

ARBITRATION OF LEGAL MALPRACTICE CLAIMS: THE GOOD, THE BAD AND THE UGLY.

BY

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For the first time in Michigan jurisprudence, the Court of Appeals in *Watts v Polaczyk, et al* __ Mich App __ (Docket #212953, September 22, 2000)(MLW #) ruled that attorneys can include arbitration clauses in their initial fee agreements for the purpose of covering not only fee disputes, but also *prospective legal malpractice claims* that may arise out of the legal representation. Applying the plain provisions of the Michigan Arbitration Act (“MAA”), and finding that nothing in the legislation exempted the provisions of the act from attorneys or their clients, the Court of Appeals held that the arbitration clause in the fee agreement, “including Plaintiff’s legal malpractice claim,” was valid and enforceable (*Id.* p. 5) The MAA, in effect, trumped informal ethics opinions of the State Bar.

Prior to *Watts*, informal ethics opinions dampened the use of such clauses, suggesting that they may run afoul of rule 1.8(h)(i) of the Michigan Rules of Professional Conduct (“MRPC”), which prohibits lawyers from entering into contractual arrangements that *prospectively* limits their liability. These opinions, discussed in *Watts*, also suggested that prudence and ethics dictated that a lawyer desiring such an arbitration clause was required to advise the client in writing to obtain independent legal counsel concerning the arbitration clause – suggesting that a client must hire an attorney in order to hire an attorney. The plaintiff in *Watts* argued, among other things, that the failure to provide him an opportunity to consult with independent legal counsel invalidated the arbitration clause.

This argument was premised on two notions: (1) the informal ethics opinions from the State Bar were binding on all attorneys and the Courts in their interpretation of the MRPC and, therefore, (2) an ADR clause in a fee retainer agreement requiring the arbitration of legal malpractice claims was invalid and unenforceable if it violated the requirements of rule 1.8(h)(i) of the MRPC. Citing the pre-MRPC case of *Lipton v Boesky*, 110 Mich App 589; 313 NW 2d 163 (1981), plaintiff argued that a violation of an MRPC is like violating a statute. The *Lipton* court had held that, like statutes, a violation of disciplinary rule under the prior Code of Professional Responsibility (replaced by the MRPC in 1988) is “rebuttable evidence of malpractice” and therefore was legally sufficient to bar the enforcement of the arbitration clause (even absent more traditional common law grounds to void a contract, like fraud, duress, etc). Defendant attorney’s alleged failure to comply with MRPC 1.8(h)(i), according to the plaintiff, made the agreement to arbitrate invalid (Plaintiff-Appellant’s Brief, p 12).

In affirming the enforceability of the arbitration clause, the *Watts* Court held that informal ethics opinions interpreting the legal effect of the MRPC’s are not binding on the Courts and, further, specifically held that an asserted violation of MRPC 1.8(h) by plaintiff “does not give rise to a cause of action for enforcement of the rule or for damages caused

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by failure to comply with the rule”, citing rule 1.0(b) of the MRPC. (Opinion, p. 4 at fn.1). In short, *Watts* rejected plaintiffs argument and enforced the arbitration clause notwithstanding any alleged failure to recommend that the client seek additional legal counsel regarding such a clause -- a ruling that rejects the implicit (and offensive) notion that lawyers are inherently untrustworthy and, therefore, must have their clients hire a lawyer to determine whether they should hire a lawyer.

Attorneys and clients are now faced with the issue of whether an arbitration clause should or should not be included in the retainer agreement. For a client with a well armed legal malpractice claim, arbitration may seem like a poor alternative to a trial. Prospective plaintiffs and their counsel may hope to maximize an award in front of a jury, who they hope will carry the baggage of our popular culture concerning attorneys into the jury deliberation room. On the other hand, weaker claims that might otherwise be subject to summary dismissal will probably obtain an extended life in an arbitration process and result in some award.

Lawyers desiring to seek a more private and less public route to resolve potential claims may opt for arbitration clauses. On the other hand, limited discovery, relaxed rules of evidence, the loss of procedural weapons like summary disposition and the loss of appellate rights from an adverse result may effect the analysis as to whether an ADR clause should be included.

For attorneys considering the inclusion of such clauses, they must comply with all aspects of the Michigan Arbitration Act. However, beyond that, attorneys should also consider an array of factors in deciding to include an arbitration clause. The positive factors include the perception that arbitration is faster and cheaper, with attenuated discovery obligations and rights. This may, however, encourage the filing of more claims by clients, who may perceive the litigation process as more expensive or more intimidating.

Additionally, although arbitration may be a faster process because of limited discovery rights and process, this may present problems in a difficult or complex case where more in depth discovery is necessary to defend the claim. Although the availability of more detailed discovery may be possible, depending on the arbitration process or venue selected, limitations on discovery could pose a problem from a defense viewpoint. On the other hand, the more discovery available and the more the process resembles a civil litigation proceeding, the less likely the arbitration process will be faster or more cost efficient -- the very factors that weigh in favor of ADR.

Moreover, the arbitration process often involves a more relaxed application of the rules of evidence. This may provide an opening to plaintiffs to introduce evidence that may not otherwise see the light of a court room, including alleged irrelevant or prejudicial material like prior ethic rule violations or other extrinsic evidence of conduct designed to make the lawyer appear to be a “bad” actor, although not a “negligent” actor . See “The Use and Misuse of Ethics Rules in Legal Malpractice Cases: Protecting the Right to A Fair Trial for the Lawyer Defendant” (MLW, March 1997). For attorneys who want a plaintiff to be put to the maximum test of meeting all evidentiary, substantive and procedural aspects of proving a malpractice claim, this factor may be a negative.

Perhaps the great advantage to arbitration is the notion that the matter will be resolved in private and without resort to a jury trial. For attorneys concerned about public and cultural bias against lawyers, and obtaining a fair trial, this factor may outweigh all others. However, an arbitration process almost guarantees a hearing and an opportunity for the plaintiff to proffer his evidence of damages. This raises the concern that arbitration may result in a higher “award” rate than traditional litigation.

Summary disposition is a powerful weapon for attorneys. Any recent sampling of reported cases reflect that a large percentage of legal malpractice cases are resolved through summary disposition motion practice. The reason may be generic to legal malpractice claims. Unlike medical malpractice, which very often results in a new injury and that makes it relatively easy to establish causation of harm, legal malpractice usually involves an omission or failure to remedy an existing problem -- a failure that can often result from any number or variety of factors. This can, and often does, lead to a summary dismissal of legal malpractice claims before a plaintiff can have the opportunity to proffer proofs of negligence and damages during trial – something that could be lost under arbitration.

Indeed, the Michigan Supreme Court in *Simko v Blake*, 448 Mich 648 (1995), strongly reaffirmed the professional judgment immunity rule for attorneys, i.e., that attorneys involved in making good faith judgmental decisions concerning litigation tactics should not be held liable for such determinations, even if the attorney’s judgment turns out to be poor or, in hindsight, wrong. In *Simko*, the Supreme Court affirmed the dismissal of legal malpractice claims *on the pleadings*, underscoring that when malpractice claims are predicated on nothing more than a former client’s allegations that an attorney’s professional tactical judgment was incorrect -- even if other reasonable attorneys would have chosen a different tactic or acted in a different manner -- the pleading does not raise a triable issue of fact and otherwise fails to state a breach of duty. See “*Simko v Blake: Trial Lawyers and the Error In Judgment Immunity Rule*” (MLW, November 6, 1995, Vol. 9, No 52). This doctrine, together with general causation defenses, provide powerful defensive tools for the attorney faced with a malpractice suit. Although these doctrines would be available during arbitration, they would most likely arise in the *same hearing* where the plaintiff is presenting his case for liability and damages. Under this circumstance, arbitration may result in prolonging the life of malpractice claims than would be the case under traditional civil practice.

Finally, there are a host of issues in a legal malpractice case that are required to be determined by a trial judge and not a jury. These include any issues in the underlying matter that intrinsically involve issues of law within the exclusive province of the courts as well as any issues that generally were allocated or would have been allocated to the judge in the underlying matter. See “*Attorney’s Right to a Bench Trial in Legal Malpractice Suits*” (MLW, November 4, 1996, Vol. 10, No. 42). Judges, perhaps more than most, have a deep appreciation of what lawyers do and the special challenges they face. In short, not every malpractice claim requires or mandates a potential trial by jury.

Under *Watts*, attorneys are now permitted to include arbitration clauses for *prospective legal malpractice claims*. The diverse tasks and responsibilities attorneys undertake in today’s legal environment mandate a close evaluation of whether arbitration clauses should be utilized by all attorneys in all practice fields. The variety of situations in

which attorney error can occur, and the harm or injury that can result, may make it difficult to assess the positive and negative aspects of arbitration. However, under *Watts*, attorneys and their clients now **have** the option of choosing such a format to resolve their disputes.