

PRACTICE TIPS

THE PROS & CONS OF BINDING ARBITRATION

by W. Brian Ahern, RPLU

There is an ongoing 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. Understanding the pros and cons will help a law firm determine if binding arbitration is the best solution.

Advantages of Binding Arbitration

- ◆ Arbitration is typically less expensive than litigation.
- ◆ An arbitrator is a more educated, less emotional 'fact finder' than a jury.
- ◆ With arbitration, there is less likelihood of a 'runaway' verdict or judgment.

Disadvantages of Binding Arbitration

- ◆ Arbitration has limited discovery as compared to a civil lawsuit.
- ◆ With arbitration there is an increased chance of a 'split the baby' judgment than a complete defense victory.
- ◆ Arbitration offers very limited appeal opportunities for perceived erroneous findings.

Before adding binding arbitration 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 carrier or your broker for more information. As a matter of course, virtually all policies are currently silent on the issue, which is surprising considering that the insurer is forced to use arbitration in the event the insured has such a provision.

According to Jeff Goode, JD, CPCU, Vice President of XL Insurance, his company encourages the use of binding arbitration agreements. "We believe that the inclusion of these provisions gives the defense an option if a suit is filed: move to enforce the provision or allow the suit to proceed in state/federal court, depending on the perceived most beneficial venue to have the case be heard."

Despite Goode's endorsement, an informal query of numerous defense lawyers and claims adjusters indicates that the opinion to use or not use binding arbitration is equally weighted. Many defense lawyers believe that if an attorney or firm has a very defensible case, they would prefer to litigate.

Malpractice defense attorney Heather L. Rosing supports binding arbitration clauses in engagement letters, since most of the time the legal malpractice plaintiffs will still file in court, leaving the lawyer with the option of moving to compel arbitration or staying in court. Rosing says the analysis of whether to compel for arbitration is very specific to the facts of the case at hand, but that there are three key considerations in making the decision: the complexity of the issues (the more complex cases are usually more well suited to arbitration), the cost (arbitration can be an expensive process) and the experience of the proposed or contractually mandated arbitrator. One commonly discussed downside to arbitration is the lack of appellate review of the arbitrator's statement of decision, though Rosing notes that binding arbitration clauses can be drafted to include a right to appeal.

There is obviously no clear answer with respect to incorporating a binding arbitration regarding malpractice in your fee agreement. The best advice is to evaluate both sides of this issue and pursue the course that works best for your firm.



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