LITIGATION

# Arbitration Bind

## In Attorney Fee Agreements

*By Jerome J. Blum and Allan Herzlich*

Attorney retainer agreements often provide binding-arbitration provisions for resolution of fee and nonfee disputes, including malpractice. Are such provisions enforceable? What alternatives are available?

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In *Schatz v. Allen Matkins Leck Gamble & Mallory*, 2007 DJDAR 407, the 4th District Court of Appeal held recently that a binding-arbitration provision in a retainer agreement, as applied to a fee dispute, was trumped by a client's election to submit the dispute to nonbinding arbitration under the Mandatory Fee Arbitration Act.

The highest priority for most attorneys is to avoid jury trials on malpractice claims. The importance is not as clear with respect to fee disputes: Some attorneys prefer binding arbitration, but others want a court resolution to guard their right to appeal or avoid the potentially higher cost of arbitration.

A decade ago, in *Powers v. Dickson, Carlson & Campillo*, 54 Cal.App.4th 1102 (1997), the 2nd District upheld a binding-arbitration provision as applied to a malpractice claim, noting the policy favoring arbitration in the California Arbitration Act.

The following year, in *Alternative systems Inc. v. Carey*, 67 Cal.App.4th 1034 (1998), the 1st District struck down a binding-arbitration provision as applied to a fee dispute, finding it contrary to the client's rights under the Mandatory Fee Arbitration Act.

The California Supreme Court weighed in on the subject in *Aguilar v. Lerner*, 32 Cal.4th 974 (2004), where the retainer agreement required binding arbitration of all disputes. The client filed a malpractice action, and the attorney responded by filing a petition to compel arbitration, adding a claim for unpaid attorney fees.

Of greater concern than the venue for the fee dispute was the client's contention that the binding-arbitration provision should be thrown out in its entirety, leaving the malpractice claim and fee dispute with the possibility of a jury trial. The court concluded that the provision was enforceable as applied to the fee dispute (and to the malpractice claim) because the client had waived his rights under the Mandatory Fee Arbitration Act by filing a malpractice action.

But the *Aguilar* court failed to answer the central issue raised in Alternative Systems and Shatz: If a client elects (and has not previously waived) the mandatory-fee act's nonbinding-arbitration procedure, then the client or attorney requests a trial de novo, is the de novo venue the Superior Court or arbitration if the agreement calls for binding arbitration?

The *Aguilar* court described the California Arbitration Act and the Mandatory Fee Arbitration Act. The former provides the ground rules when both parties agree to arbitration voluntarily. Code of Civil Procedures Sections 1280 et seq. The court noted that, by passing the California Arbitration Act, the Legislature expressed a strong public policy in favor of arbitration, citing *Moncharsh v. Heily & Blase*, 3 Cal.4th 1 (1992).

By contrast, the Mandatory Fee Arbitration Act gives clients the right to require nonbinding arbitration of a fee dispute before a local bar association. The act requires notice by the attorney to the client of any action to collect fees and provides that the action may be stayed by the client's election of nonbinding arbitration. Business and Professions Code Sections 6201(a) and (b).

In the event the attorney or client is dissatisfied with the result of the arbitration, the act adds, either party is entitled to a trial. Business and Professions Code Section 6204(a).In his concurring opinion in *Aguilar*, Justice Ming W. Chin argued that the California Arbitration Act and the Mandatory Fee Arbitration Act are complementary. A logical reading of the two, he wrote, permits de novo dispute resolution via binding arbitration if it was provided for in an agreement. Chin's reading prevents a client who agreed to binding arbitration to avoid it by electing nonbinding arbitration under the mandatory-fee act (resulting in a sham arbitration because the client is participating only so he or she can file a suit thereafter).

In another concurring opinion, Justice Carlos R. Moreno stressed the 1996 amendment to Section 6204(a), emphasizing that parties may agree to binding arbitration after a fee dispute arises.

In *Schatz*, the 4th District followed *Alternative Systems* and concluded that it was good law, despite the Supreme Court's ruling in *Aguilar*. The retainer agreement had provided for binding arbitration of all disputes. The law firm sought arbitration to resolve a fee dispute, but the client demanded that the firm go through mandatory-fee act nonbinding arbitration.

The firm did so and received an award in its favor, then the client filed a complaint in court seeking a trial de novo. The firm responded with a petition to compel binding arbitration. The appellate court held that the client was not constrained by the binding-arbitration provision and was entitled to a trial de novo.

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*Schatz* concluded that *Aguilar* did not implicitly overrule *Alternative Systems*. There were legitimate arguments on both sides of the issue, but the court found that the Legislature did not intend to deny trial-de-novo protection to clients.

Where does the law stand now? Per *Aguilar*, if the client waives his or her right to request arbitration pursuant to the Mandatory Fee Arbitration Act, he or she is not entitled to the act's trial-de-novo rights, so a binding-arbitration provision for fees will be upheld. But if the client does not waive his or her rights and elects arbitration under the mandatory-fee act, at least in the 1st and 4th Districts, then he or she can avoid the binding-arbitration provision in a retainer agreement by rejecting an arbitration award and seeking a trial de novo in court.

How will other appellate districts and the California Supreme Court decide? They could go either way, but it seems likely they will follow *Alternative Systems* and *Schatz*.

If either party files a request for trial de novo and the client makes a malpractice claim, can the attorney petition the court for arbitration of that claim if there is a binding-arbitration provision pertaining to malpractice in the retainer agreement? The answer is likely yes.

The *Aguilar* court noted strong public policy in favor of arbitrating disputes, and Powers upheld a binding-arbitration provision for malpractice disputes. In addition, the California Arbitration Act recognizes that the same parties might be litigating some issues while seeking to arbitrate others.

The law permits the court to consider whether the litigation (for example, a fee dispute) will resolve some of the issues sought to be arbitrated (including malpractice) before ordering the arbitration. Code of Civil Procedure Section 1281.2. To come within Powers, though, an attorney should make sure a binding-arbitration provision clearly puts the client on notice that nonfee disputes are covered.

Attorneys who prefer to recover fees in court, rather than arbitrate, might include two provisions in their agreements: one providing for binding arbitration in nonfee disputes, and one providing for court resolution of fee disputes, subject of course to provisions of the Mandatory Fee Arbitration Act. Those who want binding arbitration for both types of disputes might provide for it, but it will be ineffective as to fee disputes absent the client's waiver of his or her mandatory-fee-act rights.

Caveat: In consumer cases, the federal Fair Debt Collection Practices Act might prohibit any provision that relies on a client waiver to be effective. Before making a choice, attorneys also must consider requirements imposed by their malpractice carriers and whether the Federal Arbitration Act is applicable and might pre-empt state law with respect to the client or matter.

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