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# The Twin E's of Arbitration Provisions in Commercial Agreements: Enforceability and Ethics




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# Bressler, Amery & Ross P.C.

## About Us

### FIRM OVERVIEW

Bressler Amery & Ross, P.C. is a leading full-service law firm with more than 165 attorneys across nine offices – in **Alabama, Florida (2), New Jersey, New York, Washington D.C., North Carolina and Texas (2).**

Bressler, Amery & Ross, P.C. provides legal advisory services to banking, financial, manufacturing, insurance, and technology sectors. For nearly 40 years, Bressler attorneys have been industry leaders. The firm has achieved national recognition in the legal services industry and has appeared on the U.S. News “Best Law Firms” list.

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# Presentation Preview.

The inclusion of alternative dispute resolution (ADR) provisions in commercial contracts and in retainer agreements has become commonplace. As a substitute to litigation, arbitration remains a favored method for dispute resolution outside of the courthouse.

In this presentation, we will unpack emerging issues related to the enforceability of arbitration provisions in commercial contracts and corresponding ethical requirements that arise from including such clauses in retainer agreements.

# Presentation Preview.

The panel will discuss themes including:

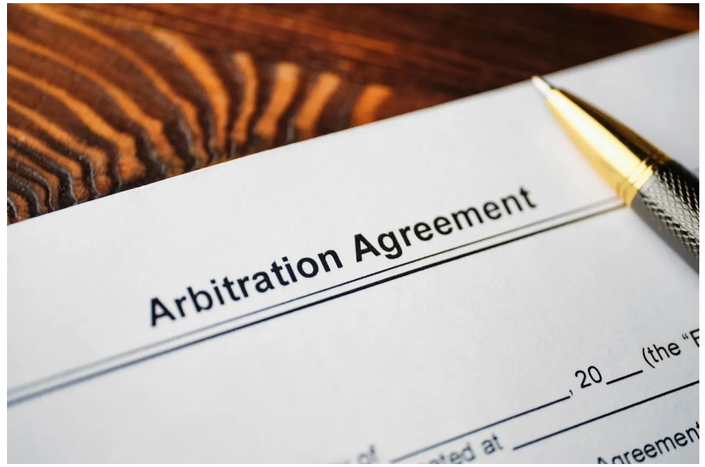
- The relationship between the sophistication of parties to a commercial contract and whether an arbitration provision may be deemed unenforceable absent an express waiver in writing.
- How litigation conduct may preclude invocation of an otherwise enforceable arbitration provision.
- The implications of ABA Model Rule 1.4 (Communications) and level of disclosure provided to clients with respect to the scope and meaning of ADR provisions in retainer agreements.

# Presentation Preview.

- Part I: Commercial Contracts and Mutual Assent to Arbitrate
- Part II: Ethical Implications of Arbitration Provisions
- Part III: Waiver of Arbitration Rights

# In Context: Arbitration of Disputes

- *Arbitration clauses = commonplace in commercial agreements*
  - Enable parties to a contract to elect to private resolution of disputes
  - Waiver of rights to litigate in judicial forum




Credits: https://www.forbes.com/sites/jayadkisson/2022/09/26/is-arbitration-really-in-your-best-interests/

# In Context: Arbitration of Disputes

- Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 – 16
- New Jersey Arbitration Act ("NJAA"), N.J.S.A. 2A:23B-1 to -36

    - Both express a general policy in favor of arbitration "as a means of settling disputes that otherwise would be litigated in a court." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015).

- Congress enacted the FAA to "reverse the longstanding judicial hostility" towards arbitration agreements and to "place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

♠Fun fact: The FAA was originally titled "the United States Arbitration Act" until it was re-codified in 1947.

# In Context: Arbitration of Disputes

- New Jersey codified identical principles in favor of arbitration within the NJAA. See Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014), cert. denied, 135 S. Ct. 2804 (2015).

    - The FAA preempts state laws that single out and invalidate arbitration agreements. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996).

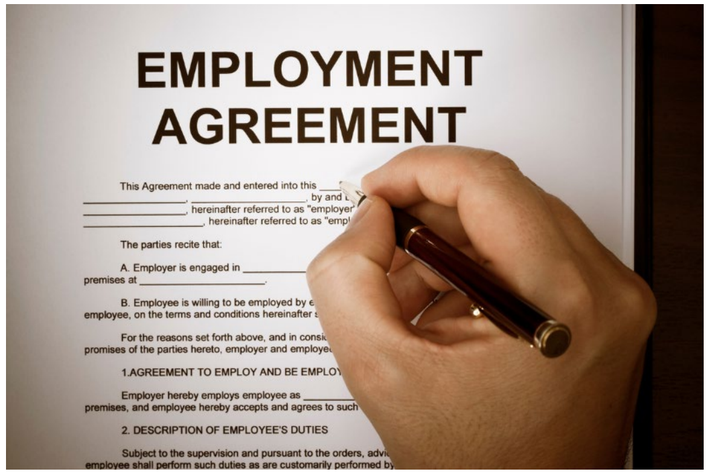
# In Context: Arbitration of Disputes

- N.J.S.A. 2A:23B-6(a) provides that
  - an agreement "to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."

  - A court "'cannot subject an arbitration agreement to more burdensome requirements than' other contractual provisions." Atalese, supra, 219 N.J. at 441 (citation omitted).

# Enforceability Standards

- The standard for enforcement of an arbitration provision differs based on the existence of a consumer, employment, or commercial agreement.

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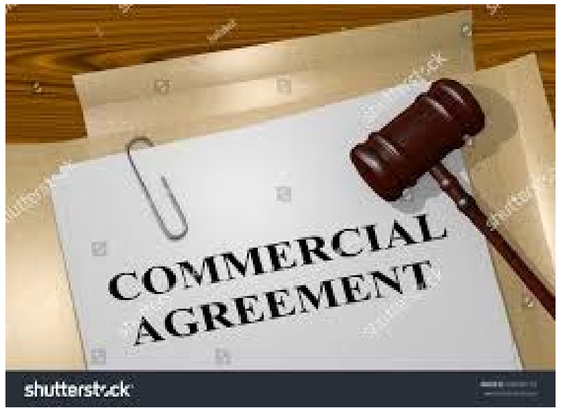


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# Preliminary Requirements

- Elements of contract formation must be satisfied for the arbitration provision to be enforceable.

- Two-pronged inquiry:

  - Whether a valid agreement to arbitrate exists; and
  - Whether the particular dispute falls within the scope of that agreement.

  - There must be "**mutual assent**" to resolve covered disputes through arbitration rather than in a judicial forum and to the terms of the agreement.

# Preliminary Requirements

- Whether a valid agreement to arbitrate exists in satisfaction of the first prong of the test:

- An arbitration agreement is valid and enforceable where it “clearly” and “unambiguously” puts the parties on notice of their rights and their "intent to surrender those rights." Noren v. Heartland Payment Sys., Inc., 448 N.J. Super. 486 (App. Div. 2017).

- "No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights . . . Whatever words compose an arbitration agreement, they must be clear and unambiguous that a [party] is choosing to arbitrate disputes rather than have them resolved in a court of law. In this way, the agreement will assure reasonable notice to the [party].“ Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014), cert. denied, 135 S. Ct. 2804 (2015).

    - Weeks v. 735 Putnam Pike Operations, LLC, 85 A.3d 1147 (RI 2014) (“No one is under a duty to arbitrate unless with clear language he or she has agreed to do so, and, consequently, a finding that contracting parties have agreed to substitute arbitration for adjudication must rest on clear contract language as evidence of definite intent to do so.”)

# Preliminary Requirements

- Whether a valid agreement to arbitrate exists in satisfaction of the first prong of the test:

- Horn v. Cooke, 118 Mich. App. 740 (Mich. Ct. App. 1982)(No contract to arbitrate can arise except upon the expressed mutual assent of the parties).

- Extremity Healthcare Inc. v. Access to Care America, LLC, 339 Ga. App. 246 (Ga. Ct. App. 2016)("If a contract is unenforceable for lack of mutual assent, an arbitration clause contained within the contract is likewise unenforceable. [T]he validity of an arbitration agreement is [] governed by state law principles of contract formation.")

- Baber v. First Republic Group, L.L.C., 475 F. Supp. 2d 844 (N.D. Iowa. 2007) ("The first step in analysis of whether or not a party may compel arbitration is whether a valid agreement to arbitration exists.")

# Mutuality of Assent

- An enforceable arbitration provision requires that there be “mutual assent” to the terms of the contract and to resolve those covered disputes by way of arbitration rather than in a court of law.

- Whether there is mutual assent is often made on a case-by-case basis and hinges on whether the contracting parties understand the terms of the contract as well as their ramifications.

    - For example, the absence of a signature may indicate a lack of mutual assent. See Seriki v. Uniqlo N.J., L.L.C., No. A-5835-13T3, 2015 WL 4207263 (App. Div. July 14, 2015) (noting that although the signatures of both parties are “customary and desirable, a contract may be enforceable upon proof of some other explicit indication of intent to be bound” and remanding for determination of intent in absence of signature in employment agreement).

# Mutuality of Assent

- Parties are not required “to arbitrate when they have not agreed to do so.” Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989).

- “[O]nly those issues may be arbitrated which the parties have agreed shall be.” Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001).

- Weeks v. 735 Putnam Pike Operations, LLC, 85 A.3d 1147 (RI 2014) (“Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit.”)

# Part I: Commercial Contracts and Mutual Assent to Arbitrate

- *Sophistication of the Parties*

- In the commercial context, a court's determination of the enforceability of an arbitration provision is frequently guided by the sophistication of the parties.

- Rooted in the concept that sophisticated commercial parties are presumed to understand the nature of arbitration and waiver of rights to judicial recourse.

# Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014), cert. denied, 135 S. Ct. 2804 (2015).

- *Clear and Unambiguous Waiver of Rights Required*

  - New Jersey Supreme Court declined to enforce an arbitration clause in a consumer contract because it lacked the clear and unambiguous language that the consumer was waiving her right to seek relief in a court of law.

## Stricter Approach found in Atalese in the context of employment and consumer contracts: arbitration agreement could not be enforced without an express waiver of the right to seek relief in a court of law.

- Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 124 (2020)(employment contract);
- Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 307 (2019)(consumer contract);
- Morgan v. Sanford Brown Institute, 225 N.J. 289, 294 (2016) (consumer contract);
- Atalese, 219 N.J. at 435 (consumer contract);
- Leodori v. Cigna Corp., 175 N.J. 293, 295 (2003)(employment contract);
- Martindale v. Sandvik, Inc., 173 N.J. 76, 81 (2002)(employment contract);
- Garfinkel v. Morristown Obs. & Gyn. Assocs., 168 N.J. 124, 127 (2001) (employment contract).

# Clear and Unambiguous Waiver of Rights

- In re Remicade Antitrust Litig., 938 F.3d 515, 525 (3d Cir. 2019)

- The Third Circuit Court of Appeals held that the explicit waiver language set out in Atalese does not apply to commercial contracts involving sophisticated parties.

- The Third Circuit observed that "[w]hile the New Jersey Supreme Court has not definitely resolved the scope of the rule [set out in Atalese], it has applied it thus far only in the context of **employment and consumer contracts**." (emphasis added).

# ‘So, What’s All the Fuss?’

- Growing tension as to whether the rationale of Atalese (requiring clear and unambiguous waiver language for enforceable arbitration provision in consumer/employment agreements) should be extended to sophisticated commercial parties and commercial agreements.

# Supreme Court Appeals – New Jersey

A-46-22 County of Passaic v. Horizon Healthcare Services, Inc. (087989)

**Read Appellate Opinion**

Under the circumstances presented, was the arbitration clause unenforceable under Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), because it lacked an explicit waiver of the right to seek relief in a court of law?

Certification Granted : May 22, 2023

Posted: May 22, 2023

Source: https://www.njcourts.gov/courts/supreme/appeals

## Cnty. of Passaic v. Horizon Healthcare Servs., Inc., No. A-0952-21, 2023 N.J. Super. LEXIS 10 (App. Div. Feb. 8, 2023).

- Subject arbitration provision need not contain an express waiver of the right to a judicial forum to be enforceable when the parties to a commercial contract "are sophisticated and possess relatively equal bargaining power." Id. at *3.

- First published opinion by the New Jersey Appellate Division to weigh in on whether the Court's holding in Atalese established a bright line rule that all commercial contracts containing an arbitration provision must include an explicit waiver to be enforceable.

## Cnty. of Passaic v. Horizon Healthcare Servs., Inc., No. A-0952-21, 2023 N.J. Super. LEXIS 10 (App. Div. Feb. 8, 2023), certif. granted, 2023 N.J. LEXIS 514 (May 16, 2023.

- The Appellate Division rejected the plaintiff's assertion that Atalese rendered the arbitration provision unenforceable due to the lack of an explicit waiver observing that Atalese focused on, among other things, the unequal relationship between contracting parties outside of a commercial setting.
    - The "concern for those not versed in the law or not necessarily aware of the fact that an agreement to arbitrate may preclude the right to sue in a court or invoke the inestimable right of trial by jury, on the other hand, vanishes when considering individually-negotiated contracts between sophisticated parties - often represented by counsel at the formation stage - possessing relatively similar bargaining power." Id. at *5.

# Some courts found that Atalese covers commercial contracts and sophisticated parties (unpublished opinions)

- Estate of Noyes v. Morano, No. A-1665-17T3, 2019 N.J. Super. Unpub. LEXIS 47 (App. Div. Jan. 8, 2019)(observing that “the plaintiff's 'level of sophistication' or representation by counsel does not negate Atalese's requirement that a court find he 'actually intended to waive his statutory rights’”)

- Itzhakov v. Segal, No. A-2619-17T4, 2019 N.J. Super. Unpub. LEXIS 1829 (App. Div. Aug. 28. 2019) ("[E]ven a sophisticated party, or one represented by counsel, will not be deemed to waive his or her rights - whether constitutional, statutory, or common-law - without clear and unambiguous language.")

- Perkins v. Advance Funding, LLC, No. 20-15708, 2021 U.S. Dist. LEXIS 168964
- (D.N.J. Sept. 7, 2021)(An attorney’s acknowledgment of a contract with an arbitration clause has been held insufficient to waive Atalese.)

# Explicit Waiver?

- In Harrington v. Pulte Home Corp., 211 Ariz. 241, 119 P.3d 1044, 1052 (Ariz. App. Ct. 2005), the party seeking to avoid arbitration argued that an arbitration clause was unenforceable under the "reasonable-expectations doctrine" because it did not include an explicit waiver of jury rights, though that would be its functional effect.

    - In rejecting the party's argument, the court observed that "to predicate the legality of a consensual arbitration agreement upon the parties' express waiver of a jury trial would be as artificial as it would be disastrous." Id. (noting that “[t]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate,“).

- Burden v. Check Into Cash of Kentucky, LLC, 267 F.3d 483, 492 (6th Cir. 2001) ("As to the failure of the arbitration clause to include a jury waiver provision, 'the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.").

# Explicit Waiver?

- Borgarding v. JPMorgan Chase Bank, No. 16-2485, 2016 U.S. Dist. LEXIS 191612 (C.D. Cal. Oct. 31, 2016) ("[I]t is well-settled that an arbitration agreement does not need to contain an express waiver of the right to a jury trial.")

- L&M Creations, Inc. v. CRC Info. Sys., No. 10-685, 2011 U.S. Dist. LEXIS 36269 (D. Nev. Mar. 23, 2011) (granting motion to compel arbitration even though arbitration clause did not "specifically state that the parties are waiving their right to a jury trial").

# Hypothetical 1:

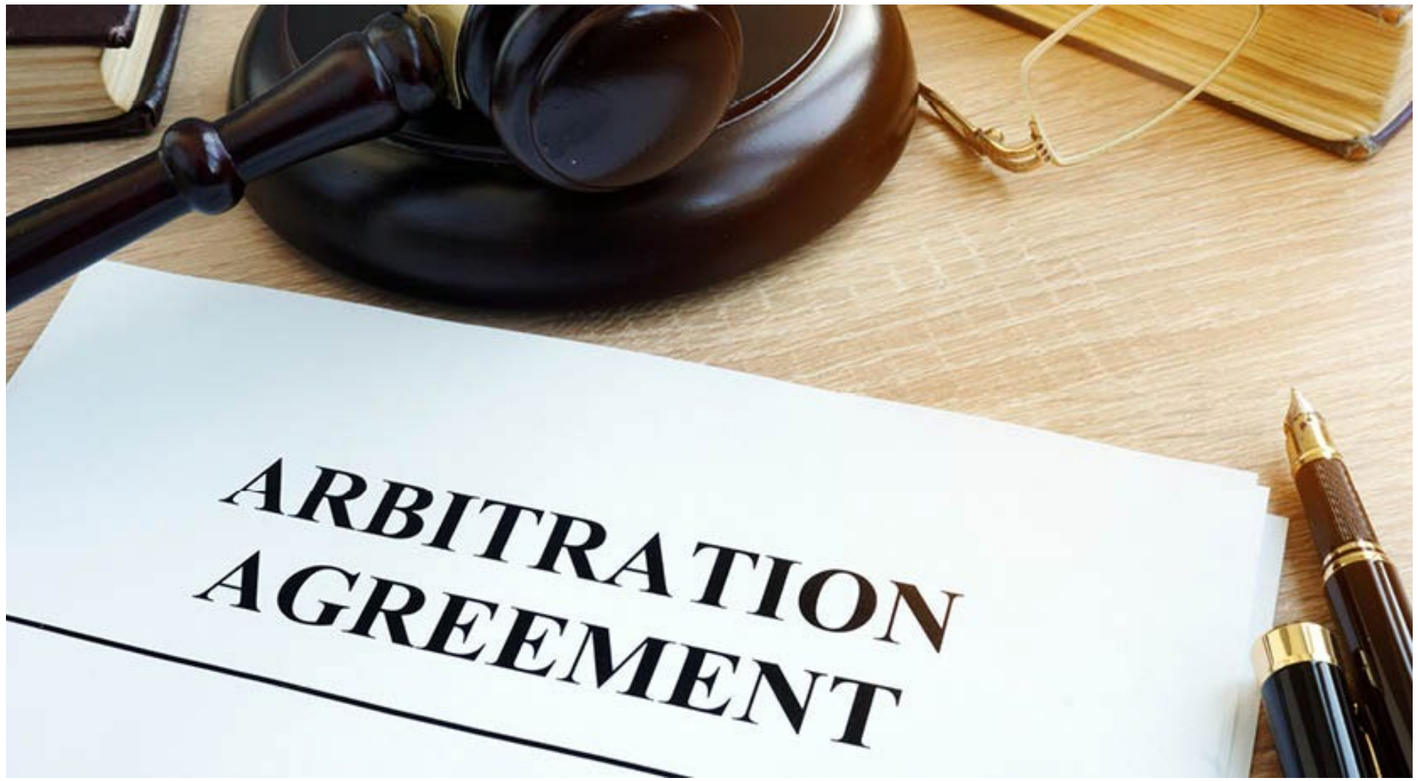
Two international corporations sign a contract for the provision of goods and services after weeks of negotiations. The contract was extensively reviewed by attorneys for each party, and the agreement provides that all disputes arising under the contract shall be resolved by arbitration. One party files suit claiming breach of contract, and the defendant files a motion to compel arbitration. Plaintiff opposes on the grounds that the provision is unenforceable because it does not contain an express waiver. What is the likely result?

A) Likely enforceable.

B) Likely unenforceable.

C) It depends. In jurisdictions requiring an express waiver regardless of the nature of the contract or sophistication of the parties, it would be unenforceable.

# Part II: Ethical Implications of Arbitration Provisions




Credits: https://www.bricker.com/insights-resources/publications/us-supreme-court-decision-has-important-implications-for-employers-seeking-to-enforce-arbitration-agreements

# Ethical Implications of Arbitration Provisions

- *ADR Provisions in Retainer Agreements*
  - Inclusion of alternative dispute resolution (ADR) provisions in retainer agreements has become more common and has drawn increased scrutiny.
  - Generally speaking, the level of disclosure provided with respect to the scope and meaning of the ADR provisions is often determinative of its enforceability.

# The American Bar Association's View

- *ABA Formal Op. 02-425, Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims (Feb. 20, 2002)*

  - Held that a provision in an attorney engagement letter requiring "the binding arbitration of disputes concerning fees and malpractice claims" did not violate ABA Model Rule of Professional Conduct 1.4, "provided that the client has been fully 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."

# ABA Model Rule 1.4

- *ABA Model R. 1.4 (Client-Lawyer Relationship)*

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

- (3) keep the client reasonably informed about the status of the matter;

- (4) promptly comply with reasonable requests for information; and

- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# What ABA Formal Op. 02-425 & Model R. 1.4 Tell Us

- *Ethically Permissible to include in retainer agreement with client a provision requiring the binding arbitration of fee disputes and claims for malpractice provided:*

  - **The client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit the client to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement,**

**and**

  - the arbitration provision does not insulate the lawyer from liability or limit the liability to which the lawyer would otherwise be exposed under common and/or statutory law.

# What ABA Formal Op. 02-425 & Model R. 1.4 Tell Us

- *Ethically Permissible to include in retainer agreement with client a provision requiring the binding arbitration of fee disputes and claims for malpractice provided:*

  - The client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit the client to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement,

**and**

  - **the arbitration provision does not insulate the lawyer from liability or limit the liability to which the lawyer would otherwise be exposed under common and/or statutory law.**

# Majority View of Jurisdictions

- *Generally follow ABA Formal Op. 02-425 formulation:*

- ***Informed-Consent + Disclosure of Risks & Benefits***

  - Professional ethics committees in numerous jurisdictions have issued advisory opinions reaching conclusions similar to those expressed in the ABA Opinion.

  - Generally, these opinions instruct attorneys to disclose the benefits and disadvantages of arbitration when an arbitration provision is included in a retainer agreement.

# Jurisdictional Specifics: New Jersey

- *Delaney v. Dickey*, 244 N.J. 466, 473-474 (2020)
  - The New Jersey Supreme Court permitted attorneys to include arbitration provisions in engagement agreements, but imposed significant requirements on their use to be enforceable, including disclosure of the specific differences between the "arbitral and judicial forum" which may include limitations on discovery mechanisms in ADR, the lack of a jury trial, associated costs of arbitration, and that the outcome is non-appealable and confidential.
  - Under the reasoning advanced in *County of Passaic v. Horizon Healthcare Services*, No. A-0952-21, 2023 N.J. Super. LEXIS 10 (App. Div. Feb. 8, 2023), it is unclear whether *Dickey*'s reasoning should apply to an engagement agreement with a sophisticated client.

# Jurisdictional Specifics: New Jersey

- *Delaney v. Dickey*, 244 N.J. 466, 473-474 (2020)
  - The Court held that a mandatory arbitration provision in an attorney client retainer agreement is acceptable if the attorney generally explains to the client—either orally or in writing—"the benefits and disadvantages of arbitrating a prospective dispute between the attorney and client." 244 N.J. at 472-73.
  - The Court also provided some examples of the disclosures that an attorney could provide to the client to meet this requirement:
    - Attorneys may explain, for example, that in arbitration the client will not have a trial before a jury in a courtroom open to the public; the outcome of the arbitration will not be appealable and will remain confidential; the client may be responsible, in part, for the costs of the arbitration proceedings, including payments to the arbitrator; and the discovery available in arbitration may be more limited than in a judicial forum. *Id.* at 497.

# *Daly v. Komline-Sanderson Engineering Corp.*, 40 N.J. 175 (1963)

- *Court expresses view favorable to using arbitration to resolve attorney-client disputes*
  - Defendant contends the arbitration agreement is void because it invades our exclusive jurisdiction over practice of the law. We see no substance in this objection. We think we should encourage arbitration of disputes between attorney and client, and to that end should uphold an award in the absence of good reason to reject it. Whether an award in a dispute of this kind should be vulnerable on grounds which are not available in attacks on arbitration awards generally, we need not decide.
  - *Id.* at 177.

# State Ethics Committees

- Arizona Ethics Op. 94-05, at 5 (Mar. 1, 1994) (advising that an arbitration clause in a retainer agreement is permissible if, among other things, the attorney "fully discloses, in writing and in terms that can be understood by the client, the advantages and disadvantages of arbitration")

- Texas Ethics Op. 586, 72 Tex. B.J. 128, 129 (2009) (advising that the lawyer must provide "sufficient information about the differences between litigation and arbitration" and "the significant advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes is necessary for an informed decision by the client")

- Pennsylvania Ethics Op. 97-140, at 3 (1997) (advising that a retainer agreement's arbitration provision must be "fully disclosed in writing to the client, setting forth the principal advantages and disadvantages of arbitration")

# State Ethics Committees

- N.Y. Cty. Lawyers Ass'n Ethics Op. 723 (1997) (advising that an attorney must make a full disclosure of the "material differences between arbitration and litigation in a court of law" if an arbitration provision is included in a retainer agreement)

- Conn. Ethics Op. 99-20 (1999) (expressing concern over an arbitration provision in a retainer agreement in which the lawyer noted the benefits but not the potential drawbacks of arbitration)

- Michigan Ethics Opinion RI-257 (1996)(barring a provision in a retainer agreement to arbitrate future disputes unless "the client obtains independent counsel concerning the advisability" of agreeing to the arbitration provision)

**Some jurisdictions require lawyers to advise their potential clients to seek the advice of independent counsel before signing a retainer agreement containing an arbitration provision.**

- Pa. Ethics Op. 97-140, at 3 (1997) ("[T]he client [must] be advised and given an opportunity to seek the advice of independent counsel.")

- Va. Legal Ethics Op. 638, at 1 (1984) (stating that an arbitration provision in a retainer agreement is permissible "provided that the client consents after full disclosure of the effect of such a provision and after the client is advised to seek independent counsel in regard to the advisability of such a provision").

- Michigan Ethics Opinion RI-257 (1996):
  - bars a provision in a retainer agreement to arbitrate future disputes unless “the client obtains independent counsel concerning the advisability" of agreeing to the arbitration provision.

- At the far end of the spectrum, the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline has advised that a client's retainer agreement "should not contain language requiring a client to prospectively agree to arbitrate legal malpractice disputes.“ 11 Ohio Advisory Op. 96-9, at 5 (1996)

# Hypothetical 2:

Client has retained Attorney and is presented with and signs a retainer agreement that contains a mandatory arbitration provision requiring the parties submit to arbitration any and all disputes over fees and claims for professional negligence. The Attorney verbally explains the effects of an arbitration provision and advises the client may want to seek advice of independent counsel before signing the retainer. This information and advisement is not written in the agreement. Which of the following would best help the Attorney in seeking to enforce the arbitration provision if challenged?

A) Attorney has Client contemporaneously sign a separate document incorporated into the retainer that explains the advantages/disadvantages of arbitration and the Client's right to seek independent legal advice prior to signing the retainer.

B) Attorney presents Client with a document to take home that explains advantages/disadvantages of arbitration and right to seek independent legal advice, but does not require a signature.

C) The Arbitration provision is likely enforceable under the circumstances.

D) The Arbitration provision is likely unenforceable under the circumstances.

# Jurisdictional Specifics: Maine

- *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 176 A.3d 729, 736 (Me. 2017)

- Holding that lawyers have a heightened duty of disclosure when they include a provision in a retainer agreement requiring clients to arbitrate future disputes, including malpractice claims against the law firm.

- An attorney's fiduciary relationship with a client mandates informed consent when the attorney seeks "to enforce a contractual provision that prospectively requires a client to submit malpractice claims against the law firm to arbitration."

# Jurisdictional Specifics: Maine

- *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 176 A.3d 729, 736 (Me. 2017)

- The court set forth a "heightened standard" for an attorney to secure the client's informed consent: "the attorney must effectively communicate to the client that malpractice claims are covered under the agreement to arbitrate"; "explain, or ensure that the client understands, the differences between the arbitral forum and the judicial forum, including the absence of a jury" as well as "costs" and "appealability"; and "take into account the particular client's capacity to understand that information and experience with the arbitration process, as these factors may affect both the breadth of information and the amount of detail the attorney is obligated to provide." *Id.* at 736-37.

# Jurisdictional Specifics: Louisiana

- *Hodges v. Reasonover, 103 So. 3d 1069, 1077 (La. 2012)*

- A lawyer's fiduciary duty of loyalty and candor to a client requires a full explanation "to the client [of] the possible consequences of entering into an arbitration clause, including the legal rights the client gives up by agreeing to binding arbitration" of future disputes.

- The lawyer's duty of loyalty, the Court explained, "forbids a lawyer from taking any action in his own self-interest which would have an adverse effect on the client." *Ibid.*

# Jurisdictional Specifics: Louisiana

- *Hodges v. Reasonover, 103 So. 3d 1069, 1077 (La. 2012)*

- To ensure that the client's consent to a binding arbitration clause in a retainer agreement is "truly 'informed,'" *ibid.*, at a minimum, "an attorney must make full and complete disclosure of the potential effects of an arbitration clause, including the waiver of a jury trial, the waiver of the right to appeal, the waiver of broad discovery rights, and the possible high upfront costs of arbitration," *id.* at 1078.

- In addition, the retainer agreement "must explicitly list the types of disputes covered by the arbitration clause, *e.g.,* legal malpractice, and make clear that the client retains the right to lodge a disciplinary complaint." *Ibid.*

- Last, the attorney must advise the  client that he "has the opportunity to speak with independent counsel before signing the contract." *Id.* at 1077

# Jurisdictional Specifics: New Mexico

- *Castillo v. Arrieta,* 368 P.3d 1249, 1257 (N.M. Ct. App. 2016)

- Holding that if a retainer agreement includes a provision requiring the arbitration of a future legal malpractice claim, to secure informed consent, the attorney must:
  - provide "any explanation reasonably necessary to inform the client . . . of the material advantages and disadvantages of [arbitration]" and discuss with the client "options and alternatives"

# Hypothetical 3:

Client signs a retainer agreement requiring the mandatory arbitration of fee disputes and claims for professional negligence. The retainer contains a disclosure of the risks and benefits of arbitration, and advises Client of the right to seek independent advice before signing the retainer agreement. Arbitration is governed by the arbitral rules of the AAA, but Client does not receive a copy of the rules and does not request one. Is the provision enforceable?

A) Yes. The provision is likely enforceable in all jurisdictions because the ABA guidance suggests informed consent + disclosure of risks and benefits.

A) It depends. In jurisdictions that only require informed consent + disclosure of risks and benefits, it is likely enforceable.

B) No. It is likely unenforceable in most jurisdictions.

# Part III:

# Waiver of Arbitration Rights

- Ability to invoke an otherwise enforceable arbitration provision may be compromised by issues that arise during the course of litigation.

- For example, a party may waive the right to arbitrate by acting in a manner inconsistent with an intent to assert that right.

## *White v. Samsung Elecs. Am., Inc., 2023 U.S. App. LEXIS 5398 (3d Cir. Mar. 7, 2023)*

- Samsung, through its litigation conduct, waived its right to compel arbitration by continuously seeking dismissal on the merits and sought to invoke an arbitration provision only after it was apparent that the case would not be fully dismissed before discovery.

## *White v. Samsung Elecs. Am., Inc., 2023 U.S. App. LEXIS 5398 (3d Cir. Mar. 7, 2023)*

- In cases involving waiver, the focus of the inquiry is on the actions of the party who holds the right to invoke arbitration. *Id.* at *9 (observing that Samsung's litigation actions evinced "a preference for litigation over arbitration" and thus constituted a waiver of its arbitration rights).

- The Court in *White* found it significant that Samsung knew plaintiffs' claims were arbitrable "from the outset of litigation," but failed to inform plaintiffs or the court until after it had filed a motion to dismiss on the merits, engaged in "multiple instances of non-merits motion practice and acquiesced to the District Court's pre-trial orders." *Id.* at *10

# *Laguna v. Chester Hous. Author., 2023 U.S. Dist. LEXIS 45036 (E.D. Pa. Mar. 17, 2023)*

- Defendant waived its right to arbitrate where litigation conduct was “inconstant with an intent to arbitrate” as defendant actively participated in the case and not once mentioned arbitration in court filings over the course of ten months.

- Employment discrimination action arising out of the termination of an employee after he requested medical leave.

- Defendant previously moved to dismiss Plaintiff's claims on the merits, a motion that was largely unsuccessful. After Plaintiff amended his complaint to add newly ripe discrimination claims under state law, Defendant moved to dismiss again - arguing for the first time that all Plaintiff's claims must be pursued through arbitration under a collective bargaining agreement.

- Held: Defendant waived any potential right to arbitrate these claims by litigating the case for ten months; denying motion to dismiss.

# *Nepomuceno v. Midland Credit Mgmt., 2017 U.S. Dist. LEXIS 79307 (D.N.J. May 24, 2017)*

- Defendant waived right to arbitrate where it waited two years to file a motion to compel arbitration and after engaging in "significant discovery".

- Given the stakes involved in protracted litigation, a party wishing to compel arbitration under the terms of an enforceable agreement must act in a manner consistent with that right. This means weighing the costs and benefits of invoking an arbitration provision early on and coming to a decision before the right is deemed waived during litigation.

# *Phillips v. Lyons Heritage Tampa, LLC*, 341 So. 3d 1171 (Fla. 2d DCA 2022)

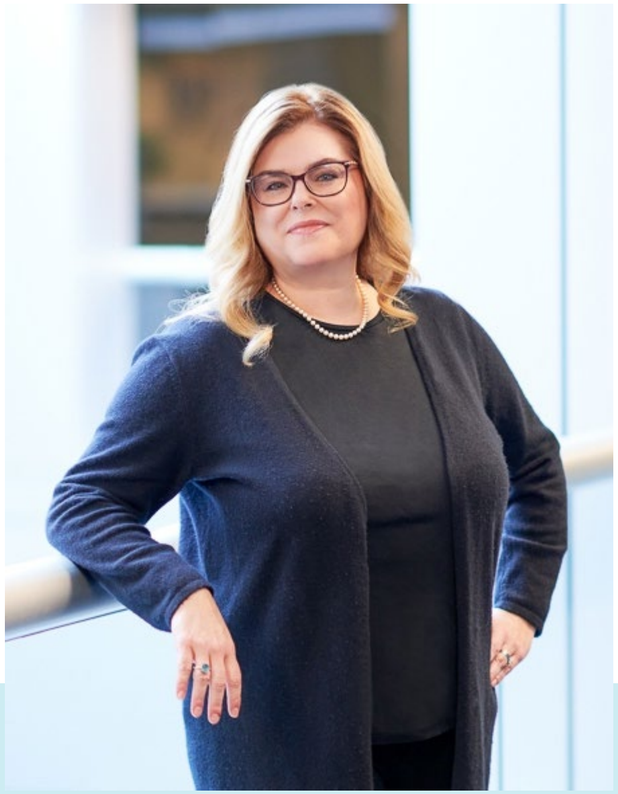
- "Whether there is a waiver of the right to arbitrate does not necessarily depend on the timing of the motion to compel arbitration, but rather on the prior taking of an inconsistent position by the party demanding arbitration. The request for an extension to file an answer does not constitute a waiver because it is not a substantive attack on the merits."

- *Gettles v. Com. Bank at Winter Park*, 276 So. 2d 837, 839-40 (Fla. 4th DCA 1973) (holding that a party had waived its contractual right to arbitration by filing suit and by moving to dismiss a counterclaim before moving to compel arbitration)

# *Palcko v. Airborne Express, Inc., 372 F.3d 588, 596-98 (3d Cir. 2004)*

- Defendant did not waive its right to arbitrate when it moved to compel arbitration within 22 days of filing its motion to dismiss on procedural grounds, for insufficiency of process.

- *But see Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102 (2d Cir. 2002) (ruling that no waiver exists even though defendant did not seek arbitration until more than eighteen months after the suit was filed and after plaintiff filed a motion for partial summary judgment).



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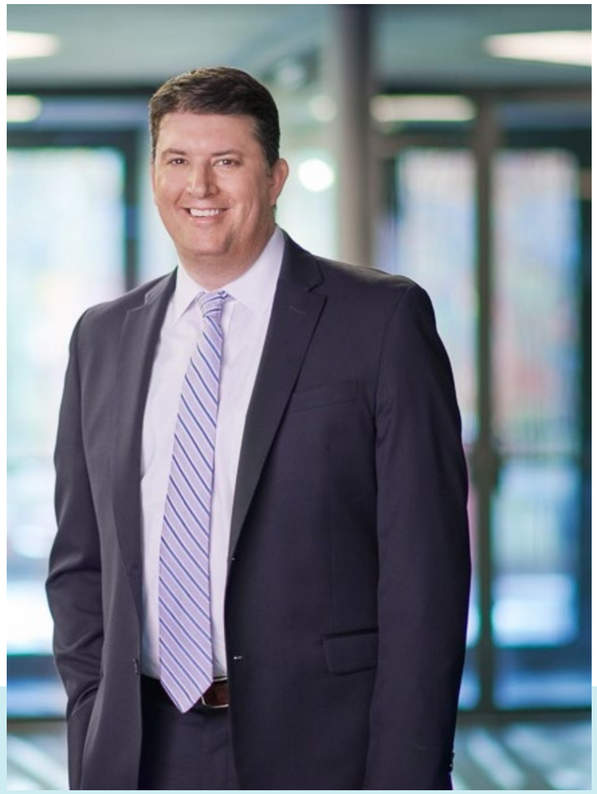

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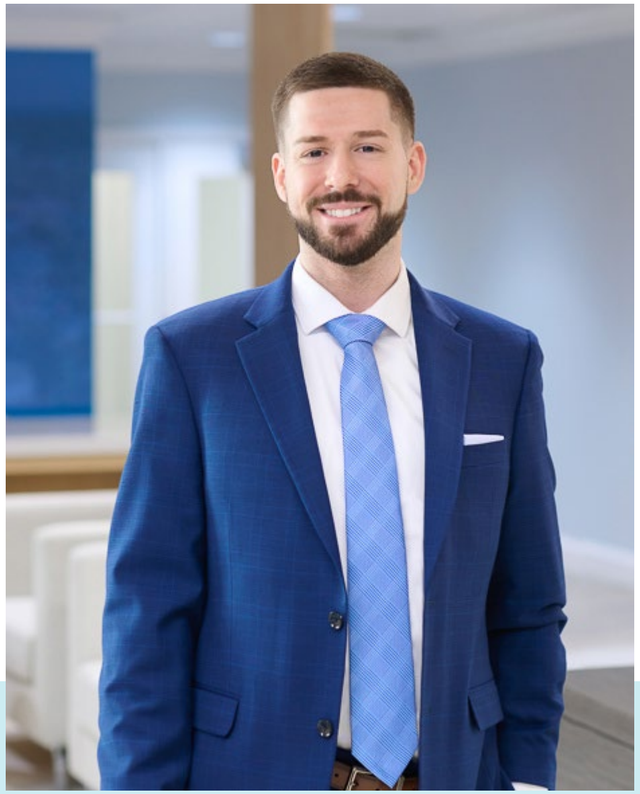

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