

Arbitrating Legal Malpractice

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Many attorneys regularly consult with clients regarding the use of binding arbitration clauses. However, lawyers are often unsure whether such clauses should be included in their own firm's client agreements. This uncertainty stems, in part, from a long-standing debate within the legal and insurance industries as to whether binding arbitration is the course of action a law firm should take when defending a malpractice claim.

Some law firms include mandatory binding arbitration clauses in their client agreements with respect to malpractice cases, while some opt for nonbinding arbitration; some include binding arbitration while reserving the right to appeal the outcome, while others elect not to include any type of arbitration clause. The insurance industry is generally silent on the issue; however, some insurance companies encourage their clients to consider binding arbitration. Many defense lawyers believe that if an attorney or firm has a defensible case, they almost always should litigate, and thus discourage the use of binding arbitration clauses. Others argue that when law firms are the defendants, binding arbitration should always be used.

As with any legal strategy, there are both advantages and disadvantages to the use of binding arbitration in regards to malpractice claims. Arbitrators are educated "fact finders," trained to make objective decisions, while jurors are often swayed by emotions, and malpractice cases can often be emotionally charged. With a jury, there is often the risk of a "runaway" verdict or judgment for malpractice. With arbitration, there is an increased chance of a "split the baby" judgment rather than a complete defense victory. When it comes to malpractice claims, many firms want nothing less than complete exoneration.

Arbitration takes less time for a matter to reach resolution, in part because there is not extensive discovery. While forgoing a long discovery phase may be appealing from a time and expense point of view, the limited discovery in arbitration as compared to a civil lawsuit can also be a disadvantage as pertinent information might not come to light. With the high stakes nature of a malpractice case, a lack of discovery could adversely affect one's defense.

A commonly discussed downside to arbitration is the lack of appellate review of the arbitrator's decision. Typically, binding arbitration confines an appeal or judicial review to a small set of instances, usually involving egregious circumstances. However, binding arbitration clauses can be drafted to include a right to appeal in broader instances, making the use much more desirable.

Arbitration also provides a greater degree of confidentiality. Whether a claim against a firm is well-founded or not, a malpractice case can reflect badly on a firm and the attorneys involved. Litigation, unlike arbitration, can lead to the exposure of confidential information, including pertinent facts that led to a malpractice claim. The use of arbitration can prevent embarrassment and damage to a law firm's reputation.

One important aspect of a binding arbitration is that often times, despite the clause, legal malpractice plaintiffs will still file suit in court. This provides the law firm and their legal counsel with the option of moving to compel arbitration or staying in court and litigating the matter. This allows the defense the advantage to strategically determine the most beneficial venue for the case to be decided.

When deciding whether to compel arbitration or move forward with litigation, the specific facts of the case should always be the foundation of the decision. However, in general there are three key considerations in making such a decision:

- Complexity — More complex cases are usually better suited for arbitration. An arbitrator's training makes them better able to understand complicated situations as well as the nuances of each case.
- Cost — Litigation and arbitration are both costly. Typically, litigation will cost more given the time needed for extensive discovery, a trial and a potential appeal. Insurance companies will cover the cost of arbitration in most cases, but lost billable time by a law firm participating in its defense can increase costs significantly.
- Experience — When arbitrating a malpractice claim, it is critical that the arbitrator have experience in professional liability matters. If the proposed or contractually mandated arbitrator does not, the law firm may be at a significant disadvantage.

Before adding a binding arbitration clause to your client agreement, read your current professional liability policy to see if your coverage has a prohibition against including such a provision. If the policy is unclear, contact the insurance carrier or your broker for more information. As a matter of course, virtually all

policies are currently silent on the issue. It is surprising that the insurance industry has not addressed the issue considering that an insurer is obligated to cover the use of binding arbitration in the event a law firm's client agreement has such a provision.

The inclusion of a binding arbitration clause and the actual use of arbitration will not affect the professional liability coverage premiums a law firm pays for its professional liability coverage. However, premiums are based, in part, on a law firm's loss ratio (premiums paid versus defense and indemnity payments). Understanding your firm's risk and the type of malpractice cases you are susceptible to may help you determine whether or not to include an arbitration provision.

When drafting a clause for a client letter of agreement there are a few issues to consider beyond the typical language that spells out the arbitration group to be used, how the arbitrator(s) will be selected, what rules will apply and so forth. As noted above, clauses can be crafted to include an appeal option. Some clauses include the right to attorney's fees by the prevailing party. However, some experts strongly suggest against including such a provision, as it can be used as a strategy to perpetuate the process. It is suggested that you review the clause with a malpractice defense attorney prior to including it in your agreement.

Some firms may also consider using nonbinding arbitration. While this is an option, one disadvantage is there is less pressure to settle a case because the option always exists to file suit. As with most types of cases, settlement is preferred when it comes to a malpractice claim.

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