fucile & reising | LLP

November 2019 WSBA *NWLawyer Ethics & the Law* Column

Common Clauses: Dispute Resolution Provisions in Fee Agreements

By Mark J. Fucile
Fucile & Reising LLP

As legal matters for individuals and businesses alike have grown more complex, law firm fee agreements have also become more detailed. In addition to such essentials as the scope of the work and the financial arrangements involved, many law firm fee agreements now include provisions addressing various facets of dispute resolution. In this column, we'll look at three common clauses: arbitration, forum selection and choice of law.[1]

Arbitration

Arbitration of both fee disputes and legal malpractice claims is generally permitted by, respectively, Comment 9 to RPC 1.5 and Comment 14 to RPC 1.8.[2] The key to enforceability in either context is whether the provision involved has been adequately explained to the client. RPC 1.5(a)(9) counsels that a client should receive "a reasonable and fair disclosure of material elements of the fee agreement[.]" Comment 14 to RPC 1.8, in turn, notes that lawyers may use arbitration provisions "provided such agreements are enforceable and the client is full informed of the scope and effect of the agreement." Advisory opinions from both the WSBA and the ABA echo that arbitration provisions will only be enforced when adequately disclosed.[3]

Courts ruling on motions to compel arbitration under provisions in law firm fee agreements have blended these RPC concepts into contractual standards for enforcing arbitration provisions. In *Smith v. Jem Group, Inc.*, 737 F.3d 636 (9th Cir. 2013), for example, the Ninth Circuit gauged whether an arbitration provision in a law firm fee agreement was "procedurally unconscionable" under Washington contract law using the RPC disclosure standards noted above. The Ninth Circuit agreed with the federal district court in Tacoma that an unexplained arbitration clause buried in a four-page, "fine print" engagement agreement did not meet the requisite disclosure standards and refused to enforce it as a matter of contract law. By contrast, the federal court in Seattle in *Mann Law Group v. Digi-Net Technologies, Inc.*, 2014 WL 535181 (W.D. Wash. Feb. 11, 2014) (unpublished), distinguished *Smith* and enforced an arbitration provision in a law firm fee agreement that included an explanation of the litigation rights—including a jury trial—being waived in clear language and in a standard font.

Before including an arbitration provision in a fee agreement, firms should also consider what kinds of claims they may wish to include and should consult with their malpractice insurance carriers. Some carriers, for example, prefer to litigate malpractice claims in court—with its typically more extensive discovery

and the availability of appeal.[4] Arbitration of fee disputes, by contrast, potentially offers law firms a confidential forum not available at the courthouse.

Finally, if an arbitration provision is included, it is often prudent to list at least a particular arbitration service rather than simply something along the lines of "we agree to arbitrate." Arbitration services vary in their locations, procedures and expertise with particular kinds of cases. Including a specific arbitration service and the office involved will generally provide a greater assurance that the service designated can be used. In the same vein, it can also be prudent to include an agreed alternative if the service chosen is, for example, no longer in business when a dispute arises later.[5]

Forum Selection

In practical effect, an arbitration provision—particularly one that includes a specific service and location—is a forum selection clause. In other instances, firms include forum selection clauses that specify a particular court and location to resolve disputes arising from an attorney-client relationship. Forum selection clauses have "offensive" and "defensive" uses. Offensively, a forum selection clause can designate a court convenient to the law firm's principal location if it becomes necessary to file, for example, a collection case against a client. Defensively, a forum selection clause can serve the same purpose if the firm has

a statewide or interstate practice and wants to gain greater procedural certainty that any claim against it will be litigated in its home town.

Case law addressing forum selection clauses in the narrow context of lawyer fee agreements is comparatively sparse.[6] The questions typically litigated, however, include both the scope of such provisions and the reasonableness of the location chosen in relation to the legal services provided. *Ginter v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008), for example, examined whether a forum selection clause in a lawyer's fee agreement was broad enough to extend to malpractice claims. *Tucker v. Cochran Firm-Criminal Defense Birmingham L.L.C.*, 341 P.3d 673 (Okla. 2014), in turn, involved a law firm fee agreement that had designated Los Angeles in a forum selection clause notwithstanding the fact that the legal services were being rendered in an Oklahoma court proceeding. Whether a forum selection clause will be enforced is controlled primarily by contract law. Although Washington substantive law generally permits forum selection clauses, the decision in any given case may be tempered by the circumstances surrounding its inclusion in the contract concerned and the reasonableness of the forum chosen.[7] This suggests crafting forum selection clauses with the same clear language discussed earlier for arbitration provisions.

Choice of Law

Particularly if a firm does interstate work, a choice of law provision can be a useful clarifying device. In *Taylor v. Bell*, 185 Wn. App. 270, 280, 340 P.3d 951 (2014), for example, the trial court in the absence of a choice of law provision left open whether Washington or Idaho causation standards applied in a legal malpractice case arising from services a Washington law firm provided to an Idaho client in a business transaction.

Washington generally recognizes choice of law provisions in resolving contractual disputes under, among others, *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 693-700, 167 P.3d 1112 (2007). In tort claims, the Washington Supreme Court in *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 159, 744 P.2d 1032 (1987) noted: "Although a choice of law provision in a contact does not govern tort claims arising out of the contract, it may be considered as an element in the most significant relationship test used in tort cases."

RPC 8.5(b) addresses choice of law in the lawyer regulatory context. Under RPC 8.5(b)(1), the law of the forum ordinarily controls in litigation. RPC 8.5(b)(2) governs non-litigation contexts and generally applies the law of the jurisdiction where the lawyer's conduct occurred or where that conduct had its

"predominant effect." RPC 8.5(b)(2) contains a qualifier: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." In 2016, Comment 5 to RPC 8.5 was amended to recognize choice of law provisions as bearing on a lawyer's reasonable belief: "With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement." The Washington amendment is patterned on an earlier change to the corresponding ABA Model Rule that was intended to provide more predictability to both lawyers and clients on the law controlling conflicts.[8]

Although limited on its face to conflict issues and technically only applicable to lawyer discipline, the Washington amendment can offer a useful clarification to Washington firms that do cross-border practice in Oregon in particular because there is a significant difference between Washington and Oregon on conflict waivers. Oregon RPC 1.0(g) requires that for any conflict waiver to be effective, "the writing shall reflect a recommendation that the client

seek independent legal advice to determine if consent should be given." Outside of lawyer-client business transactions under RPC 1.8(a), Washington has no similar requirement.

Moreover, courts in contexts beyond regulatory discipline have also increasingly looked to RPC 8.5(b) for choice of law analysis. These include legal malpractice, disqualification and fee disputes.[9] This validation of the analytical framework used in the rule suggests that courts would be equally ready to enforce choice of law provisions beyond those expressly delineated in the rule. Whether based on state common law or RPC 8.5, a choice of law provision is more likely to be enforced with it is explained clearly and set out explicitly in the firm's engagement agreement with the client.

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.

---

[1] This is not intended to be an exclusive list. Many fee agreements, for example, include attorney fee provisions in the event disputes under the agreement concerned are litigated. *See* RCW 4.84.330. By contrast, RPC 1.8(h)(1) prohibits "agreement[s] prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented by a lawyer in making the agreement[.]"

[2] Both comments are drawn from their ABA Model Rule counterparts. Comment 14 to Washington RPC 1.8 differs from its ABA Model Rule counterpart in other respects.

[3] WSBA Advisory Op. 1670 (1996) and ABA Formal Op. 02-425 (2002).

[4] *See* ABA Formal Op. 02-425, *supra*, at 5 n.15.

[5] *See, e.g., Schuster v. Prestige Senior Management, L.L.C.*, 193 Wn. App. 616, 626-27, 376 P.3d 412 (2016) (discussing a scenario where naming a specific arbitration service was considered integral to the arbitration clause itself and the unavailability of that service may render the entire arbitration clause unenforceable).

[6] *See generally* Francesca Giannoni-Crystal and Nathan M. Crystal, *Choice of Law in Lawyers' Engagement Agreements*, 121 Penn. St. L. Rev. 683 (2017) (surveying forum selection clauses in law firm-related litigation); *see also* Wayne J. Positan and Arthur M. Owens, *General Jurisdiction and Multijurisdictional Practice Following Daimler AG v. Bauman*, 23 No. 3 ABA Prof. Lawyer 23, 30 (2016) (noting forum selection clauses as a tool for multijurisdictional practice).

[7] *See generally Acharya v. Microsoft Corp*., 189 Wn. App. 243, 354 P.3d 908 (2015) (summarizing general authority in Washington); *see also Atlantic Marine Const. Co., Inc. v. U.S. District Court for the Western Dist. of Texas*, 571 U.S. 49, 134 S. Ct. 568, 187 L. Ed.2d 487 (2013) (addressing the somewhat different standard used by federal courts).

[8] *See* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 877 (2013) (discussing the background of this provision).

[9] *See, e.g., Parker v. Asbestos Processing, LLC*, 2015 WL 127930 at *13 (D. S.C. Jan. 8, 2015) (unpublished) (legal malpractice); *Airgas, Inc. v. Cravath, Swaine & Moore LLP*, 2010 WL 624955 at *4 (E.D. Pa.Feb. 22, 2010) (unpublished) (disqualification); *Guzik v. Albright*, 2018 WL 4386084 at 10 n. 7 (S.D.N.Y. Sept. 14, 2018) (unpublished) (collection action by attorney and associated malpractice counterclaim by client).