

Pre-dispute jury waivers in attorney-client disputes

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The attorney-client relationship is typically memorialized in a retainer agreement that sets out the terms of the relationship. The retainer agreement is required by law, but it is also a smart way to start the relationship. By documenting the parties' expectations from the beginning, the attorney can manage expectations, thereby minimizing the potential for misunderstandings down the road. The contract should set forth, among other things, the scope of work, how much the attorney will charge for the work, who will do the work, and how problems will get resolved. Without this basic agreement, resolution of disputes would be governed by laws that would not necessarily mirror the parties' intentions.

To avoid disputes in the future, one of the terms that attorneys sometimes expressly set forth in the retainer agreement is how disputes will get resolved, i.e., in court or in arbitration. Two common claims that arise between an attorney and client are fee disputes and malpractice, and one usually triggers the other. Indeed, it is highly likely that a client will respond to a lawsuit for unpaid fees with a lawsuit for malpractice. Conversely, when a client files a lawsuit for malpractice, the attorney may respond with a lawsuit for unpaid fees. So, the question that can be addressed at the onset of the relationship is, how will these disputes get resolved if they arise?

Many attorneys prefer that malpractice claims be resolved through confidential arbitration rather than through public court battles. One main reason for the preference is the confidentiality of the proceedings. However, whether arbitration is the better forum for resolving malpractice claims is subject to much debate. For example, arguments in favor of the court system over arbitration include that those matters generally result in swift elimination of meritless claims through dispositive motions, i.e., demurrer or summary judgment, the formalities of the discovery process enables attorneys to get the evidence needed to disprove the claims, proceedings are "on the record," unfavorable rulings can be appealed, and judges in the court system are not paid by the parties.

This article can be read in full at <https://www.dailyjournal.com>.

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