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May 27, 2021

Ronald K. Chen, Esq.
Chair
New Jersey Supreme Court Advisory Committee on Professional Ethics
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Dear Mr. Chen:

It has come to our attention that the Advisory Committee on Professional Ethics is planning to discuss the issue of Pre-Dispute Arbitration Agreements in New Jersey attorney and law firm retainer agreements in accordance with the referral of the Supreme Court of New Jersey pursuant to its decision in *Delaney v. Dickey* ___ N.J.___ A-30-19 (Dec. 21, 2020).

The New Jersey Association for Justice, an organization of more than 2,700 members committed to the civil justice system and the cause of justice for all, wishes to share our perspective on this issue with you and the members of the committee.

The New Jersey Association for Justice strongly opposes the approval or acceptance of lawyers and/or law firms using Pre-Dispute Arbitration Agreements in their retainer agreements. As lawyers, we respect both the 7th Amendment of the United States Constitution that guarantees all Americans the right to a trial by a jury of their peers and Article I Section 9 of the New Jersey Constitution, which states "the right to trial by jury shall remain inviolate." Arbitration clauses seek to prevent an aggrieved person from availing themselves of the right to trial by jury and effectively close the courthouse doors to people guaranteed that right.

Lawyers should never seek to deprive their own clients of their federal and state constitutional rights. The concept of lawyers seeking to block people from access to the courts is anathema to our profession. While others will argue that this is somehow voluntary, we believe that anytime an arbitration agreement is presented, whether required or implicitly required, to obtain any goods or services, the consumer is forced to accept the terms or forego the product or service. This is not fair and is why the Forced Arbitration Injustice Reform Act that would ban such arbitration provisions in consumer contracts was passed by the House of Representatives last year and has been endorsed by over 70 consumer groups including the NAACP, American Civil Liberties Union and the National Organization for Women.

While we oppose any inclusion of an arbitration agreement in a legal retainer, we would be remiss if we did not point out the impropriety of a beneficiary of an arbitration clause being the one to advise a client on agreeing to that same clause. No lawyer or firm should be put in the position of having to explain the arbitration system and the advisability of agreeing to such a clause to their own client when they would be the eventual beneficiary of the same arbitration agreement.

In addition, the language proposed by the New Jersey State Bar Association fails to advise how the arbitrator will be selected, what the cost to the client will be, what limits will be applied on discovery or what the limits of appealability of an arbitrator's ruling are. Arbitration by its very nature incurs greater cost for the client. In an arbitration, in addition to paying a lawyer's fee, most often the client also pays half of the fee for the arbitrators. The experience of our members shows that in many cases arbitrators charge fees of $500 an hour or more.

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While there is always an advantage to a corporate defendant in the arbitration system, there is an even greater one when that corporate defendant is a law firm that has developed relationships with arbitrators over many years, if not decades. Simply put, the arbitration system stacks the deck against the layperson. To make this point even clearer, an analysis of the closed files of JAMS performed by the American Association for Justice found that only 2.3% of claims for professional liability/malpractice were found favorably to the consumer.

As an organization whose mission requires it "to uphold and defend the Constitution of the United States of America and the Constitution of the State of New Jersey … to advocate tirelessly for the fair administration of justice and for the constitutional right to trial by jury," we urge you and the members of the Committee to find that, under no circumstances, shall it be ethical for any lawyer to include a Pre-Dispute Arbitration clause in their retainer agreement.

We stand ready to provide any further assistance the Committee may desire.

Respectfully,

Edward P. Capozzi, Esq.
President