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March 18, 2022

By Email & Regular Mail

Advisory Committee on Professional Ethics
Attention: Carol Johnston, Committee Secretary
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 08625-0970
Comments.Mailbox@njcourts.gov

Re: Delaney v. Dickey, et al.
Notice to the Bar Dated February 11, 2022 (the Notice)

Dear Committee Secretary Johnston:

On behalf of Sills Cummis & Gross P.C. (Sills), and pursuant to the Notice, please accept these comments on the Report and Recommendations of the Advisory Committee on Professional Ethics (ACPE or Committee), dated January 18, 2022 (the R&R).

In Delaney v. Dickey, 244 N.J. 466 (2020), the Supreme Court of New Jersey, *inter alia*, ruled that an attorney-client retainer agreement may contain an arbitration provision governing both malpractice claims and fee disputes, provided the attorney "generally explain[s] to the client the benefits and disadvantages" of such a provision. Id. at 473. As guidance, the Court's opinion contained specific examples of appropriate disclosures, which the Court held may be "conveyed in an oral dialogue or in writing, or by both, depending on how the attorney best chooses to communicate it." Id. at 474. The Court asked the ACPE to "propose further guidance on the scope of an attorney's disclosure requirements." Ibid.

After receiving submissions from various interested parties, including Sills, the ACPE made two distinct recommendations. First, a majority of the ACPE recommended that the Court should reconsider permitting attorneys to include provisions in their retainer agreements that require the client to arbitrate future fee disputes or legal malpractice actions. Second, assuming the Court does not reconsider, the ACPE recommended a set of uniform written disclosures that the Committee believes would ensure that attorneys adequately explained any such arbitration provisions to clients.

As explained below, and with due respect to the ACPE, no reason exists for the Court to reconsider Justice Albin's comprehensive and unanimous decision in Delaney. Because it was not apparent from the Court's referral that it intended the ACPE to suggest that the Court reconsider the entire holding in Delaney, Sills did not comment on that holding when submitting its proposed disclosures to the Committee during the initial round of comments. We do so below in light of the ACPE's recommendation that Delaney's holding be jettisoned. As also explained below, assuming the Court does not reconsider its holding, we submit that the ACPE's proposed recommendations go too far in that they would unduly burden arbitration provisions in attorney-client retainer agreements, conflict with the decision in Delaney in several instances, and would prove unrealistic or unworkable in practice.

In contrast, the proposed disclosures that Sills provided to the ACPE, which Sills provides again here with only minor modifications after reading the R&R, strike the correct balance of providing adequate disclosure to clients without overly burdening arbitration of attorney-client disputes. The ACPE dismissed Sills' proposal, stating that "[t]he Committee found that the Sills Cummis & Gross proposal presented an overly favorable picture of the advantages of arbitration." R&R at 10. That is not so, as we hope will become apparent when the Court reviews Sills' proposed disclosures in their entirety, attached for the Court's convenience as Exhibit A.

I. THE DELANEY DECISION

As noted, in Delaney, 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.

The Court also held that, if the arbitration provision encompasses legal malpractice claims, that intent must be disclosed explicitly in the retainer agreement. Id. at 498. The Court, however, made "no value judgment whether a judicial or arbitral forum is superior in resolving a legal malpractice claim, for that is a determination to be made by the lawyer and client, after the lawyer explains to the client the differences between two forums so the client can make an informed decision." Id. at 494. In the same opinion, the Court also recognized the benefits of arbitration, explaining:

> To be sure, arbitration can be an effective means of resolving a dispute in a low cost, expeditious, and efficient manner. The parties may be afforded the opportunity to choose a skilled and experienced arbitrator in a specialized field to preside over and decide the dispute. And the proceedings may be conducted in a forum out of the public glare. Id. at 493.

Consistent with many seminal decisions of our highest state court, the justices in Delaney reached their holding only after surveying the law of various states, reviewing model guidance from the American Bar Association, considering the varying views of numerous New Jersey stakeholders in the form of amici briefs, and hearing extensive oral argument. The Court considered nearly every possible advantage and disadvantage of arbitration before ruling in favor of that form of dispute resolution, provided sufficient oral or written disclosures were given to clients. And, it almost goes without saying, that prospective clients always are free to reject an engagement letter that includes an arbitration provision and, in so doing, may then seek counsel from a wide population of skilled attorneys or firms who do not seek to resolve future disputes in such a forum.

II. THERE IS NO REASON TO "RECONSIDER" DELANEY

Against that backdrop, a majority of the ACPE's first recommendation is that the Court "reconsider" its holding in Delaney. Specifically, the ACPE urges the Court to repudiate its holding in Delaney by disallowing arbitration provisions in attorney-client retainer agreements. See R&R at 2-7. This identical argument was presented to the Court in Delaney and the Court flatly and correctly rejected it. The Court should do so again in response to the ACPE's recommendation.

As outlined above, after the Court granted Sills' petition for certification, Delaney attracted numerous amici and arguments both in favor of and against arbitration provisions in attorney-client retainer agreements. As the Court is aware, included were sweeping arguments seeking to prohibit all such agreements as a matter of public policy as well as arguments that would have barred agreements as presenting an inherent conflict of interest on the part of attorneys. The Court conducted oral argument, during which not only Sills and Mr. Delaney presented argument, but also the New Jersey State Bar Association, the Bergen County Bar Association, and the New Jersey Association for Justice (NJAJ).

The participation of the NJAJ is especially notable. It strongly presented its views to the Court in Delaney and was perhaps the firmest voice in favor of disallowing nearly all forms of arbitrations in the attorney-client setting. In an equally firm but fair voice, the Court rejected the NJAJ's arguments. Yet, as support for its surprise recommendation that the Court now abandon its holding in Delaney, the ACPE cites specifically to some of the very same, previously rejected arguments of the NJAJ. If the integrity of the judicial process and stability of our law are to mean anything, judicial decisions should not be so readily set aside by allowing one litigant that loses a policy argument before our state's highest court to suddenly win that same argument some fifteen months later.

As just indicated, for the past fifteen months Delaney has been the law in the State of New Jersey as binding precedent, and lower courts have been following it. See Kopec v. Moers, 2022 N.J. Super. LEXIS 3, at *19-20 (App. Div. Jan. 13, 2022); Micro Tech Training Ctr. v. DeCotiis Fitzpatrick & Cole, 2021 N.J. Super. Unpub. LEXIS 3159, at *5-8 (App. Div. Dec. 27, 2021) (both cases attached). The ACPE offers no special justification to depart from the holding in Delaney. See State v. Shannon, 210 N.J. 225, 227 (2021) (declining to alter relatively recent case law because Court did "not find sufficient support in the current record to establish the special justification needed to depart from precedent.") (internal quotations and citation omitted). That the ACPE simply disagrees with the decision in Delaney on policy grounds is insufficient under these circumstances to reverse the decision or even to reconsider it.

III. THE ACPE'S RECOMMENDATIONS GO TOO FAR

Next, assuming the holding in Delaney stands, the ACPE "suggests that lawyers who seek to include an arbitration provision in a retainer agreement do so in a separate rider with uniform language." R&R at 8. If the ACPE's specific language is adopted, however, the ACPE's recommendations may violate the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA), and/or the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -36 (NJAA). As the Court recognized in Delaney, "[t]he main thrust of the FAA, as well as the NJAA, is to ensure that states 'place arbitration agreements on equal footing with other contracts,' and do '[not] subject an arbitration agreement to more burdensome requirements than other contractual provisions.'" 244 N.J. at 494 (quoting Atalese v. U.S. Legal Servs. Gp., L.P., 219 N.J. 430, 441 (2014) (further quotation and citation omitted)). As Justice Albin noted in Delaney, there must be "uncompromising neutrality" towards arbitration agreements. See 244 N.J. at 495. Relatedly, both the FAA and the NJAA "enunciate federal and state policies favoring arbitration." Atalese, 219 N.J. at 440 (citation omitted).

The ACPE's recommendations, however, plainly fail to place arbitration provisions in attorney-client retainer agreements on equal footing with other contracts and would subject them to more burdensome requirements than other contractual provisions. As just one example, requiring a separate written rider including approximately ten separate boxes that the potential

client needs to check, and requiring the attorney to advise the prospective client of the opportunity to seek advice by independent counsel before execution, does not reflect uncompromising neutrality towards arbitration agreements in attorney-client retainer agreements. In short, the ACPE's recommendations, if adopted, likely would violate the FAA and the NJAA or at the very least, would almost certainly breed further litigation.

Beyond those global comments, Sills responds to the ACPE's General Guidance (R&R at 11-16) seriatim:

1. Separate Rider with Uniform, Comprehensible Language.

The ACPE recommends that the written disclosures be contained in a stand-alone document, separately signed by the client. While Sills believes that, on balance, written disclosures are better than oral disclosures to avoid future disputes (see Section IV., infra), the Delaney Court already decided that the disclosures could be made orally. See 244 N.J. at 497 ("Attorneys can fulfill that requirement in writing or orally -- or by both means.") Further, requesting that the client also sign the separate, stand-alone document is more burdensome than other contractual provisions and could violate the FAA and/or the NJAA.

2. Rider Should Include Check Boxes to Assist Client Comprehension.

The ACPE recommends that the written disclosures also contain check boxes. As noted, however, the Court has ruled that the disclosures could be made orally. See 244 N.J. at 497. Accordingly, the ACPE's recommendation requiring a writing with boxes checked should be rejected as inconsistent with Delaney. Moreover, requiring the prospective client to check boxes is more burdensome than other contractual provisions and could violate the FAA and/or the NJAA.

3. General Rider for Arbitration, with Specific Language for Disputes it Covers.

In accordance with Delaney, we believe it is necessary to disclose, either orally or in writing, that the arbitration provision covers fee disputes and claims for legal malpractice. As set forth on Sills' disclosure, attached as Exhibit A, Sills proposes the following language: "This retainer agreement contains a mandatory arbitration provision of all future disputes between the attorney and client. This includes, but is not limited to, claims of alleged legal malpractice against the attorney."

Sills does not believe that it is necessary to "describe the types of conduct that may give rise to malpractice claims or fees disputes," as the ACPE recommends and sets forth in its proposed Uniform Language. See R&R at 12 and 17. In the commercial setting, the Court has explained that arbitration agreements need not "list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168

N.J. 124, 135 (2001). We acknowledge that arbitration agreements in the attorney-client setting carry "heightened" professional duties on the part of the attorney, as compared to the typical commercial setting. See Delaney, 244 N.J. at 473. That said, Garfinkel's underlying logic should have equal application here. Namely, it should not be necessary to list or describe every imaginable form of conduct that could give rise to legal malpractice claims or fee disputes, assuming that even would be possible or practicable to do.

4. Opportunity for Independent Counsel to Review.

The ACPE recommends that the attorney advise the prospective client that he or she is able to consult with independent counsel before agreeing to the arbitration provision. See R&R at 12. The Court in Delaney, however, recognized the law in other jurisdictions that requires attorneys to advise their potential clients to seek the advice of independent counsel before signing a retainer agreement containing an arbitration provision. See 244 N.J. at 489. Yet, the Court did not mandate that attorneys provide this advice to their potential clients. Therefore, the ACPE's recommendation regarding independent counsel should be rejected as inconsistent with Delaney.

In addition, the ACPE notes that "[a] lawyer presenting an arbitration provision to a client at the initiation of representation is in a position of conflict with the client." R&R at 13. This statement fails to recognize, however, that several provisions in an attorney-client retainer agreement arguably put the attorney and client in conflict. For example, if the attorney proposes an hourly rate of $400 per hour, and the prospective client only wants to pay $300 per hour, that is a conflict. Similarly, if the attorney requests a monetary retainer as part of the engagement, and the client refuses to provide one, that is a conflict. The inclusion of an arbitration provision is no different than many other provisions in an attorney-client retainer agreement.

5. State Whether the Client May Reject the Arbitration Provision Yet Still Retain the Lawyer.

We believe that this disclosure is problematic generally and should not be included because such a requirement is not imposed on any other term in the engagement letter.

If, however, the Court is inclined to include this disclosure, the disclosure should be mutual. In other words, if the prospective client rejects the arbitration provision, the attorney may refuse to represent the client. There must be a meeting of the minds between the attorney and client that there will not be an arbitration provision in the retainer agreement.

6. Oral Discussion of Arbitration Rider is Required Unless Client is an Institution and/or a Client with a Legal Department.

This recommendation is too cumbersome and unworkable. Moreover, again, it requires both written and oral disclosures in certain instances, which the Court did not require in Delaney. In addition, whether a client is "an institution and/or a company with a legal department" is susceptible to differing interpretations. Such vagueness could lead to future litigation about whether oral disclosures were required on top of written disclosures. One set of disclosures—either oral or written—should be required in all cases.

7. Arbitration Provision Cannot Foreclose a Client from Choosing Fee Arbitration Before an Office of Attorney Ethics District Fee Arbitration Committee.

We agree and had included such language in our initial proposal to the Committee and include it here as well.

8. Arbitration Rider Must Specifically Exclude Any Prohibited Provisions that the Arbitration Forum May Offer; the Arbitration Must Be Governed by New Jersey Law.

We agree, of course, that an engagement letter cannot contain any terms that are contrary to law. Nor can attorneys be prohibited from including certain provisions in engagement letters if such prohibition is contrary to law. In any event, we have included in the attached proposed disclosures that the arbitration will be governed by New Jersey law.

9. Arbitration Rider Must Identify the Arbitration Forum and Provide the Rules and Procedures of the Forum.

We agree and have identified in our proposed disclosures the forum and the link to the forum's rules and procedures.

In sum, the ACPE clearly disagrees with the Court's holding in Delaney. But, respectfully, the ACPE is wrong. In Delaney, the Court carefully balanced the dictates of the FAA and the professional obligations of attorneys, producing a fair and practical result. The ACPE's onerous and impractical set of disclosures should not be permitted to upset that result. While some of the ACPE's recommendations make sense, we strongly disagree with many, particularly against the backdrop that arbitration provisions must be treated with uncompromising neutrality. There is no need to require the prospective client to check a long series of boxes or be advised of the opportunity to seek independent counsel to discuss the arbitration provision. Finally, requiring oral disclosures layered on top of written disclosures unless the client is an institution and/or has a legal department is vague and will create more problems than it hopes to solve.

IV. THE COURT SHOULD ADOPT SILLS' PROPOSED DISCLOSURES

Sills respectfully submits that, in deciding on any recommendations, the Court should bear in mind the realities of how the majority of attorney-client retainer agreements are currently being executed. Typically, retainer agreements are sent to clients by email or regular mail, with a covering communication inviting the client to review the agreement, call if the client has questions, and otherwise return the signed agreement to the attorney who sent it. In most instances, the client signs and returns the agreement, asking few or no questions. As was noted among the many arguments before the Court in Delaney, it is not the standard practice for lawyers to meet with clients in person and/or to explain the terms of a retainer agreement absent specific questions or concerns being raised. The Court appeared to recognize this reality by providing that attorneys could satisfy their disclosure obligations in written form only, without the need for in-person or telephonic meetings with clients.

We believe that it would be a service to the Bar if the Court built on its opinion in Delaney by mandating a set of specific written disclosures that an attorney could attach to the retainer agreement if it contains an arbitration provision. Consistent with Delaney, an attorney could choose to make these disclosures orally to the prospective client. The best practice, however, would be to include the disclosures in writing. The disclosures would set forth certain advantages and disadvantages of arbitration, consistent with Delaney. See 244 N.J. 472-73. To assist the Court in that effort, Sills attaches a proposed set of disclosures as Exhibit A.

We believe the attached disclosures comply with the requirements of Delaney by explaining certain advantages and disadvantages of arbitration, yet they do not unduly burden the arbitration provision contained in an attorney-client retainer agreement. By providing the client with these written disclosures, as opposed to oral ones, there should not be disputes about whether the attorney properly advised the client about the advantages and disadvantages of arbitration.

We thank the Court and the ACPE for considering this submission and respectfully request an opportunity to be heard by live testimony if the Court allows stakeholders to provide such testimony as part of its administrative rulemaking process.

Respectfully submitted,

/s/ Richard H. Epstein

Richard H. Epstein

Attachments

EXHIBIT A

PROPOSED DISCLOSURES FOR A MANDATORY ARBITRATION PROVISION

This retainer agreement contains a mandatory arbitration provision of all future disputes between the firm and you. This includes, but is not limited to, claims of alleged legal malpractice against the firm. Please be advised of the following benefits and disadvantages of arbitration:

1. **General Information.** As a general matter, arbitrations can resolve disputes efficiently, expeditiously and at a reduced overall cost. The parties to an arbitration have an opportunity to agree on a skilled and experienced arbitrator in a specialized field to preside over and decide the dispute outside the public spotlight. Those benefits should be weighed against certain limitations, such as a limitation on the exchange of information (called discovery), as well as payment of certain upfront costs. Also, as compared to an arbitration, the filing party in a civil lawsuit generally can proceed in the county where the party resides or where the firm is located, whereas in an arbitration the place of the arbitration is defined in the agreement. In a lawsuit, the case will be decided by a jury in open court and will be part of the public record, and the parties will have the right to an appeal, whereas arbitrations typically are held in confidence with limited right to an appeal. The following specific rules will apply to the arbitration to which you and the firm are agreeing:

2. **Waiver of Jury.** By agreeing to arbitrate, both the firm and you are waiving the right to a trial by jury in a courtroom open to the public, and the firm and you are giving up their right to seek relief in civil court except in very limited circumstances.

3. **Confidentiality.** The entire arbitration—including any claims the firm might have against you and any claims you might have against the firm—will be private and confidential as opposed to proceeding in civil court where the proceedings are held in an open courtroom, and the jury's verdict and award of damages is a matter of public record.

4. **Discovery.** The discovery process in an arbitration generally will be more limited than in civil court. For example, the numbers of depositions and other forms of discovery may be limited in an arbitration as compared to in civil court. This, however, has the benefit of reducing costs.

5. **Costs.** In arbitration, you as the client will be responsible to pay for some of the costs of the arbitration, including your share of the arbitrator's fees and the upfront costs of the arbitration, whereas in civil court the parties do not need to pay for the services of the judge other than certain filing fees. Arbitrators generally bill by the hour.

6. **Arbitrator's Decision.** The arbitrator's decision, which will be in writing, will be final and binding and neither party will be able to appeal the decision except in very limited circumstances.

7. **Selection of the Arbitrator.** The arbitration will be conducted by one impartial arbitrator (who may be a former judge, practicing attorney or person who is not an attorney), selected by mutual agreement or, if the firm and you cannot agree, the arbitrator will be selected in accordance with the rules governing the arbitration proceeding.

8. **Place of Arbitration.** The arbitration will take place in _____, New Jersey and the arbitrator will apply the substantive law of the State of New Jersey.

9. **Rules of Arbitration.** A copy of the rules that will apply to the arbitration proceeding can be found at [INSERT WEBSITE].

10. **N.J. Court Rule Fee Arbitration.** You shall retain the absolute right to proceed under the fee arbitration rules set forth in New Jersey Court Rule 1:20A, which take precedence.

If you have any questions or concerns about the arbitration process, you should raise them with the firm before executing this retainer agreement.

Kopec v. Moers

Superior Court of New Jersey, Appellate Division

December 13, 2021, Submitted; January 13, 2022, Decided

DOCKET NOS. A-2551-18, A-2552-18, A-2553-18, A-2554-18, A-2726-18, A-2731-18, A-2758-18, A-3579-18, A-4190-18, A-4191-18

Reporter

2022 N.J. Super. LEXIS 3 *; 2022 WL 120462

JAMES T. KOPEC, Plaintiff-Respondent, v. ANNA M. MOERS, Defendant.JOSEPH LOPRESTI, Plaintiff-Respondent, v. JENNIFER LOPRESTI, Defendant.RICK G. ZORN, Plaintiff-Respondent, v. CHRISTINA ZORN, Defendant.SAMUEL MCGEE, Plaintiff-Respondent, v. LILLIAN MCGEE, Defendant.SANDRA WEED, Plaintiff, v. LEROY WEED II, Defendant-Respondent.MARY DETER, Plaintiff, v. ROY L. DETER, Defendant-Respondent.KAREN PREVETE, f/k/a MENDIBURU, Plaintiff-Respondent, v. THOMAS MENDIBURU, Defendant.CHRIS DEFONTES, Plaintiff, v. NICOLE DEFONTES, Defendant-Respondent.CHRISTINE OSHIDAR, Plaintiff-Respondent, v. DARIUS OSHIDAR, Defendant.SUZZAN M. HEISLER, Plaintiff, v. ERIC HEISLER, Defendant-Respondent.

Subsequent History: [*1] Approved for Publication January 13, 2022.

Prior History: On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Sussex, Union, Morris and Burlington Counties, Docket Nos. FM-190423-15, FM-19-0177-16, FM-19-0063-14, FM-200815-15, FM-14-0311-16, FM-14-0691-16, FM-141312-04, FM-14-0753-13, FM-03-1029-12, and FM-03-1221-13.

Oshidar v. Oshidar, 2021 N.J. Super. Unpub. LEXIS 2551 (App.Div., Oct. 26, 2021)

Core Terms

arbitration, binding arbitration, uncontested, terms, summary judgment, Cases, arbitration provision, certified mail, fee dispute, regular, mailed, notice, divorce, former client, certification, consumer, unpaid, reconsideration motion, retainer agreement, sentence, motions, parties, assent, costs, arbitration clause, attorney's fees, outstanding, assigned, agreement to arbitrate, legal fees

Case Summary

Overview

HOLDINGS: [1]-R. 5:1-2 and 4:3-1 supported the conclusion that the Chancery Division, Family Part was not the proper forum to hear firm's fee-related issues because the contractual enforcement claims to collect unpaid legal fees did not arise out of a family or family-type relationship, nor were the firm's collection actions included in the case types listed in R. 4:3-1(a)(3) and (a)(4); [2]-Arbitration clause required that the client initiate fee arbitration pursuant to R. 1:20A-6, but such a mandate violated both the wording and intent of the rule;

plain language of the rule makes clear that it is the client who has the right to initiate fee arbitration proceedings; [3]-Given the confusing, contradictory and improper language included in the arbitration clause, the judges did not err in declining to compel the firm's former clients to submit to binding arbitration.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] **Appellate Jurisdiction, Final Judgment Rule**

Appeals are taken from orders and judgments and not from opinions, oral decisions, or reasons given for the ultimate conclusion. A trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning.

Family Law > Delinquency & Dependency > Delinquency Proceedings

HN2[] **Delinquency & Dependency, Delinquency Proceedings**

The appropriate forum for the commencement of a specific claim is established by the Rules of Court. *R. 5:1-2(b)*, *(c)* provide that juvenile delinquency actions and certain criminal and quasi-criminal actions are cognizable in the Chancery Division, Family Part. *R. 5:1-2(b)*, *(c)*.

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN3[] **Attorney Fees, Fee Agreements**

R. *4:3-1(a)(3)* reiterates the parameters for actions cognizable in the Chancery Court, Family Part set forth in *R. 5:1-2*. *R. 4:3-1(a)(1)-(4)* do not encompass actions to enforce retainer agreements.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] **Standards of Review, De Novo Review**

R. *4:46-2* provides that a court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An appellate court reviews a trial court's summary judgment determination de novo, applying the same legal standard that governs the trial court's review.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN5[] **Motion Practice, Content & Form**

Summary judgment requirements are not optional. Failure to file the required statement alone warrants denial of the movant's motion. The moving party is required not only to support the motion with a brief but also with a statement of those material facts which the movant asserts to be materially undisputed, set forth in separate numbered paragraphs, each with precise record references. Failure to comply with this requirement may result in dismissal of the motion without prejudice.

Legal Ethics > Client Relations > Billing & Collection

HN6[] **Client Relations, Billing & Collection**

Courts scrutinize contracts between attorneys and clients to ensure that they are fair. Agreements between attorneys and clients concerning the client-lawyer relationship generally are enforceable, provided the agreements satisfy both the general requirements for contracts and the special requirements of professional ethics. The agreement ordinarily controls unless it is overreaching or is violative of basic principles of fair dealing or the services performed were not reasonable or necessary.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN7[] **Attorney Fees & Expenses, Reasonable Fees**

A retainer agreement may not provide for unreasonable fees or for the unreasonable waiver of the clients' rights. Attorneys have never had the right to enforce contractual provisions for more than a fair and reasonable fee., A lawyer's bill for services must be reasonable both as to the hourly rate and as to the services performed. That is not only the lawyer's legal obligation but the lawyer's ethical one as well.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Legal Ethics > Client Relations > Attorney Fees > Excessive Fees

HN8[] **Attorney Fees & Expenses, Reasonable Fees**

Pursuant to *N.J. R. Prof. Conduct 1.5(a)*, the factors to be considered in determining the reasonableness of a fee include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Legal Ethics > Client Relations > Attorney Fees > Excessive Fees

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN9[] **Attorney Fees & Expenses, Reasonable Fees**

When an attorney seeks the entry of a judgment for unpaid fees, he or she must prove the reasonableness of the fees by a preponderance of the evidence pursuant to *N.J. R. Prof. Conduct 1.5(a)*. The attorney bears the burden of establishing the fairness and reasonableness of the transaction. Courts tasked with determining the reasonableness of fees must calculate the lodestar, which equals the number of hours reasonably expended multiplied by a reasonable hourly rate. It does not follow that the amount of time actually expended is the amount of time reasonably expended. Therefore, when calculating the lodestar, a trial court may exclude any excessive, redundant, or otherwise unnecessary hours spent on the case.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > Appeals > Standards of Review > De Novo Review

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

HN10[] **Contract Conditions & Provisions, Arbitration Clauses**

A retainer agreement may not provide for the unreasonable waiver of the clients' rights. When construing an arbitration provision of a contract, including one contained in a retainer agreement, a de novo standard of review is applicable and no special deference is owed to the trial courts' interpretation.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN11[] **Federal Arbitration Act, Arbitration Agreements**

The *Federal Arbitration Act (FAA), 9 U.S.C.S. §§ 1-16*, and the nearly identical *New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to 2A:23B-32*, enunciate federal and state policies favoring arbitration. The FAA requires courts to place arbitration agreements on equal footing with other contracts and enforce them according to their terms. A state cannot subject an arbitration agreement to more burdensome requirements than other contractual provisions. That said, the FAA permits states to regulate arbitration agreements under general contract principles, and a court may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of any contract.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN12[] **Arbitration, Arbitrability**

An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law. Mutual assent requires that the parties have an understanding of the

terms to which they have agreed. By its very nature, an agreement to arbitrate involves a waiver of a party's right to have his or her claims and defenses litigated in court. But an average member of the public may not know-without some explanatory comment-that arbitration is a substitute for the right to have one's claim adjudicated in a court of law.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN13[] **Arbitration, Arbitrability**

An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously. In choosing arbitration, consumers must have a basic understanding that they are giving up their right to seek relief in a judicial forum. Moreover, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum. Courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN14[] **Contract Conditions & Provisions, Arbitration Clauses**

An arbitration clause, at least in some general and sufficiently broad way, must explain that the consumer is giving up the right to bring his or her claims in court or have a jury resolve the dispute.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN15[] **Arbitration, Arbitrability**

No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights. Arbitration clauses will pass muster when phrased in plain language that is understandable to the reasonable consumer. New Jersey courts have upheld an arbitration provision that it found to be sufficiently clear, unambiguously worded, satisfactorily distinguished from the other agreement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate. By contrast, an arbitration provision that lacks clear and understandable plain language and does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law is unenforceable.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN16[] **Arbitration, Arbitrability**

A consumer cannot be required to arbitrate when it cannot fairly be ascertained from the contract's language that he or she knowingly assented to the provision's terms or knew that arbitration was the exclusive forum for dispute resolution.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN17[] **Arbitration, Arbitrability**

The procedure for arbitration of attorney's fees outlined in *R. 1:20A-1 to 1:20A-6* was implemented to promote public confidence in the bar and the judicial system. When a client requests fee arbitration, participation by the attorney is mandatory. *R. 1:20A-3(a)(1)*. Also, before an attorney can file suit against a client to recover a fee, the attorney must notify the client of the availability of fee arbitration by sending the client a pre-action notice.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN18[] **Arbitration, Arbitrability**

The plain language of *R. 1:20A-6* makes clear that it is the client who has the right to initiate fee arbitration proceedings conducted under Rule 1:20A. Stated differently, whether or not a fee dispute will be arbitrated pursuant to Rule 1:20A is a matter within the exclusive control of the client and the lawyer may not unilaterally invoke the binding arbitration technique of this rule.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN19[] **Arbitration, Arbitrability**

Although the attorney's retainer agreement may contain a provision for arbitration of fees under general arbitration law and practice, it will be enforceable only if it clearly states that: (1) the client has an absolute right to fee arbitration under R. 1:20A; and (2) explains all the consequences of an election to arbitrate.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN20[] **Arbitration, Arbitrability**

Citing the New Jersey Uniform Arbitration Act in a retainer agreement is not a substitute for clearly stating the consequences of an agreement to arbitrate disputes over legal fees because the potential effect of an agreement to arbitrate must be clear to the client to be binding upon him.

Counsel: Weinberger Divorce & Family Law Group LLC, appellant, Pro se (Jessica Ragno Sprague and Bari Z. Weinberger, on the briefs).

Respondents have not filed briefs.

Judges: Before Judges Messano, Rose and Enright.

Opinion by: ENRIGHT

Opinion

The opinion of the court was delivered by

ENRIGHT, J.A.D.

In these ten one-sided appeals, which we consider back-to-back and have consolidated for the purpose of writing a single opinion, appellant Weinberger Divorce & Family Law Group LLC (the firm), challenges the denial of its motions to enforce the terms of its retainer agreement (RA) to obtain a judgment against its former clients for unpaid fees, or alternatively, to compel the former clients to submit to binding arbitration to resolve the parties' fee disputes. We affirm.

I.

We briefly summarize the facts of each appeal to provide context for our decision.

A. The Retainer Agreements Executed in All Cases

[*2] The firm entered into written RAs with each client. Seven of the agreements, those executed in *Kopec, Lopresti, Zorn, McGee, Weed, Deter*, and *DeFontes*, are titled "Matrimonial Retainer Agreement." The three remaining agreements, executed in *Prevete, Oshidar*, and *Heisler*, are titled "Post-Judgment Retainer Agreement." Although titled differently, all agreements contain nearly identical language.

Paragraph One of the RA explains the hourly fee arrangement and discloses the hourly rates for attorneys and paralegals. Paragraph Two describes the legal services that the firm will provide. Paragraph Three requires an initial retainer payment, which "is not intended as an indication of the final costs of the proceedings." Paragraphs Four and Five require the client to pay various costs and disbursements, plus a monthly fixed office charge. Paragraph Six requires that the client submit payments within seven days of receipt of the invoices emailed monthly. Paragraph Seven explains that if a trial or hearing is needed, another retainer payment of $15,000 will be due thirty days before it begins. Paragraph Eight states that "[i]f no comment is received" from the client within two weeks of an invoice's receipt, it is "deemed correct . . . and accepted" by the client. Paragraph Eleven states that if **[*3]** the client does not pay an invoice in full within thirty days, "interest shall apply to any outstanding balance which shall be calculated at the rate of [eighteen percent] . . . per annum on the declining balance, or such higher rate as allowed by law on judgments."

We highlight more fully Paragraphs Fifteen and Seventeen of the RA, considering the issues raised on appeal. Paragraph Fifteen is titled "Attorney Withdrawal," and states:

> If the firm chooses not to exercise its option to withdraw in the event of any defaults to the Agreement, the firm does not waive its right to enforce any and all provisions of this Agreement. *If it becomes necessary to bring a lawsuit for collection of the amounts due us under this Agreement, you will also be responsible for our court costs and reasonable attorney's fees*. [(Emphasis added).]

Paragraph Seventeen is titled, "Arbitration of Differences Between the Client and the Firm," and provides:

> You agree that should *any* dispute between you and the firm arise as to its representation of you, *the matter shall be submitted to binding arbitration*. As such, *you agree to file the applicable papers with the appropriate Fee Arbitration Committee within 30 days* **[*4]** *of your receipt of a Pre-Action Notice* pursuant to R. 1:20A-6 in order to have such issue resolved in that forum. *Should you fail to submit the fee dispute to fee arbitration within the specified time, or should the Fee Arbitration*

Committee refuse to accept jurisdiction, or the differences between you and the firm involve a matter other than fees and costs, you or the firm may submit the dispute to binding arbitration governed by the New Jersey Uniform Arbitration Act, N.J.S.A. 2A:24-1 et seq. An arbitrator shall be chosen by consent or in accordance with N.J.S.A. 2A:24-5, the fees for which shall be an issue to be determined by the arbitrator. Any arbitrator award shall be confirmed by the Superior Court of New Jersey in accordance with N.J.S.A. 2A:24-8, and a judgment entered in accordance with N.J.S.A. 2A:24-2 & 10. Signing of this Agreement will be deemed your consent to the method of alternative dispute resolution set forth in this Section, and constitutes a waiver on your part and on the part of the firm to have such dispute(s) resolved by a court. [(Emphasis added).]

The final section of the RA states that by signing the RA, the client "acknowledge[s] the following":

a. you have fully read and understand the terms of this Agreement;

b. the terms and provisions of the Agreement have been fully explained **[*5]** to you to your satisfaction;

c. all of your questions about the Agreement have been fully and completely answered;

d. you have had sufficient time to consider all of the terms set forth in this Agreement, and that you acknowledge that you have the right to have this Agreement reviewed by another attorney outside of the firm prior to signing this Agreement;

e. you have the ability to and will fully and completely comply with the terms of this Agreement;

f. you specifically agree to the arbitration provisions, particularly the waiver of your right to submit any dispute between you and the firm to a court for resolution or trial by jury; and

g. you have been given a copy of this Agreement.

Attached to each of the Matrimonial RAs (versus the Post-Judgment RAs executed in *Prevete, Oshidar*, and *Heisler*), is a two-page document entitled, "DIVORCE - DISPUTE RESOLUTION ALTERNATIVE TO CONVENTIONAL LITIGATION [Text Promulgated 12/04/06 as Approved by the Supreme Court]." The document contains a section discussing arbitration, which states:

> In an arbitration proceeding, an impartial third part[y] decides issues in a case. The parties select the arbitrator and agree on which issues the arbitrator will **[*6]** decide. The parties also agree in advance whether the arbitrator's decisions will be binding on them or instead treated merely as a recommendation. While an arbitrator may decide issues within a divorce case, the judge would still make the final determination as to whether to grant the divorce.

B. The Pre-Action Notices of Fee Arbitration Sent in All Cases

Once a fee dispute arose in each of the ten cases before us, the firm mailed the client a pre-action notice (PAN) via regular and certified mail pursuant to *Rule 1:20A-6*. The PAN stated that the client owed the firm legal fees and that the firm would "place [the] account into suit" unless the client complied with the RA and paid the "total outstanding balance."

The PAN explained that if any outstanding fees were disputed, the client "ha[d] *the opportunity* to file for an arbitration hearing" with the District Fee Arbitration Committee by contacting them at the address or phone number provided. (Emphasis added). It emphasized that if the process was not initiated within thirty days, the client would lose the right to pursue this process.

Finally, it advised that if the firm did not receive notice that the client requested arbitration, it would " ***[*7]*** *have no alternative but to file a Complaint* for legal fees and costs outstanding in [thirty] days." (Emphasis added).

C. The Enforcement Motions Filed in All Cases

None of the ten clients requested fee arbitration with the District Fee Arbitration Committee. Consequently, in lieu of filing a complaint, the firm filed motions to enforce the RAs in the underlying matrimonial matters and sought entry of a judgment for the unpaid fees. Alternatively, the firm sought an order requiring it and the client "to attend binding arbitration governed by the *New Jersey Uniform Arbitration Act, N.J.S.A. 2A:24-1 et. seq.*, with an Arbitrator to be selected by the [c]ourt from the listed options provided by [the firm] respecting the parties' fee dispute, in accordance with paragraph 17 of the" RAs. The firm also sought an award of counsel fees.

In support of each motion, the firm submitted, among other proofs: (1) a certification from Bari Z. Weinberger, Esq.; (2) a copy of the PAN sent to the client; (3) a copy of the client's RA; and (4) copies of the client's itemized monthly billing invoices. It also submitted a memorandum of law arguing it was "entitled to summary judgment in the sum [owed by the client] together with contract interest and attorney's fees."

[*8] *D. The Unique Procedural Histories and Facts in Each Case*

1. The Sussex County Cases

a. Kopec v. Moers

In December 2017, the firm mailed James T. Kopec a PAN, via regular and certified mail, stating he owed the firm $3,814.71 as of November 30, 2017. In November 2018, the firm filed a motion to enforce the RA and certified that it served Kopec with the motion as required by *Rule 1:5-3*.

In December 2018, the judge assigned to the matter denied the uncontested motion without prejudice. Citing *Rule 5:1-2*, the judge rejected the firm's reliance on *Levine v. Levine, 381 N.J. Super. 1, 884 A.2d 222 (App. Div. 2005)*, to support its claim that the Chancery Division, Family Part should hear its motion. The judge observed that in *Levine*, the movant sought an attorney lien pursuant to *N.J.S.A. 2A:13-5*, whereas the firm did not seek such a lien against Kopec. Further, the judge concluded that an attorney fee award was "premature" because "a lawyer's fee must be reasonable" and a court must perform an analysis consistent with the *Rule of Professional Conduct (RPC) 1.5(a)* to make a fee determination.

The judge also cited to *Giarusso v. Giarusso, 455 N.J. Super. 42, 55, 187 A.3d 194 (App. Div. 2018)*, noting in that case, we held "[a] petition for fees is to be tried as a separate and distinct plenary action with the right to conduct discovery and a pre-trial conference." Additionally, the judge determined that although **[*9]** the dispute "may still be subject to arbitration," the law firm had "not cited to any case law in support of the enforcement of the arbitration clause and whether [it] conforms with the Supreme Court's holding in *Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 99 A.3d 306 (2014)*." The firm subsequently moved for reconsideration of the judge's ruling, and on January 25, 2019, the judge denied the uncontested reconsideration motion.

b. Lopresti v. Lopresti

In September 2018, the firm mailed Joseph Lopresti a

PAN, via regular and certified mail, stating he owed the firm $27,410.70 as of August 31, 2018. In November 2018, the firm moved to enforce the RA and certified it served Lopresti with the motion as required by *Rule 1:5-3*.

On December 7, 2018, the same judge assigned to the *Kopec* matter denied the uncontested motion without prejudice, for the same reasons he stated in *Kopec*. Two weeks later, the firm moved for reconsideration, and on January 25, 2019, the judge denied the uncontested reconsideration motion.

c. Zorn v. Zorn

On September 2, 2015, the firm mailed Rick G. Zorn a PAN, via regular and certified mail, stating he owed the firm $2,450.65 as of the date of the letter. In November 2018, the firm moved to enforce the RA and certified that it served Zorn **[*10]** with the motion as required by *Rule 1:5-3*.

On December 7, 2018, the judge previously assigned to the *Kopec* and *Lopresti* matters denied the uncontested motion without prejudice, for the same reasons he provided in the *Kopec* and *Lopresti* decisions. The firm's subsequent motion for reconsideration was denied on January 25, 2019.

2. The Union County Case

a. McGee v. McGee

In June 2018, the firm mailed Samuel McGee a PAN, via regular and certified mail, confirming he owed the firm $5,422.48 as of May 31, 2018. Approximately three months after it sent McGee the notice, the firm moved to enforce the RA. McGee filed a cross-motion, seeking dismissal of the motion on the grounds: (1) the motion was improperly venued; (2) it violated his attorney-client privilege; and (3) he signed the RA under duress. McGee sought to void the RA and requested $5,000 in punitive damages.

On October 29, 2018, the judge hearing the application denied the firm's motion, granted McGee's cross-motion to dismiss the firm's motion, and denied without prejudice his requests for punitive damages and to void the RA. The judge concluded the firm was not entitled to a judgment for the unpaid fees because although "there may not be a dispute **[*11]** over the amount of fees, there is a dispute of . . . material fact regarding the validity of the RA, what the parties agreed to when they signed it, and how that agreement should be interpreted."

Citing *Rule 4:3-1(a)(3)* and distinguishing *Levine, 381 N.J. Super. at 10*, the judge further concluded that the Family Part was an improper forum because the matrimonial action "is entirely irrelevant to the principle claim here, which is a contractual claim" that does not "arise out of a family type relationship." Consequently, it held that the Law Division should decide questions concerning enforcement of the RA and whether the matter should be referred to binding arbitration.

After the firm moved for reconsideration, McGee filed an untimely response, which the court did not consider. On January 4, 2019, the court denied the firm's reconsideration motion, concluding that since the Chancery Division, Family Part was an improper forum for the enforcement motion, the court lacked "jurisdiction to order the parties to attend binding arbitration to resolve the nonpayment of . . . fees."

3. The Morris County Cases

a. Weed v. Weed

In November 2016, the firm mailed LeRoy Weed II a PAN, via regular and certified mail, noting Weed owed the firm $6,005.38 **[*12]** as of October 31, 2016. The firm moved in October 2018 to enforce the RA and certified that it served Weed with the motion as required by *Rule 1:5-3*.

The following month, the judge assigned to the matter denied the firm's uncontested motion without prejudice, concluding that an attorney fee award was "premature" because the court must perform "an *RPC 1.5* analysis to make a fee determination" and fee petitions are to be tried as a plenary action. The judge also determined that although the dispute "may still be subject to arbitration," the firm had "not cited to any case law in support of the enforcement of the arbitration clause and whether [it] conforms with the Supreme Court's holding in *Atalese*."

In December 2018, the firm moved for reconsideration, and the judge denied the unopposed motion on February 1, 2019, finding that while he agreed with the firm that the Chancery Division, Family Part was an appropriate forum for the motion, he could not "make necessary findings of fact and conclusions of law . . . to provide the basis for any fee award" and complete an analysis of the *RPC 1.5(a)* factors, because the firm "failed to provide any certification of services or otherwise address any of the factors." Also, the judge **[*13]** reiterated that the firm failed to establish the arbitration clause complied with *Atalese*.

b. Deter v. Deter

On July 24, 2017, the firm mailed Roy L. Deter a PAN, via regular and certified mail, advising him that he owed the firm $7,610.96 as of June 30, 2017. In October 2018, the firm moved to enforce the RA and certified that it served Deter with the motion as required by *Rule 1:5-3*.

On November 30, 2018, the judge who had decided the enforcement motion in *Weed* denied the firm's uncontested motion against Deter without prejudice, applying the same analysis the judge set forth in *Weed*. Approximately two months later, the judge denied the firm's unopposed reconsideration motion.

c. Prevete v. Mendinburu

In February 2018, the firm mailed Karen Prevete a PAN, via regular and certified mail, stating she owed it $4,772.90 as of December 31, 2017. Approximately six months later, the firm moved to enforce the RA and certified that it served Prevete with the motion as required by *Rule 1:5-3*.

On October 29, 2018, the judge assigned to the matter denied the uncontested motion without prejudice, finding "an award of attorney's fees is premature" because "the [c]ourt must engage in an analysis as to whether [the requested fees] **[*14]** are reasonable" in "a separate and distinct plenary action with the right to conduct discovery and a pre-trial conference." Further, the judge concluded that ruling on the matter would not "serve the interests of judicial economy and efficiency" because other judges had presided over the underlying matrimonial action. On February 4, 2019, the judge denied the firm's uncontested motion for reconsideration.

d. DeFontes v. DeFontes

In July 2013, appellant mailed Nicole DeFontes a PAN, via regular and certified mail, informing her she owed the firm $9,210.01 as of June 29, 2013. The firm moved in October 2018 to enforce the RA and certified that it served DeFontes with the motion as required by *Rule 1:5-3*.

On December 10, 2018, the judge assigned to the case denied the firm's uncontested motion without prejudice. He concluded that "an award of attorney's fees is premature" because it "must determine [the fees] are reasonable" in a plenary action. Additionally, the judge found the firm "has not cited to any case law in support of the enforcement of the arbitration clause and whether [it] conforms with the Supreme Court's holding in *Atalese*." On April 2, 2019, the judge denied the firm's uncontested motion **[*15]** for reconsideration.

4. The Burlington County Cases

a. Oshidar v. Oshidar

In July 2018, the firm mailed Christine Oshidar a PAN, via regular and certified mail, advising her that she owed it $8,479.87 as of June 30, 2018. In January 2019, the firm moved to enforce the RA and certified that it served Oshidar with the motion as required by *Rule 1:5-3*.

On February 15, 2019, the judge assigned to the matter denied the uncontested motion, noting the firm sought, "in effect, [s]ummary [j]udgment per *R[ule] 4:46-2(c)*." The judge initially addressed the forum issue and concluded that none of the cases cited by the firm "provide[d] any legal support for the proposition that the Chancery Division, Family Part, has the authority under its [dissolution] docket number to decide a contractual matter between" the firm and its former client. The judge also rejected the firm's reliance upon *Levine, 381 N.J. Super. at 10*, as well as its reliance on other cases interpreting *N.J.S.A. 2A:13-5*, because the firm did not seek a lien against Oshidar. But the judge added that the firm "clearly has a remedy available to it by way of an appropriate Complaint in the Law Division."

Turning to the merits of the firm's motion, the judge found he could not "glean any sufficient factual or **[*16]** legal basis that would permit the [c]ourt to enforce the terms of the [RA] in general and the arbitration provision in particular." He expressed that he had "several concerns" about Paragraph Seventeen of the RA. Noting the title of this paragraph was "Arbitration of Differences Between Client and the Firm," the judge stated he was "unclear on the extent of the 'differences' subject to this arbitration process." Further, the judge observed that "[w]hile the [RA] specifically references the arbitration process, nowhere does it contain how non-fee 'differences,' for example, malpractice or other actions against the attorney[,] would be handled." The judge also stated he was "not aware of any statutory, case law, Court Rules, or other procedures requiring family law litigants to submit themselves to the binding arbitration process without their consent." Moreover, he found the "Fee Arbitration Committee is subject to a voluntary decision being made by the litigant," so that the RAs "mandatory requirement for . . . 'binding arbitration' does not appear to have any basis in the law."

The judge also analyzed Paragraph Seventeen against the legal framework set forth in *Kernahan v. Home Warranty Administrator of Florida, Inc., 236 N.J. 301, 199 A.3d 766 (2019)*, and *Atalese*. For example, **[*17]** he found that while the disputed arbitration provision in *Kernahan* "appeared on the last page of the contract . . . with the introductory paragraph of the provision . . . in bold print," the firm's binding arbitration provision appeared at the end of the RA without "bold or capitalized print." Additionally, the judge referenced the "obvious confusion" in the wording of Paragraph Seventeen, noting the first sentence requires "differences" to be submitted to binding arbitration, but the second sentence "talks about the fee arbitration process" before the District Fee Committee, and then the language that follows "turns back to binding arbitration under the *Uniform Arbitration Act*" without

giving the litigant the right "to choose arbitration under the Alternative Dispute Resolution Act if they choose to do so."

The judge concluded, too, that the firm's PAN added to the confusion created by the RA, as the last paragraph of the PAN provided:

> You will lose your right to initiate the arbitration action if you do not promptly communicate with the Fee Arbitration Secretary and file the approved formal request for fee arbitration within 30 days. I will have no alternative but to file a Complaint for Legal Fees and Costs Outstanding **[*18]** in 30 days if I have not received a notice that you have requested arbitration.

He explained that "the word 'Complaint'" "implies that some form of legal action would be filed in court and at that point the [former client] would have the opportunity to answer that Complaint and file any other appropriate actions."

The judge also expressed concern that in the certification provided by the firm, there were "no allegations relating to communications between [an attorney from the firm]" and the former client about "her right to seek adjudication of fee disputes by way of an action in the Law Division." Accordingly, the judge denied the firm's uncontested motion on February 15, 2019.

Subsequently, on April 26, 2019, the judge entered an order, denying the firm's uncontested reconsideration motion. He found the firm failed to provide "any additional factual and/or legal basis as to why the [c]ourt should reconsider the February 15 . . . [o]rder."

b. Heisler v. Heisler

In September 2018, the firm mailed Eric Heisler a PAN, via regular and certified mail, notifying him that he owed the firm $7,514.90 as of August 31, 2018. Roughly four months later, the firm moved to enforce the RA and certified **[*19]** that it served Heisler with the motion as required by *Rule 1:5-3*.

On February 15, 2019, the same day the judge denied the firm's enforcement motion on *Oshidar*, he denied the uncontested enforcement motion on *Heisler*, applying the same analysis in both cases. Thereafter, the firm moved for reconsideration of the February 15 order and the judge denied the uncontested motion.

On appeal, the firm presents the following arguments for our consideration:

> POINT I
> THE FAMILY PART IS THE APPROPRIATE FORUM TO HEAR ALL FEE[-]RELATED ISSUES.
>
> POINT II
> THE REQUEST FOR BINDING ARBITRATION SHOULD HAVE BEEN GRANTED IF THE TRIAL COURT WAS NOT GOING TO ENTER A JUDGMENT FOR FEES.[1]

In its supplemental briefs, the firm raises the following additional contentions:

> [THE CASE OF] *DELANEY V. DICKEY*[2] DOES NOT APPLY TO THIS MATTER
>
> A.) The prohibition against retroactive application prevents the application of *Delaney v. Dickey* to this matter.

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[1] In the *McGee* and *Prevete* appeals, the firm only advances the argument set forth in Point I.

[2] *244 N.J. 466, 472-73, 242 A.3d 257 (2020)*.

> B.) The terms of the [firm's RA] are factually different from those in *Delaney v. Dickey*.
>
> C.) This matter is distinguishable as the client[s] [were] not disputing the terms of arbitration.

We dispense with the firm's supplemental arguments first. In short, we agree with its position **[*20]** that the firm's former clients do not benefit from the new rule announced in *Delaney v. Dickey*, which requires an attorney to "discuss with the client the basic advantages and disadvantages of a provision in a retainer agreement that mandates the arbitration of a future fee dispute or malpractice claim against the attorney." *244 N.J. at 496*. Indeed, the *Delaney* Court made clear that its holding was to be applied prospectively, stating:

> Because the professional obligation we now impose may not have been reasonably anticipated and would unsettle expectations among lawyers, we apply this new mandate prospectively, with one exception. Applying the holding of our opinion here is "consistent with the usual rule that the prevailing party who brings a claim that advances the common law receive the benefit of his efforts." *See Estate of Narleski v. Gomes, 244 N.J. 199, 204, 237 A.3d 933 (2020)*.
>
> [*Id. at 474*.]

Consequently, when determining the enforceability of the arbitration provisions contained in the firm's RA, the ordinary contract principles applicable to arbitration provisions in consumer and employment contracts apply, and the heightened *Delaney* standard does not.

HN1[↑] Regarding the firm's argument in Point I that certain trial courts erred in finding the Chancery Division, **[*21]** Family Part was not the proper forum to address its enforcement applications, we initially observe that "appeals are taken from orders and judgments and not from opinions, oral decisions, . . . or reasons given for the ultimate conclusion." *Hayes v. Delamotte, 231 N.J. 373, 387, 175 A.3d 953 (2018)* (quoting *Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199, 773 A.2d 706 (2001)*). "A trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning." *Ibid.* Thus, to the extent any trial courts denied the firm's enforcement motions and determined the Chancery Division, Family Part was not the proper forum for the firm's applications, we are persuaded that reasoning is not subject to appeal. Nonetheless, for the sake of completeness, and to provide guidance to attorneys who may seek to collect unpaid fees against former matrimonial clients, we briefly address the forum issue.

HN2[↑] "[T]he appropriate forum for the commencement of a specific claim is established by the Rules of Court." *Solondz v. Kornmehl, 317 N.J. Super. 16, 19, 721 A.2d 16 (App. Div. 1998)*. *Rule 5:1-2*, "Actions Cognizable," governs which actions are cognizable in the Chancery Division, Family Part. *Subsection (a)* of the Rule provides that "[a]ll actions in which the principal claim is unique to and arises out of a family or family-type relationship . . . shall be filed and heard in the Chancery Division, **[*22]** Family Part." *Subsections (b)* and *(c)* provide that juvenile delinquency actions and certain criminal and quasi-criminal actions are also cognizable in the Family Part. *R. 5:1-2(b)*, *(c)*.

HN3[↑] *Subsection (a)(3) of Rule 4:3-1*, "Divisions of Court; Commencement and Transfer of Actions," reiterates the parameters for actions cognizable in the Family Part set forth in *Rule 5:1-2*. *Rule 4:3-1(a)(5)* provides that "[a]ll actions in the Superior Court except those encompassed by *subparagraphs (1)*, *(2)*, *(3)*, and *(4)* hereof shall be filed and heard in the Law Division or the Law Division, Special Civil Part." *R. 4:3-1(a)(5)*. *Subparagraphs (1) through (4)* do not encompass

actions to enforce RAs. Thus, the plain language of *Rules 5:1-2* and *4:3-1* supports the conclusion that the Chancery Division, Family Part was not the proper forum to hear the firm's fee-related issues because the principal claims it asserted, i.e., contractual enforcement claims to collect unpaid legal fees, did not arise out of a family or family-type relationship, nor were the firm's collection actions included in the case types listed in *Rule 4:3-1(a)(3)* and *(a)(4)*.

We are cognizant that we held in *Giarusso, 455 N.J. Super. at 55*, "that a petitioning attorney may obtain a judgment against his or her client for the reasonable amount of unpaid legal fees in the underlying [divorce] action without filing a separate action in the Law Division." But we came to **[*23]** this conclusion before *Rule 4:3-1(a)* was amended and became effective on September 1, 2018.[3] In light of the 2018 amendment, only certain case types are to be heard in the Chancery Division, Family Part "as specified." Considering the revisions to the *Rule* and reading *subparagraphs (a)(1) through (a)(5)* in their entirety, we are persuaded the firm's applications, all of which were decided after September 1, 2018, should have been filed as complaints in the Law Division and heard in that part of the Superior Court.

Lastly, in Point II, the firm contends the judges who heard the enforcement motions erred by failing to compel the firm's former clients to submit to binding arbitration when the judges declined to enter a judgment for fees. Again, we disagree.

When the firm filed its motions to collect outstanding fees in these back-to-back matters, it included a memorandum of law with each application, arguing, in part, that the firm was entitled to summary judgment in the amount of the former client's outstanding fees, together with contract interest and attorney's fees. But the firm's summary judgment requests were procedurally deficient because the firm failed to file a statement of material facts with its applications, as required by *Rule 4:46-2(a)*.

Despite its flawed submissions, the firm contends on appeal **[*25]** that the *Kopec, Lopresti, Zorn, Weed, Deter, Defontes, Oshidar*, and *Heisler* matters were "clearly ripe for summary judgment" in its favor.

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[3] Based on the revised rule, *Rule 4:3-1(a)* was modified as follows: *subparagraphs (a)(1)*, *(a)(2)* and *(a)(3)* were amended, a new *subparagraph (a)(4)* was adopted, and former *subparagraph (a)(4)* was amended and redesignated as *subparagraph (a)(5)*. Notably, prior to the 2018 amendment, subparagraph (a)(3) read:

> Chancery Division - Family Part. All civil actions in which the principal claim is unique to and arises out of a family or family-type relationship shall be brought in the Chancery Division, Family Part. Civil family actions cognizable in the Family Part shall include all actions and proceedings provided for in Part V of these rules; all civil actions and proceedings formerly cognizable in the juvenile and domestic relations court; and all other actions and proceedings unique to and arising out of a family or family-type relationship.

However, post-amendment, subparagraph (a)(3) provides:

> Chancery Division - Family Part. All actions in which the principal claim is unique to and arises out of a family or family-type relationship . . . shall be filed and heard in the Chancery Division, **[*24]** Family Part. *Actions cognizable in the Family Part shall include all actions and proceedings referenced in Part V of these rules, unless otherwise provided in subparagraph (a)(4) of this rule*; all actions and proceedings formerly cognizable in the juvenile and domestic relations court; and all other actions and proceedings unique to and arising out of a family or family-type relationship.
>
> [*R. 4:3-1(a)(3)* (emphasis added).]

Alternatively, it argues that "if the trial court was not going to enter summary judgment on the fee issue, [it] should have referred the matter[s] to binding arbitration based upon the explicit terms of the [RA]." These arguments are unavailing.

"*Rule 4:46-2* *HN4*[↑] provides that a court should grant summary judgment when 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law.'" *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29, 666 A.2d 146 (1995)* (quoting *R. 4:46-2(c)*). An appellate court reviews a trial court's summary judgment determination de novo, "[a]pplying the same legal standard that governs the trial court's review." *Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582, 243 A.3d 633 (2021)*.

HN5[↑] "Summary judgment requirements . . . are not optional." *Lyons v. Twp. of Wayne, 185 N.J. 426, 435, 888 A.2d 426 (2005)*. "[F]ailure to file the required statement alone warrants denial of the movant's motion." *Ibid.; see* Pressler & Verniero, *Current N.J. Court Rules*, cmt. 1.2 on *R. 4:46-2* (2022) ("[T]he moving party is required not only to support the motion with a brief but also with **[*26]** a statement of those material facts which the movant asserts to be materially undisputed, set forth in separate numbered paragraphs, each with precise record references. Failure to comply with this requirement may result in dismissal of the motion without prejudice."). Since the firm failed to comply with the procedural requirements set forth in *Rule 4:46-2(a)*, we are convinced the judges hearing the firm's summary judgment applications committed no error by declining to grant summary judgment.

Moreover, even if the judges were able to look past the procedural defects accompanying the firm's summary judgment requests, we are persuaded the firm was not entitled to summary judgment as a matter of law in any of the cases, because the proofs it submitted were inadequate to permit a judge to determine whether the fees sought were reasonable.

HN6[↑] "Courts scrutinize contracts between attorneys and clients to ensure that they are fair." *Cohen v. Radio-Electronics Officers Union, Dist. 3, NMEBA, 146 N.J. 140, 155, 679 A.2d 1188 (1996)*. "Agreements between attorneys and clients concerning the client-lawyer relationship generally are enforceable, provided the agreements satisfy both the general requirements for contracts and the special requirements of professional ethics." *Ibid.* The "agreement ordinarily controls **[*27]** unless it is overreaching or is violative of basic principles of fair dealing or the services performed were not reasonable or necessary." *Gruhin & Gruhin, P.A. v. Brown, 338 N.J. Super. 276, 281, 768 A.2d 822 (App. Div. 2001)*.

HN7[↑] "A retainer agreement may not provide for unreasonable fees or for the unreasonable waiver of the clients' rights." *Cohen, 146 N.J. at 156*. "Attorneys have never had the right to enforce contractual provisions for more than a fair and reasonable fee." *American Trial Lawyers Asso. v. New Jersey Supreme Court, 126 N.J. Super. 577, 591, 316 A.2d 19 (App. Div.)*, *aff'd.*, *66 N.J. 258, 330 A.2d 350 (1974)*. "A lawyer's bill for services must be reasonable both as to the hourly rate and as to the services performed. That is not only the lawyer's legal obligation but [the lawyer's] ethical one as well." *Gruhin, 338 N.J. Super. at 280*.

HN8[↑] Pursuant to *RPC 1.5(a)*, "[t]he factors to be considered in determining the reasonableness of a fee include":

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional **[*28]** relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent.

HN9[] When an attorney seeks the entry of a judgment for unpaid fees, he or she must prove the reasonableness of the fees by a preponderance of the evidence pursuant to RPC 1.5(a). Cohen, 146 N.J. at 156 ("[T]he attorney bears the burden of establishing the fairness and reasonableness of the transaction."). Courts tasked with determining the reasonableness of fees must calculate the "'lodestar,' which equals the number of hours reasonably expended multiplied by a reasonable hourly rate." J.E.V. v. K.V., 426 N.J. Super. 475, 493-94, 45 A.3d 1001 (App. Div. 2012) (quoting Yueh v. Yueh, 329 N.J. Super. 447, 464, 748 A.2d 150 (App. Div. 2000)).

"It does not follow that the amount of time actually expended is the amount of time reasonably expended." Rendine v. Pantzer, 141 N.J. 292, 335, 661 A.2d 1202 (1995) (citation omitted). Therefore, when calculating the lodestar, a trial court may exclude any "excessive, redundant, or otherwise unnecessary" hours spent on the case. *Ibid.*

Here, we are satisfied the firm's certifications in support of its motions did not adequately address the factors under RPC 1.5(a). For example, the firm included one paragraph in each certification that generally explained the nature of the work performed and, in some cases, noted the results obtained, **[*29]** e.g., a final judgment of divorce. The certifications did not inform the court of the outcome of every motion filed. Moreover, the certifications did not address the fee customarily charged in the locality for similar legal services or offer any information regarding the experience, reputation and ability of the lawyer or lawyers who performed the services.

Furthermore, although the certifications set forth the total amount of money billed and the total number of hours expended on each case, the firm did not explain why the amount of time expended was reasonable and necessary given, for instance, the level of complexity of the issues presented. *Cf.* Gruhin, 338 N.J. Super. at 280 (finding that the petitioner's certification "assert[ed] that all of the services performed were both reasonable and necessary in representing [the] defendant in the litigation and complying with his instructions"). Because the firm failed to establish the reasonableness of the fees requested, we are persuaded the judges properly denied its requests for judgments against its former clients for unpaid fees. *See* id. at 281 (holding that even when an attorney-petitioner's motion for summary judgment on an unpaid fee claim is unopposed, the petitioner **[*30]** must still "meet a prima face test of fairness and reasonableness").

Similarly, we cannot conclude the judges erred in denying the firm the alternate relief it requested in its motions, i.e., to enforce the binding arbitration provision in the firm's RA.

HN10[] As we have discussed, "[a] retainer agreement may not provide for . . . the unreasonable waiver of the clients' rights." Cohen, 146 N.J. at 156. When "construing an arbitration provision of a contract," including one contained in an RA, a de novo standard of

review is applicable and "no special deference" is owed to the trial courts' interpretation. *Atalese, 219 N.J. at 445-46*.

HN11[↑] "The *Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16*, and the nearly identical *New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32*, enunciate federal and state policies favoring arbitration." *Id. at 440*. "The FAA requires courts to 'place arbitration agreements on equal footing with other contracts and enforce them according to their terms.'" *Id. at 441* (quoting *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*). "'[A] state cannot subject an arbitration agreement to more burdensome requirements than' other contractual provisions." *Ibid.* (quoting *Leodori v. CIGNA Corp., 175 N.J. 293, 302, 814 A.2d 1098 (2003)*). That said, "the FAA 'permits states to regulate . . . arbitration agreements under general contract principles,' and a court may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation **[*31]** of any contract.'" *Ibid.* (quoting *Martindale v. Sandvik, Inc., 173 N.J. 76, 85, 800 A.2d 872 (2002)*).

HN12[↑] "An agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" *Id. at 442* (quoting *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424, 24 A.3d 777 (App. Div. 2011)*). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." *Ibid.* "By its very nature, an agreement to arbitrate involves a waiver of a party's right to have [his or] her claims and defenses litigated in court." *Ibid.* (quoting *NAACP of Camden Cnty. E., 421 N.J. Super. at 425*). "But an average member of the public may not know - without some explanatory comment - that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." *Ibid.*

HN13[↑] "An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously." *Id. at 435*. "In choosing arbitration, consumers must have a basic understanding that they are giving up their right to seek relief in a judicial forum." *Ibid.* Moreover, "the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." *Id. at 445*. "[C]ourts take particular care in assuring the knowing assent of both parties to arbitrate, **[*32]** and a clear mutual understanding of the ramifications of that assent." *Id. at 442-43* (quoting *NAACP of Camden Cnty. E., 421 N.J. Super. at 425*).

In *Atalese*, the Court held that an arbitration provision in a consumer contract that "made no mention that [the] plaintiff waived her right to seek relief in court" was unenforceable. *Id. at 435-36*. *HN14*[↑] "[T]he clause, at least in some general and sufficiently broad way, must explain that the [consumer] is giving up [the] right to bring [his or] her claims in court or have a jury resolve the dispute." *Id. at 447*. *Cf. Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 138, 236 A.3d 990 (2020)* (holding that an arbitration provision in an employment contract complied with *Atalese* in that it "makes clear that the contemplated arbitration would be very different from a court proceeding" and evidenced a "meeting of the minds" as to the employee's "waiver of her right to pursue her age discrimination cause of action . . . before a judge or a jury").

HN15[↑] "No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." *Atalese, 219 N.J. at 444*. "Arbitration clauses . . . will pass muster when phrased in plain language that is understandable to the reasonable consumer." *Ibid.* Our courts have upheld an arbitration provision that it found to be "sufficiently clear, unambiguously worded, satisfactorily distinguished from the **[*33]** other

[a]greement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate." *Ibid.* (quoting *Curtis v. Cellco P'ship, 413 N.J. Super. 26, 33, 992 A.2d 795 (App. Div. 2010)*). By contrast, an arbitration provision that lacks clear and understandable plain language and "does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law" is unenforceable. *Id. at 446*.

HN16[↑] "A consumer cannot be required to arbitrate when it cannot fairly be ascertained from the contract's language that [he or] she knowingly assented to the provision's terms or knew that arbitration was the exclusive forum for dispute resolution." *Kernahan, 236 N.J. at 322*. In *Kernahan*, cited by the judge who presided over the motions in *Oshidar* and *Heisler*, the Court held that an arbitration provision in a consumer contract was unenforceable because "[t]he provision's language [was] debatable, confusing and contradictory - and, in part, misleading" and thus "fail[ed] to support a finding of mutuality of assent to form an agreement to arbitrate." *Id. at 308*. It concluded that "[t]he small typeface, confusing sentence order, and misleading caption exacerbate[d] the lack of clarity in expression" and found it "unreasonable to expect a lay **[*34]** consumer to parse through the contents of this small-font provision to unravel its material discrepancies." *Id. at 326*. "Because the contract contain[ed] material discrepancies that call into question the essential terms of the purported agreement to arbitrate," the Court held that "mutual assent [was] lacking," which rendered the agreement unenforceable. *Id. at 327*.

Here, the firm contends that the waiver language contained within Paragraph Seventeen is clear and unambiguous, and complies with *Atalese*. In support of this argument, it cites the following sentence from Paragraph Seventeen: "Signing of this Agreement will be deemed your consent to the method of alternative dispute resolution set forth in this Section, and constitutes a waiver on your part and on the part of the firm to have such dispute(s) resolved by a court." Although that sentence does address a waiver of rights, we are convinced Paragraph Seventeen, when read in its entirety, contains vague, confusing and misleading language which fails to satisfy the requirements of *Atalese* and *Kernahan*.

While the first sentence of Paragraph Seventeen requires that any disputes between the client and the firm be submitted to binding arbitration, nothing in Paragraph Seventeen **[*35]** or anywhere else in the RA details for the client's benefit "what arbitration is" or "how arbitration is different from a proceeding in a court of law" as is required by *Atalese, 219 N.J. at 446*. Furthermore, the second sentence of Paragraph Seventeen requires that the client initiate fee arbitration pursuant to *Rule* 1:20A. Such a mandate violates both the wording and intent of that *Rule*, as evidenced by its plain language, and case law interpreting it. Indeed, *Rule 1:20A-6* provides, in relevant part:

> No lawsuit to recover a fee may be filed until the expiration of the 30[-]day period herein giving Pre-Action Notice to a client; however, this shall not prevent a lawyer from instituting any ancillary legal action . . . . The notice shall specifically advise the client of the right to request fee arbitration and that the client should immediately call the secretary to request the appropriate forms; the notice shall also state that if the client does not promptly communicate with the Fee Committee secretary and file the approved form of request for fee arbitration within 30 days after receiving pre-action notice by the lawyer, the client shall lose the right to initiate fee arbitration.

HN17[↑] "The procedure for arbitration of

attorney's **[*36]** fees" outlined in *Rules 1:20A-1 to -6* was implemented to "promot[e] . . . public confidence in the bar and the judicial system." *Saffer v. Willoughby, 143 N.J. 256, 263, 670 A.2d 527 (1996)*. "When a client requests fee arbitration, participation by the attorney is mandatory." *Id. at 264*; *see also R. 1:20A-3(a)(1)* ("A fee dispute shall be arbitrated only on the written request of a client or a third party defined by *Rule 1:20A-2*."). Also, "[b]efore an attorney can file suit against a client to recover a fee, the attorney must notify the client of the availability of fee arbitration" by sending the client a PAN. *Saffer, 143 N.J. at 264* (citing *R. 1:20A-6*).

HN18[↑] Thus, the plain language of *Rule 1:20A-6* makes clear that it is the client who has the right to initiate fee arbitration proceedings conducted under *Rule* 1:20A. Stated differently, "[w]hether or not a fee dispute will be arbitrated" pursuant to *Rule* 1:20A "is a matter within the exclusive control of the client" and "[t]he lawyer may not unilaterally invoke the binding arbitration technique of this rule." Pressler & Verniero, cmt. 1 on *R. 1:20A-6*. Therefore, the language in Paragraph Seventeen of the firm's RA, mandating that its clients initiate fee arbitration pursuant to *Rule 1:20A-6*, is contrary to the *Rule* itself, and is unenforceable.

Paragraph Seventeen also contains confusing language to the extent it refers to an alternative **[*37]** forum for binding arbitration should the client fail to invoke the procedures set forth in *Rule* 1:20A, or if the Fee Committee declines jurisdiction. Again, without explaining the rules associated with this alternative forum or how it differs from a court proceeding, Paragraph Seventeen states that "you [the client] or the firm may submit the dispute to binding arbitration governed by the *New Jersey Uniform Arbitration Act, N.J.S.A. 2A:24-1 et seq.*"

HN19[↑] "[A]lthough the attorney's retainer agreement may contain a provision for arbitration of fees under general arbitration law and practice," as is the case in Paragraph Seventeen, "it will be enforceable only if it clearly states that[:(1)] the client . . . has an absolute right to fee arbitration under [*Rule* 1:20A;] and [(2)] explains all the consequences of an election to arbitrate." Pressler & Verniero, cmt. 1 on *R.* 1:20A; *see Kamaratos v. Palias, 360 N.J. Super. 76, 86-87, 821 A.2d 531 (App. Div. 2003)* (explaining that "an enforceable agreement should contain a clear statement that a client has an absolute right to proceed under *R.* 1:20A" and finding it inappropriate "to hold a client to the limited appealability of a commercial arbitration award, *N.J.S.A. 2A:24-8*, and a waiver of the right to a jury trial, without a clearer statement that the client understands those sequelae of an agreement to arbitrate.").

Here, the RA **[*38]** satisfies neither of the two requirements. First, nothing is mentioned about the client's "right" to *Rule* 1:20A fee arbitration; instead, Paragraph Seventeen portrays it as mandatory, thereby misleading the client. Second, as noted, the RA fails to "explain[] all the consequences of an election to arbitrate." Pressler & Verniero, cmt. 1 on *R.* 1:20A. *HN20*[↑] Citing the New Jersey Uniform Arbitration Act in the RA is not a substitute for "clearly stat[ing] the consequences of an agreement to arbitrate disputes over legal fees" because "[t]he potential effect of an agreement to arbitrate must be clear to the client to be binding upon him [or her]." *Kamaratos, 360 N.J. Super. at 87*.

Moreover, the waiver provision in the last sentence of Paragraph Seventeen is confusing and misleading. Indeed, it requires the client to consent to a singular "method of alternative dispute resolution set forth in this Section," despite describing two methods of alternative dispute resolution governed by different rules without explaining what either entails, namely: (1) fee arbitration before the District Fee Committee pursuant to *Rule* 1:20A; or, alternatively, (2) binding fee arbitration

governed by the New Jersey Uniform Arbitration Act.

Additionally, Paragraph Seventeen **[*39]** contradicts language appearing in Paragraph Fifteen, Attorney Withdrawal, which states, in relevant part: "If it becomes necessary to bring a lawsuit for collection of the amounts due us under this Agreement, you will also be responsible for our court costs and reasonable attorney's fees." Plainly stated, Paragraph Fifteen contemplates a collections action if a fee dispute arises, while Paragraph Seventeen requires the client and the firm to waive their rights to have fee disputes resolved by a court. We are satisfied this "material discrepanc[y]" between Paragraph Fifteen and Paragraph Seventeen "call[s] into question the essential terms of the purported agreement to arbitrate" and thus "fail[s] to support a finding of mutuality of assent." *Kernahan, 236 N.J. at 308, 327*.

Adding to the confusion, attached to the RA in those matters that are not post-judgment-related (i.e., all matters but *Prevete, Oshidar*, and *Heisler*) is a document entitled "DIVORCE - DISPUTE RESOLUTION ALTERNATIVE TO CONVENTIONAL LITIGATION," which discusses arbitration as an alternative to a trial. That document explains that, in the divorce context, arbitration is only binding if the parties so agree and the judge will "make the final determination." **[*40]**

The ordinary client may not be aware that there are two types of arbitration: binding (as contemplated in Paragraph Seventeen) and non-binding (as an option in the divorce matter itself). While the court has the final say in the divorce context, the same would not be true in the context of an arbitrated fee dispute. But the wording of the RA fails to support the conclusion that this distinction was presented to the firm's clients in clear and understandable terms.

Given the confusing, contradictory and improper language included in Paragraph Seventeen, we are convinced the judges did not err in declining to compel the firm's former clients to submit to binding arbitration. We hasten to add, however, that although Paragraph Seventeen of the RA is unenforceable, the balance of the RA is not rendered a nullity. Thus, striking Paragraph Seventeen's binding arbitration provision does not "defeat[] the primary purpose of the contract," *Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 33, 607 A.2d 142 (1992)*, i.e., the firm's provision of legal representation to the client in exchange for payment of reasonable fees and costs.

In sum, we perceive no basis to disturb the challenged orders denying the firm's enforcement motions, nor are we persuaded there is any reason **[*41]** to upset the orders denying the firm's reconsideration motions.[4]

To the extent we have not addressed any remaining arguments presented by the firm, we are satisfied they are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.

End of Document

[4] Although the firm included the trial courts' orders denying its motions for reconsideration in its notices of appeal, it failed to address in its briefs why the trial courts erred in denying its reconsideration motions. Therefore, the firm's appeals of the trial courts' orders denying reconsideration are deemed waived. *Sklodowsky v. Lushis, 417 N.J. Super. 648, 657, 11 A.3d 420 (App. Div. 2011)*; Pressler & Verniero, cmt. 5 on *R. 2:6-2*.

Micro Tech Training Ctr. v. DeCotiis Fitzpatrick & Cole

Superior Court of New Jersey, Appellate Division

November 3, 2021, Submitted; December 27, 2021, Decided

DOCKET NO. A-0143-20

Reporter
2021 N.J. Super. Unpub. LEXIS 3159 *; 2021 WL 6109382

MICRO TECH TRAINING CENTER INC. d/b/a EASTERN INTERNATIONAL COLLEGE and BASHIR MOHSEN, Plaintiffs-Appellants, v. DECOTIIS FITZPATRICK & COLE, LLP and CHASAN LAMPARELLO MALLON & CAPPUZZO, PC, Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8652-19.

Core Terms

retainer agreement, arbitration, legal malpractice claim, arbitration provision, subject to arbitration, malpractice

Counsel: Peter A. Ouda, attorney for appellants.

Wilson Elser Moskowitz Edelman & Dicker, LLP, attorneys for respondent Chasan Lamparello Mallon & Cappuzzo, PC (Thomas F. Quinn, of counsel; Susan Karlovich, of counsel and on the brief).

Judges: Before Judges Fisher, DeAlmeida and Smith.

Opinion

PER CURIAM

Plaintiffs Micro Tech Training Center, Inc. d/b/a Eastern International College and Bashir Mohsen (collectively Micro Tech) appeal from the August 20, 2020 order of the Law Division staying their legal malpractice action against defendant Chasan Lamparello Mallon & Cappuzzo, P.C. (Chasan), and compelling arbitration of their claims. We affirm.

I.

In 2015, Micro Tech, which operates a college in Jersey City, was sued by its landlord for early termination of its lease. Micro Tech countersued for constructive eviction and loss of revenue and retained defendant DeCotiis Fitzpatrick & Cole, LLP (DeCotiis) to provide legal representation in its dispute with its landlord.

On August 9, 2017, Micro Tech, at the urging of its in-house counsel, retained Chasan to replace DeCotiis as counsel in the dispute. Micro Tech's retainer **[*2]** agreement with Chasan provides in relevant part:

> 12. ARBITRATION. Should any differences, disagreements or disputes arise between us relating to your representation, we both agree to submit such differences, disagreements or disputes

to binding arbitration.

. . . .

(B) *Any Other Disagreements*. Should an issue arise between us as to fee dispute [sic] which the Fee Arbitration Committee declines to accept or involving any matter other than a fee dispute, the [sic] we both agree to submit the difference, disagreement or dispute to binding arbitration according to the *New Jersey Uniform Arbitration Act, N.J.S.A. 2A:24-1 et seq.* An arbitrator shall be chosen by consent of the parties or in accordance with *N.J.S.A. 2A:24-5*, the fees for which shall be an issue to be determined by the arbitrator. Any arbitration award shall be confirmed by the Superior Court of New Jersey in accordance with *N.J.S.A. 2A:24-8*, and a judgment entered in accordance with *N.J.S.A. 2A:24-10*.

By signing this Agreement you acknowledge you have an absolute right in the first instance (and obligation under this Agreement) to submit any fee disputes between us to the appropriate Fee Arbitration [C]ommittee for resolution, and should that method not be available, then you or we have the obligation to submit any fee or other dispute **[*3]** to binding arbitration as set forth in this Section 12B instead of submitting the difference, disagreement or dispute to resolution by the court or through trial by jury. By signing this Agreement you will be deemed to have given your consent to the Alternative Dispute Resolution mechanisms recited in Paragraph 12 and to waive the right to a trial.

Client initials signifying approval of this Section 12: [BM][1]

. . . .

13. AGREEMENT. You have read and agree to this Agreement. We have answered all of your questions and fully explained this Agreement to your complete satisfaction. You have been given a copy of this Agreement.

In 2019, Micro Tech filed a legal malpractice action in the Law Division against DeCotiis and Chasan. In lieu of filing an answer, Chasan moved for an order staying the complaint and compelling arbitration of Micro Tech's claims. Micro Tech opposed the motion, arguing: (1) that legal malpractice claims are not expressly identified in the retainer agreement as being subject to arbitration; and (2) the arbitration provisions of the retainer agreement are invalid because no representative of Chasan orally advised Micro Tech that its legal malpractice claims would be subject **[*4]** to arbitration.

The trial court granted Chasan's motion. In a written opinion, the court concluded that the phrase "any differences, disagreements or disputes arising between us relating to your representation" in the arbitration provisions of the retainer agreement plainly included legal malpractice claims. In addition, the court concluded that a specific reference to legal malpractice claims in the retainer agreement was not necessary to put Micro Tech, a sophisticated business with in-house counsel, on notice that those claims were subject to arbitration. The court noted that Micro Tech had the benefit of attorney review of the retainer agreement prior to consenting to its terms and that the arbitration provisions were initialed by Mohsen, a principal of Micro Tech.

An August 20, 2020 order stayed Micro Tech's legal malpractice action against Chasan and referred its

[1] Micro Tech concedes that the retainer agreement contains Mohsen's initials after paragraph 12 and does not dispute his authority to bind Micro Tech to the contract.

claims to arbitration.[2]

This appeal follows. Micro Tech repeats its arguments that the arbitration provisions in the retainer agreement did not put it on notice that legal malpractice claims were subject to arbitration and are unenforceable because Chasan did not advise Micro Tech orally or in a separate writing that its **[*5]** legal malpractice claims would be subject to arbitration.

II.

The holding in *Delaney v. Dickey, 244 N.J. 466, 242 A.3d 257 (2020)*, issued after the trial court's decision, resolves the issues raised in this appeal. In that case, the Supreme Court considered the circumstances in which an arbitration provision in a retainer agreement for legal services is enforceable with respect to legal malpractice claims. The Court's holding is unequivocal:

> We conclude that the professional and fiduciary obligation imposed on a lawyer by *RPC 1.4(c)* - to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" - requires that the lawyer discuss with the client the basic advantages and disadvantages of a provision in a retainer agreement that mandates the arbitration of a future fee dispute or malpractice claim against the attorney.
>
> [*Id.* at 496.]

Without having provided such advice, an attorney will be precluded from enforcing an arbitration provision in a legal retainer agreement when sued for legal malpractice. *Id. at 501*.

The Court was equally clear, however, that its holding would be applied prospectively:

> Because the professional obligation we now impose may not have been reasonably anticipated and **[*6]** would unsettle expectations among lawyers, we apply this new mandate prospectively, with one exception. Applying the holding of our opinion here is "consistent with the usual rule that the prevailing party who brings a claim that advances the common law receive the benefit of his efforts." See *Estate of Narleski v. Gomes, 244 N.J. 199, 204, 237 A.3d 933 (2020)*.
>
> [*Id.* at 474.]

Thus, apart from the retainer agreement signed by the plaintiff in *Delaney*, the Court's holding does not apply to retainer agreements, like the one signed by Micro Tech in 2017, executed prior to the Court's December 21, 2020 holding in *Delaney*.

Micro Tech does not, therefore, enjoy the benefit of the new rule announced in *Delaney* requiring an attorney to provide advice explaining arbitration provisions in a retainer agreement for legal services. As a result, the trial court correctly rejected Micro Tech's argument that its legal malpractice claims are not subject to arbitration because Chasan failed to explain the arbitration provisions of the retainer agreement.

The holding in *Delaney* also resolves Micro Tech's argument that the arbitration provisions are unenforceable because they do not specifically list legal malpractice claims as being subject to arbitration. The arbitration provision of the retainer agreement **[*7]** before the court in *Delaney* applied to "any dispute (including, without limitation, any dispute with respect to the Firm's legal services and/or payment by you of amounts to the Firm)" and "[a]ny disputes arising out of or relating to this agreement or the Firm's engagement

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[2] Micro Tech's claims against DeCotiis remain pending in the Law Division.

by you . . . ." *Id. at 475-76*. The agreement did not specifically mention legal malpractice claims as being subject to arbitration.

The Court held that "[t]he arbitration provision at issue in this case - on its face - would be enforceable if [it] were a typical contract between a commercial vendor and a customer." *Id. at 494* (citing *Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 444-45, 99 A.3d 306 (2014)*). The Court held that "if this were an ordinary commercial contract, the term 'any dispute' is broad enough to encompass a dispute about whether the attorney committed legal malpractice." *Id. at 498*. The only exception to this interpretation of the contract noted by the Court is the attorney's "fiduciary duty to make clear the retainer agreement's terms so that the meaning of those terms is readily apparent to the client." *Ibid.* However, as noted above, the Court held that the attorney's obligation to provide an explanation will be applied prospectively from the date of the issuance of its opinion in *Delaney*.

The terms of the Chasan **[*8]** retainer agreement with Micro Tech, applying the arbitration provisions to "any differences, disagreements or disputes arising between us relating to your representation" is as broad, and arguably broader, than the language found by the *Delaney* Court to apply to legal malpractice claims. Because the attorney advice obligation established in *Delaney* does not apply to the Micro Tech retainer agreement, its plain language is enforceable and requires arbitration of Micro Tech's legal malpractice claims.

To the extent we have not specifically addressed any of Micro Tech's remaining claims, including its contention that the pendency of its claims against DeCotiis should preclude arbitration of its legal malpractice claims against Chasan, we conclude they lack sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.[3]

Affirmed.

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[3] We offer no opinion with respect to whether a stay of Micro Tech's claims against DeCotiis, if requested by the parties, would be warranted.