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**ARBITRATION ADVISORY**

**1998-02**

**STANDARD OF REVIEW IN FEE DISPUTES WHERE THERE IS A WRITTEN FEE AGREEMENT**

**November 22, 1993**  
**Updated November XX, 2022**

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**Summary**

Under applicable California law, where a written fee agreement is otherwise required under the terms of California Business and Professions Code sections 6147, 6148 or related sections, the applicable standard of review is the "reasonable fee" or "lodestar" standard. On the other hand, where the parties have entered into a complying written fee agreement, under applicable California case law the fee agreement determines the amount that is recoverable even if it may be more than what would be recoverable under the reasonable fee or lodestar standard.

As the Court of Appeal has held in *Pech v. Morgan* (2021) 61 Cal.App.5<sup>th</sup> 841, 846 "when an attorney sues a client for breach of a valid and enforceable fee agreement, the amount of recoverable fees must be determined *under the terms of the fee agreement*, even if the agreed upon fee exceeds what otherwise would constitute a reasonable fee under the familiar lodestar analysis [emphasis in the original]," unless the fee agreement is found to be unconscionable or where a breach of the implied covenant of good faith and fair dealing may be found. "This requires a court adjudicating a fee dispute to determine, among other things, whether the attorney used reasonable care, skill, and diligence in performing his or her contractual obligations." *Pech, Id.*

**Discussion**

First, there is no question that a complying written fee agreement does not operate to remove a matter from the jurisdiction of the fee arbitration statutes. Thus, a fee dispute involving a complying written fee agreement is to be arbitrated under the statutory scheme despite the existence of a written fee agreement.

Second, the standard of review to be applied when analyzing a written fee agreement is a combination of principles of contract law and the 13-factor test for unconscionability under Rule 1.5 (formerly Rule 4-200) of the Rules of Professional Conduct and not a determination of a

45 “reasonable fee” under a “lodestar” analysis. To apply the “reasonableness” standard of review  
46 to the terms of a written fee agreement would eliminate the difference between instances where  
47 the attorney has entered into a written fee agreement with his or her client, and those where the  
48 attorney has failed to do so and is limited to a reasonable fee. Thus, once it has been established  
49 that an otherwise enforceable written fee agreement is in existence, the higher standard of  
50 unconscionability should be applied to the terms of the written fee agreement.

51  
52 Accordingly, the first question that should be answered by the arbitrator is whether,  
53 applying principles of contract law, as well as taking into consideration the fiduciary duty of a  
54 lawyer to his or her client, the fee agreement is valid and enforceable. If the arbitrator  
55 determines that the fee agreement is not valid or enforceable, then the standard of review is a  
56 “reasonable fee” as provided in Business and Professions Code section 6148 as if no written fee  
57 agreement existed. *See*, Arbitration Advisory 1998-03 [updated March 20, 2015].

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59 If the arbitrator finds that the written fee agreement is valid and enforceable under  
60 principles of contract law, the arbitrator next should engage in three additional steps in reviewing  
61 the terms of the agreement.

62  
63 The first additional step is a determination if the written contract may be unconscionable  
64 under Rule 1.5 of the Rules of Professional Conduct. For example, where the contract rate may  
65 call for \$600 per hour while the prevailing hourly rate charged by similarly experienced  
66 attorneys for similar work in the community is less than \$600 per hour, the arbitrator should  
67 apply the \$600 rate under the terms agreed upon by the parties written contract unless, taking  
68 into consideration the factors listed in Rule 1.5 of the Rules of Professional Conduct, the  
69 arbitrator finds that the \$600.00 hourly rate is unconscionable.<sup>1</sup>

70  
71 [Do we want to include a paragraph on unconscionability? Something like, “In addition to the  
72 Rule 1.5 factors, cases such as *Shaffer v. Superior Court* (1995) 33 Cal.App.4<sup>th</sup> 993, have held  
73 that ‘Unconscionability has both a “procedural” and a “substantive” aspect. The former involves  
74 (1) “oppression,” which refers to an inequality of bargaining power giving no meaningful choice  
75 to the weaker party or (2) the “surprise” of a contractual term hidden in a printed or complex  
76 contract. . . . “Substantive” unconscionability, on the other hand, refers to an overly hrsh  
77 allocation of risks or costs which is not justified by the circumstances under which the contract  
78 was made. . . . Presumably, both procedural and substantive unconscionability must be present  
79 before a contract or clause will be held unenforceable.””]

80  
81 Assuming that the arbitrator finds that the written fee agreement is valid and enforceable,  
82 and that the terms, while not necessarily reasonable are not unconscionable, then the second

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<sup>1</sup> By this numerical example, the Committee does not intend to express an opinion on (a) whether these hourly rates are either reasonable or unconscionable or, (b) whether the relationship between “reasonable” and “unconscionable” is more or less than 50% or even that there is a percentage relationship between “reasonable” and “unconscionable.” Rather, these are matters that arbitrators must determine for themselves.

83 additional step in the arbitrator's analysis should be a review of the attorney's performance under  
84 the terms of the agreement under the implied covenant of good faith and fair dealing.

85  
86 This analysis includes reviewing whether the attorney used reasonable care, skill and  
87 diligence in performing the duties required of the attorney under the contract, that unnecessary,  
88 duplicative or unproductive time is not charged to the client, and that the attorney has not  
89 performed services that were required as a result of the attorney's negligence or some lack of  
90 ordinary skill or diligence.<sup>2</sup> This is not an exhaustive list, but merely representative of the type  
91 of performance issues that may arise during the arbitration.<sup>3</sup>

92  
93 Finally, the arbitrator should consider whether the written contract may be rendered  
94 unenforceable in whole or in part by a serious and willful breach of the Rules of Professional  
95 Conduct by the attorney. In such cases, the arbitrator then must determine whether the attorney  
96 still may be entitled to "reasonable" compensation under the Supreme Court's holding in  
97 *Sheppard, Mullin, Richter & Hampton LLP v J-M Manufacturing Company, Inc.* (2018) 6 Cal.5<sup>th</sup>  
98 59, 88-96, and, if so, in what amount.

99  
100 [Do we want to take on a discussion of the *J-M* factors in this Advisory? Or, do we leave that for  
101 another advisory?]

## 102 103 104 Conclusion

105  
106 Where the fee dispute is found to be governed by an enforceable written contract,  
107 complying with applicable Business & Professions Code sections and is not unconscionable or  
108 tainted by some breach of the covenant of good faith and fair dealing or serious and willful  
109 violation of the Rules of Professional Conduct, then the dispute shall be determined under the  
110 terms of the written fee agreement even if the agreed upon fee exceeds what otherwise would  
111 constitute a "reasonable fee" under the familiar "lodestar" analysis.

112  
113 The Committee hopes that the foregoing answers some of the questions that have arisen  
114 regarding the appropriate standard of review so that arbitrations may be conducted on a uniform  
115 basis throughout the state. Please keep in mind that the foregoing is not an official opinion of the  
116 State Bar, but merely reflects the conclusions of many hours of thought, research and discussion  
117 among the Committee members over an extended period of time. [Do we need this paragraph?]  
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<sup>2</sup> [Do we want to add a cautionary footnote that while B&P Code 6203(a) permits the arbitrator to consider evidence of malpractice or rules of professional conduct in determining the value of the services performed, affirmative relief or damages applicable to such acts of malpractice are beyond the jurisdiction of the arbitrator?]

<sup>3</sup> [Do we want to add a footnote about judgmental immunity – something about exercise of reasonable strategic judgment is not malpractice?]