

Committee Opinion  
January 12, 1998

LEGAL ETHICS OPINION 1707

ENGAGEMENT AGREEMENT  
PROVIDING FOR MANDATORY  
ARBITRATION OF MALPRACTICE  
CLAIMS WITH CLIENT WAIVING  
RIGHT TO TRIAL.

You have presented a hypothetical situation in which a Virginia law firm proposes to include in its client engagement agreement a provision obligating the client to submit any claim of legal malpractice by the firm's lawyers (excluding disciplinary complaints to the Virginia State Bar) to binding arbitration by an arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Arbitration would be conducted in the city or county where the law firm's office is located unless otherwise agreed. The arbitrator would have the discretion to order that the losing party bear the costs of arbitration, including fees, expenses and reasonable attorney's fees. You state that the client engagement agreement would contain the following:

By agreeing to this [binding arbitration] provision, you waive your rights to a trial by jury or to a judge. We urge you to seek the advice of independent counsel of your choosing before you agree to this provision.

Your inquiry to the committee is whether the requirement of binding arbitration of claims of legal malpractice as stated above violates any provision of the Code of Professional Responsibility. If it does not violate the Code of Professional Responsibility, what specific disclosures should the attorney make to the client in order to enable the client to make an informed decision regarding consent to binding arbitration.

The pertinent Disciplinary Rules are (i) DR:5-101(A), providing that a lawyer shall not accept employment if his professional judgment on behalf of his client may be affected by his own financial, business, property or personal interests except with the client's consent after full and adequate disclosure, and (ii) DR:6-102, providing that a lawyer shall not limit his liability to his client for his own personal malpractice. On December 3, 1984, the Committee opined that it is not ethically improper under DR:6-102 for a lawyer to include a provision in a client retainer agreement requiring binding arbitration, or nonbinding but admissible arbitration, of a malpractice claim against the lawyer, provided that (1) the client consents after full disclosure of the effect of the provision, and (2) the client is advised to seek independent counsel regarding the advisability of the provision. LE Op. 638. The committee cited Massachusetts Legal Ethics Opinion 82-1. In a later opinion, the committee observed that client retainer agreements requiring binding arbitration of malpractice claims do not constitute a limitation of liability in violation of DR:6-102 because they merely identify a procedure for the determination of liability and do not specifically limit liability. LE Op. 1550. See *McGuire, Cornwell & Blakey v. Grinder*, 765 F. Supp. 1048 (D. Colo. 1991).

LE Op. 638 did not mention DR:5-104(A), governing business transactions between a lawyer and a client in which they have differing interests, and the client expects the

Committee Opinion  
January 12, 1998

lawyer to exercise professional judgment therein for the client's protection. In LE Op. 1586 the committee opined that a client engagement agreement provision requiring binding arbitration of fee disputes (but not malpractice claims) is not violative per se of DR:5-104(A), provided that (1) before entering into the engagement agreement, the lawyer makes a full and adequate disclosure to the client of all possible consequences of the binding arbitration provision, (2) the client gives an informed consent, and (3) the binding arbitration provision is not unconscionable, unfair or inequitable when made. The committee observed that all doubts about the adequacy of disclosure to obtain informed consent are resolved in the client's favor.

Upon further consideration of LE Op. 1586, the committee believes that applying DR:5-104(A) to binding arbitration provisions in client engagement agreements is problematic. EC:5-3 suggests that the "business transaction with a client" language of DR:5-104(A) contemplates transactions in which a lawyer and a client acquire a co-interest in property or in an enterprise or become co-investors in a business venture. See ABA/BNA, *Lawyers' Manual on Professional Conduct* 51:501-51:508. Hence, the committee concludes that DR:5-101(A) rather than DR:5-104(A), is applicable to client engagement agreements requiring binding arbitration of malpractice claims even though the requirements of disclosure and consent are fundamentally the same under both DR:5-101(A) and DR:5-104(A).

Provisions in client engagement agreements requiring binding arbitration of malpractice claims have received considerable attention since LE Op. 638 was issued in 1984. In a recent article, the Attorneys' Liability Assurance Society reported that the propriety of such provisions remains questionable, and that the pertinent ethics opinions are about evenly split on whether they are permissible. VIII ALAS, *Loss Prevention Journal* 13, 14 (Sept. 1997). Judicial recognition of such provisions has been described as giving the lawyer a license to exploit the client. *Arbitration Clauses in Retainer Agreements: A Lawyer's License to Exploit the Client*, 1992 *Journal of Dispute Resolution* 341, discussing *Haynes v. Kuder*, 591 A.2d 1286 (D.C. 1991).

Generally speaking, arbitration of malpractice claims would be more expeditious and efficient and less expensive than litigation. Those advantages benefit lawyer and client alike. The lawyer's motive is implicated nonetheless. It has been suggested that the lawyer's objective in requiring arbitration of malpractice claims is usually to avoid a jury trial in an effort to minimize losses and reduce a client's recovery for any legal malpractice. *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 10 at n. 5 (Ct. App. 1989).

The making of a contract between the lawyer and the client, particularly when it requires the client to forego a right to a judicial adjudication of legal malpractice claims, harbors special problems that entail a heightened ethical scrutiny of fairness and conscionability. An engagement contract between lawyer and client is not tested by the standards of ordinary commercial contracts. *Heinzman v. Fine, Fine, Legum & Fine*, 217 Va. 958, 962 (1977). The lawyer has an influential and superior position, excepting possibly when the client is a corporation with in-house counsel. See *Spilker v. Hankin*,

Committee Opinion  
January 12, 1998

188 F.2d 35, 39 (D.C. Cir. 1951). The lawyer is dealing in an area in which the lawyer is an expert, and the client is not. The client necessarily looks to the lawyer for guidance. See *Udall v. Littell*, 366 F.2d 668, 675 (D.C. Cir. 1966); *In re Will of Tank*, 503 N.Y.S.2d 495, 497 (Civ. Ct. 1986).

It is noted that until an engagement agreement is made, the lawyer is dealing with a prospective client. Even so, it is generally recognized, and the committee agrees, that a lawyer's fiduciary duties extend to preliminary consultation by a prospective client with a view to engagement. E.g., *Westinghouse Elect. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1316-19 (7th Cir.), cert. den., 439 U.S. 955 (1978); *Nolan v. Foreman*, 665 F.2d 738, 739 n. 3, reh'g den., 671 F.2d 1380 (5th Cir. 1982); *Green v. Montgomery County*, 784 F. Supp. 841, 845 (N.D. Ala. 1992). But see *McGuire, Cornwell & Blakey*, 765 F. Supp. 1048, 1051 (D. Colo. 1991). A lawyer's fiduciary duties, it has been noted, "arise from his status as a member of the legal profession and are expressed, at least in part, by the applicable rules of professional conduct." ABA/BNA, *supra*, 31:101 at 21.

There is no consensus among ethics panels that have addressed whether it is ethically permissible for a lawyer to include a provision requiring binding arbitration of malpractice claims in the client engagement agreement. District of Columbia Bar Legal Ethics Comm. Op. 211 (1990) stated that an arbitration provision covering malpractice claims is not ethically permissible unless the client is represented by independent counsel in entering into the agreement. Its rationale was that it is unrealistic to expect lawyers to provide enough information about arbitration in a first meeting to allow the client to make an informed decision. Maryland Ethics Opinion 90-12 (1989) stated that the client must have actually consulted with another lawyer before the client's consent to binding arbitration of malpractice claims can be effective. See Michigan Informal Ethics Opinion RI-257 (1996).

Other ethics panels have concluded that it is enough if the lawyer makes an adequate disclosure to the client of the effect on the client's rights of a provision requiring arbitration of malpractice claims and advises the client to consult an independent lawyer regarding the provision. Arizona Ethics Opinion 94-05 (1994); Philadelphia Ethics Opinion 88-2 (1988); see California Formal Ethics Opinion 1989-116. On the other hand, Ohio Ethics Opinion 96-9 (1996) found it unseemly for a client to be admonished that the client needed to "hire a lawyer to hire a lawyer." In the Ohio ethics panel's view, the admonition to hire another lawyer for advice about a malpractice arbitration provision in the engagement agreement conveyed a chilling caveat to the client: the lawyer you are hiring to protect your interests may be taking advantage of you in the engagement agreement.

The Ohio ethics panel advised that provisions requiring arbitration of malpractice claims should be avoided because they eliminate the clients' opportunity to make a decision based on the particular facts and circumstances of a dispute at the time it arises. Hence, the Ohio ethics panel discouraged such provisions even though it concluded that they were not per se unethical as an attempt to limit a lawyer's liability to his client for personal malpractice.

Committee Opinion  
January 12, 1998

Based on its prior opinions, as well as the factors considered by other ethics panels, the committee is of the opinion that a client engagement agreement providing for binding arbitration of legal malpractice claims does not constitute a per se violation of the proscription of DR:6-102 against a lawyer limiting liability to the client for personal malpractice. The committee cautions, however, that the ethical propriety of such provisions is tested by the adequate disclosure and informed consent requirements of DR:5-101(A) and by the paramount principles of fairness and conscionability governing contracts between lawyer and client generally. See *Heinzman, supra*. Like the fee agreements addressed in LE Op. 1606, a determination of the fairness and conscionability of client engagement agreements requiring binding arbitration of malpractice claims is subject to the occurrence of unusual and extraordinary facts and circumstances not contemplated at the outset of the representation. Their occurrence may well implicate the adequacy of the disclosures made to obtain the client's consent in the engagement agreement.

The committee observes that EC:9-6 expresses the aspirational objective that lawyers conduct themselves in a manner that reflects credit on the legal profession and inspires the confidence, respect and trust of clients and of the public. The aspirational objective is troubling in the context of the lawyer's admonition that "before signing my client engagement agreement for me to represent you, you should hire another lawyer to advise you about the provision requiring you to arbitrate any malpractice claim against me."

The committee is unable to respond to your second question about specific disclosures to be made to a client in order to obtain an informed consent to the binding arbitration provision. The content of the disclosures, such as waiver of trial by jury or by the court, discovery, evidentiary rules, arbitrator selection, scope of award, expense, appellate rights, finality of award, enforcement of award, etc., cannot be stated in a categorical fashion and, in addition, may vary from client-to-client based on the client's sophistication, education, and experience and even the exigency or the character of the representation sought. The fundamental ethical imperatives are that the client's consent must be an informed one, and that the consent sought and given for binding arbitration is not unfair or unconscionable under the circumstances.