Public Policy Position
ADM File No. 2021-07 – Proposed Amendment of MRPC 1.8

The Alternative Dispute Resolution Section is a voluntary membership section of the State Bar of Michigan, comprised of 775 members. The Alternative Dispute Resolution Section is not the State Bar of Michigan and the position expressed herein is that of the Alternative Dispute Resolution Section only and not the State Bar of Michigan. The State Bar's position on this matter is to oppose ADM File No. 2021-07 and authorize the Section to advocate its position.

The Alternative Dispute Resolution Section has a public policy decision-making body with 24 members. On February 9, 2022, the Section adopted its position after an electronic discussion and vote. 18 members voted in favor of the Section's position, 1 member voted against this position, 0 members abstained, 5 members did not vote.

Oppose with Recommended Amendments

Position Vote:
Voted for position: 18
Voted against position: 1
Abstained from vote: 0
Did not vote: 5

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ALTERNATIVE DISPUTE RESOLUTION SECTION

March 23, 2022

Re: ADM File No. 2021-07
Proposed Amendment to Rule 1.8 of the
Michigan Rules of Professional Conduct

Dear Michigan Supreme Court -

I am writing on behalf of the Alternative Dispute Resolution (ADR) Section to offer our commentary on the proposed amendment to Rule 1.8(h) of the Michigan Rules of Professional Conduct (ADM File No. 2021-07, dated December 15, 2021) and to propose alternatives to address the concerns raised by the proposed amendment.

My understanding is that the State Bar Board of Commissioners has voted to oppose the proposed amendment. Our Section has been authorized by the Board of Commissioners to submit our comment directly to the Court.

As the ADR Section, we are eager to work with the Court to consider ways to address the concerns raised by this proposed amendment to the MRPC.

Respectfully,

Erin R. Archerd, Chair
State Bar of Michigan
Alternative Dispute Resolution Section

Enclosure: ADR Section MRPC 1.8 (h)(3) Comment and Proposal

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Comment

We appreciate and support the desire of the Michigan Supreme Court (MSC) to ensure that prospective clients are fully informed of and knowingly consent to an arbitration provision contained in a proposed retainer agreement. The ADR Section has many arbitrators among our members, and we agree that informed consent is important both to the general practice of law and to the continued trust in arbitration by the public.

However, as explained below, we believe that as drafted, the proposed MRPC 1.8(h)(3) inappropriately equates arbitration with limitations of liability, is overbroad, and is contrary to authority in other jurisdictions. In addition, we suggest that the MSC's goals could better and more appropriately be achieved amending a different MRPC.

MRPC 1.8 deals with "Conflict of Interest: Prohibited Transactions." Subsection (h) specifically deals with prohibitions against lawyers limiting their liability. MRPC 1.8(h)(1) provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless . . . the client is independently represented in making the agreement." By adopting the same requirement of actual independent representation, the proposed MRPC 1.8(h)(3) suggests that arbitration agreements are equivalent to a limitation of liability. They are not. Absent some separate limitation, which would be subject to MRPC 1.8(h)(1), parties can receive the full range of legal remedies in arbitration. Further, arbitration offers substantial advantages to both the lawyer and the client, including speed and reduced cost compared to judicial proceedings, the parties' ability to choose a respected arbitrator skilled in a specialized field, and a private forum. That is why both the US Congress and the Michigan Legislature have enacted statutes that embody a strong public policy favoring arbitration and prohibit discrimination against arbitration.

Moreover, in contrast to MRPC 1.8(h)(1) and the proposed 1.8(h)(3), the existing MRPC 1.8(h)(2) (settling a claim with an unrepresented client or former client) requires only that the client be informed in writing that the client has an <u>opportunity</u> to seek separate representation in connection with the settlement of an <u>actual</u> malpractice claim.

The proposal is overbroad for multiple reasons.

1. It exposes the lawyer to discipline for the inaction of a client who fails to seek separate representation.

2. The proposal assumes – and comes very close to announcing as a matter of policy – that arbitration is an inherently unfair and biased means of dispute resolution that somehow prospectively limits the lawyer's liability to the client.

3. As a practical matter, the proposed rule would discourage lawyers from including arbitration provisions in their proposed retainer agreements as the lawyer would likely be reluctant to send the potential client to consult with a competitor, and the client may be reluctant to pay a second attorney to review an arbitration provision. Because it makes arbitration a "Prohibited Transaction" and treats it differently than other contractual provisions, the proposed rule may be preempted by the Federal Arbitration Act (FAA) and contrary to the Michigan Uniform Arbitration Act (MUAA). At a minimum, the proposed rule violates the strong public policy favoring arbitration embodied in both statutes.

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4. The proposal goes beyond the reasoning of State Bar of Michigan Ethics Formal Opinion R-23 (2016), which provides that an arbitration agreement is not ethically permissible unless the proposed client consults with independent counsel **or** consults with the contracting lawyer and is fully informed in writing regarding the scope and practical consequences of the arbitration provision.

5. Finally, the proposal is contrary to American Bar Association Formal Opinion 02-245 (2002) which provides that a retainer agreement may contain a binding arbitration provision if the proposed client has been apprised of the advantages and disadvantages of arbitration and has "given her informed consent to the inclusion of the arbitration provision in the retainer agreement."

The many members of our ADR Section who act as arbitrators would disagree with any assumption that arbitration is an inferior, unfair, or biased method of dispute resolution. We recognize that states are wrestling with issues regarding mandatory arbitration provisions in form contracts because of the possible lack of informed and voluntary consent. However, MRPC 1.4(b) has long required attorneys to explain matters to clients "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation". We would encourage the MSC to consider the New Jersey Supreme Court's reasoning in *Delaney v Dickey*, 244 NJ 466, 494; 242 A2d 257 (2020): "We make no value judgment whether a judicial or arbitral forum is superior in resolving a legal malpractice claim, for that is a determination to be made by the lawyer and client, after the lawyer explains to the client the differences between the two forums so the client can make an informed decision." The issue for the *Delaney* court was one of informed consent drawn from RPC 1.4. The Court concluded:

> Consistent with ABA Formal Opinion 02-245, the weight of authority as expressed in professional advisory opinions and judicial case law in other jurisdictions, and this Court's interpretation of its own RPCs, we hold that attorneys who insert provisions in their retainer agreements to arbitrate future fee disputes or legal malpractice claims must explain the advantages and disadvantages of arbitral and judicial forums. Attorneys can fulfill that requirement in writing or orally—or by both means.

244 NJ at 496.

Significantly, Section 2 of the FAA, 9 USC 2, and Section 6(1) of the MUAA, MCL 691.1686(1), identically provide that an agreement to arbitrate must be treated as "valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract."

In *Kindred Nursing Centers v Clark*, 137 S Ct 1421 (2017), the US Supreme Court held that Section 2 of the FAA "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses,' but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue,'" quoting *AT&T Mobility LLC v Concepcion*, 563 US 333, 339 (2011). Thus, the FAA "preempts any state rule that discriminates on its face against arbitration" or that "covertly accomplishes the same objective . . . ." 137 S Ct at 1426.

The *Kindred* Court held that the FAA preempted a Kentucky Supreme Court decision holding that the state constitution barred enforcement of an arbitration clause in a nursing home contract

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signed under a power of attorney that did not expressly allow the representative to enter into arbitration agreements on behalf of the nursing home resident. The Court held that "[p]lacing arbitration agreements within [a disfavored] class reveals the kind of 'hostility to arbitration' that led Congress to enact the FAA." *Id.*, quoting *Concepcion*, 563 US at 339.

The Court in *Kindred* rejected argument that the Kentucky decision – like the proposed MRPC 1.8(h)(3) – governed contract formation, rather than contract enforcement, holding that "By its terms . . . [Section 2 of the FAA] cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]' – that is, about what it takes to enter into them." 137 S Ct at 1428.

The Michigan legislature was presumptively aware of the US Supreme Court decisions construing the identical language of the FAA when it enacted the MUAA in 2012. Indeed, in *Watts v Polaczyk*, 242 Mich App 600, 607 (2000) the Court of Appeals upheld an arbitration clause in a retainer agreement under the predecessor to the MUAA, recognizing that the Legislature's endorsement of arbitration is "strong and unequivocal" and binding on the courts. In *Tinsley v Yatooma*, 333 Mich App 257 (2020), the Court of Appeals again enforced an arbitration provision in a retainer agreement. The court rejected the argument that the clause violated MRPC 1.8(h)(1) and applied the language of MCL 691.1686(1) prohibiting discrimination against arbitration. While the plaintiff in *Tinsley* had actually consulted with independent counsel concerning the retainer agreement, nothing in the opinion makes actual consultation with independent counsel a requirement. Indeed, such requirement would likely run afoul of the US Supreme Court's reasoning in *Kindred*.

Because the proposed MRPC 1.8(h)(3) would deem an arbitration provision a "Prohibited Transaction" unless the client actually consulted with independent counsel and would as a practical matter deter attorneys from proposing an arbitration provision, it may be preempted by the FAA and contrary to the MUAA, and at a minimum is contrary to the policy of those statutes.

Alternative Proposal

To avoid preemption by the FAA or conflict with the MUAA, the ADR Section recommends that a provision requiring informed consent to an arbitration provision in an attorney-client retainer agreement not appear in MRPC 1.8(h), Prohibited Transactions. Instead, it should be part of MRPC 1.4, dealing with client communication; *or* MRPC 1.18, dealing with duties to a prospective client; *or* a new MRPC 1.19 that specifically deals with arbitration. Further, the rule should require that the client be properly informed of the advantages and disadvantages of arbitration, and should have an opportunity to consult independent counsel, but analogous to the existing MRPC 1.8(h)(2), the new rule should not mandate that the client actually consult independent counsel.

For the reasons discussed above, the ADR Section proposes that the Court adopt the following proposed language as a new MRPC 1.4(c), MRPC 1.18(e), or perhaps a new MRPC 1.19:

> A lawyer shall not include a provision requiring arbitration of disputes in an agreement with a client or proposed client unless the client or proposed client is reasonably informed of the advantages and disadvantages of the arbitration provision, is advised to seek independent counsel, and affirmatively consents to arbitration in writing.

We appreciate the Court's attention to this significant matter.