In "Case" You Missed It: Delaney v. Dickey

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In a recent decision, *Delaney v. Dickey,* __ N.J. __, A-30-19 (Dec. 21, 2020), the New Jersey Supreme Court clarified the requirements that attorneys must follow in order to include a valid arbitration clause in a retainer agreement. In so doing, the Court held that "for an arbitration provision in a retainer agreement to be enforceable, an attorney must generally explain to a client the benefits and disadvantages of arbitrating a prospective dispute between the attorney and client." The Court based its holding on the Model Rules of Professional Conduct as well as the fiduciary duties that attorneys owe to their clients. The Court also referred its opinion to the Advisory Committee on Professional Ethics to provide additional clarifications of this requirement.

The facts were fairly straightforward. The plaintiff sought legal counsel from a law firm and was presented with a retainer agreement. The retainer agreement included a provision that any dispute regarding the firm's legal fees or services would be subject to mandatory and binding arbitration and that the plaintiff was thereby waiving his right to a trial by jury. The agreement also indicated that the arbitration proceeding would be conducted through a private arbitration and mediation organization called JAMS and contained a hyperlink to thirty-three pages of JAMS rules governing the arbitral forum. The firm did not provide the plaintiff with a hard copy of the JAMS rules, offer an explanation of the arbitration provisions in the agreement, or advise the plaintiff of the advantages and disadvantages of an arbitral forum. The plaintiff signed the retainer agreement that same day.

A fee dispute arose between the plaintiff and the law firm, and the plaintiff ultimately filed an order to show cause and verified complaint in the Chancery Division, arguing that the arbitration provision must be set aside because he was not advised of the "inequities and costs" associated with arbitration, and that he would not have signed the agreement had he known that he was waiving his right to a jury trial.

The case made its way to the New Jersey Supreme Court, which framed the issue as "whether a lawyer has a duty to explain the benefits and disadvantages of a provision in a retainer agreement that binds the client to arbitrate a future fee dispute or legal malpractice action in a non-judicial forum." Justice Albin's opinion for the Court noted several principles to consider in deciding the issue. He noted that "a retainer agreement is not an ordinary contract governed by the rules of the marketplace but is a contract that must meet the high standards of the Rules of Professional Conduct." These requirements, the Court explained, are "different from the typical norms that regulate arm's-length commercial transactions between vendors and customers." Specifically, "[u]nlike the vendor in a typical commercial transaction, a lawyer serves in a fiduciary role to a client or prospective client." The Court explained that, "[a]bove all else, a lawyer's fiduciary role requires that the lawyer act fairly in all dealings with the client." This fiduciary role also requires that an attorney "provide the client with not only 'complete and undivided loyalty,' but also with advice that will 'protect the client's interests.'"

Moreover, the Court noted that “[a]n attorney's freedom to contract” is subject to the Supreme Court's "exercise of its constitutional authority to regulate the practice of law" through both the Rules of Professional Conduct and applicable case law, both of which make clear "that a retainer agreement [must] satisfy not only ordinary principles governing contracts, but also the professional ethical standards governing the attorney-client relationship.”

In addition to these overarching principles, the Court looked also to ABA model opinions and to other states. In particular, the Court looked to ABA Formal Opinion 02-425, *Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims*, which held that a provision in a retainer agreement requiring "the binding arbitration of disputes concerning fees and malpractice claims" did not violate ABA Model Rule of Professional Conduct 1.4(b), “provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.” The Court noted that both state courts and professional ethics committees have reached conclusions similar to those in the ABA Opinion. In sum, the Court concluded that "[a]dvisory ethics opinions and judicial opinions in many jurisdictions make clear that, when a retainer agreement includes an arbitration provision, attorneys acting in their fiduciary relationship with a client, at the very least, must explain the advantages and disadvantages of arbitrating a future fee dispute or malpractice action. That is so because of the substantial differences between adjudicating a dispute in a judicial and arbitral forum."

After reviewing these authorities, the Court concluded that "an attorney's fiduciary obligation mandates the disclosure of the essential pros and cons of the arbitration provision so that the client can make an informed decision whether arbitration is to the client's advantage." That information, the Court stated, could include, "for example, that in arbitration the client will not have a trial before a jury in a courtroom open to the public; the outcome of the arbitration will not be appealable and will remain confidential; the client may be responsible, in part, for the costs of the arbitration proceedings, including

payments to the arbitrator; and the discovery available in arbitration may be more limited than in a judicial forum." The information "can be conveyed in an oral dialogue or in writing, or by both, depending on how the attorney chooses best to communicate it." The Court based its holding in large part on the professional and fiduciary obligations imposed by RPC 1.4(c), which requires that an attorney “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The Court held that this "requires that the lawyer discuss with the client the basic advantages and disadvantages of a provision in a retainer agreement that mandates the arbitration of a future fee dispute or malpractice claim against the attorney."

Next, the Court explained that its holding did not run afoul of either the Federal Arbitration Act or the New Jersey Arbitration Act. It noted that the specific arbitration provision at issue "satisfies the requirements for a typical consumer or commercial agreement," but explained that the "heightened professional and fiduciary responsibilities of an attorney . . . demand more." Thus, although a vendor and purchaser are free to agree to mutually acceptable contractual terms in a typical transaction, the "formation of the attorney-client relationship is not an ordinary commercial transaction," and thus requires heightened scrutiny.

The Court concluded that it was not making a "value judgment" as to "whether a judicial or arbitral forum is superior in resolving a legal malpractice action," but rather that it is up to a lawyer's client to make an informed decision after disclosure of the important and relevant facts. Furthermore, the Court noted that it had merely set forth the "rudimentary requirements" expected of attorneys who include a provision in a retainer agreement requiring the arbitration of fee disputes and malpractice actions. It stated that its opinion would not be the "last word" on the subject, and referred the issues raised in its opinion to the Advisory Committee on Professional Ethics, which could then "make recommendations . . . and propose further guidance on the scope of an attorney's disclosure requirements." The Court thus left it to the Advisory Committee to flesh out the proper terms of any such disclosure, and whether the required disclosures are better put in writing or stated orally. Also, although the Court noted that "[s]ome jurisdictions require lawyers to advise their potential

clients to seek the advice of independent counsel before signing a retainer agreement containing an arbitration provision," it did not weigh in on the issue. It will likely be up to the Advisory Committee to provide further guidance on that point. Finally, the Court stated that its decision would apply prospectively, and will therefore not undo any retainer agreements made prior to its decision.

Importantly, the Court's decision is far from the final word on this topic, and the legal community can expect that the Advisory Committee on Professional Ethics will further flesh out the Court's opinion in the coming months.