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'Sheppard Mullin' Decision One Year Later: Problems for Streamlined Enforcement of Arbitration Provisions in Attorney-Client Fee Agreements, The Recorder

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In the past year since 'Sheppard Mullin', the fallout has been palpable.

Most attorneys include arbitration provisions in their engagement agreements with clients—as they should. Arbitration is confidential, generally more expeditious than proceeding in court with increasingly-congested dockets, and attorneys tend to fare much better in malpractice cases with a retired judge or attorney arbitrator acting as the trier of fact. As opposed to juries, arbitrators are also more equipped to handle the usually-complicated "case within a case" framework applicable in such actions.

And this is why clients will almost always fight to avoid arbitration of claims against their former lawyers. Until recently, there were limited grounds to do so. California law expresses a clear public policy in favor of the enforceability of arbitration provisions as a speedy and (relatively) inexpensive means of dispute resolution. Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 9 (1992). There is nothing ethically wrong with lawyers including a provision requiring binding arbitration of both fee disputes and legal malpractice claims, and arbitration clauses will be enforced even if clients fail to read or understand them. Powers v. Dickson, Carlson & Campillo, 54 Cal. App. 4th 1102, 1108-09, 1115 (1997).

Clients will usually argue for "revocation" of the agreement under Cal. Civ. Proc. Code §1281.2(b). They will claim for one reason or another that the engagement agreement is unenforceable, and that as a result, the arbitration provisions contained therein are also invalid. Standing alone that usually doesn't work. Both federal and California law hold that arbitration provisions are considered independently (severably) from the rest of the contract, even where the party challenging enforcement contends that the whole contract is unenforceable. See, e.g., Prima Paint v. Flood & Conklin, 388 U.S. 395, 402 (1967); Ericksen, Arbuthnot, McCarthy, Kearney & Walsh v. 100 Oak St., 25 Cal. 3d 312, 322 (1983).