

**FINDINGS AND AWARD
OF THE MARIN COUNTY BAR ASSOCIATION
CLIENT RELATIONS COMMITTEE
MANDATORY FEE ARBITRATION PANEL**

In the Matter of the Arbitration Between:

Client: BRYAN MICHAEL STEWART	
v. Attorney: WAYNE K.D. MORGAN	

INTRODUCTION

This arbitration was heard pursuant to a written Request for Arbitration filed by Client. The matter was heard on February 13, 2015 at 10:00 a.m. The matter was heard by a panel of three arbitrators: Michael J. Fish, as Chair Arbitrator, and Panelists **JENNIFER K. KRAMER** and **DAVID R. HARRIS**. Neither party was represented by counsel.

This arbitration is **NON-BINDING**. Both parties requested non-binding arbitration by checking the appropriate box for non-binding arbitration on the Request for Arbitration Form and Attorney's Arbitration Statement.

RESPONSIBLE ATTORNEY

Pursuant to Business and Professions Code § 6203(d), the responsible attorney in this matter is **WAYNE K.D. MORGAN**.

FEES INCURRED AND AMOUNT IN DISPUTE

- | | |
|---------------------------------------------------------------------------------------------------------|--------------|
| 1. The amount that the Petitioner claims the services were worth: | \$26,000.00 |
| 2. The amount that the Respondent claims the services were worth: | \$155,576.13 |
| 3. The amount that the client has paid the attorney: | \$26,224.00 |
| 4. If there was a written fee agreement, under the fee agreement, what fees are owed: | \$28,000.00 |
| 5. The amount that the arbitrator/panel determines that the services were worth: | \$30,000.00 |
| 6a. The filing fee was paid to the Marin County Bar Association by Client: BRYAN MICHAEL STEWART | |
| 6b. The amount of the filing fee paid to the Marin County Bar Association: | \$7000.00 |

STATEMENT OF FACTS/ISSUES IN DISPUTE

Having read the Request for Arbitration, the Attorney's Reply, and the documents provided, and listening to the testimony and arguments of the parties, the following facts are found to exist.

Client filed a Request for Arbitration with the Marin County Bar Association on September 22, 2014, disputing approximately \$150,000 of the \$176,000 he claimed he had been billed for the attorney's time regarding client's international child custody matter. Client's former spouse had filed an action in Canada to, in part, transfer jurisdiction of the existing Marin County matter to Canada. Attorney's billing records revealed the client had been billed an amount that he discounted to \$155,567.13 of which the client paid \$26,224, leaving a balance due in the amount of \$129,343.23. The client agreed that these records were an actual reflection of the amounts in dispute.

The evidence supported the fact that there was a valid and enforceable written fee agreement between the parties. There was no evidence provided that would suggest that the written fee agreement was voidable at the option of the client.

When the Arbitrator finds that a valid fee agreement exists and the fees are not "unconscionable," the attorney will ordinarily be entitled to fees and costs charged per the contract. (See State Bar of California, Arbitration Advisory 93-02).

Rule 4-200(A) of the Rules of Professional Conduct (PC) states that an attorney "shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." To be unconscionable, a fee must be so far beyond the realm of reasonableness that it shocks the conscience. Subpart (B) of Rule 4-200 requires consideration of all of the facts and circumstances existing at the time the fee agreement is entered into, except where the parties expect that the fee will be affected by later events, and lists eleven factors to be considered, among others. If the fee is unconscionable, the attorney is nonetheless entitled to recover a reasonable fee.

Client claims that the attorney held himself out as a family law specialist, and more importantly, on matters regarding the Hague Convention, which was significant since a custody matter was initiated in Canada by Client's former spouse, to change custody jurisdiction from Marin County to Canada. While Attorney made great efforts to convince the Marin County Courts to retain jurisdiction and dissuade the Canada Courts from assuming jurisdiction, he ultimately was unsuccessful. The arbitrators have determined that this was a reasonable approach calculated to benefit client. The fact that Attorney could not succeed at this stage on client's behalf does not relieve client from his legal fee obligation to this point. It is additionally the finding of this panel that all services performed to this point were necessary as authorized by the client. The arbitrators have further determined that this effort cost the client approximately \$30,000.

Client further asserts that Attorney knew that client had little in the way of assets or savings in order to finance the litigation, but was assured by Attorney that Client's former spouse would be required to pay his fees. This is evidenced by many facts, including, but not limited to, Client's fee request declaration prepared by the attorney in the Marin County matter. Attorney knew that he had assumed the responsibility to collect these fees from Client's former spouse

and that client was relying upon that representation as they moved forward and client incurred more fees. The arbitrators have determined that any fees incurred by attorney in excess of the initial \$30,000 would be unconscionable.

Additionally, Business and Professions Code section 6203 states that evidence relating to claims of malpractice and professional misconduct are "admissible only to the extent those claims bear upon fees, costs, or both, to which the attorney is entitled," but no affirmative relief in the form of damages or offset can be awarded for injuries claimed to have resulted from the malpractice or misconduct. If the arbitrators find that professional negligence did occur, they may then determine that there was a reduced value, or no value for the services, and adjust the fees accordingly.

The arbitrators find that after the Canadian Court assumed jurisdiction, Attorneys advice to client to NOT appear in Canada was misplaced. All other Canadian counsel consulted in this matter by Attorney were advising the contrary (i.e., that Client should make an appearance in Canada), yet Attorney directed client to not submit to Canadian jurisdiction, while he continued to bill out large fee amounts. In fact, the Canadian Court even went so far as to allow Client to make a conditional appearance in Canada for the sole purpose of challenging jurisdiction and to relieve Client from making a general appearance that would have submitted him to Canadian jurisdiction. Attorney again counseled Client to not make that appearance, but to fight jurisdiction here in California. It is the finding of this panel that attorney's actions substantially reduced the value of his services and therefore, in spite of what the Marin County Courts ordered regarding Client's former wife pay Attorney's fees, no further fees will be allowed Attorney from Client beyond the initial \$30,000 described in this Award. To otherwise allow these fees would result in an unconscionable fee to the Attorney which cannot be allowed.

Business and Professions Code Section 6203(a) gives the arbitrators discretionary authority to allocate the filing fee between the parties. No standard is given, but in practice the allocation is based upon the extent to which the payor's claim is found to be supported in the basis of the award. It is the determination of this Panel that Attorney is entitled to fees and costs in the total amount of \$30,000. However, this Panel found that client's assertions about attorney's conduct, lack of professionalism, and skill below industry standards were totally supported by the facts after the Canadian Courts assumed jurisdiction in this matter. As such, the filing fee is allocated 50% to Client and 50% to Attorney.

Based upon the foregoing, the arbitrators render the below-stated award.

