied authority to incur costs which are reasonably necessary to the client's case. For example, many courts no longer provide a court reporter for law and motion hearings or other matters so an attorney must specifically request and pay for reporter expenses. While a client may dispute the necessity of this type of discretionary expense, if it is reasonably necessary to the client's case such expenses are likely within the scope of an attorney's implied authority.

## **CONCLUSION**

The reasonableness, fairness, or unconscionability of an attorney's charges for costs and expenses can never be a matter of exact mathematical calculation. Rather, the attorney's charges for costs and expenses should be evaluated pursuant to the fee agreement, and also examined for necessity, reasonableness, disclosure, method of calculation, and the reasonable expectations of the client. Such examination also should include reference to the foregoing guidelines of what the arbitrator may consider when the client may dispute the attorney's charges for costs and expenses.

**From:** [Carol M Langford](#)  
**To:** [Difuntorum, Randall](#); [Tuft, Andrew](#)  
**Subject:** Arbitration Advisory 2020-OXB  
**Date:** Thursday, November 19, 2020 3:13:09 PM

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

I cannot figure out how to comment on this Opinion. My comment is simple: it appears to allow a lawyer to charge for HVAC (heating and air conditioning) and legal malpractice insurance and the like as a sort of admin fee if the client consents.

What?? That will not make the public enamoured with lawyers. We sell professional services, not HVAC.

Filing fees, etc. are fine. But this clearly refers to things that are office overhead, like rent.

Can you pass this along for me?

--

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**From:** [Carol M Langford](#)  
**To:** [Difuntorum, Randall](#); [Tuft, Andrew](#)  
**Subject:** Fee Arb Opinion  
**Date:** Saturday, November 21, 2020 6:08:29 PM

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FYI if you allow the fee arb draft Opinion to be published with the part in it - the way it is written - on admin/rent, and HVAC, you will suffer. Or the Bar will. It is one thing if a rich client who wants overtime is willing to pay. It is another fir the poor schmuk in Stockton who feels stuck paying because all middle and low range clients think they have to pay. This I know for sure.

Clients should NOT have to pay for a lawyer's rent. That is so "Let them eat cake" in this day and age.

Sent from my iPhone

**From:** [Robert Burns](#)  
**To:** [Marlaud, Angela](#)  
**Cc:** [Dawn Gray](#)  
**Subject:** INTERIM ARBITRATION ADVISORY 2020-0XB  
**Date:** Friday, November 27, 2020 11:15:19 AM

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Greetings. The Bar put out an advisory with no suggestion for directing responses; renoting is in order but my substantive comments follow. Where not mentioned, I agree and appreciate your work product.

Please remember that "Bankruptcy Court" operates under Federal Law as to which the State Bar has almost no authority and vice-versa. Furthermore, almost no attorney practices in that area.

**Secretarial and staff:** I recommend that regular secretarial services be further parsed to reflect whether merely regular in type (which might be hired *ad hoc* for a client) or regularly a part of general overhead.

**Messenger Services:** "[S]uch charges may not be reasonable where the need for such delivery services arises from the attorney's procrastination or inattention." I see no reason to limit recovery of only messenger services for such attorney subpar service. Please put it somewhere that it addresses all situations of attorney "procrastination or inattention" and other subpar service (e.g., errors). I know of one attorney fired for billing clients for time spent in sexual encounters unrelated to the client or agreed services, according to his physician ex-wife.

**Computer Assisted Legal Research (CALR):** 1st paragraph: Please step out of apparent big/institutional law-firm bias. I'd treat this like messenger services. 2nd paragraph: I agree.

**Witness Fees:** I suggest a change to the statute governing fee agreements to require fee-agreement language which apprises clients of the potentiality of enormous (if not predatory) amounts of expert witness fees. A statute limiting predatory expert witness fees, e.g., \$1,000/hour for a mere medical doctor, would, in my opinion, be pursued by a responsible Legislature and/or a responsible Judicial Council.

Thank you.

I recommend some C.E.B. coverage of these issues and whatever Arbitration Advisory is ultimately adopted.

--

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*As Mankind becomes more liberal, they will be more apt to allow that all those who conduct themselves as worthy members of the community are equally entitled to the protections of civil government. I hope ever to see America among the foremost nations of justice and liberality--George Washington.*

*I am...for freedom of the press, and against all violations of the constitution to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents.--Thomas Jefferson*

*Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech.--Benjamin Franklin*

*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses, and waste of time ... Never stir up litigation. A worse man can scarcely be found than one who does this.--Abraham Lincoln.*



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As a certified fee dispute arbitrator for SDCBA and someone who arbitrates and litigates issues involving disputed fees and costs regularly, I do not believe this Opinion offers much if any clarification and if anything, makes the issue more confusing with due respect to the authors. I refer you to SDCBA Legal Ethics Opinion 2013-3.

A few other comments:

First paragraph: The lawyer's fiduciary duties to a client do not begin until after the contract is executed unless significant legal work is performed prior to signing the contract which is why the agreement is arms length and not construed against the lawyer as an evidentiary presumption or a business transaction with a client.

B.1. Paragraph 2: You all use the word "fees" which is going to be relied on for fee disputes. This paragraph as written, could be construed to mean that the reasonableness analysis (under 1.5) of the ultimate fees charged and costs incurred is assumed if the client enters into the fee agreement. That is not my understanding of the law. Instead, 1.5 considers all of the factors that involve events occurring AFTER the fee agreement is signed to determine whether the fee or cost is reasonable. I would remove the word fee entirely. I

would also further explain that it is not necessarily reasonable to charge a client a cost simply because it is listed as a category of recoverable cost in the agreement. The analysis is based on the typical standard rate charged in the legal community. Similarly, a cost is not unreasonable simply because it is not categorically or specifically listed in the agreement but was incurred and charged in an amount consistent with the scope of representation and in the community. (consistent with 1.5).

Photocopying section. Please add Scanning which is probably done more than copying these days. Lawyers charge for that too. Copying and Scanning charges should be allowed if they are within the typical range of charges in the legal community. Lawyers shouldn't have to break out their copy machine contracts to prove what they pay per click. Even worse, if they own the machine outright, how do they prove the hard cost of copy including toner, paper and use of the machine?

Overall, I give deference to lawyers trying to recover costs which under CA law, the client remains typically responsible for paying consistent with Rule 1.5 unless the contract provides otherwise.

This Opinion fails to address the issue that typically triggers such disputes - LIENS. How to analyze a right to recover costs when an attorney is fired or quits constructively or otherwise. Many contingency fee lawyers state in advertising and in agreements. You pay nothing unless we win. Then they do a bad job for the client who fires them thinking they will owe nothing (unless clearly written in the fee agreement otherwise) only to find out later that they in fact have to pay costs they never knew they incurred with the original contingency lawyer.

An issue the proposed opinion addresses is secretarial overtime that may be listed in an hourly agreement and frankly its unfair. The client has no control as to whether the lawyer directed the secretary to work on another case all day then address the client's case later at an overtime rate. I have never agreed with this. Further, I have seen contingency lawyers who are fired assert liens and try to recover time for secretary and paralegal work including overtime in their quantum meruit claim. I think it should be made clear that overtime and salary is not a cost that can be passed to the client. It is overhead. Would the client get to see the secretaries paycheck to confirm or contest the purported overtime charged? No because that would be private financial information.

I am also greatly concerned with terminated contingency lawyers being forced to sue clients for fees and costs under the horrible ruling of *Mojtahedi v. Vargas* 2014 228 Cal.App.4th 974 when they assert liens on the ultimate successor counsel's settlement. What happens is it gives the previously terminated lawyer (who is usually fired for

ignoring the client or other bad acts) all of the power to hold the successor counsel's fee hostage. Some lienning attorneys will not even endorse the settlement checks because of another horrible case holding that says they surrender their lien rights upon signing the settlement check. This forces the client to file for declaratory relief to force the attorney to sign the checks and initiate the prove up of the original lawyer's lien. Then the original lawyer has to sue the settling lawyer who is precluded from suing the first lawyer to free up their earned fees. Its completely inefficient and invites bad faith by the terminated counsel. I would like to propose legislation, an advisory opinion or contribute to addressing this serious issue with Cal Bar. The second lawyer should be able to sue the first lawyer to resolve a lien asserted on their fees by the first lawyer or the first lawyer should be able to sue the second lawyer directly and free the client from additional fees and costs (which they could be responsible for per the terms of either fee agreement)

Kind Regards,  
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