The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE
41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 96-9
Issued December 6, 1996
Withdrawn October 1, 2021
[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: An engagement letter between a lawyer and an individual client should not contain language requiring a client to prospectively agree to arbitrate fee disputes, legal malpractice disputes, or professional ethical misconduct disputes. Within this opinion, the use of the word "client" refers to an individual who has sought legal assistance. Arbitration of a fee dispute should be a voluntary decision made by a client after opportunity to consider the facts and circumstances of the dispute and to consult, if desired, with independent private counsel or with a bar association fee dispute program. Arbitration of a legal malpractice dispute should be a voluntary decision made by a client after opportunity to consider the facts and circumstances of the dispute and to consult, if desired, with independent counsel. Arbitration of a professional ethical misconduct dispute is not a decision for an attorney to impose upon a client. An attorney should not require a client to forego filing a disciplinary grievance or to dismiss or resolve a disciplinary grievance outside Rule V.

OPINION: This opinion considers the application of the Ohio Code of Professional Responsibility to the use of arbitration clauses in engagement contracts between attorneys and individual clients. This opinion does not address the enforceability of arbitration clauses for that is a legal question outside the scope of this opinion. This opinion also does not address the use of arbitration clauses in engagement contracts between attorneys and clients that are corporations or any other organization recognized by law as a separate entity. Within this opinion, the use of the word "client" refers to an individual who has sought legal assistance.

> Should an engagement letter between a lawyer and an individual client contain language requiring a client to arbitrate fee disputes; malpractice disputes; and or disputes regarding ethical misconduct?

Fee dispute-arbitration clauses

Ethical Consideration 2-22 of the Ohio Code of Professional Responsibility urges lawyers to amicably resolve fee disputes with clients.

EC 2-22

> A lawyer should be zealous in his [her] efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He [she] should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

Amicable fee dispute resolution is also favored under Rule V of the Supreme Court Rules for the Government of the Bar. The rule expressly permits time extensions in an investigation "when all parties voluntarily enter into an alternative dispute resolution method for resolving fee disputes sponsored by the Ohio State Bar Association or a local bar association." *See* Gov.Bar R. V §4(D)(1). Fee arbitration is also mentioned within the Ohio Code of Professional Responsibility. Under DR 2-103(C)(2)(b), attorneys who participate in a lawyer referral service may be required to submit any fee disputes with a referred client to mandatory fee arbitration. The rule does not mention whether a client's consent is required.

Fee dispute resolution is also encouraged on a national level. In February 1995, the House of Delegates of the American Bar Association approved Model Rules for Fee Arbitration. Under the Model Rules, arbitration of fee disputes is voluntary for clients, but mandatory for lawyers if commenced by a client. *See* ABA Model Rules for Fee Arbitration, Rule 1(C) (1995).

Under both Gov.Bar R. V §4(D)(1) and the ABA Model Rules for Fee Arbitration, the decision to arbitrate must be entered into voluntarily by the client. This Board agrees that a decision to arbitrate a fee dispute should be by voluntary consent of a client. An engagement contract requiring an individual client to prospectively arbitrate all fee disputes makes such decision less voluntary. The client must sign the agreement in order to receive legal services. The agreement attempts to prospectively eliminate a client's opportunity to consider particular facts and circumstances of a dispute and to seek independent advice as to the matter. When a fee dispute overlaps with claims of ethical misconduct such as inadequate representation or charging a clearly excessive fee, there is the danger that an attorney might attempt to mask the ethical misconduct by enforcing the prospective agreement to arbitrate the fee issue.

Ethics advisory committees in several states permit attorneys to use retainer agreements providing for mandatory arbitration of fee disputes, but impose conditions upon the use. In the District of Columbia, the client, prior to deciding whether to sign an agreement, must be advised in writing of the availability of counseling by the staff of the Attorney-Client Arbitration Board and the client's written consent must to obtained. *See* District of Columbia Bar, Op. 218 (1991). In Maryland, the client must be advised in the retainer agreement that his or legal rights, including the right to a jury trial, may be affected by the decision to arbitrate fee disputes; and the client must be advised of the right to confer with other counsel about adverse consequences, such as res judicata or collateral estoppel,

that may result from the decision to arbitrate. *See* Maryland State Bar Ass'n, Op. 94-40 (1994).

This Board is not persuaded by these opinions. It is impractical to require a client to seek independent counsel before signing an engagement contract with a lawyer—the client would need to "hire a lawyer to hire a lawyer." It sends the wrong message to the public: Beware, the lawyer you are hiring to protect your interests may be trying to take advantage of you in the engagement contract.

Arbitration of fee disputes serves the Code's aspirational objective of amicable fee dispute resolution and has received broad support from the profession. This Board joins in supporting arbitration of fee disputes. However, the Board emphasizes and advises that an agreement to arbitrate a fee dispute should not be required of an individual client prospectively. It should be a voluntary decision made by a client after opportunity to consider the facts and circumstances of the dispute and to consult, if desired, with independent private counsel or with a bar association fee dispute program.

Legal malpractice-arbitration clauses

DR 6-102(A) of the Ohio Code of Professional Responsibility restricts efforts by attorneys to limit their liability for personal malpractice.

DR 6-102 LIMITING LIABILITY TO CLIENT

> (A) A lawyer shall not attempt to exonerate himself [herself] from or limit his [her] liability to his [her] client for his [her] personal malpractice.

By comparison, the Board notes that ABA Model Rule 1.8(h) restricts a lawyer from making a prospective agreement to limit liability to a client for malpractice unless permitted by law and the client is independently represented.

What is considered an attempt to limit liability for personal malpractice? In *Cincinnati Bar Ass'n v. Schultz*, a majority shareholder of a legal professional association instructed employees not to forward a file to a client who decided to change attorneys until the client signed a confidential release of all claims against the firm. A violation of DR 6-102(A) was found. *See Cincinnati Bar Ass'n v. Schultz*, 71 Ohio St. 3d 383, 385, 386 (1994) In *Columbus Bar Ass'n v. Blankenship*, an attorney paid a client money and required the client to sign a release of claims after the client filed a grievance against the attorney for not filing her custody case. A violation of DR 6-102(A) was found *See Columbus Bar Ass'n v. Blankenship*, 74 Ohio St. 3d 586, 587, 589 (1996). In *Columbus Bar Ass'n v. Ewing*, a violation of DR 6-102(A) was found when an attorney attempted to have his clients sign a "Memorandum of Settlement and Disclosure of Conflicting Interest of Counsel" that stated the clients did not believe the attorney was "taking their farm" and promised that the clients would not make such statements to anyone. *See Columbus Bar*

Ass'n v. Ewing, 75 Ohio St. 3d 244, 248, 249, 251 (1996). In *Toledo Bar Ass'n v. Dzienny* and *Toledo Bar Ass'n v. Westmeyer*, violations of DR 6-102(A) were found when the attorneys attempted to cover up their negligence in missing the statute of limitations. *See Toledo Bar Ass'n v. Dzienny*, 72 Ohio St. 3d 173, 175, 176 (1995); *Toledo Bar Ass'n v. Westmeyer*, 35 Ohio St. 3d 261, 263 (1988).

Is a clause in an engagement contract requiring a client to arbitrate legal malpractice claims an attempt by an attorney to limit liability for personal malpractice? The Board is not aware of any disciplinary case in Ohio addressing this precise issue.

A legal malpractice-arbitration clause shifts resolution of a legal malpractice dispute from a court of law to a different forum. A client's right to sue in court and have a jury trial may be eliminated. However, there is no automatic escape for an attorney from liability for personal malpractice. An arbitration decision may favor the client instead of the lawyer. Thus, this Board's view is that an attorney's use of a legal malpractice arbitration clause in an engagement letter is not a per se attempt to limit liability in violation of DR 6-102(A). See e.g., *Monahan v. Paine Webber Group*, 724 F. Supp. 224, 227 (S.D. N.Y. 1989); *McGuire, Cornwell, & Blakey v. Grider*, 765 F. Supp. 1048, 1050, 1051 (D. Colo. 1991).

Nevertheless, the Board discourages the use of engagement letters requiring clients to prospectively agree to arbitrate legal malpractice disputes. The basis for the Board's view is that underlying the DR 7-101 duty to represent a client zealously there is a lawyer's duty of loyalty to a client that includes protection of clients from agreements that do not serve the client's best interest. A decision to file a malpractice action against an attorney or arbitrate a malpractice claim may depend upon the facts and circumstances of the particular conduct involved. Prospective agreements in which a lawyer requires a client to arbitrate future legal malpractice claims may not be in the client's best interest. Such prospective agreements eliminate the opportunity for a client to consider the facts and circumstances of the dispute and to seek independent counsel for review of the disputed matter and advice as to the best course of action for the client. Before entering such prospective agreements, most clients would benefit from the advice of individual counsel. As stated in Question One, it is impractical to expect most clients to "hire a lawyer to hire a lawyer." This reflects poorly upon the legal profession. In addition, although not a concern of this Board, a decision to arbitrate a malpractice dispute may be a decision that the attorney should not make independently without consultation with his or her malpractice insurance carrier.

The Board notes that some states permit prospective agreements to arbitrate legal malpractice claims, but with conditions. Some states advise that the client must be represented by independent counsel in entering the agreement. *See e.g.*, District of Columbia Bar, Op. 211 (1990); State Bar of Michigan, Informal Op. RI-257 (1996). Other states require that the client be advised to seek counsel. *See e.g.*, State Bar of

Arizona, Op. 94-05 (1994); Philadelphia Bar Ass'n, Op. 88-2 (1988); Virginia State Bar, Op. 638 (1984).
This Board is not persuaded by these views. It is impractical to require most clients to consult a lawyer to determine whether it would be in their best interests to sign an engagement contract with a lawyer. This approach does not foster the type of relationship that should exist between an attorney and his or her individual client. It sends the message that the lawyer being hired cannot be trusted to consider the client's best interest. It discourages access to the legal system. It makes lawyers look untrustworthy in the eyes of the public and the profession.

Thus, the Board advises that an engagement letter between a lawyer and a client should not contain language requiring a client to prospectively agree to arbitrate legal malpractice disputes. Arbitration of a legal malpractice dispute should be a voluntary decision made by a client after opportunity to consider the facts and circumstances of the dispute and to consult, if desired, with independent counsel. In so advising, the Board is not discouraging arbitration of legal malpractice disputes when the decision is made voluntarily by a client who has had an opportunity to consider the facts and circumstances of a particular dispute and opportunity to consult with independent counsel.

Professional ethical misconduct-arbitration clauses

Under Gov.Bar R. V §4(G) an attorney has a duty to cooperate with the disciplinary process. A client should not be asked by an attorney to forego filing a disciplinary grievance or to dismiss or resolve a disciplinary grievance outside Rule V. By requiring a client to prospectively agree to arbitrate disputes regarding professional misconduct, an attorney is attempting to circumvent the disciplinary process rather than cooperate with the process.

Such agreements also exceed the scope of an attorney's authority, for the authority to regulate and discipline the legal profession lies within the sole authority of the Supreme Court of Ohio. See Ohio Const. art. IV, § 2(B)(1)(g). Further, an attorney is responsible for his or her conduct and should not attempt to escape responsibility for misconduct through a contract with a client. Attempting to thwart the disciplinary process undermines the regulation of the legal profession.

Attempts to thwart disciplinary investigations after misconduct has occurred has been found to be an ethical violation. In *Cuyahoga County Bar Ass'n v. Berger*, two attorneys, in settling a matter, had their client enter into an agreement that in the event of inquiries by any bar association the response would be limited to "the matters have been resolved." This was found to be an attempt to suppress a bar association investigation. *See Cuyahoga County Bar Ass'n v. Berger*, 64 Ohio St. 3d 454, 456 (1992).

This Board also disfavors attempts by attorneys to limit exposure to disciplinary proceedings through prospective agreements with clients. Several other states have

advised against such attempts. In Michigan, a lawyer may not enter an agreement with a client that disputes arising from the representation pertaining to the lawyer's ethical misconduct will be resolved in an alternate dispute resolution program. *See* State Bar of Michigan, Op. RI-257 (1996). Also in Michigan, a lawyer may not use a retainer agreement that restricts a client from reporting an attorney to the attorney grievance commission. *See* Michigan State Bar, Op. RI-196 (1994). In Maine, a lawyer may not accept a release from a client for past or future claims of ethical misconduct. *See* Maine Bd of Overseers of the Bar, Op. 68 (1986).

For these reasons, the Board advises that an engagement letter between a lawyer and a client should not contain language requiring a client to prospectively agree to arbitrate professional ethical misconduct disputes. Arbitration of a professional ethical misconduct dispute is not a decision for an attorney to impose upon a client. An attorney should not require a client to forego filing a disciplinary grievance or to dismiss or resolve a disciplinary grievance outside Rule V. The regulation and discipline of the legal profession lies within the authority of the Supreme Court of Ohio.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.