

ARBITRATION ADVISORY

1998-02

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

Updated July XX, 2023

Summary

Under applicable California law, where a written fee agreement is required under California Business and Professions Code section 6147, 6148 or related sections, and such a written agreement does not exist, the applicable standard of review is the “reasonable fee” or “lodestar” standard.¹ 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 held in *Pech v. Morgan* (2021) 61 Cal.App.5th 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 to have been breached. “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.” *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. 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 the principles of contract law and the 13-factor test for unconscionability under California Rules of Professional Conduct, Rule 1.5, and not a determination of a “reasonable fee” under the “lodestar” analysis. To apply a “reasonableness” standard of review to the terms of a complying written fee agreement would eliminate the difference between instances where the

¹ See, Arbitration Advisory 1998-03 [updated March 20, 2015].

attorney has entered into a written fee agreement with his or her client and those where the attorney has failed to do so (and thus is limited to a “reasonable fee”). Thus, once it has been established that an otherwise enforceable written fee agreement is in existence, the higher standard of unconscionability should be applied to the terms of the written fee agreement. For example, where the contract rate may call for \$600 per hour while the prevailing hourly rate charged by similarly experienced attorneys for similar work in the community is less than \$600 per hour, the arbitrator should apply the \$600 rate under the terms agreed upon by the parties’ written contract unless, taking into consideration the factors listed in Rule 1.5, the arbitrator finds that the \$600 hourly rate is unconscionable.²

Accordingly, the first question that should be answered by the arbitrators is whether, applying the principles of contract law, as well as taking into consideration the fiduciary duty of the lawyer to his or her client, the fee agreement is valid and enforceable.

If the arbitrators determine that the fee agreement is not valid or enforceable, then the standard of review is a “reasonable fee” as provided in Business and Professions Code section 6148(c) as if no written fee agreement existed.

If the arbitrators find that the written fee agreement is valid and enforceable under the principles of contract law, then the arbitrators should engage in three additional steps in reviewing the terms of the agreement.

The first additional step is a determination whether the written contract is unconscionable under the 13-factor test in Rule 1.5. In this analysis, cases such as *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, have held that “[u]nconscionability has both a ‘procedural’ and a ‘substantive’ aspect. The former involves (1) “oppression,” which refers to an inequality of bargaining power giving no meaningful choice to the weaker or (2) the ‘surprise’ of a contractual term hidden in a printed contract ‘Substantive’ unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by circumstances under which the contract was made. . . . Presumably, both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable.”

The second additional step, assuming that the arbitrators find that the written contract is valid and enforceable and that the terms and, while not necessarily reasonable are not unconscionable, then the arbitrators’ analysis should be a review of the attorney’s performance under the implied covenant of good faith and fair dealing. This analysis includes reviewing whether the attorney used reasonable care, skill and diligence in performing the duties required of the attorney under the contract, that unnecessary, duplicative or unproductive time is not charged to the client, and that the attorney has not performed services that were required as a result of the attorney’s negligence or some lack of ordinary skill or diligence.

² By this numerical example, the Committee does not intend to express an opinion on (a) whether these example hourly rates either are reasonable or unconscionable or (b) any difference between a reasonable rate and a contract rate may or may not render the latter rate unconscionable. Rather, these are matters that arbitrators must determine for themselves as may be appropriate under the evidence presented at the hearing.

In cases where malpractice or a breach of the Rules of Professional Conduct may be found, Business and Professions Code section 6203(a) provides: “Evidence relating to claims of malpractice and professional conduct 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. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney.” In addition, in *Sheppard, Mullin, Richter & Hampton LLP v. J-M Mfg. Co., Inc.* (2018) 5 Cal.5th 59, 88-96, the Supreme Court has held that in certain cases where there has been a violation of the Rules of Professional Conduct, the written contract may be found to be void, in which case the attorney may be entitled to no fee or, depending upon the egregiousness of the breach, entitled to recover the reasonable value of his or her services under the “reasonable fee” standard discussed in Arbitration Advisory 1998-03 [updated March 20, 2015], among other considerations articulated in *Sheppard, Mullin*.

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

ARBITRATION ADVISORY ~~1993~~

1998-02

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

November 23, 1993

~~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.~~

~~After the new and amended Rules of Professional Conduct became operative on November 1, 2018, the committee reviewed the opinion and updated the citations to the Rules of Professional Conduct.~~

~~The State Bar's Committee on Mandatory Fee Arbitration has, from time to time, received inquiries regarding the standard of review to be used when arbitrating a matter in which the attorney and client have entered into a written fee agreement. This issue has been under discussion by the Committee over a period of time, and the purpose of this advisory is to set forth the Committee's analysis of an appropriate standard of review in such circumstances.~~

Updated July XX, 2023

Summary

Under applicable California law, where a written fee agreement is required under California Business and Professions Code section 6147, 6148 ~~makes it clear that where a written fee agreement is otherwise required under the terms of the statute~~ or related sections, and such a written agreement does not exist, the ~~attorney may only recover a reasonable fee. The Committee has been unable to identify a similarly clear~~ applicable standard of review ~~embodied in either statutory~~ is the "reasonable fee" or case law "lodestar" standard.¹ On the other hand, where the parties have entered into a written-complying written fee agreement, under applicable California case law, the fee agreement. A question has determines the amount that is recoverable even been raised as to whether such a matter if it may be arbitrated more than what would be recoverable under the arbitration statutes reasonable fee or lodestar standard.

~~In an effort to bring some uniformity to the conduct of arbitration throughout the state, the Committee on Mandatory Fee Arbitration has undertaken to fully examine the issues of whether such matters are subject to arbitration and, if so, the standard of review to be applied in determining an award.~~

¹ See, Arbitration Advisory 1998-03 [updated March 20, 2015].

37
38 ~~First, there appears to be no question that a matter otherwise subject to arbitration under~~
39 ~~the provisions of Business and Professions Code section 6200 et. seq. is to be arbitrated~~
40 ~~under the statutory scheme despite the existence of a written fee agreement. Conversely,~~
41 ~~the existence of a~~ As the Court of Appeal held in *Pech v. Morgan* (2021) 61 Cal.App.5th 841,
42 846, “when an attorney sues a client for breach of a valid and enforceable fee agreement, the amount
43 of recoverable fees must be determined *under the terms of the fee agreement*, even if the agreed upon
44 fee exceeds what otherwise would constitute a reasonable fee under the familiar lodestar analysis
45 [emphasis in the original],” unless the fee agreement is found to be unconscionable or where a breach
46 of the implied covenant of good faith and fair dealing may be found to have been breached. “This
47 requires a court adjudicating a fee dispute to determine, among other things, whether the attorney
48 used reasonable care, skill and diligence in performing his or her contractual obligations.” *Id.*
49

50 51 Discussion

52
53 First, there is no question that a complying written fee agreement does not operate to remove
54 a matter from the jurisdiction of the fee arbitration statutes. A fee dispute involving a complying
55 written fee agreement is to be arbitrated under the statutory scheme despite the existence of a written
56 fee agreement.
57

58 Second, the ~~Committee has concluded that the~~ standard of review to be applied
59 when analyzing a written fee agreement is a combination of the principles of contract law

and Rule 1.5 (formerly Rule 4-200) of the 13-factor test for unconscionability under California Rules of Professional Conduct~~pertaining to illegal or unconscionable fees.~~

~~The first question that should be answered by the arbitrators is whether, applying principles of contract law, as well as taking into consideration the fiduciary duty of a lawyer to his or her client, the fee agreement is valid, Rule 1.5, and enforceable. If the arbitrators determine that the fee agreement is not valid or enforceable, then the standard of review is a determination of a “reasonable fee as provided in Business and Professions Code section 6148 as if no written fee agreement existed. If the arbitrators find that the written fee agreement is valid and enforceable under principles of contract law, the arbitrators should engage in a two-step process by reviewing the terms of the agreement separate from the attorney’s performance” under the terms of the agreement.~~

~~The terms of the written fee agreement should be reviewed under the standard of unconscionability as discussed in Rule 1.5 of the Rules of Professional Conduct. “lodestar” analysis. To apply thea “reasonableness” standard of review to the terms of a complying written fee agreement would eliminate the difference between instances where the attorney has entered into a written fee agreement with his or her client, and those where the attorney has failed to do so (and thus is limited to a “reasonable fee under section 6148. In order to distinguish between those situations where a”). Thus, once it has been established that an otherwise enforceable written fee agreement is in existence, and those where there is no such agreement, the higher standard of unconscionability should be applied to the terms of the written fee agreement.~~

For example, where the arbitrators contract rate may find that call for \$600 per hour while the prevailing hourly rate charged by similarly experienced attorneys for similar work in the community is less than \$400/600 per hour, and, if the issue were arbitrator should apply the determination of a “reasonable fee”, the arbitrators would choose that amount as the hourly \$600 rate. If, however, a valid written contract between lawyer and client provides for an hourly rate of \$400.00, the arbitrators should use under the terms agreed upon by the parties parties’ written contract unless, taking into consideration the factors listed in Rule 1.5 of, the Rules of Professional Conduct the arbitrators find arbitrator finds that the \$400.00/600 hourly rate is unconscionable. If the agreed upon rate produces an unconscionable result, a reasonable standard should be applied to the ultimate fee on the theory that the written agreement between the parties is not enforceable.⁴²

Assuming Accordingly, the first question that should be answered by the arbitrators is whether, applying the principles of contract law, as well as taking into consideration the fiduciary duty of the lawyer to his or her client, the fee agreement is valid and enforceable.

If the arbitrators have found determine that the fee agreement is not valid or enforceable, then the standard of review is a “reasonable fee” as provided in Business and Professions Code section 6148(c) as if no written fee agreement is valid and enforceable, and existed.

² By this numerical example, the Committee does not intend to express an opinion on (a) whether these example hourly rates either are reasonable or unconscionable or (b) any difference between a reasonable rate and a contract rate may or may not render the latter rate unconscionable. Rather, these are matters that arbitrators must determine for themselves as may be appropriate under the evidence presented at the hearing.

If the arbitrators find that the written fee agreement is valid and enforceable under the principles of contract law, then the arbitrators should engage in three additional steps in reviewing the terms of the agreement.

The first additional step is a determination whether the written contract is unconscionable under the 13-factor test in Rule 1.5. In this analysis, cases such as *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, have held that “[u]nconscionability has both a ‘procedural’ and a ‘substantive’ aspect. The former involves (1) “oppression,” which refers to an inequality of bargaining power giving no meaningful choice to the weaker or (2) the ‘surprise’ of a contractual term hidden in a printed contract ‘Substantive’ unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by circumstances under which the contract was made. . . . Presumably, both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable.”

The second additional step, assuming that the arbitrators find that the written contract is valid and enforceable and that the terms and, while not necessarily reasonable, are not unconscionable, then the arbitrators’ analysis should be a review of the attorney’s performance under the terms of the agreement. In every contract, there is an implied covenant of good faith and fair dealing. While parties may include in a contract any terms not deemed unconscionable (for example, \$400 per hour), the client has the right to expect that the attorney’s performance of the contract will be in good faith and in a professional manner.

Hence, a “reasonableness” standard should be applied in reviewing the attorney’s performance under the written fee agreement. This would include analysis includes reviewing whether the attorney

¹—~~By this numerical example, we do 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 20% or even that there is a percentage relationship between “reasonable” and “unconscionable.” Rather, these are matters that the arbitrators must determine for themselves.~~

used reasonable care, skill and diligence in performing the duties required of the attorney under the contract, that unnecessary, duplicative or unproductive time is not charged to the client, and that the attorney has not performed services that were required as a result of the ~~attorney's~~attorney's negligence or some lack of ordinary skill or diligence. ~~This is not an exhaustive list, but merely representative of the type of performance issues that may arise during the arbitration.~~

~~The Committee hopes that the foregoing answers some of the questions that have arisen regarding the appropriate standard of review so that arbitrations may be conducted on a uniform basis throughout the state. Please keep in mind that the foregoing is not an official opinion of the State Bar, but merely reflects the conclusions of many hours of thought, research and discussion among the Committee members over an extended period of time.~~The third additional step is that the arbitrators also should consider the issue of any malpractice or violation of the Rules of Professional Conduct by the attorney during the representation.

In cases where malpractice or a breach of the Rules of Professional Conduct may be found, Business and Professions Code section 6203(a) provides: "Evidence relating to claims of malpractice and professional conduct 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. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney." In addition, in *Sheppard, Mullin, Richter & Hampton LLP v. J-M Mfg. Co., Inc.* (2018) 5 Cal.5th 59, 88-96, the Supreme Court has held that in certain cases where there has been a violation of the Rules of Professional Conduct, the written contract may be found to be void, in which case the attorney may be entitled to no fee or, depending upon the egregiousness of the breach, entitled to recover the reasonable value of his or her services under the "reasonable fee" standard discussed in Arbitration Advisory 1998-03 [updated March 20, 2015], among other considerations articulated in *Sheppard, Mullin*.

Conclusion

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

This 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 upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.