Order

Michigan Supreme Court
Lansing, Michigan

June 8, 2022

ADM File No. 2021-07

Addition of Rule 1.19 of the Michigan Rules of Professional Conduct and Official Comment

_____

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, new Rule 1.19 of the Michigan Rules of Professional Conduct and its Official Comment are adopted, effective September 1, 2022.

Rule 1.19. Lawyer-Client Representation Agreements: Arbitration Provisions

A lawyer shall not enter into an agreement for legal services with a client requiring that any dispute between the lawyer and the client be subject to arbitration unless the client provides informed consent in writing to the arbitration provision, which is based on being

(a) reasonably informed in writing regarding the scope and the advantages and disadvantages of the arbitration provision, or

(b) independently represented in making the agreement.

Official Comment:

MRPC 1.19 is designed to ensure that a client entering into an arbitration agreement with a lawyer has sufficient information to make an informed decision or is independently represented by counsel in making the agreement. This paragraph applies to agreements entered into at the onset of an attorney-client relationship as well as to agreements entered into during the course of the attorney-client relationship.

In order to ensure that client consent to an arbitration provision is informed consent, at a minimum the agreement should advise the client of the practical advantages and disadvantages of arbitration. Inclusion of the following information is presumed to be sufficient to enable a client to give informed consent:

(1) By agreeing to arbitration, the client is

(a) waiving the right to a jury trial,

(b) potentially waiving the right to take discovery to the same extent as is available in a case litigated in a court,

(c) waiving or limiting the right to appeal the result of the arbitration proceeding to specific circumstances established by law, and

(d) agreeing to be financially responsible for at least a share of the arbitrator's compensation and the administrative fees associated with the arbitration;

(2) whether the agreement to arbitrate includes arbitration of legal malpractice claims against the lawyer;

(3) identification of the organization or person(s) that will administer the arbitration;

(4) if the client declines to agree to arbitration at the onset of the attorney-client relationship, there is no prohibition against the lawyer and the client agreeing to arbitrate the matter at a later date;

(5) arbitration may be conducted as a private proceeding, unlike litigation in a court;

(6) the parties can select an arbitrator who is experienced in the subject matter of the dispute;

(7) depending on the circumstances, arbitration can be more efficient, expeditious and inexpensive than litigation in a court; and

(8) the client's ability to report unethical conduct by the lawyer is not restricted.

Staff Comment: The addition of new MRPC 1.19 and its Official Comment clarify that a lawyer may only include an arbitration provision in a lawyer-client representation agreement if the client provides informed consent in writing to the provision after being reasonably informed about the scope, advantages, and disadvantages of the provision, or being independently represented.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

VIVIANO, J. (*dissenting*). The majority today adopts MRPC 1.19, which establishes that an attorney-client agreement cannot contain an arbitration clause unless the client is either "reasonably informed" about the provision or is "independently represented in making the agreement." The rule thus tips the scale against arbitration by placing procedural hurdles to entering these agreements. I have no doubt that the rule represents a

well-intentioned effort to protect clients. But good intentions do not justify needless, ineffective, and potentially deleterious rules. I believe the present rule is all of these.

Today's rule change is a classic solution in search of a problem: no evidence has been produced that arbitration agreements between lawyers and clients in Michigan are currently a problem.[1] Even if such a problem did exist, I do not believe this new requirement would be effective in solving it. To be sure, we must be concerned with a lawyer's asymmetrical information advantage over a client, who often lacks the training and knowledge to fully understand legal matters. See Griffith, *Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics*, 63 U Pitt L Rev 347, 365-366 (2002). But informed-consent laws such as the one here are often poor tools for ensuring that the intended beneficiary of the additional information makes better decisions; in fact such rules might lead to worse outcomes for the beneficiary.[2] Even when disclosures are potentially helpful, their form and content must be carefully crafted. See Sunstein, *Nudges.gov: Behaviorally Informed Regulation*, in The Oxford Handbook of Behavioral Economics and the Law (New York: Oxford University Press, 2014), p 729. The rule today does nothing to ensure that the disclosures are produced in a comprehensible and useful fashion.

And, lastly, I fear the new rule could be more harmful than helpful for clients. Paying yet another lawyer to review the agreement does not bode much better for the client. What is the client to do if that additional lawyer, too, has an arbitration clause—hire a third lawyer? The probable result of the new rule will not be better-informed clients—more likely, it will be clients who come to court seeking to avoid arbitration by capitalizing on the new rule's vague language. What does it mean for the client to be "reasonably informed"? What are the "advantages" or "disadvantages" of an arbitration provision?

---

[1] Although we received comments containing generalized statements about clients' unfamiliarity with arbitration agreements, none of the comments identified any particular instances of this confusion or resulting problems for clients.

[2] See generally Ben-Shahar & Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014), pp 43-47 (noting research showing that information-disclosure requirements across subjects are ineffective); Nahmias, *The Limitations of Information: Rethinking Soft Paternalistic Interventions in Copyright Law*, 37 Cardozo Arts & Ent L J 373, 376, 392-407 (2019) (arguing that disclosure requirements often prove ineffective and sometimes even harmful); Klick & Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 Minn L Rev 1620, 1636 (2006) (arguing that ex ante paternalistic measures like disclosure requirements "reduce[] the incentive to search for information, carefully evaluate decision options, or develop good decision-making strategies").

Courts and ethics bodies will be busy deciphering these vague standards, without any discernable benefit to the client, who will now be dealing with (and funding) more extensive and time-consuming satellite litigation.

One potential source of litigation will be whether this rule is enforceable at all. Michigan's Uniform Arbitration Act, MCL 691.1686(1), provides that arbitration agreements are "valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract," and the Federal Arbitration Act (FAA), 9 USC 2, echoes this provision almost verbatim. This "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[.]' " *Kindred Nursing Ctrs Ltd Partnership v Clark*, 581 US ___, ___; 137 S Ct 1421, 1426 (2017) (citation omitted). Accordingly, the FAA "preempts any state rule that discriminates on its face against arbitration" or that "disfavor[s]" such agreements. *Id*. An argument could be made that the new rule violates the statute by creating a potential defense unique to arbitration agreements when the client was not "reasonably informed" or did not have independent representation. Cf. *In re Mardigian Estate*, 502 Mich 154, 199 (2018) (MCCORMACK, J., opinion for reversal) ("[W]e have endorsed the view that it is nonsensical for courts to uphold unethical fee agreements when those agreements will subject the attorney to discipline for violating our professional rules."); but see *Delaney v Dickey*, 244 NJ 466, 495-496 (2020) (holding that an informed-consent requirement for attorney-client arbitration agreements did not violate the FAA or the state arbitration statute); *Snow v Bernstein, Shur, Sawyer & Nelson, PA*, 176 A3d 729 (Me, 2017) (same). Regardless of whether the argument prevails, it will certainly produce litigation, again with little benefit to the client.

The rule adopted today thus promises few benefits and many costs, all to address a nonissue. I therefore would decline to adopt the rule and instead would allow attorneys and their clients to freely enter arbitration agreements without any special requirements. The Court of Appeals has upheld the enforceability of such agreements, and I would not put these decisions in doubt by creating a vague and unnecessary rule of professional conduct. See *Tinsley v Yatooma*, 333 Mich App 257, 264 (2020); *Watts v Polaczyk*, 242 Mich App 600, 604-606 (2000). For these reasons, I dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 8, 2022

Clerk