Foreseeing Claims Between You and Your Client

As you know, we are required to communicate in writing to our clients the scope of the representation and the basis of our fees and expenses for every new engagement.[1] With that change in the ethical rules, there may be some other provisions that could be added to our engagement letters that would make for easier resolution of problems that might arise between our clients and us. Take, for instance, provisions providing for mandatory arbitration of fee disputes and malpractice claims.

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Generally speaking, agreements to arbitrate fee disputes alone are likely to be held enforceable, especially because the Arizona Supreme Court has upheld fee arbitration agreements between lawyers and their clients.[2] Many state ethics rules (including those in Arizona) have for many years favored resolution of fee disputes by arbitration.[3]

The arbitration of malpractice claims is a different matter. Agreements for mandatory and binding arbitration of malpractice claims against lawyers are usually treated with more circumspection than those relating solely to fee disputes. This is because it is unethical for a lawyer to make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.[4]

Ethics Opinions are on page 35 and available at www.myazbar.org/Ethics

The State Bar's Committee on the Rules of Professional Conduct has weighed in on this one; read its opinion before trying to provide a mandatory arbitration agreement for malpractice claims.[5]

Noting that it disagreed with those ethical opinions from other jurisdictions holding that a mandatory arbitration agreement limits a lawyer's malpractice liability, the Arizona opinion concedes that there is, nevertheless, a "heightened obligation" of ensuring that arbitration clauses and retainer agreements are fair and reasonable. Though the Arizona opinion acknowledges that it is may be ethical for a lawyer to seek mandatory arbitration for malpractice claims, it cautions that lawyers must not use their training and expertise to advance their own self-interest in transactions with clients that might ultimately be at their clients' expense.

The opinion concludes that a lawyer may ethically ask a client to agree to a retainer agreement providing for mandatory arbitration of malpractice claims if the lawyer (1) ensures that the arbitration clause is fair and reasonable to the client; (2) fully discloses, in writing and in terms that can be understood by the client, the advantages and disadvantages of arbitration, including, for example, the waiver of the right to trial by jury; (3) gives the client a reasonable opportunity to seek the advice of independent counsel; and (4) obtains the client's written consent to the agreement.

As a practical matter, every lawyer who uses such a provision in an engagement letter should anticipate that it may be attacked on some ground should a later malpractice claim appear on the horizon. In this regard, it is very important to list specifically the advantages and disadvantages of arbitration in the agreement. Such things as privacy, promptness of decision, protection of privileged communications, waiver of the right to trial by jury, waiver of the right to appeal, limited right to discovery, and inability to join parties who are not subject to the terms of the engagement letter should all be mentioned.

But the most sensitive issue will probably be the need to suggest that your client seek the advice of another lawyer in agreeing to the terms you have proposed for your engagement. As has been stated by an authority in another jurisdiction, advising clients about to hire a lawyer to go hire a lawyer sends a very disturbing message to the public.[6] Clients who consider having to see one lawyer as an unhappy occasion are probably going to be very unhappy if, before you will take their case, they have to see another lawyer. The placing of such stresses at the outset of what is supposed to be a confidential and trusting relationship may militate against such a provision and make it appropriate for only the most sophisticated commercial clients.

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endnotes

1. *See* ER 1.5 (b), Rule 42, ARIZ.R.S.CT.
2. *In re Connelly,* 55 P.3d 756 (Ariz. 2002). The actual agreement tacitly approved by the Court is found at ¶ 14 of the opinion.
3. *See* comment 10, ER 1.5 (fees), where it is stated that lawyers should conscientiously consider submitting all fee disputes to the State Bar's fee arbitration procedure; *see also* Annotation, *Agreements for Arbitration of Fee Disputes Between Lawyers and Clients,* 17 A.L.R. 4th 993 (1982). These kinds of provisions allow for a speedy and inexpensive resolution of fee disputes without the occasional counterclaims against the lawyer for malpractice.
4. ER 1.8(h)(1).
5. See Op. No. 94-05 (Mar. 1, 1994).
6. Ohio Board of Commissioners on Grievances and Discipline, Op. No. 96-9 (Dec. 6, 1996).