NJ Attys Fear Arbitration Clause Issue Will Muddle Retainers

By Jeannie O'Sullivan

Law360 (March 30, 2021, 6:56 PM EDT) -- New Jersey lawyers say they fear that a recent state Supreme Court decision nixing the arbitration clause in a retainer agreement could give rise to onerous and awkward requirements to ensure clients are well-informed about waiving the right to a jury trial in dealings with their own attorneys.

Garden State attorneys want to clarify what's expected of them in terms of ensuring clients understand the ramifications of arbitration if disputes such as legal malpractice claims arise, the issue in the New Jersey Supreme Court's December ruling nullifying a Sills Cummis & Gross PC arbitration clause. The high court has referred the matter to the Advisory Committee on Professional Ethics for further discussion.

At the same time, attorneys are hoping ethics authorities won't require firms to advise prospective clients to get independent legal advice on arbitration clauses before entering into a retainer agreement, a duty they say would pose an awkward, impractical and time-consuming burden on the lawyer-retention process. The justices ruled that while the firm didn't violate ethics rules, it didn't go far enough to explain the arbitration clause to client Brian Delaney.

"It would also involve an unnecessary expense to the client, as a second attorney would need to not only review the arbitration clause, but also to gain some understanding of the facts involved in the underlying engagement to properly advise the client," said Arthur D. Felsenfeld of Jaspan Schlesinger LLP, a New York-based attorney who has represented clients in arbitrations for more than 40 years.

It's also a "bad reflection on the legal community if attorneys must require their clients to review the retainer agreements with separate counsel," said Marc Garfinkle, a New Jersey solo practitioner who has focused exclusively on legal ethics and discipline, bar admission and judicial conduct for the past decade.

Disclosure requirements for arbitration clauses make sense to Fox Rothschild LLP attorney Robert S. Tintner, but the Philadelphia-based litigator predicted that a rule requiring advice to seek independent counsel to review them could face "heavier opposition" than less onerous parameters.

In the Delaney case, a Sills Cummis attorney gave Delaney a four-page retainer agreement containing an arbitration clause with a link to a 33-page document explaining the procedures for resolving issues through arbitration. Affirming an Appellate Division's panel's finding, the high court ruled that Delaney could pursue his malpractice claim in court because the arbitration clause wasn't enforceable.

While the justices determined that the firm didn't violate any ethics rules, they nonetheless held that the firm should have explained to Delaney, either orally or in writing, that he was giving up his rights to a jury trial and to broad discovery, and that the matter would be decided by an arbitrator or arbitration panel that he may have to pay for.

Acknowledging attorney professional conduct rules around the nation, the justices said courts or ethics authorities in states including Louisiana, Michigan, Pennsylvania and Virginia require that lawyers advise prospective clients to seek independent counsel to review arbitration clauses.

It would be a "mistake" for New Jersey to impose such a duty, said Michael S. Stein of Hackensack, New Jersey-based Pashman Stein Walder Hayden PC, which represented the Bergen County Bar Association as an amicus in the Delaney case.

The Bergen County bar thinks the Appellate Division unfairly imposed new standards on attorneys with respect to section 1.4(c) of the state's Rules of Professional Conduct, which says that attorneys "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Previously, attorneys felt they were satisfying the state's professional standards as long as

they adhered to the standard established in the New Jersey Supreme Court's landmark decision in Atalese v. U.S. Legal Services Group, according to Stein. Atalese, which has been the state's guiding case law in arbitration matters since it was decided in 2014, held that arbitration clauses must be "clear and unambiguous" in order to be enforceable.

"[The Delaney] case raised an issue that law firms didn't even know existed prior to the Appellate Division decision," Stein said, referring to what the Bergen bar feels were new standards imposed with respect to section 1.4(c).

Both the Bergen County bar and the New Jersey State Bar Association hope the ethics committee maintains the status quo while clarifying the parameters for making the necessary disclosures about arbitration agreements. The Bergen County bar has modeled its recommendation on an opinion issued by the American Bar Association, which says clients must be informed that agreeing to arbitration forecloses the advantages of a trial and that they may have to fund the cost of the arbitration.

Like the Bergen County attorneys, the NJSBA recommends that the ethics committee formally spell out the disclosure rules that for now are implied in section 1.4(c), but refrain from expanding the requirements.

NJSBA trustee David Edelberg, a Scarinci Hollenbeck LLC partner who co-chairs the statewide bar association's Professional Responsibility Committee, echoed Stein's view about the importance of a candid, but concise, attorney retention process.

Large, sophisticated companies might have an advantage in terms of understanding arbitration clauses, according to Edelberg. However, he said "it just seems impractical" to have to advise smaller business clients and individuals to seek additional counsel to review an arbitration clause in a retainer agreement.

"A lot of times when someone comes in to see you, they need quick action," Edelberg said.

The New Jersey Association for Justice, another amicus in the Delaney case, also wants clarity — but in the form of abolishing such arbitration agreements. In its brief, the association urged the court to create a "bright line" rule prohibiting them. Citing the "inherent imbalance of power" of the attorney-client relationship and the "high ethical duties" imposed through the Rules of Professional Conduct, the association, which describes itself

as "dedicated to protecting New Jersey's families," alternatively urged the court to specify requirements that strictly adhere to Atalese.

The Delaney case and the subsequent scrutiny on the retainer agreements reflect the continued controversy over arbitration raging on a national scale, said professor Robert Rubinson of the University of Baltimore School of Law. He noted that Congress is currently considering legislation, the Federal Arbitration Injustice Repeal, or FAIR, Act, that would prohibit agreements that force arbitration of antitrust, consumer, civil rights and employment disputes.

An explanation of the clause seems prudent given the exploitative potential of arbitration clauses and the fact that attorneys are fiduciaries for their clients, Rubinson said, but efforts to enact stricter rules — such as to advise prospective clients to seek out attorney review of the clause — have in the past have met with substantial opposition from the bar.

"Such a requirement could serve to highlight the importance of the clause to clients, but it's hard to imagine a potential client actually seeking out a lawyer to get advice about a clause contained in the retainer agreement prepared by the lawyer that a client wants to retain," Rubinson said.

The fact that arbitration agreements can sometimes benefit clients and firms in matters such as fee disputes complicates the issue, said professor Brian Sheppard of Seton Hall University School of Law, noting that the American Bar Association approves of arbitration for fee disputes.

It's when arbitration clauses in retainer agreements extend to disputes like malpractice claims that things get murky, according to Sheppard, who thinks a duty to advise clients to seek outside counsel would "spell the end" for arbitration clauses in retainer agreements.

However, Sheppard is aligned with attorneys like McCarter & English LLP partner Jose L. Linares who think that malpractice lawsuits are the very type of dispute that require a judge and jury in a courtroom setting.

Linares, New Jersey federal court's former chief justice who now chairs his Newark-based firm's alternative dispute resolution practice, suspects arbitration clauses in retainer agreements represent an "endangered species."

"At the end of the day, these are legal interpretations that are really best suited for court resolution," Linares said.

--Additional reporting by Nick Muscavage. Editing by Jill Coffey.