

ARBITRATION OF ATTORNEY MALPRACTICE CLAIMS

American Bar Association Section of Litigation Professional Services Liability

PEOPLE

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Numerous legal malpractice cases were filed against lawyers and law firms in 2015. Several were highly publicized and had large verdicts. *See, e.g.,* Adrienne Appel, "4 Big Malpractice Cases in 2015: From Weird to Wildly Costly," *Bloomberg Law*, Dec. 30, 2015. What can a lawyer do (besides providing appropriate legal advice) to keep himself or herself out of the courtroom in a malpractice case? The answer may be to include a provision in the retainer agreement that requires the binding arbitration of malpractice claims. This article explores this course of action and some of the positive and negative aspects of doing so.

THE BASICS

Most states permit a lawyer to include in a retainer agreement with a client a provision that requires the binding arbitration of malpractice claims (and fee disputes) provided that certain conditions are met. First, the lawyer must fully apprise the client of the advantages and disadvantages of binding arbitration and give the client enough information so that the client can make an informed decision about this issue. Second, the arbitration provision cannot limit the liability to which the lawyer would otherwise be exposed under common or statutory law unless the client is independently represented in making the agreement. While these guidelines generally apply, a lawyer should check state-specific rules and decisions before deciding to include such a provision in a retainer agreement.

In Illinois, for example, where we principally practice, the Rules of Professional Conduct and recent case law have touched on this issue. Illinois Rule of Professional Conduct 1.8(h)(1) states that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Comment 14 to the rule provides the reasoning for this, noting that such an agreement is "likely to undermine competent and diligent representation." Further, this comment notes that "many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen." The comment also notes that the rule does not "prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable

and the client is fully informed of the scope and effect of the agreement." Two recent Illinois cases are in accord: *Woods v. Patterson Law Firm, P.C.*, 381 Ill. App. 3d 989, 997 (1st Dist. 2008) (holding that while an arbitration provision related to a malpractice claim was valid, the law firm waived it by actively participating in the discovery process in furtherance of a filed lawsuit), and *Davis v. Fenton*, 26 F. Supp. 3d 727, 739-40 (N.D. Ill. 2014) (holding that an arbitration clause in the retainer agreement was valid and not substantively unconscionable). In both cases, the courts held that arbitration clauses related to attorney malpractice claims are enforceable in Illinois.

Similarly, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 02-425, finding that retainer agreements that require binding arbitration are permissible under the Model Rules of Professional Conduct provided certain conditions are met.

Other courts have found a binding arbitration provision in a retainer agreement unenforceable. Very recently in *Batoff v. Widin*, No. 02350, the Philadelphia Court of Common Pleas found a retainer agreement's arbitration clause unenforceable because it was in an addendum attached to the agreement that was not signed or initialed by the client and it did not contain language providing notice of the rights that the client was waiving. The court reached this finding in spite of the client being a sophisticated businessman and former attorney. The *Batoff* court analyzed two other cases—*Sanford v. Bracewell & Guilliani, LLP*, 6 F. Supp. 3d 568 (E.D. Pa. 2014), *reversed and remanded*, 618 F. App'x 114, 116 (3d Cir. 2015), and *Hodges v. Reasonover*, 103 So. 3d 1069 (La. 2012)—that discussed disclosure requirements for an enforceable arbitration provision. The *Hodges* court, for example, found that for a binding arbitration provision related to legal malpractice claims to be valid, "[a]t a

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Waiver of the right to a jury trial;

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Waiver of the right to an appeal;

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Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or Federal Rules of Civil Procedure;

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Arbitration may involve substantial upfront costs compared to litigation;

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Explicit disclosure of the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;

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The arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities;

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The client has the opportunity to speak with independent counsel before signing the contract.”

Hodges, 103 So. 3d at 1077.

Attorneys who wish to include a binding arbitration provision related to malpractice claims in their retainer agreements should make sure they are fully informing the client of the advantages and disadvantages of binding arbitration and giving the client enough information to make an informed decision.

INSURANCE ISSUES

Another important consideration before an attorney decides to include a binding arbitration provision in a retainer agreement is how it may affect his or her malpractice insurance. It is extremely important that an attorney review his or her insurance policy and discusses this issue with the insurer to avoid mistakenly invalidating malpractice coverage. It is also worthwhile to see if the insurer has a position on binding arbitration provisions. Some insurers have issued advisory opinions about this issue that may offer valuable insight to the attorney. It is best practice to obtain the insurer's written consent before deciding to include an arbitration clause that covers malpractice claims in a retainer agreement.

PROS AND CONS

As with most decisions, there are pros and cons to electing arbitration over

traditional litigation. Further complicating the issue, whether a factor is a pro or a con may differ for each attorney or firm. Below we explore the factors that attorneys should consider when weighing whether to include a binding arbitration provision in a retainer agreement.

Private and confidential. Arbitration is private by nature. Thus, it enables lawyers to limit public disclosure of otherwise confidential information when attempting to recover fees or defending malpractice claims. In addition, it protects the law firm's reputation, which may be damaged immediately upon the public filing of a malpractice suit regardless of the strength of the claim.

Costs. Arbitration, generally, should be less expensive than traditional litigation. Although the parties are required to pay up-front administrative fees and the arbitrator's (or arbitrators') hourly rate, the overall cost of arbitration from filing through resolution should be less because discovery and motion practice typically are limited. That being said, if the law firm has a strong dispositive motion to dismiss, it may be less expensive to litigate in court. That is because the arbitrators may prohibit motion practice, preferring to allow all the facts and legal issues to be addressed at trial.

No jury. Binding arbitration avoids the risks associated with a jury trial. Those risks include having the case decided by a jury of unsophisticated individuals who may not understand some of the complex issues that arise in a legal malpractice case. There also is a perception that jurors are predisposed to dislike or distrust attorneys. Thus, as a general rule, a legal malpractice defendant is better off with an arbitrator—typically another lawyer or a former judge—making the final determination as opposed to a jury primarily comprising non-lawyers. On the other hand, because arbitrators are allowed to exercise discretion and do not face substantive appellate review, they may be subject to outside influences or apply principles of equity to reach what they perceive to be a fair resolution.

Input in selecting the arbitrator. In addition to having an attorney or judge make the final determination, arbitration also is beneficial because the defendant attorney will be involved in selecting the arbitrator. This stands in stark contrast to the random appointment of a judge or panel of potential jurors in court. Having input into the selection process enables the parties to attempt to identify an arbitrator with experience in handling legal malpractice cases. Of course, the plaintiff also will be involved in selecting the arbitrator, and if the law strongly favors the plaintiff's case, having an experienced arbitrator may benefit the plaintiff as much as, if not more than, the defendant attorney.

Expeditious resolution. Arbitration will likely be resolved more expeditiously than a court case. For example, according to the 2014 *Annual Report of the Illinois Courts*, lawsuits seeking jury verdicts of more than \$50,000 filed in the Circuit Court of Cook County, Chicago, on average spanned 37.5 months from complaint to verdict. By contrast, according to the American Arbitration

Association (AAA) Arbitration Roadmap, a commercial case should take only 297 days from filing to award.

Limited discovery. In arbitrations, discovery usually is limited to document requests exchanged by the parties and a limited number of depositions. Indeed, under the AAA rules, the arbitrator has discretion to direct the parties to exchange documents and identify witnesses. However, the rules do not address any other formal discovery procedures such as interrogatories, requests for admission, or depositions. (See AAA Commercial Arbitration Rules and Mediation Procedures R-21.)

No substantive appeal. Parties to an arbitration proceeding do not have any right to a substantive appeal. Indeed, under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., a party may appeal an arbitrator's decision only in the following circumstances:

- where the award was procured by corruption, fraud, or other undue means;
- there was evident partiality or corruption in the arbitrators . . . ;
- where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

As a result, an arbitration award is rarely overturned.

Insurance concerns. Finally, before adding an arbitration clause to an engagement letter, attorneys should consider the insurance concerns discussed above.

CONCLUSION

The inclusion of a binding arbitration provision in a retainer agreement is an almost sure-fire way to keep legal malpractice allegations private and out of the public courtroom setting. Whether the benefit of privacy and the other pros of arbitration outweigh the cons is a conclusion that each law firm must reach on its own after analyzing the rules and case law in the applicable jurisdiction, the requirements of the firm's malpractice insurance carrier, and the factors discussed above.



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