



## Alerts

### Florida Appellate Court Rules Arbitration Clause in Retainer Agreement is Unenforceable because Client was not advised to Consider Hiring Independent Counsel

July 9, 2018

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*Owens v. Katherine L. Corrigan & Klc*, 2018 Fla. App. LEXIS 9174 (Court of Appeal of Florida, Fourth District, 6/27/18; Not final until disposition of any motion for rehearing.)

#### Brief Summary

A Florida appellate court held that the retainer agreement violated Florida Bar Rule 4-1.5(i) because the agreement prospectively provided for mandatory arbitration of fee disputes without giving plaintiff the required written notice that she should consider obtaining independent legal advice before entering into such an agreement. Because the arbitration clause did not comply with Florida Bar Rule 4-1.5(i), the court held it was unenforceable on its face.

#### Complete Summary

Plaintiff filed a three-count legal malpractice action against the defendants, alleging they negligently represented plaintiff in a dependency case, causing her to lose custody of her children. Defendants moved to dismiss the complaint, asserting that plaintiff had signed a retainer agreement requiring her to submit the dispute to binding arbitration. The retainer agreement included the following arbitration clause:

Any controversy, dispute or claim arising out of or relating to our fees, charges, performance of legal services, obligations reflected in this letter, or other aspects of our representation shall be resolved through binding arbitration in Broward County, Florida, in accordance with the Fee Arbitration Rule (Chapter 14) of the Rules Regulating the Florida Bar, and judgment on the award may be entered in any court having jurisdiction thereof. [YOU ACKNOWLEDGE THAT BY AGREEING TO ARBITRATION YOU ARE RELINQUISHING YOUR RIGHT TO BRING AN ACTION IN COURT AND TO A JURY TRIAL.]

The trial court entered a final order of dismissal, finding that the parties "entered into an agreement to arbitrate that was not waived." After plaintiff's motion for rehearing was denied, plaintiff appealed. On appeal, plaintiff argued that: (1) the trial court's order violated her right to due process by denying her a

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proper forum for redress of grievances; (2) the arbitration agreement was unenforceable because it violated Florida Bar Rule 4-1.5(i) by omitting the cautionary notice required under that rule; and (3) the arbitration provision was ambiguous as to whether it required arbitration of a legal malpractice claim.

The appellate court addressed plaintiff's second argument, which the court found to be dispositive. The court initially noted that in deciding whether arbitration of a dispute is required, there are three elements for a court to consider: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999). Plaintiff argued the arbitration provision was invalid because it violated Florida Bar Rule 4-1.5(i), and the court agreed. Florida Bar Rule 4-1.5(i) prohibits lawyers from making an agreement with a client prospectively providing for mandatory arbitration of fee disputes without advising the client in writing that the client should consider obtaining independent legal advice. Rule 4-1.5(i) provides:

**(i) Arbitration Clauses.** A lawyer shall not make an agreement with a potential client prospectively providing for mandatory arbitration of fee disputes without first advising that person in writing that the potential client should consider obtaining independent legal advice as to the advisability of entering into an agreement containing such mandatory arbitration provisions. A lawyer shall not make an agreement containing such mandatory arbitration provisions unless the agreement contains the following language in bold print:

**NOTICE: This agreement contains provisions requiring arbitration of fee disputes. Before you sign this agreement you should consider consulting with another lawyer about the advisability of making an agreement with mandatory arbitration requirements. Arbitration proceedings are ways to resolve disputes without use of the court system. By entering into agreements that require arbitration as the way to resolve fee disputes, you give up (waive) your right to go to court to resolve those disputes by a judge or jury. These are important rights that should not be given up without careful consideration.**

Here, the court held the retainer agreement violated Florida Bar Rule 4-1.5(i) because the agreement prospectively provided for mandatory arbitration of fee disputes without giving plaintiff the required written notice that she "should consider obtaining independent legal advice as to the advisability of entering into an agreement containing such mandatory arbitration provisions." Because the arbitration clause did not comply with Florida Bar Rule 4-1.5(i), the court held it was unenforceable on its face.

The court disagreed with defendants' argument that Rule 4-1.5(i) is inapplicable because this case did not involve a fee dispute. The court held that although the arbitration clause could be read as requiring arbitration of matters in addition to fee disputes, this did not alter the fact that the arbitration clause clearly violated the rule by prospectively providing for mandatory arbitration of fee disputes without giving the required warning language. The court concluded that this was enough to invalidate the arbitration clause in its entirety.

The dissent argued that the court should sever those portions of the clause relating to fees and enforce the remainder of the signed contract.

### **Significance of Opinion**

The court held, as most other courts have done, that in order for mandatory arbitration clauses within engagement agreements to be enforceable, the prospective client should be advised in writing to consider consulting with independent counsel before signing the agreement. *But see Bezio v. Draeger*, 737 F.3d 819 (1st Cir. 2013), in which the U.S. Court of Appeals for the First Circuit held that Maine will uphold clearly stated arbitration clauses within engagement agreements without a requirement that the lawyer advise the client to seek independent counsel, with certain limitations.

For more information, please contact Terrence P. McAvoy.