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Not Everything is Black and White: Jurisdictions are at Odds in Determining the Enforceability of an Arbitration Clause in an Attorney-Client Agreement

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Before representation can begin, an attorney should tender an engagement letter that details the nature of the relationship, scope of work, fee structure, and dispute resolution procedures. The engagement letter is one of the most important risk management tools that attorneys and law firms can use.

As part of overall risk management strategy, some lawyers place arbitration clauses in their engagement letter requiring that any claims arising from the attorney-client relationship, whether a fee dispute, malpractice claim, or other controversy, be resolved through arbitration rather than in court. By setting forth a process of dispute resolution, the

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Letter from the President

Peter J. Biging | *Goldberg Segalla, LLP*

In my inaugural President's Message, I want to start off by congratulating my predecessor, Dave Anderson, for a terrific year at the helm, and an incredible Annual Meeting. I don't think anyone could have conceived that we'd be dealing with a hurricane in Atlanta! But the Annual Meeting went ahead with the weather fortunately having limited impact on the proceedings, and I couldn't have been more impressed by the quality of the presentations. Next year the Annual Meeting will be in Las Vegas, not a noted hotbed of tropical storm activity. So hopefully the hurricane possibilities will be dramatically reduced!

With the start of our new PLDF year,

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PLDF
The Standard of Care

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> While Illinois law follows this "blanket rule" of whether attorneys must explain arbitration clauses in engagement agreements to their clients for those clauses to be deemed enforceable, other jurisdictions follow a different approach.

lawyer can control costs by avoiding a jury, limiting discovery, avoiding appeals, and maintaining the confidentiality of the dispute. Despite there being obvious benefits to the law firm by including an arbitration provision within the engagement letter, litigation may ensue regarding the enforceability of the provision should a dispute arise.

Arbitration clauses in an attorney-client agreement may be valid absent public policy considerations. However, an arbitration agreement may be found unenforceable if the provision is held to be procedurally or substantively unconscionable. Jurisdictions across the country have different law on this point. This issue has arisen frequently in recent years with jurisdictions at odds with one another in interpreting what public policy to employ. Generally, if the court applies the Model Rules of Professional Conduct, it is likely a court will find an arbitration provision violative of public policy, but if the court applies statutory law and rules, it is likely that the provision will be enforced.

Dick-Ipsen v. Humphrey, Farrington & McClain, P.C.

A recent Illinois court case has addressed this issue in *Dick-Ipsen v. Humphrey Farrington McClain P.C,.* 2024 IL App (1st) 241043. There, an attorney included an arbitration provision in an attorney-client agreement where Plaintiff must submit to arbitration in the event that Plaintiff brings a legal malpractice claim against Defendant. *Id*. at ¶ 2. The plaintiff, who claimed he developed Parkinson's disease from exposure to certain harmful chemicals, signed an engagement letter with the defendant law firm containing the following arbitration clause which the defendant law firm sought to enforce after the plaintiff sued the law firm for malpractice:

> "ARBITRATION. Claims, disputes or controversies between [the law firm] and [plaintiff] arising out of or relating to this Agreement or breach thereof shall be subject to non-binding mediation. In the event no mediated resolution is reached, then the claim, dispute or controversy shall be resolved exclusively by arbitration before a single arbitrator in Kansas City, Missouri, in accordance with the Rules of the American Arbitration Association currently in effect. The determination of the arbitrator shall be final and binding on us, and may be entered in any court of competent jurisdiction to enforce it." *Id*. at ¶ 7.

In evaluating the enforceability of the arbitration clause, the Illinois Appellate Court adopted a "blanket rule." *Summerville v. Innovative Images, LLC*, 826 S.E.2d 391, 397 (Ga. App. Ct. 2019). In applying the Illinois Rules of Professional Conduct to guide their decision, the Illinois Appellate Court in *Dick-Ipsen* found that an agreement to arbitrate a legal malpractice claim without the client being informed of the scope and effect of the agreement was unenforceable against a client. *Dick-Ipsen,* 2024 IL App (1st) at ¶ 19. The *Dick-Ipsen* court's decision used Rule 1.4(b) of the Illinois Rules of Professional Conduct for guidance, while not finding that the rule itself rendered the provision unenforceable. *Id.* at ¶ 18.

Illinois version of Rule 1.4 mirrors the ABA Model Rules of Professional Conduct which states that "(a) lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Ill. R. Prof'l Conduct (2010) R. 1.4(b) (eff. Jan. 1, 2010). The ABA has issued a Formal Opinion, 02-425, cited by the *Dick-Ipsen* court, which states, in relevant part, that:

> [i]t is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law.

The *Dick-Ipsen* court also looked to Rule 1.8 of the Illinois Rules of Professional Conduct for guidance. *Dick-Ipsen*, 2024 IL App. (1st) at ¶ 18. That Rule provides that "(a) lawyer shall not: make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Ill. R. Prof'l Conduct (2010) R. 1.8(h)(1) (eff. Jan. 1, 2010). The comment to Rule 1.8 details the main issue presented in *Dick-Ipsen*, specifically, providing that there is no general prohibition on a lawyer to enter into an agreement with a client to arbitrate legal malpractice claims, however, the client must be fully informed of the scope and effect of the agreement. *Id.*

What was key to the success of the plaintiff in *Dick-Ipsen* resisting the arbitration clause was he offered uncontested evidence that he was unsophisticated in legal matters, the defendant law firm never discussed the arbitration provision with him, and he was not fully informed about the effect of the provision. *Id.* at ¶ 20. Specifically, he did not know what arbitration was and he unaware that the was giving up the right to a trial by jury, discovery, and appeal on the merits. *Id.* at ¶ 11. Accordingly, the court held that the plaintiff was unable to properly appraise the advantages and disadvantages of arbitration and make an informed decision regarding whether to enter into the agreement. *Id.* at ¶ 20.

The Different Approaches: "Blanket Rule" vs. "Contract Principle"

The methodology applied by the *Dick-Ipsen* court is often characterized as a "blanket rule" approach. See *Summerville v. Innovative Images, LLC.,* 848 S.E.2d 75, 80 (Ga. Sup. Ct. 2020). Under the "blanket rule," an arbitration clause in an attorney-client agreement is unconscionable and against public policy if the attorney under the professional code fails to explain what the client is giving up with arbitration before the execution of the contract. *Id.* On the other hand, other jurisdictions decline to apply this rule and instead follow a rule that we will refer to as the "contract principle" approach. Under the "contract principle" approach, the court will apply basic contract law to determine whether there is a public policy violation. See generally *Summerville,* 848 S.E.2d 75. While Illinois law follows this "blanket rule" of whether attorneys must explain arbitration clauses in engagement agreements to their clients for those clauses to be deemed enforceable, other jurisdictions follow a different approach. Georgia, for example, does not adopt the "blanket rule." *Id.*

When the Georgia Supreme Court was faced with the same issue as *Dick-Ipsen* in *Summerville*, the Georgia Supreme Court looked into the power that the courts gave in voiding contracts due to "public policy" reasons. See generally *Summerville,* 848 S.E.2d 75. Specifically, the Georgia Supreme Court turned towards the legislature which carefully considers public policy in enacting laws and, thus, the power of the courts to declare a contract provision void should be exercised cautiously. *Id.* at 81. The Georgia courts draw a distinction between what is to be considered conscionable and unconscionable: "A contract is not unconscionable if permitted by statute." *Id*. at 80. As there is no law preventing an attorney from contracting with a client that includes an arbitration provision, Georgia Courts are hesitant to void a contract for public policy considerations. *Id.*

Other Courts' Views on the Two Approaches?

This "contract principle" approach is wholly different from Illinois' "blanket" approach. The "contract principle" approach as present in *Summerville*, does not give deference to the Model Rules of Professional Conduct, as codified by the State of

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Georgia. Instead, the Georgia Appellate Court reasoned that just because a case involves an attorney-client relationship does not mean that the rules of professional conduct can preempt statutory and case law regarding contracts. *William J. Cooney, P.C. v. Rowland*, 524 S.E.2d 730, 732 (Ga. App. Ct. 1999).

Michigan, too, has refrained from considering this a case of professional conduct, but rather a contract case. Their rationale relies on the basic principles of contract law—one who signs a written agreement knows the nature of the instrument and understands its contents. *Watts v. Polacyck*, 619 N.W.2d 714, 717 (Mich. Ct. App. 2000). Similarly, Texas courts have relied on the same basic principles of contract law citing that it is well-established that arbitration agreements be treated the same as other contracts in that a person should have the utmost liberty of contracting. See generally *In Re Meador*, 968 S.W.2d 346 (Tex. Sup. Ct. 1998). Because of this well-established notion, Texas courts are reluctant to give substantial weight to disciplinary rules over statutory law. *Id.* at 350.

On the other hand, jurisdictions like New Mexico do not find that this is an issue of preemption between statutory laws and disciplinary laws. *Castillo v. Arrieta*, 368 P.3d. 1249, 1256 (N.M. App. Ct. 2016). Rather, a New Mexico court, when presented with this issue, found that explaining arbitration agreements was an issue of an attorney's fiduciary obligations of candor and loyalty to the client. *Id.* at 1247. In their application, New Mexico courts interpret the failure to inform the scope of the arbitration agreement as an issue of professional conduct rather than an issue of contract law. *Id*.

Similarly, Louisiana courts applied this rationale in *Hodges v. Reasonover*, 103 So.3d 1069 (La. Sup. Ct. 2012). The Louisiana court, similar to Illinois and New Mexico, gave deference to the Model Rules of Professional Conduct based on the notion that the client had an unequal bargaining power to the attorney. *Id*. at 1077. The court looked to the ABA Model Rule of Professional Conduct 1.4(b) as enacted by Louisiana and reveals the implicit duties within this rule. *Id*. The court noted that inherent within this rule is the principle that an attorney cannot take any action adverse to the client's interest unless the client has been given informed consent under Rules of Professional Conduct 1.0(e). *Id*. This is largely due to the fact that attorneys, by virtue of their legal education and training, have an advantage over clients who may or may not understand the binding effects of an arbitration clause. *Id*. Therefore, at minimum, the attorney must disclose the legal effects of an arbitration clause including: waiver of the right to a jury trial, waiver of the right to an appeal, waiver of right to discovery, arbitration's substantial upfront costs, explicit disclosure of the nature of the claims, right to make disciplinary complaint to appropriate authorities, and the opportunity to speak with independent counsel before signing the contract. *Id.*

Conclusion

It is likely that this issue will continue to present itself in many jurisdictions over the years to come. Therefore, it is essential that whether you practice in a state that follows the blanket rule or in a state that follows the contract principle approach or in an undecided jurisdiction, a lawyer should inform their prospective client if there is an arbitration clause and advise the rights that are being given up by agreeing to an arbitration clause, namely the right to a trial by jury, discovery, and appeal on the merits. As it is not practical to instruct clients to consult with other lawyers before signing an engagement letter, if a lawyer wants to try to enforce an arbitration clause, especially if the prospective client is sophisticated, it is best to include the disclosure of what

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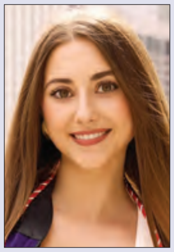

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