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Re: FKB Legal Malpractice Advisory: Legal Malpractice Claims Arising from Underlying Arbitrations; The Vast Discretion Afforded Arbitrators Often Proves to be an Insurmountable Hurdle Precluding a Legal Malpractice Plaintiff from Establishing Causation.

Dear Clients and Colleagues:

Arbitration is often a useful alternative dispute resolution mechanism, as it is employs less expensive, less formal and more efficient procedures than those of the various Courts. However, the same lax procedures that provide the foregoing benefits, also confer on the arbitrator broad powers and discretion, as the arbitrator is not bound by the same strictures of precedent and evidence that the Courts are mandated to follow. As a result, losing parties may find themselves bound by an arbitrator's decision that is seemingly unjustified or against the weight of the evidence and be disgruntled as a result. What sometimes follows are legal malpractice claims against the attorneys, wherein the former client alleges that the attorney negligently handled the arbitration, which resulted in the unfavorable arbitration ruling. However, as discussed herein, the well-recognized broad discretion of the arbitrator can prove to be an obstacle that is difficult for a legal malpractice Plaintiff to overcome to prove the critical element of "but for" proximate causation.

It is without question that arbitrators exercise great discretion in determining questions of law and fact. This discretion has been recognized and acknowledged by New York Courts. Specifically, the Court of Appeals has held: "It is well settled that judicial review of arbitration awards is extremely limited…An arbitration award must be upheld when the arbitrator "offer[s] even a barely colorable justification for the outcome reached"… Indeed, we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice. Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471 (N.Y. 2006) (*internal citations omitted)*. Moreover, an arbitrator is free to "apply his own sense of law and equity to the facts as he has found them to be in resolving a controversy." Sprinzen v. Nomberg, 46 N.Y.2d 623, 631 (1979).

The practical effect of this well-settled standard on legal malpractice cases is that Plaintiffs will often encounter difficulty proving the critical element of proximate causation. To establish a claim to recover for malpractice the Plaintiff must show that, "but for" the lawyer's negligence Plaintiff would not have suffered the alleged damages. AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434, 834 N.Y.S.2d 705 (2007). Accordingly, for a legal malpractice Plaintiff to prove proximate causation in connection with an attorney's representation at an

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arbitration, that Plaintiff must prove that "but for" the attorney's alleged negligence—which is typically in the form of an allegation that the attorney failed to introduce evidence or call witnesses—the arbitrator would have ruled differently and in Plaintiff's favor.

But as the aforementioned standard demonstrates, an arbitrator has extremely broad discretion to rule as he or she sees fit. Indeed, the Court may not even overturn an arbitrator's award that contains errors of law and fact. See Wein & Malkin, supra. As such, proving that omitted evidence or witness testimony could have, would have, or should have, changed the decision of the arbitrator, can be difficult to do without resorting to impermissible speculation. Seemingly, the legal malpractice Plaintiff must be able to prove that the attorney omitted key evidence that directly contradicts a stated conclusion of the arbitrator to prevail on such a claim.

Furthermore, a legal malpractice Plaintiff's efforts to prove causation can be frustrated by the lack of a written opinion or explanation for the arbitration award. Many arbitration venues, including AAA and FINRA, require arbitration awards to be in writing; however, the arbitrators are not required to issue opinions, reasoning or explanations for the ultimate award. As such, it can often prove difficult for a legal malpractice Plaintiff to prove proximate causation because the reasons for the arbitrator's decision are often unknown to the parties. Complicating matters further is the well-settled principle that, as a matter of law, arbitrators may not be compelled to testify as to the basis of an unreasoned decision. See Colletti v. Mesh, 23 A.D.2d 245, 247, 260 N.Y.S.2d 130 (1st Dept. 1965) *affd* 17 N.Y.2d 460, 266 N.Y.S.2d 814 (1965) ("Inquisition of an arbitrator for the purpose of determining the processes by which he arrives at an award, finds no sanction in law").

In light of the wide latitude afforded arbitrators, a legal malpractice Plaintiff who chooses to pursue a subsequent claim against her attorney arising from the handling of an arbitration faces an uphill battle in proving the critical element of "but for" proximate causation. For this reason, defense counsel and insurers tasked with defending legal malpractice claims arising from an underlying arbitration should carefully examine the possibility of a causation-based defense; for as long as the arbitrator's award is "barely colorable" based on the evidence presented, it will be afforded deference by the Courts.

Should you have any questions concerning the above or legal malpractice generally, please feel free to contact Andrew S. Kowlowitz (akowlowitz@fkblaw.com) or Eric D. Mercurio (emercurio@fkblaw.com).

Yours faithfully,

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