Ethics Opinion 376

Mandatory Arbitration Provisions in Fee Agreements

Fee agreements containing mandatory arbitration provisions are "ordinary fee arrangements," and the requirements of Rule 1.8 which addresses business transactions between lawyers and clients do not apply. The standard for obtaining client consent to fee agreements containing mandatory arbitration provisions is set forth in Comment [13] to Rule 1.8, and Legal Ethics Opinions 211 and 218 are superseded by Comment [13] and this opinion.

Applicable Rules

- Rule 1.0(e) (Definition of "Informed Consent")
- Rule 1.4 (Communication)
- Rule 1.5 (Fees)
- Rule 1.8 (Conflict of Interest: Specific Rules)

Inquiry

The Committee has received an inquiry as to whether D.C. Legal Ethics Opinions 211 and 218 state the current requirements for a mandatory arbitration provision in a fee agreement to comply with the D.C. Rules of Professional Conduct, in light of the 2007 amendments to the D.C. Rules of Professional Conduct, in particular Comments [1] and [13] to Rule 1.8 (hereinafter "Comment [1]" and "Comment [13]").1

Discussion

Legal Ethics Opinion 211 (Fee Agreements; Mandatory Arbitration Clauses) and Legal Ethics Opinion 218 (Retainer Agreement Providing for Mandatory Arbitration of Fee Disputes Is Not Unethical) were issued by the Committee in May 1990 and June 1991, respectively. In the more than twenty-five years since, the use of arbitration as a means for dispute resolution has proliferated, and this development, together with the 2007 amendments to the D.C. Rules of Professional Conduct, have led the Committee to determine it is the appropriate time to revisit these opinions. A brief summary of these two prior opinions and the 2007 amendments to the Rules is set forth below.

A. Opinion 211

The retainer agreement at issue in Opinion 211 contained a provision requiring the firm and the client to arbitrate claims by the firm against its client for unpaid fees and claims against the firm for malpractice. In analyzing whether such mandatory arbitration provisions in fee agreements would be permitted, the Committee looked to Rule 1.8(a) and to D.C. Legal Ethics Opinion 190 (Retainer Agreement Mandating Arbitration of Attorney-Client Disputes) (1988), which was issued prior to the promulgation of Rule 1.8. The Committee disagreed with the pre-Rule 1.8(a) conclusion in Opinion 190 that a lawyer could include a mandatory arbitration provision provided that the lawyer made full disclosure to the client of any rights the client may waive by agreeing to arbitration and that the lawyer must not create arbitration procedures that violated DR 6-102(A);Opinion 190 did not require the client to obtain advice from independent counsel.

In Opinion 211, the Committee determined that Opinion 190 was "incorrect in its belief that the complex nature of arbitration could be adequately disclosed to a lay client." In reaching this determination, the Committee was guided by its belief that it was "unrealistic" to expect that lawyers could provide their clients with sufficient information regarding arbitration so that the client could give his informed consent to a mandatory arbitration provision.

The Committee also relied on Rule 1.8(a), which requires independent review by counsel of any "business transaction" between a lawyer and a client. The Committee acknowledged, however, that a mandatory arbitration provision did not "precisely fit the language of Rule 1.8(a)." It also described mandatory arbitration provisions as "atypical" for fee agreements and on that basis determined that lawyers must bring attention to that provision at the time the fee agreement is entered into so it can be considered fully by the client. Ultimately, the Committee concluded that "mandatory arbitration

agreements covering all disputes between lawyer and client are not permitted under either our prior Opinions or Rule 1.8(a) unless the client is in fact counseled by another attorney."

B. Opinion 218

Opinion 218 was issued by the Committee not long after Opinion 211 and also addressed mandatory arbitration clauses in fee agreements. Unlike Opinion 211, however, Opinion 218 was limited to fee disputes. The inquiry addressed in Opinion 218 was brought to the Committee by the Attorney-Client Arbitration Board ("ACAB"), an arbitration service provided by the D.C. Bar to its members and their clients to resolve solely disputes about legal fees. The ACAB inquired about the impact of Opinion 211 on fee agreements providing for mandatory arbitration of fee disputes before the ACAB.

The Committee distinguished the mandatory arbitration provisions in fee agreements under the ACAB rules from the arbitration provision at issue in Opinion 211. Unlike the possible AAA arbitration discussed in Opinion 211, the ACAB rules and procedures are relatively simple. The fees are low and the arbitrators are not compensated. In addition, the Committee determined that the ACAB staff was able to advise clients who were contemplating signing fee agreements with mandatory arbitration provisions about fee arbitration, its advantages and disadvantages, as well as its alternatives.

Based on these features of a fee arbitration before the ACAB, the Committee determined in Opinion 218 that a client could be adequately informed of the pros and cons of mandatory arbitration so that the client could make a decision about whether to enter into a fee agreement that contained a provision requiring mandatory arbitration under the ACAB's rules and procedures. The Committee required, however, that "the client be advised in writing that counseling and a copy of the ACAB's rules are available through the ACAB staff and further that the lawyer encourage the client to contact the ACAB for counseling and information prior to deciding whether to sign the agreement and that the client consent in writing to mandatory arbitration."

C. 2007 Amendments

The February 2007 amendments to the D.C. Rules of Professional Conduct added two comments to Rule 1.8 that directly impact Opinions 211 and 218. Comment [1] to Rule 1.8 states that paragraph (a) "does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5 . . . ." In addition, Comment [13] states: "Rule 1.8(g) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, to the extent that such agreement is valid and enforceable and the client is fully informed of the scope and effect of the agreement."

Analysis

For the reasons discussed below, the conclusions reached by the Committee in Opinions 211 and 218 are not consistent with amended Comments [1] and [13] to Rule 1.8. These comments, when applied to mandatory arbitration provisions in fee agreements, require the Committee to loosen the requirements set forth in Opinions 211 and 218.2

A. The Effect of Comment [13] on Opinions 211 and 218

Comment [13] speaks specifically to agreements to arbitrate legal malpractice claims and deems such agreements permissible provided that the client is "fully informed of the scope and effect of the agreement." This explanation is in conflict with the mandates of Opinion 211, which required much more, including that the client must in fact receive advice from independent counsel regarding the arbitration provision. Comment [13] recognizes the evolution and proliferation of arbitration as an alternative dispute resolution method that has occurred since the issuance of Opinion 211.3 Because of this change, clients are now likely to be able to understand the "complex nature" of arbitration in a way they might not have been able to in the early nineties when arbitration was less common.

In light of Comment [13], the Committee determines that the more onerous requirements imposed by Opinion 211 are no longer required. The same is true for Opinion 218, which deals with a narrow subset of arbitration provisions – those limited to fee arbitrations before the ACAB. Comment [13] specifically addresses agreements to arbitrate legal malpractice claims, and it was arbitration agreements with this scope that caused the Committee great concern in Opinion 211. To the extent Comment [13] has

rendered such agreements generally permissible as long as the client is "fully informed of the scope and effect of the agreement," more narrow agreements (i.e., those limited to the arbitration of fee disputes) should not have different, more burdensome requirements related to obtaining client consent.

B. Application of Comment [1] to Rule 1.8 to Fee Agreements Containing Mandatory Arbitration Provisions

Although the 2007 amendments to Comment [13] standing alone are enough to convince the Committee that agreements between lawyers and clients to arbitrate fee disputes do not fall within the scope of Rule 1.8(a), the 2007 amendments to Comment [1] of Rule 1.8 also lend support to such a conclusion.

Comment [1] explains that the purpose of the requirements of paragraph (a) is to prevent "the possibility of 'overreaching' when a lawyer participates in a "business, property or financial transaction with a client." However, Comment [1] now specifically states that the requirements of 1.8(a) "do not apply *to ordinary fee arrangements between client and lawyer*, which are governed by Rule 1.5…." The Comment also provides a specific example of a "non-ordinary fee arrangement" that would subject a lawyer to the requirements of 1.8(a), namely, "when a lawyer accepts an interest in a client's business or other non-monetary property as payment of all or some of the fee."

We conclude that fee arbitration provisions are *ordinary fee arrangements* within the meaning of Comment [1] to Rule 1.8(a). First, in the many intervening years since the Committee issued Opinion 211, the use of arbitration clauses in fee agreements has grown considerably, and the Committee's description in Opinion 211 of such clauses as "atypical" is no longer accurate. As the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility noted as early as 2002: "The use of binding arbitration provisions in retainer agreements has increased significantly in recent years." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 425 (2002). The increase in mandatory arbitration provisions in fee agreements reflects the overall trend towards greater reliance on arbitration to resolve commercial and other disputes.

Second, the example in Comment [1] of a non-ordinary fee arrangement, "when a lawyer accepts an interest in a client's business or other non-monetary property as payment of all or some of the fee" underscores the specific harm for which the protections of Rule 1.8(a) are deemed necessary: to ensure fairness to the client when the lawyer may be in a better position by virtue of legal skill and training to assess the value of a client's business or non-monetary property and therefore potentially take advantage of the client. As the Committee explains in D.C. Legal Ethics Opinion 300 (Acceptance of Ownership Interest in Lieu of Legal Fees) (2000):

> We agree with the commentators who have written on the subject …that a stock-as-fees arrangement is subject to Rule of Professional Conduct 1.8(a), which governs certain transactions with or related to clients…. In many respects, Rule 1.8(a) codifies the well-established common law principle that a lawyer occupies a fiduciary position vis-à-vis his client, which means that all transactions between lawyer and client are suspect and must be fair to the client.

However, this specific concern is not present when a lawyer and client agree to arbitrate rather than litigate future fee disputes. So long as a client is fully informed of the extent and scope of such an agreement as required by Comment [13], and the client agrees to such a provision before any dispute arises, the selection of an arbitration forum as the setting in which fee disputes will be resolved does not give a lawyer any particular advantage over his or her client. Rather, it is part and parcel of any ordinary fee agreement.

As an ordinary fee arrangement, the requirements of Rule 1.8(a) do not apply (i.e., the client need not be given a reasonable opportunity to seek the advice of independent counsel or give informed consent in writing), and the further obligation imposed by Opinion 211, namely, that the client "is in fact counseled by another attorney," should no longer apply as well. This conclusion is wholly consistent with the Committee's analysis of the effect of Comment [13] on Opinions 211 and 218.4

Comment [13] makes clear that it is permissible for a lawyer and a client to agree to arbitrate legal malpractice claims provided that the "agreement is valid and enforceable" and the "client is fully informed of the scope and effect of the agreement." Comment [13] does not require that the client be given the reasonable opportunity to seek the advice of independent counsel or that the client give informed consent in writing as is required by Rule 1.8(a), let alone go as far as Opinion 211, to require that the client "in fact [be] counseled by another attorney."

Indeed, the only way to square Comment [13] and Comment [1] in the context of mandatory arbitration provisions in fee agreements is to conclude that such arbitration agreements are "ordinary" and Rule 1.8(a) does not apply. This result is also appropriate given the Committee's own recognition, when it relied on Rule 1.8(a) in reaching its conclusion in Opinion 211, that a mandatory arbitration provision did not "precisely fit the language of Rule 1.8(a)." This is particularly true in light of the clarifying amendments to Comments [1] and [13] that explain the meaning of the Rule.

C. The Requirement That The Client Be "Fully Informed"

Comment [13] to Rule 1.8 permits a lawyer and client to agree to arbitrate legal malpractice claims as long as the "client is fully informed of the scope and effect of the agreement." Although the phrase "fully informed" is not defined elsewhere in the comments to Rule 1.8, the definition of the term "Informed Consent" in Rule 1.0(e) is instructive. "'Informed Consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The definition of "Informed Consent" contains a description of the nature and extent of information that must be presented to a client in order to obtain that client's consent to a "proposed course of conduct." In the Committee's view, that description ably summarizes the information that must be shared with a client in order for that client to be "fully informed." Indeed, a fully informed client is the prerequisite to obtaining "Informed Consent." Therefore, Rule 1.0(e), along with Comment [13] to Rule 1.8, should guide a lawyer's communications to a client regarding a mandatory arbitration provision in a fee agreement. Put another way, in order for a client to be "fully informed" about the "scope and effect" of a mandatory arbitration provision, a lawyer should communicate "adequate information and explanation about the material risks of and reasonably available alternatives" to entering into a fee agreement that contains such a provision.

For a client to appreciate the "scope and effect" of a mandatory arbitration provision, the lawyer must provide a client with sufficient information about the differences between litigation in the courts and arbitration proceedings. As a general matter, a discussion regarding at least the following differences between the two methods of dispute resolution is prudent: (1) the fees incurred;(2) the available discovery;(3) the right to a jury; and (4) the right to an appeal. As with the application of the informed consent standard, the scope of this discussion depends on the level of sophistication of the client.5

Conclusion

Legal Ethics Opinions 211 and 218 are superseded by Comments [1] and [13] to Rule 1.8 and this opinion. Mandatory fee agreements are ordinary fee arrangements and are thus not subject to the requirements of Rule 1.8(a). Comment [13] clarifies that mandatory arbitration provisions in fee agreements are permissible, provided that the requirements set forth in Comment [13] are met.

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1 Rule XIII of the District of Columbia Court of Appeals' Rules Governing the Bar ("Rules Governing the Bar") states that: "[a]n attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client…." The arbitration shall take place before the ACAB, unless the client and attorney agree otherwise. *See* Rule XIII of the Rules Governing the Bar.

2 A lawyer's failure to comply with an obligation or prohibition imposed by a D.C. Rule of Professional Conduct is a basis for invoking the disciplinary process. *See* D.C. Rules, SCOPE [3]. The Comments to the D.C. Rules are promulgated by the District of Columbia Court of Appeals. Although they do not add obligations to the Rules, they provide guidance for interpreting the Rules and practicing in compliance with them. *Id*. at [1]. Comment [13] was promulgated by the District of Columbia Court of Appeals after Opinions 211 and 218 were issued by this Committee. Comment [13] therefore controls the use of mandatory arbitration clauses in fee agreements, and the conflicting guidance offered in Opinions 211 and 218 must not be followed.

3 *See* ABA Comm. on Ethics &Prof'l Responsibility, Formal Op. 425 (2002).

4 While the ethics rules no longer require that the client be advised in writing that the ACAB staff is available to provide counseling, the ACAB staff remains available to advise a lawyer's client who is contemplating signing a fee agreement with a mandatory provision about fee arbitration, its advantages and disadvantages, as well as its alternatives. Lawyers may continue to voluntarily provide information about this resource to a client.

5 In December 2018, the D.C. Bar Board of Governors amended Section 8 of the ACAB Rules of Procedure. Section 8(b)(iii) now provides, "The ACAB will enforce an attorney/client agreement to arbitrate a fee dispute if the agreement: (1) is valid and enforceable, (2) is signed by all parties to the dispute, and (3) encompasses fee disputes in the scope of the disputes to be arbitrated. Further, the client must have been adequately informed of the scope and effect of a mandatory arbitration provision, consistent with D.C. Bar Legal Ethics Committee Opinion 376 (copy attached). In this instance, the ACAB can compel a client to arbitrate a fee dispute filed by a lawyer…."