

Comment,
AN ETHICS ANALYSIS OF ARBITRATING
MALPRACTICE CLAIMS

Introduction

Arbitration of attorney-client disputes has become highly favored over the last several years as the utilization of the general idea of arbitration has grown. However, there has not been quite the consensus on the appropriateness of specifically arbitrating legal malpractice claims. A number of ethical issues arguably still exist when an agreement requires a client to submit malpractice claims to binding arbitration. The matter of enforceability of such provisions has yet to be definitively decided in most jurisdictions and thus treatment of such provisions varies greatly from jurisdiction to jurisdiction. Recently the First Circuit Court of Appeals validated a malpractice arbitration agreement in the case, *Bezio v. Draeger*.¹ This decision is the most recent of such to address this topic and the focus of this article.

This article will examine the court's analysis of malpractice arbitration agreements in *Bezio v. Draeger* and the ethical issues that surround such provisions. Part II will begin with a brief overview of arbitration and its historical evolution into the realm of attorney-client disputes. Part III explores the *Bezio v. Draeger* court analysis and application of the concept of arbitration of malpractice claims. Parts IV and V delve into the ethical implications surrounding such provisions and provide a comparison of current states' treatment of the issue. In conclusion, Part VI looks at the implications of current approaches and the future of arbitration of malpractice claims.

II. Overview of Arbitration

Arbitration is not a new phenomenon. Early forms of arbitration existed during the Middle Ages as a mechanism to settle commercial disputes in many societies.² Over the last half century arbitration has become the primary method of resolving disputes in labor law related issues, especially in management and

¹ 737 F.3d 819 (1st Cir. 2013).

² Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 3-4 (2006).

union disputes.³ In the United States, arbitration gained substantial popularity beginning in the 1920s. Equities buyers and traders on Wall Street were upset with the lengthy court processes and began pushing for arbitration as an alternative to resolving their disputes.⁴

A. *Change in Tide: Acceptance of Arbitration*

At first, arbitration faced considerable opposition by the judiciary. The hostility of the courts stemmed from a long-standing fear that arbitration “usurped judicial authority” and thus deprived them of jurisdiction.⁵ Congress, responding to the urging of business facilitators on Wall Street and the heightened hostility from the courts, enacted the Federal Arbitration Act (FAA)⁶ in 1925.⁷ Congress saw value in the concept of arbitration and chose to legislatively overrule the courts’ consistent refusal to recognize arbitration agreements. With the enactment of the FAA, arbitration became the favored legal means of resolving many disputes. Since then, arbitration has gained widespread favor among state and national public policy, particularly in the business and employment context.⁸

Arbitration has had a slow expansion into other areas of law, including the area of attorney-client relations. Initially, in the context of attorney-client disputes, arbitration gained prevalence as a method to resolve fee disputes.⁹ However, recognition that these types of disputes were a significant problem did not occur until the 1970s. At that time the ABA began looking into it and concluded that fee disputes were “the most serious problem in the relationship between the Bar and the public.”¹⁰

³ See Louis A. Russo, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 *HOSTRA L. REV.* 327, 329-30 (Fall 2006).

⁴ Daly, *supra* note 2, at 6.

⁵ *Id.* at 7.

⁶ Federal Arbitration Act, 9 U.S.C. §§ 1-16, §§ 201-208, §§ 301-307 (2012).

⁷ Daly, *supra* note 2, at 7.

⁸ *Id.* at 9.

⁹ Russo, *supra* note 3, at 330.

¹⁰ Steven Quiring, *Attorney-Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements*, 80 *TEX. L. REV.* 1213, 1240 (2002)

As a practical matter, exploration of arbitration of malpractice claims followed. With the realization that fee disputes often coincided with malpractice claims, attempts to draft attorney-client agreements that encompassed both disputes gained considerable interest.¹¹ However, in the context of malpractice claims, arbitration has failed to achieve the same heightened favor or general consensus.¹² In fact, states vary widely on their policies regarding enforceability of such encompassing provisions.¹³ This uncertainty has largely stemmed from the ethical considerations surrounding the compulsory nature of such agreements.¹⁴

B. *Why Arbitrate?*

Arbitration gained favor in handling disputes for a number of reasons. From a business perspective it is seen as an “essential tool to control costs of resolving a dispute and preserve current and future business relationships.”¹⁵ Arbitration is also generally recognized as a quicker, more efficient route to handle disputes given its limited rules of discovery and evidence.¹⁶ With arbitration, the parties do not have to function on a court’s time line. Arbitration provides flexibility in the time and manner that the dispute is handled.¹⁷ It often allows for a matter to be settled within a matter of months rather than years as is often the case

(quoting the ABA SPECIAL COMM. ON RESOLUTION OF FEE DISPUTES, THE RESOLUTION OF FEE DISPUTES 1 (1974)).

¹¹ See David Hricik, *Lawyer Client Arbitration Agreements*, 12 No. 3 PROF. LAW. 24, 24 (Spring 2001). Responses to a suit for fees generally follows with a counterclaim for malpractice. One study found that “such counterclaims were brought in 40% of fee actions.” *Id.* See also Russo, *supra* note 3, at 330-331 (stating “A client dissatisfied in whole or in part with the legal services he received is more likely to claim that the attorney committed malpractice in response to a bill for outstanding legal fees.”).

¹² See Robert J. Kraemer, *Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 ST. MARY’S L.J. 909, 919 (2002).

¹³ See *infra* Part IV.

¹⁴ See *infra* Part III.

¹⁵ Daly, *supra* note 2, at 9.

¹⁶ See Russo, *supra* note 3, at 334-35.

¹⁷ See Joseph P. McMonigle & Thomas Weathers, *A New Way To Go: Arbitration of Legal Malpractice Claims*, 64 DEF. COUNS. J. 409, 409 (July 1997).

with litigation. Litigating disputes forces the parties to have to deal with backlogged courts and the potential for jury trials.¹⁸

Arbitration also implies a certain level of “fairness.” Arbitration by definition involves a neutral third party, usually agreed upon by the parties, to hear the contested issue.¹⁹ Ultimately both parties have a hand in selecting the arbiter and thus have some level of control in the overall process.²⁰ Although many features of arbitration are attractive to defendants, the California Supreme Court has rejected the assertion that arbitration favors defendants’ interests stating that the “speed and economy of arbitration, in contrast to the expense and delay of jury trial, could prove helpful to all parties; the simplified procedures and relaxed rules of evidence in arbitration may aid an injured plaintiff presenting his case.”²¹

Arbitration also has the added benefit of greater privacy. Proceedings do not occur in open court and for the most part records of proceedings are not open to the public.²² This confidential aspect is beneficial to both parties. Attorneys obviously want to protect their reputation and clients may desire the extra level of confidentiality as well in protecting their own interests.²³

C. *Current Authority on Attorney-Client Arbitration*

Currently few authorities exist that specifically address the subject of arbitration in attorney-client malpractice disputes. Federally, congressional intent has favored arbitration as seen by the enactment of the FAA.²⁴ The FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save

¹⁸ See Daly, *supra* note 2, at 11.

¹⁹ “Arbitration is a method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties whose decision is binding.” BLACK’S LAW DICTIONARY 44 (9th ed. 2009).

²⁰ See Russo, *supra* note 3, at 341.

²¹ *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1186 (Cal. 1976).

²² See Russo, *supra* note 3, at 336.

²³ The ABA Model Rules allow lawyers to use certain confidential information to defend against a client’s claim, and thus a client might shy away from instigating formal litigation in order to protect his privacy and the information that may have been shared with the lawyer in the course of the relationship. See Mark Richard Cummisford, *Resolving Fee Disputes and Malpractice Claims Using ADR*, 85 MARQ. L. REV. 975, 982 (2002).

²⁴ See *supra* Part II.A.

upon such grounds as exist at law or in equity for the revocation of any contract.”²⁵ Additionally, the U.S. Supreme Court has shown its support by declaring that “ambiguities [in agreements] should be resolved in favor of arbitration.”²⁶ Despite the clear favoritism of arbitration in general, no authority provides definitive guidance on the arbitration of legal malpractice claims.

Secondary sources of authority, such as *The Restatement (Third) of the Law Governing Lawyers* (“The Restatement”), minimally address the issue. The Restatement states, in part, that “an agreement prospectively limiting a lawyer’s liability to a client for malpractice is unenforceable.”²⁷ It offers more of an explanation regarding arbitration provisions, specifically, in a comment; however, it ultimately defers to the law of the jurisdiction in determining enforceability.²⁸ The American Bar Association (“ABA”) has also provided some guidance on the issue. It addresses the topic generally in the Model Rules of Professional Conduct and in more detail in a formal ethics opinion.²⁹ However, there are still underlying ethical concerns regarding whether or not an agreement to arbitrate malpractice claims actually limits attorney liability. Decisions regarding enforceability of such provisions remain uncertain and continue to vary from jurisdiction to jurisdiction.

The U.S. Supreme Court has yet to rule on a case regarding this issue. Thus, it has been largely left to the state courts for interpretation. States currently remain very much divided on the validity of malpractice arbitration agreements.³⁰ The lack of na-

²⁵ Quiring, *supra* note 10, at 1240.

²⁶ Kraemer, *supra* note 12, at 921.

²⁷ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54(2) (2000).

²⁸ *See id.* § 54 cmt. b.

²⁹ *See* MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(1) (1984) (“MPRC”) (stating “[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”); MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. (14) (2000) (stating, “[t]his paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.”); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 02-425 (“ABA Op. 02-425”) (2002) (discussing when an agreement to arbitrate malpractice claims is ethical and permissible).

³⁰ *See infra* Part V.

tional authority offering guidance on the issue has resulted in a complete lack of consensus on how to handle it.

III. *Bezio v. Draeger* Analysis

A. *Facts of the Case*

In *Bezio v. Draeger*, the First Circuit applied Maine law and ultimately upheld the enforceability of a provision compelling arbitration of malpractice claims. The plaintiff, Douglas Bezio, had previously been employed at a securities firm when the Maine Office of Securities brought an enforcement action against him for an alleged violation of Maine state security laws.³¹ Bezio retained the firm of Bernstein, Shur, Sawyer & Nelson (BSSN) to represent him in the enforcement action.³²

The dispute involved in this case stemmed from a clause in BSSN's attorney-client engagement letter of which Bezio signed as part of the retainment of their firm. Bezio, upset with the outcome of the enforcement action, attempted to bring a claim of malpractice against BSSN.³³ BSSN then moved for a dismissal of Bezio's claim and instead moved to compel arbitration under the arbitration clause of the engagement agreement.³⁴

The engagement agreement contained the following arbitration provision:

If you disagree with the amount of our fee, please take up the question with your principal attorney contact or with the firm's managing partner. Typically, such disagreements are resolved to the satisfaction of both sides with little inconvenience of formality. In the event of a fee dispute that is not readily resolved, you shall have the right to submit the fee dispute to arbitration under the Maine Code of Professional Responsibility. Any fee dispute that you do not submit to arbitration under the Maine Code of Professional Responsibility, *and any other dispute that arises out of or relates to this agreement or the services provided by the law firm shall also, at the election of either party, be subject to binding arbitration.* Either party may request such arbitration by sending a written demand for arbitration to the other.³⁵

³¹ *Bezio*, 737 F.3d. at 820.

³² *Id.*

³³ *Bezio v. Draeger*, 2013 WL 3776538, at *1 (D. Me. 2013).

³⁴ *Id.* at *2.

³⁵ *Bezio*, 737 F.3d. at 821 (emphasis in original).

Bezio opposed the dismissal of the malpractice claim and made a number of arguments as to the enforceability of the arbitration provision in regards to the malpractice claim. The court provided an analysis of the issue and as a result validated the arbitration provision as to malpractice and affirmed the dismissal of Bezio's claim.

B. Court's Analysis

The First Circuit relied on a few key authorities in developing its rationale and affirming the district court's holding. It focused on several state authorities including the Maine Rules of Professional Conduct, the Maine Professional Ethics Commission Advisory Opinion 170; and Maine's Uniform Arbitration Act in support of its conclusion. The court also drew support from national sources such as the American Bar Association and the federal policy favoring arbitration, the FAA. Using these as guidance, the court fleshed out Bezio's arguments and developed a rationale that furthered the current state and national policies favoring arbitration.³⁶

In 1999, Maine's Professional Ethics Commission published Advisory Opinion 170 ("Opinion 170")³⁷ which addressed whether attorneys could enter arbitration agreements with clients on matters other than fees.³⁸ The result of that opinion brought clear support for enforceability of the provision at hand in *Bezio v. Draeger*. The opinion stated that a "lawyer and a client may indeed, under the Maine Bar Rules, include in their initial engagement agreement a clause compelling arbitration of any and all malpractice claims as long as the clause does not preclude the client from requiring resolution of any fee dispute pursuant to Rule 9."³⁹

Bezio made a number of arguments that arbitration provisions limit a lawyer's liability in clear violation of the Maine Rules of Professional Conduct. However, this court again looked to Opinion 170 and found that a "mutual agreement on a neutral forum within which to adjudicate a lawyer's future liabil-

³⁶ See *id.* at 823.

³⁷ Me. Prof'l Ethics Comm'n, Op. 170: Attorneys' and Clients' Agreement to Arbitrate Future Malpractice Claims (Dec. 23, 1999) ("Me. Op. 170").

³⁸ See *id.*

³⁹ *Bezio*, 737 F.3d. at 823-24.

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ity' is simply not an agreement 'limiting the lawyer's liability.'"⁴⁰ This opinion had provided guidance to the courts and attorneys in Maine for nearly fifteen years, and this court found no reason to overrule it.

Bezio also made several arguments surrounding the idea of "informed consent." Unfortunately for Bezio, he relied on another state's holding which this court rejected and ultimately found would be displaced by federal legislation.⁴¹ The FAA does not allow a state to impose limitations that are special to arbitration clauses.⁴² The First Circuit argued that informed consent preconditions would constitute special limitations on arbitration clauses and thus not be allowed via preemption under the FAA.⁴³

The court continued to rely on Maine state authorities in support of its findings in this matter. Opinion 170 further provides that "the presence of such an arbitration clause in an engagement agreement, without more, [does not] require that the client be advised to consult with other counsel."⁴⁴ Thus, the Commission "expressly rejected" the informed consent argument.⁴⁵

Bezio's past did not help this argument either. He had previously been involved with arbitration proceedings and therefore knew what they were and of the consequences associated with signing such a provision.⁴⁶ Additionally, he was not rushed into signing the agreement. The record shows that he made changes to the agreement, initialed each page, and thus had ample time to conduct a thorough review of the document and even to seek outside counsel if he had thought it was necessary.⁴⁷ The court clearly felt that these previous actions on the part of Bezio car-

⁴⁰ *Id.* at 824.

⁴¹ Bezio relied on the Louisiana Supreme Court's holding in *Hodges v. Reasonover* where the court outlined a minimum of what an attorney must disclose in order for an arbitration agreement to be binding. *See Hodges v. Reasonover*, 103 So.3d 1069, 1077 (La. 2012).

⁴² *See Bezio*, 737 F.3d. at 823.

⁴³ *Id.*

⁴⁴ *Id.* at 824.

⁴⁵ *Id.*

⁴⁶ *Id.* at 825.

⁴⁷ *Id.*

ried weight and ultimately weakened his “lack of informed consent” argument.

C. Outcome

The First Circuit court affirmed the lower court’s decision in support of the arbitration provision. Overall, the First Circuit relied on long-standing ethics opinions and Maine’s preference for arbitration. The court developed its rationale through close examination of the current state policy regarding the issue and found further support in national ABA ethics opinions and federal legislation. Despite Bezio citing to another jurisdiction that would likely have not upheld such a provision, professional liability rules guide these outcomes and at present these rules vary greatly from jurisdiction to jurisdiction. Thus, the First Circuit found no basis to recognize this other jurisdiction’s views as they clearly contradicted the favored policy of this case’s jurisdiction.⁴⁸

IV. Ethical Issues

Despite the growing favor and use of arbitration in handling disputes in a number of fields, it has struggled to achieve the same enthusiastic fervor in regards to legal malpractice disputes.⁴⁹ This is largely due to a few ethical concerns that surround the unique relationship that exists between an attorney and a client and the compulsory nature of such provisions. The fiduciary duty an attorney owes a client plays a crucial role in how arbitration of malpractice claims are viewed.⁵⁰ An attorney, as a fiduciary, is expected to “be a paragon of candor, fairness, honor, and fidelity in all of her dealings with those who place their trust in her ability and integrity.”⁵¹ The client has an expectation that the attorney will act in their best interests at all times. Mandatory arbitration agreements for malpractice claims create several areas of ethical concern: limitation of attorney liability, lack of informed consent, and involuntary waiver of rights.

⁴⁸ *Id.*

⁴⁹ *See* Kraemer, *supra* note 12, at 919.

⁵⁰ Russo, *supra* note 3, at 339.

⁵¹ *Id.*

A. *Limitation of Attorney Liability*

There are no ethical rules that expressly preclude the use of arbitration provisions for malpractice claims; however, the ABA Model Rules of Professional Conduct, does specifically prohibit lawyers from making prospective limitations on malpractice liability.⁵² This is where many clients have tried to stake their claims on the issue but without much success. Most authority has held that clauses requiring arbitration of malpractice claims do not constitute such a limitation.⁵³ The general rule has been that “arbitration agreements are not in conflict with the prohibition on advance waivers of malpractice liability.”⁵⁴ An arbitration agreement ultimately just offers another avenue for determining liability and resolving a dispute.⁵⁵

B. *Lack of Informed Consent*

Additionally, as part of an attorney’s fiduciary duty, informed consent has been a contentious area and key ethical consideration for many states on this issue. Model Rule 1.4(b) suggests that a client have an understanding of a provision and agreement to such before they can be subject to it.⁵⁶ The ABA further addressed this issue in a formal opinion, suggesting that:

An agreement to arbitrate legal malpractice claims is ethical and permitted when: (1) the client is fully apprised of the advantages and disadvantages of arbitration; (2) the client is 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; and (3) the arbitration clause does not insulate the attorney from liability or limit the liability to which she would otherwise be exposed under common or statutory law.⁵⁷

⁵² See MODEL RULES OF PROF’L CONDUCT R. 8.1(h)(1). See also *supra* discussion at note 29.

⁵³ See Hricik, *supra* note 11, at 25.

⁵⁴ RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, LAW, DESK BK. PROF. RESP. §1.8-9(a)(4) (2013-2014 ed.).

⁵⁵ Stanley A. Leasure & Wayne L. Anderson, *Arbitration of Attorney/Client Disputes: The Missouri Perspective*, 64 J. MO. B. 132, 134 (May-June 2008).

⁵⁶ See MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2013) (stating “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

⁵⁷ Russo, *supra* note 3, at 352. See also ABA Op. 02-425, *supra* note 29.

However, with these recommendations comes an implicit level of discretion for the attorney.⁵⁸ The extent to which an attorney must explain a matter will ultimately vary based on the client.⁵⁹ Can one really draw a line as to when a client is considered sufficiently informed in order for an attorney to fulfill his or her ethical duties? The ABA implies this discretionary element because the attorney is expected to know the client's needs and act in their best interests.⁶⁰ Attorneys are expected to act competently in achieving their client's goals by advising them on legal issues.⁶¹ There should not be any less of a standard for an attorney to use their own judgment to properly advise them on matters such as this. States do vary on their interpretation of the ethical guidelines set out by the ABA and their own state opinions, thus, affecting state application in determining the enforceability of malpractice arbitration.

C. Involuntary Waiver of Rights

Another ethical consideration involves the client's involuntary waiver of rights. In agreeing to arbitration, clients often waive their right to a jury trial.⁶² Waiving a right to a jury trial could have substantial ramifications for a client.⁶³ In addition, there exists significant concern for the potential of unfair bargaining power within the attorney-client relationship.⁶⁴ An attorney is considered well-educated in the legal processes whereas the client may not be as sophisticated. Thus, without the assurance of informed consent nothing suggests that clients are truly aware of the consequences and implications, such as waiving their right to a jury trial, that agreeing to arbitrate involves.

⁵⁸ Russo, *supra* note 3, at 352.

⁵⁹ See *Bezio*, 737 F.3d at 823.

⁶⁰ See Russo, *supra* note 3 at 353.

⁶¹ *Id.*

⁶² See Kraemer, *supra* note 12, at 939.

⁶³ See Powers, *supra* note 58, at 633.

⁶⁴ See Kraemer, *supra* note 12, at 941. "The attorney's in-depth knowledge of legal rights is a powerful advantage over the client who relies upon that attorney to provide information needed to make an informed decision on arbitration." *Id.* See also Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 647-48 (1997).

Due to these ethical implications, there remain significant concerns for some states in enforcing arbitration clauses in this context.⁶⁵ Some have gone so far as to require a client seek outside counsel before agreeing to an arbitration provision.⁶⁶ This essentially assures that the primary attorney has taken measures to ensure the client understands the potential consequences of arbitration and the risk of involuntary waiver of rights is limited. It gives the client the opportunity to obtain the “knowledge and bargaining power needed to enter into such an agreement on their own terms.”⁶⁷

V. Current State Approaches

States vary considerably in their approaches dealing with the arbitration of legal malpractice disputes. This is mainly due to the lack of national guidance on the issue. Instead states develop their rules, not based on embodied law, but rather on advisory opinions of their individual state bars.⁶⁸ Courts take those opinions and apply them on a case by case basis to establish the law of that particular state. Thus, the lack of consensus and significant variations from jurisdiction to jurisdiction are largely the result of “differing professional responsibility rules, differing advisory opinions on those rules, and differing applications by courts.”⁶⁹ States can be divided into four main categories regarding their approach to enforcement of malpractice arbitration agreements: (1) those without restrictions in regards to informing clients, (2) those that require informed consent of the client, (3) those that require independent counsel for the client, and (4) those that disallow them altogether.

A. *No Requirement of Informed Consent*

The state of Maine took a unique approach in its recent decision. As established by the court in *Bezio*, Maine has no further requirement for enforceability beyond the prohibition of

⁶⁵ See *infra* Part V.

⁶⁶ See Russo, *supra* note 3, at 345.

⁶⁷ Quiring, *supra* note 10, at 1249.

⁶⁸ See Brian Cressman, *Bezio v. Draeger: A Missed Opportunity for a Doctrinal Solution to the Jurisdictional Split as to the Arbitrability of Legal Malpractice Claims*, 6 Y.B. ON ARB & MEDIATION 359, 364 (2014).

⁶⁹ *Id.*

limiting an attorney's liability. Like most states, the court relied primarily on its own state bar opinions in support of its rationale. It also utilized the decision in *Doctor's Associates v. Casarotto*⁷⁰ in direct support of rejecting the requirement of informed consent.⁷¹ In *Casarotto*, the court held that "a state statute imposing special requirements for arbitration clauses that did not apply to other contract provisions was 'inconsonant with', and preempted by, the FAA."⁷² In other words, state laws cannot impose limitations special to an arbitration agreement. The First Circuit in *Bezio*, held that the informed consent requirement was just such a limitation in its justification for validating the malpractice arbitration clause.⁷³ In addition, Maine's Professional Ethics Commission has made it clear that the mere presence of an arbitration clause, without more, does not require that a client be advised to consult other counsel.⁷⁴

B. Requirement of Informed Consent

A number of states permit malpractice arbitration agreements if the attorney fully discloses and informs the client of the advantages and disadvantages of arbitration.⁷⁵ States that utilize this approach rely heavily on the fiduciary nature of the attorney-client relationship in its justification.⁷⁶ Clients should trust that their attorneys are going to be open and honest with them about the business relationship they are engaging in.⁷⁷ Thus, ensuring that clients are aware of the expectations and nature of the relationship is just part of an attorney's general duty toward the client. Arizona permits such agreements as long as the agreement is "fair and reasonable to the client" and the attorney "fully discloses in understandable terms the advantages and disadvantages . . . of arbitration."⁷⁸

⁷⁰ *Doctor's Assoc., Inc. v. Cassarotto*, 517 U.S. 506 (1974).

⁷¹ See *Bezio*, 737 F.3d at 823.

⁷² *Quiring*, *supra* note 10, at 1240.

⁷³ *Bezio*, 2013 WL 3776538, at *3.

⁷⁴ See *Bezio*, 737 F.3d at 824 (citing Me. Op. 170, *supra* note 33).

⁷⁵ See *Russo*, *supra* note 3, at 352.

⁷⁶ See *Quiring*, *supra* note 10, at 1247.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1246-47 (citing Ariz. Ethics Op. No. 94-05 (1994)).

California has similar requirements. In *Lawrence v. Walzer & Gabrielson*,⁷⁹ the court reasoned that even though California favored arbitration, a client agreeing to it still had to do so voluntarily.⁸⁰ Thus, in California, an attorney must ensure that the client is “fully advised of the possible consequences of [an] agreement” before the court will consider enforcing it.⁸¹ Ultimately, attorneys must prove to the court that they provided enough information such that the client comprehended the consequences of arbitration. If they can establish that fact then the court will find that the client voluntarily consented.⁸²

This approach is also favored in Louisiana and what Bezio relied on with his arguments.⁸³ In Louisiana, a court may decline to enforce an arbitration clause if an attorney does not make the client aware of the full scope of the arbitration clause or if in doing so he fails to adequately disclose the potential consequences of agreeing to such a clause.⁸⁴ The Louisiana Supreme Court even went so far as to outline, at a minimum, what an attorney must disclose in order to compel arbitration.⁸⁵

C. Requirement of Independent Counsel

Another fairly common approach among states places a strict requirement on attorneys who wish to use arbitration provisions in regards to malpractice claims to ensure that clients seek and retain independent counsel on the matter. Attorneys are to have the clients consult with a separate attorney that will explain the concept of binding arbitration and, specifically, its effects as to malpractice claims.⁸⁶ The idea behind such a stringent requirement is to “protect those who are unable to protect themselves.”⁸⁷ It also serves to combat the appearance of attorney “self-dealing” or the taking advantage of ignorant clients.⁸⁸

⁷⁹ 256 Cal. Rptr. 6 (Ct. App. 1989).

⁸⁰ *Id.*

⁸¹ Russo, *supra* note 3, at 354.

⁸² *Id.*

⁸³ *See Bezio*, 737 F.3d at 822.

⁸⁴ *See Hodges*, 103 So.3d at 1076.

⁸⁵ *See Bezio*, 737 F.3d at 822 (citing Hodges, 103 So.3d at 1077).

⁸⁶ *See Russo*, *supra* note 3, at 345.

⁸⁷ *Id.*

⁸⁸ Quiring, *supra* note 10, at 1249.

Texas has taken this approach in determining enforcement of malpractice arbitration agreements. Texas focuses on Rule 1.08(g) of its Disciplinary Rules of Professional Conduct as it relates to transactions prohibited in attorney-client relationships. Texas sets its basis for this on the fact that the agreement of an arbitration provision is considered a transaction between the attorney and the client and thus the rule is implicated.⁸⁹ The rule suggests that the enforcement of a clause restricting malpractice claims to arbitration are only permitted where “the client is represented by independent counsel when making the agreement.”⁹⁰

Pennsylvania also imposes this standard upon its attorneys before it will consider enforcing an agreement to arbitrate malpractice claims. Pennsylvania’s own Rules of Professional Conduct mirror that of Texas and require a client to be independently represented in making an agreement to arbitrate malpractice claims.⁹¹ The Eastern District Court of Pennsylvania in *Dilworth Paxson, LLP v. Asensio*⁹² found that the agreement expressly acknowledged that the client had consulted outside counsel prior to signing and thus held it enforceable.⁹³

D. Malpractice Arbitration Agreements Unenforceable

A few states still disallow malpractice arbitration agreements altogether. The few that do have grounded that basis not necessarily on the idea that such a provision constitutes a “per se attempt to limit attorney liability,” but rather that it would “run afoul of the duty to zealously represent” a client.⁹⁴ The Ohio Court of Appeals declared arbitration clauses in attorney-client agreements unenforceable out of concern that client consent would not be voluntary if it was a requirement in order to receive services.⁹⁵ Additionally, Ohio has refused to adopt the informed consent or independent counsel requirement out of a “fear that

⁸⁹ See Russo, *supra* note 3, at 346.

⁹⁰ *Id.* (citing TEXAS DISCIPLINARY RULES OF PROF’L CONDUCT R1.08(g) (1995)).

⁹¹ See PA. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.8(h) (2006).

⁹² *Dilworth Paxson LLP v. Asensio*, 2003 WL21076984 (E.D. Pa. 2003).

⁹³ See Russo, *supra* note 3, at 351.

⁹⁴ Leasure, *supra* note 52, at 137.

⁹⁵ See *Thornton v. Haggins*, No. 8305, 2003 WL 23010100 (Ohio Ct. App. 8th Cir. 2003).

such a requirement would effectively tell clients they cannot trust their attorneys.”⁹⁶ The Ohio Board of Commissioner’s on Grievances and Discipline also felt that requiring a client to “hire a lawyer to hire a lawyer” seemed absurd and undermined the profession.⁹⁷

VI. Future of Malpractice Arbitration

The courts and the ABA have recognized the value and usefulness of the concept of arbitration. Opinions and case law have reflected a clear favor for arbitration in many types of disputes. However, the current diversity in approaches regarding arbitration of malpractice claims shows the lack of consensus and the struggles that jurisdictions face with enforcement. There are a number of advantages to using arbitration in malpractice disputes; however, ethical concerns still plague jurisdictions in making their decisions.

Maine took a very unique approach and attempted to interpret current authorities in a way that had not been done by other jurisdictions. Maine attempted to rely on the guidance of the FAA in developing its rationale, at least at the district court level.⁹⁸ However, the First Circuit, although acknowledging and consistent with the FAA argument made by the district court, actually relied on Maine law, primarily the state ethics opinion, in making its decision.⁹⁹ This is generally how most states develop their law regarding enforceability of such agreements so it was not unexpected. However, some argue that the First Circuit had an opportunity to establish a doctrinal resolution to the split in jurisdictional solutions regarding this issue had it taken up the district court’s FAA argument.¹⁰⁰ Instead, it opted to treat the issue as the rest of the jurisdictions have by relying on the state ethics opinion and perpetuating the variability among jurisdictions.

On a state level, the variations between jurisdictions have the potential to create issues in the future. Some of the more

⁹⁶ Quiring, *supra* note 10, at 1251.

⁹⁷ *Id.*

⁹⁸ *Bezio*, 2013 WL 3776538, at *3.

⁹⁹ *See Bezio*, 737 F.3d at 823.

¹⁰⁰ *See Cressman*, *supra* note 68, at 370.

restrictive approaches to handling arbitration of malpractice claims could render it impossible for attorneys to even use. If clients are unable to seek outside independent counsel or an attorney feels it is too high a burden to establish sufficient explanation of arbitration to achieve informed consent, then they could refrain from engaging in their use altogether.¹⁰¹ On the other hand, such approaches do protect clients and limit the potential for attorney misconduct.¹⁰²

The current trend of adopting the professional rules and ethics opinions on a state by state basis is likely to pose more problems in the future, not only at the state level, but at the national level as well. Variations by jurisdictions create the potential for problems, particularly at the federal circuit level. Jurisdictions adopting their own respective state's rules will always have the potential to produce states within the same circuit adopting different approaches.

The creation of a national rule would streamline approaches and set a standard of expectations for both attorneys and clients. It would allow the courts to provide uniformity in enforceability and, potentially, consistent with the current favor toward arbitration in general, encourage its widespread use. Ultimately though, without a national consensus the issue remains subject to a myriad of future problems.

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¹⁰¹ See Quiring, *supra* note 10, at 1248. Here the author goes into detail about financial difficulties that some clients may face in being forced to seek and hire second, independent counsel. He makes reference to the "little protection" that this would actually provide for "those clients who are most in need of the protection" in such a process. *Id.*; See also Russo, *supra* note 3, at 352. Some states "bear the burden of ensuring that an independent attorney advises their potential clients" while others "face the greater challenge of advising the clients themselves." *Id.*

¹⁰² See *infra* Part IV.

