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The Use and Availability of Arbitration Provisions in Attorney Retention Agreements

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Arbitration provisions are common among businesses and vendors. To many, arbitration provides significant benefits by offering an efficient, flexible and private channel for recourse should a future dispute arise. However, those benefits come at the expense of forfeiting a jury trial, the ability to conduct comprehensive discovery and the option to appeal unfavorable rulings. In a typical commercial setting, these considerations are weighed independently by the parties involved.

The use and enforceability of an arbitration provision becomes more complicated when it involves attorneys and their clients. Attorneys are generally permitted to require that claims concerning fees and malpractice be resolved through arbitration, subject to the requirements of their respective jurisdictions. But unlike typical commercial transactions, attorneys serve a fiduciary role to their clients, along with ethical and professional obligations. These obligations, which also

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Letter from the President

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Hi Everyone. This Presidential Message is a little different from my others. Usually, they are somewhat self-congratulatory. However, it would be inauthentic of me to take that tone this quarter because I give myself a 6/10. While difficult to admit, I see an opportunity in that score. It draws attention to the important attorney mental health and well-being work that PLDF is doing, and compliments the teamwork of the other PLDF Directors, Officers, and Committee Leaders, as PLDF continued to operate at more like a 9/10 due to their combined excellence.

I had a few months of personal challenges, lots of work, and not feeling on

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Attorneys are generally permitted to require that claims concerning fees and malpractice be resolved through arbitration, subject to the requirements of their respective jurisdictions.

extend to prospective clients, impact how attorney-client arbitration agreements are presented, executed, and enforced.

This article discusses recent developments in New Jersey and Michigan regarding arbitration provisions within attorney retention agreements, compared to traditional approaches in other states. While no state completely prohibits arbitration provisions within attorney-retention agreements, the pre-conditions and obligations of attorneys vary from state to state.

ABA Model Civil Rules

The American Bar Association Model Rules of Professional Conduct, adopted in some capacity in most jurisdictions, do not prohibit attorneys from including arbitration provisions within their retention agreements. But the rules of professional conduct impose certain ethical and professional obligations that impact the enforceability of arbitration provisions. These obligations concern whether a client is properly informed in their decision to consent to arbitration and whether an attorney impermissibly limits future liability claims by a client. Model Rule 1.4 requires attorneys to keep clients reasonably informed so that they may make informed decisions regarding representation. Jurisdictions across the country vary in the degree of notice and informed consent needed to comply with applicable rules of professional conduct and to render an arbitration provision enforceable. Model Rule 1.8(h)(1) addresses conflicts of interest related to clients and provides that no attorney shall "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."

New Jersey

Recent activity in New Jersey provides insight regarding the competing arguments surrounding the use of arbitration provisions by attorneys. In December 2020, the New Jersey Supreme Court confirmed that attorneys may include provisions in retainer agreements that bind the client to arbitrate future fee disputes or legal malpractice actions, provided that the attorney adequately explains the provisions to the client. *See Delaney v. Dickey*, 242 A.3d 257 (N.J. Sup. Ct. 2020). In its analysis, the Court relied on ABA Formal Opinion 02-425 (2002), which held that an arbitration provision in an attorney retainer agreement did not violate Model Rule 1.4(b), as long as the client gave informed consent. An attorney must "explain" the implications of the proposed arbitration terms, including the advantages and disadvantages. Further, the Court acknowledged that the sophistication of the specific client is relevant in assessing whether informed consent is established. Citing those considerations, the Court found that the particular arbitration terms were not enforceable, as they did not fully advise the client of the impli-

cations associated with arbitration. *Id*. at 265. The *Delaney* Court observed that an arbitration provision "is an acknowledgment that the lawyer and client may be future adversaries" and cautioned that "there should never be a perception that a lawyer is exalting his own self-interest at the expense of the client." *Id*. at 261, 275. Noting a need for further assessment of these issues to ensure adequate protections for clients, the Court directed the New Jersey Advisory Committee on Professional Ethics (ACPE) to prepare a report and recommendation on the use of arbitration provisions in attorney engagement agreements and the scope of an attorney's disclosure requirements.

On January 18, 2022, the ACPE issued its report and recommendation. A majority of the panel recommended that the Supreme Court reconsider its ruling in *Delaney*. The majority recommended that attorneys be prohibited from including provisions in retainer agreements requiring the arbitration of fee disputes and legal malpractice claims. Although there were differing recommendations within the majority, there was a consensus that it's fundamentally unfair to require a client to agree to binding arbitration of disputes at the outset of a representation, as an attorney has the upper hand in bargaining. Alternatively, the majority prepared a uniform rider to be included within any engagement letter containing an arbitration requirement used by a New Jersey attorney. Among other provisions, the attorney is required to verbally discuss the implications of an agreement to arbitrate and advise a prospective client of the option to consult with independent counsel. But the oral communication requirement would not be applicable where the client is an institution or entity with a legal department.

A minority of the ACPE panel agreed with the Court's ruling in *Delaney*. These members noted that arbitration is common in business disputes. There is no sound reason to exclude attorneys from the opportunity to require the arbitration of disputes with clients, assuming the client is properly informed about the impact of the arbitration provision. The minority also noted that attorneys are often required to continue to represent clients even when those clients are no longer paying for legal services and that arbitration provisions provide some protection to attorneys in business relationships. The minority noted that if a client doesn't want to agree to arbitrate disputes, it can find a different attorney whose terms of engagement don't include an arbitration agreement.

On February 11, 2022, the Supreme Court requested comments on the ACPE report and recommendation. Stakeholders submitted comments, which further demonstrated the legal community's split on these issues. For example, the New Jersey Association of Justice argued against the use of arbitration provisions, expressing concerns about having the attorney, who benefits from the arbitration clause, be the one to advise the client on whether to agree to that clause. It stated, "[w]hile there is always an advantage to a corporate defendant in the arbitration system, there is an even greater one when that corporate defendant is a law firm that has developed relationships with arbitrators over many years, if not decades."

The New Jersey State Bar Association recommended that uniform language be included either as part of the retainer agreements or as an attached rider. It suggested that this language will serve the following important objectives: (1) to clarify the current New Jersey law, which permits binding arbitration clauses to be included in contracts and hence, attorney retainer agreements; (2) to provide attorneys in New Jersey with model language which is clear, easy to understand and explains the pros and cons of agreeing to binding arbitration, thereby allowing the client to make an informed decision about whether to sign the retainer; and (3) to provide attorneys with approved language which, if utilized, will avoid court intervention regarding whether the language is appropriate and enforceable.

As of the date of this publication, the New Jersey Supreme Court has not responded to the ACPE Report and Recommendation or the subsequent comments within the jurisdiction.

Michigan

The Michigan Rules of Professional Conduct prohibit an attorney from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement." Mich. Rules of Prof'l Conduct r 1.8(h)(1). The Michigan Supreme Court examined Michigan Rule of Professional Conduct 1.8(h)(1) and noted that it was not "entirely convinced" that the rule barred arbitration provisions in attorney retention agreements. *Tinsley v. Yatooma*, 964 N.W.2d 45, 49 (Mich. Sup. Ct. 2020).

In *Tinsley*, the plaintiffs retained the attorney-defendants to represent them in an underlying legal-malpractice action. The engagement agreement contained a provision for binding arbitration encompassing claims of attorney malpractice. The engagement agreement provided that the plaintiffs waived the right to submit the dispute to a court and the right to a jury trial by agreeing to binding arbitration. Plaintiffs also had independent counsel review the engagement agreement before voluntarily signing it.

The plaintiffs sued their former attorneys for legal malpractice, alleging that they settled the underlying litigation

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for less than the case was worth. The attorney-defendants moved to dismiss the case, arguing that the arbitration agreement barred the lawsuit. The plaintiffs countered that the arbitration clause violated Michigan Rule of Professional Conduct 1.8(h)(1).

The plaintiffs cited State Bar of Michigan Ethics Opinion R-23 (July 22, 2016), which provides that an arbitration clause in an attorney-client agreement violates Michigan Rule of Professional Conduct 1.8(h) unless, before signing the agreement, the client is fully informed of the provision's consequences in writing or consults with independent counsel regarding the provision. Plaintiffs submitted affidavits averring that the attorney-defendants didn't specifically advise them to discuss the arbitration provision with independent counsel. But it was undisputed that independent counsel actually reviewed the engagement agreement. The trial court ruled in favor of the attorney-defendants because the plaintiffs consulted with independent counsel.

The Court of Appeals affirmed the trial court's decision. The Court questioned whether the arbitration provision triggered Michigan Rule of Professional Conduct 1.8(h)(1), noting that arbitration may not limit an attorney's liability to a former client. Yet, assuming the rule applied, the Court held that the rule only required that the plaintiffs consulted with independent counsel, which they did. The Court rejected the plaintiffs' argument that the attorney-defendants specifically needed to advise them to have independent counsel review the arbitration provision. The agreement was only several pages long, the provision was in all capital letters, and a failure to read an agreement is no defense. In sum, the Court of Appeals held that the arbitration provision was enforceable.

In December 2021, the Michigan Supreme Court issued an administrative order proposing an amendment to Michigan Rule of Professional Conduct 1.8(h). Under the proposed Michigan Rule of Professional Conduct 1.8(h)(3), attorneys would be prohibited from making "an agreement that includes a lawyer-client arbitration provision unless the client is independently represented in reviewing the provision." As of the date of this publication, the Michigan Supreme Court has yet to adopt or reject the proposed amendment.

Other Jurisdictions

Ohio doesn't prohibit arbitration agreements for future claims by a client against an attorney, but its requirements largely render such provisions unenforceable. Ohio Rule of Professional Conduct 1.8(h)(1) prohibits an attorney from entering into an arbitration agreement regarding claims of malpractice "unless the client is independently represented in making the agreement." Thus, unless there is written confirmation that a client has actually consulted with independent counsel regarding the agreement to arbitrate, the provision will be unenforceable. *See, e.g., Helbling v. Lloyd Ward, P.C.*, 2014-Ohio-1513 (Ohio Ct. App. 2014).

Texas follows a similar approach to Ohio. The Texas Disciplinary Rules of Professional Conduct do not specifically address agreements for arbitration of malpractice claims. However, arbitration agreements covering future malpractice have been found to fall within the scope of Texas Disciplinary Rule of Professional Conduct 1.08(g), which requires that the client be represented by independent counsel with respect to the agreement. *See Tex. Ethics Op. 586*, 72 Tex. B.J. 128, 129 (2009); *See also In re Godt*, 28 S.W.3d 732, 738–39 (Tx. Ct. App. 2000).

Pennsylvania, by contrast, requires that the agreement must be enforceable as a matter of law and that the client must be "fully informed of the scope and effect of the agreement." *See* Pennsylvania Rules of Professional Conduct r. 1.8, Comment 14. In *Mackin Medical, Inc. v. Lindquist & Vennum LLP*, 236 A.3d 1078 (Pa. Super. Ct. 2020), a client challenged the enforceability of a provision requiring that any malpractice claims against the attorney be submitted to arbitration. The trial court found the agreement unenforceable, construing the arbitrating of claims as a limitation on future liability and finding that the client was not fully informed regarding the agreement to arbitrate. On appeal, a divided Superior Court of Pennsylvania reversed the trial court. It found that submitting a malpractice claim to arbitration did not limit future liability because the client's claims were not restricted. Further, the Court found that the retainer agreement sufficiently explained the benefits and disadvantages of arbitration such that the client was "fully informed" of impact of the agreement.

Additional Considerations

Litigation has an intrinsic value that should not be overlooked. Among attorneys that regularly litigate legal-malpractice claims, most can recall matters that would have been hampered if adjudicated through arbitration. The ability to conduct comprehensive discovery regarding the reasons behind professional decisions and the ability to conduct comprehensive motion practice are factors that, in the appropriate claim, would provide a benefit to the resolution of a claim through the appropriate judicial forum. Furthermore, the ability to have claims resolved through a jury and, where necessary, the option to review trial court rulings and outcomes, carries significant benefits to any party.

The Takeaway

Most attorneys have the ability to include, in some capacity, arbitration provisions within the terms of their engagement with respective clients. However, that decision should be made with appropriate consideration for the nature of the representation and with the client's informed consent.

If an attorney decides to include an arbitration provision, the enforceability of the provision varies from one jurisdiction to another. Regardless of jurisdiction, any attorney proposing or requiring an arbitration provision should, at a minimum, act in accordance with their respective rules of professional conduct. Decisions and comments within many jurisdictions are quick to note that even where enforceable, attorneys may find themselves subject to disciplinary action where a client is not fully informed regarding the implications of an arbitration provision and/or where a provision has the potential to impact a client's future claims against the attorney. Accordingly, a client should be informed about the benefit of consulting with outside counsel regarding the impact of the arbitration provision. ■

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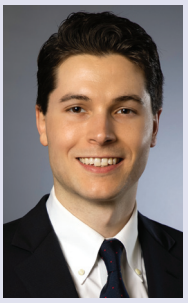

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COVID-19 Immunity Statutes: An Overview and Legal Implications

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COVID-19 created a dramatic period of uncertainty and the laws governing healthcare providers' immunity from lawsuits arising from COVID-19-related care were not exempt. Uncertainty still remains surrounding the application of the immunity statutes passed during the COVID-19 pandemic, both at the federal and state level. This article seeks to provide an overview of the current state of COVID-19 immunity statutes, judicial interpretation of the Public Readiness and Emergency Preparedness Act ("PREP Act" or "Act") at the federal level, and potential legal issues arising from the COVID-19 pandemic and related immunity statutes.

The PREP Act

The PREP Act was enacted in 2005 and allows the Secretary of the Department of Health and Human Services (HHS) to provide immunity from liability for certain individuals and entities against claims for damages arising from the manufacture, distribution, administration, or use of "covered countermeasures." 42 U.S.C. § 247d. The PREP Act's grant of immunity applies to both tort and contract claims. A "covered countermeasure" is defined as follows:

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