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Lawyers' Lawyer Newsletter – Recent Developments in Risk Management – February 2021 Edition

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In this edition of the *Lawyers' Lawyer Newsletter* we cover the following:

- Is It Ethical for Attorneys to Include Arbitration Provisions in Their Engagement Agreements?
- May (and Should) Lawyers Ethically Respond to Online Criticism?

Is It Ethical for Attorneys to Include Arbitration Provisions in Their Engagement Agreements?

Brian Delaney v. Trent S. Dickey and Sills Cummins & Gross, P.C., 2020 N.J. LEXIS 1435, 2020 WL 7483754 (December 21, 2020).

Risk Management Issues

Engagement Agreements | Arbitration Provisions | Informed Consent

The Case

A New Jersey law firm provided a client with a four-page engagement agreement, which included an arbitration provision for fee disputes and legal malpractice claims. The retainer stated that by agreeing to the arbitration

provision, the client waived his right to a jury trial and that any results from the arbitration would be final and non-appealable. The retainer also included a link to a 33-page document that explained the procedures of arbitration, but the law firm did not discuss the arbitration provision with the client. The client, a sophisticated businessman, signed the retainer agreement without asking any questions, even though the law firm advised the client to review the retainer carefully and offered to answer any questions.

After the client terminated the law firm's representation, the law firm claimed the client owed outstanding legal fees and invoked the arbitration clause. While the arbitration was pending, the client brought a legal malpractice suit against the law firm, but the case was dismissed after the court found the arbitration provision to be valid and enforceable and also broad enough to encompass legal malpractice claims. However, the appellate court reversed, finding that the law firm should have provided the client with the actual 33-page document explaining arbitration."

The New Jersey Supreme Court subsequently affirmed the appellate court's decision, opining that lawyers are required to explain the advantages and disadvantages of arbitration if they include arbitration provisions in their retainer agreements. This requirement arises out of a lawyer's duty to communicate with clients and provide them with enough information to make informed decisions, pursuant to Rule 1.4(c) of the Rules of Professional Conduct. The Supreme Court acknowledged that lawyers can ethically put an arbitration provision in retainer agreements, but made it clear that lawyers are held to a higher standard and must fully explain the differences between arbitration and a traditional judicial forum in order to fulfill their obligation to be fair and transparent with clients. This duty applies whether or not the clients are sophisticated.

New Jersey is not the first jurisdiction to tackle this issue. In *Feacher v. Hanley*, the court found that an arbitration provision in a law firm's retainer agreement was unconscionable and unenforceable where the terms wholly favored the law firm. The Legal Ethics Committee for the D.C. Bar also addressed this issue in Ethics Opinion 376, which suggests that lawyers may place arbitration provisions in their retainer agreements, so long as the client gives informed consent.

Risk Management Solution

Lawyers in New Jersey may include an arbitration provision in their engagement agreements, but must discuss with the client the benefits and consequences of arbitration in order for the provision to be enforceable. Notably, different jurisdictions have varying positions on this issue. For lawyers licensed in states other than New Jersey, it is important to determine whether your jurisdiction has any restrictions on placing an arbitration provision in an attorney-client engagement agreement and, similarly, what obligations go along with such a provision.

May (and Should) Lawyers Ethically Respond to Online Criticism?

ABA Formal Opinion 496: Responding to Online Criticism

Risk Management Issues

Social Media | Negative Reviews/Criticism | Confidentiality

The Opinion

Lawyers often find themselves on the receiving end of negative online reviews. The latest formal opinion from the American Bar Association Committee on Ethics and Professional Responsibility addresses ethical issues lawyers should consider when deciding on a possible response.

Most lawyers will understand that confidentiality of client information is implicated in any kind of response. It's tempting to read Model Rule 1.6(b)(5) as an exception to the confidentiality requirement: "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." However, the ABA's Standing Committee on Ethics and Professional Responsibility definitively concluded that a negative online review by itself does not constitute a "controversy" between the lawyer and the client. Further, it concluded that even if the post did rise to the level of a controversy, a public response is not reasonably necessary to establish a claim or defense to said controversy.

Rather than identifying what types of information could be included in a response to online criticism, the Committee offered a non-exhaustive list of best practices to lawyers who are dealing with negative online reviews:

- The lawyer may request that the host of the website remove the post. If a request is made, it may not contain any information relating to the representation of the client, or that could reasonably lead to the discovery of confidential information. The request may include a statement that the post is not accurate or that the poster was not a client, if that is the case.
- If the poster is not a client or former client, the lawyer may respond by saying that. Caution should still be used in responding to nonclients, however. If the comment is from a former opposing party or opposing counsel, the response may not disclose any information relating to the representation without the former client's informed consent—even when giving a general disclaimer that the post is not accurate. In this situation, lawyers should consider obtaining the client's informed consent to respond, especially if a response would be in the client's best interest.

- The Committee stated that lawyers may respond with a request to take the conversation offline in attempt to rectify the situation. For example, “please contact me by telephone so that we can discuss your concerns” or “professional obligations do not allow me to respond as I would wish.” Note however, that such an offer should not be made unless the lawyer really intends to attempt to address the person’s concerns, as failure to do so may result in additional negative posts.
- Lawyers should also consider not responding at all. Responses draw attention to the negative post, which could create more criticism. Instead of responding online, consider communicating directly with the client or former client to address the problem.

Risk Management Solution

If you ever are the subject of a critical online review or criticism, consider employing the steps recommended by the Committee. While states differ somewhat in their approach to this problem, none permit disclosure of information relating to the representation of the client. If you respond at all, keep it short and consider referring to the Rules of Professional Conduct that prevent you from sharing additional information. When in doubt, consult general counsel or outside ethics counsel before posting anything.