

PROFESSIONAL LIABILITY UPDATE

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FEE ARBITRATION

California Law

*The First District permits enforcement of a binding fee dispute arbitration provision in an attorney-client fee contract where the client fails to avail himself of the protections of the statutory non-binding fee dispute arbitration provisions. The Supreme Court has accepted the case for review.*

by Jessica Rudin

*Aguilar v. Lerner* (2001) 1 C.D.O.S. 5392 (rev. granted 10/17/01)

Raul Aguilar, a licensed attorney, signed a retainer agreement with attorney Esther Lerner in which he agreed to submit legal malpractice claims and fee disputes to binding arbitration. Aguilar ultimately sued Lerner for professional negligence. Lerner requested Aguilar arbitrate the legal malpractice claim and her claim for fees. Aguilar declined and Lerner petitioned to compel arbitration.

In opposition to the petition, Aguilar stated that he had no desire to submit either claim to arbitration. He specifically declared that had he been given the option of participating in non-binding arbitration under B & P Code § 6200 *et seq.* (Mandatory Fee Arbitration or “MFA”) he would have declined.

Lerner’s petition was granted. The binding arbitration was conducted, Lerner prevailed, and Aguilar obtained no relief. Aguilar’s petition to set aside the arbitrator’s award was denied.

Aguilar argued that the arbitrator exceeded his powers by making a decision under an unenforceable arbitration clause. He maintained that the clause was unenforceable because it contained a prospective agreement to submit fee disputes to binding arbitration in violation of B & P Code §6200 *et seq.*

The Court of Appeal disagreed and affirmed the lower court’s decision. First, it found the provision was not void as against public policy. The statute requires a client to submit fee disputes to the MFA process only if he agrees to do so in writing. There is no language in the statute to indicate “an explicit legislative expression of public policy” that it is the exclusive means to resolve a fee dispute. Thus, the binding arbitration provision in the fee agreement did not violate fundamental public policy and would not be invalidated on those grounds.

The Court found that Aguilar waived

protection under the MFA scheme by failing to avail himself of those rights. He filed a legal malpractice action, which acts as a waiver of the statute's provisions, and he made explicit statements that he would have refused to participate in an arbitration under the statute. This conduct persuaded the court that the client had no right to the protections afforded by a statutory scheme he never sought to invoke. Therefore the subsequent arbitration under the contractual binding arbitration provision was not in excess of the arbitrator's powers.

*Comment:* The Court of Appeal's decision in *Aguilar* does not provide any bright line rules regarding the enforceability of binding arbitration clauses in attorney-client fee agreements. By accepting review, the Supreme Court may establish guidelines concerning attorney-client fee arbitration agreements.