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.