



NEW JERSEY STATE BAR ASSOCIATION

KIMBERLY A. YONTA, PRESIDENT
Yonta Law, LLC
111 Livingston Ave.
New Brunswick, NJ 08901
732-421-1680 • FAX: 732-543-7502
kim@yontalawnj.com

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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: Comments on Supreme Court Referral in *Delaney v. Dickey*

Dear Ms. Johnston:

Thank you for the opportunity, and for extending the time, to allow the New Jersey State Bar Association to submit comments in connection with arbitration provisions and the scope of an attorney's disclosure requirements. The NJSBA believes the issues referred to the Advisory Committee on Professional Ethics in *Delaney v. Dickey*, ___ N.J. ___ (A-30-19, Dec. 21, 2020) are important for both attorneys and their clients. We appreciate being able to be a part of this discussion.

After careful review and robust debate, the NJSBA recommends that the ACPE not expand the requirements for arbitration provisions outlined by the Court in *Delaney*. Rather, the NJSBA urges the ACPE to recommend that:

- a. The disclosures set forth in *Delaney* are sufficient to protect both attorneys and their clients when arbitration clauses are included in retainer agreements;
- b. No further disclosure or information should be required;
- c. The *Delaney* disclosure requirements should be incorporated into the Rules of Professional Conduct; and
- d. Model disclosure language should be published to promote uniform application and to better protect both attorneys and their clients.

In arriving at its recommendation, the NJSBA carefully reviewed the language suggested by the Court in *Delaney* that attorneys who insert arbitration provisions in retainer agreements can meet their obligation to convey information about the advantages and disadvantages of arbitral and judicial forums by explaining key concepts. Specifically, that “in arbitration the client will not have a trial before a jury in a courtroom open to the public; the outcome of the arbitration will not be appealable and will remain confidential; the client may be responsible, in part, for the costs of the arbitration proceedings, including payments to the arbitrator; and the discovery available in arbitration may be more limited than in a judicial forum.” *Delaney*, Slip Op. at 41. Further, if malpractice claims are included in any arbitration provision, the Court concludes that information must be specifically noted in the retainer agreement. *Id.*

The NJSBA believes that the general guidelines provided by the Court are clear and unambiguous, and will provide clients with the information they need to make a decision about whether to agree to arbitrate disputes without being overly burdensome on attorneys at the start of an attorney-client relationship. For these reasons, the NJSBA does not believe that any additional disclosures are necessary.

To ensure that all attorneys are aware of what is expected, the NJSBA believes it is important to include the disclosure requirements in the Rules of Professional Conduct, and that model language would dispel any further confusion about what is required. The NJSBA will endeavor to provide sample language to the ACPE within the next week for its consideration as a supplemental submission, as that language was not finalized at the time this letter was prepared.

Again, thank you for the opportunity to provide comments for the Advisory Committee on Professional Ethics’ consideration. The NJSBA stands ready to assist the ACPE in any further way it can.

Very truly yours,



Kimberly A. Yonta, Esq.
President

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cc: Domenick Carmagnola, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director