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Arbitration Clauses in Fee Retainer Agreements.

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CASE NOTE

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CONTENTS

I. INTRODUCTION

Although arbitration clauses in attorney–client retainer agreements are enforceable,[1] courts across the country continuously struggle with the

1. Watts v. Polaczyk, 619 N.W.2d 714, 717–18 (Mich. Ct. App. 2000) (holding an arbitration clause enforceable in a retainer agreement when the attorney advised the client in writing to obtain independent counsel before signing the agreement); Chambers v. O'Quinn, 305 S.W.3d 141, 148

undecided question of whether the attorney is required to fully apprise the client of the legal consequences of such a clause.[2] State courts take various viewpoints on the issue, and most stand contrary to the position of the American Bar Association and state ethics committee opinions on the subject.[3] Consequently, attorneys must disclose truthful and accurate information regarding arbitration agreements when engaged in multi-jurisdictional practice in order to ensure their protection from malpractice liability.[4]

The Louisiana Supreme Court recently stretched this requirement to place a heavy burden on the attorney in *Hodges v. Reasonover*.[5] The court

(Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("[A]rbitration agreements are enforceable in the context of a legal malpractice suit."). *But see In re* Godt, 28 S.W.3d 732, 737 (Tex. App.—Corpus Christi 2000, no pet.) (striking down an arbitration clause in an attorney–client contract because it referenced both federal and state arbitration laws).

2. *See* Desert Outdoor Adver. v. Superior Court, 127 Cal. Rptr. 3d 158, 163–65 (Ct. App. 2011) (concluding the arbitration clause in the retainer agreement was "readily discernible and clear" therefore, further disclosure by the attorney was not required). *Compare* Hodges v. Reasonover, 103 So. 3d 1069, 1078 (La. 2012) (requiring attorneys to fully disclose the scope, terms, and legal consequences of the arbitration clause), *with* Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315, 318–19 (Fla. Dist. Ct. App. 2011) (stating there is no legal authority that either prohibits arbitration clauses in retainer agreements or mandates what level of disclosure about the consequences is desirable), *and* Haynes v. Kuder, 591 A.2d 1286, 1290–91 (D.C. 1991) ("Although in deciding this issue we touch on substantial ethical concerns, and the written agreement was somewhat terse in explaining the rights [the client] would relinquish by agreeing to arbitration, we agree with the trial judge that the *written disclosure* was sufficient to negate the claim of fraudulent inducement as a matter of law.") (emphasis added) (footnote omitted).

3. *Compare Haynes*, 591 A.2d at 1290–92 (providing although the language of the arbitration clause did not expressly describe the waiver to a jury trial, the client was reasonably informed of the clause's application), *with* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002) (opining clients must receive information about the possible benefits and consequences of arbitration to enable them to make an informed decision about the provision), *and* Tex. Comm. on Prof'l Ethics, Op. No. 586 (2008) (agreeing the lawyer should inform the client about the advantages and disadvantages of arbitration, but only "to the extent the lawyer reasonably believes is necessary"). The District of Columbia Legal Ethics Committee originally encouraged greater disclosure about the ramifications of arbitration, but subsequently revised its opinion; it concluded that a separate attorney must counsel the client regarding arbitration. D.C. Legal Ethics Comm., Op. 211 (1990) ("Therefore, we now conclude that Opinion 190 was incorrect in supposing that adequate disclosures concerning mandatory arbitration could be made to lay clients. Accordingly, mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under either our prior Opinions or Rule 1.8(a) unless the client is in fact counseled by another attorney.").

4. *See generally* Louis A. Russo, Note, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 HOFSTRA L. REV. 327, 344–60 (categorizing states' handling of malpractice arbitration into two groups: those that require the client to consult with independent counsel, and those that require the attorney to disclose the consequences of arbitration to the client).

5. Hodges v. Reasonover, 103 So. 3d 1069 (La. 2012); *see also* State Bar of Ariz., Ethics Op. 94-05 (1994) (opining the attorney should disclose the advantages and disadvantages of arbitration in the agreement, but not listing them specifically).

balanced two integral policies: the favorability of the enforcement of arbitration clauses in contract law against the fiduciary duties an attorney owes his client.[6] The court not only mandated the attorney's disclosure of the arbitration clause, but also listed a minimum number of legal consequences stemming from the arbitration clause that the client must be aware of before signing the retainer agreement.[7] The concurring and dissenting opinions offered special insight into the potential problems with the majority's ruling.[8] While the standard dictated by the majority opinion far exceeds those found in other jurisdictions, an attorney can curtail legal malpractice claims by including the legal benefits and consequences of arbitration in the retainer agreement. The extent of the fiduciary duties owed by the attorney to a prospective client, however, remains an open question.[9]

Part II of this Case Summary will walk through the facts of the case and analyze the majority, concurrence, and dissenting opinions. Part III will explore and balance the pros and cons of arbitration, and Part IV will analyze the relevant Model Rules applicable to fee agreements. Finally, Part V will offer advice to attorneys counseling clients about the ramifications of arbitration clauses in fee retainer agreements.

II. CASE SUMMARY

The facts of *Hodges* are straightforward: the Hodges originally retained the Reasonover & Olinde law firm to sue MedAssets in federal court.[10] The Hodges signed a retainer agreement containing an arbitration clause.[11] Two years into the dispute, the Hodges requested the fee arrangement in the retainer be changed from a blended fee schedule to a pure contingency fee.[12] The revised agreement contained the same arbitration clause as the original, and the attorneys advised the Hodges to

6. *Hodges*, 103 So. 3d at 1072–73.

7. *Id.* at 1077.

8. *See generally id.* at 1079–83 (providing two concurring opinions and a dissenting opinion).

9. *See* Tex. Comm. on Prof'l Ethics, Op. No. 586 (2008) (specifying that Texas Disciplinary Rule 1.03(b), which requires a lawyer to reasonably explain matters affecting representation to their client, applies only when a *prospective* client signs a retainer agreement with an arbitration clause). The Committee also distinguished between clients that have differing levels of experience and sophistication. *Id.*; *accord* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002) ("Depending on the sophistication of the client[,] . . . the lawyer should explain the possible adverse consequences as well as the benefits arising from execution of the agreement.").

10. *Hodges*, 103 So. 3d at 1071.

11. *Id.*

12. *Id.* at 1072.

seek independent counsel before signing the agreement.[13] The claims against MedAssets proved unsuccessful, and the Hodges sued the firm for legal malpractice.[14] Both the district court and the appellate court ruled against enforcing the arbitration clause, labeling it a "prospective limitation of liability."[15]

A. *The Majority's Balancing Act*

In the court's reasoning, the Louisiana Supreme Court first outlined the commonly held principle that public policy favors arbitration.[16] Although an issue of first impression in Louisiana, the court recognized the American Bar Association Ethics Committee, along with various state bar ethics committees, enforce agreed-upon arbitration clauses in attorney–client retainer agreements.[17] The Hodges conceded the arbitration clause did not prospectively limit the attorney's liability, but argued that mandatory arbitration imposed "unreasonable procedural barriers" on clients.[18] Particularly, the Hodges contended that the upfront cost of arbitration simultaneously deters litigants from entering the arbitration stage and shields the attorney from malpractice claims.[19] The court dismissed this argument by underlining the option for a waiver of the initial filing fee from the American Arbitration Association (AAA) and noting the balance

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*; *see also* Steven Quiring, Note, *Attorney–Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements*, 80 TEX. L. REV. 1213, 1215 (2002) (acknowledging the federal policy of favoring arbitration clauses, but expressing skepticism at the inclusion of such clauses in adhesion contracts). *See generally* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475–76 (1989) (declaring ambiguities in arbitration clauses should be viewed in the clause's favor); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (describing the Federal Arbitration Act as "a congressional declaration of a liberal federal policy favoring arbitration agreements"). The Federal Arbitration Act preempts any state law on the subject. West Point-Pepperell, Inc. v. Multi-Lane Indus., Inc., 201 S.E.2d 452, 453 (Ga. 1973) ("Where such a transaction involves commerce, within the meaning of the Federal Arbitration Statute, the state law and policy with respect thereto must yield to the paramount federal law." (citing Am. Airlines, Inc. v. Louisville & Jefferson Cnty. Airport, 269 F.2d 811, 815 (6th Cir. 1959))).

17. *Hodges*, 103 So. 3d at 1072; ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002); State Bar of Mich. Comm. on Prof'l & Judicial Ethics, Informal Op. RI-257 (1996). The public policy favoring arbitration clauses stems from the "duty to read" maxim of contract law. *See generally* Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 275 (1990) ("The typical doctrinal shorthand for this view is that the buyer has a 'duty to read' the contract; if she neglects this duty she waives her objection to the consequences.").

18. *Hodges*, 103 So. 3d at 1074.

19. *Id.* at 1074–75.

between the upfront cost and the efficiency of arbitration.[20] The court further stated that an arbitration clause generally does not limit the substantive rights of either party; rather, the arbitration clause is best viewed as an alternative method of dispute resolution.[21] Thus, the court concluded, these clauses do not violate the Rules of Professional Conduct and are enforceable.[22]

In their second argument before the court, the Hodges asserted their attorney did not sufficiently disclose the full extent of the legal consequences that accompanied the arbitration clause and maintained that the clause was unenforceable.[23] In response to this argument, the court completely changed its focus from the clause's enforceability to the fiduciary duties owed to a prospective client by an attorney.[24]

"'The relation of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client on the basis of strictest fidelity and honor.'"[25] As a result, retainer agreements between attorneys and their clients are traditionally interpreted with strict scrutiny to correspond with the attorney's fiduciary duties.[26]

The court started by exploring the fiduciary duties of candor and loyalty.[27] Drawing from the definition and rules governing informed consent,[28] the court reasoned that the client may only make an informed

20. *Id.* The court specifically pointed to AAA's waiver of initial filing fees for those 200% below the poverty line, and emphasized that arbitration "streamline[s] discovery," saving both time and money. *Id.* at 1075.

21. *Id.* at 1076.

22. *Id.*

23. *Id.*

24. *Id.* at 1077.

25. *Id.* at 1073 (quoting Teague v. St. Paul Fire & Marine Ins. Co., 974 So. 2d 1266, 1271 (La. 2008)). The trend of bringing a breach of fiduciary duty claim is on the rise, but the actual phrase still lacks a precise definition. *See* Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 141–46 (2008) (explaining a breach of fiduciary duty may involve a breach of multiple duties because of the lack of a strict definition).

26. *Hodges*, 103 So. 3d at 1073 ("At the same time, agreements between law firms and clients are held to higher scrutiny than normal commercial contracts because of the fiduciary duties involved."); Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 646 (1997).

27. *Hodges*, 103 So. 3d at 1077.

28. *Id.* According to Rule 1.4(b) of the Model Rules of Professional Conduct, a lawyer must explain the legal effects of any decision related to the client's representation "*to the extent reasonably necessary*." ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 53 (7th ed. 2011) (emphasis added). This language has been interpreted to include arbitration agreements in attorney–client retainer agreements. *Id.* at 63 (citing Tex. Comm. on Prof'l Ethics,

decision about the inclusion of an arbitration clause in the retainer agreement if the significant legal consequences are fully explained to the client.[29] Reversing its earlier assessment, the court leaned on the long-standing Louisiana tradition that attorneys should inform their clients of consequences associated with contracts that "negatively affect the client's rights."[30] Attorneys, the court reasoned, hold an unfair advantage over their clients who do not understand the inner workings of the legal system.[31] The court then mandated that when entering a retainer agreement with a client, the attorney must inform the client of: the waiver of a jury trial, the waiver of appeal, the waiver of broad discovery, the upfront costs of arbitration, the claims covered by the clause, the client's continued right to report the attorney to the state disciplinary committee, and the client's right to seek separate counsel about the clause.[32] The court thus concluded the attorneys in *Hodges* failed to meet the disclosure requirements and invalidated the arbitration clause.[33] Though this seemed to be a victory for the clients, the decision carries broad implications for current industry practice.[34]

B. *The Concurrence's Preemptive Timing Trap*

Justice Weimer's concurrence generally agreed with the majority's view on the enforceability of arbitration agreements, but disagreed with the level of disclosure required of the attorney.[35] Specifically, he points to a "potential [preemptive] trap" that could affect a client's malpractice claim.[36] Louisiana law dictates a one-year uninterrupted time limit on

Op. No. 586 (2008)).

29. *Hodges*, 103 So. 3d at 1077 ("Inherent in these duties is the principle that an attorney cannot take any action adversely affecting the client's interest unless the client has been fully apprised, to the extent reasonably practicable, of the risks and possible consequences thereof—that is, the client must give informed consent.").

30. *Id.* *But see id.* at 1074 (stating arbitration clauses do not substantially affect the rights of either party).

31. *Id.* at 1077.

32. *Id.* at 1077.

33. *Id.* at 1078. The court further held the attorney's duty does not depend on the client's sophistication. *Id.* *But see* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002) (striking a compromise between the lawyer's expertise and the client's sophistication by recommending the attorney explain the legal ramifications "to the extent necessary," with the caveat that a mandatory arbitration clause is only allowed when accompanied by full disclosure of the legal consequences).

34. *Hodges*, 103 So. 3d at 1079 (Victory, J., dissenting) (lamenting the majority's expansion of disclosure duties owed by an attorney).

35. *Id.* at 1080 (Weimer, J., concurring).

36. *Id.*

legal malpractice claims; therefore, if arbitration is not concluded within one year of the alleged malpractice, it is arguable that the client's claim will be barred.[37] Viewed in this light, no arbitration clause treats these claims fairly.[38] States have various statutes of limitation periods on legal malpractice claims, but this argument potentially applies to all jurisdictions because of the lengthy nature of arbitration.[39] There is a valid argument based on public policy that clients should be informed of this timing trap prior to signing a retainer agreement containing an arbitration clause.

C. *The Dissent's Independent Counsel Option*

Justice Victory relied upon the fundamentals of contract law in his dissenting opinion.[40] Victory concluded the arbitration clause in the retainer agreement contained plain, unambiguous language; therefore, it was enforceable under the Federal Arbitration Act and local Louisiana law.[41] The Hodges testified the attorney advised them to consult with independent counsel before agreeing to the arbitration clause.[42] Though Justice Victory acknowledged the importance of the attorney–client relationship,[43] he emphasized the purpose of advising clients to consult with independent counsel: to provide the client with the option of reviewing the legal ramifications of arbitration with a neutral attorney.[44] Therefore, under the dissent's analysis, Mr. Reasonover performed everything *legally* required of him.[45] However, this argument relies on the assumption that the mere offer of independent counsel would cause a

37. *Id.*

38. *Id.* at 1082. Justice Weimer also defers this issue to the legislature, stating: "If the legislature wishes to allow the initiation of an arbitration to be the functional equivalent of filing a lawsuit[,] . . . the legislature could amend the law." *Id.* at 1083.

39. *See, e.g.*, CAL. CIV. PROC. CODE § 340.6 (West 2010) (fixing a one-year time period on legal malpractice claims); R.I. GEN. LAWS § 9-1-14.3 (1956) (setting a three-year statute of limitations on legal malpractice claims); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West Supp. 2012) (establishing a two-year limit on malpractice actions).

40. *Hodges*, 103 So. 3d at 1079–80 (Victory, J., dissenting).

41. *Id.* at 1080. The clause itself specifically designated that it covered *any* dispute. *Id.*

42. *Id.* at 1079.

43. *Id.* at 1080. The attorney–client relationship is fiduciary; it arises out of the client's complete reliance and trust in the attorney. Courts generally hold agreements between attorneys and their clients to a higher standard because of this special relationship and the unequal bargaining power of the parties. *See generally* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 844–45 (1999) (describing the fiduciary nature of the attorney–client relationship and applying it to arbitration disputes).

44. *Hodges*, 103 So. 3d at 1080 (Victory, J., dissenting).

45. *Id.*

reasonable person to infer that arbitration carries adverse legal implications.

III. THE UNSPOKEN BENEFITS OF ARBITRATION

As with any legal action, arbitration carries potential benefits and consequences.[46] The *Hodges* opinion lists the potential consequences in explicit detail, but makes no mention of the possible benefits of arbitration. Even if not required to do so, it would make sense for attorneys to inform their clients of the possible advantages of arbitration. For the legal system as a whole, arbitration provides an alternative way to resolve disputes, thus removing cases from clogged courts.[47] For the client, the legal consequences accompanying arbitration may also be potentially beneficial.[48] For example, there are corollary advantages to waiving the right to a jury trial; arbitration provides one qualified decision-maker, and hearings take less time because there is no need to manage a jury.[49] Though there are upfront costs to arbitration, evidentiary and procedural complications are non-existent because arbitration hearings are informal, thus making the overall cost of arbitration much less than malpractice litigation.[50] The shorter time span and confidential nature of arbitration proceedings also maintain more privacy than public litigation proceedings.[51]

Just as there are pros and cons for the client to consider, the attorney

46. *See generally* Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 204–10 (1996) (exploring the benefits and perceived drawbacks of arbitration).

47. *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1670, 1672 (1996) (considering the benefits of arbitration).

48. Steven Quiring, Note, *Attorney–Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements*, 80 TEX. L. REV. 1213, 1219 (2002) (identifying elements of arbitration that may be appealing to clients).

49. Thomas B. Metzoff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 208 (1996). Though Metzoff's article mainly focuses on medical malpractice litigation, the principles are directly applicable to the realm of legal malpractice. *Id.*

50. *See id.* (explaining arbitration hearings reduce costs because "there is no need to select, instruct, or manage a jury" and "conflicts over evidentiary issues are minimized because arbitration hearings are typically less formal than a jury trial").

51. *Id.* at 209. Metzoff also explores the use of experts in arbitration proceedings, concluding the use of neutral experts in arbitration hearings is preferable over the "expert fights" one encounters in malpractice litigation. *Id.* at 209–10. *But see* Bruce A. Rubin & Jennifer J. Roof, *A Contrarian's Checklist to Arbitration Clauses*, 74 DEF. COUNS. J. 242, 242–46 (2007) (counter-arguing that arbitrators, who are often retired judges or lawyers, charge by the hour, could potentially stretch the arbitration process over a longer time span than litigation, and that the confidentiality of arbitration is only temporary in nature).

must also weigh the benefits and consequences of arbitration.[52] Many attorneys are reluctant to include arbitration clauses in their retainer agreements because of the finality of the proceedings and the potential embarrassment of subjecting their administrative practices to the arbitrator's scrutiny.[53] The attorney must weigh these negative attributes of arbitration against the negative aspects of malpractice litigation.[54] These consequences include harm to the attorney's reputation and the cost of the litigation process.[55] Like most choices in the legal profession, neither choice is legally wrong; the attorney must simply determine whether to include an arbitration clause in retainer agreements with his clients.

IV. FIDUCIARY DUTIES AND DISCLOSURE: FACTORS TO CONSIDER

A. *Rule 1.8: Prospective Limitation of Liability*[56]

The debate concerning arbitration clauses in attorney–client retainer agreements originally centered on Model Rule of Professional Conduct 1.8(h)(1), which states, "A lawyer shall not . . . make an agreement *prospectively limiting the lawyer's liability to a client for malpractice* unless the client is independently represented in making the agreement."[57] The ABA and the courts eventually concluded arbitration agreements do not violate this rule.[58] Comment 14 to Rule 1.8 explicitly states that "[t]his paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided

52. *See generally* Steven Quiring, Note, *Attorney–Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements*, 80 TEX. L. REV. 1213, 1217 (2002) (summarizing concerns attorneys should ponder before choosing to include an arbitration clause in their retainer agreements).

53. *Id*. at 1218.

54. In general, arbitration is more efficient, informal, and private; litigation is generally more thorough and final. *Id*. at 1217–18.

55. *Id.*

56. *See* E. NORMAN VEASEY ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133–34 (6th ed. 2007) (listing the provisions of Rule 1.8—specific rules regarding conflicts of interest with current clients); *see also* Chambers v. O'Quinn, 305 S.W.3d 141, 150 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (explaining the parallel rule in the Texas Disciplinary Rules of Professional Conduct and holding that "the arbitration clause in the instant case does not limit the liability to which appellees would otherwise be exposed, and therefore it does not violate [the Texas Disciplinary Rules]").

57. E. NORMAN VEASEY ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 134 (6th ed. 2007) (emphasis added).

58. *Id.* at 138 cmt. 15 ("Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule.").

such agreements are enforceable and the client is fully informed of the scope and effect of the agreement."[59] After overcoming the enforceability obstacle, attorneys wishing to include arbitration clauses in retainer agreements encountered another problem: to what degree should the client be apprised of the advantages and disadvantages of arbitration?

The dispute over this question shifted the focus in the Model Rules. The duty of loyalty requires lawyers to screen for potential conflicts of interest among current and former clients.[60] This duty of loyalty also encompasses the confidentiality obligation between lawyers and clients.[61] However, in some instances, the duty of loyalty differs for prospective clients from current and former clients; for example, a lawyer will only be barred from representing a client with an adverse interest to a former potential client if the former potential client revealed information "that could be significantly harmful to him."[62] This treatment suggests certain duties to prospective clients are diminished when other rights or factors are at play.[63] Therefore, whether a client is current or prospective could potentially determine the level of required disclosure and the legal consequences of a binding arbitration clause in the attorney's retainer agreement.

B. *Rule 1.4: Communication*[64]

Communication is paramount to the overall quality of the attorney–client relationship.[65] Rule 1.4 governs communication in the client–

59. *Id.* at 138 cmt. 14. Comment 15 expands upon this statement by requiring a lawyer to inform the client in writing of their option to consult independent counsel. *Id.* at 138 cmt. 15.

60. *Id.* at 160–61 (discussing how to determine if the client should be categorized as a "former" client).

61. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 280 (7th ed. 2011) (emphasizing the scope of the confidentiality obligation: it does not end because a prospective client did not retain the lawyer for representation).

62. *Id.* at 281. A similar Rule applies to short-term legal service attorneys. *Id.* at 165, 529–31 (eliminating the attorney's obligation to check for conflicts of interest when rendering limited legal services).

63. *See id.* at 280 ("Although a lawyer may neither use nor reveal information relating to the representation of a current client, she may use information relating to the representation of a former client once it is generally known.").

64. E. NORMAN VEASEY ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 53 (6th ed. 2007).

65. Ursula H. Weigold, *The Attorney–Client Privilege As an Obstacle to the Professional and Ethical Development of Law Students*, 33 PEPP. L. REV. 677, 681–82 (2006) (characterizing communication as a "necessary lawyering skill" and describing numerous situations where successful lawyers must be capable of effective communication).

lawyer relationship.[66] Specifically, subsection (b) states, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[67] Thus, it makes logical sense that the decision of whether to agree to a retainer agreement is a decision regarding the representation. However, Comment 5 seemingly narrows the scope of part (b).[68] It also further clarifies the issue by stating that the "[a]dequacy of communication depends in part on the kind of advice or assistance that is involved."[69] The comment expands on communication involving the *objective* of representation, but not on preliminary or initial agreements concerning the attorney–client relationship.[70] The annotated version of the rules, however, includes a broad discussion about communicating adverse consequences and refers to mandatory arbitration clauses in retainer agreements.[71] Though the ABA Model Rules do not carry the force of law, they are controlling and enforceable in jurisdictions that adopt the Model Rules.[72]

C. *Rule 1.5: Fees*[73]

In a comment to Rule 1.5 that relates to fees, the ABA gives each state bar the ultimate power to regulate the disclosure procedure in arbitration disputes regarding fees.[74] Therefore, the guidance in the Model Rules is

66. *Id.* at 681–83.

67. E. NORMAN VEASEY ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 53 (6th ed. 2007).

68. *Id.* at 54.

69. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 54 cmt. 5 (7th ed. 2011).

70. *Id.*

71. E. NORMAN VEASEY ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 63 (6th ed. 2007) ("Accordingly, a lawyer must explain the legal effect of entering an agreement or executing a legal document."). While this seems to contradict the scope of Comment 5, Rule 1.4(b) on its face is broad enough in its language to encompass all interactions and decisions between attorney and client.

72. *See* Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 298 (1992) ("Although the profession initially formulates ethics rules in an attempt at self-regulation, it is the courts that, as external governors of the profession, must give ethics rules the force of law in disciplinary proceedings. Likewise, courts must decide whether and to what extent ethics rules have authoritative force in other contexts.").

73. E. NORMAN VEASEY ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 65 (6th ed. 2007).

74. "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it." E. NORMAN VEASEY ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 68 cmt. 9 (6th ed. 2007).

not mandatory.

D. *ABA and State Ethics Committees*

ABA and state ethics committee opinions attempt to untangle the arbitration problem, but often only contribute to the confusion. In a 2002 formal opinion, the ABA expressed concern about clients' ability to appreciate the consequences of arbitration.[75] The ABA opined that clients must be sufficiently informed to be able to make a proper decision about whether to submit to a mandatory binding arbitration clause in a fee retainer.[76] The ABA derived this conclusion from Rules 1.4(b) and 1.7, combining the lawyer's fiduciary duty to explain properly legal ramifications involved in a client's representation and the lawyer's duty to resolve conflicts of interest with the client's informed consent to create an ethically permissible technique for including arbitration clauses in retainer agreements.[77]

> It is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that (1) the client has been *fully apprised* of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common [or] statutory law.[78]

In contrast to the ABA's fullest disclosure stance, the District of Columbia Bar issued an opinion retracting its previous position on the

75. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002).

76. *Id.* *See also* Steven Quiring, Note, *Attorney–Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements*, 80 TEX. L. REV. 1213, 1219–22 (2002) (analyzing the various concerns clients have when deciding on an arbitration clause).

77. The Opinion further postulates an arbitration clause mandatory in nature represents a conflict of interest "that can be neutralized only by the lawyer providing full disclosure and an explanation sufficient 'to permit the client to make an informed decision' about whether to agree to a binding arbitration provision." ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002); *accord* N.Y. Cnty. Lawyers' Ass'n, Ethics Op. 723 (1997) ("[A] lawyer may ethically include a condition in a retainer agreement requiring that all disputes . . . be subject to arbitration . . . provided that the lawyer fully discloses the consequences of that condition to the client and allows the client the opportunity, should the client so choose, to seek independent counsel regarding the provision.").

78. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002) (emphasis added). The opinion also clarifies the prior opinions regarding Rule 1.4(b) construed the Rule as relating to the matter of representation, but Opinion 02-425 extends Rule 1.4(b) to the attorney–client relationship. *Id.* at n.13.

matter.[79] D.C. Bar Ethics Opinion 190 expressed the need for full disclosure of the legal consequences of arbitration clauses in retainer agreements with clients.[80] Subsequently, in Opinion 211, the D.C. Bar completely reversed its position, stating, "Opinion 190 was incorrect in its belief that the complex nature of arbitration could be adequately disclosed to a lay client."[81] Therefore, the D.C. Bar concluded that full disclosure is an unrealistic expectation because of the flexible nature of the arbitration procedure and the many factors affecting it.[82] The Bar removed the disclosure requirement and instead mandated that the client seek counsel from an independent attorney before signing the agreement.[83] The D.C. Rules of Professional Conduct were subsequently changed a second time in 2007; the amendment removed the requirement for advice from independent counsel under Rule 1.5.[84] The District of Columbia made a complete circle, turning from mandatory full disclosure, to the necessity of independent counsel, to no requirements at all.

The Texas Professional Ethics Committee issued an opinion that attempted to find a middle ground between full disclosure and none at all—the Committee suggested the lawyer should explain the benefits and consequences of arbitration to the client "*to the extent the lawyer reasonably believes is necessary*."[85] Additionally, the opinion considers the sophistication of the client when discerning the level of disclosure required. For example, the opinion specifies that when the client is a large business entity, disclosure may not be necessary.[86] However, the opinion also

79. D.C. Bar Legal Ethics Comm., Op. 211 (1990).

80. D.C. Bar Legal Ethics Comm., Op. 190 (1988).

81. D.C. Bar Legal Ethics Comm., Op. 211 (1990).

82. *Id.*

83. *Id.* Two members dissented, arguing an attorney can summarize effectively the legal consequences and the basic nature of arbitration proceedings. *Id.* The dissent leans primarily on the AAA, emphasizing the easy accessibility of information related to arbitration. *Id.*; *see also* AM. ARBITRATION ASS'N, INTRODUCTORY GUIDE TO AAA ARBITRATION AND MEDIATION (2007), *available at* https://www.aaau.org/resources/adr-resources (explaining each stage of mediation and arbitration proceedings).

84. *Opinions Substantively Affected by the Amended Rules (Effective 2/1/07)*, D.C. BAR, http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion_table.cfm (last visited Dec. 28, 2012).

85. Tex. Comm. on Prof'l Ethics, Op. No. 586 (2008) (emphasis added). One year after the release of this Opinion, a Houston Court of Appeals punted the issue of the enforceability of arbitration to the legislature. Chambers v. O'Quinn, 305 S.W.3d 141, 149 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("The legislature's failure to impose such conditions on attorney–client contracts, while expressly recognizing them in other contexts, indicates that the legislature did not intend to impose such conditions.").

86. *Id.*; *see also* Desert Outdoor Adver. v. Superior Court, 127 Cal. Rptr. 3d 158, 164 (Ct. App. 2011) (holding an attorney had no duty to separately disclose the arbitration clause and its

clarified that the Committee did not possess the power necessary to answer substantive questions about arbitration clauses in attorney–client agreements.[87] While the "reasonably necessary" standard logically entrusts lawyers with the judgment whether to consult the client about the arbitration clause, it is difficult to enforce because each case must be analyzed on its own individual facts.[88]

VI. PROTECTING AGAINST LIABILITY

Due to the variety of approaches jurisdictions employ when determining the disclosure of the legal ramifications of arbitration clauses in fee retainer agreements, the best practice is perhaps the most obvious: explicit inclusion of the legal consequences of arbitration into the agreement itself. The attorney can, and should, fully explain the potential benefits of arbitration to the client. Attorneys engaged in multi-jurisdictional practice should pay special attention to the required disclosure in each state that could affect liability.[89]

Though this issue will undoubtedly continue to surface, attorneys should always remember to consider their clients first and foremost; proper practice ensures that the client makes an informed decision on the matter of binding arbitration clauses.

consequences after analyzing the following factors: the client's sophistication; the attorney's encouragement for the client to seek independent counsel; the client's corrections to other parts of the agreement; and a cover letter notating a new retainer agreement and drawing the client's attention to new provisions); Powers v. Dickson, Carlson & Campillo, 63 Cal. Rptr. 2d 261, 267–68 (Ct. App. 1997) (emphasizing the difference between an initial and an existing client's expectations, and the effect on the attorney's fiduciary obligations).

87. Tex. Comm. on Prof'l Ethics, Op. No. 586 (2008) ("It is beyond the authority of this Committee to address questions of substantive law relating to the validity of arbitration clauses in agreements between lawyers and their clients.").

88. *See also Desert Outdoor Adver.*, 127 Cal. Rptr. 3d at 163 (stating specific factors of each case affect the fiduciary's obligations).

89. *See* Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315, 318–319 (Fla. Dist. Ct. App. 2011) ("While there are arguably ethical issues that arise in this type of contract, there is currently no Florida Bar Rule which prohibits this sort of agreement."); State Bar of Ariz., Ethics Op. 94-05 (1994) (providing an arbitration clause may be included in an attorney–client fee agreement if: the clause is reasonable, the clause discloses both the advantages and the disadvantages of arbitration, the attorney encourages the client to seek independent counsel, and the client consents in writing); Me. Prof'l Ethics Comm'n, Op. 170 (1999) (permitting the inclusion of arbitration clauses in attorney–client fee arrangements); Vt. Advisory Ethics Op. 2003-07 (2003) (allowing arbitration clauses in fee arrangements if the attorney encourages the client to consult independent counsel).