STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-17-54

SUSAN R. SNOW,

Plaintiff – Appellee

v.

BERNSTEIN, SHUR, SAWYER & NELSON, P.A., et al.,

Defendant – Appellants

APPEAL
FROM THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF APPELLANTS

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INTRODUCTION

This appeal presents an issue of first impression for this Court: whether a contractual provision providing for mutual elective arbitration is enforceable by an attorney against its former client in the context of a subsequent legal malpractice claim. Defendant-Appellants Bernstein, Shur, Sawyer & Nelson, P.A. and J. Colby Wallace, Esq. (collectively "BSSN") were previously engaged as attorneys for the Plaintiff-Appellee, Dr. Susan Snow ("Dr. Snow") pursuant to a signed written engagement contract that contained an unambiguous mutual elective arbitration provision, providing in relevant part as follows:

> Any fee dispute that you do not submit to arbitration under the Maine Code of Profession Responsibility, and any other dispute that arises out of or relates to this agreement or the services provided by the law firm shall also, at the election of either party, be subject to binding arbitration. Either party may request such arbitration by sending a written demand for arbitration to the other. If a demand for arbitration is made, you and the firm shall attempt to agree on a single arbitrator. If no agreement can be reached within 30 days of the receipt of the demand, the party demanding arbitration may designate an arbitrator by sending written notice to the other party. Within two weeks of that initial designation, the other party shall designate an arbitrator in writing. Thereafter, those two designated arbitrators shall meet promptly to select a third arbitrator. The arbitrators shall conduct the arbitration proceedings according to the procedures under the commercial arbitration rules of the American Arbitration Association and

> shall hold the arbitration hearing in Maine. The arbitrators shall be bound by and follow applicable Maine substantive rules of law as if the matter were tried in court. Either party shall have the right to appeal a decision of the arbitrators on the grounds that the arbitrators failed to properly apply applicable law.
>
> In the event that a dispute between us ends up in court, both parties agree that it shall be tried exclusively in a court in Maine.

A. 107. This Court has universally recognized a public policy in favor of the enforceability of arbitration provisions in every context to have yet come before it, and there is nowhere an express prohibition on the use of such provisions as part of a lawyer-client engagement contract. Nonetheless, when Dr. Snow sued BSSN for legal malpractice, and BSSN requested arbitration pursuant to this provision, Dr. Snow sought to avoid this contractual commitment and the Superior Court erroneously concluded that "the arbitration provision in Snow's engagement letter violated public policy, and the court will not enforce that provision." A. 15.

The Superior Court's decision improperly ignored the decisional law from this Court regarding the public policy in favor of arbitration in all other contexts, and the overwhelmingly persuasive authority from elsewhere finding such provisions enforceable by an attorney against its former client in a legal malpractice claim. Indeed, in an unrelated case

involving BSSN, the First Circuit Court of Appeals found this very provision enforceable in a similar context. Instead, the Superior Court based its denial primarily on one informal ethics opinion, authored by a single attorney and at odds with other formal ethics opinions of the Professional Ethics Commission, that improperly presumes arbitration provisions to be suspect when used by attorneys in their own engagement contracts. From that advisory opinion, the Superior Court fashioned an entirely new substantive exception to the Maine Uniform Arbitration Act that is not anywhere supported in the law.

No such "lawyer-client" exception has been recognized by the majority of other jurisdictions that have similarly adopted the Uniform Arbitration Act. Indeed, most states that have addressed the issue have found attorney-client arbitration agreements enforceable under the Uniform Arbitration Act and the rules governing lawyer conduct in those states, which reinforces the conclusion that Maine's Rules of Professional Conduct are not inconsistent with Maine's legislative policy in favor of arbitration.

Moreover, if Maine's Rules of Professional Conduct did create a judicially imposed "special notice requirement" for arbitration provisions

not applicable to attorney-client contracts generally—which they do not—such provisions, whether "of legislative or judicial origin," would be preempted by the Federal Arbitration Act. *Doctors' Associates Inc. v. Casarotto*, 517 U.S. 681, 685 (1996); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012).

Finally, the Superior Court also impermissibly shifted the evidentiary burden from the party seeking to establish a defense to contractual enforcement to the party seeking to enforce that contractual provision. The Superior Court's Order should therefore be reversed, and the parties ordered to proceed with arbitration.

STATEMENT OF THE FACTS

By an engagement letter dated May 11, 2012, Dr. Susan Snow hired attorney Karen Lovell of the law firm Bernstein, Shur, Sawyer & Nelson, P.A. to represent her in a lawsuit brought against her under the Improvident Transfer Act. A. 96-107; *see also* A. 24 and 62. Dr. Snow signed the engagement letter with BSSN. A. 111. The May 11, 2012 engagement letter contained an arbitration provision whereby client and attorney mutually agreed that any dispute shall, "at the election of either party, be subject to binding arbitration" (the "Arbitration Agreement"). A. 107.

As that previous litigation proceeded, the scope of the representation was amended and memorialized in an amended engagement letter dated July 16, 2013. A. 112. The 2013 amended engagement letter incorporated by reference all terms from the May, 2012 letter that were not inconsistent with the 2013 terms. A. 112. Dr. Snow signed the 2013 amended engagement letter. A. 114. Ultimately, the matter ended in an unfavorable decision for Dr. Snow. *See In re Estate of Snow*, 2014 ME 105, ¶¶ 1, 22, 99 A.3d 278, 279, 285.

Unhappy with that result, Dr. Snow filed suit in Cumberland County Superior Court alleging legal malpractice and related claims against BSSN

on August 17, 2016. *See* A. 17-54. Dr. Snow then filed an amended complaint on September 23, 2016. A. 55-94. BSSN moved to compel arbitration pursuant to the Arbitration Agreement, and stay or dismiss the Superior Court lawsuit pending arbitration, A. 134, and Dr. Snow responded with a motion to stay arbitration. A. 156-187. On January 20, 2017, the Superior Court (Warren, J.) issued its Order denying Appellants' request for arbitration and granting Dr. Snow's request to stay. A. 7-16. BSSN timely appealed under the immediate appeal provision in 14 M.R.S.A. § 5945(1)(A)(2003).

STATEMENT OF THE ISSUES

(1) Whether the Superior Court erred in ignoring Maine's strong public policy favoring arbitration as enacted in the Maine Uniform Arbitration Act, and the ethical rules governing lawyers in the State of Maine which permit arbitration of disputes between attorney and client, in denying the Appellants' motion to compel arbitration?

(2) Whether the Superior Court erred in failing to rule that the Federal Arbitration Act preempts state law, if any, that disfavors attorney-client arbitration agreements?

(3) Whether the Superior Court erred by misapplying the burdens of production and persuasion?

STANDARD OF REVIEW

This Court reviews a trial court's decision on arbitrability "for errors of law, and for facts not supported by substantial evidence in the record." *Champagne v. Victory Homes, Inc.*, 2006 ME 58, ¶ 8, 897 A.2d 803. Errors of law are reviewed *de novo*. *See, e.g. Travelers Indem. Co. v. Bryant*, 2012 ME 38, ¶ 8, 38 A.3d 1267. The Superior Court's conclusion that lawyer-client arbitration provisions are against public policy and unenforceable is an error of law reviewed *de novo*. To the extent the Superior Court purported to find that the facts in the record are sufficient to establish a defense to enforceability of the contractual provision, that is an error of law reviewed *de novo*. To the extent the Superior Court determined that BSSN bears the burden of production or persuasion on Dr. Snow's defense to the enforceability of the contract, that is an error of law reviewed *de novo*. To the extent the Superior Court's decision is premised on a factual finding that Dr. Snow was unaware of the consequences of agreeing to binding arbitration, that fact is not supported by substantial evidence in the record. The Superior Court's legal errors, reliance on insufficient evidence, and impermissible burden shift provide sufficient basis for this Court to reverse the trial court.

SUMMARY OF ARGUMENT

The Superior Court's denial of Appellant's motion to compel arbitration ignores applicable law and requires reversal for at least three reasons.

First, the Maine Uniform Arbitration Act creates a strong presumption in favor of arbitrability, which presumption must take precedence over non-binding commentary. Several jurisdictions considered this very issue, often analyzing the exact arguments that Appellee now raises, and the weight of authority favors arbitration. Given the goal of uniformity and the presumption of arbitrability, the Superior Court wrongly denied the motion to compel arbitration.

Second, the Federal Arbitration Act contains a similarly strong presumption favoring arbitration. To the extent any state policy disfavors arbitration agreements, it is preempted by the Federal Arbitration Act.

Third, the Superior Court improperly shifted the evidentiary burden and placed it on Appellants.

ARGUMENT

I. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER STATE LAW

A. Maine Law Recognizes a Strong Public Policy Favoring Arbitration, and the Arbitration Provision At Issue Here is Clearly Applicable to this Dispute.

This Court has repeatedly recognized that "[t]he presumption in favor of substantive arbitrability advances the Maine Legislature's 'strong policy favoring arbitration'" as enacted in the Maine Uniform Arbitration Act, (the "UAA"), 14 M.R.S.A. §§ 5927-5949 (2003). *Barrett v. McDonald Investments, Inc.*, 2005 ME 43, ¶ 16, 870 A.2d 146, *quoting Westbrook Sch. Comm. v. Westbrook Teachers Ass'n,* 404 A.2d 204, 207-08 (Me. 1979); *see also Anderson v. Banks*, 2012 ME 6, ¶ 19, 37 A.3d 915; *Roosa v. Tillotson,* 1997 ME 121, ¶ 3, 695 A.2d 1196. Thus, under Maine law as construed by this Court, a dispute must be arbitrated when "(1) the parties have generally agreed to arbitrate disputes, and (2) the party seeking arbitration presents a claim that, on its face, is governed by the arbitration agreement." *V.I.P., Inc. v. First Tree Development Ltd.*, 2001 ME 73, ¶ 4, 770 A.2d 95 (*quoting Roosa,* 1997 ME 121, ¶ 3, 695 A.2d 1196). A dispute will be found arbitrable "unless it may be said with positive assurance that the arbitration clause is not

susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *V.I.P. Inc.*, 2001 ME 73, ¶ 4, 770 A.2d (*quoting Westbrook Sch. Comm. v. Westbrook Teachers Ass'n*, 404 A.2d 204, 208 (Me. 1979)).

There can be no dispute that the Arbitration Agreement here at issue meets the two-step arbitrability analysis from *V.I.P.* The agreement to arbitrate is set forth in the large paragraph under the heading "Arbitration" in the contractual agreement between the parties, A. 107, and the scope of that clause clearly covers the claims asserted by Dr. Snow in this case. *See Bezio v. Drager,* 737 F.3d 819, 823-825 (1st Cir. 2013) *cert. denied*, 134 S. Ct. 2666 (2014)*(*any argument that the language of the agreement here at issue does not cover legal malpractice claims characterized as "self-evidently frivolous").

B. An Arbitration Provision Favored By Public Policy Does Not Become Suspect Merely Because It Is Made Between A Lawyer and Its Client.

There is nothing in this Court's jurisprudence to suggest that an arbitration provision becomes suspect merely because it is contained in a contract made between a lawyer and its client. And while the Maine Rules of Professional Conduct make clear that an attorney's liability for

malpractice cannot be prospectively limited by contract, M.R. Prof. Conduct 1.8(h), an arbitration provision that determines the forum of dispute resolution but does not limit liability is consistent with this rule. *See, e.g., Bezio v. Drager*, 737 F.3d 819, 823-825 (1st Cir. 2013); Me. Prof. Ethics Comm'n, Op. No. 170, 1 *Maine Manual on Professional Responsibility* O-597 to O-602 (Dec. 23, 1999), A. 173-177; *see also* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: LAW. DESKBK. PROF. RESP. § 1.8-9 (Rule 1.8(h)—LIMITING THE LAWYER'S LIABILITY FOR MALPRACTICE) (WEST, 2016-2017 ed.) ("The general rule is that arbitration agreements are not in conflict with the prohibition on advance waivers of malpractice liability").

Indeed, in an early case involving arbitration between lawyer and client, this Court affirmed the constitutionality of fee arbitration. *Anderson v. Elliott*, 555 A.2d 1042 (Me. 1989) involved a challenge to a Bar Rule (now contained in Bar R. 7), providing that a client may invoke fee arbitration and prevent her former lawyer from pursuing the client for unpaid fees in court. In upholding fee arbitration by Rule, the *Anderson* Court rejected the idea that Maine lawyers were constitutionally entitled to a jury trial in

furtherance of a fee dispute.[1] Once a client opts to initiate fee arbitration, this Court stated, lawyer and client alike are "deemed to have bargained for arbitration," the lawyer by virtue of the Rules, and the client by filing the petition in the first place. *Bennett v. Prawer*, 2001 ME 172, ¶ 10, 786 A.2d 605.

Among the reasons that mandatory fee arbitration is appropriate, the *Anderson* Court explained, is that it comes with "the judicial safeguards of the Uniform Arbitration Act." *Anderson*, 555 A.2d at 1049. *See also* M. Bar R. 7(g) (incorporating almost all of the UAA into mandatory fee arbitration). In other words, by Rule and in its jurisprudence, this Court endorsed the utility and procedural safeguards present in the UAA. As illustrated in both *Anderson* and Bar Rule 7(g), attorney-client contracts do not pose a suspect exception to the general presumption in favor of arbitration.

Nor is there a basis to assume that arbitration becomes suspect when invoked by the attorney rather than the client. Accordingly, the First Circuit Court of Appeals in *Bezio* enforced the identical arbitration clause contained in this case and reviewed both Maine's UAA and this Court's

[1] A strict reading of the decision suggests that the lawyer's failure to raise timely the constitutionality argument waived it. *Anderson*, 555 A.2d at 1044. However, the sweeping language of the opinion suggests the Court was concerned with much more than timeliness in upholding fee arbitration by Rule.

precedent as evidence of "Maine's broad and strong presumption favoring arbitration." 737 F.3d at 824. The Superior Court, in contrast, substituted its own judgment that arbitration of disputes between lawyer and client are somehow suspect when the attorney rather than the client seeks arbitration. This Court has not yet had occasion to address whether arbitration becomes suspect when sought by the attorney rather than the client, but there is no basis in law for that conclusion.

C. Persuasive Authority From Other Jurisdiction Confirms That The Uniform Arbitration Act Policy in Favor of Arbitration Is Not Diminished When Invoked By An Attorney.

While this Court has not expressly addressed the application of Maine's UAA to an attorney seeking arbitration to resolve a malpractice claim, other jurisdictions that have adopted the UAA have addressed this issue, and Maine should follow the overwhelming majority rule that upholds such an agreement. Maine's UAA is to "be so construed as to effectuate its general purpose to make uniform the law of those states which enact it," 14 M.R.S.A. § 5947; *see also* UAA § 21 (same). Accordingly, as this Court has recognized in other circumstances, reference to the decisional law in other states that have enacted similar laws is instructive. *See, e.g., HL 1, LLC v. Riverwalk, LLC*, 2011 ME 29, ¶ 26, n.11, 15 A.3d 725,

(quoting at length from Uniform Laws Annotated, collecting cases from other UAA jurisdictions).[2]

Forty jurisdictions have currently enacted some form of the UAA. 7 (IA) U.L.A. Table of Jurisdictions 1 (Supp. 2016) (including the District of Columbia). The majority rule favors arbitration between lawyer and client. *See* 26 A.L.R. 5th 107 (WEST 1995) (when clients challenge arbitration agreements for alleged nondisclosure, "courts have not been persuaded that the arbitration agreements presented for consideration should be declared invalid on such grounds"); *see also* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: LAW. DESKBK. PROF. RESP. § 1.8-9(a)(4) (Rule 1.8(h)—LIMITING THE LAWYER'S LIABILITY FOR MALPRACTICE) (WEST, 2016-2017 ed.) ("The general rule is that arbitration agreements are not in conflict with the prohibition on advance waivers of malpractice liability").

[2] The National Conference of Commissioners on Uniform State Laws promulgated a UAA in 1956, and a more recent UAA (sometimes referred to as the Revised Uniform Arbitration Act or RUAA) in 2000. *See, e.g.*, 14 M.R.S.A. § 5928 UAA Table (Supp. 2016); 7 (IA) U.L.A. 1 (commentary on 2000 UAA) & 7 (IA) U.L.A. 99 (commentary on 1956 UAA) & *id.* at Supp. 2016. As seen in those tables, enacting states are almost evenly split between the 1956 version and the 2000 version, so Maine's continued use of the 1956 UAA is within the mainstream of state enactments. Unless otherwise indicated, all references in this brief to the UAA refer to the 1956 version. There seem to be no differences between the 1956 and 2000 acts that are relevant to this appeal. *See, e.g., HL1, LLC*, 2011 ME 29, n.11 (quoting the U.L.A. volume on differences relating to judicial review of arbitrator decisions).

For example, the Texas Supreme Court faced the same issue presented now in its decision *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015), *reh'g denied* (Sept. 11, 2015). That case arose because a client and law firm executed an arbitration agreement wherein the client agreed to arbitrate all claims except for fee suits brought by the firm. *Id.* at 497. When the client brought suit against the firm, the firm moved to compel arbitration. *Id.* at 498. In response, the client argued that the arbitration provision was procedurally and substantively unconscionable, violated public policy in the context of an attorney-client agreement, that the burden was on the law firm to prove it properly explained the issues to the client, and that the contract was illusory because it was asymmetric between the parties. *Id*. at 499.

The Supreme Court of Texas held that the agreement to arbitrate was enforceable. The *Royston, Rayzor* court started by discussing the arbitration act, citing to the Texas enactment of the UAA. *Id.* The court noted the special relationship between an attorney and client, but went on to explain how that relationship "does not alter the basic principle that arbitration clauses in agreements are enforceable absent proof of a defense." *Id.* at 500. Moreover, "absent fraud, misrepresentation, or deceit, one who signs a

contract is deemed to know and understand its contents and is bound by its terms . . . regardless of whether they read [the contract] or thought it had different terms." *Id.*; *accord, J.R. Watkins Med. Co. v. Stahl,* 117 Me. 190, 191, 103 A. 70, 71 (1918) ("When a person signs a written contract, he is presumed, by the ordinary rules of law, to know its contents, whether read or not."); *see also Maine Mut. Ins. Co. v. Hodgkins*, 66 Me. 109, 112-113 (1876).

As to the client's purported unconscionability defense, the *Royston, Rayzor* court put the burden on the client to bring forth sufficient evidence to prove the contract defense. "The burden of proving such a ground—such as fraud, unconscionability or voidness under public policy—falls on the party opposing the contract." *Id.* at 500, *quoting In re Poly-Am., L.P.*, 262 S.W.3d 337, 349 (Tex. 2008). The client presented insufficient evidence to prove either substantive or procedural unconscionability. *Royston, Rayzor,* 467 S.W.3d at 502.

The *Royston, Rayzor* court went on to examine arbitration agreements as the intersection between duly enacted statutes that support arbitration, and ethics opinions. *Id.* at 503-504. The court reviewed how, for example, a fee agreement that clearly violated the Disciplinary Rules for the State Bar of Texas was voidable. *Id.* at 504. Absent a clear rule violation, however,

"where the Legislature has addressed a matter, as it has addressed the enforceability of arbitration provisions, [the courts] are constrained to defer to that expression of policy." *Id*. The clients are protected by the same contract defenses available to all contracting parties, and the Texas Supreme Court declined to craft an exception disfavoring arbitration against the will of the legislature. *Id* at 504-505 (*citing* the Texas enactment of the UAA).

Michigan has similarly explored the intersection between the UAA and lawyers' professional rules of conduct and come down in favor of enforcement of an arbitration agreement between lawyer and client. In *Watts v. Polaczyk*, 619 N.W.2d 714 (Mich. App. 2000) (case decided under the 1956 UAA as used by Maine (s*ee supra* at p. 15, n. 2)), the client challenged the arbitration agreement because the lawyer allegedly did not advise the client about the arbitration clause. The court followed Michigan law that "one who signs a written agreement knows the nature of the instrument so executed and understands its contents," and that the "mere failure to read an agreement is not a defense in an action to enforce the terms of a written agreement." *Id.*, 619 N.W.2d at 717. *Accord*, *J.R. Watkins Med. Co.* 117 Me. at 191, 103 A. at 71.

Next, the *Watts* court considered Michigan's attorney ethics rules, including its Rule 1.8(h), and the state bar's ethics opinions about that rule. The client argued that the lawyer's "failure to provide [the client] with the opportunity to obtain independent counsel as required by these ethics opinions rendered the arbitration agreement invalid." *Id.* at 717-18. The court was not moved, however, because the ethics opinions, "though instructive, are not binding on this Court." *Id* at 718. What was binding on the *Watts* court was Michigan's enactment of the UAA, which "evidences Michigan's strong public policy favoring arbitration . . . a strong and unequivocal endorsement of binding arbitration agreements." *Id.* (citations and quotation marks omitted). Because of the strong presumption of arbitrability contained in the UAA, and the lack of any fraud or deception alleged by the client, the voluntarily signed fee agreement was enforced on its terms, and the parties were required to arbitrate. *Id.* at 718-19. *Accord*, *Plyer v. BDO Seidman, L.L.P.*, No. 04 2146 B/AN, 2004 WL 5039850, at *7 (W.D. Tenn. Dec. 15, 2004) (rejecting similar Rule 1.8 argument) (report and recommendation subsequently adopted, 2005 WL 4904453); *Stewart v. Legal Helpers Debt Resolution*, LLC, No. 2:11-cv-26, 2012 WL 1969624, at *6 n.3 (W.D.N.C. June 1, 2012) ("An arbitration clause in an engagement letter

proposed by an attorney is not unconscionable and does not rise to the level of being unethical," citing applicable professional rule); *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 67 So. 3d 315, 318 - 19 (Fla. Dist. App. 2011) (no constitutional provision, statute, or professional rule prevents an attorney-client arbitration agreement, therefore enforced).

This presumption of arbitrability is so firmly established in Michigan that a party's frivolous arguments against arbitration resulted in the imposition of sanctions. *Nathan Neuman & Nathan, P.C. v. Global Electronics, Ltd.*, No. 270079, 2007 WL 2781032 (Mich. Dist. App. Sept. 25, 2007) (per curiam, unpublished). Unusually, this case involved an attorney arguing against application of the UAA. *Id.* at *2. Among the frivolous arguments that merited the court's ire were claims that the law firm induced the client's principal "to sign the retainer agreement and return it immediately in order to obtain [the law firm's] services;" that the law firm "did not explain the arbitration clause or its consequences;" that the firm "did not advise [the client] regarding the impact of submitting a malpractice claim to arbitration;" and that the firm "did not afford [the client] independent advice about the arbitration agreement." *Id.* at *3. The trial court found those and other arguments insufficient to void the arbitration provision,

and so frivolous to justify imposing sanctions. *Id.* at *2-4. The sanctions were upheld on appeal. *Id.* at *4.

When Hawaii's intermediate appellate court reviewed an attorney-client agreement to arbitrate legal malpractice claims, it began its legal discussion with the UAA's definition of validity of an agreement to arbitrate. *Vickery v. Hastert*, 120 Haw. 115, 2009 WL 383682, *2, 201 P.3d 628 (Haw. Ct. App. 2009) (Table), *citing* H.R.S. § 658A-6 (Supp. 2008). The court compared Hawaii's policy favoring arbitration to the client's clear execution of the agreement for arbitration. *Vickery,* 2009 WL 383682 at *3-4.

The Hawaiian appeals court rebuffed the client's challenge that the arbitration clause was an unconscionable contract of adhesion. While allowing that the lawyer may have had a superior bargaining position, the client failed to prove facts that would show an adhesive contract. For example, the client did "not establish[ ] that [the lawyer] was the only immigration firm that could represent him. Further, there is no evidence that had [client] declined the arbitration provision, the Agreement as a whole would have been nullified—i.e., that the provision was a 'take-it-or-leave-it' proposition." *Vickery*, 2009 WL 383682 at *8. Without that showing, the defense of an adhesive or unconscionable contract failed. *Id. See also*

Fields v. Maslon Edelman Borman & Brand, LLP, No. C1-02-940, 2003 WL 115449, at *2-3 (Minn. Ct. App. Jan. 14, 2003) (unpublished) (client failed to show an adhesive contract; arbitration agreement enforced).

Like Dr. Snow here, the client in *Vickery* argued that Hawaii's Rule 1.8(h) prohibited the arbitration provision between attorney and client. The Court disagreed, however, explaining that the "arbitration agreement did not prospectively limit [the lawyer's] liability to [the client]; rather, it exchanged one forum for another." *Id*. at *9; *accord*, ROTUNDA & DZIENKOWSKI, LAW. DESKBK. PROF. RESP. § 1.8-9(a)(4) ("Arbitration goes to remedy, not liability. Thus, a lawyer dealing with a new client may insert an arbitration clause into the retainer agreement without violating any fiduciary obligations").

The District of Columbia Court of Appeals was recently called upon to decide this same question, applying the revised UAA to an agreement to arbitrate legal malpractice disputes. *Woodroof v. Cunningham*, 147 A.3d 777 (D.C. 2016). The D.C. court relied on the language in the revised UAA whereby the court merely looks to see if the arbitration clause is susceptible to an interpretation that would support arbitration. *Id.* at 787-88, *citing* D.C. Code § 16-4406(b)(within the revised UAA as adopted in D.C.). The court

found that, because any ambiguity would be resolved in favor of arbitrability, there is an interpretation requiring arbitration. *Id*. at 788-89.

Continuing, the *Woodroof* court found no basis for the client's contract defense of unconscionability. The court relied on D.C. law for the proposition that a party asserting unconscionability bears the burden of proving "an absence of choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Woodroof*, 147 A.3d at 789; *accord*, *Royston, Rayzor,* 467 S.W.3d at 500. The client never argued, and thus failed to prove, that the arbitration agreement "resulted from disparate bargaining power, a lack of opportunity for negotiation, or her inability to obtain services elsewhere." *Woodroof*, 147 A.3d at 789 n.8; *accord*, *Vickery*, 2009 WL 383682 at *8; *Fields*, 2003 WL 115449, at *2-3.

Finally, in a case factually similar to this one, in New Jersey, when a former client sued her lawyer in federal court, the attorney asserted the fee agreement's arbitrability clause and demanded arbitration. *Smith v.*

Lindemann, No. 10-cv-3319 KM, 2014 WL 835254 (D.N.J. Mar. 4, 2014).[3] The former client—a doctor—"clearly has an advanced educational background and at least some experience retaining attorneys, as she had retained and dismissed two attorneys immediately prior" to hiring the attorney-defendant in this case. *Smith*, 2014 WL 835254 at *8. In other words, the doctor's sophistication cut against her contract defense of undue influence.

The doctor complained that the attorney did not advise her about the contents of the arbitration provision, but the arbitration clause itself unambiguously discussed arbitration including the New Jersey Uniform Arbitration Act, and there was no argument that the doctor did not sign the agreement herself. *Id*. at *9. Ultimately, the court determined that the arbitration clause was not unconscionable, and the former-client-doctor was sophisticated enough to be charged with reading a document she had signed; she was required to arbitrate against her former lawyer. *Id.* at * 10, 13.

[3] Although not important to the *Smith* court's opinion, the lawyer's fee agreement cited the previous version of the New Jersey UAA enactment, N.J.S.A. § 2A:24-1 *et seq*. (the 1956 UAA). The *Smith* court accurately cited to the operative New Jersey Uniform Arbitration Act, N.J.S.A. § 2A:23B-1 *et seq*., which enacted the 2000 UAA into New Jersey law, repealing the previous 1956 version of the UAA. *See* New Jersey Senate Report No. 514, L.2003, c. 95. The *Smith* court did not note any difference between the two versions of the UAA.

In all, courts in twenty UAA jurisdictions have either enforced arbitration agreements in circumstances similar to this case, or have issued opinions suggesting they would do so.[4] Many of the twenty other adopting states have not yet considered the question, and only two UAA state courts have ruled to the contrary.[5] This Court should follow the

[4] Ten decisions from nine of those states are cited in the text above: *Fields v. Maslon Edelman Borman & Brand, LLP,* No. C1-02-940, 2003 WL 115449 (Minn. Ct. App. Jan. 14, 2003) (unpublished); *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 67 So. 3d 315, 318 - 19 (Fla. Dist. App. 2011); *Nathan Neuman & Nathan, P.C. v. Global Electronics, Ltd.,* No. 270079, 2007 WL 2781032 (Mich. Dist. App. Sept. 25, 2007) (per curiam, unpublished); *Plyer v. BDO Seidman, L.L.P.*, No. 04 2146 B/AN, 2004 WL 5039850 (W.D. Tenn. Dec. 15, 2004); *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015), reh'g denied (Sept. 11, 2015); *Smith v. Lindemann,* No. 10-cv-3319 KM, 2014 WL 835254 (D.N.J. Mar. 4, 2014); *Stewart v. Legal Helpers Debt Resolution, LLC*, No. 2:11-cv-26, 2012 WL 1969624 (W.D.N.C. June 1, 2012); *Vickery v. Hastert*, 120 Haw. 115, 2009 WL 383682, 201 P.3d 628 (Haw. Ct. App. 2009)(Table); *Watts v. Polaczyk*, 619 N.W.2d 714 (Mich. App. 2000); *Woodroof v. Cunningham*, 147 A.3d 777 (D.C. App. 2016).

Decisions out of or applying the law of eleven other states are in accord or suggest a similar result: *Carlisle v. Curtis, Mallet Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008)(appeal from E.D. Kentucky, applying federal law), *rev'd sub nom. Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *Harlow v. Parkevich*, 868 N.E.2d 822 (Ind. Ct. App. 2007); *Coulter v. First American Resources, LLC*, 214 P.3d 807, 809-810 (Okla. 2009); *Mann Law Group v. Digi-Net Technologies,* No. C13–59RAJ, 2014 WL 535181 (W.D. Wash. Feb. 11, 2014)(applying federal law); *MCA Financial Group, Ltd. v. Gardere Wynne Sewell, LLP*, No. 05–2562–PHX–MHM, 2007 WL 951959 (D. Ariz. March 27, 2007)(applying federal law); *Robinson & Wells, P.C. v. Warren*, 669 P.2d 844 (Utah 1983); *Sanford v. Bracewell & Giuliani, LLP*, 618 Fed.Appx. 114 (3d Cir. 2015)(unpublished)(applying federal law); *Tolliver v. True*, No. 06–cv–02574–WDM–BNB, 2007 WL 2909393 (D. Col. Sept. 28, 2007) (applying federal law); *Vassalluzzo v. Ernst & Young LLP*, No. 06-4215-BLS2, 2007 WL 2076471 (Mass. Super. June 21, 2007); *Welch v. Centex Home Equity Co., LLC*, 178 P.3d 80 (Kan. App. 2008)(unpublished); *Woods v. Patterson Law Firm, P.C.* 886 N.E.2d 1080, 1089 (Ill. App. 2008).

[5] Those two states are New Mexico and Missouri. For New Mexico, *see Castillo v. Arrieta*, 368 P.3d 1249, 1256 (N.M. App. 2016), *cert. denied*, No. S-1-SC-35772 (March 23, 2016)(following precedent from Louisiana, a non-UAA state); *see also id.* (noting attorney-client arbitration agreements are permitted in Maine). For Missouri, *see Hopmann v. Kaplan Associates*, LLC¸ 449 S.W.3d 827 (Mo. App. 2014)(Mem)(per curiam)(affirming trial court's decision denying motion to compel arbitration; the court issued no public memorandum opinion, and instead "the parties have been furnished with a memorandum for their information only." *Id.* at 828).

majority rule and find that the Arbitration Agreement is enforceable under the UAA.

D. The Maine Rules of Professional Conduct Do Not Impose a Heightened Factual Predicate That Must Be Established By An Attorney To Invoke An Otherwise Enforceable Arbitration Provision.

Rather than rely on decisional law, the Superior Court chose to focus on the ethical rules governing lawyers in the State of Maine, together with formal and informal guidance about those Rules. In fact, contrary to the conclusions of the Superior Court, the relevant and persuasive ethics sources support the Arbitration Agreement's enforceability.

The law appears unsettled in three jurisdictions, two of which (Utah and Washington) are listed above in note 4 as supporting jurisdictions. For Utah, *see Feacher v. Hanley*, No. 2:13-cv-92-EJF, 2014 WL 119382 (D. Utah Jan. 13, 2014) (declining to enforce arbitration agreement without addressing the prior Utah Supreme Court decision, *Robinson & Wells*, 669 P.2d 844, which enforced arbitration). For Washington, *see Smith v. JEM Group, Inc.*, 737 F.3d 636 (9th Cir. 2013), *distinguished by Mann Law Group v. Digi-Net Technologies*, No. C13–59RAJ, 2014 WL 535181 (W.D. Wash. Feb. 11, 2014).

The third jurisdiction is North Dakota, which has considered this question but in a different context. *In re Disciplinary Action Against Wolff*, 2010 N.D. 175, 788 N.W.2d 594; *but see id*. at ¶¶ 28-43 (Crothers, J. dissenting on question of whether the rules concerning arbitration in attorney fee agreements are clear enough to form the basis for attorney discipline). Although the court's holding did not support arbitration, this point of law should be considered unsettled in North Dakota because the *Wolff* case was not a client-versus-lawyer malpractice action, but was instead a bar discipline case stemming from multiple ethical and even criminal acts by the attorney and ultimately resulting in disbarment. *See Wolff*, 2010 N.D. 175 at ¶¶ 1-24, 788 N.W.2d at 594-600; *see also id.* at ¶ 28, 788 N.W.2d at 600 (". . . disciplinary counsel is unnecessarily 'stacking' allegations of rule violations and . . . the disciplinary board's hearing panel has not sufficiently explained the rationale behind several of its findings of fact and conclusions of law on those issues.") (Crothers, J. dissenting).

1. **While The Rules Of Professional Conduct Have The Force Of Law, The Comments Thereto And Ethics Opinions Interpreting The Rules Do Not**.

The Maine Rules of Professional Conduct are intended to protect the public and ensure the "proper administration of justice." *Anderson v. Elliott*, 555 A.2d 1042, 1048 (Me. 1989), *cert. denied*, 493 U.S. 978 (1989) (referring to the then-applicable Bar Rules). Rules of court, like the Rules of Professional Conduct and Rules of Evidence, are adopted through rulemaking, "a legislative-type function performed by the Supreme Judicial Court with the assistance of advisory rules committees operating under procedures designed to permit the views of the bar generally to be considered on proposed amendments." *State v. Doucette*, 544 A.2d 1290, 1294 & n.3 (Me. 1988) (referring to the Rules of Evidence). "The Supreme Judicial Court in its rulemaking capacity binds not only the bar and all other courts," but the duly adopted rules governing lawyers "also have the full force of law in [this Court's] deliberations as the Law Court." *Anderson*, 555 A.2d at 1047–48. While exercising its appellate power sitting as the Law Court, this Court will resolve the dispute at issue without announcing *ad hoc* changes to the underlying rules of court themselves. *Doucette*, 544 A.2d at 1294 & n.3.

Unlike the formally adopted Maine Rules of Professional Conduct themselves, the Comments to the Rules do not have the force of law. As explained in the Preamble to the Rules, "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." M.R. Prof. Conduct Preamble, ¶ 14B. That the Comments are non-binding makes sense because they "have not been specifically adopted by the Maine Supreme Judicial Court," and instead "are published with the Rules for background information and illustration." M.R. Prof. Conduct Preamble, ¶ 1A.

Finally, the Professional Ethics Commission, which is appointed by Maine's Board of Overseers of the Bar, M. Bar R. 8(a), is empowered "to render advisory opinions to the Court, the Board, Bar Counsel, and the Grievance Commission on matters involving the interpretation and application of the Maine Rules of Professional Conduct." M. Bar R. 8(d)(1).

2. The Parties' Arbitration Agreement Did Not Violate Rule 1.8(h) Or Any Other Rule Of Professional Conduct.

Rule 1.8(h) of the Maine Rules of Professional Conduct provides, in relevant part that:

> (h) A lawyer shall not:

> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice.

Nothing in the language of Rule 1.8(h) prohibits an agreement to arbitrate malpractice claims and that is precisely what the Professional Ethics Commission concluded in Me. Prof. Ethics Comm'n, Op. No. 170, 1 *Maine Manual on Professional Responsibility* O-597 to O-602 (Dec. 23, 1999) (hereinafter, Opinion #170). There, the Commission was presented with the question of whether it is permissible for an attorney at the outset of the representation to "enter into an agreement with a client by which the attorney and the client mutually agree to submit to binding arbitration of any and all malpractice claims that may arise out of the representation." Opinion #170, A. 173. The Ethics Commission answered this question in the affirmative, finding "nothing in the language of the rule, or its history, to support the proposition that a mutual agreement on a neutral forum within which to adjudicate a lawyer's future liability is an agreement 'limiting the lawyer's liability.'" *Id.* Rather, the Commission reasoned, "an agreement to arbitrate is an agreement to select a forum within which the unlimited liability of the lawyer will be determined . . . ." *Id.* at A. 174. It then went on to address the issue of consent, concluding that "the

arbitration clause should be clear" but specifically stating that "we do not conclude that the presence of such an arbitration clause in an engagement agreement, without more, requires that the client be advised to consult with other counsel." *Id.* at A. 178.

Rather than relying on the language of the Rule or Ethics Commission Opinion #170, the Superior Court based its decision primarily on another opinion of the Ethics Commission, Opinion #202. In that Opinion, the Commission addressed the propriety of attorneys prospectively seeking jury trial waivers from their clients for disputes between them that end up in court.[6] It concluded that a bare jury trial waiver required informed consent confirmed in writing by the client, among other protections. Opinion #202, A. 179-181.

Comparing Opinion #202 with Opinion #170, the Superior Court concluded that the view of the Ethics Commission "has evolved" from what the Superior Court recognized as the "largely unqualified approval" of agreements to arbitrate in Opinion #170 to the "rule in Opinion #202

[6] The precise question addressed by the Ethics Commission in Opinion #202 was "whether the phrase 'without a jury' can ethically be added to a sentence in an engagement agreement which otherwise states: 'In the event that a dispute between us ends up in court, both parties agree that it shall be tried exclusively in a court in Maine.'" Opinion #202 at A. 178. The BSSN Arbitration Agreement includes the provision that a case ending up in court will be tried exclusively in Maine but does *not* include the jury waiver language.

that arbitration agreements can be included only if the requirement of informed consent is strictly observed." A. 11-12. The Superior Court thus determined that the level of informed consent necessary to render an arbitration agreement enforceable was lacking in this case.

This conclusion is wrong. Opinion #202 did not address arbitration agreements but rather disputes that "end up in court." Indeed, the Commission made a point of distinguishing waiver of a jury trial in favor of a bench trial from an agreement to arbitrate. Thus, it explained, *"[i]n contrast to arbitration agreements*, there is no public policy favoring the waiver of jury trials, and a limitation that excludes the right to a jury trial has potentially serious constitutional dimensions." Opinion #202, A. 180 (emphasis added).

Comment 14 to Rule 1.8 is in accord. It specifically provides that the Rule "does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement." M.R. Prof. Conduct 1.8 cmt. (14). Here, Dr. Snow was fully informed by the clear language of the Arbitration Agreement: "Any fee dispute . . . and any other dispute that arises out of or

relates to this agreement or the services provided by the law firm shall also, at the election of either party, be subject to binding arbitration." A. 107. *See also Bezio*, 737 F.3d at 823-825 (frivolous to argue scope of provision does not include malpractice). Indeed, Dr. Snow has never claimed that she did not understand the scope or meaning of the provision.[7]

The Superior Court next turned to an "Enduring Ethics Opinion" authored by James M. Bowie, Esq. A. 182 - 184. In that article, Attorney Bowie, a single member of the Ethics Commission, criticized the First Circuit's decision in *Bezio* and concluded that both the waiver of a jury trial and agreement to arbitrate require "the informed consent of the client, confirmed in writing." A. 184.[8]

[7] This comment does not suggest that an enforceable agreement to arbitrate legal malpractice claims requires the level of a written "informed consent," as suggested by the Superior Court. A. 9. By way of contrast, see M.R. Prof. Conduct 1.8 cmt. (13) (suggesting that an aggregate settlement offered to multiple clients in a common representation requires "informed consent…in writing, signed by the clients."); *see also Mann Law Grp.*, 2014 WL 535181, at *5 (distinguishing Washington's Rule 1.5 requirement for fair disclosure from the heightened disclosure requirements in Rule 1.8 and applying only the former to an arbitration agreement). In any event, there is no dispute here that Dr. Snow signed both the original engagement letter and the amendment. A. 111 & A. 114. *See* M.R. Prof. Conduct 1.0(b).

[8] Not only does Attorney Bowie suggest that an attorney seeking to include an arbitration agreement in an engagement with a client must obtain informed consent confirmed in writing but also that the client must be advised to seek independent legal counsel before entering into the engagement. A rule that requires lawyers to advise a prospective client to have the proposed engagement reviewed by a different lawyer who, presumably would need to have his proposed engagement reviewed by a third lawyer, and so on, would be unworkable.

Attorney Bowie's article, which is nothing more than his personal opinion, has no persuasive authority over this Court. In fact, it appears that his opinion is not universally accepted by other members of the Commission because the article authored by Attorney Bowie is in direct conflict with another "Enduring Ethics Opinion" authored by a different member of the Commission. Thus, in his "Enduring Ethics Opinion," David Herzer, Esq. came to opposite conclusions on the question at issue in this appeal. After surveying several older ethics opinions, Attorney Herzer closely examined Opinion #170 and Opinion #202. He concluded that, according to the Commission, an arbitration agreement does not limit the lawyer's liability: "Particularly at the time the engagement agreement is struck with the client and no liability claim yet exists, it is impossible to say that any real limitation of liability is achieved by electing the forum [arbitration or litigation] or the fact finder [jury or arbitrator] so as to be unethical." A. 187. Attorney Herzer gave no indication that a heightened form of consent or confirmation is required to comply with the Rules or the suggestions in the Ethics Opinions.

In contrast to the careful analysis by Attorney Herzer, Attorney Bowie's article did not address the important distinction between jury trial

waivers and arbitration agreements discussed in Ethics Opinion #202 and distinguished by Attorney Herzer. Instead, Attorney Bowie simply lumped the two very different types of agreements into one and imposed specific consent requirements found nowhere in the Rule or any formal opinion.

In the end, it is not what Attorney Bowie, or Attorney Herzer, or even the Professional Ethics Commission itself thinks about this issue that matters, but what the law provides. Given the strong public policy in favor of arbitration in Maine as enacted through the UAA, recognized by the Ethics Commission in Opinion #170, and discussed by the First Circuit Court of Appeals in *Bezio*, there should be no doubt that the Arbitration Agreement is enforceable. This Court should therefore reverse the decision of the Superior Court and remand this case for entry of an order compelling the parties to arbitrate as they agreed to do.

II. EVEN IF THE MAINE RULES OF PROFESSIONAL CONDUCT MADE THE ELECTION OF ARBITRATION PROVISIONS SUSPECT, THAT JUDICIALLY IMPOSED RULE WOULD BE PREEMPTED BY THE FEDERAL ARBITRATION ACT.

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

The Act creates a presumption in favor of arbitration for any arbitration agreement within Congress' broad Article I powers over commercial and maritime transactions. 9 U.S.C. § 2 (2013); *see also* U.S. Const. art. I, § 8, cl. 3. The FAA mandates that any state law purporting to encumber arbitration contracts in particular, whether "of legislative or judicial origin," is preempted. *Casarotto*, 517 U.S. at 685; *see also* U.S. Const. art. VI, cl. 2.

The *Casarotto* decision is a good illustration of what type of state law will be preempted under the FAA. The parties in *Casarotto* were a franchisor and franchisee whose Montana franchise agreement included an arbitration clause. 517 U.S. at 683. State law required heightened notice provisions for an arbitration clause, including underlined, capital letters for the arbitration language, on the first page of the contract. *Id.* at 684. The franchise agreement did not comply with the heightened notice law. *Id.*

The Supreme Court struck down Montana's heightened notice provision. The *Casarotto* Court (Ginsburg, J.) held that Montana's law:

> directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana

> statute with respect to arbitration agreements covered by the Act.

Casarotto, 517 U.S. at 687. *See also Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539-40 (2001) (striking down similar heightened notice requirement in South Carolina law). While the Supreme Court placed a clear marker favoring arbitration with *Casarotto*, not all states understood the boundary.

For example, a West Virginia statute prohibited enforcement of pre-dispute arbitration provisions over personal injury or wrongful death actions of nursing home patients. The West Virginia Supreme Court upheld the state law prohibiting those arbitrations largely on grounds of public policy. *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) (*vacated & remanded*, 565 U.S. 530). In vacating the West Virginia high court, the U.S. Supreme Court explained that the state law amounted to "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam). Further, if parties wanted to persist in their challenges to those arbitration agreements, general contract defenses could be considered but only

"absent that general public policy" against arbitration that is expressly prohibited by the FAA. *Id*. at 534 (remanding).

Turning to the Arbitration Agreement in this case, that same language was previously enforced by the Maine Federal District Court because the FAA requires its enforcement. *Bezio v. Draeger*, Civil No. 2:12–cv–00396–NT, 2013 WL 3776538, *2-3 (D. Me. July 16, 2013), *aff'd on other grounds*, 737 F.3d 819 (1st Cir. 2013); *see also* Order, A. 7 (trial court below correctly identifying the arbitration clause in *Bezio* as the same Arbitration Agreement in this case). When the dissatisfied former client in that case argued that the Rules required a showing of informed consent by the lawyer, the U.S. District Court (Torresen, J.) explained that "[s]uch a holding would be futile, because the FAA displaces state law to the extent it 'singl[es] out arbitration provisions for suspect status.'" *Bezio*, 2013 WL 3776538, *2, *citing Casarotto*, 517 U.S. at 687; *accord, Marmet Health Care*, 565 U.S. at 533-34 (an anti-arbitration rule is not a valid "public policy" contract defense to arbitration, but is instead preempted by the FAA). Like Appellee in this case, the former client in *Bezio* could "point to no 'generally applicable contract defenses' to support revocation of the contract," so

arbitration was required. *Bezio*, 2013 WL 3776538, *2, *quoting Casarotto*, 517 U.S. at 687.

In addition to the Maine federal court enforcing this same Arbitration Agreement in another case, a number of other courts have similarly enforced attorney-client arbitration agreements under the FAA to create a general trend in the case law. For example, in a case very similar to this one, a New Jersey federal court referenced the FAA (in addition to the UAA) when enforcing an attorney-client arbitration agreement against the objecting former-client-doctor. *Smith*, 2014 WL 835254 at *5-6; *see also id.* at *6-7 (*quoting Marmet Health Care*, 565 U.S. at 533 (then slip op. at 3-4)); *Coulter v. First American Resources, LLC*, 2009 OK 53, ¶¶ 7-8, 214 P.3d 807, 809 (Okla. 2009) (requiring arbitration under both federal and state arbitration laws); *see also McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1051-52 (D. Colo. 1991) (despite Oklahoma's Rule 1.8, FAA nevertheless required enforcing arbitration agreement against objecting client). Federal courts in California and Illinois have also arrived at the same conclusion and enforced attorney-client arbitration agreements under the FAA. *Sayta v. Martin*, No. 16-cv-03775-LB, 2017 WL 491161, at *7 (N.D. Cal. Feb. 7, 2017); *Davis v. Fenton*, 26 F.Supp.3d 727 (N.D. Ill. 2014).

The Superior Court's Order below gives short shrift to the FAA. In denying BSSN its bargained-for arbitral forum, the Superior Court attempts to distinguish *Casarotto* by explaining that the "informed consent" requirement from the Rules "does not apply 'specifically and solely' to arbitration provisions but applies generally to any instance in which a lawyer seeks the client's assent and agreement." Order, A. 15 -16. Of course, as discussed above, the idea that some heightened version of informed consent is needed for arbitration does not come from the Rules at all, but was instead extrapolated from non-binding bar and lawyer opinions. In other words, the Superior Court was incorrect: the theory that heightened informed consent is needed to validate an arbitration provision in a fee agreement, if operable at all, is itself a limitation *specific to arbitration provisions*, and therefore preempted under the FAA. *See Bezio,* 2013 WL 3776538, *2, *citing Casarotto*, 517 U.S. at 687 (trial court describing purported anti-arbitration rule as futile due to operation of the FAA).

When the trial court in *Bezio* enforced this same Arbitration Agreement under the FAA, it was in accord with binding Supreme Court precedent and a judicial consensus on this point. Federal courts that examined the intersection of the FAA and the attorney-client relationship

typically order arbitration over objections grounded in the attorneys' professional ethics rules or vague "public policy" or similar defenses. While Maine's UAA is reason enough to reverse the trial court in this case, *see supra* Part I, the FAA provides this Court with an adequate and independent ground for reversal as well.

III. THE SUPERIOR COURT ERRED BY SHIFTING THE BURDENS OF PRODUCTION AND PERSUASION ON DR. SNOW'S CONTRACT DEFENSE FROM DR. SNOW TO BSSN.

The Superior Court declined to order arbitration in this case because it concluded that there were insufficient facts to support a valid arbitration contract. In so doing it improperly placed the burden of production on BSSN, which is reversible error. In fact, it is the party opposing arbitration that has that burden.

In *Stenzel v. Dell*, 2005 ME 37, 870 A.2d 133, the plaintiff attempted to avoid arbitration by claiming unconscionability. One of the bases for the asserted unconscionability was that arbitration was prohibitively expensive. Citing Supreme Court precedent and applying Texas law, this Court opined that, "in order to establish unconscionability, the party challenging an arbitration clause must establish who will conduct the

arbitration as well as a detailed showing of the arbitration costs." *Id*. ¶ 29. Having failed to make the requisite showing of unconscionability, the plaintiff's attempt to avoid arbitration was unsuccessful. 2005 ME 37 ¶¶ 27-32, 870 A.2d.

Placing the burden on the party asserting a contract defense aligns with both evidentiary and pleading standards, as a party asserting an affirmative defense like voidness or illegality bears the burden of proof. *See, e.g.,* M.R. Civ. P. 8(c) ("illegality" listed among enumerated affirmative defenses). Other courts around the country have come to the same conclusion: "A party asserting the defense of unconscionability must prove that the contract is both procedurally and substantively unconscionable." *Stewart*, 2012 WL 1969624, at *5. The Texas Supreme Court ruled that by presenting insufficient evidence and unpersuasive arguments, the challenging client "did not prove a defense to arbitration" sought by the lawyer. *Royston, Rayzor*, 467 S.W.3d at 506. Similarly in *Vickery*, a case from Hawaii, the client challenging arbitration "has not established that [the lawyer] was the only immigration firm that could represent him. Further, *there is no evidence* that had [client] declined the arbitration provision, the Agreement as a whole would have been nullified—i.e., that the provision

was a 'take-it-or-leave-it' proposition." *Vickery*, 120 Haw. 115, 2009 WL 383682, *8 (emphasis added); *see also Woodroof*, 147 A.3d at 789 (D.C. decision similarly allocating the burden); *Stewart*, 2012 WL 1969624, at *7 (North Carolina client failed to carry burden of proving unconscionability). These decisions come from UAA jurisdictions like Maine, so their consistently placing the burden of production on the party challenging arbitration should inform this Court. *See* 14 M.R.S. § 5947.

Here, the record before the Superior Court on BSSN's motion to compel arbitration established that Snow signed the engagement letter which contained the Arbitration Agreement and then signed the amendment to the engagement letter incorporating the terms of the Arbitration Agreement into the amended engagement letter. Nowhere in Snow's opposition to the motion to compel is there any evidence that she did not knowingly consent to arbitrate. Thus, under any reading of the standard for enforceability of the Arbitration Agreement, Snow did not bear her burden to show that it is unenforceable. By denying the motion to compel, the Superior Court improperly shifted the burden to BSSN which is reversible error. *Merrill v. Sugarloaf Mountain Corp.*, 2000 ME 16, ¶ 14, 745 A.2d 378. This Court should therefore reverse the decision of the Superior

Court and order that this matter proceed to arbitration pursuant to the Arbitration Agreement.[9]

CONCLUSION

This Court should reverse the Superior Court because its order fashioned entirely new theories for both attorney-client relations and the law of arbitrations and these new theories were without precedent as to the former and at odds with the latter. The Uniform Arbitration Act requires Maine courts to presume arbitrability and strive for uniformity with other adopting states, and the Superior Court's order violates both legislative goals. The Federal Arbitration Act similarly requires this matter be submitted to arbitration, and any state law or rule to the contrary is preempted. Finally, for the Superior Court's impermissibly shifting the burden onto BSSN, the Superior Court should be reversed and this matter ordered to proceed to arbitration.

[9] If the Court is unwilling to reverse outright, this matter could be remanded for the development of additional facts. *See, e.g., Golden Gate Nat'l Seniorcare, LLC v. Lane*, No. 3:cv–14–1957, 2015 WL 926432, *6-7 (M.D. Pa. March 4, 2015) (denying motion to arbitrate but staying state court action pending limited discovery on validity of arbitration agreement).

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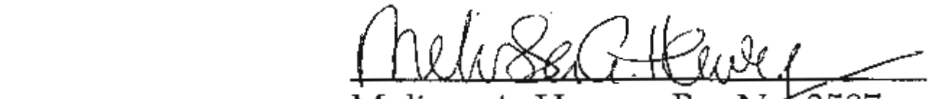

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