CASENOTE: ARBITRATION

By the Publications Subcommittee of the
Louisiana State Bar Association's Ethics Advisory Committee

Jacqueline T. Hodges and HRC Solutions, Inc. (formerly known as Med-Data Management, Inc.) v. Kirk Reasonover, Esq., Alfred A. Olinde, Jr., Esq. and Reasonover & Olinde, L.L.C.

Supreme Court of Louisiana Opinion
No. 2012-CC-0043
On Supervisory Writs to the Civil
District Court for the Parish of Orleans

On July 2, 2012, the Louisiana Supreme Court issued its decision in *Jacqueline T. Hodges and HRC Solutions, Inc. (formerly known as Med-Data Management, Inc.) v. Kirk Reasonover, Esq., Alfred A. Olinde, Jr., Esq. and Reasonover & Olinde, L.L.C.* The Court was "called on to decide whether a binding arbitration clause in a lawyer-client retainer agreement is enforceable where the client has filed suit for legal malpractice."

5-2 Ruling with Three Separate Opinions

The majority opinion was issued by Justice Knoll, with a concurring opinion by Justice Weimer. Justice Johnson concurred in the result. Separate dissenting opinions were issued by Chief Justice Kimball and Justice Victory. This is a decision of significance for a number of reasons because: (1) it addresses an issue of first impression within Louisiana; (2) the scope of the language of the Court as well as the number of opinions issued; and (3) it affects basic relationships between lawyers and clients within the state of Louisiana.

The most obvious directly relevant and important conclusion of the opinion is how lawyers should handle arbitration agreements within their fee agreements with their clients. However, the implications of the Court's opinion may go beyond that issue and into the general question of what level of notice or explanation to clients is appropriate or necessary, both legally and ethically, in order for clients to be bound to their agreements with lawyers, as those agreements are typically written by those same lawyers.

Given the wide range of sophistication among clients with regard to finance, business, law and accounting, there can be a wide range of explanation both appropriate and necessary to properly inform clients and to validate provisions of lawyer fee agreements with clients. In order to obtain a lawyer's services, some clients will merely sign the fee agreement without receiving an adequate explanation or having a clear understanding of the terms and conditions of the agreement. For that reason, a lawyer should take the time and give the attention needed to explain the retainer agreement in detail to a client. One conclusion from the Court's opinion is that an uninformed client may seek to overturn an arbitration provision and potentially other provisions of a retainer agreement because of a lack of thorough explanation or comprehension of the details of the agreement.

In some cases, the lawyer-client relationship is of such financial and legal significance to the client, and the matter may be of such size, that it may be appropriate for the client to have a separate independent lawyer to provide advice on the fee agreement itself. Certainly, where clients have separate general counsel or similar long-standing trusted lawyers with whom they work regularly, that lawyer may play the role of negotiating a fee agreement with the new lawyer for the same client, or participate in the drafting of the retainer agreement with the new lawyer.

Factual Background

The arbitration clause at issue in *Hodges* stemmed from a lawyer-client retainer agreement reached in August 2009. In this case, the parties were not strangers as they were engaged in a lawyer-client relationship dating back to 1998. The arbitration clause in their agreement was likely similar to numerous agreements used by lawyers throughout Louisiana, and found in the American Arbitration Association standard arbitration provision stating, in pertinent part, "[a]ny dispute, disagreement or controversy of any kind concerning this agreement . . . shall be submitted to arbitration." The retainer agreement urged the client to "review this agreement with independent counsel." On the face of the agreement, counsel appeared to meet the requirements of professional conduct by stating in clear language that *any* dispute shall be handled through arbitration and also urging the client to seek independent

legal counsel before signing the agreement.

Before the Louisiana Supreme Court, the parties advanced their arguments as to whether the arbitration agreement was enforceable. The lawyers' counsel argued that the arbitration clause did not result in a limitation of ultimate liability to the clients in a malpractice suit. They argued that the agreement merely limited the venue for the airing of such disputes, by removing the case from the state courts of Louisiana and placing the matter before the American Arbitration Association and an arbitrator or arbitrators appointed through the procedures of that organization. In contrast, the clients' counsel provided a two-part argument. First, it was argued that arbitration, while not limiting the substantive remedies available to the clients, did impose substantial procedural barriers.[1] Second, and critical to the Court, the clients' counsel argued the lawyers had failed to adequately disclose the full scope of the arbitration clause and the potential consequences to the clients of agreeing to limit their remedies to arbitration. The clients contended that the lawyers never mentioned malpractice throughout their negotiations and that it was the clients' understanding that the arbitration agreement only applied to fee disputes.

Facets of the Opinion

All members of the Court, with the exception of Justice Weimer, agreed that arbitration agreements between lawyers and clients are enforceable. However, the Justices disagreed over what requirements are necessary to make such agreements both legally binding and appropriate to fulfill a lawyer's professional responsibility pursuant to the Louisiana Rules of Professional Conduct.

Justice Knoll, speaking for the majority, laid out the requirements, which, as a result of this opinion, are now the law in Louisiana as it pertains to arbitration agreements in legal fee agreements. First, the Court held that there is not a *per se* bar on arbitration agreements, provided the agreement does not limit the lawyer's substantive liability, does not impose an undue procedural burden on the client, and the agreement is fair and reasonable. However, the Court went further in discussing the disclosures a lawyer must make to the client before seeking an arbitration provision. In short, the lawyer must make the consequences of arbitration abundantly clear to the client. At a minimum, the lawyer must inform the client of the following elements of binding arbitration:

1. The waiver of a right to a jury trial on the possible claims that arise under the arbitration agreement;
2. The waiver of the right to appeal the decision of the arbitrator;
3. The waiver of the right to the broad discovery permitted under the Louisiana Code of Civil Procedure or the Federal Rules of Civil Procedure;
4. An explanation that arbitration may include significant upfront costs and a comparison between the costs of arbitration and the costs of litigation;
5. An explicit disclosure of the nature of the claims covered by the arbitration agreement, *i.e.*, malpractice claims, fee disputes, etc.;
6. The fact that the arbitration agreement does not limit the client's ability to file a disciplinary complaint against the lawyer; and
7. The lawyer must provide an opportunity for the client to consult with independent legal counsel prior to signing the agreement.

In promulgating these new disclosure requirements, the Court relied upon the language of Rule 1.4(b) of the Louisiana Rules of Professional Conduct as it pertains to the lawyer's duty of candor and communication, and its requirement that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Court reasoned that, embodied in this Rule, is the principle that a lawyer cannot take action which may be adverse to the client unless the lawyer reveals all risks and consequences of the action. The Court also discussed Rule 1.0(e), which defines "informed consent."[2] In expounding upon what was required by Rules 1.4 and 1.0(e), the Court delineated what must be made clear to a client. Applying the disclosure requirements to the lawyers in *Hodges*, the majority found the lawyers did not reasonably explain to the clients the terms and consequences of the arbitration agreement. The arbitration clause failed to alert the clients as to what specific claims would be subject to arbitration. The arbitration clause failed to alert the clients that by participation in arbitration they waived a jury trial and appeal, as well as the right to the broad discovery offered through traditional litigation.

The dissenting opinions of both Chief Justice Kimball and Justice Victory would have permitted these parties to proceed in arbitration, as opposed to litigation. Chief Justice Kimball found that the current Louisiana Rules of Professional Conduct failed to mandate the disclosure requirements required by the majority of the Court; and that, as such, retroactive application resulted in an unfair application upon the lawyers who lacked notice of the requirements set out by the Court in this opinion.

Justice Victory agreed with Chief Justice Kimball that retroactively imposing new disclosure requirements upon the lawyers in this case was unfair and unnecessary, as the lawyers performed all that was required under the law at the time of entering into the fee agreement. However, Justice Victory also believed the lawyers met their duty of full disclosure in regard to the arbitration clause. First, the clear language of the clause reveals that it pertains to "any dispute" that may arise under the contract, thus alerting the client that the arbitration agreement includes malpractice claims. Second, the client was informed through the clause to obtain independent legal counsel and review the agreement with counsel; it was the client's decision not to seek independent counsel on the matter and, therefore, the lawyer performed his duty.

Only Justice Weimer was willing to find that an arbitration clause that included legal malpractice was not fair and reasonable to the client, regardless of lawyer disclosure. Justice Weimer based this argument on La. R.S. 9:5605, which governs the timeliness of legal malpractice claims and mandates that a claim must be filed within one year of the alleged malpractice. Based upon the statute, the peremptive period could limit a client's remedies. For instance, even if a client filed a claim in arbitration within the one year mandated by the statute, if an award is not rendered within one year of filing the arbitration action, the client could not then enter a Louisiana court seeking a

remedy as the period would have expired. Justice Weimer concluded that this "trap," in his words, is unfair to clients and cannot be overcome, regardless of the disclosures made by a lawyer. However, Justice Weimer believed the "trap" could be fixed by the Legislature's amending the malpractice statute to consider arbitration the functional equivalent of litigation and satisfying the peremptive period.

In contrast to Justice Weimer's view, despite the Court's additional disclosure requirements, arbitration clauses were acceptable to six of the seven Justices, suggesting that the new disclosure requirements are likely here to stay. In addition to the majority, Chief Justice Kimball believed the requirements could be added to the Louisiana Rules of Professional Conduct and based her dissent on retroactive application of the requirements. Even Justice Victory was not hostile to the new disclosure requirements, rather based his dissent on retroactive application and his conclusion that the lawyers satisfied the disclosure requirements. Considering the foregoing, there may be little potential for rescinding the disclosure requirements in the future.

Legal and Ethical Requirements of Arbitration Agreements

In light of *Hodges*, many lawyers will be required to alter their protocol in negotiating with clients and entering into fee agreements. No longer will a lawyer merely be able to hand a client a document and say "Please sign here."

Obviously, lawyers must engage in detailed conversations with clients in regard to arbitration, explaining what procedural rights can be lost in the process. With less sophisticated clients, this process may need to be extensive, as a client may be naïve about differences between arbitration and litigation. A conversation about how jury trials and appeals could be lost should be straightforward. However, some discussions may be more complex, requiring a lawyer to carefully discuss the differences between the litigation process and the arbitration process. One example is how discovery or costs differ between arbitration and traditional litigation. Some conversations will also need to touch on uncomfortable subjects for the lawyer, such as disciplinary complaints and the claims, including legal malpractice, that will be covered in arbitration. These topics should be included in client discussions, although many lawyers may prefer that these subjects not be raised with a client. Finally, a lawyer must alert the client of the opportunity to speak with independent counsel in regard to the matter because, throughout these conversations, a client may be inclined to seek additional consultation from an independent lawyer due to the procedural rights the client is relinquishing under arbitration and the potential costs/risks associated with same.

Many lawyers may conclude that *Hodges* has little impact on their cases and clients because they represent a sophisticated entity or entities with counsel. However, that may be an incorrect assumption. The majority in *Hodges* explicitly disagreed and stated that a client's sophistication or familiarity with the arbitration process is irrelevant in providing warnings and disclosures to clients. The majority did not wish to create two classes of clients and did not believe a business-savvy client was any less deserving of a lawyer's reasonable communication than an average client.[3] Thus, the disclosures mandated by the Court must be made to every client, regardless of whether the client is inexperienced and with little formal education or is a long-time, sophisticated business person.

How Attorneys Can Protect the Legality of an Arbitration Agreement

Once a lawyer makes all the necessary disclosures required by *Hodges*, then the issue becomes what the lawyer must do to show that proper disclosures have been made.

A lawyer would be advised to discuss the arbitration disclosure requirements while reviewing the fee agreement with the client. The aspects of the disclosures can perhaps be emphasized through enlarging, highlighting or applying bold print to the disclosures in the agreement, or even interlineation and initialing of specific provisions of the fee agreement. This is an obvious approach, but it could be relevant if a client later claims that he or she was unaware of the limitations of arbitration. In fact, this same argument was persuasive to Justice Victory, who found the contractual language of the fee agreement in *Hodges* put the clients on notice that "any dispute" would be resolved by arbitration. To further emphasize the disclosures in the fee agreement, a lawyer should ask the client to initial each of them specifically, allowing the client to read the document and then directly sign off next to each one in the arbitration clause. The agreement could also contain a client certification that the lawyer did discuss all relevant disclosures. The combination of both emphasized language and a client signature immediately next to the arbitration clause, as well as a client certification of discussion of all relevant disclosures, should provide additional protection to a lawyer. While not required, a combination of some or all of these suggestions may provide evidence for a lawyer looking to safeguard an arbitration agreement in the event a dispute or challenge is later raised.

Wise counsel must be familiar with the new disclosure rules promulgated by *Hodges* and act accordingly when entering into new agreements with clients. Furthermore, counsel should also take care to follow the new disclosure requirements with any clients who have previously entered into such agreements.

FOOTNOTES

1. The clients stated their filing fee with the American Arbitration Association was $18,800, compared to the $500 that would be required in Louisiana state courts. The American Arbitration Association bases filing fees in relation to the size of plaintiff's demand. Here, the clients demanded $70 million in damages.

2. ". . .*(e) "Informed consent" denotes the agreement by a person to the proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably reasonable alternatives to the proposed course of conduct. . . ."*

3. In making this point, the Court cited to *Mayhew v. Benninghoff*, where the court was "baffled" by a lawyer's argument that ethical considerations were loosened in dealings with wealthy and business-educated clients. 53 Cal. App. 4th 1365, 1368 (1997).