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## The Enforceability of Arbitration Provisions in Law Firm Engagement Agreements

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by David P. Atkins and Marcy T. Stovall

In a lengthy decision issued in December 2020, the New Jersey Supreme Court refused to enforce an arbitration agreement in a legal malpractice action filed against a prominent New Jersey law firm by a former client acknowledged to be a “sophisticated businessman...not unfamiliar to litigation.” *Delaney v. Dickey*, 242 A.3d 257 (N.J. 2020).

The court held that “...attorneys who insert provisions in their retainer agreements to arbitrate [either] future fee disputes or legal malpractice claims must explain the advantages and disadvantages of the arbitral...forum[ ];” and such explanation must specifically *compare* the features of arbitration to those of the “judicial” forum. Among other authorities, the court relied on ABA Formal Opinion 02-425 (“Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims”), a smattering of state and local ethics opinions – including CBA Informal Ethics Op. 99-20 (1999) – and state supreme court decisions from two states (Maine (2017) and Louisiana (2012)). The court pointed to Rule 1.4(b) of the Rules of Professional Conduct, which requires that a lawyer “explain a matter to the extent reasonably necessary to permit the client to make informed decisions” about “the representation.” The court also deemed the provision that would have precluded the former client from obtaining punitive damages in arbitration to be a violation of Rule 1.8(h) – which generally prohibits prospective limitations on malpractice liability – and therefore unenforceable.

The Court reached its conclusion notwithstanding its acknowledgement that the challenged arbitration provision - which expressly warned the client of his obligation to split the arbitrator's fees, as well as his waiver of his jury right, of his right to a public trial, as well as of his right to recover punitive damages - was not only “detailed,” but would “easily meet the standard for an arbitration provision

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in a typical commercial contract.”

The Court did not appear to adopt the additional requirement, endorsed in ethics opinions from Pennsylvania and Virginia, that a law firm's arbitration provision must also include the directive that the client seek independent counsel; or the requirement, mandated in Michigan Ethics Op. RI-257 (1996), of notice that the arbitration provision will not be enforceable at all unless the client actually *does* first "obtain[ ] independent counsel" before inking the agreement.

In CBA Informal Ethics Op. 99-20, the CBA's Standing Committee on Professional Ethics reiterated its previous approval of mandatory lawyer arbitration agreements with clients, but did so with one reservation: the Committee faulted the proposed arbitration provision because it “specifically mentions perceived benefits . . . but does not mention factors that may be perceived as drawbacks to arbitration,” thereby ““leav[ing] the client with the impression that there are no drawbacks to mandatory arbitration clauses.” The Committee's conclusion was that “the duty of candor and fair dealing require that the arbitration clause be formulated in neutral language.”

### Risk Management Lessons

In declining to making the ruling retroactive, the Court acknowledged that “our ruling today may not have been reasonably anticipated and would disturb the settled expectations of many lawyers throughout our state.” Indeed, the New Jersey decision takes an unusually hostile approach to arbitration provisions in lawyer fee agreements. Connecticut law, for example, does not require that an arbitration provision in an attorney fee agreement include discussion of the advantages and disadvantages of arbitration, and at least to the extent that an arbitration provision is limited to arbitration of fee disputes, our courts routinely enforce arbitration provisions that are far less detailed than the one at issue in the New Jersey case.

But if a law firm elects to include in its client engagement agreements a dispute resolution provision requiring arbitration, it risks having it deemed unenforceable unless it accompanies the agreement with certain disclosures to the client. The most important disclosure will be to alert the client – in advance of signing the engagement agreement – of both the advantages *and the disadvantages* of the arbitral and judicial forums. As the New Jersey Supreme Court indicated, the identified drawbacks the lawyer should identify for the client include, at a minimum, the costs of arbitration, the lack of open trial before a jury, that the outcome of an arbitration will be confidential and non-appealable, and that there will be limits on discovery.