

**WSBA NWSidebar**

**Posted: November 1, 2016**

## **Court of Appeals Discusses Arbitration of Legal Malpractice Claims**

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

Division I of the Court of Appeals recently discussed arbitration of legal malpractice claims in *Butler v. Thomsen*, 2016 WL 4524244 (Wn. App. Aug. 29, 2016) (unpublished). The facts in *Butler* were unusual. A lawyer had negotiated the settlement of a minority shareholder “squeeze out” case involving a closely held high tech company. The settlement agreement contained a broad release of claims and a companion provision selecting arbitration for “any dispute” arising from the agreement. Later, another shareholder raised a similar claim after allegedly being “squeezed out” of the company. None of the parties requested arbitration but the trial court held that several claims in the second case fell within the release from the first. The shareholder in the second case then sued the lawyer who had drafted the release for malpractice—arguing that it was overly broad.

In the malpractice case, the lawyer did not argue either that release barred the second shareholder’s malpractice claim or that the malpractice case itself was subject to arbitration. The lawyer, however, argued that the key question for the “case within a case” on the malpractice claim was whether the release from the first shareholder case should have been applied to the second shareholder case. The lawyer argued, therefore, that this discrete question was subject to

arbitration under the companion arbitration provision from the first shareholder case. The trial court in the malpractice case disagreed and the Court of Appeals affirmed. On the specific question before it, the Court of Appeals was “unpersuaded” that the arbitration provision from the first shareholder case was “so broad that ‘any dispute’ includes a critical portion of a legal malpractice claim[.]” 2016 WL 452244 at \*4.

The *Butler* opinion contains a useful review of the more common scenario involving arbitration of legal malpractice claims: when the arbitration provision is in the lawyer’s fee agreement with the client. The Court of Appeals noted that both the ABA in Formal Opinion 02-425 (2002) and the WSBA in Advisory Opinion 1670 (1996) had long counseled that arbitration provisions are permitted as long as they are sufficiently disclosed to the client. The ABA opinion addresses both malpractice and fee disputes and the WSBA opinion is framed around fee disputes. Although the *Butler* opinion does not cite it, Comment 14 to RPC 1.8 makes this same point regarding malpractice claims: “[A] lawyer . . . [may enter] . . . into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.” (Comment 9 to RPC 1.5 also addresses and generally approves arbitration of fee disputes.) The Washington

comment, in turn, is based on the corresponding one in the ABA Model Rules.

As this discussion in *Butler* suggests, the enforceability of an arbitration provision in a subsequent legal malpractice case will turn largely on the degree to which the lawyer provided the disclosure outlined in Comment 14 to RPC 1.8.

#### **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.