

Are Mandatory Fee Arbitration Clauses Enforceable?

By Debra S. Frank

Saturday, May 9th was the 41st Annual Family Law Symposium sponsored by the Los Angeles County Bar Family Law Section and the Los Angeles Superior Court. Attendance surpassed expectations, with approximately 400 attendees. I moderated the Recent Developments panel. Speakers were Garrett C. Dailey, Esq., Judge Robert A. Schnider (Ret.), Commissioner Michael Convey, a commissioner of the Los Angeles Superior Court, and myself. One of the more interesting cases dealt with attorney client fee agreements and held that contractual arbitration agreements in retainer agreements are valid.

In *Schatz v. Allen, Matkins, Leck, Gamble & Mallory, LLP* (2009) 45 Cal.4th 557, the client signed a fee agreement with attorney that provided for binding arbitration of fee and malpractice disputes. After a fee dispute arose, the attorney invoked the arbitration clause. The client requested non-binding arbitration under the MFAA. The attorney prevailed. The client asked for a trial de novo. The attorney filed a petition to compel arbitration. The attorney's request was denied. The Court of Appeal affirmed. The Supreme Court reversed.

In *Schatz, supra*, the court held that the Mandatory Fee Arbitration Act (MFAA, Bus. & Prof. Code, §6200 et seq.), which for public policy reasons entitles clients to nonbinding arbitration and trial de novo, does not limit the ability of attorneys and clients to enter into predispute binding contractual arbitration. Accordingly, attorney retainer agreements can contain predispute arbitration agreements pursuant to the California Arbitration Act (CAA, Code Civ. Proc., §1280 et seq.), the statutory scheme regulating private arbitration in this state, and they will be upheld. Further, binding arbitration satisfies the MFAA requirements for a trial de novo.

A good tip for practitioners is that clients should read and initial the arbitration provisions in retainer agreements. An example of such provisions in retainer agreements follows.

1. All disputes between us regarding any aspect of our attorney-client relationship will be resolved by binding arbitration with the American Arbitration Association in Los Angeles, California. An award from any binding arbitration shall be enforceable in all courts of competent jurisdiction. The Arbitrator (s) shall apply the law of the State of California and shall award costs and attorneys fees to the prevailing party in such arbitrations. The parties agree that to the extent permitted by law, the resolution provisions provided in this paragraph are the sole and exclusive remedy of the parties and they waive and forego any right to pursue action in any court or other legal forum to resolve such claims. The parties acknowledge and agree that they are waiving their respective right to a jury trial. This provision applies to all disputes whether they are about financial matters (fees and costs) or about the quality of our services (malpractice). By this provision, we are both giving up our right to have any such dispute decided by a judge or a jury.

As to fees and costs only, you also have the right under the law to non-binding arbitration pursuant to sections 6200 et seq. of the Business and Professions Code. If there is an unresolved dispute as to fees, I will give you 30 days written notice of your right to nonbinding arbitration. If you decline to accept that nonbinding arbitration within that 30 day period, either you or I are then entitled to bring an action as set forth above. If you request non-binding arbitration, it will take place before the binding arbitration which is provided for above. If you ask for non-binding arbitration and you or we are unhappy with the result, it will be followed by binding arbitration. The arbitration which we are agreeing to replaces litigation in court before a judge or jury. It does not replace non-binding arbitration under Business and Professions Code sections 6200 et seq. The prevailing party in any arbitration or litigation arising out of or relating to any such arbitration between us, shall be entitled to reasonable attorneys fees and costs.

2. YOU ACKNOWLEDGE THAT YOU HAVE HAD AN OPPORTUNITY TO CONSULT WITH INDEPENDENT COUNSEL CONCERNING THE EXECUTION OF THIS AGREEMENT AND THE TERMS OF REPRESENTATION, ESPECIALLY THE PROVISIONS RELATING TO THE WAIVER OF A RIGHT TO JURY TRIAL, AND HAVE EITHER ENGAGED IN SUCH CONSULTATION OR HAVE VOLUNTARILY RELINQUISHED THAT RIGHT. PLEASE INITIAL THIS PARAGRAPH WHERE INDICATED THAT YOU UNDERSTAND AND AGREE WITH THE CONTENTS OF THIS PARAGRAPH.

initial

3. Please countersign this letter Agreement and initial Paragraph 2 acknowledging that the contents accurately reflect your understanding of our relationship and return it to me in the enclosed envelope. Please note again that as set forth in Paragraphs 1 and 2 above, you are agreeing to waive your right to a jury trial, whether as to fees, quality of services rendered, or otherwise, arising hereunder. This Agreement, if signed by you, will be an important, legally binding contract having substantial financial impact upon you. You should not sign this Agreement if you have any questions about it.

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