

**RESOLUTION 09-03-2016**

**DIGEST**

Mandatory Fee Arbitration: Procedures Following Awards

Amends Business and Professions Code sections 6202-6204.5 to clarify that trial de novo following a Mandatory Fee Arbitration procedure includes binding contractual arbitration.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code sections 6202, 6203, 6204, and 6204.5 to read as follows:

§6202

1           The provisions of Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of  
2 the Evidence Code shall not prohibit the disclosure of any relevant communication, nor shall the  
3 provisions of Chapter 4 (commencing with Section 2018.010) of Title 4 of Part 4 of the Code of  
4 Civil Procedure be construed to prohibit the disclosure of any relevant work product of the  
5 attorney in connection with: (a) an arbitration hearing or mediation pursuant to this article; (b) a  
6 trial in court after arbitration; (c) binding contractual arbitration under a pre-dispute contract  
7 between attorney and client which provides for an alternative to a trial in court after arbitration  
8 under this article; or (ed) judicial confirmation, correction, or vacation of an arbitration award. In  
9 no event shall such disclosure be deemed a waiver of the confidential character of such matters  
10 for any other purpose.

11  
12 §6203

13           (a) The award shall be in writing and signed by the arbitrators concurring therein. It shall  
14 include a determination of all the questions submitted to the arbitrators, the decision of which is  
15 necessary in order to determine the controversy. The award shall not include any award to either  
16 party for costs or attorney's fees incurred in preparation for or in the course of the fee arbitration  
17 proceeding, notwithstanding any contract between the parties providing for such an award or  
18 costs or attorney's fees. However, the filing fee paid may be allocated between the parties by the  
19 arbitrators. This section shall not preclude an award of costs or attorney's fees to either party by a  
20 court pursuant to subdivision (c) of this section or ~~or by a court or binding contractual arbitrators~~  
21 pursuant to subdivision (de) of Section 6204. The State Bar, or the local bar association  
22 delegated by the State Bar to conduct the arbitration, shall deliver to each of the parties with the  
23 award, ~~an original~~ a declaration of service of the award.

24           Evidence relating to claims of malpractice and professional misconduct, shall be  
25 admissible only to the extent that those claims bear upon the fees, costs, or both, to which the  
26 attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or  
27 offset or otherwise, for injuries underlying the claim. Nothing in this section shall be construed  
28 to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both  
29 previously paid to the attorney.

30           (b) Even if the parties to the arbitration have not agreed in writing to be bound, the  
31 arbitration award shall become binding upon the passage of 30 days after service of ~~notice of the~~  
32 award, unless a party has, within the 30 days, sought a trial ~~after~~ in court pursuant to subdivisions

33 (b) or (c) of Section 6204, or binding contractual arbitration pursuant to subdivision (d) of  
34 Section 6204. If an action has previously been filed in any court, any petition to confirm,  
35 correct, or vacate the award shall be to the court in which the action is pending, and may be  
36 served by mail on any party who has appeared, as provided in Chapter 4 (commencing with  
37 Section 1003) of Title 14 of Part 2 of the Code of Civil Procedure; otherwise it shall be in the  
38 same manner as provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of  
39 the Code of Civil Procedure. If no action is pending in any court, the award may be confirmed,  
40 corrected, or vacated by petition to the court having jurisdiction over the amount of the  
41 arbitration award, but otherwise in the same manner as provided in Chapter 4 (commencing with  
42 Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

43 (c) Neither party to the arbitration may recover costs or attorney's fees incurred in  
44 preparation for or in the course of the fee arbitration proceeding with the exception of the filing  
45 fee paid pursuant to subdivision (a) of this section. However, a court confirming, correcting, or  
46 vacating an award under this section may award to the prevailing party reasonable fees and costs  
47 incurred in obtaining confirmation, correction, or vacation of the award including, if applicable,  
48 fees and costs on appeal. The party obtaining judgment confirming, correcting, or vacating the  
49 award shall be the prevailing party except that, without regard to consideration of who the  
50 prevailing party may be, if a party did not appear at the arbitration hearing in the manner  
51 provided by the rules adopted by the board of trustees, that party shall not be entitled to  
52 attorney's fees or costs upon confirmation, correction, or vacation of the award.

53 (d) (1) In any matter arbitrated under this article in which the award is binding or has  
54 become binding by operation of law or has become a judgment either after confirmation under  
55 subdivision (c) ~~or~~, after a trial in court under subdivisions (b) or (c) of Section 6204, or after  
56 binding contractual arbitration under subdivision (d) of Section 6204, or in any matter mediated  
57 under this article, if: (A) the award, judgment, or agreement reached after mediation includes a  
58 refund of fees or costs, or both, to the client and (B) the attorney has not complied with that  
59 award, judgment, or agreement the State Bar shall enforce the award, judgment, or agreement by  
60 placing the attorney on involuntary inactive status until the refund has been paid.

61 (2) The State Bar shall provide for an administrative procedure to determine whether an  
62 award, judgment, binding contractual arbitration award after arbitration under this article or  
63 agreement should be enforced pursuant to this subdivision. An award, judgment, binding  
64 contractual arbitration award after arbitration under this article or agreement shall be so enforced  
65 if:

66 (A) The State Bar shows that the attorney has failed to comply with a binding fee  
67 arbitration award, judgment, binding contractual arbitration award after arbitration under this  
68 article or agreement rendered pursuant to this article.

69 (B) The attorney has not proposed a payment plan acceptable to the client or the State  
70 Bar.

71 However, the award, judgment, binding contractual arbitration award after arbitration  
72 under this article or agreement shall not be so enforced if the attorney has demonstrated that he  
73 or she (i) is not personally responsible for making or ensuring payment of the refund, or (ii) is  
74 unable to pay the refund.

75 (3) An attorney who has failed to comply with a binding award, judgment, binding  
76 contractual arbitration award after arbitration under this article or agreement shall pay  
77 administrative penalties or reasonable costs, or both, as directed by the State Bar. Penalties  
78 imposed shall not exceed 20 percent of the amount to be refunded to the client or one thousand

79 dollars (\$1,000), whichever is greater. Any penalties or costs, or both, that are not paid shall be  
80 added to the membership fee of the attorney for the next calendar year.

81 (4) The ~~board~~ State Bar Court shall terminate the inactive enrollment upon proof that the  
82 attorney has complied with the award, judgment, binding contractual arbitration award after  
83 arbitration under this article, or agreement and upon payment of any costs or penalties, or both,  
84 assessed as a result of the attorney's failure to comply.

85 (5) A request for enforcement under this subdivision shall be made within four years  
86 from the date (A) the arbitration award was mailed, (B) the award in a binding contractual  
87 arbitration after arbitration under this article was mailed; (C) the judgment was entered, or (D)  
88 the date the agreement was signed. In an arbitrated matter, however, in no event shall a request  
89 be made prior to 100 days from the date of the service of a signed copy of the award. In cases  
90 where the award is appealed, a request shall not be made prior to 100 days from the date the  
91 award has become final as set forth in this section.

92  
93 §6204

94 (a) The parties may agree in writing to be bound by the award of arbitrators appointed  
95 pursuant to this article at any time after the dispute over fees, costs, or both, has arisen. In the  
96 absence of such an agreement, either party shall be entitled ~~to a trial~~, after arbitration ~~if sought~~  
97 ~~within 30 days~~, pursuant to this article, to (1) a trial in court after arbitration pursuant to  
98 subdivisions (b) and (c), or (2) binding contractual arbitration under a pre-dispute contract  
99 between attorney and client which provides for an alternative to trial in court after arbitration  
100 under this article if sought within 30 days after service of the arbitration award, pursuant to  
101 subdivision (d), except that if either party willfully fails to appear at the arbitration hearing held  
102 pursuant to this article in the manner provided by the rules adopted by the board of trustees, that  
103 party shall not be entitled to a trial in court or to binding contractual arbitration after arbitration-  
104 under this article. The determination of willfulness shall be made by the court in proceedings  
105 brought under subdivisions (b) or (c) or by the subsequent binding contractual arbitrators in  
106 proceedings brought under subdivision (d). The party who failed to appear at the arbitration  
107 under this article shall have the burden of proving that the failure to appear was not willful. In  
108 making its determination, the court or the subsequent binding contractual arbitrators, may  
109 consider any findings made by the arbitrators appointed pursuant to this article on the subject of a  
110 party's failure to appear.

111 (b) If there is an action pending, the trial in court after arbitration shall be initiated by  
112 filing a rejection of arbitration award and request for trial in court after arbitration in that action  
113 within 30 days after service of ~~notice of~~ the award. If the rejection of the arbitration award has  
114 been filed by the plaintiff in the pending action, ~~all defendants each defendant~~ shall file a  
115 responsive pleading within 30 days following service upon the ~~defendant~~ defendants of the  
116 rejection of the arbitration award and request for trial in court after arbitration. If the rejection of  
117 the arbitration award has been filed by a defendant in the pending action, ~~all defendant~~ each other  
118 defendant shall then file a responsive pleading within 30 days after ~~the filing~~ service of the  
119 rejection of the arbitration award and request for trial in court after arbitration under this article.  
120 Service may be made by mail on any party who has appeared; otherwise service shall be made in  
121 the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the  
122 Code of Civil Procedure. Upon service and filing of the rejection of arbitration award, any stay  
123 entered pursuant to Section 6201 shall be vacated, without the necessity of a court order.

124 (c) If no action is pending, the trial in court after arbitration shall be initiated by the

125 commencement in the manner provided in Section 350 of the Code of Civil Procedure of an  
126 action in the court having jurisdiction over the amount of money in controversy within 30 days  
127 after ~~service of notice~~ of the arbitration award issued under this article. After the filing of such an  
128 action, the action shall proceed in accordance with the provisions of Part 2 (commencing with  
129 Section 307) of the Code of Civil Procedure, concerning civil actions generally.

130 (d) If there is a written pre-dispute agreement between the parties for binding contractual  
131 arbitration of controversies including attorney's fees, or costs, or both, instead of a trial in court  
132 under subdivisions (b) or (c), either party may request binding contractual arbitration under said  
133 contract. If there is an action in court pending between the parties, the party desiring such binding  
134 contractual arbitration shall file a petition in that action to compel binding contractual arbitration  
135 in accordance with Section 1281.2 of the Code of Civil Procedure within 30 days after service of  
136 the award, or within the time to respond if the other party timely filed a rejection of the award  
137 and request for trial in court after arbitration as set forth in subdivision (b) or timely initiated  
138 court proceedings as set forth in subdivision (c). If there is a binding contractual arbitration  
139 proceeding pending between the parties, the party seeking such binding contractual arbitration  
140 after arbitration under this article shall follow the procedures of the binding contractual  
141 arbitration provider to resume the binding contractual arbitration within 30 days after service of  
142 the award. If there is no action in court or binding contractual arbitration pending, the party  
143 desiring binding contractual arbitration after arbitration under this article shall, within 30 days of  
144 service of the award, either file a demand for binding contractual arbitration with a mutually  
145 agreed upon arbitration provider or file a petition to compel binding contractual arbitration in a  
146 new court action in the court having jurisdiction over the amount of money in controversy. If it is  
147 hereafter determined that there is no enforceable written pre-dispute agreement between the  
148 parties for binding contractual arbitration of the controversy, either party may then proceed  
149 pursuant to subdivisions (b) and (c) with a trial in court after arbitration within 30 days after such  
150 determination.

151 (e) The party seeking a trial in court or binding contractual arbitration after arbitration  
152 under this article shall be the prevailing party if that party obtains a judgment or subsequent  
153 binding contractual arbitration award more favorable than that provided by the arbitration award  
154 issued under this article, and in all other cases the other party shall be the prevailing party. The  
155 prevailing party may, in the discretion of the court or subsequent binding contractual arbitrators,  
156 be entitled to an allowance for reasonable attorney's fees and costs incurred in the trial or binding  
157 contractual arbitration after arbitration under this article, which allowance shall be fixed by the  
158 court or subsequent binding contractual arbitrators. In fixing the attorney's fees, the court or  
159 subsequent binding contractual arbitrators shall consider the award and determinations of the  
160 arbitrators appointed under ~~to~~ this article, in addition to any other relevant evidence.

161 (f) Except as provided in this section, the award and determinations of the arbitrators shall  
162 not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding.

163  
164 §6204.5

165 (a) The State Bar shall provide by rule for an appropriate procedure to disqualify an  
166 arbitrator or mediator upon request of either party.

167 (b) The State Bar, or the local bar association delegated by the State Bar to conduct the  
168 arbitration, shall deliver a notice to the parties advising them of their rights to judicial relief or  
169 binding contractual arbitration under a pre-dispute contract between attorney and client which  
170 provides for an alternative to trial in court subsequent to the arbitration proceeding under this

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Sacramento County Bar Association

**STATEMENT OF REASONS**

The Problem: The current statutes are not consistent with case law established by the California Supreme Court in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 55, because while the statute provides that a party must file an action in court to reject a non-binding award, under *Schatz* a party is entitled to pursue binding arbitration de novo instead of an action in court. The proposed amendments would make the statute consistent with the case law established by the Supreme Court and provide guidance as to the manner in which to timely exercise a right to arbitration de novo.

The Solution: The changes would provide that a party seeking to reject a non-binding MFA award can file a petition to compel arbitration (if a court action is pending) or file a demand for arbitration with an arbitration provider (if no action is pending).

The proposed resolution is to amend provisions of the Mandatory Fee Arbitration Act (“MFAA” - Business & Professions Code §§ 6200 et seq.) to address issues created by the California Supreme Court’s decision in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 55.

Business & Professions Code sections 6203 and 6204 provide that either party to a fee arbitration may reject a non-binding award within 30 days after the award has been served and have a “trial after arbitration” by filing an action “in court.”

In *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 55, the Supreme Court held that that if the parties to a mandatory fee arbitration proceeding have a provision in their fee agreement for binding contractual arbitration that provision can be enforced after a non-binding fee arbitration and that client can be forced to arbitration de novo instead of trial de novo as set forth in the statute.

The Supreme Court’s decision in *Schatz* created logistical problems for MFA programs because the statute still says that filing a trial de novo in court is the means to reject a non-binding award. In addition, the Supreme Court did not address how a party to an MFA proceeding would commence an arbitration de novo which has led to further confusion.

The proposed amendments would modify the statutes, particularly Business & Professions Code section 6204(d), to specify the manner in which a party may reject an award and commence a binding arbitration de novo.

**IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule.

**CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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**RESPONSIBLE FLOOR DELEGATE:** Kenneth E. Bacon.

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**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Business and Professions Code sections 6202-6204.5 to clarify that trial de novo following a Mandatory Fee Arbitration procedure includes binding contractual arbitration. This resolution should be approved in principle because it clarifies that a Mandatory Fee Arbitration award can be rejected either by a trial in court or binding private arbitration pursuant to a pre-dispute arbitration provision.

Mandatory Fee Arbitration (governed by Business and Professions Code sections 6202-6206) is a cost effective and efficient means for attorneys and clients to resolve fee disputes. It is mandatory for the attorney if the client demands it. But, it is only binding if either all parties agree to make it binding, or the award is not rejected within 30 days. If the award is rejected, either party can seek trial de novo; one way to reject the award is to seek trial de novo within 30 days of the award. The statutory scheme is currently silent on whether such trial de novo includes binding private arbitration pursuant to an enforceable pre-dispute arbitration agreement.

Pre-dispute arbitration agreements are common between attorneys and clients, and already form the basis for further dispute resolution if either party rejects a Mandatory Fee Arbitration award. The California Supreme Court’s decision in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 55 confirms this practice and it is reasonable to update Business and Professions Code sections 6202-6204.5 to reflect the current practice.