

ETHICS OPINION

RO-02-04

QUESTION:

"I want to get an opinion from the Alabama State Bar regarding whether or not a law firm can have an arbitration provision in their employment contract with their client. Please let me know whether or not this is ethical."

ANSWER:

The inclusion of a binding arbitration provision in the employment contract between you and your clients would prospectively limit your liability to your clients for malpractice within the meaning of Rule 1.8(h). Accordingly, you may ethically include a binding arbitration provision in your attorney-client contract only if the client is independently represented by counsel in connection with the negotiation and execution of the contract.

DISCUSSION:

Rule 1.8(h) of the Rules of Professional Conduct provides, in pertinent part, as follows:

"A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement . . .".

Applying the above-quoted Rule to your inquiry, the determinative issue appears to be whether binding arbitration prospectively limits the lawyer's liability to a client for malpractice.

It would appear that the primary purpose to be achieved by requiring binding arbitration as a condition of representation by an attorney is to preclude the client from suing the attorney for malpractice in a court of law and before a jury. Therefore, a client who signs a binding arbitration agreement with an attorney is giving up rights the client is otherwise constitutionally and legally guaranteed, i.e., to have a jury determine whether and to what extent the attorney is guilty of malpractice and, if so, the amount of damages to be awarded the client in compensation therefor. The fact that binding arbitration denies the client adjudicatory rights afforded by the United States Constitution, the Alabama Constitution and state law constitutes, in the opinion of the Disciplinary Commission, a limitation on the lawyer's liability to a client for malpractice. It is, therefore, the opinion of the Commission, that the inclusion of a binding arbitration provision in the employment contract between you and your clients would prospectively limit your liability to your clients for malpractice within the meaning of Rule 1.8(h). Accordingly, you may ethically include a binding arbitration provision in your attorney-client contract only if the client

is independently represented by counsel in connection with the negotiation and execution of the contract.

The rationale for the requirement of independent counsel is inexorable. The client must not be placed in a position of surrendering significant legal and constitutional rights without fully comprehending the ramifications thereof. Since the client is surrendering these rights as a precondition of obtaining your services, you would have a conflict of interest in counseling and advising the client with regard thereto. Such counsel and advice must come from an attorney whose interest would not be affected by the client's decision. The requirement of independent counsel is particularly compelling where, as in most instances, the client is relatively uneducated and unsophisticated with regard to legal matters and would be, for the most part, otherwise at the mercy of the attorney who has drafted the employment contract.

LGK/vf

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