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10 Arbitrations And A 5th Circ. Ruling Flag Arb. Clause Risks

By **Christopher Blazejewski** (April 24, 2025, 4:36 PM EDT)


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Arbitration clauses in attorney engagement letters can transform how legal malpractice claims unfold. When disputes arise between lawyers and clients, the forum for resolution may hinge on a few critical sentences in the initial engagement letter.

For attorneys, arbitration clauses represent a dispute resolution choice with significant consequences. Some believe that arbitration offers efficiency and privacy, but that is not always the case.

The U.S. Court of Appeals for the Fifth Circuit's March 11 decision in Sullivan v. Feldman, a case described by U.S. District Judge Lee Rosenthal in 2020 as "the Bleak House of arbitration," demonstrates how efficiency and privacy in arbitration with aggrieved clients is far from guaranteed.[1]

This article looks at some of the benefits and risks of including an arbitration clause in an attorney engagement letter or retainer agreement.

It also explains how Sullivan is a cautionary tale about how attorneys who agree to arbitrate may get much more than they bargained for.

Why To Consider an Arbitration Provision

Some attorneys view arbitration clauses as defensive measures against potential disputes with clients. The appeal is understandable: Arbitration may offer a faster, more private forum for resolving conflicts compared to traditional litigation.

For busy practitioners, the prospect of avoiding lengthy court proceedings is attractive, as is the confidentiality that may shield potentially embarrassing disputes from public view.

Arbitration offers procedural flexibility that court proceedings rarely can match. Furthermore, parties can select arbitrators with specialized knowledge relevant to the dispute. And the relative finality of arbitration decisions — with limited grounds for appeal — may lead to closure more quickly than litigation, which can involve multiple appeals.

The potential efficiency can translate to cost savings, particularly when considering the reduced

discovery and fewer formal proceedings typical in arbitration.

Legal and Practical Concerns of Arbitration Provisions

Despite these possible advantages, arbitration clauses in attorney engagement letters raise significant legal and practical concerns.

First, attorneys should check the local rules, ethics opinions and law of their jurisdiction before including an arbitration provision in an engagement letter. Some jurisdictions impose special requirements on attorneys who wish to include arbitration provisions in their agreements.

For example, some require that clients receive specific disclosures about the implications of arbitration, including among other things the waiver of jury trial, discovery, and appellate rights, and may require that the clients be advised that they may consult independent counsel.

Second, attorneys should check with their insurance carrier before including an arbitration provision in their engagement letter.

A crucial aspect that attorneys may overlook is the potential impact of arbitration clauses on professional liability insurance coverage. Many policies contain provisions giving insurers significant control over the defense and settlement of claims.

Some policies explicitly require the insurer's consent before agreeing to alternative dispute resolution methods. If an attorney includes an arbitration clause without obtaining this consent, the insurer might argue that the attorney violated policy conditions, potentially jeopardizing coverage.

Attorneys should check their malpractice insurance policy and check with their carrier before including such an arbitration provision in engagement letters.

Third, attorneys should be aware that the enforceability of arbitration clauses varies significantly by jurisdiction and depends on the facts.

For example, in 2024, in Dick-Ipsen v. Humphrey Farrington & McClain PC, the Illinois Appellate Court, First District, found an arbitration clause in a retainer agreement procedurally unconscionable.[2]

The court held that because the attorneys never discussed the arbitration provision with the client and failed to explain its implications, and the client did not understand what arbitration meant, it would be unconscionable to enforce the provision.

By comparison, in 2021, in Drake Partners LLC v. Wilson Sonsini Goodrich & Rosati LLP, the Massachusetts Superior Court reached a different conclusion, upholding an arbitration clause in a law firm's engagement letter.[3]

The court found that while the law firm could have provided more detailed disclosures about arbitration's implications, the clause was sufficiently clear, used bold language to alert readers to its terms and expressly advised the client to call the attorney if clarification was needed.

The court also considered the client's sophistication as a healthcare investment company and the fact that the client had previously agreed to arbitration in a prior representation.

The above cases demonstrate that courts may consider multiple factors, including client sophistication and the clarity of disclosures, when determining whether an arbitration provision is enforceable.

Courts generally scrutinize arbitration provisions in attorney-client agreements more closely than in other contracts, recognizing the special nature of the attorney-client relationship.

The enforceability of arbitration provisions in an engagement letter will vary from state to state and depend on the facts. Attorneys considering arbitration clauses should approach them with caution.

Bleak House of Arbitration

The Engagement

For attorneys, the Fifth Circuit case Sullivan v. Feldman is a cautionary tale about what can go wrong when including an arbitration provision in an engagement letter.

The case involved a complex dispute between two New Orleans doctors and their various business entities, an attorney and his law firm, and several other related service companies.

Seeking to pool their risks through specialized insurance arrangements, the doctors entered into an engagement letter with the lawyer that included a detailed arbitration provision.

The arbitration provision included several key elements:

1. The arbitration must be concluded within four months;

2. If the four-month timeline was not met, any party may file another arbitration with another arbitrator;

3. The arbitrator would have sole and exclusive ability to rule on all aspects of the arbitrator's appointment, would have exclusive authority to resolve all disputes as to the enforceability of the parties' agreements; and

4. The parties' intention was to "divest the courts of all powers in disputes involving the parties, except to compel arbitration, and to confirm, vacate or enforce award."

10 Arbitrations — So Far — with 10 Different Arbitrators

To date, a dispute between the parties has led to 10 arbitration proceedings with 10 different arbitrators in Texas and Louisiana.

The arbitrators in four of the proceedings eventually presided over a single evidentiary hearing at a five-star resort where the same evidence and witnesses were presented — and where room fees alone exceeded $300,000.

During the hearing, the four arbitrators issued conflicting evidentiary rulings. On the subject of class arbitrability, two of the arbitrators vocally disagreed with each other from the bench.

After the hearing, the arbitrators issued final awards, but after the contractual four-month deadline had expired. In a joint order, all four arbitrators agreed that the four-month deadline was unenforceable as unconscionable and inconsistent with due process.

Notwithstanding that all four of the arbitrators ruled in favor of the doctors, and against the lawyer and the service company, the awards differed significantly — from $1.5 million to $88.7 million.

District Court Proceedings

The parties filed several cross-motions to vacate and confirm the respective awards. The U.S. District Court for the Southern District of Texas district court confirmed all four awards in favor of the doctors, effectively enforcing the highest award, which amounted at that date to approximately $94.5 million with interest continuing to accrue.

After the lawyer and the service company appealed the federal district court's order, they initiated the tenth arbitration in July 2023, arguing that another arbitration could resolve the conflicting confirmed awards. The federal district court halted the tenth arbitration, ruling that there were to be no further attempts to arbitrate until a decision from the Fifth Circuit.

Fifth Circuit Ruling — and the Potential for More Arbitration Proceedings

The Fifth Circuit affirmed in part, reversed in part, vacated in part and remanded the case to the federal district court. It affirmed all the awards against the lawyer and the service company, but reversed as to a particular individual who had not become president of the service company until after the engagement letter and related service contract was executed.

The proceedings may not end there. The Fifth Circuit found that the district court erred by enjoining further arbitration to resolve the conflicting confirmed awards. It held that maintaining the stay at this juncture "thwarts the parties' bargain" and is "now overbroad because it enjoins a defendant from engaging in legal conduct."

The court vacated the stay and remanded to allow the parties to exercise their contractual right to engage in further arbitration.

Notwithstanding the Fifth Circuit opening the floodgates for potentially more arbitration proceedings, the court expressed hope that "for the sake of sanity, judicial efficiency, and litigation economics" the parties' disagreements would be finally resolved.

Conclusion

Arbitration clauses in attorney engagement letters present a complex calculus of benefits and risks. Sullivan stands as a cautionary tale of arbitration gone awry, showcasing both risks and limitations of the arbitration framework.

While arbitration clauses may offer potential advantages in terms of efficiency, cost and confidentiality, they also raise significant legal and practical concerns for attorneys and clients alike.

Attorneys must carefully weigh these factors in the context of their specific practice, jurisdiction and

client relationships. The Bleak House of arbitration may eventually find resolution, but only after extraordinary expenditures of time, money, and judicial and party resources.

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[1] Sullivan v. Feldman, No. 23-20140, --- F.4th ---- (5th Cir. March 11, 2025). "Bleak House" is a novel by Charles Dickens.

[2] Dick-Ipsen v. Humphrey Farrington & McClain P.C., 2024 IL App (1st) 241043, appeal denied, 246 N.E.3d 1186 (Ill. 2024).

[3] Drake Partners LLC v. Wilson Sonsini Goodrich & Rosati LLP, No. 2184CV2131, 2021 WL 8565959, at *1 (Mass. Super. Nov. 7, 2021).