Bloomberg BNA | ABA

ABA/BNA
Lawyers' Manual on Professional Conduct™



# Location, Location, Location: What's the Best Venue for Malpractice Claims?

BY KENDRA L. BASNER

The answer to the question ''what is the best venue for a legal malpractice action'' is the same as it is for many legal issues: ''It depends.''

At least this was the general consensus of speakers who explored this topic at the Fall 2015 National Legal Malpractice Conference, held Sept. 16-18 in Scottsdale, Ariz., by the ABA Standing Committee on Lawyers' Professional Liability. The panel offered the varied perspectives of litigators, fact-finders and insurers.

## Pros and Cons of Arbitration

To arbitrate or not is a topic that is often debated, particularly when it comes to claims against lawyers. One reason is because such a decision must often be made long before a potential dispute ever arises—namely, at the inception of the attorney-client relationship when the legal services agreement is prepared.

The panel presented eight separate factors to be considered when weighing the advantages and disadvantages of arbitration to resolve a legal malpractice dispute:

- privacy;
- speed;
- availability of discovery;
- evidentiary considerations;
- chances of success on dispositive motions;
- availability of appellate recourse;
- arbitrator's reported inclination to ''split the baby''; and
- cost.

The speakers seemed to agree that privacy is likely the number one concern of most attorney-clients, weighing in favor of arbitration, and that this issue has become more heightened as a result of social media.

Defense attorney Carolyn Fairless told the audience clients are anxious about publicity and ''the negative repercussions'' that may follow, particularly because legal media ''loves to report that a lawsuit has been filed, [but] you don't really hear about defense successes.''

However, she said, ''by the time you get to the point of making the decision whether to move to compel arbitration, much of the publicity has already happened.''

Fairless is managing partner of Wheeler Trigg O'Donnell LLP in Denver.

**Speed.** Moderator and litigator Andrew Dilworth, of Cooper, White & Cooper in San Francisco, asked the panel whether speed of resolution is a consideration, citing the old adage that arbitration is quicker than a court for resolving a case.

Kevin McKenney, a third-party neutral with JAMS and former California judge, said parties should look to how quickly the courts of their community are getting cases through the system. On the other hand, he said, scheduling among multiple busy calendars can be a huge contributor to a slow arbitration process.

**Discovery.** Discovery, as well as evidentiary matters and the use of dispositive motions, were all generally considered cons of arbitration, at least from the perspectives of the panelists who are or were litigators. They said these issues are particularly vital in a legal malpractice case because such matters are typically very fact intensive and can involve difficult legal issues.

Fairless said in her experience ''the rules of evidence do not apply [in arbitration]. . ., no matter what the contract says—because [arbitrators] want to avoid any argument that they denied someone due process.''

Brant C. Weidner, a former litigator who is now specialty lines claims manager at Beazley in Chicago, agreed, from an insurer's perspective, that arbitration offers ''robust discovery.'' McKenney, on the other hand, stated that limitations under the arbitration contract or arbitration rules make discovery in arbitration more restrictive.

**Getting Out Early.** McKenney did agree with the rest of the panel that ''dispositive motions are less likely to be granted in arbitration than in court, . . . so [that factor] would fall in the con category.''

Weidner added that the perceived inability to succeed on such motions in arbitration can be a significant factor against arbitration in the legal malpractice context

*Kendra L. Basner is a partner in the San Francisco office of Hinshaw & Culbertson LLP, focusing her practice on professional liability defense, with an emphasis on legal malpractice, attorney fee disputes, legal ethics and risk management.*

 ISSN 0740-4050

because defendant attorneys often prevail on legal arguments in court.

Even if an attorney defendant does not win on a dispositive motion, he said, at least the right to appeal is preserved. He told the attendees the lack of review or appellate recourse in arbitration is the most significant ''con'' of the arbitration process, with the dispositive motions issue coming in a close second.

''Forum shopping'' was briefly addressed. McKenney noted that in the court system judges are assigned, limiting the ability to choose the fact-finder. On the other hand, selection of the fact-finder in arbitration is typically wide open, assuming the parties can agree. Yet, there may be restrictions imposed by the arbitration agreement or an applicable statute.

**Solomonic Neutrals.** ''Splitting the baby,'' an outcome commonly recognized as militating against arbitration, is another factor to be considered.

McKenney said arbitrators do have fewer restrictions to take into account when resolving a dispute. Fairless reported, based on her experience, that ''if the arbitrators feel that your client is on the wrong side of justice. . ., the fact that you are in an arbitration setting gives them the opportunity to do what they feel is right even if there is no legal justification for it.''

She said it is important to recognize an arbitrator's decision may not be based solely on the law.

**Cost.** Arbitration myths were debated, principally the conventional belief that arbitration generally trades procedures and appellate review for simplicity, informality and an expeditious resolution.

In this day and age, this has not been the experience for many. For some, as Weidner attested, arbitration has been the ''longest, slowest, most expensive process that you can ever imagine.''

Contrary to the long touted impression that arbitration is a cheaper alternative, arbitration today is commonly accepted as being just as expensive, if not more expensive, than pursuing an action through the court system, depending on the nature of the case.

## Judge, Jury or Arbitrator(s)?

The panel also explored whether a legal malpractice action fares better before a judge, jury, one arbitrator or a panel of arbitrators.

Juries are ordinarily considered to be the most unpredictable choice, but Weidner said his experience suggests arbitrators can be just as unpredictable, despite efforts to identify and select the ''right'' arbitration panel.

Fairless cautioned against making generalizations about decision-makers, advising, instead, backgrounds be investigated because ''everybody looks at the world through their own lens.''

Legal malpractice cases, in particular, can involve difficult legal issues. Weidner said he generally believes those with a legal background are better suited to understand legal concepts and processes than nonlawyer jurors. Further, notwithstanding the higher expense, a panel of three arbitrators may offer a more informed decision than a single arbitrator.

Fairless and Weidner both spoke highly of their experiences defending lawyers before a jury. In fact, Fairless said she often prefers a jury. Based on her personal knowledge and available jury research, she believes it is a myth that ''jurors hate lawyers,'' an opinion supported by McKenney.

## Federal or State?

As to whether federal or state court is a better venue for legal malpractice cases, the panel tended to lean more toward federal court.

If the case can be removed, federal court dockets are typically more manageable, providing more time for issues to be considered, jurors are thought to be more sophisticated and judges often have more research attorneys. State courts, by contrast, commonly have more limited resources and less time to consider the issues.

However, federal court is not always an option. Factors such as diversity of citizenship, the existence of federal question jurisdiction (see *Gunn v. Minton*, 2013 BL 43481, 29 Law. Man. Prof. Conduct 118 (U.S. Feb. 20, 2013)) and amount in controversy obviously must be analyzed.

Weidner stressed that limited liability partnerships and companies are not regarded as corporations for diversity purposes. Thus, the citizenship of its members is determinative on the issue of removal of a malpractice case from a state forum to federal court. Knowledge of all procedural requirements for removal is imperative so that an opportunity, should it exist, is not missed.

## Arbitration Agreements

After vetting the pros and cons of arbitration, the panel contemplated the value of including an arbitration provision in an agreement for legal services.

Notwithstanding the downside, privacy often outweighs the other negative aspects of arbitration, they said.

Fairless said the provision can be written to incorporate conditions the lawyer is comfortable with, such as specifying from where the arbitrator must be selected. Yet, even if swallowing the arbitration pill can be made easier, dealings between lawyers and clients are scrutinized, so attorneys must take steps to ensure the provision, if added, is enforceable.

McKenney suggested looking to the federal arbitration policy and ABA model rules when drafting an arbitration clause.

Weidner cautioned that the rules of each jurisdiction must be followed because courts vary as to what is required for enforceability.

He pointed to cases such as *Hodges v. Reasonover*, 103 So. 3d 1069, 1071, 28 Law. Man. Prof. Conduct 428 (La. 2012), requiring several disclosures re the legal effects of binding arbitration to be enforceable, and *Bezio v. Draeger*, 737 F.3d 819, 821, 30 Law. Man. Prof. Conduct 6 (1st Cir. 2013), requiring very little disclosure for a sophisticated client, as representing opposite ends of the broad spectrum of court considerations.

## Over Better Than Under

Regardless, all the speakers agreed it is always better to be over-inclusive in disclosures and to obtain the client's signature. Fairless opined:

> In a perfect world, we all as lawyers would have arbitration provisions in our fee agreements, and every single

   ISSN 0740-4050

> plaintiff who happens to sue one of our firms or one of our clients would file the suit in court and we would have the option, the luxury, of being able to sit back and look at who our judge is, what are the facts, how concerned are we about the case, how strong do we think our defenses are, and then we could make the decision, with the benefit of all that information, whether to arbitrate or not.

Unfortunately, she said, more often than not, this ''perfect'' scenario does not materialize and, in any event, the decision to have an arbitration provision must be made far in advance of any dispute.

Despite its growing complexities and challenges, arbitration is still looked at favorably by many, including judges and legislatures, because ultimately it lessens the burden on the court systems.

Conversely, insurers are not always in favor of arbitration provisions due to the many cons, but Weidner said some, including Beazley, ultimately support the decision of its insureds.

## Recommendations

The session ended with a few concluding recommendations: be informed, consult with other local attorneys regarding the pros and cons of arbitration in your area, know the applicable venue laws in your jurisdiction, evaluate whether a decision to include an arbitration provision can be made on a case-by-case basis and, if you ultimately decide to add such a provision, be fair and upfront with the client so as to obtain the client's informed consent.