

NOTICE TO THE BAR

ARBITRATION CLAUSES IN ATTORNEY RETAINER AGREEMENTS – ADOPTION OF OFFICIAL COMMENT TO RULE OF PROFESSIONAL CONDUCT 1.4

This notice promulgates the attached Official Comment to Rule of Professional Conduct (RPC) 1.4 (“Communication”) as adopted by the Supreme Court, to be effective immediately. The Official Comment provides guidance regarding arbitration provisions in attorney retainer agreements consistent with Delaney v. Dickey, 244 N.J. 466 (2020).

/s/ Glenn A. Grant

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: March 5, 2025

Official Comment to RPC 1.4 (March 5, 2025)

In Delaney v. Dickey, 244 N.J. 466, 472-73 (2020), the Court held that attorneys may include in their retainer agreements provisions requiring clients to resolve potential fee disputes and legal malpractice claims by arbitration. As a condition of enforcing such an agreement, however, the Court held that “an attorney must generally explain to a client the benefits and disadvantages of arbitrating a prospective dispute between the attorney and client.”

The Court offers the following general guidance and sample language to assist attorneys and clients in the drafting of arbitration provisions in retainer agreements. The Court does not require that the sample language be used; it is provided solely for the convenience of the bar. Attorneys and clients may decide to use different language about arbitration in a retainer agreement.

Pursuant to RPC 1.4(c), arbitration agreements that are part of attorney-client retainer agreements must be written in plain English that is understandable to the least sophisticated client.

It is not necessary for the attorney to orally explain the arbitration agreement to the prospective client, because attorneys generally encourage clients to contact them with any questions prior to signing the retainer agreement. A written agreement, conforming to this guidance, that informs the client, in a balanced way, of the advantages and disadvantages of arbitration will suffice.

Prospective clients retain the right to seek advice from independent counsel regarding the arbitration agreement, although independent review is not mandatory.

The arbitration agreement should speak to both the advantages and disadvantages of arbitration in a balanced manner.

Waiver of an arbitration provision in a signed retainer agreement is permissible, but the parties must mutually agree to waive the arbitration provision. Provisions allowing for unilateral waiver are not permissible.

In the event the prospective client rejects the arbitration provision, an attorney is at liberty to decline the representation.

The following non-exhaustive list of arbitration-related concepts and issues is provided to serve as a guide for attorneys in preparing arbitration provisions within their retainer agreements:

- Overview of Arbitration;
- Waiver of Jury and Appeal Rights;
- Confidentiality;
- Discovery;
- Costs;
- Arbitrator's Decision;
- Rules of Arbitration;
- Selection of the Arbitrator;
- Place of Arbitration and Choice of Law;
- Fee Arbitration.

Sample Arbitration Provisions for Retainer Agreements

In the event that [I/we, the attorney/firm], and you, the client, are unable to come to an amicable resolution with respect to any dispute including, but not limited to, claims of alleged legal malpractice and, in certain circumstances, attorney fee disputes, you and I/we agree that such dispute will be submitted to and finally determined by arbitration in accordance with the provisions set forth in this agreement. If you have any questions or concerns about the arbitration process, please raise them before signing the retainer agreement. You may also have independent counsel of your choice review the retainer agreement, including this provision addressing arbitration, before you sign it.

(1) Overview. There are both advantages and disadvantages to arbitration. Arbitrations may resolve disputes efficiently and expeditiously. The parties to an arbitration have an opportunity to agree on a skilled and experienced arbitrator, including one in a specialized field if so desired, to preside over and decide the dispute privately. Those potential benefits of arbitration should be weighed against certain potential disadvantages, including but not limited to a limitation on the exchange of information (called “discovery”), as well as both parties’ obligation to pay certain upfront costs of the arbitration. In contrast to arbitration, the party that files a lawsuit generally can proceed in the county where the party resides or where the law firm is located, whereas the place of an arbitration may be the subject of negotiation. Additionally, in a lawsuit, the case will be decided by a judge or jury in open court and will be part of the public record, and the parties will have the right to appeal the verdict and award. Parties to an arbitration, however, typically have a limited right to appeal the arbitrator’s decision, and that right applies only in very limited circumstances.

(2) Waiver of Right to Trial by Jury. By agreeing to arbitrate, both you and [the attorney/firm] are waiving the constitutional right to a trial by jury in a courtroom open to the public.

(3) Confidentiality. The entire arbitration, including the parties’ claims and the decision of the arbitrator, under most circumstances will be private and confidential. This contrasts with proceedings in court, which are open to the public and in which, for example, the jury’s verdict is a matter of public record.

(4) Discovery. The discovery process in an arbitration generally will be more limited than the discovery process in court. For example, the number of depositions and other forms of discovery may be restricted, which may limit the

opportunity for the parties to exchange information during the arbitration. Consequently, arbitration may have the potential for reducing costs associated with discovery when compared to a more extensive discovery process available in court.

(5) Costs. In arbitration, you as the client will be responsible for some of the costs of the arbitration, including your share of the arbitrator's fees and the upfront costs. Arbitrators generally bill by the hour, and the arbitration will likely move forward only if both parties pay their share of the required fees and costs. If you cannot afford the costs of arbitration, you may not be able to proceed. In contrast, in court, the parties are responsible only for certain filing fees and costs.

(6) Arbitrator's Decision. Whereas the losing party may appeal a judge's order or judgment following a jury's verdict to a higher court, the arbitrator's award will be final and binding. The parties will only be able to appeal from an arbitration award in very limited circumstances.

(7) Rules of Arbitration. The arbitration will generally be conducted in accordance with procedures outlined by the arbitrator. Disputes concerning those procedures are governed by New Jersey law.

(8) Selection of the Arbitrator. The arbitration will be conducted by [one] impartial arbitrator(s), who may be a former judge, practicing attorney, or non-lawyer, selected by mutual agreement between the parties. If the parties cannot agree, the arbitrator will be selected in accordance with New Jersey law.

(9) Place of Arbitration & Choice of Law. The arbitration will take place in the county where you reside, the county where [the attorney/firm] is located, the county where the arbitrator is located, or at a mutually acceptable location. The arbitration will apply the substantive law of the State of New Jersey. If a dispute were brought before a court, the court that would hear the dispute would most likely be located in the county where the client resides or the county where [the attorney/firm] is located.

(10) Fee Arbitration. You retain the absolute right to proceed under the fee arbitration rules set forth in New Jersey Court Rule 1:20A. This process allows you to file a fee arbitration claim for any dispute with the Office of Attorney Ethics District Fee Arbitration Committee. This fee arbitration process applies to disputes over attorneys' fees billed to you and is always available to you.