ON TOPIC

Arbitration Provisions in Fee Agreements

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INCREASINGLY, ATTORNEYS and law practices look for ways to limit liability while preserving the ability to collect earned attorney's fees. One approach that continues to emerge in retainer letters and fee contracts is the use of alternative dispute resolution ("ADR") provisions, including mandatory arbitration clauses in retainer agreements with clients.

Most states have yet to specifically address the enforceability of mandatory ADR provisions, including mandatory arbitration clauses. As a result, limited precedent exists on the issue.

Some states treat attorney-client fee contracts and retainer agreements as they would any other commercial transaction. In those states, enforceable arbitration provisions in other types of contracts probably are likewise enforceable in attorney-client fee agreements.

Other states treat attorney-client fee agreements differently. For example, some states hold for public policy reasons that any contract for the employment of an attorney that imposes a penalty on the client for exercising the legal right to end the attorney-client relationship is unenforceable. Whether a mandatory arbitration provision would be found to violate this limitation on attorney-client contracts is unclear.

Finally, some states permit mandatory arbitration provisions but impose additional disclosure obligations that do not exist in the context of other commercial transactions.

Notably, to date, no state appears to have held that a mandatory arbitration provision in the attorney-client context is per se unenforceable in the abstract.

The American Bar Association addressed the issue in 2002 in ABA Formal Opinion 02-425 as follows: "It is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law."

Other jurisdictions impose limitations on the use of mandatory arbitration provisions. For instance, the Louisiana Supreme Court held in *Hodges v. Reasonover*, 103 So.3d 1069 (La. 2012) that an arbitration clause between an attorney and client is permitted as long as it meets other requirements, including that: (i) it "does not limit the attorney's substantive liability"; (ii) it is reasonable and fair to the client; and (iii) the client has the opportunity to seek independent counsel in connection with the agreement.

Similarly, the District of Columbia Bar concluded in Ethics Opinion 211 that mandatory arbitration provisions are permitted only if the client "has actual counsel from another lawyer."

Most recently, the Fourteenth Court of Appeals for the State of Texas enforced an arbitration provision in a legal malpractice action against the law firm Greenburg Traurig LLP. The court explained that the firm did not have a fiduciary duty to disclose or explain the implications of the arbitration agreement that was included in a flat fee retainer agreement between the firm and its client. The court noted that to require such a duty would convert an arms' length

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negotiation between the firm and future client into a fiduciary transaction before the fiduciary relationship began.

As a result of these and other opinions and rulings, the option for attorneys and law practices to include a mandatory arbitration provision in a fee agreement appears to be squarely on the table.

Mandatory arbitration provisions included in a retainer agreement can vary in scope and effect. For example, some mandatory arbitration provisions are limited to fee disputes and do not apply to other claims arising out of the attorney-client relationship. On the other hand, broader arbitration provisions require that any dispute arising out of the attorney-client relationship, including legal malpractice claims, be arbitrated.

The advantages and disadvantages of including a binding arbitration provision in an attorney-client agreement generally are the same as those for including such a provision in any other type of agreement. Of course, there are some differences. For example, the risks for attorneys facing jury trials can be greater. The expenses of defending legal malpractice lawsuits (with expert witnesses often required) also can be greater than in many other commercial disputes. Mandatory arbitration can reduce these risks.

With no consensus among the states, enforceability of mandatory arbitration provisions necessarily vary from state to state. However, attorneys and law practices can take steps to increase the likelihood that a mandatory arbitration clause will be enforced.

1. Include a Severability Clause

A good first step to reduce the risk, include a severability clause in retainer agreements and fee contracts where a mandatory arbitration clause is included. Then, if a particular state or jurisdiction finds the binding arbitration agreement unenforceable, other protections included the agreement still may remain in effect.

2. Use a Proven Arbitration Clause

Because arbitration clauses in the attorney-client context have yet to be fully tested, there is no need to take risks regarding the general enforceability of the provision. As a result, the safer course is to use a boilerplate or judicially tested language for a binding arbitration clause. If that happens, any challenges should turn on the application of lawyer's law, not a challenge to the provision itself. In addition, in states that have decided to treat attorney-client agreements like other commercial transactions, a generally accepted and commercially enforceable arbitration clause will be a significant asset.

3. Include the Bar Association Mandatory Disclosure

Although generally not controlling, ABA Formal Opinion 02-425 certainly is persuasive precedent, especially in states that have adopted the ABA Model Rules of Professional Conduct. Also, states limiting the enforceability of mandatory arbitration clauses have imposed disclosure requirements, typically recommending the disclosures referenced in the ABA Formal Opinion.

Therefore, it is important to make sure the client has been apprised fully and in writing of the advantages and disadvantages of arbitration and has been given sufficient information to permit an informed decision about whether to agree to the inclusion of the arbitration provision in the agreement.

4. Address Independent Counsel

For enforceability, Louisiana requires that the client has the opportunity to seek independent counsel. The District of Columbia requires that the client "has actual counsel from another lawyer." Under either scenario, it is best to have recommended in writing that a client seek and obtain actual counsel from another attorney before agreeing to a retainer agreement with a mandatory arbitration provision. Recognizing that it might not be judicially significant, it nonetheless might be helpful to include a default provision stating that the client's execution of the agreement confirms that the client has done so or has elected to voluntarily waive this right.

5. Segregate Fee Disputes from Other Disputes

As reflected by the ABA Formal Opinion and the Louisiana Supreme Court, serious questions exist regarding the enforceability of a mandatory arbitration provision that limits the attorney's substantive liability. Rather than risk both binding arbitration for fee disputes and binding arbitration of claims arising out of the representation by combining them, segregate the two into separate mandatory arbitration provisions. By doing so, attorneys and law firms can save one, even if the other is lost. DR

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