St. Mary's Law Journal

Volume 33 | Number 4 Article 8

1-1-2002

# Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas.

Robert J. Kraemer

# ATTORNEY-CLIENT CONUNDRUM: THE USE OF ARBITRATION AGREEMENTS FOR LEGAL MALPRACTICE IN TEXAS

ROBERT J. KRAEMER

## I. INTRODUCTION

Agreeing to arbitrate disputes is quite increasingly common.[1] Businesses frequently contract with other businesses to settle disputes by arbitration.[2] An employment contract can mandate arbitration as the means to resolve any future employee grievances.[3] As a condition of sale, a retailer may handle any claims made by a customer through arbitration,[4] as

1. *See* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 958 (2000) (predicting an increased use of arbitration over other forms of alternative dispute resolutions, especially when finality of a decision is needed).

2. *See* Stephen S. Maris & Kevin Hamby, *No Clause for Alarm: The Desire For More Control Is Leading Corporations to Include Binding Arbitration in Almost All Contracts*, TEX. LAW., Oct. 9, 1995, WL 10/9/1995 TEXLAW 30 (noting an increased trend in ADR clauses in commercial contracts); Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (stating a preference for arbitration by commercial parties due largely to the ability to control costs).

3. *See* Michael V. Abcarian & Michael E. Coles, *Don't Abandon Arbitration Clauses: Employers Will Continue to Benefit from Well-Crafted Arbitration Programs*, TEX. LAW., May 24, 1999, WL 5/24/1999 TEXLAW 23 (stating that the growing national practice of companies includes arbitration clauses as an essential element of their employment agreements); Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (verifying that the Supreme Court of the United States endorsed the increased use of arbitration clauses in employment contracts); Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW S22 (offering, by way of example, several large national companies in a variety of business areas that have adopted binding arbitration as a "cutting edge" means of resolving employment disputes). *But see* David L. Hudson, Jr., *EEOC Can Override ADR*, A.B.A. J. EREPORT, Jan. 18, 2002, at http://www.abanet.org/journal/redesign/j18arb.html (last visited Feb. 24, 2002) (on file with the *St. Mary's Law Journal*) (reporting that the U.S. Supreme Court's ruling in *EEOC v. Waffle House, Inc.*, No. 99-1823 (2002) allows the EEOC as a federal agency to pursue anti-discrimination claims for an employee despite an agreement between the employer and employee to arbitrate those claims).

4. *See* 27 STEPHEN G. COCHRAN, TEXAS PRACTICE: CONSUMER RIGHTS AND REMEDIES § 1.29 (2d ed. 1996) (predicting that arbitration clauses will become more common between merchants and consumers); *see also* Dave Thom, *Turning Up the Heat on Mandatory ADR: Two Federal Agencies and the Labor Bar Mount Legal and Economic Challenges*, TEX. LAW., Oct. 9, 1995, WL 10/9/1995 TEXLAW 5 (relating that some plaintiffs' attorneys look forward to including "arbitration clauses in customer contracts with health care providers, banks, insurance companies and other industries").

arbitration agreements are valid under the Texas Deceptive Trade Practices Act.[5] Professionals, such as architects and physicians, can include pre-dispute arbitration clauses in their client contracts.[6] The use of contractual clauses compelling arbitration is acceptable and even encouraged in these instances.[7]

Despite the rise in popularity of all forms of Alternative Dispute Resolution ("ADR"), the enforceability of pre-dispute arbitration clauses in attorney-client contracts has been a point of contention.[8] While Texas policy generally favors arbitration agreements,[9] the unique relationship between an attorney and client carries with it significant ethical and public policy concerns above and beyond the law of contracting.[10] Attorneys find themselves singularly poised in a debate about their rights versus those of their clients.[11]

---

5. *See* 27 STEPHEN G. COCHRAN, TEXAS PRACTICE: CONSUMER RIGHTS AND REMEDIES § 1.29 (2d ed. 1996) (citing *D. Wilson Construction Co. v. McAllen Independent School District*, 848 S.W.2d 226, 231 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.) in support of the assertion that an arbitration clause drafted under Texas law was enforceable and did not violate the DTPA). However, other Texas courts have held that DTPA claims are separate and distinct from purely contractual claims. *Id.*

6. *See* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2026-27 (1993) (addressing the impact of a growing tendency for professionals such as doctors and securities brokers to include arbitration clauses in their client contracts); Joseph P. McMonigle, *Arbitration of Legal Malpractice Actions*, 1 LEGAL MALPRACTICE REP. 3, 3 (1989), WL 1 No.1 LMALR 3 (contrasting the uncommon use of arbitration for legal malpractice claims with increasingly common use by other professionals).

7. *See* Lionel M. Schooler, *Arbitration in the New Century: Developments in the Law*, 38 HOUS. LAW. 16 (2001), WL 38-APR HOULAW 16 (considering enforceability to be the key to arbitration jurisprudence).

8. *See generally* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 626-31 (1997) (delineating arbitration from other forms of ADR and providing ethical reasons why the attorney-client relationship may be an exception to the otherwise advantageous growth of ADR).

9. *See* L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351 (Tex. 1977) (noting Texas's long standing history of the use of arbitration clauses); Massey v. Galvan, 822 S.W.2d 309, 316 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (stating that "[h]istorically, the settlement of disputes by arbitration has been favored in Texas law"); *see also* 27 STEPHEN G. COCHRAN, TEXAS PRACTICE: CONSUMER RIGHTS AND REMEDIES § 1.29, n.8 (2d ed. 1996) (contending that if there is any doubt on whether arbitration applies, the presumption in Texas is to favor arbitration).

10. *See* Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443, 444 (1998) (positing that whether treated with more favoritism or held to a more exacting standard, the interpretation of contracts involving a lawyer as a party is different from the contracts between members of the general public or even between other professionals).

11. *Compare* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 626 (1997) (recognizing

Arbitration in Texas is governed by the Texas Arbitration Act ("TAA") of 1995.[12] Enforcement of arbitration agreements entered into for the purpose of avoiding legal malpractice suits, while seemingly in compliance with the TAA, has met with mixed success in the few Texas courts that have addressed the issue. Differing opinions on whether an attorney's pre-dispute agreement can compel arbitration came sharply into focus in 2000 with the Fourth District Court of Appeals decision in *Henry v. Gonzalez*[13] and the Thirteenth District Court of Appeals opinion in *In re Godt*.[14] Both courts relied upon the same retainer language used by the same attorney under very similar fact patterns. However, the *Gonzalez* court held that the arbitration clause was enforceable while the *Godt* court declared it outside of the TAA.[15] Given two different interpretations by the courts, the Texas practitioner is left with mixed signals,

---

the need for attorneys to negotiate enforceable contracts with clients), *with* Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443, 490 (1998) (revealing a "presumption of undue influence" that arises when an attorney contracts with a client). Among the arguments Professor Perillo advances for a presumption of undue influence include: (1) the client's assumption that the attorney will have no interest that competes with the client's own, (2) the attorney's ability to dominate his client, (3) the attorney's fiduciary duty owed to the client, and (4) the public's confidence in the legal system. Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443, 490 (1998).

12. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171-172 (Vernon Supp. 2002). The TAA provides for enforceable arbitration agreements that are in writing and arise due to an existing dispute or where the parties have previously agreed to submit any dispute that arises between them to arbitration. *See* 14 FRANK W. ELLIOT & NANCY SAINT-PAUL, TEXAS PRACTICE: TEXAS METHODS OF PRACTICE § 78.18 (2d ed. 1996) (emphasizing that the basis of enforceability of these agreements lies in contract and that the laws of contract apply, such that a court would not enforce an arbitration agreement that was revocable due to unconscionability or other grounds in law or equity); *see also* Derek J. Lisk, *Challenging Arbitration Awards in Texas Courts*, 64 TEX. B.J. 534, 538 n.2 (2001), WL 64 TXBJ 534 (stating that "[t]he Texas Arbitration Act authorizes the enforcement of written agreements to arbitrate").

13. 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.).

14. 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.).

15. *See* Brenda Sapino Jeffreys, *Lawyers Wary of Arbitration Clauses in Fee Contracts*, TEX. LAW., Oct. 2, 2000, WL 10/2/2000 TEXLAW 1 (noting that the appellate attorney in both cases found the suits identical but the courts issued different rulings); Mary Alice Robbins, *Arbitration Clause in Attorney-Client Contract Invalid*, TEX. LAW., Sept. 11, 2000, WL 9/11/2000 TEXLAW 1 (reporting on the decisions in the Fourth and Thirteenth District Courts of Appeals involving the same attorney and his attempts to compel arbitration with two different clients claiming malpractice); Lionel M. Schooler, *Arbitration in the New Century: Developments in the Law*, 38 HOUS. LAW. 16, 20-21 (2001), WL 38-APR HOULAW 16 (noting that two Texas appellate courts in 2000 considered the same agreement from the same law firm, but came to opposite decisions).

at best, on whether to attempt to compel arbitration in a dispute with a client by means of a contractual clause in a retainer agreement.[16]

This Comment examines attempts by attorneys to include an arbitration clause in their client contracts as a binding alternative to litigation of malpractice disputes. It analyzes the statutory language governing attorney-client arbitration clauses, as well as the professional rules, ethics opinions, and applicable case law. Part II begins by defining the terminology and dynamics of arbitration clauses as they have been used in attorney-client agreements across the nation. Part III focuses on Texas law, exploring the effect of the TAA on legal malpractice arbitration. Part III also discusses the public policy issues stemming from the attorney-client relationship in light of recent case law. Potential sources for a standard on attorney-client arbitration clauses in Texas are also surveyed. Finally, Part IV questions the applicability of the exclusionary section of the TAA on legal malpractice and recommends publishing an ethics opinion in the near term while promulgating a change to the Texas Disciplinary Rules of Professional Conduct. A rule specifically addressing attorney-client arbitration agreements would provide clear guidance to Texas attorneys and supply a basis for future legal decision on the issue.

## II. THE NEED FOR A STANDARD IN TEXAS

### A. *Distinguishing Terminology: The Attorney-Client Arbitration Clause*

#### 1. Type of Arbitration

Of the five different ADR processes available in Texas,[17] arbitration is on the rise particularly when parties contract for an alternative to litiga-

16. *See* Brenda Sapino Jeffreys, *Lawyers Wary of Arbitration Clauses in Fee Contracts*, TEX. LAW., Oct. 2, 2000, WL 10/2/2000 TEXLAW 1 (noting that the conflicting opinions by the two appellate courts have complicated the issue of the ethics of attorney-client arbitration clauses); *see also* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (commenting that the law on this issue remains unsettled in Texas over the last five years).

17. *See* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 956-57 & n.33 (2000) (relating that the Texas ADR Act provides for at least five types of ADR). The five procedures provided for under subchapter B of the Texas ADR Act are mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.023-.027 (Vernon 1997 & Supp. 2002); *see also* Lionel M. Schooler, *Arbitration 1993—The New Frontier in ADR*, TEX. LAW., Mar. 1, 1993, WL 3/1/1993 TEXLAW 18 (distinguishing arbitration as distinctively different from other forms of ADR).

tion.[18] Plaintiffs, recognizing a trend toward lower awards from jury verdicts, and defendants, eager to avoid the length and expense of trials and appeals, are increasingly motivated to enter into pre-dispute arbitration agreements.[19] Such agreements constitute voluntary arbitration, in contrast to compulsory arbitration or court-ordered arbitration.[20] In compulsory arbitration, at least one party is forced into arbitration by rule or statute.[21] Court-ordered arbitration occurs when a court decides to refer the parties to arbitration in a case already before it.[22] On the other hand, voluntary arbitration avoids litigation altogether and can provide a less adversarial solution.[23] Regardless of how the arbitration is initiated, its consequences may or may not be binding.[24] Non-binding arbitration leaves open the possibility of further trial action, whereas binding arbitration reaches a final resolution.[25] While a court may refer parties to non-

18. *See* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 958-59 (2000) (finding increasing use of binding arbitration clauses in business contracts as a means of final settlement).

19. *See id.* at 959 (attributing a variety of negative factors in litigation to the increasing attractiveness of arbitration for parties on both sides of a dispute).

20. *See* M. David LeBrun, Annotation, *Validity of Statute or Rule Providing for Arbitration of Fee Disputes Between Attorneys and Their Clients*, 17 A.L.R.4TH 993, 994 (1982 & Supp. 2001) (suggesting a common understanding of arbitration carries the meaning that it is voluntary).

21. *See id.* at 994 (noting that many courts have declared such provisions unconstitutional for depriving a party of due process).

22. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (Vernon 1997 & Supp. 2002) (allowing a court to refer pending litigation to any of a variety of forms of ADR as requested by one of the parties or upon the court's own motion).

23. *See* Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 433 (2000) (viewing a settlement from litigation and ADR as two distinct processes, the latter, "in theory, requires one to shuck the adversary paradigm to be successful").

24. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 627 (1997) (commenting that arbitration procedures are well established and the consequences can be binding on one or both parties, or not binding on either party).

25. *See* Derek J. Lisk, *Challenging Arbitration Awards in Texas Courts*, 64 TEX. B.J. 534 (2001), WL 64 TXBJ 534 (explaining that since public policy favors the conclusiveness of arbitration, there are only limited circumstances where an arbitration decision can be set aside). Those limited circumstances are provided in TEX. CIV. PRAC. & REM. CODE ANN. § 171.014. *See* Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no writ) (showing the intention to make arbitration a binding resolution).

binding arbitration as a possible alternative to mediation,[26] contracting parties bargain for binding arbitration to remain out of court.[27]

Agreements under the TAA are based upon the following definition: "'Arbitration' is the referral of a dispute to one or more impartial persons for final and binding determination."[28] In order to ensure its enforceability, the parties must make the arbitration agreement mandatory.[29] In *Porter & Clements, L.L.P. v. Stone*,[30] the First District Court of Appeals addressed both the appropriateness of the TAA to attorney-client pre-dispute arbitration agreements, and the need for explicit language declaring the arbitration binding.[31] The court examined the Texas Civil Practice and Remedies Code which contains both the Texas ADR Act[32] and the Texas Arbitration Act.[33] The *Porter* court held that the ADR Act, which allows for non-binding arbitration,[34] applies only in

---

26. *But see* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 958 n.41 (2000) (finding that while arbitration is preferred in contractual arrangements, courts have largely preferred mediation).

27. *See id.* at 960 (categorizing arbitration as an adjudicative procedure which is superior to mediation for those parties who desire a final determination outside the court); *see also Porter & Clements*, 935 S.W.2d at 221 (holding that the TAA assumes all arbitration is binding and a trial court may enter judgment pursuant to the arbitrator's award); Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 204 (1996) (describing arbitration as a decision based upon the merits of the case but arrived at through an alternative method to litigation).

28. HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 1 (1979). The Texas Supreme Court relied upon another definition in a landmark arbitration decision in the early 1990s, stating that arbitration is:

> a contractual proceeding by which the parties to a controversy or dispute, in order to obtain a speedy and inexpensive final disposition of matters involved voluntarily select arbitrators or judges of their own choice, and by consent submit the controversy to such tribunal for determination in substitution for the tribunals provided by the ordinary processes of the law.

Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992).

29. *See* MODEL RULES FOR FEE ARBITRATION R. 1.D.(1) (1995) (stating that fee arbitration is binding only if the parties have agreed in writing).

30. 935 S.W.2d 217 (Tex. App.—Houston [1st Dist.] 1996, no writ).

31. *See* Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 219-21 (Tex. App.—Houston [1st Dist.] 1996, no writ) (discussing the type of contractual agreements that are governed by the TAA).

32. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001-.073 (Vernon 1997 & Supp. 2002) (containing provisions for all forms of ADR, including arbitration).

33. *See id.* §§ 171.001-.098 (providing for general arbitration based upon the Uniform Arbitration Act). Arbitration of international disputes is found in Chapter 172 of the code. *See id.* §§ 172.001-.023. Chapter 173 contains special procedures for arbitration of disputes between non-profit entities. *See id.* §§ 173.001-.004.

34. *See id.* § 154.027 (setting forth a presumption that the arbitration will be non-binding unless stipulated in advance by the parties that they agree to a binding award).

the case of court-ordered arbitration.[35] Voluntary pre-dispute arbitration agreements, the court ruled, are governed exclusively by the TAA.[36] Moreover, the court reasoned that general contract principles apply in interpreting arbitration clauses.[37] Therefore, a pre-dispute arbitration clause, by its plain meaning, is intended to avoid litigation and does not require the words "binding" to appear in the clause to make the arbitration binding on the parties.[38] Indeed, the court found that since non-binding arbitration is not provided for,[39] "arbitration under the Texas Arbitration Act is a mechanism by which the parties to a contract reach a *binding resolution* to their differences."[40]

2. Sophistication of the Client

Even with a well-written binding arbitration clause, opinions vary over whether the client should be held to the agreement based upon the client's level of sophistication.[41] A sophisticated client is deemed to have a basic knowledge of the legal process or access to his own counsel.[42] Business entities and wealthy individuals with private attorneys typify sophisticated clients.[43] Because the sophisticated client is generally expected to understand the agreements, process, and ramifications of arbitration, such agreements are often enforced against this type of client.[44] The un-

35. *See Porter & Clements*, 935 S.W.2d at 220 (concluding that since the ADR act applies exclusively to court-ordered arbitration, arbitration clauses in private contracts do not fall under its provisions).

36. *See id.* (finding that in this case, where the existence of a pre-dispute arbitration clause was uncontested, the agreement comes under the provisions of the TAA).

37. *See id.* (citing a previous decision in *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.—Houston [1st Dist.] 1996, no writ), in support of interpreting an arbitration clause according to plain meaning under contract law).

38. *See id.* at 221-22 (construing the TAA in similar fashion to the Fifth Circuit in *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 983-85 (5th Cir. 1995), where the applicable Louisiana arbitration statute was found to define all arbitration as binding).

39. *See id.* at 221 (stating that all arbitration under the TAA is considered a contractual proceeding designed to accommodate an efficient final settlement to a dispute).

40. *Porter & Clements*, 935 S.W.2d at 221-22.

41. *See* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 848 (1999) (identifying that commentators distinguish the ethical issues raised in an arbitration agreement by the type of client involved).

42. *See id.* at 849-50 (suggesting that sophisticated clients do not require as much protection as unsophisticated clients).

43. *See* McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048, 1049 (D. Colo. 1991) (suggesting that the respondent in the case was a sophisticated client since he was a successful businessman who understood the arbitration clause in the agreement and was represented by independent counsel).

44. *See id.* at 1051 (rejecting a sophisticated client's argument of fraudulent inducement, the court declared that notice of the arbitration clause and ability to have it ex-

sophisticated client, on the other hand, knows little of legal processes, including arbitration.[45] Commonly thought of as the "average person," the unsophisticated client is at a bargaining disadvantage to the attorney in regard to the client's rights and duties under a contract.[46] He may think that trial is always an option, regardless of any agreement he may sign.[47] This type of client may require more consultation on the advantages and disadvantages of arbitration before such an agreement will be valid.[48]

3. Legal Malpractice As Opposed to Fee Disputes

Arbitration clauses can be used in retainer agreements to determine the forum for settling fee disputes, misrepresentation issues, or both.[49] The use of such clauses to resolve fee disputes is commonplace.[50] In

---

plained by independent counsel made the client a fully informed party to arbitration); *see also* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 995 (1995) (arguing that predispute arbitration agreements made by sophisticated clients are "fully supportable" because these clients have the ability to recognize and resist an unwanted contract clause); Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J. 330, 332 (1998), WL 61 TXBJ 330 (relating that arbitration agreements are not subject to heightened scrutiny when made with sophisticated clients).

45. *See* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 848-49 (1999) (representing the enforcement of an arbitration agreement with an unsophisticated client as problematic due to his unfamiliarity with the process and the alternatives he has forsaken).

46. *See id.* at 849 (asserting that the attorney has the advantage over the unsophisticated client both during negotiation over the agreement itself and then at the arbitration).

47. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 993 (1995) (questioning whether an attorney will explain to the client that arbitration means the loss of a jury trial, a potentially favorable forum for the client).

48. *See id.* at 995 (concluding that the issues facing the unsophisticated client are so great as to require him to meet with independent counsel prior to signing an arbitration agreement with his attorney). The attorney bears the burden of determining how much each individual client needs by way of explanation. *See* Va. Comm. on Legal Ethics, Op. 1707 (1998) (delineating the potential content of disclosures to the client and noting that the determination of how an attorney must address each disclosure depends upon the sophistication, education, and experience of the client).

49. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (advising that the issues involved in arbitration of fee disputes and arbitration of legal malpractice must be kept separate).

50. *See* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2025-26 (1993) (describing the reversal of the judiciary's traditional hostility towards arbitration to acceptance in most jurisdictions of enforcing arbitration

1995, the American Bar Association ("ABA") promulgated Model Rules for Fee Arbitration, reflecting its preference for this form of settlement and encouraging states to adopt such systems.[51] Once a fee arbitration system is in place in a state, the Model Rules further encourage attorneys to submit to it.[52] Since fee disputes comprise the vast majority of attorney-client disagreements,[53] an arbitration clause in the agreement limited to fee disputes will likely be held enforceable, especially in those states following the Model Rules.[54] In many cases, though, especially when the

---

agreements for fee disputes). Professor Rau also illuminates the extent of attorney-client fee disputes. *See id.* at 2007 n.7 (finding through his own survey of 3,379 Texas law firms that 85.6% of firms with greater than ten attorneys experienced a recent fee dispute); *see also* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (stating simply that "[f]ee disputes are common"); Jane Massey Draper, Annotation, *Validity and Construction of Agreement between Attorney and Client to Arbitrate Disputes Arising Between Them*, 26 A.L.R.5TH 107, 113 (1995 & Supp. 2001) (noting the adoption of arbitration by legislatures and bar associations to avoid the public scrutiny in settling high fee cases).

51. *See* MODEL RULES FOR FEE ARBITRATION R. 1.B (1995) (recommending that the state's highest court endorse a policy to encourage informal resolution of fee disputes); *see also* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 990 (1995) (describing the push toward incorporating arbitration as a primary means of resolving fee disputes); Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 831 (1999) (stressing the need found by the ABA to address what it deemed the "most serious problem" between attorneys and the general public). *See generally* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2020-24 (1993) (discussing the evolution of the ABA model rules and their acceptance by state and local bar associations). The ABA Model Rules for Fee Arbitration, however, specifically exclude consideration of legal malpractice claims. *See* MODEL RULES FOR FEE ARBITRATION R. 1.F.(2) (1995) (making disputes based on misconduct or malpractice outside the scope of these model rules).

52. *See* MODEL RULES FOR FEE ARBITRATION R. 1. cmt. (1995) (making participation in the program mandatory for attorneys upon request by the client and encouraged as an expeditious and inexpensive means for the attorney to resolve a fee dispute); *see also* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 634-35 (1997) (attributing the Model Rules preferred stance for attorneys to settle fee disputes using ADR).

53. *See* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 831 (1999) (noting that fee disputes are the most frequent type of complaint against an attorney and carry a negative public image).

54. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24-25 (2001), WL 12 No. 3 PROFLAW 24 (crediting the enforcement of arbitration agreements for fee disputes to favorable public policy and acceptance by bar associations). At least ten states and the District of Columbia have established rules for mandatory fee arbitration. *See* A.B.A. JOINT COMM. ON LAWYER REGULATION, THE LAWYER REGULATION HAND-

dispute is initiated by the attorney, the client also brings a malpractice claim.[55] Enforcing an arbitration clause that is broad enough to cover both fee disputes and malpractice, however, is not as universally accepted.[56] Courts will usually treat the enforceability of malpractice arbitration contracts much differently from arbitration contracts for fee disputes.[57]

4. Arbitration Enforcement at the Attorney's Request

Arbitration clauses in attorney-client contracts are enforced in a number of jurisdictions by statute or professional rules, as long as the request for arbitration is made by the client.[58] As an extreme example, an attorney-client arbitration case in New Jersey, *In re Application of LiVolsi*,[59] upheld a client's right to demand arbitration of a fee dispute according to a pre-established court rule on compulsory arbitration despite the attor-

---

BOOK (1999) (reprinting fee arbitration procedures for Alaska, Arizona, Georgia, New Jersey, and the District of Columbia).

55. *See* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2017 (1993) (claiming it is virtually guaranteed that when an attorney brings an action for unpaid fees, the client will countersue for malpractice). *But see* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (cautioning that automatic counterclaims for malpractice may overstate reality by a substantial margin).

56. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 634 (1997) (concluding that agreements to settle fee disputes by arbitration are more commonly accepted than agreements to arbitrate malpractice claims); Byron D. Brown, Note, *Restoring Faith in the Attorney/Client Relationship: Alaska's Mandatory Fee Arbitration*, 1998 J. DISP. RESOL. 95, 102-03 (1998), WL 1998 JDR 95 (commenting that the Alaska Supreme Court's adoption of mandatory attorney-client fee arbitration follows a national trend, but noting that the state bar prohibits arbitration in the case of attorney malpractice).

57. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (stressing the different treatment of malpractice and fee disputes by both courts and bar associations); *see also* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 635 (1997) (finding that in some cases there may need to be two separate proceedings, negating the advantages of arbitration).

58. *See* Jane Massey Draper, Annotation, *Validity and Construction of Agreement between Attorney and Client to Arbitrate Disputes Arising Between Them*, 26 A.L.R.5TH 107, 112 n.2 (1995 & Supp. 2001) (recognizing that some jurisdictions have established rules that allow the client to compel arbitration); *see also* MODEL RULES FOR FEE ARBITRATION R. 1.C. (1995) (stating that arbitration is mandatory for the lawyer if the procedure is commenced by the client); David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 754-55 (1997) (arguing that an attorney who refused a client's request to include an arbitration clause might defeat the purpose of ADR and breach the fiduciary duty owed the client).

59. 428 A.2d 1268 (N.J. 1981).

ney's unwillingness to consent.[60] In contrast, enforcement of an arbitration clause at the attorney's request is not well established in case law. Whereas in *Porter*, the court enforced the arbitration clause in a malpractice dispute at the insistence of the attorney,[61] in *LiVolsi*, the court allowed the attorney to make the arbitration request, but would only enforce it upon the consent of the client.[62] Some commentators contend that when the request to include a pre-dispute arbitration clause is made by the attorney, the arbitration clause is presumptively unenforceable.[63]

### B. *Authority for Arbitration Clauses in Attorney-Client Malpractice Disputes*

#### 1. Emerging National Issue

##### a. National Statutes and Rules on Attorney-Client Arbitration

The Federal Arbitration Act ("FAA") applies to arbitration agreements in contracts involving interstate commerce.[64] Congressional intent

---

60. *See In re* LiVolsi, 428 A.2d 1268, 1283 (N.J. 1981) (upholding N.J. CODE PROF. CONDUCT DR 1:20A which allows a client to bring a fee dispute to an established Fee Arbitration Committee as constitutional); M. David LeBrun, Annotation, *Validity of Statute or Rule Providing for Arbitration of Fee Disputes Between Attorneys and Their Clients*, 17 A.L.R.4TH 993, 995 (1982 & 2001) (explaining that the *LiVolsi* court, under its inherent plenary power, could promulgate a rule mandating arbitration for attorney-client fee disputes without violating the due process rights of the attorney). The ABA Committee on Ethics and Professional Responsibility has only issued one ethics opinion on Model Rule 1.8(h) which does not deal with attorney-client arbitration agreements. *See* A.B.A. STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, FORMAL AND INFORMAL ETHICS OPINIONS: 1983-1998 613 (2000) (showing in the citator index to the Model Rules of Professional Conduct that Rule 1.8(h) was interpreted in Formal Opinion 96-401 which declares that belonging to a limited liability partnership does not violate the rule). The ABA issued no opinions on Rule 1.8(h)'s predecessor, Model Code of Professional Responsibility Rule DR 6-102(A). *See id.* at 639.

61. *See* Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 220 (Tex. App.—Houston [1st Dist.] 1996, no writ) (establishing the fact that since the parties agreed that their dispute fell within their arbitration clause, the court did not question the enforceability of the clause itself).

62. *See In re* LiVolsi, 428 A.2d at 1270 (acknowledging N.J. CODE PROF. CONDUCT DR 1:20A-3(a) requires client consent if the arbitration is at the lawyer's request); *see also* M. David LeBrun, Annotation, *Validity of Statute or Rule Providing for Arbitration of Fee Disputes Between Attorneys and Their Clients*, 17 A.L.R.4TH 993, 994-95 (1982 & 2001) (describing the rule promulgated by the New Jersey Supreme Court which called for arbitration of fee disputes by specially established committees and which was at issue in *LiVolsi*).

63. *See* David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 755 (1997) (noting the consensus at a relevant symposium).

64. *See* Federal Arbitration Act, 9 U.S.C.A. §§ 1-16 (1999 & Supp. 2001) (including maritime transactions as well as interstate commerce). Provisions for enforcing the Con-

favors arbitration among consenting parties, so states must enforce such agreements regardless of state law.[65] Removing any doubt as to whether the federal act applies, the U.S. Supreme Court declared that ambiguities should be resolved in favor of arbitration.[66] This ringing endorsement of arbitration under the FAA, however, remains within the substantive federal law it created and does not address the subject of arbitration in attorney-client malpractice disputes.[67] The Restatement (Third) of the Law Governing Lawyers does not address the issue either.[68] It contains only language prohibiting an attorney from limiting his personal malpractice liability to his client.[69] On the other hand, the ABA has only recently

---

vention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are found in Chapter 2 of the code. *See id.* §§ 201-208 (1999 & Supp. 2001). Chapter 3 of Title 9 contains provisions for enforcing the Inter-American Convention on International Commercial Arbitration of January 30, 1975. *See id.* §§ 301-307 (1999). In Texas, "an arbitration will be governed by the Federal Arbitration Act if the underlying transaction affects interstate commerce, and by the Texas Arbitration Act or Texas common law if it does not." Derek J. Lisk, *Challenging Arbitration Awards in Texas Courts*, 64 TEX. B.J. 534, 536 (2001), WL 64 TXBJ 534.

65. *See* William G. Phelps, Annotation, *Pre-Emption by Federal Arbitration Act* (9 U.S.C.S. §§ 1 et seq.) *of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179, 187 (1992) (noting that the national policy in enacting the FAA strongly favored the enforcement of voluntary arbitration that the judicial power for finding otherwise was withdrawn from the states).

66. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. 460 U.S. 1, 24-25 (1983) (declaring that the Federal Arbitration Act conforms to a federal policy favoring arbitration); *see also* William G. Phelps, Annotation, *Pre-Emption by Federal Arbitration Act* (9 U.S.C.S. §§ 1 et seq.) *of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179, 188 (1992) (noting that *Moses H. Cone Mem'l Hosp.* extends the scope of arbitrable issues to the interpretation of contract language and consideration of potential defenses to arbitrability).

67. *See* William G. Phelps, Annotation, *Pre-Emption by Federal Arbitration Act* (9 U.S.C.S. §§ 1 et seq.) *of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179, 187 (1992) (pointing out that the federal substantive law created by the FAA is an anomaly in that the only thing it establishes is a duty to comply with an arbitration agreement).

68. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (confirming that the uncertainty in the law on attorney-client arbitration clauses stems from whether or not they are governed by a national ethics rule prohibiting liability limits on malpractice); Joseph P. McMonigle & Thomas Weathers, *A New Way to Go: Arbitration of Legal Malpractice Claims*, 64 DEF. COUNS. J. 409, 410 (1997), WL 64 DEFCJ 409 (finding no express ethical prohibition against the use of attorney-client arbitration clauses in retainers).

69. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54(2) (2000) (stating "[a]n agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable"). Previous drafts of the Restatement have included comment language to section 54 concerning fee determination proceedings which evolved from a consideration of arbitration to all forms of ADR. *Compare* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54 cmt. b(iv) (Tentative Draft No. 4, 1991) (stating that only some states have

provided guidance on the issue in both the Model Rules of Professional Conduct and a formal ethics opinion.[70] However, as a matter of law, the question remains whether a pre-dispute arbitration agreement so limits attorney liability.[71] Court decisions have yet to consistently clarify this question.

---

fee arbitration procedures and that arbitration agreements are only binding with sophisticated clients), *with* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54 cmt. b(iv) (Proposed Final Draft No. 1, 1996) (noting that many jurisdictions use fee arbitration procedures and that attorneys and clients, regardless of sophistication, may agree to arbitration, as long as the agreement meets the "standards of fairness"). Neither of these comments to section 54, however, appear in the current version of the Restatement. *See* JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 767 (2001-2002 ed. 2001) (relating the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54 absent of any comments).

70. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (1984) (stating "[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"); MODEL CODE OF PROF'L RESPONSIBILITY EC 6-6 (1980) (stating "[a] lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice"); MODEL CODE OF PROF'L RESPONSIBILITY DR 6-102 (1980) (stating "[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice"). There were no further amendments to Rule 1.8(h) through 1999. *See* A.B.A. CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROF'L CONDUCT 609 (4th ed. 1999) (listing no amendments to Rule 1.8(h) since its inception in 1983). The ABA's Ethics 2000 Commission, however, provided an expanded interpretation of Rule 1.8(h). *See* A.B.A. Comm. on Ethics and Prof'l Responsibility, *Ethics 2000 Commission Report R. 1.8(h) cmt. 15* (2000), *available at* http://www.abanet.org/cpr/e2k-rule18.html (last visited Apr. 11, 2002) (stating for the first time that arbitration clauses for legal malpractice claims are allowable under the Model Rule 1.8(h) provided that the agreement is enforceable and that "the client is fully informed of the scope and effect of the agreement"). The Ethics 2000 Commission went further to provide a comment on the duties of an attorney to construct an enforceable agreement. *See* A.B.A. Comm. on Ethics and Prof'l Responsibility, *Ethics 2000 Commission Report R.* 1.8 cmt. 15 (2000), *available at* http://www.abanet.org/cpr/e2k-rule18.html (last visited Apr. 11, 2002) (showing complete annotations of deletions and additions of the comments to the model rules which provides the addition of a dedicated comment on attorney-client malpractice agreements). The ABA provided a more comprehensive discussion of the issue in their first formal ethics opinion of 2002. *See* Eileen Libby, *A Different Resolution: Binding Arbitration in Retainer Agreements Permissible*, A.B.A. J. EREPORT, Apr. 12, 2002, *at* http://www.abanetnet.org/journal/ereport/a12ethics.html (last visited Apr. 13, 2002) (on file with the *St. Mary's Law Journal*) (reporting the release of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 02-425).

71. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (advancing an argument that an attorney must only advocate for arbitration in instances where a reduction in his liability is at stake). *But see id.* at 25 (commenting that most legal authorities would not find legal malpractice arbitration agreements to "constitute a 'prospective limitation' on malpractice").

b. Limited Case Law Across the United States

The U.S. Supreme Court has not ruled on a case involving the enforcement of a mandatory arbitration clause in an attorney-client contract.[72] Cases among state courts on this issue are few, but two cases in particular illustrate the division in interpretation over the limits of attorney liability in contracting with the client. In *Lawrence v. Walzer & Gabrielson*,[73] one of the earliest cases contesting a pre-dispute agreement for mandatory arbitration of legal malpractice, a California appellate court found the arbitration clause in a signed attorney-client agreement did not compel enforcement.[74] Although the clause mandated binding arbitration for any disputes "regarding fees, costs, or any other aspect of [the] attorney-client relationship,"[75] the court applied a rule of construction evaluating that phrase within the context of the rest of the clause.[76] Since the rest of the clause dealt exclusively with financial matters, the trial court held that the mandatory arbitration clause applied only to a fee dispute.[77] The appellate court affirmed, and, despite plain language in the contract purporting otherwise, denied mandatory arbitration of the malpractice issue.[78]

The opposite result was reached by a District of Columbia court of appeals in *Haynes v. Kuder*.[79] In *Kuder*, the clause in question read: "any defenses or counterclaims to such a claim, *whether based on a claim of inadequate representation or any other ground*, shall be resolved exclusively through arbitration."[80] Even though the client argued that neither

---

72. *But see* Michael V. Abcarian & Michael E. Coles, *Don't Abandon Arbitration Clauses: Employers Will Continue to Benefit from Well-Crafted Arbitration Programs*, TEX. LAW., May 24, 1999, WL 5/24/1999 TEXLAW 23 (advising that just because the U.S. Supreme Court has not ruled on the issue of arbitration clauses in employment contracts, does not mean employers should avoid continued use of pre-dispute arbitration agreements).

73. 256 Cal. Rptr. 6 (Cal. Ct. App. 1989).

74. *See* Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6, 10 (Cal. Ct. App. 1989) (finding that the client did not understand and agree to the arbitration clause).

75. *Id.* at 9.

76. *See id.* (using the doctrine of *ejusdem generis* to broaden the issue beyond the one sentence which presents a compelling argument for arbitration to an examination of the content of the clause which contained it).

77. *Id.*

78. *Id.* at 10. *But see* Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-116 (1989), *at* 1989 WL 253264 (stating the *Lawrence* decision found the agreement legally insufficient yet assumed that it was ethically proper); Joseph P. McMonigle, *Arbitration of Legal Malpractice Actions*, 1 LEGAL MALPRACTICE REP. 3, 3 (1989), WL 1 No.1 LMALR 3 (reading into the *Lawrence* decision an implied acceptance of a properly drafted arbitration agreement).

79. 591 A.2d 1286 (D.C. 1991).

80. Haynes v. Kuder, 591 A.2d 1286, 1288 (D.C. 1991).

the arbitration clause nor its effects were adequately explained to her, the court found the mandatory arbitration clause enforceable.[81] Specifically, the court held that the language in the clause adequately informed the client of her relinquishment of the right to a jury trial.[82]

2. Confusing Issue in Texas

a. Application of Texas Statutes and Rules to Attorney-Client Arbitration

Whether a valid arbitration agreement exists is a question of law.[83] In general, Texas courts favor arbitration.[84] In deciding whether an arbitration agreement is enforceable, courts use a two-part test, first determining if the parties agreed to arbitrate, then evaluating the scope of the agreement.[85] The intention of the parties to arbitrate is governed by contract principles and the plain meaning of the agreement.[86] Once the

---

81. *See id.* at 1288-89 (enforcing the arbitration because the client was aware that arbitration was an alternative to trial, the client was not coerced into agreeing, the language of the agreement encompassed the malpractice claim, and no legal ethics standards were violated).

82. *Id.* at 1291.

83. *See* Haynsworth v. Lloyd's of London, 933 F. Supp. 1315, 1326 (S.D. Tex. 1996) (holding that the trial court determines whether the parties have entered into a valid arbitration agreement); Emerald Texas, Inc. v. Peel, 920 S.W.2d 398, 403 (Tex. App.—Houston [1st Dist.] 1996, no writ) (stating that it is a question of law whether an arbitration agreement is valid for purpose of enforcement); Kline v. O'Quinn, 874 S.W.2d 776, 782 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (noting that the court determines whether an agreement made by the parties actually imposes a duty to arbitrate).

84. *See Haynsworth*, 933 F. Supp. at 1326 (finding under Texas law that an agreement to arbitrate will be valid unless there are grounds for revocation); Fridl v. Cook, 908 S.W.2d 507, 511 (Tex. App.—El Paso 1995, writ dism'd w.o.j.) (beginning the analysis with the assertion that arbitration is a favored proceeding for dispute resolution in Texas); Monday v. Cox, 881 S.W.2d 381, 384 (Tex. App.—San Antonio 1994, writ denied) (affirming that the Texas legislature expressly approves of agreements to arbitrate disputes); Smith Barney Shearson v. Finstad, Inc., 888 S.W.2d 111, 114 (Tex. App.—Houston [1st Dist.] 1994, no writ) (noting at the start of the opinion that Texas law favors arbitration proceedings); Howell Crude Oil Co. v. Tana Oil & Gas Corp., 860 S.W.2d 634, 636 (Tex. App.—Corpus Christi 1993, no writ) (confirming that the Texas Supreme Court has acknowledged the public policy favoring arbitration).

85. *See* Henry v. Gonzalez, 18 S.W.3d 684, 688 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (stating that "[i]n determining whether to compel arbitration, the trial court must decide the following: (1) whether a valid, enforceable arbitration agreement exists, and (2) if so, whether the claims asserted fall within the scope of that agreement"); *accord* Dallas Cardiology Ass'n v. Mallick, 978 S.W.2d 209, 212 (Tex. App.—Texarkana 1998, pet. denied); Amoco Gas Co. v. MG Intrastate Gas Corp., 914 S.W.2d 156, 158 (Tex. App.—Houston [1st Dist.] 1995, no writ); Phillips v. ACS Mun. Brokers, Inc., 888 S.W.2d 872, 875 (Tex. App.—Dallas 1994, no writ).

86. *See* Certain Underwriters at Lloyd's of London v. Celebrity, Inc., 950 S.W.2d 375, 378 (Tex. App.—Tyler 1996) (agreeing to the rule that arbitration clauses should be inter-

court finds a valid agreement, it must compel arbitration.[87] The only grounds for revocation of the agreement are fraud, misconduct, or unconscionability.[88] Where there are doubts stemming from an evaluation of the scope of an arbitration agreement, Texas courts have also generally resolved these in favor of arbitration.[89] Determination of the scope of the agreement is based on the factual allegations and not a legal cause of action.[90]

The primary statutory authority governing arbitration agreements in Texas is the TAA, codified in Chapter 171 of the Texas Civil Practice and Remedies Code.[91] The first two sections of Chapter 171 provide the rules

---

preted as a contract), *writ dism'd w.o.j.*, 988 S.W.2d 731 (Tex. 1998); Emerald Texas, Inc. v. Peel, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.] 1996, no writ) (interpreting arbitration clauses under general contract principles means that they are valid unless proven unconscionable); *Porter & Clements*, 935 S.W.2d at 220 (explaining how the plain meaning is enforceable unless it would defeat the parties' intent); Pepe Int'l Dev. Co. v. Pub Brewing Co., 915 S.W.2d 925, 930 (Tex. App.—Houston [1st Dist.] 1996, no writ) (interpretating the language in the arbitration agreement on contract principles and then enforcing the language according to plain meaning); City of Alamo v. Garcia, 878 S.W.2d 664, 665 (Tex. App.—Corpus Christi 1994, no writ) (describing arbitration as a "creature of contract").

87. *See Henry*, 18 S.W.3d at 688 (concluding that if the two-prong test for determining whether to compel arbitration is met, then the trial court must compel arbitration with no discretion to do otherwise); *accord Dallas Cardiology Ass'n*, 978 S.W.2d at 212 (explaining that once the agreement to arbitrate is proven, then it is presumed the court will favor arbitration unless the opposing party can meet the burden of proving the agreement invalid); *see also* Freis v. Canales, 877 S.W.2d 283, 284 (Tex. 1994) (noting that courts may only enforce existing arbitration agreements); X.L. Ins. Co. v. Hartford Accident & Indem. Co., 918 S.W.2d 687, 689 (Tex. App.—Beaumont 1996) (noting that neither Texas courts nor the FAA will compel arbitration without an agreement), *writ dism'd—moot*, 988 S.W.2d 741 (Tex. 1999); *Garcia*, 878 S.W.2d at 665 (finding that there is no duty to arbitrate without an agreement).

88. *See* Hearthshire Braeswood Plaza Ltd. P'ship, SMP v. Bill Kelly Co., 849 S.W.2d 380, 386 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (stating that the defenses to enforcement of an arbitration provision under the TAA are fraud and unconscionability); Island on Lake Travis, Ltd. v. Hayman Co. Gen. Contractors, 834 S.W.2d 529, 533 (Tex. App.—Austin 1992) (stating the determining factors of fraud, misconduct, and gross mistake), *set aside*, 848 S.W.2d 84 (Tex. 1993).

89. *See* Solis v. Evins, 951 S.W.2d 44, 51 (Tex. App.—Corpus Christi 1997, no writ) (finding that in order for a presumption favoring arbitration to attach, an initial showing of an agreement to arbitrate must first exist); Am. Employers' Ins. Co. v. Aiken, 942 S.W.2d 156, 159 (Tex. App.—Fort Worth 1997, no writ) (relating the policy that given any doubt concerning whether a claim falls within an arbitration agreement, the court should resolve such in favor of arbitration).

90. *See* Prudential Sec., Inc. v. Marshall, 909 S.W.2d 896, 900 (Tex. 1995) (stating that the court evaluates whether or not statements are "factually intertwined" with claims of arbitration); *X.L. Ins. Co.*, 918 S.W.2d at 689 (determining whether a tort claim is "so interwoven with the contract that it could not stand alone").

91. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.098 (Vernon Supp. 2002).

for enforceability of arbitration agreements.[92] First, Section 171.001 codifies a policy allowing parties to freely contract for arbitration.[93] Second, Section 171.002 prohibits certain agreements and claims from compelling arbitration at all and provides some specific limitations for others.[94] Although no particular form is required for an arbitration agreement,[95] compliance with the limitations in Section 171.002 requires the agreement to be signed.[96]

Attorneys who desire to incorporate arbitration clauses in contracts with their clients must at least comply with the general requirements

---

92. *Compare* Texas General Arbitration Act, 74th Leg., R.S., ch. 588, § 1, 1995 Tex. Gen. Laws 3403 (showing section 171.001 containing language that covered the validity and scope of arbitration agreements), *with* Texas General Arbitration Act, 75th Leg., R.S., ch. 165, § 5.01, 1997 Tex. Gen. Laws 329 (splitting the previous language contained in section 171.001 into a shorter section on the validity of agreements under section 171.001 and a new section on the scope of arbitration under section 171.002).

93. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (Vernon Supp. 2002) (determining when arbitration agreements are valid). The rule provides that:

> (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement. (b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

*Id.*

94. *See id.* § 171.002 (designating the scope of the chapter). Arbitration under this statute is limited as follows:

> (a) This chapter does not apply to: (1) a collective bargaining agreement between an employer and a labor union; (2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000, except as provided by Subsection (b); (3) a claim for personal injury, except as provided by Subsection (c); (4) a claim for workers' compensation benefits; or (5) an agreement made before January 1, 1966. (b) An agreement described by Subsection (a)(2) is subject to this chapter if: (1) the parties to the agreement agree in writing to arbitrate; and (2) the agreement is signed by each party and each party's attorney. (c) A claim described by Subsection (a)(3) is subject to this chapter if: (1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and (2) the agreement is signed by each party and each party's attorney.

*Id.*

95. *See* Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 220 (Tex. App.—Houston [1st Dist.] 1996, no writ) (holding that an agreement to arbitrate is not determined by any particular form, so long as the language of the agreement is clear); Massey v. Galvan, 822 S.W.2d 309, 316 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (asserting that no form for the agreement is required as long as party intent is clear).

96. TEX. CIV. PRAC. & REM. CODE ANN. § 171.002. *But see* Merrill Lynch, Pierce, Fenner & Smith v. Eddings, 838 S.W.2d 874, 879 (Tex. App.—Waco 1992, writ denied) (affirming that a party may be held to an agreement to arbitrate made without his signature).

under Section 171.001 for the agreement to be valid and enforceable.[97] Legal malpractice claims are not specifically prohibited from arbitration under a plain reading of Section 171.002, although at least one court has interpreted the general nature of a legal malpractice claim as a personal injury tort governed by Section 171.002.[98] The Texas Disciplinary Rules of Professional Conduct do not squarely address attorney-client arbitration clauses.[99] Also, Texas, unlike several other states, does not have an ethics opinion addressing attorney-client arbitration clauses, save an older opinion on the ethics of using retainer agreements.[100]

b. Very Limited Case Law in Texas

Following *Porter* in 1996, no other appellate opinions were published on cases involving attorney-client arbitration clauses until 2000.[101] In

---

97. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 25 (2001), WL 12 No. 3 PROFLAW 24 (using the example that an arbitration clause in an attorney-client contract could not be enforced under section 171.001 if unconscionable).

98. *See In re* Godt, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi 2000, no pet.) (declaring an arbitration agreement unenforceable for failure to comply with section 171.002).

99. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (enumerating prohibited transactions for an attorney in his relationship with a client). Subpart (g) proscribes:

> 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 with out [sic] first advising that person in writing that independent representation is appropriate in connection therewith.

*Id.* This rule corresponds in general to the ABA's Model Rule of Professional Conduct 1.8(h) prior to changes implemented by the Ethics 2000 Commission. *See* TEXAS YOUNG LAWYERS ASS'N, TEXAS LAWYERS' PROFESSIONAL ETHICS 5-3 (3d ed. 1997) (providing a comparison table linking the Texas rules with the ABA rules); *see also* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 25 (2001), WL 12 No. 3 PROFLAW 24 (observing that because no ethical rule specifically addresses attorney-client arbitration agreements, many authorities rely upon ABA Model Rule 1.8(h) or its state equivalent).

100. *See* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 27 (1950) (declaring specifically that written agreements between attorneys and clients covering consultation, advice, and fees payable do not violate any canons of ethics).

101. *See* Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J. 330, 330 (1998), WL 61 TXBJ 330 (noting that besides *Porter*, there were only two other Texas appellate opinions on attorney-client arbitration clauses for malpractice, one in 1996 and the other in 1997, but both were unpublished). In *Priour v. Pullen*, the San Antonio Court of Appeals enforced an arbitration agreement against a legal malpractice claim. *See id.* at 331 (providing the court's opinion in *Priour v. Pullen*, No. 04-96-00054 CV, 1997 WL 136530 (Tex. App.—San Antonio 1997, no writ) (not designated for publication), withdrawn 1997 WL 375586 (not designated for publication)). In *Bristow v. Jameson*, the First District Court of Appeals in Houston upheld the attorney's motion to compel arbitration of a legal malpractice claim from an unsophisticated client. *See* Bristow v. Jameson, No.

that year, two Texas cases involving different plaintiffs, but the same attorney-client contract, resulted in opposite holdings on the enforceability of a mandatory arbitration clause.[102] In the first case, *Henry v. Gonzalez*,[103] the trial court denied the defendant attorney's motion to compel arbitration under the contract clause, holding it unenforceable under the TAA.[104] The Fourth District Court of Appeals reversed and remanded the case to the lower court compelling the arbitration, agreeing that the contract fell under the TAA, but concluding that the arbitration clause was valid.[105] According to the appellate court, since the claim was valid and fell within the scope of the agreement, arbitration was mandatory.[106]

Remarkably, even though the same arbitration clause was used by the same attorney in the retainer agreement in a second case later that year, the results were exactly the opposite in *In re Godt*.[107] This time, the trial court compelled arbitration under the TAA,[108] but the Thirteenth District Court of Appeals found abuse of discretion, declaring the arbitration clause for the malpractice action unenforceable.[109] The court held that the absence of the attorney's signature rendered the agreement unenforceable.[110] The *Godt* court went further, however, to assert that a claim

---

01-96-00113-CV, 1996 WL 277138, at *5 (Houston [1st Dist.] May 22, 1996, no writ) (not designated for publication) (upholding arbitration despite the fact that the client was elderly, not mentally alert, and the contract had not been read to him). The Houston First District Court of Appeals used the same reasoning in *Bristow* to rule on *Porter* less than seven months later. *See* Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J. 330, 330 n.1 (1998), WL 61 TXBJ 330 (noting the unpublished opinion in *Bristow* preceded the published opinion in *Porter*).

102. *Compare* Henry v. Gonzalez, 18 S.W.3d 684, 692 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (granting the motion to compel arbitration), *with In re* Godt, 28 S.W.3d 732, 740 (Tex. App.—Corpus Christi 2000, no pet.) (denying the motion to compel arbitration).

103. 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.).

104. *See* Henry v. Gonzalez, 18 S.W.3d 684, 687 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (finding that the trial court effectively denied the motion to compel arbitration by granting the attorney defendant's motion for summary judgment on the same issue).

105. *See id.* at 690 (finding that the validity of the arbitration clause could be determined separately from the contract itself and that the attorney defendant had satisfactorily proven the clause's validity).

106. *See id.* at 692 (finding that evidence met the test for compelling arbitration under the clause and that there were no grounds to revoke the agreement).

107. 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.).

108. *See In re* Godt, 28 S.W.3d 732, 735 (Tex. App.—Corpus Christi 2000, no. pet.) (relating that the trial court found the arbitration clause valid and enforceable and that the dispute fell within the scope of the agreement).

109. *Id.* at 739-40.

110. *Id.* at 738. The *Godt* court based the signature requirement not on the TAA, but on the Texas Government Code provision requiring contingent fee agreements to be

of legal malpractice falls under the personal injury action exception to the TAA.[111] This opinion was never reviewed on appeal as originally expected,[112] and the issue of enforceability of a mandatory arbitration clause in an attorney-client contract has yet to be addressed by the Texas Supreme Court.[113]

## III. Developing a Standard in Texas

### A. *Which Section of the Texas Arbitration Act Applies?*

#### 1. Whether Legal Malpractice in Texas Is a Personal Injury Tort

The additional requirements to construct a valid arbitration agreement under Section 171.002 of the TAA, including the need for legal advice on the arbitration clause itself, are only necessary if legal malpractice is truly regarded as a personal injury tort under Texas law. In fact, legal malpractice most often arises as a negligence claim in Texas and is generally treated as such.[114] While other claims, including breach of fiduciary duty

---

signed by the attorney. *See* Tex. Gov't Code Ann. § 82.065(a) (Vernon 1998 & Supp. 2002) (making a contingent fee contract valid for legal services only if it is in writing and signed by both the attorney and the client); *see also Lack of Signature on Retainer Contract Keeps Lawyer From Using Arbitration Clause*, 16 A.B.A./B.N.A. Lawyers' Manual on Professional Conduct 504 (2000) (reporting that the decision in the *Godt* case to not enforce the attorney-client contract was based solely upon the attorney not having signed it, even though the court expressed further opinion about the enforceability of an arbitration clause).

111. *See In re* Godt, 28 S.W.3d at 738 (stating that "Texas law classifies a legal malpractice claim as a personal injury action"). As such, the arbitration clause in the retainer failed to meet a much more rigorous test of enforceability. *See id.* at 738-39 (delineating that an arbitration clause for a claim for personal injury under the TAA is not enforceable unless each party is advised on the arbitration clause by counsel, agrees to it in writing, and evidences having received independent counsel by both the party and the party's attorney signing the agreement).

112. *See* Mary Alice Robbins, *Arbitration Clause in Attorney-Client Contract Invalid*, Tex. Law., Sept. 11, 2000, WL 9/11/2000 TEXLAW 1 (reporting a predicted appeal to the Texas Supreme Court).

113. *See* Petition for Review at 1, Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (No. 00-0658) (noting that the appeal would present an issue of first impression). None of the three appellate court cases which addressed attorney enforcement of an arbitration clause in a client contract was reviewed by the Texas Supreme Court. *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, pet. denied); Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.); Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217 (Tex. App.—Houston [1st Dist.] 1996, no writ).

114. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989) (holding that in a legal malpractice action, the negligence of the attorney is evaluated by his conduct at the time the alleged breach took place); Byrd v. Woodruff, 891 S.W.2d 689, 700-01 (Tex. App.—Dallas 1994, writ denied, order withdrawn; writ dism'd by agr.) (affirming that a malpractice claim contains the element of duty); Veschi v. Stevens, 861 S.W.2d 291, 292 (Tex.

and breach of contract, are also actionable,[115] they are less common.[116] The *Gonzalez* court did not categorize the nature of the legal malpractice claim, enforcing arbitration under Section 171.001 of the TAA.[117] The *Godt* court, on the other hand, having distinguished a cause of action for legal malpractice as a personal injury claim, specifically applied Section 171.002.[118] The precedents cited in *Godt* reveal a rather thin case law history.

The chain of opinions leading to the conclusion in *Godt* is relatively short. In 1988, the Texas Supreme Court ruled in *Willis v. Maverick*[119] that "[a] cause of action for legal malpractice is in the nature of a tort and is thus governed by the two-year limitations statute."[120] The statute of limitations, not the nature of legal malpractice, was the issue in *Willis*.[121]

---

App.—San Antonio 1993, no writ) (finding that since a legal malpractice claim is based in negligence, the attorney's standard of care is that of a reasonably prudent attorney); *see also* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE § 3.03 (2d ed. 2000) (reiterating that in most cases, liability for the attorney in Texas comes from negligence); Edward F. Donohue III, *What Every Lawyer Should Know*, *in* A.B.A. STANDING COMM. ON LAWYERS' PROF'L LIABILITY, THE LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE 3 (2d ed. 1999) (asserting that legal malpractice throughout the nation is usually based in a professional negligence claim).

115. *See* Edward F. Donohue III, *What Every Lawyer Should Know*, *in* A.B.A. STANDING COMM. ON LAWYERS' PROF'L LIABILITY, THE LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE 3 (2d ed. 1999) (stating that legal malpractice is not always based upon an issue of competence, but can be brought on a contractual claim or for breach of ethical duties or implied fiduciary duties).

116. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2, n.48 (1986) (noting that malpractice claims for breach of contract are rare compared to negligence claims). For the attorney, one of the reasons to avoid a breach of contract malpractice claim is that the statute of limitations is longer on a contract claim than on a tort. *See id.* (suggesting that the difference in application of the longer statute of limitations depends solely upon whether the agreement is in writing).

117. *See* Henry v. Gonzalez, 18 S.W.3d 684, 690 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (quoting section 171.001 and applying it to the attorney-client contract). This section of the TAA makes no distinction regarding the nature of the agreement or the claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a) (Vernon Supp. 2002) (placing conditions on the time of the controversy, but no restrictions on the nature of the agreement). At the time of the *Gonzalez* decision, section 171.001 began: "A written agreement to submit *any* controversy to arbitration or a provision in a written contract to submit to arbitration *any* controversy thereafter arising between the parties is valid." *Gonzalez*, 18 S.W.3d at 690 (emphasis added).

118. *See In re* Godt, 28 S.W.3d 732, 739 (Tex. App.—Corpus Christi 2000, no pet.) (holding that as a personal injury claim under section 171.002(a)(3), a legal malpractice claim must meet the criteria of section 171.002(c) to be valid).

119. 760 S.W.2d 642 (Tex. 1988).

120. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988).

121. *See id.* (deciding that the two year limit under TEX. CIV. PRAC. & REM. CODE § 16.003 applied after referring to its decision in *First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W.2d 287 (Tex. 1986)). However, section 16.003 does not mention the word "tort" in

Two years later, in *Estate of Degley v. Vega*,[122] the Thirteenth District Court of Appeals held that legal malpractice qualifies as a personal injury in order to apply the two-year statute of limitations.[123] Without elaboration in *Sample v. Freeman*,[124] the Ninth District Court of Appeals also held legal malpractice to be a personal injury action for the purpose of applying a rule to calculate prejudgment interest.[125] The defendant in *Godt* argued that these two appellate court decisions were limited to the statute of limitations and damage calculation issues and that legal malpractice claims should not be considered personal injury actions for all purposes.[126] The *Godt* court was unpersuaded by these arguments,[127]

---

describing the cases it controls. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2002) (providing the causes of action subject to a two-year limitations period). Specific causes of action in the rule other than for wrongful death are as follows:

> [a] person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, *personal injury*, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

*Id.* § 16.003(a) (emphasis added).

122. 797 S.W.2d 299 (Tex. App.—Corpus Christi 1990, writ ref'd).

123. *See* Estate of Degley v. Vega, 797 S.W.2d 299, 302-03 (Tex. App.—Corpus Christi 1990, writ ref'd) (reasoning that since "tort" was not listed under section 16.003(a), legal malpractice claims must fall under one of the express causes of action in that section to apply the two-year statute of limitations).

124. 873 S.W.2d 470 (Tex. App.—Beaumont 1994, writ denied).

125. *See* Sample v. Freeman, 873 S.W.2d 470, 476 (Tex. App.—Beaumont 1994, writ denied) (extending the holding in *Willis* that legal malpractice is a tort to declare legal malpractice a personal injury action so that the ruling on daily compounding of prejudgment interest on damages in *Canvar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), would apply).

126. *See In re* Godt, 28 S.W.3d 732, 739 (Tex. App.—Corpus Christi 2000, no pet.) (describing defendant's argument for the inapplicability of *Sample* and *Vega*); *Lack of Signature on Retainer Contract Keeps Lawyer From Using Arbitration Clause*, 16 A.B.A./B.N.A. LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 504 (2000) (relaying the attorney's contention that the previous cases declaring legal malpractice a personal injury were for the specific purposes of resolving statute of limitations and damage calculations issues).

127. *See In re* Godt, 28 S.W.3d at 739 (holding that the characterization of legal malpractice as a personal injury is not limited to the circumstances in *Sample* and *Vega*). Instead the *Godt* court classified legal malpractice as a personal injury claim based on *Willis*. *See id.* The *Godt* court justified its rationale stating that the plaintiff in *Willis* had a negligence based cause of action, similar to the plaintiff at bar. *See id.* (offering additional justification based upon the character of the claim as a physical injury). Personal injury is the most frequent area of law underlying a legal malpractice suit. *See* A.B.A. STANDING COMM. ON LAWYERS' PROF'L LIABILITY, THE LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE 29 tbl.1 (2d ed. 1999) (indicating that the number of claims involving a personal injury case exceeded 21% in the early 1990's, a full 7% higher than the next most frequent claim). Confusion over justifying legal malpractice as a personal injury because of the original legal complaint was apparent in at least one report. *See Lack of Signature on Retainer Contract Keeps Lawyer From Using Arbitration Clause*, 16 A.B.A./

and no other court has had the opportunity to make a similar declaration concerning legal malpractice as a personal injury action under the TAA.[128]

2. Legislative History of the Personal Injury Provision in the TAA

Arbitration statutes were authorized by the 1845 Texas Constitution and the first arbitration laws appeared in 1846.[129] Texas adopted its General Arbitration Act in 1965,[130] incorporating it into the Revised Civil Statutes.[131] In 1978, the House Judiciary Committee met between legislative sessions to investigate how arbitration could be better used to relieve an increasingly overburdened court system.[132] The committee issued four recommendations designed to increase use of arbitration,[133] then at-

---

B.N.A. LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 504, 505 (2000) (noting "Godt's injury in her legal malpractice claim is plainly an action for personal injury since she is suing for damages she would have recovered for her physical injury but for the attorney's alleged negligence").

128. *See* Relator's Response to Real Party in Interest's Motion for Rehearing En Banc at 7, *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.) (No. 13-00-00388-CV) (clarifying that the Gonzalez majority never considered the question on "the applicability of [s]ection 171.002 of the TAA to legal malpractice claims").

129. *See* HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 1 (1979) (noting that constitutional authorization for arbitration existed until 1969 when it was deemed no longer necessary due to its firm foothold in common law).

130. *See id.* (stating that the Texas General Arbitration Act was based upon the Uniform Arbitration Act which had also been adopted by most other states). The TAA differed from the Uniform Arbitration Act in two fundamental ways: (1) arbitration could only be enforced if the agreement proved both parties had the advice of counsel demonstrated by the signature of both counsels and (2) insurance and construction contracts were excluded from arbitration. *Id.* The 1979 revision to the TAA sought to remove the requirement for attorneys to sign. *See id.* at 2 (addressing the concern that a party may be fraudulently induced into arbitration by allowing the courts to declare an unconscionable arbitration agreement unenforceable).

131. *See* 27 STEPHEN G. COCHRAN, TEXAS PRACTICE: CONSUMER RIGHTS AND REMEDIES § 1.29, n.1 (2d ed. 1996) (stating that "[t]he Texas Arbitration Act originally appeared at Vernon's Ann. Civ. St. art. 224 et seq."); HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 1 (1979) (citing the Texas General Arbitration Act as Articles 224 through 238-6 of the statute). Additional Texas arbitration law concerning employer-employee relations was contained in Articles 239 through 249. *See id.*

132. *See* HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 2 (1979) (stating that the committee considered statements and live testimony from a cross section of legal, academic, and business professionals).

133. *See id.* (delineating the recommendations arrived at after a formal hearing and continued deliberations). The four recommendations of the committee were:

> 1. Arbitration should be encouraged as a method of relieving overcrowded court dockets. 2. Arbitration should not be mandated by law but should be permitted as a possible alternative forum for settling disputes between consenting parties. 3. Insurance contracts and construction contracts should not be excluded from Article 224 of

tempted to implement those recommendations via House Bill 15 ("H.B. 15") in the 66th Legislative Regular Session.[134] The limitation on arbitration for personal injury claims first appeared as an amendment to H.B. 15.[135]

In the second meeting of the House Judiciary Committee on H.B. 15,[136] an amendment was offered to exclude personal injury actions from the TAA.[137] The bill was subsequently referred to a special subcommittee which modified the amendment by allowing arbitration of personal injury actions under the statute so long as the parties to a written agreement could prove they were advised on the implications of arbitration by counsel.[138] The amendment was only concerned with physical personal injuries, as it also sought to exclude claims for workers' compensation.[139] The essence of the language in the amendment was agreed to by the Sen-

---

the Texas General Arbitration Act. 4. No arbitration clause in a contract should be binding if unconscionable.

*Id.*

134. *See id.* (declaring that the purpose of the bill was to amend the TAA to allow for additional types of contracts to be considered for arbitration). H.B. 15 also limited the previous restriction on arbitration between employer and employee to collective bargaining agreements. *See id.*; *see also* BILL HISTORY REPORT, Tex. H.B. 15, 66th Leg., R.S. 5 (1979) (showing favorable report from committee).

135. *See* HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 3 (1979) (stating that a special subcommittee of the House Judiciary Committee met to consider the bill and reported back to the full committee on March 5, 1979 that the measure pass with one amendment to limit personal injury arbitration agreements and to deny arbitration for workers' compensation claims).

136. BILL HISTORY REPORT, Tex. H.B. 15, 66th Leg., R.S. 5 (1979) (noting that the Judiciary Committee had considered H.B. 15 in a public hearing on Feb 14, 1979 followed by a second public hearing on Feb 21, 1979).

137. *See The Texas General Arbitration Act: Hearings on Tex. H.B. 15 Before the House Comm. on Judiciary*, 66th Leg., R.S. 4 (Feb. 21, 1979) (tapes on file with the *St. Mary's Law Journal*) (revealing that State Representative Melchor Chavez proposed the only amendment to the bill at that time which was initially approved by the committee).

138. *See* TEX. HOUSE COMM. ON JUDICIARY MINUTES 4, 66th Leg., R.S. (Feb. 14, 1979) (referring H.B. 15 to a subcommittee established solely to consider amendments to the bill); BILL HISTORY REPORT, Tex. H.B. 15, 66th Leg., R.S. 5 (1979) (showing H.B. 15 referred to subcommittee on Feb 21, 1979 and considered by the subcommittee in a meeting on March 5, 1979).

139. *See* HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 3 (1979) (reporting back the amendment). The text of the amendment read:

> A claim for personal injury shall not be submitted to arbitration under this Act except upon the advice of counsel to both parties as evidenced by a written agreement signed by counsel to both parties after a dispute has arisen. A claim for worker's [sic] compensation shall not be submitted to arbitration under this Act.

HOUSE COMM. ON JUDICIARY, COMM. AMENDMENT NO. 1, Tex. H.B. 15, 66th Leg., R.S. (1979).

ate,[140] and subsequently adopted into the final version of the bill.[141] The personal injury clause remained substantially unchanged when the 74th Legislature redesignated the TAA from the Civil Statutes to Chapter 171 of the Civil Practice & Remedies Code.[142] The reorganization of the Civil Practice and Remedies Code under the 75th Legislature, which divided the old section 171.001 into two sections,[143] placed the personal injury clause in the new section 171.002 and added the requirement that a personal injury arbitration agreement must be signed by the parties themselves, as well as their attorneys.[144] Throughout this evolution in the statute, no discussion or consideration is on record that the original legislative intent for the personal injury provision under Section 171.002 included or excluded legal malpractice.

### B. *Public Policy Debate: Merits of Using Arbitration Clauses for Legal Malpractice*

Attorney-client agreements are afforded increased scrutiny by courts due to their public policy effects.[145] While the courts in *Gonzalez* and

---

140. *See* SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 1 (1979) (adopting an amendment by State Senator Santiesteban to strike the phrase "after a dispute has arisen" from the House amendment).

141. *See* BILL HISTORY REPORT, Tex. H.B. 15, 66th Leg., R.S. 5 (1979) (showing the House adopting the Senate amendments on May 26, 1979 and passing H.B. 15 on the same day). The applicable language from the final version of the bill as passed that became Article 224(c) of the Revised Civil Statutes of Texas is as follows: "any claim for personal injury except upon the advice of counsel to both parties as evidenced by a written agreement signed by counsel to both parties. A claim for workers' compensation shall not be submitted to arbitration under this Act." Tex. H.B. 15, 66th Leg., R.S. (1979) (enrolled).

142. *See* 27 STEPHEN G. COCHRAN, TEXAS PRACTICE: CONSUMER RIGHTS AND REMEDIES § 1.29, n.1 (2d ed. 1996) (stating that "[i]n 1995, the Act was codified as Chapters 171 and 172 of the Texas Civil Practice and Remedies Code (V.T.C.A. Civ. Prac. & Rem. Code §§ 171.001-.023, 172.001-.310)"); *see also* SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 1439, 74th Leg., 1st C.S. 1 (1995) (specifying that the codification of the general arbitration statutes from Title 10 of the Civil Statutes to Chapter 171 of the Civil Practices and Remedies Code was a nonsubstantive change). Only the final word in the new section 171.001(c) changed from Article 224(c); the word "Act" was changed to "chapter." *See* Texas General Arbitration Act, 74th Leg., R.S., ch. 588, § 1, 1995 Tex. Gen. Laws 3403.

143. *See* SEN. COMM. ON ADMINISTRATION, BILL ANALYSIS, Tex. S.B. 898, 75th Leg., R.S. 1 (1997) (stating that the bill made nonsubstantive modifications in twenty-one different codes, including the Civil Practice and Remedies Code).

144. *See* Texas General Arbitration Act, 75th Leg., R.S., ch. 165, § 5.01, 1997 Tex. Gen. Laws 329 (showing section 171.002 in its current form).

145. *See* Mark G. Anderson, Note, *Arbitration Clauses in Retainer Agreements: A Lawyer's License to Exploit the Client*, 1992 J. DISP. RESOL. 341, 341-42 (1992) (supporting the conclusion that courts view attorney-client agreements suspiciously and judge them upon a higher standard because of the opportunity afforded the attorney to exploit his client by means of superior position); Lester Brickman, *Attorney-Client Fee Arbitration: A*

*Godt* did not decide their cases based upon public policy,[146] many public policy issues were implicated by the majorities in those cases. The dissent in *Gonzalez* directly addressed those issues.[147]

1. *Gonzalez* Majority: Embracing the Right to Contract and the Move Toward ADR

While the traditional benefits of arbitration over litigation are most often discussed in cases of fee disputes,[148] they also apply in the cases of malpractice. These benefits include greater efficiency due to streamlined procedures,[149] less cost,[150] less delay,[151] less formality,[152] less hostility,[153]

---

*Dissenting View*, 1990 UTAH L. REV. 277, 305-06 (1990) (refusing to apply commercial arbitration standards to attorney-client disputes due to the public policy impacts driving a closer scrutiny of that relationship). Normally, attorneys only take their clients to court when the clients have not paid their fees. *See TLIE's Top Ten List of Malpractice Claims*, TEX. LAW. INS. EXCHANGE NEWSL. (1996), *at* http://www.tlie.org/riskmgmt/news/96isu3.htm (last visited Apr. 11, 2002) (claiming suits for fees to be the number one dispute between attorneys and clients). Clients take their attorneys to court when they disagree with the amount of the fees or when they charge the attorney with some type of malpractice. *See id.* (noting that attorney suits for fees usually result in legal malpractice counterclaims). Pre-dispute clauses may be drafted to mandate arbitration only for fee disputes or, more comprehensively, for any dispute that arises between the attorney and the client. *See* David Hricik, *Arbitration Agreements Require Care and Disclosure*, TEX. LAW., June 19, 2000, WL 6/19/2000 TEXLAW 62 (noting that greater scrutiny is applied to arbitration clauses that encompass all matters that may arise between attorney and client).

146. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 (2001), WL 12 No. 3 PROFLAW 24 (determining after a review of Texas case law that both *Godt* and *Gonzalez* provided opportunities for courts to address the policy considerations of attorney-client arbitration agreements, but that the opportunities were not taken).

147. *See* Henry v. Gonzalez, 18 S.W.3d 684, 692 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (Hardberger, C.J., dissenting) (basing his dissent upon public policy considerations, Chief Justice Hardberger explored several of the issues that he accused the majority of dismissing with too little discussion).

148. *See generally* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 835-38 (1999) (reviewing the advantages of arbitration commonly put forth by commentators).

149. *See* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2027 (1993) (finding that arbitration is an "expeditious, 'business-like,' expert settlement of disputes"); *see also* Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (noting that arbitration is much more efficient compared to delays commonly found in backlogged courts).

150. *See* Stephen S. Maris & Kevin Hamby, *No Clause for Alarm: The Desire For More Control Is Leading Corporations to Include Binding Arbitration in Almost All Contracts*, TEX. LAW., Oct. 9, 1995, WL 10/9/1995 TEXLAW 30 (citing a 1993 Deloitte & Touche survey that indicated up to a 50% savings using ADR over litigation); Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2016 (1993) (reminding both the attorney and the client that their recoveries will be substantially reduced by the cost of the litigation); *see also* Lester Brickman, *Attorney-Client*

greater preservation of confidentiality,[154] relief of caseload on the courts,[155] and potentially higher quality judgments.[156] While not stated by the *Gonzalez* court, these arguments are consistent with the mandatory arbitration upheld by the court.

---

*Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 279 (1990) (noting that in an attorney-client dispute, the client avoids the cost of retaining another attorney to pursue a fee dispute); Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (noting the savings in attorney fees in arbitration procedures versus litigation).

151. *See* Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (observing that the swiftness of the arbitration process means a quick dispute resolution that is not easily overturned).

152. *See* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2027 (1993) (equating informality with efficiency).

153. *See* Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (emphasizing that the most important benefit to arbitration is resolving disputes between the parties amicably before they escalate); Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 209 (1996) (determining that because arbitration is quicker and more private than litigation, it exacts less emotional toll on the parties).

154. *See* Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (noting that the potential damages from adverse publicity can be avoided through the confidentiality of arbitration); Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2018 (1993) (warning that the client who pursues litigation against his former attorney risks revelation of his own confidential information through the litigation process).

155. *See* HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 1 (1979) (relating that at the time of this revision to the TAA, arbitration had been recognized by both the U.S. and Texas Chief Justices as a way to relieve crowded court dockets). Arbitration may indeed be contributing to the increase in settlements for legal malpractice claims which have risen a total of 11.88% from the mid-1980's to the early 1990's. *See* A.B.A. STANDING COMM. ON LAWYERS' PROF'L LIABILITY, THE LAWYER'S DESK GUIDE TO PREVENTING LEGAL MALPRACTICE 34 & tbl.4 (2d ed. 1999) (attributing the decrease in the number of cases going to trial to the greater use of settlements by the malpractice insurance industry and the increased application of ADR).

156. *See* Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 208 (1996) (suggesting arbitrators are more qualified decision makers when dealing with complex malpractice disputes); Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 837-38 (1999) (attributing arbitration's superior outcome to the parties' ability to choose an arbitrator who is better informed about the nature of their dispute); *see also* Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (noting arbitration is more likely to decide a case on the merits and less likely to result in an unreasonably large award).

In *Gonzalez*, it was uncontested that an arbitration agreement existed in the attorney-client contract.[157] The majority followed the two-prong test for general arbitration which led them to conclude enforceability.[158] The first prong determines whether the arbitration agreement is valid and enforceable.[159] By declaring the attorney-client agreement valid, the *Gonzalez* court recognized the attorney's need to establish a stable relationship with his clients, like any other business person.[160] The second prong of the test is whether the asserted claim falls within the scope of the agreement.[161] The pertinent language within the agreement between the Gonzalezes and their attorney was:

> Any and all disputes, controversies, claims, or demands arising out of or relating to this Agreement or any provision hereof, the providing of services by Attorneys to Client, or in any way relating to the relationship between Attorneys and Client whether in contract, tort, or

157. *See* Henry v. Gonzalez, 18 S.W.3d 684, 690 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (concluding that the evidence consisting of the attorney-client contract itself was not disputed in the record).

158. *See id.* at 689-92 (holding that the evidence proved a valid agreement and that the legal malpractice claim was within the scope of the arbitration clause).

159. *See id.* at 688-89; *see also* Dallas Cardiology Ass'n v. Mallick, 978 S.W.2d 209, 212 (Tex. App.—Texarkana 1998, pet. denied) (citing the two questions that a court must determine concerning an arbitration agreement and noting that positive responses to both questions leave the court with no discretion but to compel arbitration). Importantly, an arbitration agreement in and of itself has been held inherently proper by the Texas Supreme Court. *See* EZ Pawn Corp. v. Mancias, 934 S.W.2d 87 (Tex. 1996) (declaring that there is nothing per se unconscionable about arbitration agreements).

160. *See* Petition for Review at 2, Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (No. 00-0658) (characterizing the *Gonzalez* court's treatment of attorney-client contracts no differently from that of insurance salesmen or swimming pool builders); *see also* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2591 (1996) (relating that after decades of denial, lawyers finally admitted and embraced the fact that they, too, are businesspersons). The use of arbitration for disposition of disputes is appropriate to contract if it is done in the initial retainer or engagement contract. *See* Ysleta Indep. Sch. Dist. v. Godinez, 998 S.W.2d 700, 702 (Tex. App.—El Paso 1999, no pet.) (declaring arbitration a "creature of contract" and that arbitration clauses are subject to standard contract principles). Once the attorney-client relationship is established, it is unlikely that a court will enforce an agreement mandating arbitration of malpractice disputes. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 651 (1997) (presuming courts to be very suspicious of arbitration agreements for malpractice reached after the attorney has established a position of trust with the client).

161. *Gonzalez*, 18 S.W.3d at 688-89; *see also Dallas Cardiology Ass'n*, 978 S.W.2d at 212, 214-15 (finding that both an interwoven tort claim and a contractual provision can fit within the scope of a broadly worded arbitration agreement).

> otherwise, at law or in equity, for damages or any other relief, shall be resolved by binding arbitration.[162]

The court held that this language was applicable to both malpractice and breach of fiduciary duty causes of action.[163] As such, the claims fell within the scope of the agreement.[164] Given the satisfaction of the two-prong test, the court had no option but to compel arbitration.[165] The court's decision is consistent with the national trend toward arbitration which comes in part from a dissatisfaction with the practical limitations of litigation.[166] Statutes in many states have codified the policy of making arbitration "a viable alternative to litigation."[167] Other states have largely agreed to enforce arbitration clauses in contracts.[168]

A critical public policy argument addressed in *Gonzalez* was that arbitration does not deny parties a right to a trial by jury.[169] Inasmuch as a party has the right to choose between arbitration and litigation, this is true. The court, however, did not elaborate on its reasoning.[170] In Texas,

---

162. *Gonzalez*, 18 S.W.3d at 689.

163. *See id.* at 691 (concluding that both of the client's factual allegations forming the causes of action were sufficiently intertwined with the contracted legal service that they qualify under the arbitration clause).

164. *See id.* (stating it is a question of law for a court to review de novo whether a particular cause of action falls under the scope of an arbitration clause).

165. *Id.* at 692; *see also* Merrill Lynch, Pierce, Fenner & Smith v. Eddings, 838 S.W.2d 874, 878 (Tex. App.—Waco 1992, writ denied) (determining that if the court finds an enforceable arbitration agreement exists and the claim is within the scope of the agreement, then it must compel arbitration).

166. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 628-29 (1997) (arguing that support for the increased use of ADR comes from trying to avoid the time, expense, and inflexibility of litigation as the primary means for resolving disputes).

167. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 989 (1995) (portraying the rise in use of arbitration as a combined result of legislative action and an increased willingness of courts to uphold privately contracted arbitration).

168. *See* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2025-26 (1993) (explaining that legislatures in most jurisdictions have forced the courts to reverse their traditional hostility toward arbitration by enacting statutes that make arbitration agreements enforceable).

169. *See Gonzalez*, 18 S.W.3d at 691 (concluding from a survey of "well established case law" that Texas courts favor arbitration and do not regard the use of arbitration as a denial of the right to trial).

170. *See id.* (providing the citations to three cases in support of this position, only one of which addresses the issue of a right to trial). The *Gonzalez* court could only rely upon two of the cases it cited for general affirmation of the policy favoring arbitration. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992); Fridl v. Cook, 908 S.W.2d 507, 511 (Tex. App.—El Paso 1995, writ dism'd w.o.j.). The third case directly addressed the potential deprivation of a right to a jury trial by agreeing to arbitration. *See* D. Wilson Constr.

as in many jurisdictions, choosing arbitration waives the right to a jury trial.[171] The ability to present the malpractice case before a jury is often cited as the most important right waived by arbitration.[172] Once a party

---

Co. v. McAllen Indep. Sch. Dist., 848 S.W.2d 226, 231 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.). The *Wilson* court concluded that a party waives the right to trial upon agreeing to a contract containing an arbitration clause. *See id.* (arguing that in passing the Federal Arbitration Act, Congress revoked the state's power to mandate a trial where the parties agreed instead to arbitrate). Chief Justice Hardberger also notes that none of the three cases cited involved an arbitration agreement between an attorney and client. *See Gonzalez*, 18 S.W.3d at 692 (Hardberger, C.J., dissenting) (emphasizing the special policy considerations involved in the attorney-client relationship).

171. *D. Wilson Constr. Co.*, 848 S.W.2d at 231; *see* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 633 (1997) (adding that it is "a right 'not lightly to be deemed waived'"); Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (stating that employees who sign agreements with arbitration clauses waive their right to sue their employers, even though most do not realize this).

172. *See* Petition for Writ of Mandamus at App. B, *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.) (mentioning specifically the loss of jury trial as the significant impact on a client's rights when agreeing to arbitration); Joseph P. McMonigle & Thomas Weathers, *A New Way to Go: Arbitration of Legal Malpractice Claims*, 64 DEF. COUNS. J. 409, 409 (1997), WL 64 DEFCJ 409 (determining that the most important right a client would forgo in agreeing to arbitration is the right to a jury trial); Mike Yarber, *Arbitration Agreements with Clients*, TEX. LAW. INS. EXCHANGE NEWSL. (1999), *at* http://www.tlie.org/riskmgmt/news/97isu1.htm (last visited Apr. 11, 2002) (noting that if the lawyer fails to prove that he did not fully inform the client of arbitration ramifications, the court may disallow an attorney-client arbitration agreement). Whereas the previous public policy arguments are based on fairness to either party, the reasons for avoiding a jury decision seem only to benefit the attorney. *See* Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6, 10 n.5 (Cal. Ct. App. 1989) (relating that the chief interest of an attorney to seek arbitration is to avoid trial and thus limit the amount of recovery by the client); *see also* Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 220-21 (1996) (noting that the public is highly skeptical of arbitration agreements for medical malpractice because arbitration is so readily endorsed by physicians). Many attorneys believe the public disfavors them as a group. *See* Brenda Sapino Jeffreys, *Lawyers Wary of Arbitration Clauses in Fee Contracts*, TEX. LAW., Oct. 2, 2000, WL 10/2/2000 TEXLAW 1 (quoting the opinion of an attorney practicing malpractice law that arbitration is the only fair forum for the attorney because of the public hatred for the legal profession). Under this theory, juries hold the attorney in disdain and are more sympathetic toward the client. *See* Petition for Writ of Mandamus at 17, *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.) (stating that "[p]robably no other group of professionals suffers more widespread, collective disdain and criticism when one of its members is accused of taking advantage of a client"). *But see* Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (remarking that plaintiff's attorneys dislike arbitration because they cannot appeal to the emotions of an unsophisticated jury). If true, arbitration would likely result in more losses for attorneys and bigger awards for the clients. *See* Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J. 330, 333 (1998), WL 61 TXBJ 330 (arguing that arbitration removes the possibility of catastrophically high damages from jury trials where the

elects to accept arbitration, that party can no longer seek judgment from a court.

There are other due process issues in addition to the right to a jury trial that become a concern with an agreement to arbitrate in lieu of litigation. The arbitrator has limited discovery rights,[173] does not have to abide by the rules of evidence,[174] and does not have to base a decision on the same substantive laws otherwise used in court.[175] In fact, a lay arbitrator is not required to know the professional rules of ethics that normally guide decisions in legal malpractice cases.[176] Even more importantly, binding arbitration is not normally subject to appeal.[177] Although due process issues demonstrate that not all of the public policy arguments arising out

---

attorney is the defendant); *see also* Mike Yarber, *Arbitration Agreements with Clients*, TEX. LAW. INS. EXCHANGE NEWSL. (1999), *at* http://www.tlie.org/riskmgmt/news/97isu1.htm (last visited Apr. 11, 2002) (reporting a predominant sentiment that, compared to a jury, an arbitration panel will not likely award a "colossal" judgment against a professional).

173. *See* Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (noting that where extensive discovery is necessary, such as in employee discrimination cases, a pre-dispute arbitration agreement can hinder a claim); *see also* Rogge Dunn, *Arbitration vs. Litigation: It's No Contest*, TEX. LAW., Nov. 17, 1997, WL 11/17/1997 TEXLAW 22 (noting that arbitration requires fewer depositions and less production of documents during discovery).

174. *See* Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (considering that the arbitrator who can hear evidence that a court may consider irrelevant or prejudicial may render a different decision than a court on that basis).

175. *See* Jane Massey Draper, Annotation, *Validity and Construction of Agreement between Attorney and Client to Arbitrate Disputes Arising Between Them*, 26 A.L.R.5TH 107, 115 (1995 & Supp. 2001) (advising that courts are in a superior position to lay arbitrators in terms of invoking the rules of professional ethics and recognizing the fiduciary duty the attorney owes to the client).

176. *See id.*; Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (noting that arbitrators may use other than legal standards for making their decisions).

177. *See* Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (contrasting a judicial determination which is appealable, with an arbitrator's decision which is final); *see also* Stephen S. Maris & Kevin Hamby, *No Clause for Alarm: The Desire For More Control Is Leading Corporations to Include Binding Arbitration in Almost All Contracts*, TEX. LAW., Oct. 9, 1995, WL 10/9/1995 TEXLAW 30 (quoting an arbitrator who considers himself more powerful than a federal judge due to a party's inability to appeal his decision). *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098 (Vernon Supp. 2002) (allowing for appeal from a judgment entered confirming, denying, modifying, correcting, or vacating an arbitration award); RICHARD E. FLINT & L. WAYNE SCOTT, TEXAS CIVIL PROCEDURE: PRETRIAL CASES & MATERIALS 92 n.4 (Grail & Tucker, 2001) (explaining further that section 171.098 does not allow an appeal to the Texas Supreme Court from an interlocutory order that denies arbitration unless there is a dissent or conflict in the court of appeals); Lionel M. Schooler, *Arbitration in the New Century: Developments in the Law*, 38 HOUS. LAW. 16, 25 (2001), WL 38-APR HOULAW 16 (contrasting the TAA's allowance of appeal from the denial of

of the decision in *Gonzalez* favor arbitration, the dissenting opinion illuminates still more concerns with attorney-client pre-dispute arbitration agreements.

2. *Gonzalez* Dissent: Protecting the Rights of the Unsophisticated Client

Attorney-client arbitration clauses present a more problematic situation for the unsophisticated client.[178] The dissent in *Gonzalez* addressed public policy arguments offered on behalf of such a client.[179] The first concern is that an unsophisticated client is not capable of foreseeing all of the disadvantages involved with using arbitration instead of litigation.[180] Second, this type of client may not be on equal bargaining terms with his attorney.[181] The attorney's in-depth knowledge of legal rights is a powerful advantage over the client who relies upon that attorney to provide information needed to make an informed decision on arbitration.[182] As

---

a motion to compel arbitration with the lack of ability in Texas to appeal the grant of a motion to compel arbitration).

178. *See* Petition for Review at 6, Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (No. 00-0658) (using Hector Gonzalez as an example of a unsophisticated client); *see also* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 995 (1995) (contrasting the frequent desire for arbitration agreements by sophisticated clients with the troubles encountered with their use with unsophisticated clients).

179. *See generally* Henry v. Gonzalez, 18 S.W.3d 684, 692-94 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (Hardberger, C.J., dissenting) (providing the only public policy discussion on record in a Texas case concerning the viability of attorney-client arbitration clauses).

180. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 991 & n.113 (1995) (quoting the cautionary comment found in RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54 cmt. b(iv) (Tentative Draft No. 4, 1991) about an attorney taking advantage of arbitration as a favorable forum). *But see* Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (stating that "[p]ost-dispute arbitration agreements don't raise the same fairness concerns because a plaintiff typically has had an opportunity to consult with counsel to assess her claim and potential damages").

181. *See Gonzalez*, 18 S.W.3d at 693 (Hardberger, C.J., dissenting) (characterizing the bargaining position of the client relative to the attorney as "not even close to being . . . equal"); Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 647 (1997) (highlighting the sentiment from the court in *Pete v. UMW Welfare & Retirement Fund*, 517 F.2d 1275 (D.C. Cir. 1975), that plaintiffs lack the experience and education to reach a fair deal with an attorney).

182. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 647 (1997) (contending the

the dissent notes, clients are often at a further disadvantage when the decision to sign an arbitration agreement is made while they are dealing with a life crisis.[183]

Even more fundamental to the attorney-client relationship is the fiduciary duty the attorney owes the client.[184] Attorneys are held to a higher standard imposed by society upon those that maintain positions of public trust and confidence.[185] The ability of a client to bring a separate breach of fiduciary duty cause of action is indicative of the high regard the law holds for this relationship.[186] Accordingly, attorney-client contracts are judged according to a higher standard than is applicable to parties forming a general commercial contract.[187] The point at which that fiduciary

---

client is not familiar or comfortable with matters of law). This imbalance of power continues into the arbitration itself; attorneys are often trained in the arbitration process while clients, as unfamiliar with arbitration as with trial, are likely to represent themselves. *See id.* at 631 (finding that one reason the client may chose arbitration is that he would not have to be represented by an attorney). On the other hand, some commentators note that individual client representation in a arbitration proceeding is an advantage going to the simplicity of the matter. *See* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2028 (1993) (summarizing that there is simply less "lawyering" involved in arbitration); *see also* Geraldine Szott Moohr, *Arbitration Isn't Always Appropriate*, TEX. LAW., Jan. 24, 2000, WL 1/24/2000 TEXLAW 27 (finding that some clients, who find it difficult to secure representation, might prefer arbitration).

183. *See Gonzalez*, 18 S.W.3d at 693 (Hardberger, C.J., dissenting) (expounding on the psychological stresses of a client retaining an attorney for a cause of action after a calamity in his life); *see also* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 648 (1997) (outlining several situations where a client might undergo stress such as filing for divorce, being accused of a crime, or being fired from a job).

184. *See* Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 282-84 (1990) (concluding that attorneys owe a fiduciary duty to their clients because clients place special trust and confidence in attorneys to exercise professional judgment on their behalf).

185. *See id.* (stating that the duty is mandated by society for a fiduciary to act honestly, fairly, competently, and on full behalf of their clients).

186. *See id.* at 285 (revealing a presumption in many courts that any transaction between an attorney and a client is necessarily void unless the attorney can prove that the client had full knowledge of the implications of the transaction and that it was fair and equitable to the client's interests).

187. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 496 (1986) (describing the supervisory power of the court over attorney-client contracts).

> The basic contractual relationship between client and lawyer is itself subject to an overriding power in courts to affect the terms of the relationship between client and lawyer in ways favorable to the client. That is a power quite different from the common-law power of courts to fashion rules of contract law. The power is derived from the court's special role as protector of vulnerable clients against the depredations of lawyers and as primary regulator of the legal profession.

*Id.*

relationship actually forms between the attorney and the client is another point of contention. One view argues that the fiduciary relationship arises from the very first contact between attorney and client, effectively removing even a retainer agreement from the general presumption of validity for an arbitration clause.[188] The other view refuses to extend the attorney's fiduciary obligation to the initial attorney-client contract.[189] The argument is that until the actual relationship is established, the attorney may freely negotiate with the prospective client.[190] This latter position was upheld in a federal district court which ruled that the attorney has no fiduciary duty until after the client has signed the fee agreement.[191] Although there is no Texas court precedent for this issue, the Fifth Circuit has held that the fiduciary relationship begins in the initial negotiation stage.[192] Thus, the special relationship between attorney and client, and its elevated level of scrutiny in the courts, may provide the central point of contention between proponents and opponents of predispute arbitration agreements.[193]

---

188. *See* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 862 (1999) (characterizing the restrictive view taken by the Ohio Board of Commissioners on Grievances and Disciplines as the "client protective approach" to regulating attorney-client contracts).

189. *See id.* at 855 (describing the California Bar's approach to attorney-client arbitration agreements as an "arms-length approach").

190. *See* David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 754 (1997) (arguing that the fiduciary duty an attorney owes a client does not begin until after entering the initial contract).

191. *See* McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048, 1051 (D. Colo. 1991) (specifically rejecting the fiduciary duty argument in regard to the initial agreement between the attorney and the client); *cf.* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 140 & n.52 (1990) (interpreting ABA Model Rule 1.8(h) as allowing for an attorney-client arbitration agreement for malpractice at any time prior to the malpractice dispute, even after the fiduciary relationship is established, as long as the rule's requirements are met).

192. *See* Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982) (indicating that even preliminary consultations concerning the possible retention of the attorney's services establish a fiduciary relationship).

193. *See* David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 754-56 (1997) (playing the devil's advocate against Professor Power's assertion that attorney-client arbitration clauses should get greater scrutiny than commercial contracts). On appeal to the Texas Supreme Court, *Gonzalez* added a public image perspective to this debate:

> This Court may judicially notice the Yellow Pages and their own experiences as attorneys that PI lawyers routinely extol their virtues as board certified "trial" lawyers, courtroom wizards with a history of million dollar jury verdicts, to convince prospective clients to sign their contingent fee contracts. To allow these same lawyers to cover themselves on the "back end" by ensuring that clients will never be able to publicly

Finally, the *Gonzalez* dissent advanced the argument that traditional contract defenses, particularly unconscionability, are theoretically, but not practically, available.[194] Since arbitration is so highly favored, it is difficult to substantively prove that the agreement was unconscionable at the time it was signed and that arbitration was not in the client's best interest.[195] Proving procedural unconscionability has not, however, met with any greater success.[196] Although at least one opinion has held that attorney retainers are not adhesion contracts,[197] they do have a certain "take it or leave it" quality to them, especially with respect to the unsophisticated client.[198] As such, the attorney must exercise caution to prevent claims of abuse or the appearance of impropriety.[199] An arbitration

---

litigate malpractice and fiduciary claims before a local jury exemplifies why the public is so often contemptuous of the legal profession.

Petition for Review at 8, Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (No. 00-0658).

194. Henry v. Gonzalez, 18 S.W.3d 684, 693 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (Hardberger, C.J., dissenting).

195. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 640-41 (1997) (analyzing the high standard necessary to prove unconscionability, a simple claim by the client that entering into the arbitration agreement was unwise or not in his best interest is likely insufficient to set aside the agreement on contractual grounds). *But see* David Hudson, *Arbitration Case Gets New Life*, A.B.A. J. EREPORT, Feb. 15, 2002, *at* http://www.abanet.org/journal/redesign/f15arb.html (last visited Apr. 11, 2002) (on file with the *St. Mary's Law Journal*) (reporting that even after the U.S. Supreme Court held the arbitration clause in an employment contract enforceable in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), the Ninth Circuit Court of Appeals struck down the agreement as unconscionable under state contract law).

196. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 641-42 (1997) (suggesting that to set aside an arbitration agreement under procedural unconscionability the client must establish unequal bargaining power with the attorney and that the attorney used that bargaining position to the client's disadvantage).

197. *See* Jane Massey Draper, Annotation, *Validity and Construction of Agreement between Attorney and Client to Arbitrate Disputes Arising Between Them*, 26 A.L.R.5TH 107, 122 (1995 & Supp. 2001) (reporting the court's opinion in *Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d 261 (2d Dist. 1997)).

198. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 996 (1995) (arguing that attorney-client contracts may resemble, but should be distinguished from standard commercial agreements where consumers have no choice but to "take it or leave it").

199. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 632 (1997) (proposing that the combination of the nature of the attorney-client engagement contract and the fiduciary responsibility of the attorney is the significant concern for potential abuse). For example, in *Lawrence*, the arbitration clause of a retainer agreement was not enforced because the court found that it was not the product of negotiation. *See* Lawrence v. Walzer & Gabriel-

clause with a sophisticated client may be more enforceable, in part, because that client is seen to have the ability to resist such a clause.[200] Providing the unsophisticated client with a similar opportunity to accept or reject the arbitration clause independently of the retainer as a whole abates the public policy concerns.[201]

3. *Godt* Court: Maximum Procedural Protection

Going beyond the dissent in *Gonzalez*, *Godt* embraced the most extensive measures to protect the unsophisticated client.[202] In dicta, the court relied upon the language in Texas Rules of Professional Conduct 1.08(g).[203] The court quoted that rule as follows: "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.*"[204] The emphasis on the requirement for independent counsel is consistent with the court's interpretation of legal malpractice under Section 171.002(c) and provides the maximum amount of protection for the client under the statute.[205] This is the approach that the *Godt* court indicated it would have taken had it addressed the issue on the merits.[206]

---

son, 256 Cal. Rptr. 6, 10 (Cal. Ct. App. 1989) (concluding that the retainer agreement was prepared by the attorney and simply given to the client without a full explanation of the consequences of the arbitration clause).

200. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 995 (1995) (noting further that a sophisticated client recognizes the option to seek other legal representation if he cannot reach satisfaction on a proposed arbitration clause).

201. *See id.* at 996 (advocating that if the client is truly given a choice between predispute arbitration or litigation at the time of the initial contract, then the attorney has met his fiduciary duty).

202. *See* Petition for Writ of Mandamus at 20, *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.) (using Pamela Godt as an example of an unsophisticated client).

203. *In re* Godt, 28 S.W.3d at 739-40 n.7.

204. *Id.*

205. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(b) (Vernon Supp. 2002) (requiring the parties to agree to arbitrate in writing and for each party and each party's attorney to sign the agreement), *with id.* § 171.002(c) (Vernon Supp. 2002) (making the same requirements as in part (b), but adding the additional requirement for the parties to obtain counsel on the arbitration clause prior to the agreement).

206. *See In re* Godt, 28 S.W.3d at 739 n.7 (suggesting a public policy rationale for achieving the protection provided under TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(c)). In sum, the procedural protection outlined under *Godt* consisted of: (1) TEX. GOV'T CODE ANN. § 82.065(a) (Vernon 1998 & Supp. 2002), requiring the attorney-client contract to be in writing and signed by both the attorney and the client, (2) TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (Vernon Supp. 2002), requiring the arbitration clause

Excluding a pre-dispute arbitration agreement on the basis of the disciplinary rule against an attorney limiting his liability is itself debatable.[207] The key concept to the rule is that it is unethical for a lawyer to do anything that would proactively limit his liability unless the client is separately represented.[208] However, at least one court has held that use of an arbitration clause in an attorney-client contract did not violate the model rule; it "merely shift[ed] determination of the malpractice claim to a different forum."[209] The potential liability to the attorney is the same whether the case goes before a court or an arbitrator.[210]

### C. *Establishing a Standard for Legal Malpractice Arbitration in Texas*

#### 1. Suggested Standards for Legal Malpractice Clauses

Although it is not known whether another Texas court will accept the argument of *Godt* over *Gonzalez* or *Porter*, an attorney seeking to enforce a pre-dispute agreement with a client is not adequately protected by the *Gonzalez* or *Porter* decision.[211] After considering the policy argu-

---

to be enforceable under contract law and not to be unconscionable, and (3) TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(c) (Vernon Supp. 2002), requiring the client to have obtained the advice of independent counsel on the arbitration clause prior to both parties signing the agreement. *Id.* at 738-39.

207. *Compare id.* at 739 & n.7 (suggesting that an attorney-client arbitration agreement is against public policy because it violates the rule against an attorney limiting his malpractice liability), *with* Derfner & Mahler, LLP v. Rhoades, 683 N.Y.S.2d 509, 509 (N.Y. App. Div. 1999) (finding that enforcement of arbitration clauses for attorney malpractice complies with public policy when there is no violation of an ethics rule on the face of the retainer agreement).

208. *See* Mark G. Anderson, Note, *Arbitration Clauses in Retainer Agreements: A Lawyer's License to Exploit the Client*, 1992 J. DISP. RESOL. 341, 349 (1992) (concluding that the disciplinary rule applies to the issue of pre-dispute arbitration agreements between an attorney and a client for legal malpractice).

209. McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048, 1051 (D. Colo. 1991). The court rejected the application of the common professional rule against limiting attorney liability to attorney-client pre-dispute arbitration agreements. *See id.* (concluding that the Oklahoma Rule of Professional Conduct 1.08(g) did not invalidate the attorney-client arbitration agreement); *see also* Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-116 (1989) (advising that inclusion of an arbitration clause does not change the duty an attorney owes a client, but only selects the forum for any dispute over liability).

210. *See* Ariz. Comm. on Legal Ethics and Prof'l Responsibility, Op. 94-05 (1994) (deciding that a mandatory arbitration agreement does not violate the ethics rule against limiting an attorney's malpractice liability, but merely prescribes the procedure that will be used to resolve a malpractice claim); *see also* Okla. Bar Ass'n Legal Ethics Comm., Op. 312 (2000), *at* 2000 WL 33389634 (claiming the ethics rule is not violated by an attorney-client arbitration clause unless that clause puts caps on damages, costs, or fees).

211. *See* David Hricik, *Arbitration Agreements Require Care and Disclosure*, TEX. LAW., June 19, 2000, WL 6/19/2000 TEXLAW 62 (noting that these cases are incomplete and fail to address ethical requirements involving attorney-client arbitration agreements).

ments, some commentators have proposed rules or specific language to best ensure the enforceability of the agreement.[212] Three specific recom-

---

212. *See, e.g.*, Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 659 (1997) (offering a disciplinary rule for guidance). Powers's rule is as follows:

> An attorney shall not enter into a pre-dispute agreement whereby a dispute with a client must be submitted to arbitration, mediation, or like alternative dispute resolution process, unless: (1) Representation has not yet commenced; (2) The attorney reasonably believes that the client's interests will not be prejudiced by the operation of the agreement; and (3) (a) The client is represented by independent counsel in making the agreement; or (b) The attorney makes full, written, disclosure of the effect of the agreement (including any waiver of the right to a jury trial, and notice that independent representation is advised), the disclosure is read and signed by the client, and the attorney reasonably believes the client understands the agreement sufficiently to protect his interests in making the agreement.

*Id.*; David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 27 (2001), WL 12 No. 3 PROFLAW 24 (proposing a model arbitration provision that could be individually tailored and must be certain to comply with applicable laws and professional rules). Hricik's model provision reads:

> Arbitration of Fee and Malpractice Disputes. Any dispute arising out of this agreement or our representation of you will be resolved exclusively by submission to arbitration under the rules of the American Arbitration Association. This includes but is not limited to any claim for malpractice, negligence, breach of fiduciary duty, deceptive trade practices, breach of contract, or the like that you may later wish to assert against us. There are advantages to arbitration, but also disadvantages. Arbitrating our disputes may be more efficient, and it will be done in private. However, any claim for malpractice will not be decided in court or in a trial by jury. Also, unlike courts that are an arm of government, private arbitrators have no ability to require third parties to participate in an arbitration or to provide documents or witnesses. There may be other disadvantages to arbitration. Consequently, you should carefully consider whether arbitration is acceptable to you, and should consult with independent counsel if you believe it appropriate to do so. By signing this letter, you agree that the arbitrator's decision shall be binding, conclusive, and nonappealable.

*Id.*; Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J. 330, 332 (1998), WL 61 TXBJ 330 (encompassing drafting recommendations into a sample arbitration provision). Summers's proposed text is:

> Dispute Resolution by Binding Arbitration—At either party's request, any and all disputes arising under or relating to this contract or the engagement and legal services to be rendered, including but not limited to fee disputes, legal malpractice claims and claims of fraud, constructive fraud, breach of fiduciary duties, breach of contract or any others, will be submitted to [the arbitrating body] for binding arbitration and prompt resolution. Both attorney and client agree to be bound by this provision and the results of such arbitration. Client understands and agrees that it has the right to consult independent counsel regarding this provision and that if accepted, this provision will eliminate client's right to a jury trial in any and all disputes against attorney.

*Id.* Two variations of proposed language from the American Arbitration Association offer a shorter, generalized arbitration clause. *Compare* Stephen S. Maris & Kevin Hamby, *No Clause for Alarm: The Desire For More Control Is Leading Corporations to Include Bind-*

mendations reoccur in such proposals. First, language in the clause must make it abundantly clear that the agreement to arbitrate includes not only fee disputes, but also any malpractice claims that the client might bring.[213] The words "legal malpractice" should be specifically stated.[214]

---

*ing Arbitration in Almost All Contracts*, TEX. LAW., Oct. 9, 1995, WL 10/9/1995 TEXLAW 30 (stating "[a]ny controversy or claim arising out or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof"), *with* Lionel M. Schooler, *Arbitration 1993—The New Frontier in ADR*, TEX. LAW., Mar. 1, 1993, WL 3/1/1993 TEXLAW 18 (stating that

> [t]he parties agree that all disputes by them concerning the terms of or default under this Agreement or any documents executed in connection herewith shall be enforced by binding arbitration. Any controversy or claim arising out of or relating to this Agreement or any document executed in connection herewith, or the breach thereof, shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association).

Lionel M. Schooler, *Arbitration 1993—The New Frontier in ADR*, TEX. LAW., Mar. 1, 1993, WL 3/1/1993 TEXLAW 18. While not providing draft language, the petitioner in *Godt* suggested guidelines for the Texas Supreme Court to consider if it chose to adopt a rule allowing arbitration clauses in initial engagement contracts. Petition for Writ of Mandamus at App. L, *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.). The proposal stated:

> 1. The arbitration agreement should be set forth in a separate document from the fee retainer agreement or if included in the retainer agreement, should appear in a separate, conspicuously titled paragraph.
> 2. The arbitration agreement should specifically provide that it covers all actions against the firm and its attorneys, including but not limited to those alleging negligence, breach of contract, breach of fiduciary duty, fraud, deceptive trade practices and statutory claims.
> 3. The agreement should specifically state that the client is entitled to a jury trial and broad discovery and that the client is waiving those rights, as well as advise the client that the evidentiary and procedural rules in an arbitration may differ from and be less rigid than those at a judicial trial.
> 4. The agreement should specifically state that the attorney advised the client to seek independent counsel with the client to acknowledge in writing that he either consulted with independent counsel or chose not to do so after being advised of the right to seek counsel.
> 5. The signing of the agreement should take place only after a sufficient time has elapsed for the client to have a meaningful opportunity to seek independent counsel with the agreement to specify both the date it was provided to the client and the date on which it was signed.

*Id.*

213. *See* Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J., 330, 332 (1998), WL 61 TXBJ 330 (portraying the scope of the arbitration clause as the critical issue for the court's interpretation and advocating "'broad-form' contracts" to remove any doubt that the clause includes malpractice as well as fee disputes); *see also* Joseph P. McMonigle & Thomas Weathers, *A New Way to Go: Arbitration of Legal*

Second, the client must acknowledge waiving the right to trial by jury.[215] Third, the client should be told to obtain third party legal advice on the matter if it is not fully understood.[216] For added enforceability, the client should acknowledge by signature that he has had that opportunity.[217]

2. Basing a Texas Standard on Legislative Intent

Satisfying two competing themes would facilitate setting a standard for enforceable attorney-client arbitration agreements. On the one hand, all parties, including attorneys and clients, should be free to agree to use a universally favored means of conflict resolution. On the other hand, the unsophisticated client must be afforded enough protection to ensure that he does not unwittingly forfeit any rights, especially to trial by jury. Both of these positions were debated in amending the original Texas Arbitration Act.[218]

In the House Judiciary Committee discussion of H.B.15 in 1979, the focus of the revision to then Article 224 was to remove impediments to parties who desire to contract for arbitration.[219] The concern was raised that clients who have unequal bargaining power with attorneys should

---

*Malpractice Claims*, 64 DEF. COUNS. J. 409, 413 (1997), WL 64 DEFCJ 409 (advocating the inclusion of all possible causes of action against the attorney in the arbitration clause).

214. David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 25 (2001), WL 12 No. 3 PROFLAW 24 (advising that including the word "malpractice" in the clause ensures the client has seen and can understand that the agreement encompasses claims for malpractice).

215. *See* Petition for Review at 9, Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (No. 00-0658) (finding waiver of jury trial and consultation with independent counsel as the specific items advocated for inclusion in an attorney-client arbitration clause).

216. *See* Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J. 330, 333 (1998), WL 61 TXBJ 330 (advising inclusion of language in the agreement itself that the client may seek independent counsel review).

217. *See id.* (recommending written proof that client has been advised to review the agreement with independent counsel either through the client's signature or his initials on the arbitration clause itself); *see also* Joseph P. McMonigle & Thomas Weathers, *A New Way to Go: Arbitration of Legal Malpractice Claims*, 64 DEF. COUNS. J. 409, 410-11 (1997), WL 64 DEFCJ 409 (noting that if a client documents his decision on obtaining independent counsel there is an increased likelihood of enforcing a legal malpractice arbitration clause).

218. *See* Debate on Tex. H.B. 15 on the Floor of the House, 66th Leg., R.S., 103 (May 12, 1979) (tapes on file with the *St. Mary's Law Journal*) (recounting an exchange between State Representatives Bush and Jackson over the impact of modifying the TAA).

219. *See The Texas General Arbitration Act: Hearings on Tex. H.B. 15 Before the House Comm. on Judiciary*, 66th Leg., R.S. (Mar. 7, 1979) (tapes on file with the *St. Mary's Law Journal*) (placing the focus on contract liability over tort liability, the sponsors of the bill determined that the then existing version of the TAA prevented some parties from contracting for arbitration).

not be bound by agreements if they do not fully understand the consequences.[220] The same concern surfaced during floor debate on the bill, this time emphasizing the need to protect the unsophisticated client from signing boilerplate language compelling arbitration of disputes in an initial retainer agreement.[221] Acknowledging these concerns, but focusing on the continuing momentum toward voluntary agreements to arbitrate,[222] the House enacted a statute with the primary intent to broaden the TAA and allow the average person to enter into contracts with mandatory arbitration clauses at their choosing.[223]

In an apparent move toward insuring party awareness of an arbitration clause, the House added an amendment to H.B.15.[224] The amendment provided that a specific awareness notice be included at the beginning of any arbitration clause in order to make it binding.[225] The Senate deleted the specific language proposed, but kept the requirement for the notice itself.[226] Passed under the 66th Legislature, the notice requirement was

---

220. *See id.* (narrowing the question originally posed to the committee on why this modification to the TAA was necessary).

221. *See* Debate on Tex. H.B. 15 on the Floor of the House, 66th Leg., R.S., 103 (May 12, 1979) (tapes on file with the *St. Mary's Law Journal*) (using the example of a client contracting with an architect, Representative Bush questioned the protection remaining for the unsophisticated client after the bill removed the requirement to consult independent counsel).

222. *See id.* (responding to Representative Bush, Representative Jackson defended the bill he sponsored, characterizing the independent counsel requirement as a unique and unreasonable requirement that results in extra paperwork).

223. *See id.* (returning to his original theme of broadening the TAA to encourage further use of voluntary arbitration, Representative Jackson emphasized that the bill met the intention of the committee, allowing the average person to make their own agreements to arbitrate.). Representative Jackson concluded the debate by saying, "I think you've got a good bill." *Id.*

224. *See* Tex. H.B. 15, 66th Leg., R.S. (1979) (establishing a new Article 224-1 entitled "Notice in Agreements"). The amendment was adopted by the House on May 14, 1979. BILL HISTORY REPORT, Tex. H.B. 15, 66th Leg., R.S. 5 (1979).

225. Tex. H.B. 15, 66th Leg., R.S. (1979). The bill required the following statement in at least 10-point type: "CAUTION: THIS AGREEMENT CONTAINS A PROVISION THAT DISPUTES ARISING UNDER THE TERMS OF THIS AGREEMENT SHALL BE SUBMITTED TO ARBITRATION. THIS MAY MEAN THAT YOU SHALL LOSE YOUR RIGHT TO HAVE A DISPUTE DETERMINED BY A COURT OF LAW AND LOSE YOUR RIGHT TO A TRIAL BY JURY." *Id.*

226. *See* SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 15, 66th Leg., R.S. 1 (1979) (detailing committee amendment No. 1). The amendment changed the language in Article 224-1 to read: "NOTICE IN AGREEMENTS. No agreement described in Article 224 shall be arbitrated unless notice that a contract is subject to arbitration under this Act is typed in underlined capital letters, or is rubber-stamped prominently, on the first page of the contract."

in effect for eight years until it was repealed by the 70th Legislature.[227] Although no longer required by law, an arbitration notice appeared in the retainer agreement in *Gonzalez* and *Godt*, but was not dispositive in either case.[228] While commentators still advise attorneys to include a notice within their written agreement on the consequences of arbitration,[229] the legislature offers no further guidance applicable to the attorney-client contract.

3. Reliance on State Ethics Opinions

Recognizing the lack of case law, at least twelve states have addressed the issue of malpractice claims under attorney-client arbitration agreements through ethics opinions.[230] The opinions, in large part, are strik-

227. *See* Texas General Arbitration Act, 70th Leg., R.S., ch. 816, § 12, 1987 Tex. Gen. Laws 2828 (declaring that Article 224-1 is repealed); *see also* 27 STEPHEN G. COCHRAN, TEXAS PRACTICE: CONSUMER RIGHTS AND REMEDIES § 1.29, n.1 (2d ed. 1996) (reminding that although former Article 224-1 has been repealed, any contracts entered into prior to August 31, 1987 are governed by the provision requiring notice).

228. *See* Petition for Writ of Mandamus at App. B, *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.) (containing a photocopy reproduction of the actual retainer agreement signed by the plaintiff). The first sentence of the retainer is set off with bold lines above and below it and reads: "THIS CONTRACT IS SUBJECT TO ARBITRATION." *Id.* The final sentence of the retainer appears immediately above the space reserved for the client's signature and reads: "THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION STATUTE." *Id.*

229. *See* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 25 (2001), WL 12 No. 3 PROFLAW 24 (relating that several jurisdictions recommend that an attorney ensure full disclosure to the client on the effects of the arbitration clause); Mike Yarber, *Arbitration Agreements with Clients*, TEX. LAW. INS. EXCHANGE NEWSL. (1999), *at* http://www.tlie.org/riskmgmt/news/97isu1.htm (last visited Apr. 11, 2002) (focusing on the need for an attorney to include a statement on waiving the right to a jury trial); *see also* Robert Summers, *Arbitration Between Attorneys and Clients*, 61 TEX. B.J. 330, 332 (1998), WL 61 TXBJ 330 (suggesting that both the placement of the arbitration clause within the contract and the type face used are important to provide notice of the agreement to the client).

230. *See* Ariz. Comm. on Legal Ethics and Prof'l Responsibility, Op. 94-05 (1994); Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-116 (1989), *at* 1989 WL 253264; Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-20 (1999), *at* 1999 WL 958027; D.C. Bar Legal Ethics Comm., Op. 211 (1990); Me. Prof'l Ethics Comm., Op. 170 (1999); Mich. Comm. on Prof'l and Judicial Ethics, Op. RI-257 (1996), *at* 1996 WL 381513; N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 723 (1997), *at* 1997 WL 419331; N.C. Comm. on Prof'l Ethics, Op. 107 (1991), *at* 1991 WL 734380; Ohio Board of Comm'r on Grievances and Discipline, Op. 96-9 (1996), *at* 1996 WL 734408; Okla. Bar Ass'n Legal Ethics Comm., Op. 312 (2000), *at* 2000 WL 33389634; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 97-140 (1997), *at* 1997 WL 671580; Va. Comm. on Legal Ethics, Op. 1707 (1998). Note that other states have arbitration procedures only for fee disputes and not for malpractice. *See* A.B.A. JOINT COMM. ON LAWYER

ingly similar.[231] Virtually all of the opinions agree on the following: (1) state laws and policies favor arbitration,[232] (2) arbitration is an effective forum for dispute resolution between attorneys and clients,[233] (3) there is nothing per se illegal or unethical for an attorney to include a mandatory arbitration clause in an initial client retainer agreement,[234] and (4) mandatory arbitration clauses can apply to claims of malpractice, as well as claims for fees.[235] Ten out of twelve opinions direct that the attorney must fully advise the client of the consequences of agreeing to arbitration, especially the loss of right to a jury trial.[236] Of those ten opinions, two

---

REGULATION, THE LAWYER REGULATION HANDBOOK (1999) (containing fee arbitration procedures for Alaska, New Jersey, and Georgia).

231. *See generally* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 851-66 (1999) (dividing the state ethics opinions into general categories: "the arms-length approach"; "the disclosure, consent, and independent counsel approaches"; and "the client protective approach"). *But see* Peter H. Geraghty, *Ask Ethicsearch*, PROF. LAW., (2000), http://www.abanet.org/cpr/ethicsearch/ask.html (last visited Apr. 11, 2002) (on file with the *St. Mary's Law Journal*) (deciding that the state bars that have addressed this issue have arrived at different conclusions).

232. *See, e.g.*, Ariz. Comm. on Legal Ethics and Prof's Responsibility, Op. 94-05 (1994) (declaring that Arizona is similar to many other states in its public policy favoring arbitration over civil litigation); Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-116 (1989), *at* 1989 WL 253264 (stating California strongly favors arbitration because of its speed and inexpense in resolving disputes); Okla. Bar Ass'n Legal Ethics Comm., Op. 312 (2000), *at* 2000 WL 33389634 (asserting that the Oklahoma Supreme Court found a strong public sentiment favoring arbitration in the state).

233. *See, e.g.*, Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-116 (1989), *at* 1989 WL 253264 (finding arbitration to be a recognized and encouraged method of settling disputes expeditiously); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 97-140 (1997), *at* 1997 WL 671580 (holding that arbitration is generally recognized across the country as a desirable dispute resolution method).

234. *See, e.g.*, Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-20 (1999), *at* 1999 WL 958027 (concluding that it is not unethical for an attorney to include an arbitration clause in the retainer contract with their client); Ohio Board of Comm'r on Grievances and Discipline, Op. 96-9 (1996), *at* 1996 WL 734408 (declaring that an attorney's use of an arbitration clause for malpractice does not violate the model disciplinary rules).

235. *See, e.g.*, D.C. Bar Legal Ethics Comm. on Prof'l Ethics, Op. 211 (1990) (determining that mandatory arbitration clauses may be used for legal malpractice, as long as procedures to ensure the protection of the client are met); N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 723 (1997), *at* 1997 WL 419331 (assuming no difference under the ethics rules for arbitration of fee disputes or legal malpractice). *But see* Ohio Board of Comm'r on Grievances and Discipline, Op. 96-9 (1996), *at* 1996 WL 734408 (denying the use of pre-dispute arbitration clauses for either fee disputes or legal malpractice, making Ohio the exception to the fourth common area of agreement).

236. *E.g.* Ariz. Comm. on Legal Ethics and Prof'l Responsibility, Op. 96-9 (1996); Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-20 (1999), *at* 1999 WL 958027; D.C. Bar Legal Ethics Comm. on Prof'l Ethics, Op. 211 (1990); Me. Prof'l Ethics Comm., Op. 170 (1999); Mich. Comm. on Prof'l and Judicial Ethics, Op. RI-257 (1996), *at* 1996 WL

require nothing more of the attorney,[237] six direct that the attorney must provide the opportunity for the client to consult with independent counsel on the arbitration clause, if desired,[238] and two mandate consultation with independent counsel prior to signing the retainer agreement.[239]

---

381513; N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 723 (1997), *at* 1997 WL 419331; N.C. Comm. on Prof'l Ethics, Op. 107 (1991), *at* 1991 WL 734380; Okla. Bar Ass'n Legal Ethics Comm., Op. 312 (2000), *at* 2000 WL 33389634; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 97-140 (1997), *at* 1997 WL 671580; Va. Comm. on Legal Ethics, Op. 1707 (1998). California's ethics opinion stops short of making this requirement. *See* Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-116 (1989), *at* 1989 WL 253264 (drawing a distinction between an ethical obligation to fully disclose the consequences of an arbitration agreement with an existing client, with the freedom to negotiate without ethical concern about an arbitration clause in the initial contract with a client). Since Ohio's ethics opinion chooses never to adopt arbitration clauses, it does not need to advocate full disclosure. *See* Ohio Board of Comm'r on Grievances and Discipline, Op. 96-9 (1996) (fearing attorneys may mask ethical misconduct if allowed to enforce pre-dispute arbitration clauses).

237. *See* Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-20 (1999), *at* 1999 WL 958027 (declaring that the attorney satisfies his ethical duty if he uses plain language in the arbitration clause, specifically draws his client's attention to the clause, and answers all questions the client may have on the arbitration clause); Me. Prof'l Ethics Comm., Op. 170 (1999) (concluding that if the arbitration clause is clear, the client does not need to be advised to consult independent counsel). While it seemed as if a trend was developing in 1999 to limit the attorney's responsibility to full disclosure of the arbitration clause, at least one subsequent ethics opinion demanded more. *See* Okla. Bar Ass'n Legal Ethics Comm., Op. 312 (2000), *at* 2000 WL 33389634 (condoning the use of an arbitration clause for malpractice in an attorney-client agreement if the attorney obtains informed consent from the client by fully disclosing the ramifications of the clause and allowing the client to seek independent counsel if desired).

238. *See* Ariz. Comm. on Legal Ethics and Prof'l Responsibility, Op. 96-9 (1996) (stating that the attorney must provide the client a reasonable opportunity to seek independent counsel); N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 723 (1997), *at* 1997 WL 419331 (disagreeing with state ethics opinions that require clients to consult with independent counsel before entering into an arbitration agreement with their attorney, but recommending that attorneys allow a client who wants to consult outside counsel to do so); N.C. Comm. on Prof'l Ethics, Op. 107 (1991), *at* 1991 WL 734380 (requiring the client be given full opportunity to obtain advise on the ramifications of ADR from an independent counsel); Okla. Bar Ass'n Ethics Comm., Op. 312 (2000), *at* 2000 WL 33389634 (recommending the client be provided the opportunity to consult with independent counsel, but not requiring it because that would send a message to the public undermining trust in the legal profession); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 97-140 (1997), *at* 1997 WL 671580 (including that the client be provided an opportunity to obtain independent counsel as one of the requirements for an attorney-client arbitration agreement to qualify under the ethics rules); Va. Comm. on Ethics, Op. 1707 (1998) (finding the concept of a client hiring independent counsel troubling since all attorneys should act ethically, and therefore demanding only that attorneys "exercise utmost care and act advisedly").

239. *See* D.C. Comm. Bar Legal Ethics Comm. on Prof'l Ethics, Op. 211 (1990) (permitting an attorney to enter into a pre-dispute arbitration agreement with a client, only if

Some have criticized this last approach as having "to hire a lawyer in order to hire a lawyer."[240]

Extreme positions on pre-dispute attorney-client arbitration agreements are represented by the remaining two states. While the Ohio Board of Commissioners on Grievances and Discipline agreed that an appropriate level of client protection must include independent consultation prior to agreeing to arbitration, it saw the process as impractical.[241] The board's remedy, even though it acknowledged no per se ethical or legal problem with such clauses,[242] was to discourage any attorney from including a pre-dispute arbitration clause at all in the initial retainer contract.[243] California adopted the opposite extreme.[244] In reevaluating its prior ruling on the subject,[245] the California Committee on Professional

---

the client is represented by independent counsel concerning the arbitration clause); Mich. Comm. on Prof'l and Judicial Ethics, Op. RI-257 (1996), *at* 1996 WL 381513 (requiring that the client obtain independent counsel before an attorney can form an agreement with a client that includes submitting a dispute for malpractice to any form of ADR).

240. *See* Henry v. Gonzalez, 18 S.W.3d 684, 694 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (Hardberger, C.J., dissenting) (reviewing the Ohio board's consideration that the independent counsel requirement sends the wrong message to the public); N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 723 (1997), *at* 1997 WL 419331 (suggesting that when states require clients to consult with independent counsel, such skepticism is inserted into the attorney-client relationship that the policy serves to undermine the legal profession rather than protect it); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 97-140 (1997), *at* 1997 WL 671580 (positing that if the requirement exists to consult an independent lawyer for every lawyer hired, the chain of consultation would be endless); Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 863 (1999) (relating the opinion of Ohio Board of Commissioners on Grievances and Discipline that such a requirement is tantamount to a warning about the untrustworthiness of attorneys).

241. *See* Ohio Board of Comm'r on Grievances and Discipline, Op. 96-9 (1996) (reasoning further that requiring independent third party counsel to review an agreement between attorney and client does not foster the proper relationship and undermines the trust the client should have when hiring an attorney).

242. *See id.* (recognizing that arbitration is an ethical forum because an arbitration decision could favor either the attorney or the client).

243. *See id.* (basing its decision on the duty of the attorney to best represent the client and finding pre-dispute arbitration agreements for malpractice to be in conflict with that interest); *see also* Petition for Review at 9, Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (No. 00-0658) (emphasizing a conclusion by the Ohio commissioners that some attorneys might use arbitration clauses to mask unethical conduct).

244. *See* Matthew J. Clark, Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 852-54 (1999) (tracing the history of the California Bar's opinions on arbitration clauses for legal malpractice).

245. *See* Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1977-47 (1977), *at* 1977 WL 15965 (declaring it unethical for an attorney to enter into an arbitration

Responsibility and Conduct decided against the requirements for full disclosure and the opportunity for the client to seek independent counsel.[246] Maintaining that initial agreements between attorney and client are done at arms-length, the revised California ethics opinion holds that normal contract formation rules apply and the attorney is under no additional burden of disclosure.[247]

## IV. CONCLUSION

The current state of Texas law is unclear as to whether Texas Civil Practice and Remedies Code section 171.001 or 171.002 applies to the attorney-client contract for claims of legal malpractice. The *Gonzalez* court relied upon section 171.001, the general rule permitting written agreements to arbitrate.[248] This decision was consistent with *Porter & Clements, L.L.P. v. Stone*, the only precedent in Texas at that time.[249] The *Godt* court, on the other hand, based its decision on the exclusionary provisions of section 171.002.[250] Specifically, *Godt* decided that "Texas law classifies a legal malpractice claim as a personal injury action."[251] Section 171.002 removes personal injury claims from enforcement under the TAA unless each party has been advised on arbitration by independent counsel and both parties and all counsels sign the agreement.[252] While some states and commentators deliberately mandate the review of an independent counsel for attorney-client arbitration agreements, such a rule

---

agreement in a client retainer unless the client is given full disclosure of the potential conflict of interest and advised to seek independent counsel).

246. *See* Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-116 (1989), *at* 1989 WL 253264 (concluding that it is not ethically improper for an attorney to include an arbitration clause in the initial contract with his client).

247. *See id.* (noting that no other precautions are necessary as the issue involves legal enforceability and not ethical propriety).

248. *See* Henry v. Gonzalez, 18 S.W.3d 684, 690 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (citing the version of section 171.001 used at the time of the attorney-client contract in the case as "TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 1997) (amended by TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a)-(b) (West Supp. 2000), effective Sept. 1, 1997)").

249. *See* Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 221-22 (Tex. App.—Houston [1st Dist.] 1996, no writ) (holding that an arbitration clause between an attorney and client was binding under the Texas Arbitration Act).

250. *See In re* Godt, 28 S.W.3d 732, 738-39 (Tex. App.—Corpus Christi 2000, no pet.) (reversing the trial court's finding that TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(a)(3) was inapplicable to an attorney-client arbitration agreement).

251. *Id.* at 738.

252. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(c) (Vernon Supp. 2002) (providing an exception to the exception in that section 171.002(a)(3) declares personal injury claims outside the scope of the TAA unless the additional requirements of section 171.002(c) are met).

should not be established in Texas through miscategorizing legal malpractice as a personal injury. Unequivocal guidance is needed that attorney-client agreements fall under the TAA's general rule in section 171.001 and not under the personal injury exception in section 171.002. If Texas desires additional protection in attorney-client contracts, the legislature or the courts should establish it in a much more direct manner to avoid any other unintended consequences of the personal injury classification.

Whether or not legislative or judicial clarification on the legal appropriateness of pre-dispute arbitration clauses for attorney malpractice is forthcoming, it is time for the Texas Bar to provide ethical guidance on this issue to practitioners.[253] The Committee on Disciplinary Rules of Professional Conduct for the State Bar of Texas has recently proposed a series of changes to the state's conflict of interest rules.[254] Even so, simultaneous changes to the ABA's Model Rules of Professional Conduct have put the Texas rules one iteration behind in regard to attorney-client arbitration clauses.[255] Under the ABA changes, Model Rule 1.8 has been retitled from "Conflict of Interest: Prohibited Transactions" to "Conflict of Interest: Specific Rules" and specifically allows an attorney to make a pre-dispute agreement to settle a malpractice claim if the attorney fully informs the client of the agreement's scope and effect and allows the client an opportunity to consult independent counsel.[256] The Texas Bar

---

253. *See* Petition for Review at 5, Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (No. 00-0658) (offering the avoidance of criticism of the profession as a motivating factor for the bar's interest). "Aside from being obligated to police other members of the bar, attorneys have more than an abstract interest in preventing overreaching and unfairness in attorney/client agreements." *Id. But see* David Hricik, *Lawyer-Client Arbitration Agreements*, 3 PROF. LAW. 24, 24 & n.3 (2001), WL 12 No. 3 PROFLAW 24 (citing *Watts v. Polaczyk*, 619 N.W.2d 714 (Mich. Ct. App. 2000), and *Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d, 261 (Cal. Ct. App. 1997), as two examples where a court concluded that even if an attorney-client arbitration agreement violated the state ethics rule, it could still be legally enforced).

254. *See* Luther H. Soules III, Update, *Proposed Conflict of Interest and Confidentiality Rules*, 33 ST. MARY'S L.J. 753 (2002).

255. *See* James Podgers, *A Busy Week*, A.B.A. J. EREPORT, Feb. 8, 2002, *at* http://www.abanet.org/journal/ereport/f8midyr.html (last visited Feb. 24, 2002) (on file with the *St. Mary's Law Journal*) (reporting that the ABA House of Delegates completed the work of the Ethics 2000 Commission on a comprehensive update to the Model Rules of Professional Conduct); *see also* Anne Gearan, *ABA Completes Ethics Rules Overhaul*, ASSOCIATED PRESS, Feb. 5, 2002, *at* http://www.attorneydirectory.net/legalnews.html (last visited Apr. 11, 2002) (noting that the recently completed overhaul took five years to accomplish).

256. *See* A.B.A. COMM. ON EVALUATION OF THE RULES OF PROF'L CONDUCT, REP. OF THE COMMISSION ON EVALUATION OF THE RULES OF PROF. CONDUCT R. 1.8(h) cmt. 14 (2000) (declaring that it does not limit an attorney's liability for malpractice to enter into an agreement to arbitrate claims for legal malpractice, provided the attorney fully informs the client of the agreement's scope and effect). The newly adopted provision does not require consultation with independent counsel prior to the client signing the arbitration

should promulgate similar direction as part of Texas Disciplinary Rule 1.08.

The Texas Bar can implement even more immediate and perhaps more fully reasoned guidance by issuing an ethics opinion on the subject of attorney-client arbitration clauses. The fundamental provisions from the applicable ethics opinions from other jurisdictions and the ABA serve as a convenient template. A Texas ethics opinion that adopted full client disclosure regarding the client's consequences of arbitration and allowed the opportunity to seek independent counsel would be consistent with the majority of other states.[257] The only remaining question is whether Texas

---

agreement, only that the client be allowed that opportunity. *See id.* at R. 1.8(h) cmt. 15 (stating that if the attorney allows the client a reasonable opportunity to solicit independent representation concerning the arbitration clause, then the danger posed by an overreaching attorney is overcome).

257. *See* Petition for Writ of Mandamus at 22-24, *In re* Godt, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.) (advocating Ohio's strict position on barring attorney-client arbitration clauses and distinguishing her case, which was trying to avoid arbitration, from California's favorable approach toward arbitration clauses). First, there is little doubt that Texas law favors arbitration. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992) (declaring that public policy in Texas mirrors the federal government in favoring agreements to arbitrate). Second, Texas legislative intent supports the proposition that arbitration is an effective forum for dispute resolution between attorneys and clients. *See The Texas General Arbitration Act: Hearings on Tex. H.B. 15 Before the House Comm. on Judiciary*, 66th Leg., R.S. 4 (Mar. 7, 1979) (tape on file with the *St. Mary's Law Journal*) (advocating that the law should not prohibit two parties from contracting for arbitration if that is their desire). Third, while not specifically addressing the inherent legality or ethics involved with an attorney including a mandatory arbitration clause in an initial client retainer, agreements made under the TAA are presumed constitutional and do not unreasonably limit a potential client's rights. *See* Op. Tex. Att'y Gen. No. DM-127 (1992) (opining that the TAA does not violate the Texas Constitution's open courts provision). Fourth, under a very limited amount of case law, mandatory arbitration clauses have been found to apply to claims of malpractice as well as disputes over fees. *Compare* Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 222 (Tex. App.—Houston [1st Dist.] 1996, no writ) (finding the attorney-client pre-dispute arbitration clause for legal malpractice binding), *and* Henry v. Gonzalez, 18 S.W.3d 684, 692 (Tex. App.—San Antonio 2000, pet. dism'd by agr.) (compelling arbitration under the attorney-client pre-dispute agreement), *with In re* Godt, 28 S.W.3d 732, 739 (Tex. App.—Corpus Christi 2000, no pet.) (holding the attorney-client pre-dispute arbitration agreement was not enforceable under the TAA). Fifth, it seems clear from legislative intent in Texas that a lawyer must fully advise the client of the consequences of agreeing to arbitration, especially the loss of right to a jury trial. *See* Debate on Tex. H.B. 15 on the Floor of the House, 66th Leg., R.S., 103 (May 12, 1979) (tape on file with the *St. Mary's Law Journal*) (voicing concern that the client is advised of the loss of his right to pursue an action in court). The same concern over the unsophisticated client would probably dispose Texas to further adopt the provision that an attorney provide the client the opportunity to consult with independent counsel on the arbitration clause, if desired. *See* Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 629 (1997) (drawing from the language of the author's approach).

should adopt the additional requirement that the client actually meet with independent counsel and discuss the arbitration clause prior to signing the initial retainer agreement.[258] Prior court decisions and legislative history do not support including this mandatory independent counsel requirement in Texas,[259] a requirement that also does not exist under the new ABA model rule or ethics opinion. Therefore, the Texas Bar should adopt an ethics opinion consistent with the ABA's new guidance, the majority of the other states, and Texas's own legislative history, followed by a complementary Disciplinary Rule of Professional Conduct in order to provide guidance to Texas attorneys on the unsettled issue of attorney-client pre-dispute arbitration agreements.[260]

258. Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 659 (1997) (posing the "thorny question" of whether securing advice from independent counsel is an absolute necessity or whether full disclosure coupled with an opportunity to solicit independent counsel is sufficient).

259. *See Gonzalez*, 18 S.W.3d at 693-94 (Hardberger, C.J., dissenting) (suggesting that public policy concerns would be addressed if only some restrictions were placed on establishing an attorney-client arbitration agreement).

260. *See* Brenda Sapino Jeffreys, *Lawyers Wary of Arbitration Clauses in Fee Contracts*, TEX. LAW., Oct. 2, 2000, WL 10/2/2000 TEXLAW 1 (demonstrating the confusion attorneys espoused over whether to continue using arbitration clauses after *Godt*); *see also* The Texas Lawyer's Creed – A Mandate for Professionalism, *reprinted in* JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 982 (2001-2002 ed. 2001) (committing the Texas lawyer to advise clients specifically on arbitration). The mandate to fully advise clients on arbitration coupled with the lack of clear guidance from the courts or the bar leaves the Texas lawyer to face the conundrum on attorney-client arbitration clauses alone. Interview with Dean Vincent Johnson, Associate Dean of Administration of St. Mary's Law School, in San Antonio, Tex. (Apr. 15, 2002).