

**THE PROFESSIONAL ETHICS COMMITTEE FOR
THE STATE BAR OF TEXAS
Opinion No. 586**

October 2008

QUESTION PRESENTED

Are binding arbitration clauses in lawyer-client engagement agreements permissible under the Texas Disciplinary Rules of Professional Conduct?

STATEMENT OF FACTS

A lawyer would like to include a binding arbitration provision in his engagement agreements with his clients. The arbitration provision would require binding arbitration of fee disputes and malpractice claims. The terms of the particular arbitration provision would not be unfair to a typical client that was willing to agree to arbitration. The lawyer would like to know if such agreements are permitted under the Texas Disciplinary Rules of Professional Conduct, and if so, what disclosures, if any, should be made to clients.

DISCUSSION

Binding arbitration clauses have become increasingly common in lawyer fee agreements. See American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 02-425 (February 20, 2002) (“ABA Opinion 02-425”). As noted in ABA Opinion 02-425, provisions requiring arbitration of fee disputes have gained more acceptance than those involving malpractice claims. Comment 19 to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct provides that where a “procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it.” In addition, the State Bar of Texas encourages voluntary arbitration as a preferred method of resolving fee disputes. See State Bar of Texas Fee Disputes Committee Model Rules for Fee Arbitration.

The Texas Disciplinary Rules of Professional Conduct do not specifically address agreements for arbitration of malpractice claims. The Texas Disciplinary Rules prohibit a lawyer from prospectively agreeing with a client to limit the lawyer’s malpractice liability unless the agreement is permitted by law and the client is represented by independent counsel with respect to the agreement. Rule 1.08(g). Most state bar ethics committees that have considered the issue, as well as the American Bar Association Standing Committee on Ethics and Professional Responsibility in ABA Opinion 02-425, have concluded that binding arbitration provisions do not prospectively limit a lawyer’s liability but instead establish a procedure for resolving such claims. See ABA Opinion 02-425 at footnote 8. ABA Opinion 02-425 concluded:

“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 and/or statutory law.”

ABA Opinion 02-425 was cited with approval by the San Antonio Court of Appeals in holding that an arbitration clause in a fee agreement did not violate Texas Disciplinary Rule 1.08(g). *In re Hartigan*, 107 S.W.3d 684, 689 (Tex. App. - San Antonio 2003, pet. denied).

The Committee agrees with this view. An arbitration clause simply shifts resolution of a dispute from a court of law to a different forum. A client’s right to have the dispute resolved by a jury may be eliminated, but a lawyer does not for that reason escape liability for legal malpractice. Consequently, the Committee concludes that a lawyer’s use of a malpractice arbitration clause in a fee agreement is not *per se* an attempt to limit malpractice liability in violation of Texas Disciplinary Rule 1.08(g). However, the arbitration clause must not shield the lawyer from liability to which the lawyer would otherwise be exposed. For example, an arbitration clause that prohibited the recovery of certain otherwise allowable damages for malpractice would be an impermissible limit on a lawyer’s malpractice liability.

Some of the ethics opinions issued in other states that have addressed this issue have relied in part of their analysis on the equivalent of Texas Disciplinary Rule 1.08(a). Rule 1.08(a) prohibits a lawyer from entering into a business transaction with a client unless the transaction is fair and reasonable to the client, the client is given the opportunity to be represented by independent counsel, and the client consents in writing. The Committee is of the opinion that Rule 1.08(a) does not apply to a transaction establishing a lawyer-client relationship. In the Committee’s opinion, the establishment of a lawyer-client relationship is not a “business transaction with a client” within the meaning of Rule 1.08(a). Consequently, a lawyer is not required by that Rule to advise a client to seek independent counsel before agreeing to a binding arbitration clause in a fee agreement. However, the Committee notes the statement in Comment 2 to Rule 1.08 that “[a]s a general principle, all transactions between client and lawyer should be fair and reasonable to the client.” Application of this principle in the case of a lawyer-client agreement for arbitration of disputes would mean that the lawyer should not attempt to include clearly unfair terms in the agreement, such as providing for the selection of the arbitrator solely by the lawyer, requiring arbitration in a remote location, or imposing excessive costs that would effectively foreclose the client’s use of arbitration. In the case of an agreement for arbitration of legal malpractice claims, a lawyer’s insistence on onerous provisions that effectively prevented access to the arbitration process or caused the process to be fundamentally unfair to the client would also violate Rule 1.08(g) as an impermissible prospective limitation on the lawyer’s liability for malpractice.

In order for the client’s agreement for arbitration to be effective, the Committee believes that the client must receive sufficient information about the differences between litigation and

arbitration to permit the client to make an informed decision about whether to agree to binding arbitration. While most of the duties flowing from the lawyer-client relationship attach only after the creation of the lawyer-client relationship, some duties may attach before a lawyer-client relationship is established. See paragraph 12 of the Preamble to the Texas Disciplinary Rules of Professional Conduct. Rule 1.03(b) provides that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The Committee is of the opinion that this Rule applies when a lawyer asks a prospective client to agree to binding arbitration in an engagement agreement. In order to meet the requirements of Rule 1.03(b), the lawyer should explain the significant advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes is necessary for an informed decision by the client. The scope of the explanation will depend on the sophistication, education and experience of the client. In the case of a highly sophisticated client such as a large business entity that frequently employs outside lawyers, no explanation at all may be necessary. In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method for selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial. Although the disclosure should vary from client to client, depending on the particular circumstances, the overriding concern is that the lawyer should provide information necessary for the client to make an informed decision.

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. The Committee notes, however, that the Texas courts of appeals are split on whether a legal malpractice claim is one for “personal injury,” which under the Texas Arbitration Act can be the subject of an arbitration agreement only if the client has separate representation in entering into the agreement. Compare *In re Godt*, 28 S.W.3d 732, 738 -39 (Tex. App. - Corpus Christi 2000, orig. proc.) (legal malpractice claim is a personal injury claim) with *Taylor v. Wilson*, 180 S.W.3d 627, 629-31 (Tex. App. - Houston [14th Dist.] 2005, pet. denied), *Miller v. Brewer*, 118 S.W.3d 896, 898-99 (Tex. App. – Amarillo 2003, no pet.), and *In re Hartigan*, 107 S.W.3d 684, 689-91 (Tex. App. - San Antonio 2003, pet. denied) (each holding that a legal malpractice claim is not a personal injury claim).

CONCLUSION

It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and

disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice.