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The Freedom to Choose Arbitration

When corporate clients turn to their in-house counsel, the ground rules for negotiating disputes can be set right from the start.

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Ethics

For my money, a corporate client negotiating with in-house counsel and a law firm is a pretty even match. It's not the same as a relationship between a lawyer and a less-sophisticated client. That's why some of the restraints on lawyers in these situations should not apply. An important example of this is the negotiation of arbitration clauses in retention agreements, including clauses calling for the arbitration of malpractice claims.

Specifically, while authority in D.C. and elsewhere on the issue is not fully developed, where the client uses its in-house counsel to review the agreement, provisions calling for mandatory arbitration of malpractice claims and fee disputes, in my opinion, are both ethical and enforceable. What's more, such agreements can provide important practical benefits both for firms and for the clients.

The D.C. Bar Legal Ethics Committee has addressed the propriety of mandatory arbitration agreements, but never in the context of clients with in-house counsel. In Opinion 211, the committee opined that arbitration agreements with clients encompassing both future malpractice claims and fee disputes are impermissible, unless the client is represented by independent counsel in fashioning the agreement. In contrast, in Opinion 218, the committee distinguished between arbitration clauses limited to fee disputes and those encompassing malpractice claims. It approved of arbitration clauses for fee disputes, with some important provisos.

For the propriety of mandatory arbitration clauses encompassing malpractice claims, pertinent guidance comes from Opinion 211. That opinion takes on two potential obstacles, both found in Rule 1.8 of the D.C. Rules of Professional Conduct.

Liability Limits

The first obstacle is whether such provisions are barred outright by D.C. Rule 1.8, which prohibits a lawyer from making "an agreement prospectively limiting the lawyer's liability." Interestingly, this D.C. rule is stricter than the American Bar Association model rule, which adds the qualifying phrase: "unless permitted by law and the client is independently represented in making the agreement." See ABA Rule 1.8(h). Thus, in the District, even if a client is independently represented, the rule forbids anything that limits a lawyer's liability to a client.

In Opinion No. 211, however, the committee expressly found that an arbitration agreement for malpractice claims is not a substantive limit on liability and so is not precluded by D.C. law. That conclusion is in accord with the Restatement of Law Governing Lawyers §54. According to Geoffrey C. Hazard Jr. and W. William Hodes in their treatise *The Law of Lawyering,* arbitration agreements for malpractice claims "merely provide a *procedure* for resolving disputes, and do not attempt to limit the lawyer's liability in advance." (Emphasis added.)

So, in drafting such agreements are there any provisions to avoid? In order to ensure compliance with D.C. Rule 1.8(g)(i), the agreement should not include any substantive restriction on either the types of claims the client may present or the type of recovery that will be permitted. For example, a liquidated damages provision, a restriction on punitive damages, or an agreement that certain aspects of the representation are high risk and will not be sued upon would all violate the rule.

The second potential obstacle to arbitration agreements with clients is in another section of Rule 1.8, restricting a lawyer's ability to enter into "a business transaction with a client" unless "the client is given a reasonable opportunity to seek the advice of independent counsel." Here, it seems evident that an organization's in-house counsel should, except in special circumstances, satisfy the obligation of "independent counsel."

In *The Law of Lawyering,* the authors state: "In the case of sophisticated clients, including corporate clients with in-house counsel, advance agreement to arbitrate malpractice claims is fully supportable."

Douglas Richmond of Aon Risk Services, who advises law firms on ethics and risk management issues nationally, agrees emphatically, stating: "To hold otherwise would defeat the cor-

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poration's reasonable expectation in deriving key benefits of having inside counsel in the first place: one, saving money as compared to having to engage outside counsel for routine matters, and, two, having ready access to counsel." He adds that "there is no reason that an in-house lawyer can't provide the objective advice" that the rule requires.

The Practical Benefits

Finally, there are the enormous practical benefits here for law firms and clients alike. First, arbitration provides the possibility of keeping privileged or sensitive information confidential. Second, the costs and delays associated with court litigation can be reduced. Third, uncertainties (to both sides) of a jury verdict, particularly in highly complex matters, can be avoided. And fourth, the parties can arrange for the selection of an arbitrator or arbitration panel with the background and experience to understand specialized areas.

As noted in D.C. Bar Opinion 218, the U.S. Supreme Court has endorsed the validity of arbitration in a variety of contexts and has recognized the practical benefits to the parties and the courts in such alternate dispute resolution.

For example, in *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614, 626-27 (1985), the Court, in upholding a mandatory arbitration agreement between investors and stock brokers, stated: "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbtitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

There was also *Gilmerv. Interstate/Johnson Lane,* 500 U.S. 20 (1991), which upheld a mandatory arbitration clause in connection with an employee's assertion of claims under the Age Discrimination in Employment Act.

Law firms and organizational clients with in-house counsel should have the freedom to enjoy the benefits of arbitration when they want to use it. Proposing such agreements is not only ethical, but also consistent with a lawyer's obligation to suggest creative options for his or her clients.

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