
ARBITRATION AGREEMENT FOR MALPRACTICE DISPUTES
AND ITS ETHICAL MAGNITUDE

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INTRODUCTION

The right to file legal malpractice claims is an essential safeguard in preventing potential conflicts between attorneys and represented clients. As the relationship between a client and his representing attorney may be inherently unfair due to its innate information asymmetry, having the right to collect damages through filing legal malpractice claims must play a crucial role by providing a legal protection for the clients. The American Bar Association (“ABA”), recognizing such a crucial role, strictly prohibits attorneys from putting contractual limits on clients’ right to file legal malpractice claims unless inevitable circumstances trigger designated provisional exceptions.¹ With such policy support, the right to file a malpractice claim has been the most exemplary and popular protective device available for legal clients. The critical defensive mechanism, however, is currently going through structural turmoil due to the rise of a dispute resolution method, arbitration.

After the U.S. Legislature officially authorized the use of arbitration agreements in commercial contracts by enacting the Federal Arbitration Act (“FAA”) in 1925², arbitration quickly became the dominant alternative dispute resolution (“ADR”) method for commercial agreements.³ Because resolving disputes through arbitration was substantially more cost efficient than going through burdensome court litigation procedures, the ADR method’s growing popularity may have been destined to happen. With such advantageous features, arbitration became one of the core elements of every commercial agreement, and implementation of the ADR method was perceived to be a flawless enhancement of commercial agreements until attorneys began to implement the method in their retainer agreements.⁴ As an attorney-client retainer agreement is a type of commercial agreement, such implementation of the arbitration agreement is permissible pursuant to the governing principles of the FAA.⁵ However, because the right to file malpractice claims has its own ethical and fiduciary peculiarities, implementation of arbitration governing such claims has been the source of furious debates.

¹ See MODEL RULES OF PROF’L CONDUCT r. 1.8(h) (AM. BAR ASS’N 2014).

² Federal Arbitration Act, 9 U.S.C. §§ 1–6 (2012).

³ See Steven Quiring, Note, *Attorney-Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements*, 80 TEX. L. REV. 1213, 1214 (2002).

⁴ See Louis A. Russo, Note, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 HOFSTRA L. REV. 327, 330–31 (2006).

⁵ See Federal Arbitration Act, 9 U.S.C. §§ 301–07 (2012) (describing the rules and regulations that govern commercial agreements within arbitration).

Acknowledging the critical nature of the issues associated with the implementation of arbitration governing legal malpractice claims, this article will review relevant characteristics of the ADR method and will propose a prospective policy solution to resolve problems associated with its implementation. This article will begin its analysis by introducing methodological and historical details of legal malpractice arbitration through the materials of Part II. Then, this article will review the policy responses of different state legislatures and judiciaries through the materials of Part III, and will summarize the analysis with a policy suggestion through the materials of Part IV.

I. ARBITRATION AND LEGAL MALPRACTICE CLAIMS: AN EFFICIENT MISMATCH

As learning background information is crucial to understanding a new phenomenon, this chapter will begin its analysis with the historical and policy backgrounds of the recent emergence of the implementation of arbitration provisions in attorney-client retainer agreements, then this chapter will present advantages and disadvantages associated with such implementation to examine whether the ADR method can be properly used for legal malpractice claims.

A. The Rise of Arbitration

Arbitration is a method of dispute resolution conducted by one or more neutral third-party arbitrators who render binding decisions.⁶ Arbitration provides a cost-efficient alternative to court litigation as it reduces the costs associated with legal claims by simplifying burdensome procedural requirements of court litigation.⁷ The simplification is achieved by omitting some of the procedural steps of court litigation such as discovery requirements and jury systems.⁸ The U.S. Federal Government believed that implementing arbitration would effectively diminish its increasing judicial expenses and thus, decided to make active use of the ADR method by granting the method an official authorization through enacting the

⁶ Russo, *supra* note 4, at 336–37 (noting that the legal decisions rendered through the arbitration process are final and not appealable unless there are exceptional circumstances challenging the applicability of the arbitration provision itself).

⁷ See *id.* at 334–35.

⁸ See *id.* at 334–38.

FAA.⁹ As dedicating a Federal Act to arbitration to give an official recognition to the ADR method alone clearly meant more than mere authorization, some scholars viewed this enactment as assuring arbitration a “privileged position in American Law.”¹⁰ Regardless of what the legislature intended to extract out of the FAA, the Act facially certified arbitration to be the only ADR method empowered by an Act solely dedicated to itself, and the empowerment quickly broadened the ADR method’s realm of influence.¹¹ Arbitration provisions began to appear in many types of commercial agreements and became the contractual custom of many industries; for example, employment and collective bargaining agreements customarily implement arbitration provisions.¹² This cost-efficient alternative to burdensome court litigation had no reason not to be integrated into attorney-client retainer agreements, which are a type of a commercial agreement.

*B. The ABA and Arbitration Forming an Alliance:
The Beginning of the Takeover?*

It was the ABA that initiated the adoption of arbitration in attorney-client retainer agreements.¹³ In the 1970s, when arbitration was on the hike of its popularity, the ABA was searching for a way to interrupt the skyrocketing increase in disciplinary spendings associated with heavy procedural costs.¹⁴ Clients and attorneys were excessively filing disciplinary complaints against each other by taking advantage of the numerous forms of disciplinary complaints available.¹⁵ When all of the complaints had to proceed through extensive legal procedures pursuant to court litigations, the related legal costs for processing such complaints were becoming unbearable.¹⁶ The ABA, the association financing disciplinary agencies, desired to stop this trend as such increase in spending was clearly wasting judicial resources.¹⁷ Rather than raising the bar to file the complaints and reduce the number of cases, the ABA decided to simplify the associated

⁹ See Quiring, *supra* note 3, at 1215.

¹⁰ See *id.*

¹¹ See *id.* (noting that since the enactment, use of arbitration provisions became more prevalent).

¹² Russo, *supra* note 4, at 330.

¹³ Quiring, *supra* note 3, at 1215.

¹⁴ See *id.* at 1215–16.

¹⁵ See *id.* (noting that number of filed malpractice claims are increasing).

¹⁶ See *id.* at 1217.

¹⁷ See *id.* at 1216.

procedural structures by implementing arbitration.¹⁸ The ABA was not abusing its discretion by choosing such a path since there was a strong federal presumption favoring arbitration pursuant to the FAA.¹⁹ However, such presumption back then was made to overturn the policy standpoint of the U.S. Supreme Court, which gave a dubious look to the ADR method by holding that parties of commercial agreements should not be forced to implement arbitration provisions unless the implementation was mutually agreed by all parties.²⁰ In other words, the Supreme Court believed that it was still too risky to certify arbitration to be one of the official dispute resolution methods empowered with a default presumption because it believed the method was inherently insecure;²¹ the FAA overwhelmed the doubtful policy standpoint of the Supreme Court, but the enactment did not invalidate the reasoning of the Supreme Court cases imposing interpretations doubting the credibility of the ADR method.²² As an institution overseeing legal professionals, it was not a normal course of action for the ABA to implement arbitration and go against the cautious standpoint of the Supreme Court.²³ However, the institution, under extreme financial pressure due to its increasing disciplinary expenses, may not have had any other reasonable choices than to immediately reduce procedural costs by implementing arbitration.²⁴

The ABA's implementation of arbitration turned out to be a success. The U.S. judicial community gradually accepted that arbitration was a credible dispute resolution method and has actively utilized this method since the 1970s.²⁵ Now, the Supreme Court is not challenging the arbitration method anymore but is strongly supporting the practice; for the past decades since the 1970s, the Supreme Court has been ruling decisions in

¹⁸ *See id.*

¹⁹ *See id.* at 1214–15 (noting that the enactment of the FAA indicated that the federal legislature had a strong policy assumption favoring the use of arbitration provisions as it moved to reverse then-current Supreme Court cases questioning credibility of such use).

²⁰ *See id.*

²¹ *See id.* at 1217, 1222.

²² *See id.* at 1214–22.

²³ *See id.*

²⁴ *See id.* Moving to reduce the number of filed cases may be more complex than simplifying the procedural features; in order to perform such reduction, the ABA may need to conduct background and policy research to discover the causes and related solutions while procedural solution may just require adopting a facial solution such as arbitration provisions.

²⁵ *See id.* at 1216.

favor of implementing arbitration,²⁶ and with the most recent Supreme Court decision on FAA, *Direct TV v. Imburgia*,²⁷ the Supreme Court moved even further and empowered FAA by extending the effective scope of the Act to govern areas, which had been governed by State regulations.²⁸ With such judiciary support following the legislative authorization through enactment of FAA, arbitration firmly established its position and now is one of the necessary components of commercial agreements of many industries.²⁹ Having this general trend on its side, the legal industry also actively has taken advantage of the ADR method since the emergence of the mentioned general trend. Now, most legal fee disputes are contractually governed by arbitration provisions,³⁰ and many legal contracts implement the arbitration provisions to cover legal malpractice claims as well.³¹ Even though it was the ABA that initiated the implementation of the ADR method, the institution seems to believe that the method may be too unstable to govern legal malpractice disputes without regulatory controls so it imposes additional requirements for the arbitration provisions governing legal malpractice claims;³² the attorney party proposing the execution of the contract must make reasonable disclosures in accordance with the obligations provided by ABA Rule 1.4 to inform the fact that signing such provisions potentially causes adverse consequences against the client party's right to file legal malpractice claims.³³ However, considering that the rule requires nothing more than a mere verbal disclosure of the associated information,³⁴ it may be the case that the ABA unofficially adopted use of arbitration provisions governing legal malpractice

²⁶ See Imre S. Szalai, *DIRECTTV, Inc. v. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 OHIO ST. J. ON DISP. RESOL. 75, 80–81 (2017).

²⁷ *DIRECTTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467–71 (2015); see also Szalai, *supra* note 26, at 80–81.

²⁸ See Szalai, *supra* note 26, at 80–81 (noting that the Supreme Court Decision strengthened the power of FAA by granting more authority than what the legislature originally intended for the Act to have).

²⁹ Quiring, *supra* note 3, at 1216–17.

³⁰ See *id*

³¹ See *id*

³² See *id.* at 1216.

³³ See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02-425 (2002); see also MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2014).

³⁴ Even though the associated comments of the ABA Rule require advising the client of the appropriateness of the independent representation in writing, the Rule does not state any details so that such requirement may essentially be met with a simple writing comprised of a sentence or two. See MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 15 (AM. BAR ASS'N 2014). The

cases by not imposing heavy restrictions against the implementation and is waiting on more empirical or policy researchers to come out and provide theoretical and political justifications for this unofficial implementation.³⁵

C. The Advantages and Disadvantages of Arbitrating Legal Malpractice Claims

As noted, arbitration provisions for legal malpractice claims already began to appear in attorney-client retainer agreements and emerged to govern legal malpractice claims. However, it is also true that the ABA did not make an open adoption of the ADR method to legal malpractice claims, as the ABA's recent opinion letter shows that the institution is still cautious about making such implementation.³⁶ In compliance with the growing popularity of the ADR method in commercial agreements, the method may become the prevalent feature of malpractice disputes sooner or later; therefore, the ABA may need to confirm its approach to manage and operate its use of arbitration as soon as possible. In order to examine the essential matters pertaining to such confirmation, it would be helpful to discover both the practical advantages and disadvantages associated with such implementation.

i. Advantages

No one questions that arbitration is the simple and low-cost alternative of traditional court litigation and that the ADR method's effective and practical features have been demonstrated through its prevalent uses in other commercial agreements.³⁷ With arbitration, disputing parties proceed through their legal procedures in a more efficient and timely manner than using its litigation counterpart: procedural requirements of the hearings are simpler; procedural steps towards the final decision are simpler as

ABA Formal Opinion on the arbitration provisions in attorney-client retainer agreements does not mention any specific writing requirements either. *See* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002).

³⁵ *See* Quiring, *supra* note 3, at 1216 (discussing the pro-arbitration stance of the courts and the ABA).

³⁶ *See generally* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002) (discussing ethical considerations in the context of attorney-client arbitration agreements).

³⁷ *See id.* (noting that use of arbitration is now perceived as a customary feature of many commercial contracts).

arbitration renders the final decision through only one hearing,³⁸ and, associated social costs are reduced since the ADR method does not require jury trials and extensive discoveries.³⁹ The cost-efficient features of arbitration clearly make the implementation of such method fairly attractive: this cheaper alternative may be able to cover a larger number of legal claims as lesser costs may be required for each lawsuit; and, the quality of such legal procedures may improve because the saved procedural costs may be invested elsewhere. For the ABA, which had been struggling to deal with heavy judicial caseloads,⁴⁰ being able to make such efficient allocation of resources will definitely help shape better structural management.

In addition to the cost-efficient features, the users and administrators of the legal malpractice dispute resolutions will also benefit from features of the ADR method which grant stronger confidentiality.⁴¹ Unlike court litigation, information pursuant to arbitration hearings shall be kept confidential.⁴² Thus, the parties do not have to disclose information in connection with procedural requirements potentially harmful to their reputations; the only information that the associated parties must disclose is the final award.⁴³ Many lawyers may find this strengthened confidentiality feature to be very attractive, as none of the lawyers desire to publicly disclose the information associated with their malpractice lawsuits—which is highly likely to harm their practices one way or the other—thus, relieving the lawyers from concerns associated with potential defamation may incentivize them to cooperate with malpractice grievance procedures more actively. The feature reduces economic costs, as well, since less extensive disclosure procedures will be enforced.

³⁸ See Quiring, *supra* note 3, at 1217 (noting that arbitration does not have appellate procedures like court litigation).

³⁹ See Russo, *supra* note 4, at 335–36 (noting that trial litigation, even without jury and discovery features, are not as simple as arbitration procedures).

⁴⁰ See Quiring, *supra* note 3, at 1215 (noting that arbitration has eased judicial caseloads).

⁴¹ See Russo, *supra* note 4, at 336 (noting that arbitration is more private because it does not usually take place in open court); see also Mark Richard Cummisford, *Essay: Resolving Fee Disputes and Legal Malpractice Claims Using ADR*, 85 MARQ. L. REV. 975, 981 (2002) (noting how arbitration may protect attorney reputations in attorney fees disputes).

⁴² See Russo, *supra* note 4, at 336; see also Cummisford, *supra* note 41, at 981.

⁴³ See Russo, *supra* note 4, at 336; see also Cummisford, *supra* note 41, at 981.

Finally, implementing legal malpractice arbitrations will resolve the procedural conflicts breaking out of the tension between malpractice litigations and fee dispute arbitrations.⁴⁴ Since the ABA amended its Model Rule to favor implementing arbitrations for legal fee disputes, governing fee disputes with arbitration provisions has become the industry custom of retainer agreements.⁴⁵ However, such practice is not realizing its full potential since many of the fee dispute cases also involve issues pertaining to legal malpractice claims.⁴⁶ As noted, the ABA has not confirmed its policy over implementing malpractice arbitrations, therefore, there are inconsistencies with respect to using arbitration provisions for legal malpractice claims. Thus, when the legal malpractice claims are governed by court litigations under the contract, parties suffer from procedural tensions caused by the conflicting methods.⁴⁷ For example, in *Saffer v. Willoughby*,⁴⁸ the retainer agreement used different methods to deal with the two disputes, and two separate suits using arbitration and court litigation were brought for an incident which had both malpractice and fee dispute issues.⁴⁹ Unfortunately, in this case, the timelines for the arbitration and the lawsuit did not align, so the New Jersey Supreme Court had to intervene the fee dispute arbitration and postpone rendering the arbitration fee award until the related malpractice claim was finalized.⁵⁰ The court's justification was that the malpractice claim could be a valid counterclaim against issues pertaining to the fee disputes, and therefore, finalizing the fee award before the malpractice issues had been resolved would have been an unfair and inefficient practice of the law.⁵¹ This case clearly shows that because fee disputes and malpractice claims are closely related,⁵² allowing the possibility of one of those claims to not be resolved through arbitration procedures could cause unnecessary delays costing legal resources. Thus, unless the ABA confirms an identical standard to govern the two related legal issues, a similar turmoil may be destined to

⁴⁴ See Cummisford, *supra* note 41, at 989–91 (discussing the interplay between fee dispute arbitration and malpractice litigation).

⁴⁵ See Quiring, *supra* note 3, at 1216 (noting that the ABA officially authorized use of arbitrations to resolve disputes over legal fees).

⁴⁶ See Cummisford, *supra* note 41, at 989–91.

⁴⁷ See *id.*

⁴⁸ *Saffer v. Willoughby*, 670 A.2d 527 (N.J. 1996).

⁴⁹ See Cummisford, *supra* note 41, at 990 (citing *Willoughby*, 670 A.2d at 535).

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² *Id.* at 989 (citing Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 638–39 (1997)).

persist.⁵³ And, considering all other introduced factors such as financial and confidentiality matters, it may be reasonable for the ABA to choose arbitration to govern both types of legal claims since arbitration is the more cost-efficient and participation-driving alternative among the two given options.

ii. Disadvantages

Just like all other ADR methods, arbitration is not a perfect system without any loopholes. Some procedural features of arbitration may conflict with elements of legal malpractice cases when the ADR method is used to deal with such cases. First of all, requiring a signing client to resolve their legal malpractice matters through arbitration may constitute a breach of the contracting attorney's fiduciary duty.⁵⁴ The contractual relationship between an attorney and his client triggers special fiduciary obligations under the default legal requirements, in addition to those obligations under the terms and conditions of the retainer agreement.⁵⁵ The default fiduciary obligations require that communications between the attorney and the client are protected under attorney-client privilege,⁵⁶ and that the representative attorney is subject to disciplinary actions when he acts in a way that adversely affects his client's interests.⁵⁷ These elevated fiduciary duties that an attorney owes to his client are far more strict than the duties usually owed between parties in contractual agreements and also between parties with other types of fiduciary relationships. Considering the potential impacts of the attorney-client relationship to the client, putting such weight to the relationship is clearly reasonable.

Further, implementation of legal malpractice arbitration may constitute a breach of such a heavy attorney-client duty. As noted, having the right to file legal malpractice claims has been recognized as the major protective device provided for legal clients; the ABA confirms such relevance by strongly protecting the right through Rule 1.8(h) and elaborating its recognition through the Rule's related comments.⁵⁸ And, contractual features of the arbitration provisions governing the legal malpractice claims

⁵³ See *id.* at 991.

⁵⁴ See Russo, *supra* note 4, at 339 (citing James R. Deye & Lesly L. Britton, *Arbitration by the American Arbitration Association*, 70 N.D. L. REV. 281 (1994)).

⁵⁵ See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2014).

⁵⁶ See *id.*

⁵⁷ See *id.* r. 1.7.

⁵⁸ See *id.* r. 1.8(h).

may be viewed to violate the protective elements granted by the Rule 1.8(h).⁵⁹ Under ABA Model Rule 1.8(h), an attorney shall not make an agreement prospectively limiting his malpractice liabilities unless the signing client is independently represented by a separate counsel with respect to forming the agreement.⁶⁰ Strictly applying this Rule, using arbitrations to resolve malpractice disputes may be viewed to limit the attorney's liabilities because by agreeing to use arbitration, the signing client compromises some of procedural features of court litigation such as the jury system, the process of discovery, the appellate system, and the right to receive punitive damages.⁶¹

It is debatable whether adopting arbitration to govern malpractice claims, despite such procedural simplifications, would constitute a violation of the Rule 1.8(h) or a breach of the attorney's fiduciary duty to the client. However, even though some of the procedural features are omitted in arbitration, the client is still going through a type of hearing process that is authorized by the federal government and the Supreme Court as to be a fair alternative to court litigation.⁶² Thus, implementing arbitration may not limit the related liabilities or may not adversely affect the client, and in fact, the implementation could be seen to be merely moving from a fair procedural system to another fair procedural system; such movement arguably benefitting the client by reducing procedural costs through applying a simpler process. However, all of those plausible arguments do not change the fact that the use of arbitration compromises the inherent benefits of the compromised features of the litigation. Thus, although the ABA does not oppose implementing arbitration to resolve malpractice disputes,⁶³ there are uncertainties as to whether such implementation complies with attorneys' fiduciary duties.

Additionally, the structure of arbitration procedures is not free from pro-attorney bias.⁶⁴ Even though the arbitration process includes some selective schemes designed to select independent decision-makers to render the fair legal decisions, schemes such as disclosure requirements preventing conflict of interests, mandated oath to rule faithfully and fairly,

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *See* Quiring, *supra* note 3, at 1217.

⁶² *See* Szalai, *supra* note 26, at 77–80.

⁶³ MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 14 (AM. BAR ASS'N 2014).

⁶⁴ *See* Russo, *supra* note 4, at 341–42.

and empowering the clients to govern the selection decisions, these requirements do not negate the fact that the vast majority of arbitrators are practicing attorneys.⁶⁵ Considering that a legal malpractice suit necessarily involves at least one party to be an attorney, the attorney party would have a competitive advantage because he is likely to have a better understanding of how to convince the governing arbitrator, who is also a practicing attorney.⁶⁶

Moreover, the arbitrators may unintentionally render biased decisions because the malpractice disputes are so closely related to their everyday practices as practicing attorneys, such that the arbitrators may rely on their pre-formed biases while believing that they are forming neutral decisions. The federal law provides the last line of protection against the possibility of such unfair rulings by allowing a party to challenge and vacate the rulings when the related evidence proves that the award is procured by corruption, fraud, or undue means or that the arbitrator is partial or corrupted.⁶⁷ However, gathering the evidence pertaining to a procedural method mostly comprised of confidential documentations must be extremely difficult, but because the challenging process must be difficult in order to protect the rendered decision from meritless challenges, it seems that the provided protective measures should be adequate to prevent problems adverse to rendering fair decisions.⁶⁸

Despite the noted legal tensions, arbitration is a very attractive alternative to litigation. The ADR method will clearly promote efficient management of the legal malpractice claims with its simplified features and will bring more attorneys to participate in the legal malpractice claims with its attorney friendly features.⁶⁹ The saved costs and broadened coverage driven by such advantages will clearly benefit clients in the long run. Moreover, even though arbitration has its inherent disadvantages, its useful and fair nature seem to be already demonstrated through its prevalent uses in other legal areas including fee dispute resolutions akin to legal

⁶⁵ See *id.* (noting that disclosure requirements with respect to conflicts of interests and taking oath to rule faithfully and fairly are present for selection procedures of arbitrators (citing N.Y. C.P.L.R. § 7506 (MCKINNEY 1962))).

⁶⁶ See Russo, *supra* note 4, at 340.

⁶⁷ See 9 U.S.C. § 10 (2012).

⁶⁸ See Russo, *supra* note 4, at 336; see also Cummisford, *supra* note 41, at 981. Both of the sources note that the only documentary requirement of arbitration is recording the award statement.

⁶⁹ See *supra* Part II.C.i (discussing the advantages of using the ADR method).

malpractice claims.⁷⁰ Additionally, as noted, there are safety devices under the federal statute countering the introduced disadvantages.⁷¹ Thus, the associated advantages of implementing arbitration to legal malpractice claims may be more substantial than the associated disadvantages when the matters are collectively examined.

II. VARYING STATE POLICIES

Because the issue of whether arbitrating legal malpractice claims is proper is a fairly new legal question,⁷² there are not many states which have formed precedents applicable to the arbitration provisions governing legal malpractice claims.⁷³ As state courts rendering decisions in connection with ABA regulations normally refer to policy opinions of their local bar associations, each state does not completely lack guiding principles.⁷⁴ However, the opinions do not provide a consistent form of interpretation, as the ABA has not clarified its policy guidance for this unconfirmed issue.⁷⁵ Even if the tones and policy understandings of related state codes are not uniform, the approaches can be grouped into two categories: (1) the policy group only requires informed consent of the client, or (2) the policy group requires both informed consent and independent representation of the client. Examining holdings of the state courts in detail shall be helpful to shape an optimal solution to resolve this problematic legal disparity.

A. States Only Requiring Informed Consent

The majority of states with precedents view that the issue with the malpractice arbitration provision shall be decided strictly under contract principles.⁷⁶ With this policy standpoint, many of the courts rendering

⁷⁰ See *supra* Part II.B (explaining arbitration being used in fee dispute resolution).

⁷¹ See 9 U.S.C. § 10 (2012).

⁷² The ABA issued its first formal opinion on malpractice arbitration issue in 2002 when is fairly recent. See ABA Comm'n on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002) (discussing the retainer agreement requiring the arbitration of fee disputes and malpractice claims).

⁷³ See Russo, *supra* note 4, at 348 (explaining that even Illinois, which is the third most populated State of U.S., has not litigated the issue).

⁷⁴ See Ashley Carleton, Comment, *An Ethics Analysis of Arbitrating Malpractice Claims*, 27 J. AM. ACAD. MATRIMONIAL L. 445, 456 (2015).

⁷⁵ See ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002) (discussing the retainer agreement requiring the arbitration of fee disputes and malpractice claims).

⁷⁶ See Carleton, *supra* note 74, at 455–57.

applicability decisions for arbitration provisions for malpractice claims analyze nothing more than whether the terms and conditions of the arbitration provisions at issue make full disclosure of the scope and effect associated with the agreement to a reasonable extent pursuant to the federal law applying the policy.⁷⁷ If the terms and conditions of the agreement at issue reasonably disclose matters relevant under the given circumstances, signing the agreement constitutes giving an informed consent in those States.⁷⁸

i. Maine

The State of Maine applies the lowest level of scrutiny among all states with meaningful precedents validating implementation of arbitration agreements governing legal malpractice claims.⁷⁹ Applying contract law principles, Maine merely requires the arbitration provision to make a reasonable disclosure so that signing the provision constitutes an informed consent.⁸⁰ In *Bezio v. Draeger*, the Court of Appeals for the First Circuit ruled that FAA interpretation favored imposing no additional requirements other than placing an adequate provision revealing necessary information for the client to consent in an informative way.⁸¹ Specifically, the court held, that in accordance with the FAA's strong presumption favoring implementation of arbitration procedures, the arbitration provision merely presents that any "dispute [other than fee disputes] that arises out of or relates to this agreement or the services provided by the law firm shall also, at the election of either party, be subject to binding arbitration."⁸² While such provision disclosed no facts associated with arbitrating malpractice disputes, no disputes other than arbitrating matters on the malpractice disputes were possible under agreement of the parties.⁸³ The decision did not require the terms to include an advising note to seek an independent counsel for signing the agreement which is normally required in other states.⁸⁴ By specifically rejecting the lower court's application of

⁷⁷ See, e.g., *Bezio v. Draeger*, 737 F.3d 819, 825 (1st Cir. 2013) ("a court should decline to enforce an arbitration clause where . . . the clause . . . [fails to] 'adequately disclose[] the full scope of the arbitration clause'").

⁷⁸ See Carleton, *supra* note 74, at 457–58.

⁷⁹ *Id.* at 456–57.

⁸⁰ See *id.* at 457.

⁸¹ *Bezio*, 737 F.3d at 821–24.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 821–25.

the *Hodges v. Reasonover* standard, the court also declined to impose special qualifications restricting the scope of such implementation.⁸⁵ The details of the *Hodges v. Reasonover* standard will be noted in a later section herein.⁸⁶ In other words, Maine's arbitration provision for attorney-client malpractice disputes are valid when their language is proper under the reasonableness standard that normally applies to any other arbitration provision.⁸⁷ If the arbitration provision qualifies as a reasonable disclosure in light of general contract law standards, the client is treated as if he gave informed consent to arbitrate malpractice disputes upon signing the retainer agreement including such provision.

ii. California and New Jersey

California law also favors legal malpractice arbitration but sets the bar slightly higher than the Maine standard, as the law imposes higher disclosure standards for informed consent and obligates advising the client to seek an independent counsel.⁸⁸ In *Lawrence v. Walzer & Gabrielson*, the court held that there was a strong state policy favoring arbitration,⁸⁹ therefore nothing was inherently improper about forming an arbitration agreement for legal malpractice claims between the attorney and the client.⁹⁰ The decision was rendered under contract law principles.⁹¹ However, the favorable policy standard did not displace "necessity for a voluntary agreement to arbitrate."⁹² To comply with the given necessity standard, and to make the agreement granting arbitration governing malpractice disputes in a voluntary fashion with the client's informed consent, the attorney needed to fully disclose the possible consequences of the agreement and advise the client to consult with independent counsel before signing the agreement.⁹³ In other words, the attorney asking his client to make such an agreement does not need to state detailed consequences of conducting the arbitration in the granting provision, but under the reasonableness standard, the attorney must specifically explain the procedural consequences of

⁸⁵ See *id.* at 824 (citing *Hodges v. Reasonover*, 103 So. 3d 1069 (La. 2012)); see also *infra* Part III.1.d.

⁸⁶ See *infra* Part III.A.4.

⁸⁷ See *Bezio v. Draeger*, 737 F.3d 819, 822–24 (1st Cir. 2013).

⁸⁸ *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 9–10 (Cal. Ct. App. 1989).

⁸⁹ See *Quiring*, *supra* note 3, at 1244.

⁹⁰ *Lawrence*, 256 Cal. Rptr. at 9.

⁹¹ See *id.*

⁹² *Id.* at 8.

⁹³ *Id.* at 10.

arbitrating such claims and advise the client to seek independent counsel in terms of signing the agreement.⁹⁴ Otherwise, the attorney does not have an enforceable informed consent of the client,⁹⁵ although the law does not require an actual involvement of an independent counsel.⁹⁶ New Jersey law imposes the same requirements for arbitrating attorney-client disputes under the proper informed consent.⁹⁷

iii. New York

New York law applies a standard that departs from its Californian and New Jersey counterparts as the law gives one twist from those provisions.⁹⁸ Like California and New Jersey, New York's arbitration provision for legal malpractice claims are governed under contract law principles.⁹⁹ Additionally, the standards for validating such provision is pretty similar to California and New Jersey when considering two factors: "(1) whether there exists an agreement to arbitrate and (2) its scope."¹⁰⁰ In *Buckwalter v. Napoli, Kaiser & Bern LLP*, the court ruled that an attorney's legal malpractice arbitration was authorized when the arbitration provision was "free from fraud on his part, or misconception on the part of his client, and that a reasonable use was made by the attorney of the confidence reposed in him."¹⁰¹ In other words, the provision did not need to include all of the detailed circumstances pursuant to the legal malpractice arbitration unless the provision was reasonable in general contract law principles;¹⁰² the circumstances are delivered to the client in a way that need not be through the terms and conditions of the contract at issue,¹⁰³ and such requirements are virtually similar to the ones imposed by introduced precedents. One specification that must be noted is that the qualification was met when the

⁹⁴ *Id.*

⁹⁵ *See id.* at 9–10.

⁹⁶ *See* Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP, 162 Cal. Rptr. 3d 597, 603 (Cal. Ct. App. 2013) (explaining that basic contract law governs arbitration agreements in California).

⁹⁷ *See* Kamaratos v. Palias, 821 A.2d 531, 536–40 (N.J. Super. Ct. App. Div. 2003) (holding that full disclosure of all the ramifications of an agreement to arbitrate must be made to the client when the arbitration provision does not include all necessary information).

⁹⁸ *See* Buckwalter v. Napoli, Kaiser & Bern LLP, No. 01 Civ. 10868, 2005 U.S. Dist. LEXIS 5231, at *19–21 (S.D.N.Y. Mar. 29, 2005).

⁹⁹ *See id.*

¹⁰⁰ *See id.* at *19.

¹⁰¹ *Id.*

¹⁰² *See id.* at *19–26.

¹⁰³ *See id.*

law firm provided a letter with its contact information which advised the client to give the firm a call if the client had any questions while considering whether to sign the retainer agreement.¹⁰⁴ *Buckwalter* is the only case within New York's jurisdiction governing such issue, therefore, it is not clear whether this case made writing the additional letter mandatory to compel the legal malpractice arbitration. However, looking at the trends in the legal industry, attorneys will not risk possible accusation and will treat the additional letter as a mandatory conduct. Thus, writing the letter may be the customary law of the State of New York.

iv. Louisiana

Louisiana law proposes an innovative approach to decide the matters pertaining to enforceability of malpractice arbitration provisions.¹⁰⁵ The noted cases rely on the reasonableness standard to assess whether the malpractice arbitration provision is enforceable to govern legal malpractice disputes.¹⁰⁶ Under such standard, the courts inevitably look at the sophistication level of the clients, because that factor is relevant to assess whether the client fully understood the meaning of the terms when they were signing the contract.¹⁰⁷ This standard possibly brings a fairness issue hinging the validity of the whole process. The judge becomes the ultimate decision maker, determining whether the client is sophisticated enough to meet the reasonableness standard because an arbitration issue is a question of law not a question of fact, so that the judge alone becomes the final decision maker for the associated questions.¹⁰⁸ Under such structure, the level of sophistication is within the scope of the subjective ruling of an individual judge, and such subjective practice is not desirable for its potential of applying the judge's peculiar personal belief. To solve this problem, the Louisiana Supreme Court designed a specific seven-factor test to evaluate whether the informed consent of the associated clients was properly received for the legal malpractice arbitration provision.¹⁰⁹ Under *Hodges v.*

¹⁰⁴ *Id.* at *20–24.

¹⁰⁵ See Terese M. Schireson, Comment, *The Ethical Lawyer-Client Arbitration Clause*, 87 TEMP. L. REV. 547, 561–63 (2015).

¹⁰⁶ See, e.g., *Hodges v. Reasonover*, 103 So. 3d 1069, 1071 (La. 2012) (explaining that the arbitration clause must be “fair and reasonable to the client.”).

¹⁰⁷ See Schireson, *supra* note 105, at 566–68.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 562–63.

Reasonover,¹¹⁰ the court defined the seven factors as following: (i) the provision indicated that the client waived the right to receive a jury trial by agreeing to arbitrate; (ii) the provision indicated that the client waived the right to appeal by agreeing to arbitrate; (iii) the provision indicated that the client waived the right to receive broad discovery under federal and state procedural rules by agreeing to arbitrate; (iv) the provision indicated that the arbitration might incur immediate fees and expenses that might not otherwise be incurred in litigation; (v) the provision explicitly disclosed that it covered malpractice claims; (vi) the provision did not infringe the client's right to file a disciplinary complaint to an adequate authority; and (vii) the provision advised the client to seek independent counsel before signing the agreement.¹¹¹ With respect to its innovative nature, many federal courts of other states referred to this seven-factor test in connection with rendering their legal decisions,¹¹² and such references may indicate that this factor test could present a new guideline for answering unresolved questions associated with legal malpractice arbitration provisions.

B. States Requiring Independent Counsel

Some states do not recognize malpractice arbitration provisions unless the client is represented by independent counsel.¹¹³ Those minor but non-negligible number of the states appear to believe that arbitrating malpractice disputes is limiting the lawyer's malpractice liability by strictly applying ABA Model Rule 1.8(h), which could be interpreted to prohibit such limiting conduct unless the client is independently represented by a separate counsel.¹¹⁴

i. Ohio

In *Helbling v. Lloyd*, the Court of Appeals of Ohio ruled that an agreement to arbitrate legal malpractice disputes was not voluntary unless

¹¹⁰ *Hodges*, 103 So. 3d at 1077.

¹¹¹ *Id.*

¹¹² *See Feacher v. Hanley*, No. 2:13-cv-92-EJF, 2014 WL 119382, *3-5 (D. Utah Jan. 13, 2014); *see also* *Sanford v. Bracewell & Guiliani, LLP*, 6 F.Supp. 3d 568, 580-82 (E.D. Pa. 2014). *See generally* *Castillo v. Arrieta*, 368 P.3d 1249, 1256-58 (discussing and examining applicability of the *Hodges* seven-factor test to their State standards).

¹¹³ *See infra* notes 116-17.

¹¹⁴ MODEL RULES OF PROF'L CONDUCT r. 1.8(h) (AM. BAR ASS'N 2014).

the client actually consulted a separate counsel before signing the agreement.¹¹⁵ The court held that the policy favoring arbitration agreements should not infringe the attorney's fiduciary duty to represent his client's best interest and that it was not the client's best interest to sign an arbitration provision governing legal malpractice disputes if the client did not have a separate counsel independently representing the related matters.¹¹⁶ Thus, Ohio law enforces a heavier standard for validating an arbitration provision for malpractice disputes than the standards for other arbitration provisions by requiring that the signing client consult a separate counsel on issues pertaining to signing the legal malpractice arbitration provision.

ii. Texas

Texas imposes a similar requirement to Ohio law but justifies the requirement with a different reasoning. Ohio Rule of Professional Conduct Rule 1.8(h), which governs the issue, is written in identical terms with ABA Model Rule 1.8(h), which requires that the client has "given a reasonable opportunity to seek an advice of independent legal counsel."¹¹⁷ In other words, Ohio law is merely making its own interpretation of the governing ABA Rule, that does not facially force the actual representation. However, the Texas Disciplinary Rules of Professional Conduct 1.08(g), the Texas Code governing this issue, applies a different governing provision by stating that the rule does not allow the agreement prospectively limiting the attorney's legal malpractice liability "unless permitted by law and the client is independently represented in making the agreement."¹¹⁸ This Texan term of art enforces independent representations for signing malpractice arbitration provisions, without leaving any room for different legal interpretations—this is unlike the other provisions that do leave room for different interpretations, due to their use of "reasonable opportunity" language.¹¹⁹ There is an interesting legal reasoning behind this strong enforcement.¹²⁰ The Texas Court of Appeals presented the reasoning in *In*

¹¹⁵ *Helbling v. Lloyd Ward, P.C.*, No. 99991, 2014 WL 1408133, at ¶¶ 8–9 (Ohio Ct. App. 2014).

¹¹⁶ *See id.*

¹¹⁷ *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(h) (AM. BAR ASS'N 2014).

¹¹⁸ TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.08(g) (2017).

¹¹⁹ *Compare* MODEL RULES OF PROF'L CONDUCT r. 1.8(h) (AM. BAR ASS'N 2014) (terms of art enforcing independent representations for signing malpractice arbitration), *with* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.08(g) (amended May 22, 2017) (provisions leaving room for interpretation by using "reasonable opportunity" language).

¹²⁰ *See In re Godt*, 28 S.W.3d 732, 738–39 (Tex. Ct. App. 2000) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(c)(1) (West 2000)).

re Godt that signing arbitration provisions governing legal malpractice cases had to accompany a separate legal counsel for the signing client because Texan law treated legal malpractice cases as types of personal injury cases;¹²¹ in Texas, personal injury cases cannot be arbitrated unless the client consults an independent counsel in signing the arbitration provision and provides a written consent.¹²² Thus, Texas requires the independent counsel to comply with its distinctive procedural policy rather than to deal with innate issues associated with applying the arbitration provision.¹²³

According to the presented examinations, the states make varying interpretations of the ABA Rule governing legal malpractice arbitration provisions; some of the states believe that the federal government's strong policy favoring arbitration pursuant to the enactment of FAA shall grant the use of the arbitration provisions under the general standard applies to any other arbitration provisions,¹²⁴ and other states believe that arbitrating such legal dispute may need more protection than the one provided by the general standard due to the dispute's critical role played in the American adversary system.¹²⁵ However, every state with meaningful precedents has one interpretation in common: arbitration is under the strong federal policy support pursuant to the FAA, so arbitrations for legal malpractice claims is legally permitted when necessary qualifications are met.¹²⁶

III. SUMMARY DISCUSSION AND FINAL CONCLUSION

As noted, states currently apply various standards with respect to governing arbitration provisions in attorney-client retainer agreements that purport to enforce arbitrations in legal malpractice disputes. Considering the legal tendency that the ABA Model Rules generally become the uniform governing law for issues associated with attorney-client relationships, the presence of such varying remarks may not be something desirable to be governing policies of this uniformity-promoting rule. However, treating the different understandings as valid arguments for forming a valid uniform standard, the different remarks could be great resources to establish a secure and optimal standard. And, making a uniform standard in accordance with the *Hodges* seven-factor test of the Louisiana Supreme

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See generally* Part III.A.

¹²⁵ *See generally* Part III.B.

¹²⁶ *See generally* Part III.

Court may be one of the more considerable and valid options according to the features of the precedents.

A. Relevant Issues for Finding the Solution

Under the circumstances associated with current precedents, there generally are two types of regulatory schemes for malpractice arbitration provisions: one is requiring an informed consent; and, the other is requiring representation of an independent counsel with respect to signing the provision.¹²⁷ Extent and form of the qualifications associated with such requirements vary state by state, but all of the states, except for Maine, believe that arbitrations governing this area of legal issue may need to be more cautiously conducted than ones for the other legal issues due to the inherent relevance of the legal malpractice claims.¹²⁸ Considering the inherent values associated with the compromised procedural forms such as the opportunity to receive a jury trial, punitive damages, and standard discovery, arbitrating legal malpractice disputes may be viewed to compromise the legal rights of the clients to some extent.¹²⁹ Without strong Supreme Court cases and ABA policy memorandums favoring the enforcement of arbitration provisions, such provisions could be deemed to constitute a breach of fiduciary duties of attorneys as it is undeniably true that some of the clients' procedural rights are being compromised by the provisions, regardless of the extent of the rights being compromised.¹³⁰

With respect to this procedural issue associated with the malpractice arbitration provisions, requiring the informed consent alone may not provide enough protection that is needed. Without specific writing requirements, informed consent will merely require the attorney to personally inform the client about the legal consequences associated with signing the provision. And, for some unknown reasons, many of the states chose not to impose any type of specific writing requirements for legal malpractice arbitration provisions.¹³¹ Considering the associated circumstances, such as that setting writing specifications may turn against the strong federal policy favoring arbitration under FAA and that conducting matters and

¹²⁷ See generally Part III.

¹²⁸ See *id.* Moreover, even Maine law touches on the issue of whether the legal malpractice claims require stricter scrutiny to be arbitrated, although it ended up dismissing such argument. See *Bezio v. Draeger*, 737 F.3d 819, 823–24 (1st Cir. 2013).

¹²⁹ See *Hodges v. Reasonover*, 103 So. 3d 1069, 1078 (La. 2012).

¹³⁰ See Schireson, *supra* note 105, at 566–67.

¹³¹ See Part III.

ruling decisions in accordance with specific writing requirements may be quite costly with its associated enforcement and management expenses, such hesitance may be reasonable. However, considering the fact that there is no way of picturing exact circumstances occurring when such information was delivered to the clients due to the conversation's confidential nature, the courts may generally lack information to properly examine whether the informed consent was proper so that the courts will be vulnerable to the arguments of attorney parties alleging that the delivered information was adequate; the only credible information that the courts can rely on to find the factual circumstances of the verbal delivery is the testimonies of the parties who are not free from their personal interests. Thus, due to such restricted evidentiary means, the informed consent requirement may not have the teeth as strong as how it appears to have without any writing specifications.

Forcing independent representations, however, may also not be an adequate solution because of legal-economic consequences associated with such requirement. Needless to mention, imposing such a heavy requirement to confirm an arbitration provision is clearly turning against the federal policy under the FAA.¹³² Some policy makers may deem that imposing such a requirement¹³³ may be a type of denial of the arbitration system as a whole, as it could appear to be a type of the official admission that the procedural features of arbitration are not as proficient as the features of the court litigation; such admission could trigger insurmountable policy consequences because it could be the source of the policy attacks demanding the arbitration to completely go away. Considering that arbitration is now a habitual process conducted in commercial disputes including international trade disputes,¹³⁴ the policy attacks could bring a legal-economic disaster. Therefore, enforcing the independent representation may break the current balance between legal and economic factors associated with the general operation of arbitration.

B. A Suggested Solution: Applying the Hodges Test

This article proposes that among all of the existing approaches, the *Hodges* test of the Louisiana Supreme Court seems to present a solution that is potentially optimal.¹³⁵ As noted, without disclosure specifications,

¹³² See Schierson, *supra* note 105, at 547.

¹³³ See Quiring, *supra* note 3, at 1215.

¹³⁴ See *id.*

¹³⁵ See *Hodges v. Reasonver*, 103 So. 3d 1069, 1078 (La. 2012).

the informed consent requirement may lack its regulatory teeth, and the independent representation requirement may suggest that the application of the arbitration is questionable as a whole.¹³⁶ Thus, setting the disclosure specifications for the informed consent requirement, similar to the specifications featured in the *Hodges* test, may safeguard the credibility of the malpractice arbitration procedures without harming the general operative scheme of the arbitration system;¹³⁷ it will be a mere addition to the informed consent requirement.

Firstly, compliance with the disclosure specifications in accordance with the *Hodges* factors will deliver all the information needed for the signing clients to be aware of.¹³⁸ As noted,¹³⁹ the *Hodges* test not only enforces disclosing all the rights being compromised for choosing arbitration such as, the right to a jury trial, the right to appeal, and the right to receive broad discovery; but also makes all the necessary suggestions for the client to consider such as the option to file other disciplinary complaints and the option to seek advice of independent counsel.¹⁴⁰ Thus, the arbitration provision that complies with the factors test may fully disclose all of the requirements under the associated ABA commentary.¹⁴¹ In other words, application of the *Hodges* test perfectly complies with all the required qualifications under general ABA policy while not harming the general systematic justification of the use of arbitration by not extending the regulatory scheme further than requiring the informed consent.¹⁴²

The application of the *Hodges* test also clarifies the innate ambiguity of the reasonableness standard by providing clear directions to follow. As noted, determining arbitrability is a question of law not a question of fact due to its procedural nature.¹⁴³ Thus, judges may have too much discretion

¹³⁶ See generally *supra* Part IV.A (discussing how the lack of power of the informed consent requirement, coupled with the independent representation requirement, may affect the general operation of arbitration).

¹³⁷ See *Hodges*, 103 So. 3d at 1078.

¹³⁸ See *id.*

¹³⁹ See *supra* Part III.A.4.

¹⁴⁰ *Id.*

¹⁴¹ MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 15 (AM. BAR ASS'N 2014) (noting that to arbitrate the attorney-client lawsuits, the lawyer shall advise the client of the appropriateness of independent representation and shall give the client a reasonable opportunity to find and consult independent counsel).

¹⁴² See *id.*; see also *Hodges*, 103 So. 3d at 1078 (finding that plaintiff did not give informed consent, as required, in order to effectuate the arbitration provisions in the retainer agreement).

¹⁴³ See *supra* Part III.A.iv.

when it comes to rendering decisions associated with this issue without a clear guidance on the process. Therefore, judges may be able to deem anything “reasonable disclosure” when the circumstances create a sound claim, even though there may not be any concrete evidence. Consequently, providing specific directions with qualifications like the *Hodges* factors will definitely limit such risky discretionary authorization and bring a safety net to the malpractice arbitration which makes matters clearer and more concrete. Application of such test, which includes more complex elements than the regular informed consent requirement normally practiced in the majority of the states, may mean an increase in judicial expenses due to prospective costs associated with systematic and policy applications of the legal standard.¹⁴⁴ However, considering the fiduciary duty and ethical responsibility whose safety and security will be granted through such application, imposing the relatively heavy requirement to legal malpractice arbitration provisions may be a necessary evil.

CONCLUSION

Present doctrinal disparities on legal malpractice arbitration are definitely undesirable considering that conduct and ethics rules for attorneys are governed under the uniform standard basis set by the ABA. Therefore, this article after conducting a careful analysis, concludes that application of the *Hodges* test, proposed by the Louisiana Supreme Court, appears to be the best candidate to become the uniform standard among the proposed standards out there. Because of the test’s innovative features, it is not free from potential criticisms in connection with its inherent traits departed from the current practices. The criticisms shall not be overlooked as the issues associated with the application deals with a critical element of the American adversary system, the client’s safety. However, in accordance with the fact that the ABA must eventually confirm a uniform standard to take care of the issues associated with legal malpractice arbitrations, this article believes that applying the *Hodges* test as a whole or referring to the *Hodges* test to build an optimal solution should greatly help the ABA resolve problems that the institution faces in terms of issues on the legal malpractice arbitration provisions.

¹⁴⁴ See *supra* Part III.A.