



## Alerts

### Under Maine Law, Advice to Seek Independent Counsel Is Unnecessary When an Engagement Agreement Contains a Clear Arbitration Clause

December 23, 2013

*Lawyers for the Profession® Alert*

*Bezio v. Draeger*, \_\_\_ F.3d \_\_\_, 2013 WL 6570920 (1<sup>st</sup> Cir. (Me.) Dec. 16, 2013)

#### Brief Summary

The United States First Circuit Court of Appeals, considering Maine law, determined that an arbitration clause in an attorney-client engagement letter was enforceable. The attorneys were not required to advise the client to obtain the advice of independent counsel, and were not required to discuss the risks and possible consequences of the arbitration clause to ensure informed consent. The court rejected the plaintiff's argument that the arbitration clause was inherently unconscionable and against public policy.

#### Complete Summary

The plaintiff, a licensed agent and investment advisor, sought representation from the law firm and individual attorneys ("defendants") when the Maine Office of Securities threatened to revoke his license for violations of Maine law, FINRA and NASD rules. Before undertaking the representation, defendants sent an engagement letter to the plaintiff, who made revisions by hand, initialed and signed the agreement, and returned it to defendants. He made no changes to the arbitration clause. Plaintiff had been involved in arbitrations previously: once as a defendant with charges against him for breach of fiduciary duty, and once as a plaintiff against his former employer.

After the representation ended, the plaintiff sued the defendants alleging legal malpractice and violations of Maine's Unfair Trade Practices Act, as well as a fee dispute. Defendants sought to compel arbitration pursuant to the arbitration clause. Plaintiff argued that the malpractice disputes were not subject to arbitration because the agreement did not specifically state it applied to malpractice, and because the risks and consequences were not explained, thus informed consent was lacking. He argued that the defendants should have made certain specific disclosures as set forth in the Louisiana case of *Hodges v. Reasonover*, 103 So.2d 1069 (La. 2012), and that the arbitration process was slanted towards law firms. Plaintiff also argued that the arbitration clause was unconscionable and against public policy as an attempt to limit liability.

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On *de novo* review, the court rejected plaintiff's arguments as "self-evidently frivolous," finding that Maine law favors arbitration and permits attorneys to enforce arbitration clauses. Although Rule 1.4(b) of the Maine Rules of Professional Conduct states that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," the impact of the rule would vary by client. Further, Opinion 170 of the Law Court's Professional Ethics Commission approved the inclusion of arbitration clauses in engagement agreements on matters other than fees so long as the clause did not preclude the client from requiring resolution of fee disputes, and did not preclude the client's ability to file grievance complaints. Me. Prof'l. Ethics Comm'n, Opinion 170: Attorneys' and Clients' Agreement to Arbitrate Future Malpractice Claims (Dec. 23, 1999). Opinion 170 also determined that a mutual agreement to arbitrate was not an agreement limiting the lawyer's liability. The court rejected the application of Louisiana law, and noted that in Opinion 170, the Commission considered the issue of advising the client to obtain independent advice before agreeing to arbitrate. Even though theoretically "everything that is the engagement agreement" presents a conflict of interest between the lawyer and client, as long as the arbitration clause is clear, the mere presence of an arbitration agreement does not require that the client be advised to consult other counsel. Finally, the court determined that the plaintiff was nowhere near proving unconscionability under Maine law which requires that the subject clause "shock the conscience." Plaintiff was not fraudulently induced because he had ample time to read and revise the contract and was familiar with arbitration through past experience.

### **Significance of Opinion**

Significantly, the court 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, despite the fact that theoretically there is a conflict between lawyer and client regarding "everything that is the engagement agreement." This is true as long as the arbitration agreement does not limit the client's right to arbitrate fees and does not preclude the client from filing grievance complaints.

For more information, please contact [Terrence P. McAvoy](#).

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