

June 2016 *Multnomah Lawyer Ethics Focus*

Contract Clauses: Contractual Limitations and Arbitration Provisions

**By Mark J. Fucile
Fucile & Reising LLP**

Lawyers often build limitations of liability and arbitration provisions into contracts they prepare for their clients across a wide spectrum of business ventures. Lawyers' ability to incorporate similar provisions into their own fee agreements with clients, however, is more limited. In this column, we'll look at three: limitations on liability for malpractice; limitations on bar complaints; and arbitration provisions.

All three are governed principally by RPC 1.8(h). Oregon's version is based on the corresponding ABA Model Rule, former DR 6-102 and Oregon case law. With all three, it is important to remember that failure to adhere to the requirements of RPC 1.8(h) not only risks regulatory discipline, but may also result in unenforceability as a matter of contract law. In analogous circumstances, Oregon courts have refused to enforce contract provisions that violate the professional rules on public policy grounds (see, e.g., *Gray v. Martin*, 63 Or App 173, 181-82 663 P2d 1285 (1983); *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or App 700, 703-04, 683 P2d 563 (1984)).

Limitations on Liability

RPC 1.8(h)(1) permits a lawyer or law firm to "make an agreement prospectively limiting the lawyer's liability to a client for malpractice" but requires

that “the client is independently represented in making the agreement[.]” Unlike conflict waivers, which require that a lawyer recommend that a client seek independent counsel, RPC 1.8(h)(1) mandates that the client actually be represented by independent counsel. In *In re Smith*, 9 DB Rptr 79 (1995), for example, a lawyer was disciplined under RPC 1.8(h)(1)’s predecessor for including a limitation on liability in his fee agreements when the lawyer’s clients had not been separately represented. Because it would be unusual for a limitation to be in a client’s interest when being advised by truly independent counsel, these kinds of limitations are extremely rare in practice. (OSB Formal Ethics Op. 2005-165 deals with the somewhat different situation involving indemnification by a corporate client of a lawyer from third party suits stemming from an investigation by the lawyer on behalf of the client. Concluding that indemnification is permitted in this scenario, the opinion pointedly contrasts this circumstance with limitations on malpractice liability under RPC 1.8(h)(1).)

Limitations on Bar Complaints

RPC 1.8(h)(4) prohibits limitations on bar complaints outright: “A lawyer shall not . . . enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.” RPC 1.8(h)(4) did not have a

predecessor under the former DRs. It is, however, consistent with prior case law such as *In re Boothe*, 303 Or 643, 650-55, 740 P2d 785 (1987), where the Oregon Supreme Court disciplined a lawyer for “conduct prejudicial to the administration of justice” for attempting to extract an agreement not to cooperate with the Bar in connection with the settlement of a civil suit. Bar complainants are also granted “absolute” immunity from civil liability by ORS 9.537(1).

Arbitration Provisions

RPC 1.8(h)(3) permits agreements to arbitrate malpractice claims on the “informed consent” of the client “in a writing signed by the client[.]” “Informed consent” is defined by RPC 1.0(g) and sets a high bar: “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” ABA Formal Ethics Opinion 02-425, which addresses arbitration provisions in fee agreements, explains in this regard (at 5) that a “lawyer should make clear that arbitration typically results in the client’s waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal.” Further, where, as here, “informed consent” is to be confirmed “in a writing signed by the client,” RPC 1.0(g) also

requires that “the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.”

Arbitration provisions solely governing fee disputes, by contrast, do not include the “informed consent” requirement regulating their malpractice counterparts under RPC 1.8(h)(3). But, ABA Formal Ethics Opinion 02-425 counsels that a lawyer has a duty under the “communication rule”—ABA Model Rule 1.4—to adequately explain an arbitration provision encompassing fee disputes so that the client will understand the significance of the provision. Oregon’s version of RPC 1.4 is patterned on the ABA Model Rule.

Lawyers contemplating arbitration provisions addressing malpractice claims in particular should also discuss them with their insurance carriers. Although the Oregon PLF Plan does not currently take a position on arbitration, some excess carriers have historically not viewed arbitration as a uniformly favorable forum due to limitations on discovery and the lack of appeals. Arbitration provisions solely addressing fee disputes typically do not raise similar concerns from carriers because most malpractice policies (for example, the Oregon PLF Plan under Exclusion V(10)) do not cover fee disputes anyway.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.