

## OPINION NO. 2003-7

**Synopsis:** Attorneys may include general binding arbitration clauses in their representation agreements, so long as the potential client is advised that he or she or it is encouraged to seek independent counsel before agreeing to the arbitration terms of the representation agreement.

**Question:** Is it a violation of the Vermont Rules of Professional Responsibility for an attorney to include a general binding arbitration clause in the attorney's representation agreement?

**Facts:** A Vermont law firm contemplates the inclusion of a binding arbitration provision in its retainer agreements, but questions have arisen as to whether such a provision would be "per se" unethical and a violation of the Rules of Professional Responsibility.

**Analysis:** The Rules of Professional Responsibility contains no language that prohibits the inclusion of a clause in an attorney's agreement to represent a client that mandates resolution of any dispute that may later arise between the attorney and the [former] client.

Nor is there any such prohibition in either the federal arbitration act (9 U.S.C. secs.1 et seq.) or the Vermont arbitration statutes (12 V.S.A. secs. 5651 et seq.).

Accordingly, the straight-forward answer to the question is, "No, there is no violation established by the Vermont Code of Professional Responsibility with respect to the inclusion of a general, binding arbitration clause in an attorney's agreement to represent a putative client."

Three caveats come to mind.

First: The putative client normally is unrepresented when presented with a representation agreement. In order to avoid having the agreement's terms vitiated due to an attorney's having been found to have unfairly utilized his or her favorable bargaining position, the attorney should, in writing, advise the putative client that he or she [the client] may seek independent counsel before agreeing to the arbitration terms of the employment agreement. If the prospective client declines to seek independent counsel, the attorney nevertheless must (1) fully apprise the client as to the advantages and disadvantages of binding arbitration, and (2) obtain the client's informed consent in writing to the inclusion of the binding arbitration clause in the representation agreement.

Second: The provision of Rule 1.8 (h) should be considered. That rule reads as follows:

“Rule 1.8. . . .

(h) 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, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.”

While a mandatory arbitration clause does not per se limit an attorney’s potential liability for malpractice, in that it merely requires the type of forum for any determination of malpractice liability, a court might construe the rule more broadly so as to consider any such arbitration clause as being inapplicable to a claim in tort for alleged malpractice.

Third: 12 V.S.A. sec. 5652 sets forth the wording that should be used in order for an arbitration clause to be enforceable.

Conclusion: There appear to be no Vermont cases on point. Those other jurisdictions that have considered the question have not struck down mandatory arbitration clauses. Also, ABA Formal Opinion 02-425 sanctions the inclusion of provisions requiring binding arbitration of disputes concerning fees and malpractice claims. ABA/BNA Lawyer’s Manual on Professional Conduct, ABA Formal Opinions, Formal Opinion 02-425, at 1201:115-19 (2003). Moreover, the American Bar Association has under active consideration at this time the approval of an amendment to the Model Rules that would sanction the use of mandatory arbitration clauses.<sup>1</sup>

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<sup>1</sup> There is some support for the view that binding arbitration should be available only when the client demands it. In other words, while the representation agreement would provide for resolution of disputes between the attorney and the client by arbitration, the client would have the right to veto an attorney’s invocation of the binding arbitration clause. Thus, the option for binding arbitration would rest solely with the client, and the arbitration clause would have to be so worded.