

PROFESSIONAL LIABILITY UPDATE

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FEE ARBITRATION

California Law

By Jennifer A. Becker

The California Supreme Court decides that a binding fee dispute arbitration provision in a 1994 attorney-client fee contract is valid when the client waives the mandatory, non-binding, fee arbitration statutory scheme by filing a legal malpractice claim.

Aguilar v. Lerner (2004) 04 C.D.O.S. 3476

In 1994 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. After a dispute arose Aguilar filed a legal malpractice action and Lerner petitioned to enforce the arbitration provisions of their agreement, which included binding arbitration of legal malpractice claims and fee disputes.

Lerner's petition was granted and Lerner prevailed at the arbitration. Aguilar's petition to set aside the arbitrator's award was denied. Despite the fact that Aguilar never sought to invoke his rights under the nonbinding statutory scheme for fee arbitration set forth in B & P Code § 6200 et seq. (Mandatory Attorney Fee Arbitration or "MFAA") Aguilar claimed that the binding fee arbitration provision was void because it contained a prospective agreement to submit fee disputes to binding arbitration in violation of 1996 amendments to the

MFAA. The Court of Appeal disagreed and affirmed the lower court's decision on grounds of estoppel and waiver.

The Supreme Court observed that arbitration under the MFAA is based on a statutory directive and not the parties' agreement. It is voluntary for a client and mandatory for an attorney. A client can waive the provisions of the MFAA by seeking a judicial resolution of a fee dispute or by filing an affirmative claim for legal malpractice. The award is non-binding and either party may seek a trial *de novo*, although the parties may agree in writing to a binding award. In 1996 the statute was amended to allow for only post-dispute agreements to binding arbitration of fee disputes.

The Court held that Aguilar was not judicially estopped from seeking to invoke the protections of the MFAA, although he never sought to take advantage of its provisions and disavowed any interest in pursuing this option in the trial court. Judicial

estoppel occurs when, in a judicial or quasi-judicial proceeding, a party knowingly takes two totally inconsistent positions and is successful in the first position. It was not totally inconsistent for Aguilar to seek the protections of the MFAA but reject it as a dispute resolution mechanism because the scheme is voluntary for the client.

However, pursuant to the express terms of the statutory scheme, Aguilar waived any protections of the MFAA when he filed a legal malpractice action against Lerner. The court relied on Aguilar's filing of the malpractice lawsuit, not the contract, to find there was a waiver. Thus the court found it was not relevant to determine if the agreement to binding arbitration was an ineffective waiver as Aguilar contended.

The Court rejected Aguilar's argument that he was entitled to the statute's procedural protections, such as its non-binding effect, despite the waiver. There is nothing to suggest that the statute's provisions are self-executing despite a waiver and there is no reason to deviate from the common consequences of a waiver.

The statutory obligation of an attorney to provide a client notice of rights under the MFAA mandates that the notice be given before or at the initiation of any proceeding under a contract between the parties that provides for an alternative to the MFAA scheme. Thus, by implication the legislature recognized that an attorney and client could choose to resolve their dispute in the context of binding arbitration. If a client who receives such a notice declines to proceed under the MFAA, it is unreasonable to conclude that the client nonetheless retains rights under the

MFAA. Since Aguilar signed the retainer agreement in question in 1994, prior to the amendment of the statute to prohibit pre-dispute agreements to binding arbitration, Aguilar's waiver compelled him to abide by the contractual binding arbitration provisions.

The court left for another day resolution of the question as to whether the 1996 amendments prohibiting pre-dispute agreements for binding arbitration altered the analysis.

Comment: Given the Court's abstention from the issue of the effect of the 1996 amendments, it is still not clear whether a binding fee arbitration provision in retainer contracts signed after the effective date of the amendments can be enforced, even if the provisions of the MFAA are waived. Until the court has an opportunity to consider the issue careful practitioners should assume that binding arbitration agreements in fee contracts executed after the effective date of the 1996 amendments may not include fee disputes; only post-dispute agreements to binding arbitration of fee disputes are valid.