ENDURING ETHICS OPINION
By Professional Ethics Commission Member James M. Bowie, Esq.

Dispute resolution provisions in your engagement agreement with your client – Opinions 151, 170 and 202.

This issue’s Enduring Ethics Opinions review three enduring opinions all of which deal with dispute resolution provisions that lawyers may include within their engagement agreements with their clients.

The Professional Ethics Commission has addressed alternative dispute resolution provisions contained within an attorney/client retention agreement on three occasions. First, in Opinion 151, issued May 12, 1995, the Commission addressed arbitration clauses relating to fee disputes. The Commission noted that fee disputes are specifically addressed by Maine Bar Rule 9, and that as a result it would be inappropriate for a lawyer to enter into an agreement with the client which limited in any way the client’s specific rights under Rule 9 to insist on arbitration of a fee dispute before the Fee Arbitration Commission. Further, Opinion 151 made clear that it was permissible for the attorney and the client to agree to arbitrate all fee disputes, as long as the client had the option of either utilizing the Rule 9 Fee Arbitration process or another standard arbitration procedure, with that decision to be made in the client’s sole discretion. In short, Opinion 151 made clear that fee arbitration provisions in an attorney/client retention agreement are appropriate, as long as the client retains the right, in the client’s sole discretion, to utilize the Rule 9 Fee Arbitration Commission process as an alternative.

Four years later, in December of 1999, the Professional Ethics Commission again reviewed arbitration agreements between attorneys and clients, but in this instance expanded the scope of its review to the arbitration of future malpractice claims. Noting a strong public policy favoring arbitration but over a strong dissent, the Commission held that an agreement between an
attorney and a client contained within the initial engagement agreement to participate in mandatory arbitration of any and all malpractice claims was not prohibited by the Bar Rules. The majority did, however, note there was a significant split of authority on this issue in other jurisdictions, and a three member dissent found that a mandatory agreement to arbitrate imposed upon the client in effect “limited the lawyer’s liability” in violation of then existing Rule 3.4(f)(2)(v). The majority found that the agreement should be clear and expressly reserve both the client’s right to compel Rule 9 arbitration over any fee dispute and an ability to file Grievance Complaints under Bar Rule 7.1(a), but did not require that the arbitration clause in the engagement agreement, without more, explicitly implicate a need that the client be advised to consult other counsel.

Upon the Court’s adoption of the Maine Rules of Professional Conduct in August of 2009, the Commission subsequently re-examined Alternative Dispute Resolution Agreements in Opinion 202. In its issuance of Opinion 202 in January of 2011, the Commission dealt with a proposed provision in an attorney/client engagement agreement which expressly waived a jury in any court resolution of disputes between attorney and client.

Drawing on Opinions 151 and 170, the Commission held that such an agreement did not unreasonably limit a lawyer’s liability for malpractice, and thus could be ethically included within the engagement agreement between the attorney and the client. However, the Commission went on to note that such an agreement implicated Rules 1.4(b), 1.8, and 2.1 of the Maine Rules of Professional Conduct. As comment [14] to M.R.Prof. Conduct 1.8 states,

This paragraph does not, however, prohibit a lawyer from entering into an agreement with a client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. (emphasis in Opinion 202).
The Commission went on to note that Rule 1.4(b) requires the lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”, and that M.R.Prof. Conduct 2.1 required the lawyer to “exercise independent professional judgment and render candid advice.” Accordingly, the Commission noted that to be effective clauses such as arbitration clauses or jury waiver clauses must be discussed with the client so the client can determine the potential effects from both a theoretical and a practical point of view of those clauses, and that accordingly the client’s informed consent must be confirmed in writing, and that the client be advised in writing of the desirability of seeking, and be given a reasonable opportunity to seek, the advice of independent counsel prior to entering into the agreement.

In short, Opinions 151, 170, and 202 continue to endure, albeit with some further explication based upon the adoption of the Maine Rules of Professional Conduct in 2009. As a result, Maine lawyers may enter into agreements with their clients, at the outset of the engagement, to arbitrate disputes between the attorney and the client and/or to agree that if the dispute were to go to court a jury would be waived. However, given the provisions of the Maine Rules of Professional Conduct, such agreements must be based upon the informed consent of the client, confirmed in writing, and the client must be advised of the desirability of seeking, and an opportunity to seek, independent legal counsel prior to agreeing to such a provision.¹

¹ The Commission is aware of the decision of the First Circuit Court of Appeals in Bezio v. Draeger, 737 F.3d 819 (1st Cir. 2013). In that decision, the First Circuit, relying upon Opinion 170, held that Maine did not require either informed consent, or the recommendation of independent counsel. Despite a specific reference by the First Circuit that the Commission and the Law Court had taken no action to displace Opinion 170 since its approval (737 F.3d at 824,) the First Circuit inexplicably did not note either the adoption of the Maine Rules of Professional Conduct in 2009, nor the Commission’s issuance of Opinion 202 in 2011. Accordingly, the Bezio decision and its analysis would appear to be incomplete to the extent that it ignores the provisions of the Maine Rules of Professional Conduct and Opinion 202.
Enduring Ethics Opinions
- By David L. Herzer, Jr., Esq. - Professional Ethics Commission

The Commission issued a recent opinion in response to an inquiry from the Bar about the appropriateness of a jury waiver provision in an engagement agreement between attorney and client. See Opinion No. 202, January 9, 2011. The Commission concluded that the Maine Rules of Professional Conduct do not prohibit counsel from proposing in the engagement agreement that the parties waive a trial by jury in the event of a dispute between them that ends up in court. The Commission's analysis involved a review of a number of prior opinions issued under the then applicable Maine Code of Professional Responsibility about attorney liability in engagement agreements and other contexts. Despite the adoption of the Maine Rules of Professional Conduct on August 1, 2009, many of those opinions endure to this day.

The first such opinion was issued on April 2, 1980. Opinion No. 9, entitled "Limiting Liability," answered the question of whether an attorney violates the Maine Bar Rule 3.6(b) if he refuses to acknowledge and correct a disputed error in the distribution of real estate during the settlement of a probate estate. The Commission observed that the prohibition on prospective limitations of liability in engagement agreements does not restrict an attorney's ability to deny or to limit his liability retrospectively in response to an allegation that he made an error. In other words, the prohibition on limiting liability for theoretical malpractice that may or may not occur in the future does not impact that attorney's ability to defend herself by denying liability to the client after the fact. The operative language in the 1980 version of Maine Bar Rule 3.6(b) could be found in Maine Bar Rule 3.4(f)(2)(v) just prior to the adoption of the new M. R. Prof. Conduct 1.8(h).

The issue of an attorney limiting her liability to a client arose again in Ethics Opinion No. 26 issued on April 2, 1981. Still operating under then-existing Maine Bar Rule 3.6(b), the Commission decided that it was unethical to include in an engagement agreement a clause that read, "Our liability to you as a consequence of this opinion shall not exceed the amount of $30,000.00. Our liability to you shall not extend beyond the time during which you are the owner of the property in question." Distinguishing attorneys from title insurance companies, the latter of which issue policies limiting liability, the Commission noted that attorneys, unlike insurers, are only subject to liability if they fail to exercise due care. While an attorney cannot prospectively manage the risk of malpractice by limiting her liability in that fashion, she may do so by adjusting the amount of her fee based on the responsibility he assumes.

On January 7, 1986, the Commission issued Opinion No. 66 about a proposed waiver of a client's ethics grievance against the attorney. The attorney sought advice from the Commission about including a clause in a malpractice settlement agreement whereby the client agreed to withdraw the pending grievance and not pursue any further grievances in the future. The Commission pointed out that informing Bar Counsel of the settlement of the underlying malpractice claim or testifying before the Grievance Commission about the settlement would not violate any of the Bar Rules. However, any statement beyond the mere fact of the settlement would put the attorney at risk of violating Maine Bar Rules 3.2(f)(3) and 3.7(e)(1)(i) prohibiting conduct involving dishonesty and misrepresentation and enjoining her to employ only means consistent with the truth in appearing before a tribunal. The Commission expressed its concern that the client's withdrawal of the grievance, statement of satisfaction, or unwillingness to proceed with
the grievance made pursuant to a condition of the malpractice settlement could be less than completely honest and violate the Bar Rules. The Commission's concerns are as relevant today as they were back in 1986. See M. R. Prof. Conduct 3.3(a) & 8.4(c). Furthermore, the promise of payment in exchange for the client's noncooperation with the Grievance Commission would be a violation of Maine Bar Rule 3.2(f)(1), prohibiting the direct or indirect circumvention or subversion of the Maine Bar Rules. Today, a similar prohibition appears in M. R. Prof. Conduct 8.4(a). See also M. Bar R. 7.3(b).

In March of 1986, the Commission issued Opinion No. 68, deciding whether it was appropriate for an attorney to seek to be released from actual or threatened claims of ethical misconduct, professional negligence, economic harm, physical injury, and emotional distress in exchange for a return of the client's retainer after the attorney withdrew because of a subsequently discovered conflict of interest. Consistent with Opinion No. 66, the Commission reiterated the impropriety of seeking a release of claims for ethical misconduct, whether past or future. Under Maine Bar Rule 3.6(b) at the time, the Commission opined that the permissibility of the malpractice liability release depended on whether it was for existing claims or future claims. In the case of future claims, it was a violation of the Maine Bar Rules in effect at the time, as it would be under today's Maine Rules of Professional Conduct. If the release was for prior or existing claims, and the release was part of the settlement of a pending malpractice claim, then it was permissible under Bar Rule 3.6(b). However, as in all business transactions a lawyer has with her client, the settlement was appropriate only if the terms were written, fair, and reasonable to the client and fully disclosed and transmitted in a manner reasonably understandable to the client, who must sign the release, all as required by Rule 3.6(i)(1) & (2). The attorney also needed to advise the client of the prudence of getting independent legal counsel and give the client an opportunity to do so. The Rules applicable to attorneys engaged in business transactions with their own clients apply today just as they did in the case of this settlement agreement struck between attorney and client in 1986. See M. R. Prof. Conduct 1.8(a) & (h)(2).

In Opinion No. 151, issued in 1995, the Commission was asked whether a lawyer was prohibited from entering into an agreement compelling the client to submit fee disputes to binding arbitration, either according to Maine Bar Rule 9 or according to some other procedure. Similar to the jury waiver provision addressed by the Commission in Opinion No. 202 in 2011, the question before the Commission was not about a waiver of liability, per se, but about a waiver of certain means to resolve a liability claim. The Commission determined that, regardless of what the engagement agreement stated, if the client subsequently requested fee arbitration in accordance with Rule 9, then the lawyer would have to comply, pursuant to Maine Bar Rule 3.3(c). That Rule exists today in M. R. Prof. Conduct 1.5(g). The Commission also answered the question of whether the attorney could require the client to submit to arbitration, but allow the client the option of some procedure other than Rule 9. Citing the strong public policy favoring arbitration, finding no written prohibition against asking a client to forgo a court action, and agreeing that Rule 9 need not be the exclusive arbitration procedure, the Commission advised that compelling arbitration, as proposed, was ethical. The Commission furthermore expressly refused to apply the series of Rules applicable to "business transactions" in the context of this engagement agreement.

The 1999 Commission Opinion No. 170 addressed whether an attorney can enter into an
engagement agreement with the client in which they agree to submit malpractice claims to arbitration. Restating its earlier conclusion that the engagement agreement does not constitute a "business transaction," the Commission addressed whether the arbitration clause had the effect of limiting the lawyer's liability to the client for malpractice in contravention of Maine Bar Rule 3.4(f)(2)(v). The Commission concluded that it did not. The point of the agreement was not to limit the lawyer's liability, but to limit the means for resolving the lawyer's liability to arbitration, which has as many benefits to offer the client as a forum as the attorney.

Requiring arbitration of malpractice liability claims, as in Opinion No. 170, or agreeing that a jury will not decide liability if the claim is lodged in court, as in Opinion No. 202, beg the same question: Is choosing the forum or fact finder tantamount to limiting a lawyer's liability for malpractice? The Commission has concluded that it is not. Some would argue that the forum and fact finder impact both the likelihood of a liability finding against the attorney and the amount of damages awarded the client, which explains why attorneys seek arbitrators and judges over juries. However, in no given case can it be said with any reliability that a judge or an arbitrator would be more or less likely to find an attorney liable than a jury or that a jury would award more or less money to the client than a judge or an arbitrator. Particularly at the time the engagement agreement is struck with the client and no liability claim yet exists, it is impossible to say that any real limitation of liability is achieved by electing the forum or the fact finder so as to be unethical.