NEW JERSEY STATE BAR ASSOCIATION

DOMENICK CARMAGNOLA, PRESIDENT
Carmagnola & Ritardi, LLC
60 Washington Street, Suite 300
Morristown, NJ 07960-6859
973-267-4445 • FAX: 973-267-4456
dcarmagnola@cr-law.net

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Advisory Committee on Professional Ethics
Attention: Carol Johnston, Committee Secretary
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625-0970

RE: Arbitration Provisions in Retainer Agreements and the Scope of an Attorney's Disclosure Requirements (*Delaney v. Dickey*)

Dear Ms. Johnston:

Thank you for the opportunity for the New Jersey State Bar Association (NJSBA) to submit comments on the recommendations from the Advisory Committee on Professional Ethics (ACPE) in connection with arbitration provisions in attorney retainer agreements.

As referenced in the Feb. 11, 2022 Notice to the Bar, the Supreme Court requested the ACPE to study the issues arising in the case of *Delaney v. Dickey*, 244 N.J. 466 (2020) in connection with an arbitration clause in a retainer agreement, and to "make recommendations to [the] Court and propose further guidance on the scope of an attorney's disclosure requirements." 244 N.J. at 474. While we appreciate the ACPE's time and effort in reviewing the issues surrounding arbitration provisions in retainer agreements, after reviewing the ACPE recommendations as well as the numerous opinions and position papers submitted from various stakeholders in the legal community[1], the NJSBA suggests that the ACPE recommendations fall short of providing the guidance sought by the Supreme Court. Alternatively, the NJSBA provides the following recommendations and model language for inclusion in the Rules of Professional Conduct (RPCs), which builds upon the previous stakeholder submissions, for consideration by the Court.

We note that the ACPE recommendations approach arbitration clauses with a suspicion not echoed by this Court. Despite the long-standing availability of a fee arbitration option, the ACPE expresses concerns that lawyers will inherently act against the best interests of their clients when it comes to arbitration clauses for other disputes, essentially asking this Court to reverse its own decision in *Delaney*. Based on that decision, however, the availability of arbitration as a dispute resolution mechanism in attorney-client disputes is not in question, and the NJSBA does not address that here. The only open issue is what that clause should look like to be fair, easy to understand and enforceable.

[1] American Bar Association Formal Opinion 02-425, the Bergen County Bar Association position dated March 15, 2022, and comments submitted by Sills, Cummis & Gross dated Feb. 11, 2021.

The NJSBA encourages this Court to adopt the model language noted below in this regard. At the attorney's option, the language may be included as a part of the retainer agreement language itself or as an attached rider as proposed by the ACPE. We believe that this language properly reflects the guidance in *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014) and is consistent with this Court's decision in *Delaney*.

Including the following language in the RPCs serves several important objectives: (1) to clarify the current New Jersey law which permits binding arbitration clauses to be included in contracts and hence, attorney retainer agreements, (2) to provide attorneys in New Jersey with model language which is clear, easy to understand and explains the pros and cons of agreeing to binding arbitration, thereby allowing the client to make an informed decision about whether to sign the retainer; and (3) to provide attorneys with approved language which, if utilized, will avoid court intervention regarding whether the language is appropriate and enforceable. We believe the following language does exactly that.

Proposed Binding Arbitration Language

To be included in RPC 1.5(b) or as a comment: In the event that an attorney elects to include a binding arbitration clause in their written retainer agreement, the following language must be included in the body of the retainer agreement or as an addendum to it:

> This retainer agreement contains a mandatory arbitration provision of all future disputes between the attorney and client. This includes, but is not limited to, claims of alleged legal malpractice against the attorney as well as fee disputes. The following paragraphs outline some of the benefits and disadvantages of arbitration:
>
> 1. General Overview. As a general matter, arbitrations can resolve disputes efficiently, expeditiously and at a reduced overall cost. The parties to an arbitration have an opportunity to agree on a skilled and experienced arbitrator in a specialized field to preside over and decide the dispute outside the public spotlight. Those benefits should be weighed against certain limitations, such as a limitation on the exchange of information (called discovery), as well as payment of certain upfront costs. Also, as compared to an arbitration, the filing party in a civil lawsuit generally can proceed in the county where the party resides or where the law firm is located, whereas in an arbitration the place of the arbitration is defined in the agreement. In a lawsuit, the case will be decided by a jury in open court and will be part of the public record, and the parties will have the right to an appeal, whereas arbitrations typically are held in confidence with limited right to an appeal. The following specific rules will apply to the arbitration to which you and the Firm are agreeing: (include the name of the forum, i.e., AAA/JAMS or other arbitration service and what rules control, i.e., commercial rules).
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> 2. Waiver of Jury. By agreeing to arbitrate, both the attorney and client are waiving their right to a trial by jury in a courtroom open to the public, and they are both giving up their right to seek relief in civil court except in very limited circumstances.

3. Confidentiality. The entire arbitration—including any claims the attorney might have against the client and any claims the client might have against the attorney— may be private and confidential as opposed to proceeding in civil court where the proceedings are held in an open courtroom, and the jury's verdict and award of damages is a matter of public record.

4. Discovery. The discovery process in an arbitration generally will be more limited than in civil court. For example, the numbers of depositions and other forms of discovery may be limited in an arbitration as compared to in civil court. This, however, has the benefit of reducing costs.

5. Costs. In arbitration, you as the client will be responsible to pay for some of the costs of the arbitration, including your share of the arbitrator's fees and the upfront costs of the arbitration, whereas in civil court the parties do not need to pay for the services of the judge other than certain filing fees. Arbitrators generally bill by the hour. The arbitration can only move forward if both parties pay their share of the fees and costs associated with the arbitration.

6. Arbitrator's Decision. The arbitrator's decision, which will be in writing, will be final and binding and the parties will only be able to appeal it in very limited circumstances.

7. Selection of the Arbitrator. The arbitration will be conducted by one impartial arbitrator (who may be a former judge, practicing attorney or person who is not an attorney), selected by mutual agreement or, if we and you cannot agree, the arbitrator will be selected in accordance with the rules governing the arbitration proceeding.

8. Place of Arbitration. The arbitration will take place in the county where the Client resides or where the law firm is located or at a mutually acceptable location within the State of New Jersey and the arbitrator will apply the substantive law of the State of New Jersey.

9. Rules of Arbitration. The arbitration will be conducted by _____. A copy of the rules that will apply to the arbitration proceeding can be provided upon your request.

10. N.J. Court Rule Fee Arbitration. The client shall retain its absolute right to proceed under the fee arbitration rules set forth in New Jersey Court Rule 1:20A, which take precedence. This process applies to disputes over attorney's fees billed to you and is always available to you as the client.

If you have any questions or concerns about the arbitration process, please raise them with the attorney before signing this retainer agreement.

The NJSBA also offers the following comments in connection with the additional ACPE recommendations:

1. **There should be no requirement for an attorney to orally explain arbitration provisions in a retainer agreement**.

In *Delaney*, this Court noted that an attorney may present the retainer arrangement in either written or oral form or both and be available to answer questions about that contract. RPC 1.4(c) already requires an attorney to communicate pertinent information needed for a client to make informed decisions regarding the representation. Imposing an affirmative requirement that attorneys verbally communicate the terms of the arbitration clause is unreasonable and provides no additional protection to the client. To require a writing and oral explanation of retainers and arbitration clauses also ignores the practical considerations of *how* an attorney can prove that they had an oral conversation with the client. Most likely, this proof will come in the form of yet another writing, which adds no greater protection to the client than the retainer agreement itself. As discussed in the Bergen County Bar Association position, incorporated by reference herein, retainer agreements are typically emailed to a client with a request that they call or email with questions. The client controls when and if they will sign the retainer agreement, having the option not to sign the retainer if their questions are not answered or if the answers are not satisfactory. In fact, a client reviewing the retainer agreement outside the attorney's presence, with time to read it carefully and to have it reviewed by family members, friends or colleagues provides a greater level of scrutiny, and hence, more protection to that client. Once the client has reviewed and accepted the agreement by signing it, an additional obligation to *prove* that the attorney also had a verbal discussion is superfluous, commercially unreasonable, and impractical.

2. **Existing contract law must apply equally to retainer agreements.**

The ACPE recommends that a client should still be able to retain the law firm even if they refuse to agree to the arbitration provision. This, too, is commercially unreasonable. A client is always free to discuss their concerns about the arbitration clause and ask the attorney to remove it from the retainer, thereby presenting a counter-offer. The choice of whether to amend the retainer agreement must remain with the attorney, who may decide to accept the client's counter-offer or reject it and risk losing the client. Allowing a client to force an attorney into a representative relationship under terms and conditions that the attorney did not agree to is contrary to proper contract formation. Contrary to the ACPE position, an arbitration clause is not inherently anti-client and can provide an effective, efficient and commercially accepted dispute resolution mechanism. Should the client reject the arbitration provision and the attorney decline to remove it from the retainer agreement, the client can simply find another attorney that better suits their needs.

3. **A client always has the right to consult counsel regarding the arbitration clause**.

There is nothing to prevent a client from taking the retainer agreement to another attorney for review. Requiring the inclusion of language specifically alerting the client to have the retainer reviewed by another attorney necessarily creates a delay in retaining counsel that may negatively impact the client's own interests. RPC 1.8(a)(2) does not apply to retainer agreements as a whole, yet the ACPE wants it to control arbitration clauses, asserting that arbitration is inherently in conflict with the client's best interests. However, the practical implications of applying RPC 1.8(a)(2) to retainers will result in delay and prejudice to the client and may not be possible in certain retention situations where the client and attorney need to act swiftly to protect the client[2]. The plain language of the arbitration provisions provided herein alleviates the ACPE's concerns that the client will not be able to understand the clause itself or its implications, both negative and positive.

4. **The arbitration clause should not require individual check boxes to indicate informed consent.**

The use of check boxes in addition to a client's verbal or written engagement of the attorney provides no useful value and only serves to further complicate the plain and simple language of the proposed arbitration clause. The client, who signed the retainer after having reviewed it and had the opportunity to ask questions, is bound to the entire agreement. Adding check boxes around the arbitration clause is superfluous and adds no practical value nor does it give the client any greater understanding of the clause itself.

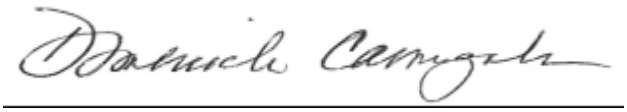
5. **There should be no restriction as to which attorneys are permitted to use arbitration clauses in their retainer agreements.**

The proposed language contained herein addresses this Court's concerns by ensuring that the arbitration clause is clear and simple, explaining the pros and cons of agreeing to an arbitration clause. With this language, all clients, whether individual or institutional, are able to read, understand, question, and knowingly consent to the entire retainer agreement as they would any other contract. The proposed language complies with ABA Formal Opinion 02-425 defining appropriate levels of disclosure as well as the requirements of *Atalese*. With this simple and clear language, following the Court's determination in *Delaney*, there is no justification for limiting their use to lawyers with large institutional clients. In fact, doing so will affect the contracting rights of more than 70% of New Jersey's lawyers who practice as solos or in small firms. There is no rationale for such an arbitrary limitation.

[2] In certain criminal or municipal court matters, attorneys may be retained immediately prior to the court appearance.

For all of the foregoing reasons, we urge the Court to not adopt the recommendations of the ACPE and, instead, consider the NJSBA's alternatives outlined above. Again, we thank the ACPE for its comprehensive report and recommendations, but respectfully believe they fall short of the Court's request. The NJSBA is appreciative of the opportunity to provide these comments, and hope they are useful to the Court's analysis.

Respectfully yours.



Domenick Carmagnola, Esq.
President

cc: Jeralyn L. Lawrence, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director