

NOTE

THE CONSEQUENCES OF ARBITRATING A LEGAL MALPRACTICE CLAIM: REBUILDING FAITH IN THE LEGAL PROFESSION

I. INTRODUCTION

Legal malpractice suits are a wide-spread phenomenon that negatively affects all who must address the adequacy and competency of counsel.¹ For the client, legal malpractice is an additional dispute in need of resolution. It forces the client to pass judgment on the attorney, or firm, in whom he has placed so much trust. For the attorney, it is an unusual change in roles: being forced to assume the position of client, instead of counselor.² For both parties, legal malpractice claims require additional money and time.³ A client who is able to obtain a favorable judgment can receive a substantial financial benefit. However, in the end the legal profession and, more importantly, society both lose. Allowing clients and attorneys to arbitrate claims of malpractice was one of the first steps toward resolving this critical issue. But as will be seen in this Note, to correct the public's lack of faith in legal professionals, attorneys need to be given greater responsibility to prove that they can be trusted.

1. See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1707 (1994) [hereinafter Ramos, *Dirty Little Secret*] ("Despite the continued massive effort at social and behavioral control, and millions of dollars being spent every year, all available evidence suggests that the status quo is not working. Legal malpractice claims and lawsuits are becoming more widespread. The image of the legal profession continues to fall."); see also ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2000–2003, at 16 (2005) [hereinafter 2003 ABA MALPRACTICE STUDY] ("Although the 2003 Study results do not definitively indicate whether clients are suing lawyers more frequently than in prior studies, the number of severe claims continues to increase. The data . . . demonstrates a slight increase in the number of actual claims settled for more than two million indemnity dollars . . ."). But see Harry H. Schneider Jr., *No: An Invitation to Frivolous Suits*, A.B.A. J., Nov. 1993, at 45 (arguing that there is not a widespread phenomenon of clients unable to recover from their disputes with attorneys).

2. See, e.g., Jill Schachner Chanen, *Representing a Fellow Lawyer*, 15 COMPLETE LAW. 40, 40 (1998), available at <http://www.abanet.org/genpractice/lawyer/complete/w98chanen.html>. Chanen argues that some attorneys who are defendants in a malpractice action "cannot contain themselves from giving advice to the lawyers they hire to represent them, even when the scope of representation is out of their field." *Id.* at 41. In support, the article gives an example of a defense attorney in Staten Island, New York, who described his experience in representing a corporate attorney in a malpractice suit. The defense attorney was forced to "contend with a barrage of phone calls from a corporate attorney-client who was offering trial strategy on his malpractice case." *Id.* After the corporate attorney consulted trial attorney friends of his and passed on their suggested strategy, the defense attorney "[h]ad enough," telling the corporate attorney: "Look, you do your trusts and estate work and let me do mine." *Id.*

3. See *infra* notes 39-44 and accompanying text.

The potential net effect of imposing greater accountability is a significant decrease in legal malpractice lawsuits, which in turn would provide a substantial overall benefit to society in general.⁴ In particular, a decrease in malpractice claims means lowered insurance premiums for the attorney,⁵ resulting in a lower cost for legal services to the client.⁶ Although lowering the cost of legal services is a significant concern, it is overshadowed by the need for attorneys and clients to see each other, not as potential adversaries in a future malpractice action, but instead as partners working together toward achieving a desired legal result. No longer burdened by the prospect of malpractice liability, the attorney can focus on providing top-rate legal services for the client.⁷

This Note begins with a brief overview of arbitration. From there, the Note compares the numerous disadvantages of litigation with its various benefits, and concludes that arbitration is the preferred method of resolving legal malpractice disputes. While it is tempting to assume that the benefits of arbitration are enough to completely rid the use of litigation in legal malpractice claims, this Note discusses how the attorney's peculiar fiduciary role complicates the issue. Specifically, the attorney's fiduciary duty to the client creates the ethical inquiry over the use of arbitration in legal malpractice claims. States are split in their handling of this issue. Certain states, such as Texas, Illinois and Pennsylvania, require that an attorney recommend that the client first consult independent legal counsel before signing a retainer requiring that any future legal malpractice claims be arbitrated. This Note urges instead that it is the states that do not require a client to retain

4. Compare *infra* note 24 and accompanying text (observing that legal malpractice suits may be avoided), with Ramos, *Dirty Little Secret*, *supra* note 1, at 1706 (arguing that “[t]here is no way to completely prevent legal malpractice”).

5. Stacey Eisenberg, Note, *The Rise and Fall of the Entire Controversy Doctrine as Applied to Attorney Malpractice Actions*, 28 SETON HALL L. REV. 1292, 1322 (1998). But see Ramos, *Dirty Little Secret*, *supra* note 1, at 1729 (“Many attorneys would prefer not to pay several thousand dollars a year in premiums, and believe that the best insurance is to be ‘bare’: it is cheaper and most plaintiff’s attorneys will simply not bother to prosecute a legal malpractice case against them.”); Schneider, *supra* note 1, at 45 (noting that malpractice insurance “premiums surely will rise across the board as all acceptable risks are pooled automatically with those who otherwise would be considered high-risk lawyers”).

6. See Ramos, *Dirty Little Secret*, *supra* note 1, at 1719 (contending that attorneys in law firms are being rewarded for billing more hours to their “deep pocket” clients in order to avoid legal malpractice claims).

7. See generally JEROME E. CARLIN, *LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 8 (1966). Carlin discusses how the integrity of attorneys is being substantially affected because they are “becom[ing] captives of their clients.” *Id.* Carlin further explains that this captivity results when the attorneys provide “a continuous and broad range of service to their business clients, and . . . become involved in client affairs.” *Id.* As a result, the attorney “may find it extremely difficult to exercise independent judgment or authority.” *Id.*

independent counsel, such as California, New York, and New Jersey, that are correct. To that end, this Note will argue that an attorney must be allowed to exercise discretion when advising a client of the consequences of agreeing to arbitrate, in order to facilitate the rebuilding of the public's reverence for the legal profession. This lack of respect and confidence in the legal profession is one of the major underlying causes for the scores of disputes that exist between the public and the Bar. This Note, as a result, stresses that this erosion of confidence must be addressed immediately. Recognizing the need to maintain an air of impartiality and honor to restore the public's faith, states allowing their attorneys to directly inform potential clients of the consequences of executing an arbitration agreement need to step in and lend a hand. In light of the technological advances that have changed the practice of law in the past twenty years,⁸ this Note suggests that it is the state bar associations that must help attorneys fulfill their duty of fully informing the client of the ramifications of agreeing to arbitrate. To accomplish this, this Note recommends that state bar associations provide clear and concise informational material about arbitration and its connection to legal malpractice claims on their respective websites. This relatively simple change would help restore the public's trust in the legal profession and, consequently, allow attorneys to return to their roles of public advocates.

II. ARBITRATING LEGAL MALPRACTICE DISPUTES

Arbitration is “[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.”⁹ Over the past half century, arbitration developed into the “[p]rincipal method of resolving disputes between employers and unions that arise in the course of administering collective bargaining agreements.”¹⁰ However, arbitration has expanded outside the realm of labor law and slowly worked its way into other areas of law, including legal malpractice.¹¹ Originally, arbitration was

8. See Melissa Blades & Sarah Vermylen, Current Development, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, 17 GEO. J. LEGAL ETHICS 637, 637 (2004) (arguing that “[e]ven if they do not understand the technology behind the Internet, most attorneys appreciate the speed at which they can communicate with clients and other attorneys, the increased volume of information literally at their fingertips, and the ease with which they can complete research”).

9. BLACK'S LAW DICTIONARY 112 (8th ed. 2004).

10. Alan Scott Rau, *Resolving Disputes over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2025 (1993).

11. See Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 REV. LITIG. 503, 503 (1996) (“Alternative dispute resolution (ADR) grew to prominence as an alternative to litigation.”); Cornelia Wallis Honchar,

brought in to resolve disputes concerning legal fees.¹² Eventually, the arbitration process expanded into attorney-client retainer agreements. As will be seen below, the views of whether arbitration agreements are legally enforceable, let alone ethically proper, remain divided—especially in the context of fee disputes, where arbitration is regularly proposed as a mechanism for resolution. Following this trend set in fee disputes, the public at large should welcome arbitration as the most effective way of resolving legal malpractice disputes.

A. Arbitration Introduced to Resolve Attorney-Client Fee Disputes

Disputes between clients and their attorneys over legal fees “constitut[e] the most serious problem in the relationship between the Bar and the public.”¹³ Although resolving an attorney-client fee dispute might appear as simple as scrutinizing the hours billed on behalf of the client, frequently this is not so. A client dissatisfied in whole or in part with the legal services he received is more likely to claim that the attorney committed malpractice in response to a bill for outstanding legal fees.¹⁴ As a result, the client will be unwilling to pay for the services he characterizes as being sub-par. The main issue which results, and which is the subject matter of this Note, is whether a client who agreed to binding arbitration of fee disputes should also be forced to arbitrate legal malpractice claims that may arise.

Whether legal malpractice claims are arbitrable is a relatively new issue. Some commentators argue, however, that although arbitration is a relative newcomer to the legal field, its precursors go back as far as

ADR: A Required Offering on Clients' Menu, CHI. DAILY L. BULL., July 1, 1994, at 5.

12. The Texas Alternative Dispute Arbitration Act calls for four other major forms of dispute resolution aside from arbitration, including mediation, mini-trials, moderated settlement conferences and, finally, summary jury trials. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.023-.026 (Vernon 2005). *Contra* 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 2.47, at 365 (2005 ed.) (“Except for mediation, alternate procedures have not yet become common for handling legal malpractice cases.”).

13. Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 830–31 (1999) (quoting ABA SPECIAL COMM. ON RESOLUTION OF FEE DISPUTES, THE RESOLUTION OF DISPUTES 1 (1974)); see Brian Cummings, *ARDC Proposes Mandatory Arbitration for Attorney-Client Disputes over Fees*, CHI. DAILY L. BULL., Nov. 16, 1995, at 1 (discussing how twenty-five percent of the 6500 complaints received each year by the Illinois Attorney Registration and Disciplinary Commission involve fee disputes, many of which involve “lack of competence, diligence or willingness to communicate”); see also Ramos, *Dirty Little Secret*, *supra* note 1, at 1664-65 (reporting that by some estimates, twenty percent of attorneys have the potential of having to defend a legal malpractice suit that is brought against them).

14. Rau, *supra* note 10, at 2017; see also, e.g., Coughlin v. SeRine, 507 N.E.2d 505, 508 (Ill. App. Ct. 1987).

biblical times,¹⁵ and with respect to American history, as far back as the will of George Washington.¹⁶ Arbitration only recently gained acceptance in the attorney-client context because alternative dispute resolution was not a generally accepted means of resolving legal controversies in the United States until recently.¹⁷ As a result, prior to the past fifty years or so, clients did not consider arbitrating legal malpractice claims because they were normally resolved through litigation.

B. Before Arbitration, There Was Litigation

Prior to arbitration, fee disputes and legal malpractice claims were reconciled through litigation. Although some argue that arbitration and litigation are very similar,¹⁸ a trial and its potential results make it a less desirable alternative to those wishing to resolve an attorney-client dispute. Litigation's numerous drawbacks are likely why arbitration was introduced into the realm of attorney-client disputes.

15. See James R. Deye & Lesly L. Britton, *Arbitration by the American Arbitration Association*, 70 N.D. L. REV. 281, 287 (1994). The article describes how a dispute by two women over who was the rightful mother of a baby was resolved in the time of King Solomon:

King Solomon did not resolve the dispute by cutting the baby in half and awarding one half of the baby to each woman. He did not make anyone else do so, and, in fact, did not sever any part of the child from any other part. What King Solomon did do to resolve the dispute, however, was to very cagily extract from the two woman [sic] information necessary to make an informed decision as to whom the baby rightfully belonged. Combining that information with his expertise in human behavior, he returned the intact infant to its rightful mother.

Id. (citing 1 *Kings* 3:16 (King James)).

16. See MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 16:8, at 16-23 (3d ed. 2005). George Washington's will read:

I hope, and trust, that no disputes will arise concerning [all devises made]; but if contrary to expectation the case should be otherwise . . . all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two—which three men thus chosen shall, unfettered by Law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes, to be as *binding* on the Parties as if it had been given in the Supreme Court of the United States.

Id. (emphasis added).

17. See *supra* text accompanying note 10.

18. See Sherman, *supra* note 11, at 506. Sherman argues that there are many commonalities between a trial and alternative dispute resolution. Specifically, he notes how “[b]oth place a high value on a rational approach to dispute resolution, fairness of process, and the centrality of party autonomy.” *Id.* In addition “[b]oth involve, in varying degrees, a process designed to reveal and present the facts, apply legal or normative standards to them, and achieve a satisfactory resolution of the dispute.” *Id.*

One such shortcoming is that litigation is a very costly process.¹⁹ Another is that litigation, unlike arbitration, can lead to the exposure of a client's confidential information.²⁰ Further, lawsuits against attorneys can elicit adverse publicity and ill will toward the legal profession in general, and particularly, toward the attorney being sued.²¹ In turn, attorneys recognize that they need to make significant improvements in attorney-client relations to purge any negative public opinion of the legal profession as a whole.²² If successful in doing so, attorneys can regain the respect of the public at large²³ and, perhaps, decrease the prevalence of legal malpractice suits.²⁴

Another downside to litigation is that attorneys who file lawsuits to recover unpaid fees are more likely to face a malpractice counterclaim.²⁵ Being a party to a malpractice or breach of fiduciary duty counterclaim

19. See Clark, *supra* note 13, at 832; Rau, *supra* note 10, at 2016; see also 1 MALLEN & SMITH, *supra* note 12, § 2.47, at 365. See generally Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 630 (1997) (“[C]lients may be even more persuaded by the ability to circumvent a legal system that is not only time-consuming, costly, and unfamiliar, but also often perceived as unfriendly.”).

20. Powers, *supra* note 19, at 630; Rau, *supra* note 10, at 2018 (“[C]onfidential information previously revealed to the attorney [becomes] part of the public record . . .”).

21. Rau, *supra* note 10, at 2018 (“[T]he public relations value of a suit by an attorney against one of his clients is likely to be a very negative quantity.”). See generally Paul E. Kovacs & Craig G. Moore, *Legal Malpractice Claims Avoidance and Defense: If an Attorney Who Represents Himself Has a Fool for a Client, Who Are You Representing?*, 61 J. MO. B. 142, 149 (2005) (“[A] substantial hurdle an attorney faces in . . . legal malpractice claims is the public's perception of attorneys. . . . Public opinion polls show that the opinion of lawyers is not much higher than that of used car salesmen.”); Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2600 (1996) [hereinafter Ramos, *Reforming Lawyers*] (“In a Reebok ad shown during the 1993 Super Bowl, viewers were reminded that on a ‘perfect planet’ there would be no lawyers.”) (citation omitted).

22. See Sup. Ct. Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 96-9, at 3 (1996), available at http://www.sconet.state.oh.us/BOC/Advisory_Opinions/1996/op%2096-009.doc (discussing how advising a client that in order to hire the attorney the client should hire another attorney “sends the wrong message to the public”). See generally State Bar of Cal. Comm. on Mandatory Fee Arbitration, *Arbitration Advisory 94-01* (1994), http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11337&id=6490 [hereinafter *Advisory 94-01*] (“Arbitration programs should be alert to the potential public relations disaster if [arbitration committee] conduct is perceived as being pro attorney.”).

23. Illinois established the Attorney Registration & Disciplinary Commission of the Supreme Court (“ARDC”). The ARDC recognized that “[t]he legal profession depends upon the public's trust” and as a result established the Client Protection Program (“CPP”). The CPP “is an example of the profession's efforts to deserve and maintain that trust, by helping client's recover losses caused by the wrongful acts of a few lawyers who fall short of their professional obligations.” ARDC, Client Protection Program, <http://www.iardc.org/clientprotection.html> (last visited Nov. 12, 2006).

24. See DAVID J. BECK, *LEGAL MALPRACTICE IN TEXAS* (2d ed. 1998), in 50 BAYLOR L. REV. 547, 548 (1998). Beck describes the fact that “the public has become even more critical of lawyers' performance” as a “disturbing pattern [that] has emerged.” *Id.* Beck further contends that “[u]nderstanding this development is an important first step in preventing malpractice claims.” *Id.*

25. Rau, *supra* note 10, at 2017.

might be enough to urge any attorney to attempt to avoid the courtroom by adding an arbitration provision to his retainer agreements.

Finally, commentators contended in the past that it was difficult for a client litigating a malpractice claim to find an attorney willing to represent her.²⁶ The thought was that attorneys would be unwilling to face the potential backlash that might result from pursuing legal malpractice claims against their professional brethren. More recently, however, large jury verdicts have been enough to entice certain attorneys to see past the potential negative criticism they may face from their colleagues.²⁷

Large verdict awards, adverse publicity, and a lawsuit's inherent uncertainty make attorneys think twice before taking any action that may be adverse to the interests of their clients. Specifically, verdicts granting punitive damage awards lead commentators to argue that the threat of a legal malpractice lawsuit is, and always will be, the most effective way to make attorneys fulfill their high professional standards and ethical duties.²⁸ Unfortunately, this anticipated deterrence may be moot to a client whose lawyer is attempting to collect on a bill for allegedly second-rate legal services.²⁹ State bar associations currently take a reactive approach when dealing with attorney-client disputes by compensating a client *after* the malpractice has already occurred. Instead, they should take a more proactive approach and attempt to eradicate the causes of legal malpractice suits *before* they occur in order to deal with this grave issue on a long-term basis.

As can be seen, arbitration was introduced as a solution to rectify litigation's numerous drawbacks. Although it has its own potential shortcomings, arbitration's numerous advantages make it a viable and

26. *Id.* at 2018 (“[F]inding a local lawyer willing to handle a suit, or to testify as an expert witness, against another attorney in a fee case is likely to be difficult . . .”).

27. The business of professional responsibility law has become so lucrative that some of the attorneys who practice in the field turn away clients if the potential damages are not in aggregate of the “outrageous” costs needed to litigate. See Jack Smart, *An Attorney's Fee Provision May Not Be a Good Idea*, ORANGE COUNTY LAW., Oct. 2000, at 34 (“[I]t is impossible to take a legal malpractice case to trial without incurring the aggregate cost and fees in the normal range of between \$20,000-\$75,000. Given the time and cost required to pursue litigation, it simply doesn't make sense to invest \$25,000-\$40,000 in pursuit of a \$25,000-\$40,000 judgment.”).

28. William L. Tabac, *Crossfire at the Bar*, N.Y. TIMES, May 3, 1987, § 6 (Magazine), at 30, 55 (reporting that law professors, such as James Vorenberg, the Dean of the Harvard Law School at the time the article was written, feel that legal malpractice lawsuits have had a positive effect).

29. However, one author contends that law firms, regardless of their size, are unlikely to collect unpaid fees in order to sustain future business. See Edward Poll, *Getting Paid: A New Look at Fee Collection*, LAW PRAC. TODAY, Sept. 2006, available at <http://www.abanet.org/lpm/lpt/articles/fin09061.shtml> (“Large and small firms alike often continue to work for the non-paying client in the misguided hope that continuing the relationship means getting paid and receiving referrals in the future.”).

preferred means of resolving disputes.³⁰ Arbitration's growing popularity and its numerous benefits lead commentators to theorize that legal malpractice may occur if an attorney fails to disclose the availability of alternative dispute resolution to the client as being a quicker³¹ and more efficient³² alternative to litigation.³³ This theory is a testament to arbitration's viability and, with its continued promotion by state courts and local bar associations, to the likelihood that it will become the preferred means of resolving legal malpractice claims in the very near future.³⁴

C. *The Pros and Cons of Arbitration Agreements*

Arbitration's role in resolving attorney-client disputes is all but solidified. The growing acceptance of arbitration reflects that any of its potential disadvantages are easily outweighed by its numerous benefits. For example, as explained above, arbitration is generally recognized as being quicker³⁵ and more efficient³⁶ than litigation,³⁷ given its limited rules of discovery and evidence,³⁸ which dramatically decrease the

30. See State B. of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. No. 1989-116, § B (1989), available at http://www.calbar.ca.gov/calbar/html_unclassified/ca89-116.html [hereinafter Cal. Formal Op. 1989-116] ("Arbitration is a recognized and favored means by which parties expeditiously and efficiently settle disputes which might otherwise take years to resolve."); see also Cummings, *supra* note 13, at 1 ("In California, which has used fee arbitration since 1979, 90 percent of attorneys and 85 percent of clients reported that they believed the [arbitration] process was fair . . .").

31. See *infra* note 35 and accompanying text.

32. See *infra* note 36 and accompanying text.

33. See Honchar, *supra* note 11, at 5 ("I strongly urge lawyers to inform clients of ADR options, not only as a matter of ethics but, importantly, to avoid legal malpractice liability.").

34. See *infra* text accompanying notes 73-75.

35. See Rau, *supra* note 10, at 2027-28 ("Arbitration tends to be a speedier process in part because it allows the parties simply to bypass any queue at the courthouse door and to schedule hearings at their own convenience . . ."); see, e.g., Bar Association of San Francisco, Frequently Asked Questions About the Attorney Client Fee Dispute Program, http://www.sfbar.org/adr/feedispute_questions.aspx (last visited Nov. 12, 2006) [hereinafter San Francisco Bar, Fee Dispute] (stating that arbitration usually takes "four to five months, which is less time than a court case would take"); Los Angeles County Bar Association, Notice of Fee Dispute Obligations, <http://www.lacba.org/showpage.cfm?pageid=2999> (last visited Nov. 12, 2006) ("Most cases take approximately four to six months to complete.").

36. See 1 MALLEN & SMITH, *supra* note 12, § 2.47, at 369 (discussing how arbitration is often conducted by people, who are often attorneys, with an expertise in legal malpractice law and its application). See generally John Flynn Rooney, *Firm Wins Bid to Force Arbitration*, CHI. DAILY L. BULL., Aug. 10, 2001, at 1 ("Courts nationwide want to send matters to alternative dispute resolution to ease their caseloads . . .").

37. See Rau, *supra* note 10, at 2027-28; see also Powers, *supra* note 19, at 630.

38. See, e.g., CAL. STATE BAR R.P. FEE ARB. 28.0 ("No discovery is allowable . . ."); *Id.* R. 33.0 (2004) ("Any relevant evidence shall be admitted if it is the sort . . . which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any

length of time necessary to complete an arbitration proceeding.

Secondly, commentators urge that a client who represents himself in arbitration does not incur the added cost of hiring a second attorney.³⁹ Although hiring an attorney is not necessary in arbitration,⁴⁰ clients are likely to do so⁴¹ to avoid making a handful of blunders.⁴² Obtaining counsel may be wise because establishing the prima facie elements of a legal malpractice cause of action⁴³ and complying with rules of evidence is a daunting task for those with and those without formal legal training. Even so, a client who does hire an attorney will still find the cost of legal fees are reduced because, on average, arbitrating a legal dispute usually leads to fewer billable hours as compared to litigation.⁴⁴

Additionally, arbitration has one important feature which is absent from litigation: confidentiality. Arbitration is more private because it does not take place in open court and, apart from certain exceptions,⁴⁵ records of such hearings are normally not open to the public.⁴⁶ Keeping information surrounding the resolution and settlement of legal malpractice disputes inaccessible to the public adds an additional layer

common law or statutory rule to the contrary.) (emphasis added).

39. Samantha R. Turian, *Drafting Fee Arbitration Provisions*, PRAC. LAW., Dec. 1994, at 23, 24.

40. See Jane Massey Draper, Annotation, *Validity and Construction of Agreement Between Attorney and Client to Arbitrate Disputes Arising Between Them*, 26 A.L.R. 5TH 107, 115 (1995).

41. See, e.g., San Francisco Bar, Fee Dispute, *supra* note 35. This question and answer website advises the client that “more than half of the parties use [the arbitration] process [provided by the San Francisco Bar] without an attorney representing them.” *Id.* Even so, the site further informs the client that “[o]f course, you do have the right to have an attorney if you choose to.” *Id.*

42. See, e.g., *In re Hartigan*, 107 S.W.3d 684, 688 (Tex. App. 2003). In this case, the client represented herself in the legal malpractice action. In response to the client’s argument that the attorney fraudulently induced her into signing the arbitration clause, the court held that the client had “failed to provide the court with either substantive analysis of her legal contentions or citation to authority supporting her contentions.” *Id.*

43. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000) (“[A] lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care . . . if the lawyer fails to exercise care . . . and if that failure is a legal cause of injury . . .”).

44. *But see* Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 826 (1998) (discussing how an arbitrator can increase the cost of arbitration by being continually unavailable for the limited window of hearing dates established by the arbitrator(s) and how most arbitrators allow the delay “[u]nless the foot-dragging is blatantly obvious.”); Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 796 (1997) (“If the arbitrator grants broad discovery similar to that permitted by the rules of civil procedure, the costs skyrocket and the benefit of [arbitration] as a low-cost solution may disappear.”).

45. See *infra* notes 49-53 and accompanying text.

46. See, e.g., CAL. STATE BAR R.P. FEE ARB. 25.1, 25.3. Although Rule 25.3 states that the award from arbitration is public, Rule 25.1 states that all arbitration hearings shall be closed to the public, and Rule 25.3 states that the entire arbitration case file remains confidential. *Id.* R. 25.1, 25.3.

of privacy to the arbitration process.⁴⁷ A secondary effect of arbitration's confidential nature is that attorneys are shielded from litigious clients with an affinity for suing their counsel.⁴⁸ An attorney, dealing with a client who is familiar with malpractice, may be hesitant to act as counsel if she realizes that the client will be scrutinizing her every move.

As a final point, arbitration makes finality a reasonable expectation because it usually precludes any right to appeal or at least narrowly confines judicial review to a small set of circumstances.⁴⁹ Some circumstances where review or appeal is warranted include when the arbitration award is found not to be based upon the arbitration agreement,⁵⁰ where the award is held to be a result of the arbitrator's failure to exercise sound judgment,⁵¹ where the award is facially incorrect,⁵² or where the award is handed down by an arbitrator with a clear conflict of interest regarding the parties involved or the dispute.⁵³ Although it is not hard to list the numerous benefits of arbitration, it is extremely difficult to determine whether the process is more beneficial to the attorney or the client.

While it is tempting to conclude that legal malpractice arbitration

47. See Kovacs & Moore, *supra* note 21, at 143 ("Some firms have initiated the practice of including binding arbitration agreements in their engagement letters. These arbitration agreements preclude many legal malpractice disputes, and the circumstances from which they originate, from ever being publicly disclosed.").

48. Turian, *supra* note 39, at 25 ("The client with a track record for bringing suits concerning former representation, however, may be the perfect candidate for an arbitration provision.").

49. See Rau, *supra* note 10, at 2028; Turian, *supra* note 39, at 24. *But see* I MALLEEN & SMITH, *supra* note 12, § 2.48, at 370 ("[T]he parties may agree that the result be binding on only one party, which is 'one-way binding arbitration' leaving the other side free to seek a trial *de novo* if sufficiently aggrieved by the result. Non-binding arbitration allows either party to seek further review."); Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 307 (suggesting that "[a]rbitration awards should be reviewable by courts to ensure that ethical and fiduciary standards have been properly applied").

50. See, e.g., *Delaney v. Dahl*, 121 Cal. Rptr. 2d 663, 668 (Ct. App. 2002) (observing that the "award [of an arbitrator] will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source." (quoting *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1006 (Cal. 1994))).

51. See, e.g., Florida International Arbitration Act, FLA. STAT. § 684.25(c) (2006) (stating that one possible ground for vacating an arbitration award is if the "[a]rbitral tribunal conducted its proceedings so unfairly so as to substantially prejudice the rights of the party challenging the award"); *In re Hartigan*, 107 S.W.3d 684, 688 (Tex. App. 2003) (discussing how arbitration awards are reviewed under an "abuse of discretion" standard).

52. See, e.g., *Daly v. Komline-Sanderson Eng'g Corp.*, 191 A.2d 37, 38 (N.J. 1963). ("Judicial review of an award is extremely narrow, generally confined to matters of corruption or errors appearing on the [face] of the award.").

53. See, e.g., *Neaman v. Kaiser Found. Hosp.*, 11 Cal. Rptr. 2d 879, 880 (Ct. App. 1992) (vacating an award granted by the arbitrator because he failed to disclose that he was previously hired by the defendant-hospital as an arbitrator).

favors attorneys, some disagree.⁵⁴ The advantages and disadvantages of arbitrating fee disputes depend mostly upon each party's individual circumstances.⁵⁵ Commentators note that a speedy resolution of a fee dispute or a malpractice claim, under certain circumstances, may be undesirable to both the client and the attorney.⁵⁶ A well-off attorney facing a legal malpractice suit from a relatively under-funded client may wish to litigate because the process lasts substantially longer. The attorney would hope that the client would not be able to subsidize lengthy litigation, and as a result, would need to seek other options.⁵⁷ On the other hand, a client not willing to have confidential information made public may desire to arbitrate due to the confidential nature of the proceedings.⁵⁸ Therefore, it is important for attorneys not to haphazardly include an arbitration provision in their retainer agreements, especially if doing so is based upon an unfounded assumption that arbitration always carries with it a pro-attorney bias. Attorneys must consider their own individual circumstances and then decide whether arbitration or litigation would be most beneficial.

Nevertheless, arbitration's appeal to both attorney and client has led several states to depart from the common law view of arbitration, which expressly disfavored its use,⁵⁹ and to adopt a trend favoring its use.⁶⁰

54. See, e.g., *Buckwalter v. Napoli, Kaiser & Bern LLP*, No. 01 Civ. 10868, 2005 WL 736216, at *7 (S.D.N.Y. Mar. 29, 2005) (stating that "[a]n arbitration clause does not necessarily favor one party over another"); Rau, *supra* note 10, at 2052-53.

55. See Rau, *supra* note 10, 2031-32.

56. See *id.* at 2031.

57. *Id.*; see Kovacs & Moore, *supra* note 21, at 147-48 (discussing how attorneys potentially facing a legal malpractice claim should not hesitate in reporting them to their professional liability insurance carrier because even if the potential claim is dropped or turns out to be nothing, the attorneys' premiums will not increase); see also Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1077 (1984) ("Seemingly rich defendants may sometimes be subject to financial pressures that make them as anxious to settle as indigent plaintiffs. But I doubt that these circumstances occur with any great frequency.").

58. Rau, *supra* note 10, at 2029-30.

59. *Id.* at 2025-26 (discussing that arbitration clauses in executory agreements are not enforceable at common law); see, e.g., *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.*, 246 Cal. Rptr. 823, 833 (Ct. App. 1988) (discussing how at common law "a party could not contract away liability for his fraudulent or intentional acts or for his negligent violations of statutory law").

60. Rau, *supra* note 10, at 2025-26 ("While the traditional attitude of judges towards arbitration was one of considerable hostility, statutes enacted in most jurisdictions have completely reversed the common-law position on arbitration and have made executory agreements to arbitrate enforceable."); see, e.g., *Buckwalter v. Napoli, Kaiser & Bern LLP*, No. 01 Civ. 10868, 2005 WL 736216, at *7 (S.D.N.Y. Mar. 29, 2005) ("It is well settled that federal and New York State public policy favor the enforcement of arbitration agreements."); *Fredrick v. Davitt*, No. Civ.A. 02-8263, 2003 WL 220287, at *2 (E.D. Pa. Jan. 31, 2003) ("Doubts are generally resolved in favor of coverage of the arbitration agreement."); *Madden v. Kaiser Found. Hosp.*, 552 P.2d 1178, 1182 (Cal. 1976) ("[A]rbitration has become an accepted and favored method of resolving disputes . . ."); *Watts v. Polaczyk*, 619 N.W.2d 714, 718 (Mich. Ct. App. 2000) ("The Michigan

Some states have gone as far as requiring arbitration through statutorily mandated programs.⁶¹ Even so, arbitration is not favored in circumstances where requiring a client to submit to it would impair his rights, as is arguably the case in claims of legal malpractice.⁶²

Although there is a general trend in favor of arbitrating attorney-client disputes, there is still no general consensus on whether arbitration is the appropriate way to resolve legal malpractice claims.

D. The Fiduciary Relationship's Effect upon Arbitrating Legal Malpractice Disputes

1. The Special Attorney-Client Relationship

The special relationship between an attorney and a client is the driving force behind the lack of consensus surrounding legal malpractice arbitration. In the attorney-client relationship, the client trusts that the attorney, as fiduciary, will always act with the client's best interest in mind.⁶³ As a fiduciary, an attorney is expected to "be a paragon of

arbitration act (MAA) 'evidences Michigan's strong public policy favoring arbitration.'" (citation omitted) (quoting *Grazia v. Sanchez*, 502 N.W.2d 751, 753 (Mich. Ct. App. 1993)); *Daly v. Komline-Sanderson Eng'g Corp.*, 191 A.2d 37, 38 (N.J. 1963) ("We think we should encourage arbitration of disputes between attorney and client . . .").

61. See, e.g., 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 1230.1(a) (2001) ("The Chief Administrator of the Courts shall establish a fee arbitration program, which shall be approved by justices of the Appellate Divisions and which shall provide for the resolution by arbitrators of fee disputes between an attorney and client based upon representation in civil matters.").

62. See *Kamaratos v. Palias*, 821 A.2d 531, 535 (N.J. Super. Ct. App. Div. 2003) (stating that although there is a "strong judicial approval for the technique of arbitration, . . . New Jersey is equally committed, on the other hand, to assuring that a party does not unwittingly lose the 'time-honored right to sue'" (quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 773 A.2d 665, 670 (N.J. 2001))); see, e.g., State Bar Act, CAL. BUS. & PROF. CODE § 6200(b)(2) (2003 & Supp. 2006) ("This article shall not apply to . . . [c]laims for affirmative relief against the attorney for damages or otherwise based upon malpractice or professional misconduct . . ."); N.J. R. CT. 1:20A-2(c)(2) (2007) (establishing that District Fee Arbitration Committees "shall not have jurisdiction to decide . . . claims for monetary damages resulting from legal malpractice").

63. See *David Welch Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339, 341 (Ct. App. 1988) (stating that "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides*." (citation omitted); *Drake v. Becker*, 303 N.E.2d 212, 216 (Ill. App. Ct. 1973) ("It is incumbent upon an attorney to exercise the utmost good faith and fairness in dealing with his client" because "[a] fiduciary relationship exists as a matter of law between [him and his] client."); *Kamaratos*, 821 A.2d at 536 ("[T]he relationship between the [attorney and the client] is a fiduciary one, calling for the highest trust and confidence."); *Greene v. Greene*, 436 N.E.2d 496, 499 (N.Y. 1982) ("[T]he relationship between an attorney and his client is a fiduciary one and the attorney cannot take advantage of his superior knowledge and position."). See generally N.Y. CODE OF PROF'L RESPONSIBILITY EC 2-33 (1970) ("A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society . . . should adhere to the highest professional standards of effort and

candor, fairness, honor, and fidelity in all of [her] dealings with those who place their trust in [her] ability and integrity,” especially the client.⁶⁴ This duty persists even if it means the attorney must put her own interests second to those of the client.

Clients who agree to arbitrate can use the attorney’s duty of loyalty and trust to their benefit. Specifically, clients argue that it is a breach of the attorney’s fiduciary duty to propose that legal malpractice claims be subject to arbitration.⁶⁵ Clients characterize such actions as an attempt by the attorney to limit her liability⁶⁶ because arbitration will preclude a client both from receiving the protections of a court, and more importantly, from seeking punitive damage awards that are otherwise available in litigation.⁶⁷

An ethical violation occurs when an attorney attempts to limit her liability to her client.⁶⁸ While a client can argue that an ethical violation occurred, an attorney may be able to reframe her actions instead as a simple decision regarding forum.⁶⁹ Still, one may think arbitration’s advantages and litigation’s shortcomings would be enough to make the client want his legal malpractice claim taken out of court and put into arbitration. Unfortunately, for most attorneys facing a malpractice suit, any potential trepidation experienced by a client contemplating the often

competence.”).

64. *Sanguinetti v. Rossen*, 107 P. 560, 563 (Cal. Ct. App. 1906).

65. *See Deye & Britton*, *supra* note 15, at 281 (“[O]nce the parties have agreed to [binding] arbitration, they are ‘bound’ to that agreement and must use arbitration as a means of resolving their dispute.”).

66. *See Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.*, 246 Cal. Rptr. 823, 833 (Ct. App. 1988) (discussing how limitation of liability provisions are freely enforced when they are fair and the product of arms-length bargaining outside of the context of the attorney-client relationship).

67. *See, e.g., In re Silverberg*, 427 N.Y.S.2d 480, 483 (App. Div. 1980) (stating that “[p]unitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention” (quoting *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976))); *Ramos, Reforming Lawyers*, *supra* note 21, at 2583 (“Each year legal malpractice costs insurers nationwide more than \$4 billion . . .”). It is important to note, however, that when establishing the rules of the arbitration, arbitrating parties can agree to allow the arbitrator(s) to award any remedy that a court would be able to, including punitive damages.

68. *Compare* MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(1) (2003) (“A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice . . .”), *and* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) (“An agreement prospectively limiting a lawyer’s liability to a client for malpractice is unenforceable.”), *with* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 02-425 (2002) [hereinafter ABA Formal Op. 02-425] (concluding that an agreement requiring arbitration of malpractice claims is ethically permissible so long as the attorney fully apprises the client of the advantages and disadvantages of arbitration and the agreement does not insulate the attorney from liability to the client).

69. *See, e.g., McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1051 (D. Colo. 1991) (finding that an arbitration clause in a retainer agreement was not an attempt by the attorney to limit his liability but instead was an ethical attempt to shift the determination of the malpractice action to a different forum).

sluggish and public litigation process will most likely be short lived in light of the prospect of a large punitive damage award.

2. Ways for the Client to Paint the Picture of a Self-interested Attorney

Many clients allege that their attorneys acted with self-interest⁷⁰ when they included an arbitration clause in their retainer agreements. There are several ways to paint a picture of a cunning attorney who took advantage of a helpless client in an effort to promote her own self-interest.

First, a client can argue that arbitrators would be more likely to side with the attorney because arbitration is usually conducted by attorneys.⁷¹ For instance, fee arbitration rules in some California jurisdictions require that the majority of those arbitrating an attorney-client fee dispute be attorneys themselves.⁷² Recognizing and accounting for the potential public relations disaster that accompanies a pro-attorney bias in arbitration,⁷³ many state bar associations have adopted strict rules for arbitrators, including requiring disclosure of any potential conflicts of interest,⁷⁴ and adherence to an oath that they will arbitrate the claim before them “faithfully and fairly.”⁷⁵ What states will not do is completely take attorneys out of arbitration because doing so would send the damaging message that no attorney *should* be trusted.

Attorneys seeking to prove that arbitration does not have an

70. See Powers, *supra* note 19, at 631 (discussing how an attorney who is aware of the fact that ethical obligations or substantive law of fiduciary duty will not apply in arbitration “may of course prefer arbitration”).

71. See generally 1 MALLEN & SMITH, *supra* note 12, § 2.48, at 370 (proposing that “[r]etired judges or law professors who focus their research on legal ethics and legal malpractice” may be best to act as arbitrators to combat any perceived bias resulting from practicing attorneys acting as arbitrators). In discussing an opinion of the California State Bar Standing Committee on Professional Responsibility and Conduct, the Los Angeles Bar echoed the need for arbitration of malpractice claims only when the arbitration procedures are perceived as neutral. Los Angeles County Bar Ass’n, Prof’l Responsibility and Ethics Comm., Op. No. 489 (1997).

72. Rule 7(B)(1) of the San Francisco Bar Rules of Procedure for Arbitration and Mediation of Fee Disputes requires disputes involving less than \$10,000 to be decided by one arbitrator who “shall be an attorney.” Alternatively, rule 7(B)(2) requires disputes involving \$10,000 or more, unless otherwise stipulated by the parties, to be heard by a panel of three arbitrators, one of whom must not be an attorney. SAN FRANCISCO BAR ARB. MED. R.P. 7(B) (2005), available at http://www.sfbar.org/forms/adr/feedispute_arb_med_rules.pdf.

73. See Advisory 94-01, *supra* note 22.

74. See, e.g., CAL. STATE BAR R.P. FEE ARB. 22 (2004) (requiring an arbitrator who does not believe he can be impartial to disqualify himself); LOS ANGELES BAR R. CONDUCT ARB. FEE DISP. 43(a) (“No person appointed as an arbitrator shall arbitrate a dispute if he or she has any financial or personal interest in the result of the arbitration, or if he or she determines that he or she is not qualified to act as to that dispute for any other reason.”).

75. N.Y. C.P.L.R. 7506(a) (McKinney 1962).

inherent pro-attorney bias may argue that many arbitration agreements allow for the *client* not only to select the arbitrators, but also to influence how the arbitration process will be conducted.⁷⁶ However, arguing that the client weighed in on the structure of the arbitration procedure is all but barred when the client is either claiming that he did not understand what he was getting himself into when he signed the retainer or that he was completely unaware that the retainer even contained an arbitration provision at all.

The potential pro-attorney bias mentioned above may lead one to infer that arbitrators are likely to dismiss such claims in order to help their peers. A client can help to make this inference stronger by pointing out that the arbitration process is not normally conducted under the same substantive rules of law as civil litigation.⁷⁷ Namely, the client can assert that state bar arbitration rules often do not recognize an attorney's breach of fiduciary duty as being within the scope of arbitrating fee disputes.⁷⁸ In addition, clients can allege that the arbitrators may not be as well-suited as judges to recognize when an attorney is trying to impose excessive fees.⁷⁹

A prudent client would also assert that it is quite plausible that arbitrators will "overlook" ethical violations⁸⁰ committed by attorneys given the limited judicial oversight of fitness of practicing attorneys in arbitration.⁸¹ In response, many jurisdictions are developing protocols to ensure that arbitrators report potential ethical violations uncovered during an arbitration proceeding to state disciplinary committees.⁸²

76. See, e.g., CAL STATE BAR R.P. FEE ARB. 22 (2004) (establishing that "[e]ach party may disqualify one arbitrator without cause and shall have unlimited challenges for cause"); Florida International Arbitration Act, FLA. STAT. § 684.07 (2003) ("[P]arties may at any time agree . . . to conduct the arbitration in accordance with . . . rules *they* select . . .") (emphasis added).

77. See Brickman, *supra* note 49, at 280.

78. The California Bar Association's website addresses the issue of malpractice claims in the arbitration process in a Frequently Answered Question format. See http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10166&id=1665 (last visited Nov. 12, 2006). Specifically the website states: "The Mandatory Fee Arbitration Program cannot help you recover damages or offset expenses incurred for attorney malpractice or misconduct." *Id.*

79. See generally Draper, *supra* note 40, § 2[b], at 115 (asserting that clients may not be able to allege the same type of breaches in arbitration as they could in a court of law).

80. See Brickman, *supra* note 49, at 281-82 ("[A]n arbitrator—not generally regarded as having code enforcement obligations or powers or even necessarily aware of relevant ethical provisions—*could well ignore* these restrictions on lawyer behavior.") (emphasis added) (citation omitted).

81. *But see* Rau, *supra* note 10, at 2045-46 (recommending that mandatory arbitration proceedings be dovetailed with disciplinary process to prevent attorneys from avoiding liability sanctions).

82. See, e.g., N.J. R. CT. 1:20A-4 (2007) ("In all cases it shall be the duty of each Fee Committee . . . to refer any matter that it concludes may involve ethical misconduct that raises a substantial question as to the attorney's honesty, trustworthiness or fitness as a lawyer . . . to the

The client can further demonstrate that his interests were not adequately advanced by his attorney by arguing that he was unaware that he was forfeiting his constitutional right to a jury trial when he signed the retainer.⁸³ This argument has a reasonable chance of being accepted by a court only if it is employed by a client who made a bona fide attempt to understand the retainer agreement that was presented to him. On the other hand, a client who fails to read the terms of a retainer agreement normally cannot claim that the attorney failed to promote his best interests.⁸⁴

An argument of last resort for the client is that the retainer was void as an adhesion contract. Specifically, the client can argue that he was extremely vulnerable.⁸⁵ This susceptibility may urge a court to hold the arbitration provision void.⁸⁶ Such heightened security is necessary to protect clients from cunning attorneys,⁸⁷ who shield themselves from malpractice liability at the expense of the fiduciary duty they owe to their clients.⁸⁸

A client has many legitimate reasons for preferring to litigate a legal malpractice claim. Specifically, it is likely that a jury, armed with a negative perception of attorneys,⁸⁹ would be more hostile toward the defendant being charged with malpractice than an arbitrator would be.⁹⁰

Director for investigation.”).

83. See, e.g., *Watts v. Polaczyk*, 619 N.W.2d 714, 717 (Mich. Ct. App. 2000). The client argued that he did not know that by agreeing to the arbitration clause that he was giving up his right to trial for any legal malpractice claims against his attorney. *Id.* at 717, 719.

84. See *id.* at 717. The court rejected the client’s argument that it was ignorant to the terms of the arbitration clause as they signed the agreement. The court reasoned the failure to read an agreement is not a defense in an action to enforce the terms of a written agreement as it was presumed by signing the agreement that you understood its terms. *Id.*

85. See *Powers*, *supra* note 19, at 648. (“A client accused of a crime, embroiled in a civil dispute, seeking a divorce, injured in an accident, fired from a job, or dealing with many other potentially overwhelming legal problems that prompted the hiring of an attorney in the first place, is looking to the attorney for help and counsel. He is neither expecting, nor emotionally prepared, to ‘do battle’ with his chosen attorney to protect his own rights.”) (emphasis added).

86. Compare *Steven v. Fid. & Cas. Co.*, 377 P.2d 284, 294 (Cal. 1962) (discussing how courts will not enforce provisions in adhesion contracts that limit the duties or liability of the stronger party unless such provisions are “conspicuous, plain and clear”), with *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 783-84 (Ct. App. 1976) (discussing how the decision of a court to invalidate a form contract as one of adhesion depends mostly upon whether both parties fully understand the terms of such a contract).

87. See, e.g., *Att’y Grievance Comm’n of Md. v. Franz*, 736 A.2d 339, 342 n.7 (Md. 1999) (discussing several statutory enactments, which acknowledge that attorneys who take advantage of clients traumatized by an accident “contribute[] to the public perception of members of the legal profession as mercenaries who take advantage of the victims of tragic accidents for their own profit”).

88. See *supra* notes 63-64 and accompanying text.

89. See *supra* note 21 and accompanying text.

90. See *Ramos, Reforming Lawyers*, *supra* note 21, at 2607 (“[C]lients would be opposed to

This hostility would play in the client's favor, not only when the jury determines liability, but more importantly, when it calculates damages. The jury's willingness to hand down a large punitive damage award is magnified in malpractice cases when a sympathetic client alleges that his confidence in the legal profession was demolished after being wronged by his attorney.⁹¹

This debate over arbitration versus litigation has led states to develop different ways of handling legal malpractice disputes. Naturally, ethical implications are at the forefront of this ongoing debate and play a major role in the approaches adopted by each of the states discussed below.

III. HOW DIFFERENT STATES HANDLE LEGAL MALPRACTICE ARBITRATION

The issue of whether legal malpractice claims can be arbitrated causes each of the six states discussed below to fall into one of two groups.⁹² The first group requires a client to seek independent counsel before signing an arbitration agreement, while the second group instead requires that the attorney wishing to be retained be the one to fully advise the client of the consequences of agreeing to arbitration. These differing requirements are both in place to protect the client. However, states requiring independent counsel protect the client at the expense of

arbitration of legal malpractice claims because they give up their right to a jury which is usually hostile toward lawyers.”).

91. Most jurisdictions allow punitive damages to be awarded only if the jury first awards compensatory damages. 2 MALLEN & SMITH, *supra* note 12, § 20.16, at 1134-35. Once compensatory damages are awarded, most jurisdictions will only uphold an award of exemplary damages if the attorney acted fraudulently, despicably, or with a “very high degree of moral culpability.” *Id.* § 20.16, at 1131-34 (quoting *Schweizer v. Mulvehill*, 93 F. Supp. 376, 409 (S.D.N.Y. 2000)). Some jurisdictions, however, completely bar a jury from awarding punitive damages in cases of legal malpractice. *See infra* note 118 and accompanying text.

92. Texas, Illinois, Pennsylvania, California, New York, and New Jersey, are discussed in this Note not only because of their high populations, but also because a study suggests that legal malpractice may occur more frequently within these states. *See* WILLIAM H. GATES & SHEREE L. SWETIN, ABA STANDING COMM. ON LAWYERS' PROF'L LIABILITY, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER (1989). The study involved the collection of data on nearly 30,000 malpractice claims against attorneys that were reported to the National Legal Malpractice Data Center between January 1983 and September 1985. *Id.* at xi. Of these 30,000 claims Texas represented 3.8% of the claims field, Illinois—2.9%, Pennsylvania—3.8%, California—16.3%, New York—5.9%, and New Jersey—2.2%. *Id.* at 84-90. While each of these states has more than the expected 2% pro-rata share among the fifty states, it is important to recognize that this study only examined claims against insured attorneys, not taking into account those attorneys practicing without professional liability insurance. *Id.* Similar studies subsequently conducted by the American Bar Association did not break out legal malpractice statistics by the state where claims originated. *See* 2003 ABA MALPRACTICE STUDY, *supra* note 1.

the client's faith in the legal profession. These states must look toward building a community that trusts the legal profession. In order to accomplish this daunting task, it is imperative that attorneys themselves are given the opportunity to educate their potential clients about arbitration and how it affects their rights.

A. States Requiring Independent Counsel

*Beware, the lawyer you are hiring to protect your interests may be trying to take advantage of you in the engagement contract.*⁹³

Attorneys practicing in Texas, Illinois and Pennsylvania⁹⁴ who draft legal malpractice arbitration clauses owe a strict duty to the potential client when entering into a retainer agreement. They must ensure that any potential client⁹⁵ wishing to retain them as counsel take the retainer agreement to another attorney who will explain exactly that to which the client is agreeing when signing a retainer compelling arbitration of legal malpractice claims.⁹⁶ These attorneys must also make certain that the client has ample time to seek such advice before discussing the terms of any potential retainer agreement. Someone viewing this standard may wonder why it is so stringent. The reasons are twofold. First, there is a belief that members of the bar, if given the opportunity, would take advantage of their clients.⁹⁷ The second reason is the desire to have a clear legal standard which is easily applied.⁹⁸ Underlying these two reasons is a state judiciary system's overarching desire to fulfill its

93. Sup. Ct. Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 96-9 (1996), available at http://www.sconet.state.oh.us/BOC/Advisory_Opinions/1996/op%2096-009.doc.

94. Texas has the highest population in the country while Illinois and Pennsylvania are the fifth and sixth most populated states, respectively. U.S. CENSUS BUREAU, CENSUS 2000: POPULATION AND HOUSING CHANGE PHC-T-2 tbl.1, available at <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf> [hereinafter CENSUS 2000, STATE].

95. See generally John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 995 (1995). Professor Dzienkowski argues that unsophisticated clients should first seek independent counsel before signing an arbitration agreement. To support this contention, Dzienkowski argues that an attorney cannot be trusted in explaining the ramifications of the agreement to arbitrate to such a client, and further, that even if the attorney did explain the issue fully, this same client would not be able to effectively evaluate the attorney's explanation when deciding whether to agree to arbitration. *Id.*

96. See Powers, *supra* note 19, at 661. Powers argues that the rule requiring a client to seek independent counsel before signing an arbitration agreement is more directed at unsophisticated clients, since sophisticated clients are more likely to have in-house counsel that could provide the protection envisioned by the rule. *Id.*

97. See CATHERINE CRIER, *THE CASE AGAINST LAWYERS* 180-82 (2002) (addressing the fact that the public has come to characterize attorneys as "legal locusts").

98. See, e.g., *infra* note 103 and accompanying text.

primary goal of protecting those who are unable to protect themselves. The state courts discussed below clearly indicate this sentiment in their respective opinions.

1. Texas

The major case in Texas concerning arbitration of legal malpractice claims is *In re Godt*.⁹⁹ In ruling against the attorney who drafted the retainer agreement containing an arbitration provision, the court cited Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct.¹⁰⁰ Rule 1.08 governs conflicts of interest, specifically focusing on transactions that are prohibited between the attorney and the client.¹⁰¹ Rule 1.08 controls because the attorney and the client are transacting,¹⁰² by way of retainer agreement, to move the resolution of legal malpractice claims into arbitration. As such, this disciplinary rule sets the parameters for when legal malpractice arbitration may appropriately be added to a retainer agreement. The rule only allows an attorney to limit his legal malpractice liability when such action is (1) permitted by law; and (2) where the client is represented by independent counsel when making the agreement.¹⁰³ In denying the defendant attorney's motion to compel arbitration, the Court of Appeals of Texas focused on whether this arbitration clause was permitted by law.¹⁰⁴ The court held this arbitration clause was not legally permissible because the defendant attorney never signed the retainer agreement.¹⁰⁵ While addressing the issue of whether a legal malpractice action is arbitrable in Texas, *Godt* also considered another related issue.

Godt addressed whether claims of legal malpractice were claims of "personal injury" under the Texas Uniform Arbitration Act ("TUAA").¹⁰⁶ To outsiders, this inquiry may appear insignificant; however, this issue is a major battleground for any party in Texas wishing to side-step an executed agreement to arbitrate and walk through

99. 28 S.W.3d 732 (Tex. App. 2000).

100. TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT R 1.08(g) (1995).

101. *Id.* R. 1.08(g).

102. *Id.* R. 1.08(a) ("A lawyer shall not enter into a business transaction with a client . . .").

103. *Id.* R. 1.08(a); *see also* McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048, 1051 (D. Colo. 1991) (affirming an order compelling arbitration because the client was represented by another attorney when he signed the retainer with the attorney). *But see* Watts v. Polaczyk, 619 N.W.2d 714, 718 (Mich. Ct. App. 2000) (compelling arbitration and rejecting the client's argument that he never had the chance to seek independent counsel because the ethical opinion relied upon by the client was not binding authority on the court and was contradictory to Michigan's public policy favoring arbitration).

104. *Godt*, 28 S.W.3d at 738-39.

105. *Id.* at 738.

106. TEX. CIV. PRAC. & REM. CODE ANN. § 171 (Vernon 2005 & Supp. 2006).

the courthouse doors. Many courts before *Godt* struggled with this personal injury issue because any potential answer hinges on the interpretation of the legislative history of the TUAA.

Under the TUAA, claims of personal injury, regardless of whether entered into freely, cannot be arbitrated.¹⁰⁷ Although the TUAA is clear in this regard, what is not so clear is whether a claim of legal malpractice falls within the statute's definition of personal injury. If a claim is held to be one of personal injury, the dispute is automatically excluded from being subject to arbitration. Consequently, those seeking to avoid legal malpractice arbitration adamantly argue that legal malpractice results in a personal injury to the client.¹⁰⁸ Conversely, those seeking to compel arbitration contend that legal malpractice is not a claim of personal injury and thus should be arbitrated¹⁰⁹ in line with Texas's public policy favoring the use of arbitration.¹¹⁰

Courts holding that legal malpractice claims do not result in personal injury rely heavily upon the legislative history of the TUAA.¹¹¹ In particular, they recognize that the intent of the statute was to minimize the burdens of litigation on courts by increasing the number of arbitrated claims.¹¹² Even so, the interest of decreasing the burden on courts was not substantial enough to mandate that all claims be arbitrated. The legislative history focuses on one group specifically: those attempting to recover for workers' compensation claims.¹¹³ The legislature prohibited the use of arbitration in these workers' compensations claims because a court would be better able to protect the rights of those injured while on the job. This reasoning may be helpful in analyzing the legal malpractice arbitration issue.

Perhaps, the same logic employed in claims of workers' compensation should be applied in the arena of legal malpractice arbitration. Clients who unknowingly entered into an agreement to arbitrate their legal malpractice claims, but were not physically injured, may require additional protection similar to those injured workers that the Texas legislature believed warranted extra attention. If a client was unable to protect himself from the alleged wrongs committed by his

107. *Id.* § 171.002(a)(3).

108. *See, e.g., In re Hartigan*, 107 S.W.3d 684, 689 (Tex. App. 2003); *Godt*, 28 S.W.3d at 735.

109. *See, e.g., Taylor v. Wilson*, 180 S.W.3d 627, 629 (Tex. App. 2005); *Miller v. Brewer*, 118 S.W.3d 896, 898 (Tex. App. 2003).

110. *See Henry v. Gonzalez*, 18 S.W.3d 684, 691-92 (Tex. App. 2000) (rejecting the client's repudiation of the attorney engagement letter and leaving the issue of whether the arbitration clause was a result of fraud to be decided by the arbitrator).

111. *See, e.g., Taylor*, 180 S.W.3d at 630-31.

112. *Id.* at 630.

113. *Id.* at 631.

attorney, it may be prudent to protect him by having his claims heard in front of a judge in a similar fashion to those seeking workers' compensation. However, protection is all but guaranteed in the courtroom.¹¹⁴

Although attorneys would argue that requiring legal malpractice to be litigated would open the floodgates to a deluge of unnecessary litigation, the legal system's various mechanisms to weed out frivolous suits sufficiently address such concerns. However, as is discussed in greater detail below, there are more effective ways to protect the public without diminishing the attorney's role of guardian and protector of the client's rights.

2. Illinois

Illinois is the fifth most populated state in the United States¹¹⁵ and is home to Chicago, the third most populated metropolitan area in the country.¹¹⁶ Considering its relatively high population, it is odd to think that someone researching cases discussing legal malpractice arbitration in Illinois would come up nearly empty-handed.¹¹⁷ A likely explanation for this lack of authority is the Illinois statute that completely bars clients from obtaining punitive damage awards in legal malpractice actions.¹¹⁸ Without punitive damages, clients in Illinois may not have the same financial incentive to bring legal malpractice claims.

Even in light of this absence of relevant case law and the statutory bar to punitive damages, Illinois attorneys considering legal malpractice arbitration still must follow the state's ethical guidelines. Rule 1.8(f) of the Illinois Rules of Professional Conduct¹¹⁹ is similar to those of Texas¹²⁰ and New Jersey.¹²¹ Specifically, Rule 1.8(f) prevents an attorney from attempting to limit her liability in legal malpractice claims

114. See generally Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 435 (1986) ("In theory, courts are committed to reason, but in practice much stands in their way. Some judges are dispassionate and disinterested seekers after justice, but not all are. And all judges are busy; it is a fair assumption that they do not have sufficient time to devote to any single case.").

115. See CENSUS 2000, *supra* note 94.

116. See U.S. CENSUS BUREAU, CENSUS 2000: POPULATION AND HOUSING CHANGE PHC-T-3 tbl.3, available at <http://www.census.gov/population/cen2000/phc-t3/tab03.pdf> [hereinafter CENSUS 2000, METRO].

117. Extensive searches of the Westlaw and LexisNexis databases revealed no controlling case law. A search of advisory opinions on the Illinois State Bar Association website, <http://www.isba.org>, also resulted in no relevant authority as of November 12, 2006.

118. 735 ILL. COMP. STAT. ANN. 5/2-1115 (West 2003 & Supp. 2006).

119. ILL. RULES OF PROF'L CONDUCT (2006).

120. See TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT (2006).

121. See N.J. RULES OF PROF'L CONDUCT § 1.8(h) (2006).

unless such actions are permitted by law and the client was represented by independent counsel when agreeing to the arbitration provision.¹²² The state's rules of conduct also impose another duty upon the attorney. In particular, Rule 3.2 requires that a "lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."¹²³ Some commentators argue that an attorney's failure to disclose the availability of alternative dispute resolution could rise to the level of legal malpractice.¹²⁴ An Illinois attorney may be able to argue that by including an arbitration provision in the retainer, she met the obligations prescribed in Rule 3.2. In order to do so, however, the attorney must prove that such conduct was "consistent with the interests of the client."¹²⁵ As discussed above, blanket assertions that arbitration is always in the best interest of the client are not always sustainable.¹²⁶

Although not heavily litigated, legal malpractice is still a major issue in Illinois. The issue was severe enough that the state recently made major changes that might not necessarily prevent legal malpractice from occurring, but would still ensure that the client is compensated for the money spent on legal services.¹²⁷ As of 2006, by way of the Attorney's Registration and Disciplinary Commission of the Supreme Court ("ARDC"), Illinois now requires all attorneys to report information regarding their malpractice insurance.¹²⁸ Further, for the seven years following the initial registration, the attorney must maintain records regarding the characteristics of his insurance—specifically, documentation showing the name of the insurer, the policy number, the amount of coverage, and the term of the policy.¹²⁹ All of this information is subject to unannounced and random audits by the administrator of the filings.¹³⁰ Any attorneys failing to register will not be allowed to practice law in the state. An attorney found to be practicing law in the state without first having registered, will be held in contempt of court.¹³¹ Most importantly, an Illinois client can access on the Internet whether an attorney reported having professional malpractice insurance when he initially registered with the ARDC.¹³² The ARDC provides no further

122. ILL. RULES OF PROF'L CONDUCT R. 1.8(f) (1990).

123. *Id.* R. 3.2.

124. *See supra* text accompanying notes 31-33.

125. ILL. RULES OF PROF'L CONDUCT R. 3.2 (2006).

126. *See supra* notes 54-58 and accompanying text.

127. ILL. SUP. CT. R. ADMISSION AND DISCIPLINE OF ATT'YS 7.56(e) (2006).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* R. 7.56(g).

132. ARDC Lawyer Search, <http://www.iardc.org/lawyersearch.asp> (last visited Nov. 12,

information. However, the website encourages clients to speak to the attorney and discuss why she does not have malpractice insurance, or alternatively, to find out more about the professional liability insurance the attorney does have. Requiring attorneys to own up to the status of their liability insurance ensures that clients have some recourse for malpractice claims because they can simply hire an attorney who is insured.¹³³ As explained above, this reactive approach does little to help rebuild the eroded faith in legal professionals especially since Illinois attorneys are insulated from punitive damage awards.

Like Illinois, Pennsylvania requires independent counsel to ensure the protection of citizens entering into retainer agreements containing arbitration provisions.

3. Pennsylvania

Rule 1.8(h)(1) of the Pennsylvania Disciplinary Rules of Professional Conduct states that “[a] lawyer shall not . . . make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is *independently represented* in making the agreement.”¹³⁴ The Eastern District of Pennsylvania in *Dilworth Paxson, LLP v. Asensio*¹³⁵ recently dealt with whether the client was independently represented when he entered into the retainer with his attorney. In this case, the attorney tried to compel the client to arbitrate in accordance with the language of the retainer agreement he signed.¹³⁶ The court refused to accept the client’s argument that he did not understand that he was agreeing to arbitrate.¹³⁷ After employing various canons of statutory construction,¹³⁸ the court focused on the sophistication of this client.¹³⁹ The client, as the president of an

2006).

133. *But see* Glen Fischer, *It’s What They Don’t Know That Can Hurt Them*, LAW. PROF. LIABILITY ADVISORY (ABA, Chi., Ill.), Spring 2004, at 2 (discussing how liability insurance disclosure laws do not protect clients from having to change attorneys midstream).

134. PA. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.8(h) (2006) (emphasis added).

135. No. Civ.A. 02-8986, 2003 WL 21076984 (E.D. Pa. May 5, 2003).

136. *Id.* at *2 (“Any future dispute between you, [client] on the one hand and [law firm] on the other hand will be arbitrated in Philadelphia by a neutral arbitrator selected in accordance with the Philadelphia Bar Association’s client dispute procedures. . . . You, [client] and [law firm] waive any right to claim consequential or punitive damages.”).

137. *Id.* at *4-5.

138. *Id.* at *4. The client claimed that he specifically addressed the arbitration agreement with the law firm. *Id.* According to the client, the law firm told him not to worry about the clause because it would be “unenforceable.” The court rejected the client’s claim that he was fraudulently induced into signing the retainer by employing the parole evidence rule. As a result, the contention that the law firm described the clause as “unenforceable” was inadmissible because the contents of the retainer agreement contained the whole understanding of the retainer agreement. *Id.* & n.7.

139. *Id.* at *5.

investment management and investment brokerage company, was not only a “highly sophisticated, highly educated businessman,”¹⁴⁰ but he was also a “registered broker in an industry where arbitration is a common mechanism for dispute resolution.”¹⁴¹ The court found the client’s involvement in countless business deals and his membership in the investment brokerage industry was enough to foreclose him from claiming that he was unfamiliar with the arbitration process and that he did not have access to numerous sources of legal counsel.¹⁴² The court was persuaded further that the client was aware of the consequences of agreeing to arbitrate because the retainer expressly acknowledged that the client consulted outside counsel prior to signing it.¹⁴³ The totality of these circumstances prevented the court from reasonably accepting the client’s argument that he relied *solely* on the drafter of the defendant law firm’s retainer agreement.¹⁴⁴

Dilworth indicates Pennsylvania’s interest in protecting those who cannot protect themselves. In this instance, the client was a sophisticated businessman who had numerous opportunities to protect his interests by consulting with a multitude of different attorneys. If the court was confident that all of these attorneys could competently advise the client of the consequences of executing an arbitration provision, it should also be confident that the defendant attorney could do the same. In particular, the defendant attorney could later be called upon to advise a different client about the consequences of agreeing to arbitrate legal malpractice. In those circumstances, the court would find the consultation with the defendant attorney sufficient to hold that the client was adequately advised of the potential effects of agreeing to arbitrate.

At first glance, it would seem that the “Independent Counsel” states take a more conservative approach toward legal malpractice arbitration. The Independent Counsel standard, requiring an attorney to direct a potential client to consult with an independent attorney before agreeing to arbitrate, is one which leaves little wiggle room and provides great protection for the client. The inquiry accompanying this standard is restricted to answering one simple question: Did the client, who forfeited his right to a jury trial to adjudicate legal malpractice claims, seek independent counsel prior to signing the arbitration agreement?

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at *2. The provisions stated: “You [client] have also advised us [law firm] that you have obtained the advice of *separate counsel* with respect to this agreement before entering into it with us.” *Id.* (emphasis added). The court then referenced how the client not only signed the fee agreement but also initialed each page. *Id.*

144. *Id.* at *5-6.

Unfortunately, the benefits of this easily applied standard are offset by the unnecessary tension they place upon the attorney-client relationship. An alternative standard used in other states serves as a model for how Independent Counsel states can uphold their promise to protect clients without undercutting the public's faith in the legal profession, which is currently eroding at an alarming rate.¹⁴⁵

B. States Requiring that the Client Is Made Fully Aware of the Ramifications of Signing an Arbitration Provision

Attorney: Do you understand that you cannot sue me in court if you agree to arbitrate?

Client: Yes.

Attorney: Are you absolutely sure?

Client: Yes.

Attorneys practicing in Texas, Illinois and Pennsylvania bear the burden of ensuring that an independent attorney advises their potential clients of the ramifications of arbitrating legal malpractice claims. Alternatively, attorneys practicing in California, New York, and New Jersey face the greater challenge of advising the client themselves. A client able to enter into a retainer agreement without having to first consult independent counsel is an enticing prospect. This prospect increases the likelihood that the client will decide to retain the attorney. However, as normally is the case, with increased opportunity comes increased responsibility.

Attorneys in these states must confront a pivotal threshold issue: To what extent must the client be informed of the ramifications of agreeing to arbitrate legal malpractice claims in order to fulfill their ethical duties? The American Bar Association discussed this matter in a 2002 formal ethical opinion. Essentially, the ABA found that an agreement to arbitrate legal malpractice claims is ethical and permitted¹⁴⁶ when: (1) the client is *fully apprised* of the advantages and disadvantages of arbitration; (2) the client is given *sufficient information* to permit her to *make an informed decision* about whether to agree to the inclusion of the

145. See generally Stephen C. Shankman, Noel G. Lawrence & Annette Boyd Pitts, *Rebuilding Public Trust and Confidence in the Legal System . . . Through Education*, FLA. BAR J., Jan. 2000, at 12 ("Eroding public confidence in our courts endangers the courts' legitimacy and influence as democratic institutions. Without intervention, what long-term impact will negative public opinion have upon our legal system, an independent judiciary, and ultimately respect for and voluntary compliance with the rule of law?") (citations omitted).

146. ABA Formal Op. 02-425, *supra* note 68.

arbitration provision in the retainer;¹⁴⁷ and (3) the arbitration clause does not insulate the attorney from liability or limit the liability to which she would otherwise be exposed under common or statutory law.¹⁴⁸ Implicit in these requirements is a level of discretion to be exercised by the attorney. Allowing attorneys to exercise discretion when informing a client about the potential consequences of legal malpractice arbitration is something states like Texas, Illinois and Pennsylvania fail to consider. Permitting attorneys to use their own sound judgment when educating a client about legal malpractice arbitration shows that, as a profession, they should not have their actions second guessed.¹⁴⁹ If attorneys are expected to competently exercise their professional judgment to achieve their clients' desired legal results, they should also then be expected to properly advise their clients of the consequences of agreeing to arbitrate a legal malpractice dispute. California was one of the first states to elucidate the *attorney's* duty to fully advise the potential client of the ramifications of arbitration.

1. California

California courts reached a similar conclusion as the ABA¹⁵⁰ on the issue of what makes an agreement to arbitrate both ethical and permissible. The first case to address this issue was *Lawrence v. Walzer & Gabrielson*.¹⁵¹ This case involved a client represented by the defendant law firm in a divorce action.¹⁵² The law firm moved to compel arbitration after the client sued for legal malpractice and willful breach of fiduciary duty.¹⁵³ The client contended that the language of the arbitration provision¹⁵⁴ was not clear enough for her to appreciate that she was giving up her right to sue her attorney.¹⁵⁵ Before using contract principles to find that the client was not bound to arbitrate,¹⁵⁶ the Second

147. *Id.*

148. *Id.*

149. *See generally* BECK, *supra* note 24, at 50 BAYLOR L. REV. 547, 548 (arguing that "statistical information suggests a greater willingness of disappointed clients to second-guess their lawyer's performance").

150. *See supra* text accompanying notes 146-49.

151. 256 Cal. Rptr. 6 (Ct. App. 1989).

152. *Id.* at 7.

153. *Id.*

154. *Id.* The provision read: "In the event of a dispute between us regarding fees, costs or *any other aspect* of our attorney-client relationship, the dispute shall be resolved by binding arbitration." *Id.* (emphasis added).

155. *Id.* at 8.

156. *Id.* at 9. The provision required that any "dispute between [the lawyer and client] regarding fees, costs or any other aspect of our attorney-client relationship" be arbitrated. *Id.* Applying *ejusdem generis* to the arbitration clause, the court held that by listing specific disputes, such as those concerning "fees [and] costs," the need for the general term which followed, namely

District Court of Appeal reasoned that even though arbitration is favored, it was still necessary that a person agreeing to arbitrate do so voluntarily.¹⁵⁷ As a result of *Lawrence*, it is necessary for a California attorney contemplating the addition of an arbitration clause in a retainer agreement to ensure that the client is “fully advised of the possible consequences of that agreement.”¹⁵⁸ If the attorney can establish that the client comprehended the consequences of agreeing to arbitrate, then a court will find that the client voluntarily consented, and will enforce the arbitration provision.¹⁵⁹

In a more recent decision, the Second District Court of Appeal in *Gemmel Pharmacies, Inc. v. Vienna*¹⁶⁰ echoed the need for the client to understand the consequences of arbitrating a legal malpractice claim. The attorney in this case represented the client in the purchase of a pharmacy.¹⁶¹ The trial court denied the attorney’s request to compel arbitration, reasoning that the language of the retainer agreement¹⁶² was insufficient to give the client proper notice that the arbitration agreement would cover anything other than future fee disputes.¹⁶³ In affirming the trial court’s ruling, the Los Angeles County Superior Court agreed that the additional amendment to the retainer, which specifically mentioned legal malpractice claims, was insufficient and inapplicable because it

“any other aspect,” was eliminated. *Id.*

157. *Id.* at 8.

158. *Id.* at 10 (quoting State Bar of Cal., Formal Op. No. 1977-47).

159. *Cf.* Cal. Formal Op. 1989-116, *supra* note 30, at § F. The Committee clearly distinguishes between the arbitration clause being legally unenforceable and being unethical. Therefore, a California attorney may escape disciplinary proceedings by the State Bar if he includes an arbitration clause in a retainer without first ensuring that: (1) the client is aware that the arbitration clause is in the retainer, and (2) the client is fully aware of the ramifications of agreeing to it. Although able to keep his license, this same attorney would not be able to escape the scrutiny of having his legal malpractice claims decided before a judge or jury. *Id.*

160. No. B161303, 2003 WL 22865624 (Cal. Ct. App. Dec. 4, 2003).

161. *Id.* at *1. Note that in California, the appellate court must certify that a decision meets certain criteria to warrant its publication. The *Gemmel Pharmacies* decision, along with the *Ober v. Mazingo* decision, No. D038616, 2002 WL 432544 (Cal. Ct. App. Mar. 19, 2002), discussed below, were not certified and, thus have no precedential value in California. Even so, I included them in this Note because California attorneys may need them to recommend potential arguments given the disproportionate number of unpublished legal malpractice decisions in the state. *See* 1 MALLEN & SMITH, *supra* note 12, § 1.6 at 27, n.13. According to a Westlaw search by the treatise’s authors, only 38 of the 260, or 17%, of legal malpractice decisions heard in 2002 and 2003 were certified for publication. *Id.* An analogous and more recent LexisNexis search of all legal malpractice cases heard by the California Court of Appeals between January 1, 2004 and October 1, 2006 yielded similar results. Of 200 total cases, only 27 (13.5%) were certified for publication.

162. *Gemmel Pharmacies*, 2003 WL 22865624, at *1. The provision read: “In case any controversy shall arise between Client and Attorney under this contract, which the parties shall be unable to settle by agreement, such controversy shall be determined by arbitration.” *Id.*

163. *Id.* at *3.

came eight months after the execution of the original retainer.¹⁶⁴ The court affirmed because the original retainer agreement only covered fee disputes and nothing referred to “malpractice claims, or the substance of the representation.”¹⁶⁵ In essence, the attorneys did not fulfill their duty to fully advise the client of the consequences of arbitration. Although the *Lawrence* and *Gemmel Pharmacies* decisions are favorable to a client wishing to avoid arbitration, they are not enough to support the contention that a California client will always be able to side-step an arbitration provision in favor of litigation.

Specifically, the Court of Appeal for the Fourth District in *Ober v. Mozingo*,¹⁶⁶ elaborated on the holding in *Lawrence*.¹⁶⁷ The plaintiff in *Ober* was a certified public accountant suing the attorney that represented her in disputes concerning her termination and her remaining interests in the accounting firm where she previously worked.¹⁶⁸ The trial court held that the client’s knowledge and sophistication prevented her from arguing that she did not know what she was doing when she signed the retainer.¹⁶⁹ The appellate court affirmed the decision and rejected the client’s argument that the defendant law firm did not fulfill the fiduciary duty it owed to her. Specifically, the client argued that the defendant attorney did not inform her that she was foregoing her fundamental constitutional right to a jury trial by signing the retainer agreement.¹⁷⁰ Although the client’s business and educational background were only two factors that influenced the court’s holding,¹⁷¹ the mere fact that they were even considered may be instructive.

164. *Id.* at *3-6.

165. *Id.* at *5.

166. 2002 WL 432544, at *3 (“Neither the lack of an express waiver of the right to jury trial, or the failure of a party to read the entire agreement is grounds for invalidation of such agreement. Nor is an attorney required to encourage the prospective client to seek the advice of independent counsel before signing the agreement containing the arbitration provisions.” (citation omitted)); *see supra* note 161.

167. 256 Cal. Rptr. 6 (Ct. App. 1989).

168. *Id.* at *2.

169. *Id.* (citing unreported trial court decision). *But see* *Kamaratos v. Palias*, 821 A.2d 531, 539 (N.J. Super. Ct. App. Div. 2003) (“It is not sufficient, moreover, that the client [has] experience in business to permit a conclusion that the client made an informed decision to agree to proceed with arbitration in all instances.”).

170. *Ober*, 2002 WL 432544, at *3.

171. *Id.* at *4. The court also focused on how the client was given a copy of the agreement, the ample time she had to review the agreement, and that the arbitration provision was not buried in the document so as to conceal it from her. *Id.*

An attorney desiring to arbitrate should not feel secure that a court will always preclude a sophisticated client from pleading ignorance.¹⁷² Even so, attorneys facing a malpractice suit can take some consolation from knowing that there is a slightly better chance of compelling arbitration against a sophisticated client, as opposed to an unsophisticated client who does not have the same educational or business prowess possessed by the client in *Ober*.¹⁷³ Unfortunately, this consolation is short-lived due to the California attorney's ethical obligations. These responsibilities prevent any reasonable attorney from being absolutely certain she can compel arbitration against a sophisticated client as opposed to an unsophisticated client.

The ethical responsibilities of a California attorney reflect the attorney's role as informer of the consequences of agreeing to arbitrate. Essentially, the California Rules of Professional Conduct dictate that it is the attorney's duty to: (1) inform the client, in *writing*, that he *may* seek the advice of an independent attorney of his choice; and (2) to give the client a "reasonable opportunity to seek [such] advice."¹⁷⁴ Aside from this writing requirement, New York imposes analogous ethical obligations upon its attorneys.

2. New York

New York is quite similar to California in the ethical obligations it imposes on attorneys who intend to include a provision to arbitrate legal malpractice disputes in their retainer agreements. The New York Lawyer's Code of Professional Responsibility is broken up into Ethical Considerations ("EC") and Disciplinary Rules ("DR").¹⁷⁵ The ECs are guidelines that every New York attorney should aspire to attain.¹⁷⁶ In contrast, the DRs set the minimum level of conduct, below which no attorney can fall without being subject to disciplinary action.¹⁷⁷ Because

172. *See generally, e.g.,* Clark, *supra* note 13, at 848-49 ("An unsophisticated client is a person who is unfamiliar with the legal process and the intricacies of the law, and a sophisticated client is one who is fairly knowledgeable about the legal process or is represented by independent counsel.")

173. 2002 WL 432544, at *1.

174. CAL. RULES OF PROF'L CONDUCT § 3-400(b) (2006) (emphasis added). *But see* Cal. Formal Op. 1989-116 (holding that the ability to arbitrate legal malpractice claims does not apply to situations where there is a "preexisting attorney-client relationship").

175. N.Y. STATE B. ASS'N., THE LAWYER'S CODE OF PROF'L RESPONSIBILITY 1 (2005) [hereinafter N.Y. CODE], available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/LawyersCodeofProfessionalResponsibility.pdf.

176. *Id.* (stating that "[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive").

177. *See id.* at 2 ("The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in

of their aspirational nature, the ECs standing alone do not deter unethical conduct. However, any deterrent effect may be amplified because the ECs and DRs can be read together when determining if an attorney has violated her ethical responsibilities.

New York's Code addresses, through a mere EC, the attorney's duty to advise the client that the client can achieve a better understanding of the consequences of agreeing to arbitrate by consulting independent counsel.¹⁷⁸ As a result, this prohibition does not have the same deterrent effect as a DR, which carries with it disciplinary implications for failure to comply. The failure to be an enforceable violation often leads ECs to be overlooked or purposely disregarded by a court as not being binding precedent upon its ultimate ruling.¹⁷⁹ This was the case in *Buckwalter v. Napoli, Kaiser & Bern LLP*,¹⁸⁰ where the Southern District of New York found that a law firm making itself available to answer the client's questions was sufficient to hold that the client was fully advised of the ramifications of agreeing to arbitrate legal malpractice actions.¹⁸¹

In *Buckwalter*, the court rejected the clients' argument that the actions of the defendant law firm were a violation of an EC, reasoning that the ethics opinion sanctioning the violation of the EC was non-binding authority for the court.¹⁸² Instead, what followed in the opinion was a factual inquiry into what the law firm did to advise the clients of the consequences of arbitration. The court was impressed with a letter from the referring attorney to the plaintiffs, advising them that the firm was available to answer any questions regarding the retainer agreement by telephone.¹⁸³ Additionally, in some instances the referring firm even

character.”).

178. *Id.* at EC 6-6 (“A lawyer should not seek, by contract or other means, to limit prospectively the lawyer’s individual liability to the client for malpractice nor shall a lawyer settle a claim for malpractice with an otherwise unrepresented client without first advising the client that independent representation is appropriate.”).

179. See *Buckwalter v. Napoli, Kaiser & Bern LLP*, No. 01 Civ. 10868, 2005 WL 736216, at *7 (S.D.N.Y. Mar. 29, 2005) (“[T]he ethics opinions cited by Plaintiffs are not binding on the Court”); see also *Watts v. Polaczyk*, 619 N.W.2d 714, 718 (Mich. Ct. App. 2000) (“These opinions, though instructive, are not binding on this Court.”). But see *In re Taylor*, 363 N.E.2d 845, 847 (Ill. filed May 20, 1977) (“The [Illinois Code of Professional Responsibility], it is true, is not binding on the court. However, such canons of ethics have been found to ‘constitute a safe guide for professional conduct and an attorney may be disciplined for not observing them.’” (quoting *In re Krasner*, 204 N.E.2d 10, 14 (Ill. filed Jan. 21, 1965))). See generally Ramos, *Reforming Lawyers*, *supra* note 21, at 2620 (“Ethical standards are increasingly being accepted as the standard of care in legal malpractice suits.” (citation omitted)).

180. 2005 WL 738216, at *1.

181. See *id.* at *8.

182. See *id.* at *7.

183. *Buckwalter*, 2005 WL 736216, at *8.

went to the trouble of setting up appointments with the individual plaintiffs to answer any questions.¹⁸⁴ This availability to answer questions, combined with the plaintiffs' failure to take advantage of this resource, was sufficient for the court to compel arbitration. That is, the clients had several opportunities to be advised of the consequences of the arbitration agreement but instead chose not to take advantage of them.¹⁸⁵

New Jersey's ethical rules also account for situations where attorneys attempt to advise their clients to seek independent counsel before agreeing to arbitrate claims of legal malpractice, but the client fails or refuses to do so.

3. New Jersey

Despite the similarity between the ethical rules governing arbitration of legal malpractice claims in New Jersey and Texas,¹⁸⁶ New Jersey's rules, unlike those in Texas, give an attorney the opportunity to represent a client even if the client does not seek independent counsel. Like Texas, the New Jersey Rules of Professional Conduct only permit an attorney to limit malpractice liability when such acts are permitted by law and when the client is represented by independent counsel.¹⁸⁷ As explained above, a client is likely to characterize an attorney's attempt to arbitrate legal malpractice claims as an unethical way of limiting his liability.¹⁸⁸ However, New Jersey offers an opportunity for an attorney to comply with ethical rules and, at the same time, include an arbitration provision in her retainer. Rule 1.8(h)(1)-(2) of the New Jersey Rules of Professional Conduct account for situations where the attorney recommends that the client speak to independent counsel and the client "refuses" to do so.¹⁸⁹ In those circumstances, if the client still wishes for the attorney to represent him, then the attorney is permitted to enter into

184. *Id.*

185. *Id.* The court found defendant attorneys had no reason to believe that further explanation of the provisions within the agreement was necessary. The court focused on a letter that the referral attorney attached to the proposed retainer agreement. The letter encouraged a client "to discuss any questions [he] might have about [his] individual case or other aspects of [the] litigation." *Id.* The court relied on the fact that, at that time, the plaintiffs did not express they were having "any difficulties understanding their respective retainer agreements." *Id.*

186. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(g) (2006).

187. *See* N.J. RULES OF PROF'L CONDUCT R. 1.8(h) (2006).

188. *See supra* notes 65-69 and accompanying text.

189. N.J. RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2006) ("A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice [to consult independent legal counsel] and the lawyer nevertheless continues to represent the client at the client's request.").

a retainer requiring legal malpractice arbitration.¹⁹⁰ It is necessary to probe deeper to see what this provision implicitly says about the state's faith in the members of the bar.

It is telling that New Jersey's ethical rules account for the possibility that a client would still want to be represented by an attorney even after the attorney has advised the client that he has the right to seek independent counsel. It represents New Jersey's belief that the public should trust the bar and has good reason to do so. This accommodation in the state's ethical rules is necessary for those clients who still respect the integrity of the legal profession. The lessons learned from this accommodation are applicable to the task of reconstructing confidence in those clients who either lost faith in the profession,¹⁹¹ or who never had any from the start. While New Jersey's professional rules are similar to that of Texas, important judicial decisions make them more similar to California's because independent counsel is not absolutely necessary to ensure that a client is fully informed of the ramifications of agreeing to arbitrate.

The major case discussing whether legal malpractice claims are arbitrable in New Jersey is *Kamaratos v. Palias*.¹⁹² In this case, the lower court denied the client's request to invoke a New Jersey arbitration committee because he signed an agreement providing for private arbitration.¹⁹³ Similarly to the *Lawrence* court in California,¹⁹⁴ the *Kamaratos* court focused on the ability of the client to understand what rights he was giving up when he agreed to arbitrate legal malpractice claims. The Superior Court rejected the contention that the client, as a minority shareholder in a corporation with abundant business experience, was so sophisticated that he would automatically understand that he was giving up his right to trial by agreeing to arbitrate.¹⁹⁵ Instead, the court found it was inappropriate to hold this client to the "limited appealability of a commercial arbitration award, and a waiver of the right to a jury trial, without a clearer statement that the client understood the

190. *Id.* R. 1.8(h)(2).

191. See generally BECK, *supra* note 24, at 50 BAYLOR L. REV 547, 548. Beck argues that until recent history, "the public exhibited considerable deference to expertise. But today, the widely-publicized mistakes of tanker captains, architects, engineers, and physicians have made the attorney a likely target . . ." *Id.*

192. 821 A.2d 531 (N.J. Super. Ct. App. Div. 2003).

193. *Id.* at 533-35.

194. 256 Cal. Rptr. 6 (Ct. App. 1989).

195. *Kamaratos*, 821 A.2d at 539 ("It is not sufficient, moreover, that the client have experience in business to permit a conclusion that the client made an informed decision to agree to proceed with arbitration in all instances.").

effects] of [the] agreement to arbitrate.”¹⁹⁶ Similarly, the court in *Leodori v. Cigna Corp.*¹⁹⁷ focused on the lack of evidence demonstrating that the worker signed the agreement, or that he intended to waive his right to a trial.¹⁹⁸ In both of these cases, the courts held that the clients did not enter voluntarily into the agreement to arbitrate because they were not advised in writing of the consequences that would result from agreeing to arbitrate. While it is clear that the client must enter into the agreement voluntarily, what is more apparent is the significance of allowing an attorney to advise the potential client of the consequences of agreeing to arbitrate legal malpractice claims. Keeping this responsibility in the hands of the attorney will produce an overall benefit to the attorney-client relationship in the future.

IV. CONTRARY TO POPULAR BELIEF, ATTORNEYS CAN, AND *SHOULD*, BE TRUSTED TO PROTECT THE INTERESTS OF THEIR POTENTIAL CLIENTS

Jokes and jabs about the sincerity and integrity of the legal profession are in no way lacking. Though such jokes may even cause many attorneys to chuckle, they are an honest reflection of how some in society perceive members of the profession. As previously discussed, the client’s protection is the driving force behind the requirement that a client must hire an attorney before he can hire another attorney.¹⁹⁹ Independent Counsel states need to understand the message that this requirement sends to the public at large. Two assumptions result from providing protection of a certain class of people: (1) the class is worthy of protection because its members cannot protect themselves; and (2) the evil being protected against is great enough to justify the protection. While the former assumption provides a plain message and provides the public with a sense of importance, the latter sends the wrong message. A person turns to an attorney for help enforcing his rights as a citizen. States need to make a concerted effort to reestablish the belief that hiring an attorney will help and not hurt. The public’s perception of attorneys should be a concern significant enough to compel states like Texas, Illinois, and Pennsylvania, to rethink their policies regarding legal malpractice arbitration.²⁰⁰

Moreover, if Independent Counsel states certify that a person is of

196. *Id.* at 538 (citation omitted). *Contra* *Watts v. Polaczyk*, 619 N.W.2d 714, 719 (Mich. Ct. App. 2000) (finding that the signature of the client was enough to show he understood they would have to arbitrate legal malpractice claims).

197. 814 A.2d 1098 (N.J. 2003).

198. *Id.* at 1105-07.

199. *See supra* notes 94-98 and accompanying text.

200. *See supra* notes 21-24 and accompanying text.

adequate moral character to practice law, they must then also trust that these same morally fit people will wisely exercise their judgment to protect a client's best interests.²⁰¹ This judgment will force the attorney to proceed into an attorney-client relationship only after she first adequately explains the consequences of agreeing to arbitrate any legal malpractice claims.

Confidence breeds confidence. Only after Independent Counsel states take steps demonstrating their confidence in the legal profession will the public follow suit. The reputation of the legal profession can be restored to its former level of reverence only after attorneys are permitted to fully advise their potential clients of the consequences flowing from agreeing to arbitrate legal malpractice claims. Once the duty is shifted back to the attorney, the states and their bar associations must supply the necessary tools to ensure that it is easily fulfilled; specifically, by providing clear and concise information to the public, free from legalese, on their organization's Internet homepage.²⁰²

V. CONCLUSION: STATE BAR ASSOCIATIONS AND TECHNOLOGY WORKING TOGETHER TO RESTORE FAITH IN ATTORNEYS

Each of the states discussed above uses different means of determining whether arbitration provisions should be enforced in legal malpractice claims. Although the two groups differ slightly, they share a common concern: ensuring that the client has the information needed to make an educated decision of whether to forgo his right to trial and agree to arbitrate. Each state discussed in this Note has ethical or judicial rules designed to guarantee that the client has access to all information that is material to his ultimate decision of whether to retain an attorney. The disagreement between the two groups stems from their requirements as to who should be the source of such information. In states like Texas, Illinois and Pennsylvania, the source is outside counsel, while in states like California, New York and New Jersey, the source is the attorney to be retained.

In this new era of free-flowing information, both groups and their respective bar associations need to step up their efforts to ensure that information that can educate potential clients about the consequences of

201. TEX. BD. OF LAW EXAMINERS, RULES GOVERNING ADMISSION TO THE BAR OF TEXAS, R. IV(b) ("The purpose of requiring an Applicant to possess present good moral character is to *exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients . . . or in a violation of the Texas Disciplinary Rules of Professional Conduct.*" (emphasis added)).

202. BLACK'S LAW DICTIONARY 913 (8th ed. 2004) (defining "legalese" as "[t]he jargon characteristically used by lawyers, esp[ecially] in legal documents").

agreeing to arbitrate is readily available, in the form of a pamphlet, flyer, or website. Further, this information should be as accessible on the Internet as the schedule for the local train or movie theater. Providing this information allows attorneys, after advising potential clients of the consequences of arbitrating legal malpractice claims in person, to direct the client to a reliable secondary source of information. If the client needs reassurance, he can then consult the bar association's pamphlet, flyer or website to confirm the accuracy of the information he received from the attorney. After confirming the information's validity, the client will be able to confidently enter into the attorney-client relationship knowing he has selected an honest and trustworthy person to protect his interests.

*Louis A. Russo**

* J.D. candidate, 2007, Hofstra University School of Law. Many thanks to Professor Bennett J. Wasserman for proposing the topic of this Note and his honest critiques. Thanks to Stefanie Hyder, Erick Rivero, and Stephanie Restifo for their tireless efforts in getting this Note ready for publication. Also, thank you to my editor, Angelina Petti, who helped me to cultivate the many ideas included in this Note. Many thanks to Arnold F. Mascali, Frank L. Russo, Sean J. McKinley, Allison Green, Andrea Yoon, and Benjamin Lewis for their thoughtful readings, insightful comments and revisions. Last and certainly not least, thank you Mom and Dad. Without your love, support and constant encouragement, I would not be where I am today. We have come a long way from the bubble car!