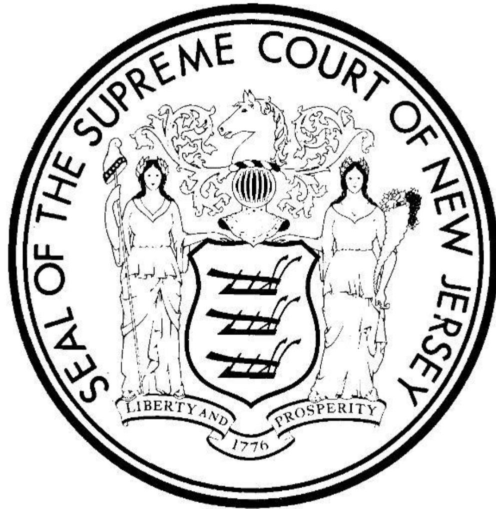
ADVISORY COMMITTEE ON PROFESSIONAL ETHICS



REPORT AND RECOMMENDATIONS

January 18, 2022

Chair: Ronald K. Chen, Esq.

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INTRODUCTION

The Supreme Court requested the Advisory Committee on Professional Ethics to study the issues arising in the case Delaney v. Dickey, 244 N.J. 466 (2020). In Delaney, the Court found that lawyers may include provisions in their retainer agreements that bind the client to arbitrate a future fee dispute or legal malpractice action, provided lawyers adequately explain the provisions to the clients. The Court stated that this explanation can be conveyed orally or in writing. Id. at 474. The Court then referred the matter to this Committee for its review, to "make recommendations to this Court and propose further guidance on the scope of an attorney's disclosure requirements." Ibid. A majority of the Committee hereby makes a recommendation: it asks the Court to reconsider its decision to permit lawyers to include, in their retainer agreements, provisions that require the clients to arbitrate future fee disputes or legal malpractice actions. In the event the Court declines to reconsider, the full Committee also proposes further guidance on lawyers' disclosure requirements and suggests uniform language intended to ensure that lawyers adequately explain arbitration provisions to clients.

In the course of its review of these issues, the Committee requested comments from the legal community. It received and considered submissions from the New Jersey State Bar Association, the law firms Sills Cummis &

Gross, PC, and Chiesa Shahinian & Giantomasi PC and the New Jersey Association for Justice.

RECOMMENDATION: RECONSIDER THE DELANEY DECISION

Majority Position

As the Court noted in Delaney, a lawyer's "professional and fiduciary obligations require scrupulous fairness and transparency in dealing with clients." 244 N.J. at 471. The Court expressed concern that an arbitration provision in a retainer agreement "is an acknowledgement that the lawyer and client may be future adversaries." Id. at 473. The presence of such a provision in the retainer agreement reflects that the lawyer has considered this potential adversarial relationship "and seeks to control the dispute-resolution forum and its procedures." Ibid. This "raises the specter of conflicting interests." Ibid. Lawyers are supposed to provide clients advice that will protect the clients' interests, not protect the lawyers' interests.
"Given the lawyer's fiduciary duties of loyalty and candor to the client, there should never be a perception that a lawyer is exalting his own self-interest at the expense of the client." Id. at 496.

A majority of the Committee (fourteen of eighteen members) similarly is concerned about the conflict between a lawyer and a client that arises when the

lawyer, at the initiation of representation, seeks to bind the client to arbitrate a future fee dispute or legal malpractice action. A lawyer who presents an arbitration provision to a client at the initiation of representation has decided that arbitration is to the lawyer's benefit, or else the provision would not have been included in the retainer agreement. While it can be difficult to assess at that point in time whether arbitration is really preferable, the lawyer, by including the provision in the retainer agreement, has made a deliberate choice.

The majority finds it fundamentally unfair to require a client to agree to binding arbitration of disputes at the very outset of a representation. The lawyer and the client have a power imbalance at the initiation of representation. They are not in equivalent bargaining positions; the lawyer has the upper hand. Including an arbitration provision in the retainer agreement, to which the client is asked to agree at the beginning of the relationship, appears to a majority of the Committee as an opportunity for the lawyer to overreach.

At this initial stage of a lawyer-client relationship, the client cannot make an informed decision as to whether hypothetical claims should be decided by a court or by arbitration. The client does not know what disputes may arise with the lawyer in the future – the lawyer has not yet committed

malpractice or embellished his legal bills. The client does not know the nature and severity of the lawyer's potential negligence or wrongful act.

The New Jersey Association of Justice, in its comment, made similar points and further stated that it is inappropriate for the "beneficiary" of an arbitration agreement – the lawyer – to be the one to advise the client on whether to agree to that clause. Noting that an overwhelming majority of arbitrations are decided against the consumer, it added: "While there is always an advantage to a corporate defendant in the arbitration system, there is an even greater one when that corporate defendant is a law firm that has developed relationships with arbitrators over many years, if not decades."

Accordingly, the majority asserts that lawyers who seek to require arbitration of disputes as part of a retainer agreement are attempting to serve only their own interests. No disclosure to the client can adequately mitigate the lawyer's self-interest. There is an inherent and overwhelming conflict of interests. The majority asks the Court to reconsider its decision to allow lawyers to include such arbitration provisions in retainer agreements.

The majority was split as to whether to recommend that lawyers be prohibited from including an arbitration provision that covers both fee and malpractice disputes, or only malpractice disputes. Ten of the fourteen members in the majority recommend that the Court reconsider its decision to

permit arbitration provisions covering both fee and malpractice disputes. Four of the fourteen members in the majority recommend that the Court reconsider only the decision to permit arbitration provisions covering malpractice disputes. These members note that clients will continue to have the option to pursue fee arbitration by a District Fee Arbitration Committee. If clients choose not to pursue this option or the fees exceed $100,000, then the lawyer and client could agree, in the retainer agreement, to private arbitration.

Four of the fourteen members in the majority would permit institutional clients with a legal department to consent to arbitration of both fee and malpractice disputes in a retainer agreement. Institutional clients with a legal department are in a roughly equivalent bargaining position to the lawyer and can assess whether it is in their interest to agree to arbitration of malpractice and fee disputes. Such clients should be permitted to consent to arbitration of those disputes.

The full majority notes that lawyers may enter into arbitration agreements with their clients after the lawyer has engaged in the conduct that gives rise to the dispute. Twelve of the fourteen members of the majority suggest that, as Rule of Professional Conduct 1.8(a)(2) requires in similar situations, the lawyer must advise the client of the desirability of obtaining independent counsel prior to agreeing to arbitrate the dispute. Two of the

fourteen members in the majority assert that the client must have independent counsel when considering whether to agree to arbitrate disputes, after the lawyer has engaged in the conduct that gives rise to the dispute.

Further, the majority is apprehensive that, should the Court decline to reconsider its decision, retainer agreements with arbitration provisions will become the industry standard. The majority views it likely that malpractice insurers will require lawyers to include such provisions in their retainer agreements.

Some members expressed general concern about arbitration agreements for professional services. Such agreements governing disputes between lawyers and their clients may presage agreements in other settings, such as between doctors and patients or psychologists and clients.

Lastly, some members noted that malpractice claims often bring lawyers' ethical violations to light. Pushing such claims to private arbitration would hide the conduct from the disciplinary authorities, depriving them of the ability to protect the public.

The majority of the Committee thanks the Court for the opportunity to present this recommendation.

Minority Position

The minority, four of eighteen members, asserts that the Court, in the Delaney opinion, correctly and properly decided to permit lawyers to include arbitration provisions covering fees and malpractice in the retainer agreement. The minority asserts that arbitration is not unusual for business disputes, and there is no sound reason to exclude lawyers from the opportunity to require arbitration of disputes with clients.

These members note that lawyers often are required to continue to represent clients even when the clients are no longer paying the legal bill and, while it is important to protect clients, lawyers also need some protection. Clients who do not want to agree to arbitrate disputes can find a different lawyer whose retainer agreement does not include the arbitration provision. The minority finds that the uniform language in the recommended stand-alone rider proposed by the Committee adequately informs clients of the benefits and risks of arbitration. It does not request the Court to reconsider the Delaney decision.

GUIDANCE ON THE SCOPE OF A LAWYER'S DISCLOSURE REQUIREMENTS

In response to the Court's request that the Committee propose further guidance on the scope of a lawyer's disclosure requirements, the Committee suggests that lawyers who seek to include an arbitration provision in a retainer agreement do so in a separate rider with uniform language. The Court had emphasized the lawyer's "duty to explain the benefits and disadvantages of a provision in a retainer agreement that binds the client to arbitrate a future fee dispute or legal malpractice action in a non-judicial forum." Delaney, supra, 244 N.J. at 471. It also noted that the client "must have a basic understanding of the fundamental differences between an arbitral forum and a judicial forum in resolving a future fee dispute or malpractice action." Id. at 473. The proposed uniform language developed by the Committee is intended to further these goals.

As the Court noted in Delaney, tendering a retainer agreement that includes a provision that works in favor of the lawyer, potentially disfavoring the client, raises questions of conflict of interest between the lawyer and the client. When the lawyer and client may become adversarial, or the lawyer is in a position to disadvantage the client or to overreach, the Rules of Professional Conduct set forth client safeguards. For example, when a lawyer enters into a

business relationship with a client – even a relationship that is relatively non-adversarial, like a passive shared investment in real estate – the lawyer is required to make certain disclosures to the client and to afford the client the opportunity to have independent counsel review the arrangement. RPC 1.8(a).

Specifically, Rule of Professional Conduct 1.8(a) provides:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The Committee finds that similar safeguards should be present when a client is asked to agree to arbitrate as-yet-unknown disputes between the lawyer and the client. The agreement must be presented in clear terms that the client can understand; it must be fair and reasonable to the client; the client must provide informed consent in writing; and the client must have an opportunity to seek the advice of independent counsel.

The Committee considered the draft uniform language submitted by the New Jersey State Bar Association (NJSBA) and by Richard H. Epstein of Sills Cummis & Gross, PC. The Committee found that the NJSBA proposal, while addressing the key points, was too cursory; the Committee was not confident that a brief list of the differences between arbitration and court would result in informed consent, especially by a less-sophisticated client. The Committee found that the Sills Cummis & Gross proposal presented an overly favorable picture of the advantages of arbitration.

The Committee hereby proposes guidelines and uniform language for a retainer agreement that provides for arbitration of disputes between the lawyer and the client. The uniform language includes a requirement that lawyers have an oral discussion with the client about the provision and that the client be given the opportunity to have independent counsel review the provision. The uniform language contains certain other sections intended to assure the lawyer that the client actually understands the decision to agree to arbitration of disputes. The Committee proposes that an arbitration provision in a retainer agreement must include the provisions listed below.

General Guidance

1. Separate Rider with Uniform, Comprehensible Language.

The Committee recommends that a provision that binds the client to arbitrate a future fee dispute, legal malpractice action, or other dispute between the lawyer and client should be set forth in a separate rider to the retainer agreement, and the rider should include uniform language that is comprehensible to the least sophisticated clients who are unfamiliar with the legal process.

Many clients do not read the retainer agreement or, if they do, they only read the paragraph that sets forth the basis and rate of the fee. Many clients do not understand legalese and are not familiar with the terminology used in retainer agreements. When a lawyer wants to insert an arbitration provision into a retainer, it should be in a stand-alone document, separately signed by the client. Hopefully, clients are more likely to pay sufficient attention to the arbitration provision if it is in a separate document.

2. Rider Should Include Check Boxes to Assist Client Comprehension.

The Arbitration Rider should include check boxes listing the differences between arbitration and court action. The client will place initials at each box, to ensure sufficient attention is given to the arbitration issue by requiring the client to consider each aspect of arbitration versus a court action.

3. General Rider for Arbitration, with Specific Language for Disputes it Covers.

The Arbitration Rider will contain uniform language about the differences between arbitration and court action and also include a specific discussion of what disputes it covers, such as fee disputes or malpractice claims.

As the Court stated, "[w]e can well imagine that an attorney might not be eager to discuss legal malpractice at the beginning of an attorney-client relationship, but if the retainer agreement intends to cover that potential scenario, then the attorney must directly and clearly address the subject." Delaney, supra, 244 N.J. at 498. The separate discussion should directly, clearly, and plainly describe the types of conduct that may give rise to malpractice claims or fee disputes, including negligence in representing the client, failure to meet applicable statutes of limitations and the consequences thereof, conflicts of interest, misapplication of the law, and other wrongful acts.

4. Opportunity for Independent Counsel to Review.

The Arbitration Rider should include a provision explaining that the client has an opportunity to seek advice of independent legal counsel concerning arbitration of disputes.

The client must be advised in writing of the opportunity to seek the advice of independent legal counsel of the client's choice. A lawyer presenting an arbitration provision to a client at the initiation of representation is in a position of conflict with the client. The lawyer has chosen arbitration; the client may be unaware of the repercussions of that choice. The Committee agrees with the numerous other jurisdictions that require arbitration provisions to include the opportunity for review by independent counsel and notes that this condition is required by Rule of Professional Conduct 1.8(a)(2) whenever a lawyer enters into a business transaction with a client or acquires a pecuniary interest adverse to a client.

5. <u>State Whether the Client May Reject the Arbitration Provision Yet Still Retain the Lawyer.</u>

The Arbitration Rider should clearly state whether the client has the opportunity to reject the arbitration provision yet still retain the lawyer.

6. <u>Oral Discussion of Arbitration Rider is Required Unless Client is an Institution and/or a Client with a Legal Department.</u>

The client must provide informed consent. Lawyers should be required to present the Arbitration Rider to the client in writing and also engage in an oral consultation with the client about the terms of the provision. If the client

is an institution and/or a company with a legal department, the lawyer may forego the required oral consultation.

The Arbitration Rider requires the client to provide informed consent, similar to the informed consent required when a lawyer enters into a business transaction with a client or acquires a pecuniary interest adverse to a client. See RPC 1.8(a)(3). Informed consent means agreement by the client "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.0(e). A client who is less sophisticated than an institution and/or a client with a legal department should have the benefit of having the lawyer orally explain to them what form legal malpractice may take and what its consequences may be, or how and why fee disputes may arise, and how arbitration of such matters differs from a court action. The discussion should be tailored to the client's circumstances and the lawyer should use language that an unsophisticated client would understand.

7. Arbitration Provision Cannot Foreclose a Client from Choosing Fee Arbitration Before an Office of Attorney Ethics District Fee Arbitration Committee.

The Arbitration Rider must notify the client that the client retains the choice to pursue arbitration of fee disputes under the Court Rules. A lawyer may not require a client to proceed with mandatory arbitration of fee disputes

in a private forum and foreclose the client from filing a fee arbitration request before the Office of Attorney Ethics District Fee Arbitration Committees, pursuant to Rule 1:20A-1 to 1:20A-6.

Fee arbitration by District Fee Arbitration Committees is designed to ensure that lawyers do not charge unreasonable fees and clients have an affordable method to challenge fees. Charging an unreasonable fee violates Rule of Professional Conduct 1.5. District Fee Arbitration Committees have the duty to refer to a District Ethics Committee any matter that may involve ethical misconduct, including overreaching. R. 1:20A-4. The disciplinary system's principal purpose is preserving the confidence of the public in the integrity and trustworthiness of attorneys. Lawyers may not require clients, as a condition of settlement of an underlying dispute, to refrain from filing an ethics grievance. Advisory Committee on Professional Ethics Opinion 721 (2011). Accordingly, a lawyer may not require that a client forego fee arbitration under Rule 1:20A-1 to 1:20A-6, as doing so would require the client to waive filing an unreasonable-fee ethics complaint with a District Fee Arbitration Committee.

Fee disputes may still be privately arbitrated, as not all fee disputes are subject to fee arbitration under Rule 1:20A-1 to 1:20A-6. The District Fee Arbitration Committee may decline to arbitrate a fee dispute if the total fee

charged exceeds $100,000 or if non-parties to the arbitration have an interest that would be substantially affected. R. 1:20A-2(b)(1) and (3).

8. Arbitration Rider Must Specifically Exclude Any Prohibited Provisions that the Arbitration Forum May Offer; the Arbitration Must Be Governed by New Jersey Law.

Some arbitration forums offer remedies that New Jersey law does not permit in lawyer-client disputes. The Arbitration Rider may not allow for the arbitrator to impose attorneys' fees and costs on the client if the client does not prevail; such fee-shifting is not permitted under New Jersey law. Delaney, supra, 244 N.J. at 494. Similarly, the Arbitration Rider may not allow for the arbitrator to award punitive damages, which is contrary to New Jersey law. Id. at 493-94. Such provisions violate Rule of Professional Conduct 1.8(h)(1), which prohibits lawyers from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice." Id. at 499. The arbitration must be governed by New Jersey law.

9. Arbitration Rider Must Identify the Arbitration Forum and Provide the Rules and Procedures of the Forum.

The Arbitration Rider must identify the arbitration forum selected by the lawyer. It must also include the rules and procedures of the forum, either attached to the Rider itself or by reference to a convenient, publicly available source.

Uniform Language

Arbitration Rider – Consent to Arbitration

The law firm has selected [Arbitration Forum] to arbitrate disputes between you, the client, and us, the law firm. The rules and procedures of [Arbitration Forum] are [attached to this Rider or can be found at this website].

If the Rider is to govern malpractice disputes, this language should be included:

This form informs you and seeks to confirm your understanding and consent to private arbitration of any dispute that may arise between you as client and us as lawyers, including any claim against us for negligence, breach of trust, or any other wrongful act by us that harms you - customarily called "legal malpractice."

Legal malpractice can take many forms. Your lawyer may neglect your case, fail to communicate with you about the matter, fail to meet applicable statutes of limitations (which means that your case will be over and you will have no remedy), fail to meet deadlines, make mistakes about the law, or engage in other improper conduct. Your lawyer's neglect or mistakes can affect your ability to win your case or achieve your goals, and may result in your case being dismissed.

Legal malpractice can also arise if your lawyer breaches your trust, discloses confidential information about your case, or engages in a conflict of interest. This conduct by your lawyer may affect your ability to win your case or achieve your goals in this matter.

If the Rider is to govern fee disputes, this language should be included:

Fee disputes between you and us will be governed by this agreement UNLESS you elect to use the court-appointed Office of Attorney Ethics District Fee Arbitration Committee for any fee dispute under $100,000.

☐ **1. By choosing arbitration, I will be waiving my right to a trial by judge and jury.**

A court is public and provides for a trial before a jury of the county's citizens, in a courtroom. An arbitration forum is private and [state whether the Arbitration Forum rules provide that it will be before a single arbitrator or a panel of three arbitrators]. A private arbitration forum means that no one but the parties and witnesses will be allowed to be present during the hearing. By choosing arbitration, I understand that I will be waiving my right to a trial by judge and jury.

☐ **2. I understand that I may have to travel outside my county to attend the arbitration; the location is chosen by the arbitrator.**

A court is located in the county where you reside or where the law firm is located, while the arbitration forum is [state whether the Arbitration Forum rules provide for a hearing at a designated location or at a place of the arbitrator's choosing]. You may need to travel outside your county to attend the arbitration.

☐ **3. I agree to waive my right of appeal to challenge mistakes or errors by the arbitrator.**

A court's decision may be appealed to a higher court, which will decide whether the judge made mistakes or errors. The outcome of arbitration is final and binding and is there is no appeal to decide whether the arbitrator made mistakes or errors. If the arbitrator makes a mistake or error, there is no way to correct that mistake; the arbitrator's decision is final.

☐ **4. I agree that the decision of the arbitrator will be private and confidential.**

A judge or jury's decision is public while an arbitrator's decision is private and confidential. A settlement of a malpractice claim brought in a court may be confidential but only if the parties negotiate that term. There will be no publicity about an arbitration decision, while a decision by a judge or jury is a matter of public record and can be publicly reported.

☐ **5. I agree to be responsible, in part, for the costs of the arbitration proceedings, which can be substantial.**

Parties do not pay a judge in court. The courts have published filing fees which you will pay to start a case or file other papers. Parties to arbitration share the costs of the services of the arbitrator and the fees of the arbitration forum. You may be responsible, in part, for the costs of the arbitration proceedings, including payments to the arbitrator. The costs of an arbitration proceeding can be substantial, as the arbitrator will often bill by the hour.

If you do not have sufficient money, and cannot obtain a lawyer who agrees to advance the costs and fees of arbitration, you may not be able to pursue a remedy for the dispute, meaning that the dispute with your lawyer cannot be addressed if you choose arbitration.

☐ **6. I understand that discovery, which permits the parties to learn about the other side's case, may be more limited.**

Discovery is the process of exchanging information for a lawsuit or hearing. It permits the parties to learn things about the other side's case. Arbitration forums may limit discovery more than courts. When discovery is limited, there is less opportunity to gather information.

☐ **7. I have been provided with the opportunity to discuss the advantages and disadvantages of agreeing to binding arbitration with an independent lawyer that I would choose.**

I have been informed of the right, and given the time to consult, an independent lawyer about whether I should sign this agreement to arbitrate disputes with my lawyer.

I have _________ / have not _________ consulted with an independent lawyer about this Arbitration Rider.

☐ **8. My lawyer has discussed the arbitration provision with me and I agree to choose arbitration to resolve potential disputes with my lawyer.**

You have discussed the arbitration provision with me and explained the advantages and disadvantages of arbitration and court. I agree to choose arbitration to resolve potential disputes with you as my lawyer.

If arbitration is offered to resolve a fee dispute, this language should be included:

☐ **9. I can still choose fee arbitration with the Office of Attorney Ethics District Fee Arbitration Committee.**
I understand that even if I choose private arbitration to resolve a dispute about my lawyer's fees, I still have the right to file a fee arbitration claim with the Office of Attorney Ethics District Fee Arbitration Committee, pursuant to Rule 1:20A-1 to 1:20A-6.

If the client may reject the arbitration provision yet still retain the lawyer, then this language should be included:

☐ **10. I understand that I can decide not to arbitrate disputes with my lawyer and still retain my lawyer.**
My lawyer has informed me that I do not have to sign this Arbitration Rider, and that if I choose not to sign it, I can still be represented by my lawyer.

☐ **11. [Other.** This uniform rider is designed for the most common situations. If the situation diverges from common situations, additional information should be presented.]

By checking each box above and signing below, I acknowledge that I understand the differences between a court and an arbitration forum and I have decided to agree to arbitrate disputes between me and my lawyer.

____

[signature and date]

CONCLUSION

This Report and Recommendations of the Advisory Committee on Professional Ethics is hereby presented to the Court for its consideration. The Committee thanks the Court for this opportunity to serve.

Respectfully submitted,

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

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