Arbitrating Disputes Between Attorney and Client

Is This a Viable Alternative?

by Willard C. Shih and Risa M. Chalfin

Arbitration is a favored method of dispute resolution for many businesses, large and small. Clauses mandating arbitration are found in commercial agreements ranging from multi-billion dollar mergers to consumer cellphone contracts. At times they are specifically negotiated and conspicuously placed, while at others they are buried in fine print at the end of multi-page 'terms of use' web pages consumers rarely review.

Courts frequently adjudicate challenges to mandatory arbitration clauses, as commercial enterprises test the boundaries of their reach. More often than not, the clause withstands challenge. This has caused commentators, and even the popular press, to criticize the fairness of arbitration, especially when the consumer is essentially presented with a 'take it or leave it' contract. *The New York Times* published an oft-cited three-part article decrying arbitration.

In contrast to their prevalence in the commercial marketplace, mandatory arbitration clauses are far less frequently found in attorney fee agreements. Rarely does an attorney present an agreement requiring the potential client arbitrate fee disputes, much less claims of negligenece or other attorney misconduct. Why are such clauses not included? As this article explains, it is not because mandatory arbitration clauses in attorney fee agreements are unenforceable.

New Jersey Public Policy Favors Arbitration

New Jersey has strong public policy favoring arbitration.[1] The New Jersey Supreme Court defines arbitration as the "voluntary reference of a dispute by the parties to ... an arbitrator or arbitrators chosen by the parties...who agree the decision will be final and binding."[2] Thus, by definition, "[a]rbitration is a 'substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary

process of law,' and its object is 'the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties.'"[3]

The longstanding policy in New Jersey favors "arbitration as a speedy and efficient approach to dispute resolution, as well as the Federal Arbitration Act's preference to resolve contractual ambiguities in favor of arbitration."[4] The New Jersey Arbitration Act provides, "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."[5]

In determining whether a matter is arbitarable, the first question is whether the parties have agreed to submit to arbitration.[6] "The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue."[7] Even a judicial mandate to arbitrate requires the parties consent, as they are waiving their right to a day in court.[8]

Arbitration Clauses in Fee Agreements—New Jersey

In New Jersey, courts uphold mandatory arbitration clauses found in retainer agreements in fee disputes. Yet such clauses are not enforceable *per se*, as New Jersey courts require more than a boilterplate arbitration clause to find that clients have waived their constitutional right to a jury trial.

In assessing the arbitrability of disputes between attorney and client, courts recognize the New Jersey Arbitration Act reflects the state's strong public policy favoring arbitration as a method to resolve disputes.

The issue is whether the right to require arbitration is abrogated because it is the Supreme Court, not the Legislature, that governs the practice of law. "The New Jersey Constitution confers upon our Supreme Court exclusive and plenary authority over every aspect of the practice of law."[9]

Another policy concern is found in the nature of the attorney-client relationship. The Supreme Court has described the attorney-client relationship as a fiduciary one, further stating, while "[a]ll fiduciaries are held to a duty of fairness, good faith and fidelity, [] an attorney is held to an even higher degree of responsibility...."[10] "It is a unique and extraordinary association."[11]

The nature of the attorney-client relationship, and the fact that it is regulated by the Supreme Court, makes it unique. These features distinguish it from the armslength business relationship between contractual parties where mandatory arbitration clauses are more often found.

"In light of the unique and special relationship between an attorney and a client, ordinary contract principles governing agreements between parties must give way to the higher ethical and professional standards enunciated by our Supreme Court. A contract for legal services is not like other contracts."[12]

Nevertheless, New Jersey courts reject the position that arbitration clauses in retainer agreements are permitted only if expressly approved by the Supreme Court.[13]

Instead, for a mandatory arbitration clause to be valid, New Jersey law requires a client to have clear notice of the clause and its impact. The Appellate Division, in *Kamaratos v. Palias*,[14] considered a clause that stated, "[a]ny controversy and/or dispute between the Law Firm and You...shall be resolved by binding arbitration between the parties. Arbitration shall be in accordance with the New Jersey Uniform Arbitration Act, N.J.S.A. 2A:24-1 et seq." The clause then set forth in specific detail the procedure the parties seemingly agreed would comply.

The Appellate Division ruled the agreement "did not clearly state the consequences of an agreement to arbitrate disputes over legal fees."[15] It did not explain that agreeing to arbitrate meant eliminating the right to sue in court and have a jury adjudicate the dispute.

An arbitration clause also cannot take precedence over the client's right to invoke fee arbitration under Rule 1:20A. If an attorney requires a client to waive the right to fee arbitration, the Appellate Division ruled, "we would have no hesitancy in striking down any such attempt to enroach upon the constitutional authority of the Supreme Court."[16] Thus, the Appellate Division in *Kamaratos* required an arbitration clause to contain a "clear statement that a client has an absolute right to proceed under R. 1:20A."[17]

So long as clear notice is provided, attorneys may require arbitration, as clients can make "a reasoned decision" whether to agree.[18] Perhaps this is because clients have an alternative. In the competitive marketplace, which is the legal industry, clients seemingly have the ability to negotiate fee agreements and reject those they find unreasonable.

Of significance, the court in *Kamaratos* specifically declined to rule whether a client can be required to arbitrate a malpractice claim, as the issue was not raised before the trial court. That issue remains undecided in the state court.

New Jersey's federal courts, however, are willing to compel arbitration of malpractice claims. In *Smith v. Lindemann*,[19] the United States District Court ruled that "legal malpractice claims arising from arbitration clauses are not *per se* invalid." In reaching this conclusion, it generally relied upon the general public policy favoring arbitration. Regarding the clause at issue, the court specifically

examined its terms, and found it "broadly defined, [and] clear and unambiguous" in its application of claims of professional misconduct.[20]

Arbitration Clauses in Fee Agreements—Select Other Jurisdictions

Given the competing policy considerations involved in mandating arbitration of an attorney's wrongful conduct, there is no universally accepted approach across jurisdictions.

Some states require that an attorney recommend the client first consult independent legal counsel before signing a retainer agreement that requires legal malpractice actions be subject to arbitration. These jurisdictions may have disciplinary rules restricting lawyers from making agreements prospectively limiting liability to a client unless the client is independently represented in making the agreement. Mandating arbitration is viewed as an attempt to limit liability.

Florida's rule is codified. Its rule states,"[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."[21] Another state that follows this principle is Pennsylvania.[22]

As one last example, the Texas Court of Appeals ruled a retainer agreement requiring arbitration of legal malpractice claims is subject to Rule 1.08 of the Texas Disciplinary Rules of Professional Conduct.[23] This rule governs conflict of interest. The court found it applicable to fee agreements, reasoning an attorney and client are transacting business to move claims of legal malpractice to arbitration.[24] Thus, to have an arbitration agreement in retainer agreements upheld, Texas law required the client to be represented by independent counsel prior to entering the agreement.[25]

While not codified in a rule or statute, Michigan's ethics committee issued an informal opinion coming to the same conclusion:

> A lawyer may enter into an agreement with a client that disputes arising out of the representation, including disputes regarding fees, possession of files and malpractice, will be resolved in a named alternate dispute resolution program, provided the client obtains independent counsel concerning the advisability of entering into the agreement.[26]

Despite the mandatory language requiring independent representation, whether the client actually obtains separate counsel is not necessarily critical. A Michigan court rejected the argument of clients who claimed they did not understand the implications of arbitration, presumably because they had not retained independent counsel as the ethics opinion requires. The court reasoned that failure to read the terms of an agreement is not a defense in an action to enforce a written agreement—it is presumed that upon signing, the terms are understood.[27]

Other jurisdictions, however, place the onus on the attorney to give the client proper notice of the consequences of arbitration.

The District of Columbia's courts recognize that the attorneys have a "heightened obligation...consistent with the oath of their profession, to be fair and frank in specifying the terms of the attorney-client relationship."[28] These courts rely upon the district's 1988 Legal Ethics Committee opinion (No. 190) requiring the attorney "make a full disclosure to the client of all the ramifications of an agreement to arbitrate, including eliminating the right to sue in court and have a jury trial."

Similarly, New York's appellate court required clients to arbitrate a legal malpractice claim when an attorney had "clearly" advised that there was a binding arbitration clause.[29] Another factor New York courts consider is whether an arbitration clause contains "deceptive language," whether it results from "disparate bargaining power" or a "lack[] of meaningful choice."[30]

Each of these foreign jurisdictions allow attorneys to arbitrate claims of wrongful conduct. Where they differ is whether the explanation a client must receive before waiving the constitutional right to a jury trial comes from the prospective attorney or independent counsel.

Conclusion

New Jersey attorneys who wish to compel clients to arbitrate disputes must have fee agreements that clearly and conspicuously inform clients that: 1) they are giving up their right to sue in court, and 2) their right to fee arbitration pursuant to Rule 1:20A remains intact. Such clauses should state they apply to fee disputes, and potentially also to claims of professional negligence and other wrongful conduct. It is important to emphasize, however, that New Jersey's Supreme Court has yet to address whether clauses mandating arbitration of legal malpractice claims are valid, a point highlighted in the concurring opinion in *Kamaratos,* which noted that arbitration clauses in retainer agreements should be viewed as "inherently unenforceable" without a Supreme Court recognition of the practice.[31] Law in other jurisdictions suggests that should the issue come before the Supreme Court, the clause would indeed be enforceable, so long as the client was adequately informed before agreeing to arbitrate. ⚖

Willard C. Shih *is a shareholder and* ***Risa M. Chalfin*** *is an associate at Wilentz Goldman & Spitzer, P.A. They are members of the firm's professional liability team.*

ENDNOTES

1. *Hojnowski v. Vans Skate Park,* 187 N.J. 323, 342 (2006).
2. *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 490 (1992).
3. *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 187 (1981) (*quoting Eastern Eng'g Co. v. City of Ocean City*, 11 N.J. Misc. 508, 510-11 (1933)).
4. *Hirsch v. Amper Fin. Servs.*, LLC, 215 N.J. 174, 184-85 (2013).
5. N.J.S.A. 2A:23B-6(a).
6. *Garfinkel v. Morristown Obstetrics & Gynecology Assoc.,* 168 N.J. 124, 132 (2001).
7. *Id.*
8. *Guidotti v. Legal Helpers Debt Resolution, L.L.C.,* 716 F.3d 764, 771 (3d Cir. 2013).
9. *Kamaratos v. Palias*, 360 N.J. Super. 76, 90 (App. Div. 2003) (Fuentes, concurring).
10. *In re Honig*, 10 N.J. 74, 78 (1952).
11. *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 518 (App. Div. 2009).
12. *Cohen v. Radio-Electronics Officers Union*, 275 N.J. Super. 241, 259 (App. Div. 1994), *modified*, 146 N.J. 140 (1996).
13. *Gastelu v. Martin*, No. L-4067-14, 2014 WL 10044913 (N.J. App. Div. July 9, 2015).
14. *Kamaratos v. Palias,* 360 N.J. Super. 76 (App. Div. 2013).
15. *Kamaratos, supra*, 360 N.J. Super. at 87.
16. *Id.* at 86.
17. *Id.* at 87.
18. *Id.* at 85.
19. No. 10-cv-3319, 2014 WL 835254 (D.N.J. March 4, 2014).
20. *Smith, supra*, at *10.
21. Rules Regulating the Florida Bar, Rule 4-1.5(i).
22. Pa. Disciplinary Rules of Prof'l Conduct R. 1.8(h).
23. *In re Godt*, 8 S.W.3d 732 (Tex. App. 2000).
24. *Id.*
25. *Id.*
26. Ethics Opinions, Mich. B.J., June 1996, at 364-365 (opinion number 257).
27. *Watts v. Polaczk*, 619 N.W.2d 714, 717 (Mich. Ct. App. 2000).
28. *Haynes v. Kuder*, 591 A.2d 1286, 1291 (Dist. Col. App. 1991).
29. *Thies v. Bryan Cave*, 35 A.D.3d 252 (2006).
30. *Arrowhead Golf Club, LLC v. Bryan Cave, LLP*, 873 N.U.S.2d 620, 621 (1st Dep't 2009); *contrast Larrison v. Scarola Reavis & Parent LLP*, 11 Misc.3d 572, 579-80, 812 N.Y.S.2d 243, 247-49 (N.Y. Sup.Ct. 2005) ("Thus, a retainer agreement that contains a clause to arbitrate in front of the American Arbitration Association, which waives the client's right to access to the courts to resolve disputes arising out of the attorney-client relationship must be viewed as inherently unenforceable and against public policy....").
31. *Kamaratos, supra*, 360 N.J. Super. at 90-91.

This article was originally published in the June 2016 issue of New Jersey Lawyer magazine, a publication of the New Jersey State Bar Association, and is reprinted here with permission.