THE BOTTOM LINE

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DRAFTING DESIRABLE DISPUTE RESOLUTION PROVISIONS FOR YOUR RETAINER AGREEMENT

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In the June 2007 issue of *The Bottom Line,* Gideon Grunfeld eloquently explained the interplay between, and case law affecting, the Mandatory Fee Arbitration Act (B&P §6200 et. seq.) and the California Arbitration Act (CCP §1280 et. seq.). While some of the cases referenced in his article are also discussed below, this article will focus on analyzing the statutory and case law in order to select the most appropriate dispute resolution provisions to include in your retainer agreement.

For most attorneys, the primary objective in any dispute resolution provision is the avoidance of a jury trial in a malpractice action. The prevalent belief that the public is biased against attorneys would suggest that binding arbitration is the preferred dispute resolution venue. However, many attorneys would prefer to litigate fee disputes.

Can the best of both worlds be achieved? The issues to consider with respect to arbitration and/or litigation of disputes are discussed in turn below.

Should You Opt For Arbitration?

A binding arbitration provision in a retainer agreement is enforceable as to malpractice claims if it unambiguously applies to such claims. *Powers v. Dickson* (1997) 54 Cal. 4th 1102. Although binding arbitration of a malpractice claim is desirable, some attorneys hesitate to arbitrate due to concerns about the lack of available discovery, the limited right to appeal an incorrect decision of law and/or the potential arbitrariness of the arbitrator.

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The discovery concern can be addressed by including a provision that "discovery shall be permitted pursuant to the provisions of C.C.P. §1283.05," which allows the parties "to obtain discovery ... and ... to use and exercise all of the same ... procedures ... as provided in [the Civil Discovery Act, commencing at C.C.P. §2016.010]." The issuance of subpoenas and notices to appear (C.C.P. §1985 et. seq.) are likewise authorized by C.C.P. §1283.05.

Concerns with the limited right to appeal and/or the potential arbitrariness of an arbitrator can be ameliorated by providing that the arbitration be conducted by a panel of three arbitrators. Such a panel (as compared to a single arbitrator) is much less likely to reach an emotional, as opposed to a legally reasoned, decision. The higher fees associated with a three person panel may provide the added benefit of deterring the filing of a malpractice case in the first instance.

Your arbitration provision can also specify a desired arbitration tribunal (such as JAMS or ADR Services, Inc.). You will probably want to add language to the effect that each party will bear his own costs and fees incurred (another disincentive, or at least a lack of incentive, for the client's malpractice attorney).

In contrast to its enforceability with respect to a malpractice action, the enforceability of a binding arbitration provision is severely restricted as to fee disputes. In *Alternative Systems, Inc. v. Carey* (1998, 1st Dist.) 67 Cal. 4th 1034, the Court invalidated a binding arbitration provision with respect to a fee dispute, holding that the right to arbitrate fee disputes was subject to the Mandatory Fee Arbitration Act ("MFAA") which provides that a client has the right to a trial *de novo* after a non-binding arbitration before the local bar association.

However, in *Aguilar v. Lerner* (2004) 32 Cal. 4th 974, the California Supreme Court upheld a binding arbitration provision with respect to a fee dispute where the client was determined to have waived his MFAA rights by instituting a malpractice suit before the attorney filed his fee claim.

Aguilar was decided based on the MFAA provisions as they existed prior to certain 1996 amendments. The Aguilar ruling left two open questions:

1) Was Alternative Systems effectively overruled, as a concurring opinion of Justice Chin suggested (i.e., will a binding arbitration provision for fee disputes be upheld when the client does not waive his MFAA rights and first participates in non-binding arbitration before the local bar association)?
2) Are binding arbitration fee dispute provisions invalid in light of the 1996 amendments to the MFAA, as suggested in the concurring opinion of Justice Moreno (i.e., was it the legislature's intent, in stating that the parties may agree to binding arbitration "after the dispute over fees … has arisen" (B&P §6204), to outlaw pre-dispute binding arbitration provisions entirely, even where the client waives his MFAA rights)?

These questions were answered, at least in the 4th and 2d Districts, by two recent decisions. The Court in *Schatz v. Allen Matkins* (2007, 4th District) 146 Cal. 4th 674, held that a binding fee arbitration provision was trumped by a client's election to submit the fee dispute to non-binding arbitration under the MFAA, thereby concluding that Aguilar did not overturn *Alternative Systems*. In *Ervin, Cohen & Jessup v. Kassel* (2007, 2d District) 147 Cal. 4th 821, the Court held that a client's rights under the MFAA could be waived by the client's failure to file a request for MFAA arbitration within 30 days of receiving notice of the right to do so. As a result, the post-1996 binding arbitration provision was upheld with respect to the fee dispute (notwithstanding the 1996 amendments to the MFAA). It should be noted, however, that the California Supreme Court remains to be heard on these questions.

The result of the foregoing is that you may include a binding arbitration provision in your retainer agreement, but it will not be effective as to fee disputes unless the client waives his MFAA rights.

An important caveat is the potential preemption of the MFAA by the Federal Arbitration Act in applicable cases. In *Shepard v. Edward Mackay Enterprises, Inc.* (2007, 3d Dist.) 2007 DJDAR 3883, the Court confronted a California statute that expressly permitted a court action (in a construction design defect case) "even if the purchaser signed an agreement containing an arbitration clause." Noting that "the FAA preempts conflicting state anti-arbitration law," the Court upheld an arbitration

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provision in a contract evidencing a transaction affecting interstate commerce. This ruling arguably applies, by analogy, to fee disputes.

A final caveat with respect to arbitration provisions: you should inquire of your malpractice carrier as to whether your insurance policy imposes any limitations on your retainer agreements. Some carriers, rightly or wrongly, are averse to using a venue that does not provide the right to trial by jury.

Or Should You Opt for Litigation?

With respect to fee disputes, attorneys are usually better served by litigation, as opposed to arbitration. In the first instance, the costs incurred (filing and service of the Complaint) are usually lower than those required for arbitration (filing and, with many providers, ongoing case management fees). Also, there are no additional costs for the services of a Judge, as opposed to costs for the arbitrator (which can be quite high). Since it is usually the attorney who will initiate a fee dispute action and, therefore, will be laying out the required costs, the attorney is best served when those costs are low. In contrast, since the client will usually be initiating (and funding the ongoing) arbitration of a malpractice dispute, the attorney is best served when those costs are high.

A quicker resolution also is often reached with litigation, especially with "collection cases" that Courts will diligently manage on a fast track. The opposing side can often delay arbitration as arbitrators are typically not as insistent on moving cases forward as are Judges. This may be because the arbitrator makes money each time he is involved in the matter and/or because the arbitrator wishes to keep everyone happy (and as a potential source of future business).

Arbitrators also seem to have more of a tendency to "compromise" fee claims than do Judges. This is another factor that weighs in favor of litigating fee disputes.

Some additional benefits of litigation are the right to appeal incorrect decisions of law, the absence of a need to petition for confirmation of the arbitration award (with its attendant cost and delay) and the fact that a civil case will have to be filed in any event if provisional remedies (such as an RTAO, TRO, etc.) will be sought.

Another potential benefit to consider in litigation is the inclusion of an attorney fee-shifting provision. If you represent yourself, you cannot recover attorneys' fees in fee dispute litigation. *Trope v. Katz* (1995) 11 Cal. 4th 274. However, if you engage other attorneys to represent you, an award of contractual attorneys' fees incurred is recoverable (even if you engage counsel on a contingency fee basis).

Since attorneys are much more likely to prevail in fee disputes than are clients, if you will not be representing yourself, you should include a provision in your retainer agreement awarding actual attorneys' fees and costs incurred to the prevailing party. This will increase both the exposure to your client (who may have to pay both his attorneys' fees and yours) and your potential gross recovery. In practice, such a provision provides great leverage towards obtaining a favorable resolution early in the litigation process.

Engaging other counsel to represent you also provides the benefit of allowing you to concentrate on matters requiring your own particular expertise—where you will be earning new fees rather than spending your time chasing fees you have already earned.

Opt for the Best of Both Worlds!

So, which dispute resolution venue should you choose? The question erroneously presupposes that a choice must be made. In reality, nothing precludes the inclusion of two separate dispute resolution provisions in your retainer agreement; one provision requiring binding arbitration of all non-fee disputes (before a three judge panel, with discovery rights and with each side to bear their own costs and fees) and a second provision stating that all fee disputes will be litigated, subject to the client's Mandatory Fee Arbitration Act rights, with an award of actual attorneys' fees and costs incurred to the prevailing party (if you will not be representing yourself). Structuring your dispute resolution provisions in this manner will provide you with the best of both worlds.

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