Arbitrating Fee Disputes

Several years ago, we looked at the considerations an Arizona lawyer should consider when contemplating having her client agree, in the engagement letter, to have fee disputes and claims for malpractice arbitrated rather than resolved through the court system.[1] The arbitration of disputes between lawyers and their clients has now become more common,[2] many more cases have been published on the issues presented,[3] and it may be time for another look at what is involved.

Any lawyer considering such agreements should look first to ER 1.8(h)(1) of the Arizona Rules of Professional Conduct,[4] which states that a lawyer shall not make an agreement prospectively limiting the liability to a client for malpractice unless the client is independently represented in making the agreement. Clear violations of this rule would be where the agreement would require the client to bring any claim for malpractice within 30 days of the occurrence,[5] or where the lawyer's liability for malpractice would be limited to the fees the client has paid. But not so clear are agreements that disputes be arbitrated instead of litigated. The question then becomes whether the process of arbitration of claims against a lawyer constitutes a limitation on that lawyer's liability to his client, and therefore subject to ER 1.8(h)(1).

Comment 14 to ER 1.8 makes it very clear that ER 1.8(h) does not ethically prohibit a lawyer from entering into an agreement with his client to arbitrate legal malpractice claims. The comment provides, however, that the client must be fully informed (presumably by the lawyer) of the scope and effect of the agreement. Just what that entails is explained in Arizona Ethics Opinion 94-05 (Mar. 1, 1994), which requires full disclosure, 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.[6] The opinion goes on to state that (1) the arbitration clause must be fair and reasonable to the client, (2) the client must be given a reasonable opportunity to seek the advice of independent counsel, and (3) the lawyer must obtain the client's written consent to the agreement.

A new ethics opinion is on page 67. Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics

A recent case from the Fifth Circuit Court of Appeals discusses a different dimension to the limitation of liability question.[7] In that case, the lawyer had required the client to agree that if any claim was asserted against the lawyer for malpractice, the action could be instituted only in the 19th Judicial District Court of the State of Louisiana. The clients, who were from South Carolina, attempted to sue the lawyer in federal court, alleging that he was negligent in not investigating certain matters in a child adoption engagement. The district court held the forum selection provision unenforceable because the lawyer had engaged in what was tantamount to a business transaction with the client without following the appropriate ethical rules. The Court of Appeals reversed, over a strong dissent,[8] holding that the forum selection provision did not constitute a lawyer–client business transaction and did not amount to a limitation of the lawyer's malpractice liability. The court held that "the possibility of reducing by some small percent the chances of an attorney being found liable" in a local state court, rather than in a presumably more objective federal forum, was "categorically different" from a provision that truly limits liability.[9]

Such provisions are here to stay.[10] They have been found to be ethical in most jurisdictions, including Arizona, and not to be impermissible limitations on a lawyer's liability for malpractice. In Arizona, the ethical requirements for such provisions are clear and concise, and need to be followed for them to be enforced.

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endnotes

1. *Foreseeing Claims Between You and Your Client,* ARIZ. ATT'Y, Feb. 2005, at 8.
2. Robert Cochran, Jr., *Must Lawyers Tell Clients About ADR?* ARB. J.8 (June 1993) (ADR is now an integral part of the practice of law).
3. See an excellent summary and discussion by Joan C. Rogers, *Attorneys' Advance Attempts to Limit Their Liability Usually Don't Work*, 24 LAW. MGMT. PROF. CONDUCT 497 (Sept. 17, 2008).
4. Rule 42, ARIZ.R.S.CT.
5. *See Iowa Supreme Court Attorney Disciplinary Bd. v. Powell,* 726 N.W.2d 397 (Iowa 2007) (provision in engagement letter requiring client to complain about services within 10 days of billing or waive claims against lawyer, and requiring client to pay for lawyer's collection expenses if he had to sue to collect his fees, found to be unethical limitations on lawyer's liability for malpractice.
6. *See also* ABA Formal Op. 02-425 (Feb. 20, 2002) (ER 1.4(b) requires lawyers to explain consequences of agreeing to waive the right to a jury trial, possible waiver of broad discovery and loss of right to appeal.)
7. *Ginter v. Belcher,* 2008 WL 2780910 (5th Cir. 2008).
8. As popular as arbitration provisions are becoming today, there are still a considerable amount of objections concerning them. *See Circuit City Stores v. Adams,* 279 F.3d 889, 896 (9th Cir. 2002) (mandatory arbitration agreement procedurally and substantially unconscionable under California law); Ohio Ethics Op. 96-9 (1996) (arbitration provisions violate lawyer's general duties to protect client's best interests). This opinion resulted in the adoption of Ohio's new ER 1.8(h), allowing such agreements under certain conditions.
9. *Accord* Calif. Formal Ethics Op. 1989-116; Maine Ethics Op. 170 (1999).
10. Arizona public policy favors arbitration over civil litigation as a dispute resolution device. *Allstate Ins. Co. v. Cook,* 519 P.2d 66, 68 (Ariz. Ct. App. 1974).