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March 21, 2022

VIA EMAIL AND FIRST CLASS MAIL
Advisory Committee on Professional Ethics
Attention: Carol Johnston, Committee Secretary
Richard J. Hughes Justice Complex
P.O. Box 970
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Comments.Mailbox@njcourts.gov

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

Dear Committee Secretary Johnston:

Please accept these comments on behalf of the Bergen County Bar Association (BCBA) in response to the Notice seeking input from the Bar on the January 18, 2022 Report and Recommendations of the Advisory Committee on Professional Ethics (ACPE), which follows a referral to the ACPE by the New Jersey Supreme Court in *Delaney v. Dickey*, 244 N.J. 466 (2020). Pashman Stein represented the BCBA as Amicus Curiae before the Supreme Court in the *Delaney* case, and our Amicus brief, which more fully sets forth our position, is attached hereto as ***Exhibit A***.

As explained below, the BCBA disagrees with the ACPE majority's suggestion that the Supreme Court, after considering full briefing and argument, got it wrong and ought to reconsider its unanimous decision that with appropriate disclosures lawyers are permitted to include arbitration provisions in their engagement letters. The BCBA also disagrees with some of the majority's proposed disclosure requirements and suggested uniform language. The BCBA believes that the recommendations put forth by the ACPE majority impose requirements on lawyers beyond those contemplated by the *Delaney* Court's decision and cases from other jurisdictions that permit similar arbitration clauses, are contrary to customary practices in connection with the formation of the attorney-client relationship, and are so onerous that they would, in effect, eliminate the use of arbitration provisions in attorney engagement letters altogether.

Recommendation to reconsider the Delaney decision

In *Delaney*, the Supreme Court upheld the use of arbitration provisions in attorney-client engagement letters, both with respect to fee disputes and legal malpractice, provided that the lawyer adequately explains the provisions to the client either orally or in writing. 244 N.J. at 497. After having "set forth the rudimentary requirements expected of attorneys who include a provision in an engagement letter that mandates the arbitration of a future fee dispute or

malpractice action," the Court referred the issues in its opinion to the ACPE, finding that the issues "would benefit from further study and discussion." *Id.* at 498–99. The role of the ACPE, as contemplated by the Court, was "to make recommendations [] and propose further guidance on the scope of an attorney's disclosure requirements," *id.* at 499, not to second-guess the underlying decision of the Court to permit attorneys to include arbitration provisions in their engagement letters in the first place.

The BCBA respectfully submits that the Court's decision to allow disputes between attorneys and clients to be resolved by arbitration is adequately supported. That decision is grounded in this State's strong public policy favoring arbitration of disputes[1] and strikes the right balance between allowing parties the freedom to contract while protecting the fiduciary relationship between attorneys and clients by imposing upon attorneys the obligation to make the necessary disclosures to ensure that the client can make an informed decision and the client's interests are protected.

There is no court or ethics rule prohibiting lawyers from signing pre-dispute agreements to arbitrate with their clients. Indeed, many other jurisdictions allow for attorney-client arbitrations of both fee disputes and malpractice claims. *See, e.g*. *Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d 261 (Ct. App. 1997); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048 (D. Colo. 1991); *Henry v. Gonzalez*, 18 S.W.3d 684 (Tex. App.--San Antonio 2000, pet. denied); *Haynes v. Kuder*, 591 A.2d 1286 (D.C. 1991); *Davis v. Fenton*, 26 F. Supp. 3d 727 (N.D. Ill. 2014); *McDougle v. Silvernell*, 738 So. 2d 806 (Ala. 1999); *Woodroof v. Cunningham*, 147 A.3d 777 (D.C. 2016); *Mintz & Fraade, P.C. v. Beta Drywall Acquisition*, LLC, 59 So. 3d 1173 (Fla. Dist. Ct. App. 4th Dist. 2011); *Potier v. Morris Bart, L.L.C.*, 214 So. 3d 116 (La. Ct. App. 4th Cir. 2017); *Derfner & Mahler, LLP v. Rhoades*, 257 A.D.2d 431 (N.Y. App. Div. 1st Dep't 1999).

The American Bar Association (ABA) historically has championed arbitration as a means of resolving attorney-client disputes. Because of the ABA's efforts, many state and local bar associations have set up programs to provide such arbitrations, and it has led to mandatory fee arbitration programs. See Steven Quiring, *Attorney-Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements*, 80 Tex. L. Rev. 1213, 1216 (2002). In its Formal

[1] Both the FAA and New Jersey law strongly support arbitration of disputes. *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 85 (2002) (discussing "the well-recognized national policy and the established State interest in favoring arbitration"); *Southland Corp. v. Keating,* 465 *U.S.* 1, 10, (1984) (In enacting section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); *Frumer v. National Home Ins. Co.,* 420 N.J. Super. 7, 13 (App. Div. 2011) ("New Jersey law comports with its federal counterpart in striving to enforce arbitration agreements"); *see also* N.J.S.A. 2A:23B–1 to –32 (providing that an agreement to arbitrate is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract").

Opinion 02-425, Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims (ABA Opinion), the ABA held that a provision in an attorney engagement letter requiring "the binding arbitration of disputes concerning fees and malpractice claims" did not violate ABA Model Rule of Professional Conduct 1.4(b), "provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement."

The Court in *Delaney* cited extensively to that ABA Opinion, as well as a number of state bar advisory opinions reaching conclusions similar to those of the ABA in upholding the use of arbitration clauses. *Delaney*, 244 N.J. at 486-492. The Court considered and rejected the position that the ACPE now seeks to advance – that it is inappropriate for attorneys to have an arbitration clause in their engagement letters. That issue was briefed at length by parties and multiple amici, including the New Jersey Association for Justice, whose arguments opposing arbitration clauses was rejected by the Court. So, the Court's decision to permit arbitration clauses in attorney-client engagement letters is neither novel nor unique, as the ABA and various other jurisdictions have embraced the concept.

The majority of the ACPE's assertion that arbitration of disputes serves only the lawyers' own self-interests, which cannot be mitigated by disclosures to the client, is unfounded. Arbitration can be a beneficial tool to a client by allowing disputes to proceed in a more efficient and timely manner than its litigation counterpart. Less time, money, and resources are spent on extensive discovery, there is less formality in hearings and trials, and often times a resolution can be achieved faster. In fact, an attorney or law firm with financial resources facing a legal malpractice suit from an under-funded client might strategically decide to litigate in court and drag out the already protracted and expensive process in the hopes that the client cannot subsidize lengthy litigation. The confidential nature of arbitrations similarly might benefit clients who may prefer that the dispute not be publicly aired. The Supreme Court recognized all of those benefits to arbitration in *Delaney*:

> 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.

244 N.J. at 493.

There is also no evidence that arbitrations are skewed in favor of attorneys and contain pro-attorney bias. *See, e.g.* Alan Scott Rau, Resolving Disputes over Attorneys' Fees: The Role of Adr, 46 SMU L. Rev. 2005, 2057 (1993) (stating that "[t]he available figures hardly demonstrate

the existence of any systematic bias in favor of either clients or attorneys").[2] So the majority's contention that "an overwhelming majority of arbitrations are decided against the consumer" and the arbitrators are biased in favor of attorneys again lacks any support. Arbitrators are often retired judges, who have spent years on the bench deciding a diverse range of matters, including consumer actions or legal malpractice. Even if arbitrators are practicing attorneys, that does not, *ipso facto*, mean that they favor other lawyers who might have committed malpractice. The majority does not cite any support for the proposition that arbitrators are biased or incapable of resolving legal malpractice disputes or that the arbitration forum unfairly favors the attorneys. Indeed, the Supreme Court in *Delaney* 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." 244 N.J. at 294. It also bears mention that some of the arbitrators in the fee arbitration program proscribed by New Jersey's Court rules are lawyers and we are aware of no evidence suggesting that dispositions of those arbitrations are skewed in favor of lawyers.

Often times arbitrations and malpractice suits go hand-in-hand. For example, in *Saffer v. Willoughby*, 143 N.J. 256 (1996), the retainer agreement had two different methods to deal with fee and malpractice disputes and involved two separate actions for an incident that had both malpractice and fee dispute issues. The timing of the two actions did not align and the Supreme Court ultimately postponed the arbitration fee award until the related malpractice claim had concluded, noting that a malpractice claim could be a valid counterclaim to an attorney's claim for unpaid fees. But that case demonstrates the extent to which fee disputes and malpractice claims may be intertwined, and allowing one of those claims to be resolved through arbitration while prohibiting the other could cause unnecessary complications, delays, and confusion.

Last, but not least, the general concern expressed by some Committee members with respect to arbitration agreements for professional services permeating into other settings, like a doctor-patient relationship, is an illusory one. The courts of this State have upheld pre-dispute agreements to arbitrate claims of medical malpractice between doctors and patients, finding that there is "no inherent harm to the doctor/patient relationship that flows from the agreement to substitute one forum for another in the event of future claims." *Moore ex rel. Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.,* No. A-0683-11T1, 2013 WL 4080947, at *6 (N.J. Super. Ct. App. Div. Aug. 14, 2013); *Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C.,* 416 N.J. Super. 30, 40 (App. Div. 2010) (rejecting a per se ban on arbitration of medical malpractice claims). The same reasoning supports the Court's decision to uphold arbitration agreements in the attorney-client context.

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[2] Statistics from various jurisdictions are cited including New Jersey. OFFICE OF ATTORNEY ETHICS, SUP. CT. OF N.J., REPORT, STATE OF THE ATTORNEY DISCIPLINARY SYSTEM 132-34 (1990) (of 911 cases resolved through arbitration during 1990, fees were "upheld in full without any reduction" in 39.8% of the cases; in the remaining 60.2% of the cases the legal fees billed were reduced, by a total of 25.1% of the dollar amounts in dispute).

In sum, the Court has already ruled that attorneys may include arbitration provisions in their engagement letters. That decision is adequately supported, is in line with this State's strong public policy favoring arbitration and its already existing method of arbitrating attorney-client fee disputes. It further is in line with the ABA's strong endorsement of arbitration, and the ABA and many other states' acceptance of arbitration clauses in engagement letters provided there are adequate disclosures in place to protect the client – a rule that the Court has embraced and disclosures that the Court asked the Committee to propose. There is no reason to reconsider the Court's substantive ruling.

Guidance on the Scope of a lawyer's disclosure requirements and Uniform Disclosures

The BCBA generally agrees with the objective that the ACPE majority seeks to advance – that "the agreement must be presented in clear terms that the client can understand; it must be fair and reasonable to the client; [and] the client must provide informed consent in writing." That said, the majority's recommendations impose burdensome and impractical obligations upon lawyers, and, in the aggregate, cast arbitration in such a negative light that the inevitable consequence will be to discourage clients from agreeing to arbitration clauses and discourage lawyers from adding arbitration provisions to their engagement letters. That is not, we submit, what the Court had in mind when it referred the matter to the ACPE.

One of the key provisions proposed by the ACPE with which the BCBA disagrees is its sixth general guidance point calling for lawyers to "engage in an oral consultation with the client about the terms of the provision." As a preliminary matter, that requirement is irreconcilable with the *Delaney* decision itself given that the Court explicitly acknowledged that "attorneys can fulfill th[e disclosure] requirement in writing ***or*** orally – or by both means." *Delaney*, 244 N.J. at 497 (emphasis added). There is no reason to disturb the Court's finding that written disclosures, without an accompanying oral explanation, are sufficient.

More importantly, however, that recommendation ignores the practical considerations surrounding how attorneys and clients execute engagement letters. One of the principal arguments that the BCBA advanced before the Supreme Court, again as explained at length in the attached briefing (***Exhibit A***), was that a requirement that lawyers orally explain provisions of an engagement letter, including an arbitration provision, would be utterly inconsistent with the common practice of law firms and lawyers concerning the formation of the attorney-client relationship. Engagement letters are typically sent to clients by email or mail, with a cover-letter advising the client to review the agreement, to call if the client has any questions, and otherwise, to return the signed agreement to the attorney who sent it.

In most instances, the client simply signs and returns the agreement. It is not standard practice for lawyers affirmatively to explain any of the terms of an engagement letter unless the client specifically raises any questions or concerns. As amicus, the BCBA urged the Court to strike a fair balance between the need for disclosure and the Bar's need for practical and uncomplicated

processes for the submission and execution of engagement letter, a need that we believe can fairly be described as an essential lubricant to the business of law. The reality of how attorney-client engagement letters are executed, particularly now, in the age of COVID, with little face-to-face interaction, militates against imposing an affirmative obligation upon lawyers to follow every emailed or mailed engagement letter with a telephone call or in-person meeting for the purpose of explaining the terms of the arbitration provision, or any other provision for that matter.

It is significant that neither the ABA opinion nor any of the cases or bar association opinions discussed by the *Delaney* court contain a requirement that attorneys make the requisite disclosures both in writing and orally. Rather, the focus is on the substance of the disclosure, which the Court recognized entails "explain[ing] the advantages and disadvantages of arbitrating a future fee or malpractice action" and is done so "because of the substantial differences between adjudicating a dispute in a judicial and arbitral forum." *Delaney*, 244 N.J. at 491. The BCBA believes that so long as adequate disclosures are made (discussed below), the client is protected, without overburdening lawyers to make additional phone calls or set up meetings every time they send out an engagement letter. Such a requirement would unnecessarily complicate and delay the process, without adding much benefit, as the client already will have the disclosures in writing and have the option of asking questions.

The ACPE's fifth general guidance point – advising whether the client has the option of rejecting the arbitration provision yet still retain the lawyer – also is problematic. Such a requirement is not imposed on any other term in the engagement letter and for good reason. By its very nature, there is an inherent conflict between lawyer and client when effectuating the execution of an engagement letter. Undeniably, engagement letters have provisions that are designed to protect the lawyer or law firm in the conduct of the business of law. That includes everything from the retainer amount to hourly rate, to rate increases, to how work is handled, or on what grounds the agreement may be modified or terminated. The way to mitigate that tension is to demand – as the Court always has – plain language and a fair explanation of terms, not to alert the client as to whether or not any given term is negotiable.

If an attorney includes an arbitration clause in an engagement letter, presumably the attorney has done so to advance a perceived interest – to protect confidentiality, to ensure a streamlined adjudication, to have a say on who will preside over the matter or where the matter might be heard. Similarly, the inclusion of provisions requiring a client to pay a certain fixed sum as a retainer amount or a certain hourly rate are designed to protect perceived interests of the attorney. The truth is that in some instances the amount of retainers and even hourly rates are negotiable. And by not disclosing that such terms are negotiable the attorney, arguably, is subordinating the client's interests to those of the law firm. Yet, for obvious reason, there is no duty to advise a client in advance that a lesser retainer or a lower rate might suffice. Fortunately or unfortunately, the business of law is still a business and lawyers must be given leeway to operate their business in a way that does not self-sabotage an attorney-client relationship from the outset.

Consider the practical implications of a requirement that an attorney must advise a client whether he or she can reject the arbitration provision yet still retain the lawyer. If the provision does give the client that option, the client may seek out that attorney's advice as to whether to agree to arbitration. That puts the attorney in a position of conflict, unable to neutrally advise the client. The lawyer then must recommend that the client seek out advice of a second attorney for the sole purpose of evaluating whether to agree to the arbitration clause. On the other hand, if the arbitration provision explicitly advises a client that absent consent to arbitration, he or she cannot retain the attorney, it has the potential to negatively affect the client's perception of the lawyer and cause the client to question the attorney's insistence on such a provision. In either event, it complicates the process and causes confusion and delay. And it is unnecessary. Attorneys enter into engagement letters with clients multiple times a day, and although disclosures are important, the process itself must still be simple and expeditious.

Although the BCBA is not specifically opposed to the fourth general guideline requiring a provision that allows the client the opportunity to consult with independent counsel, inviting review by independent counsel could complicate the process by which the attorney client relationship is formed. For instance, it could lead to the independent counsel offering to accept the retention at a lower rate or with a lower required retainer, or without an arbitration agreement altogether. The BCBA does, however, recognize that such a requirement could be a means to mitigate the tension between the interests of lawyer and client at the inception of the relationship. Several jurisdictions have opted to include as part of the attorney's disclosure obligations the need to inform a client about the opportunity to seek independent legal advice, with some jurisdictions mandating consultation with independent counsel prior to signing an engagement letter. Although the Supreme Court in *Delaney* discussed some of these cases and their disclosure obligations, it did not specifically recommend consultation with a second attorney as one of the disclosure requirements like it did for some of the other terms. Presumably, the Court recognized the inherent conflict and potential tension that could arise when a client must seek advice from lawyer two to determine whether to retain lawyer one. On balance, we would submit that the mischief that such a requirement could cause outweighs the potential benefits. If, however, the Court were to mandate that clients be offered the opportunity to seek independent counsel then we believe that the mandate should apply to the entirety of the engagement letter and not single out the arbitration provision.

Last but not least, although a minor point, the BCBA disagrees with the ACPE's second general guideline requiring checkboxes next to each numbered paragraphs in the arbitration clause to assist with client comprehension. The reason that such a requirement is problematic is that not all attorneys may opt to have written disclosures. The Court in *Delaney* gave attorneys the option of fulfilling their disclosure obligations orally. *See Delaney*, 244 N.J. at 497. Would the obligation to have checkmarks next to each written disclosure then morph into an obligation by an attorney opting for oral disclosures to pause and obtain the client's verbal consent after listing each difference between arbitration and litigation? Although the BCBA believes it is unnecessary and

not utilized in other contexts, the checkbox requirement might be acceptable if the disclosures are uniform amongst lawyers – i.e., all disclosures are required to be in writing.

The BCBA, in concept, is not opposed to the remaining general guideline points proposed by the majority.[3] What is problematic, however, is the way the Committee has sought to implement those guidelines, as evident in the uniform language that is being proposed.

For example, the third guideline provides that the arbitration must specify the dispute that it covers. We understand that the guideline is meant to enforce the Court's directive that "if the retainer agreement intends to cover [legal malpractice], then the attorney must directly and clearly address the subject." *Delaney*, 244 N.J. at 498. But the Uniform Language proposed by the Committee does more than simply advise the client that arbitration would include any potential legal malpractice claims. Instead, it contains three paragraphs dedicated to describing all forms of potential legal malpractice and is written in a less than balanced fashion. The purpose of this provision should be to inform the client of the fact that legal malpractice claims would be subject to arbitration, not to list every possible action or inaction by a lawyer that might give rise to a malpractice claim.

Other provisions contained in the uniform language also raise concerns. For example, bullet point number three regarding waiver of the right to appeal informs a potential client that "[t]he outcome of arbitration is final and binding and there is no appeal to decide whether the arbitrator made mistakes or errors. If the arbitrator makes a mistake or error, there is no way to correct that mistake; the arbitrator's decision is final." That statement is not completely true. Although arbitration awards are difficult to overturn, they are not completely non-appealable. Rather, there are limited grounds provided for challenging arbitration awards, including corruption, fraud, partiality, misconduct, exceeding the arbitrator's powers, failing to follow procedures, or misapplying the law. N.J.S.A. § 2A:23A-13. So, although it is concededly difficult to overturn an arbitration award, the way the provision is written signals to a client that under no circumstances is an arbitration ever subject to review (even, for example, a mistaken application of the law), which is not accurate.

Bullet number five purports to advise the client about arbitration costs. It informs the client that whereas judges are free, arbitrators charge by the hour and the client may be partially responsible

[3] Excluding the requirements discussed above, the remaining general guidelines include: (1) Separate Rider with Uniform, Comprehensible Language; (3) General Rider for Arbitration, with Specific Language for Disputes it Covers; (7) Arbitration Provision Cannot Foreclose a Client from Choosing Fee Arbitration Before an Office of Attorney Ethics District Fee Arbitration Committee; (8) Arbitration Rider Must Specifically Exclude Any Prohibited Provisions that the Arbitration Forum May Offer; the Arbitration Must Be Governed by New Jersey Law; and (9) Arbitration Rider Must Identify the Arbitration Forum and Provide, by electronic link or otherwise, the Rules and Procedures of the Forum.

for an arbitrator's cost. It further tells the client if he or she does not have money and an attorney that he or she retains is unable to advance the costs of the arbitration, then the client could be foreclosed from pursuing a remedy altogether. Although there is nothing inherently untrue about the statements here, like some of the other provisions, the way that this is written is skewed toward discouraging arbitration. It draws attention only to the negative aspects of arbitration, such as the cost of the arbitrator's time, and fails to advise that arbitration is often a significantly cheaper alternative to litigation, given the limited discovery and streamlined hearing process.

Overall, the BCBA finds that the model proposed by the majority is not written from the standpoint that discusses both the benefits and drawbacks of arbitration in a neutral fashion. The BCBA believes that the model presented to the Committee by Sills Cummis & Gross (Sills) on February 11, 2021 contains adequate disclosures to apprise the client of the advantages and disadvantages of arbitration and informs the client of what rights they would be foregoing by agreeing to arbitration. A copy of Sills' Model Arbitration Agreement is attached hereto as ***Exhibit B***.

The BCBA believes that the Sills' model neutrally and accurately informs clients about arbitration, yet is simple and straight forward enough to enable attorneys to continue the streamlined and efficient process of entering into engagement agreements. That model is in line with the representative disclosures set forth in the ABA's opinion,[4] as well other bar association opinions and state cases that the Supreme Court relied on and discussed favorably in *Delaney*.

The Court in *Delaney* made clear that an attorney has a "duty to explain the benefits and disadvantages of a provision in a retainer agreement that binds the client to arbitrate a future fee dispute or legal malpractice action in a non-judicial forum." *Delaney*, *supra*, 244 N.J. at 471. The content of those disclosures should ensure that clients "have a basic understanding of the fundamental differences between an arbitral forum and a judicial forum in resolving a future fee dispute or malpractice action." *Id.* at 473. The guidelines and proposed uniform language developed by the ACPE goes far beyond those intended goals and has the effect of discouraging arbitration, overcomplicating the process, and potentially sabotaging the attorney-client relationship from its inception. The BCBA urges the Court to reject the overly burdensome and

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[4] The ABA explained the disclosures that it deems appropriate:

> For example, the lawyer should make clear that arbitration typically results in the client's waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal. The lawyer also might explain that the case will be decided by an individual arbitrator or panel of arbitrators and inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration.
>
> Formal Opinion 02-425, Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims (ABA Opinion).

impractical disclosures recommended by the ACPE and instead to adopt the Sills' Model Disclosures to simplify the process while adhering to the spirit and substance of the *Delaney* Opinion and protecting clients' rights.

We thank the Court and the Committee consideration of the comments expressed herein.

Respectfully submitted,

/s/ Michael S. Stein

Michael S. Stein
Pashman Stein Walder Hayden, P.C., on behalf of the BCBA

EXHIBIT A

BRIAN DELANEY, Plaintiff-Respondent, v. TRENT S. DICKEY and SILLS CUMMIS & GROSS P.C., Defendants-Petitioners.	SUPREME COURT OF NEW JERSEY Docket No. 083440 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-1726-17T4 Civil Action Sat Below: Hon. Carmen H. Alvarez, P.J.A.D. Hon. Susan L. Reisner, J.A.D. Hon. William E. Nugent, J.A.D.

BRIEF OF *AMICUS CURIAE* BERGEN COUNTY BAR ASSOCIATION

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PRELIMINARY STATEMENT

This appeal - which concerns the adequacy and scope of disclosures in attorney retainer agreements - raises novel and significant issues that could substantially impact all New Jersey law firms and their attorneys, for whom the preparation of retainer agreements and their presentation to and execution by clients is a routine and essential occurrence.

The Appellate Division opinion has, as a matter of first impression, construed RPC 1.4(c) and 7.1(a) to retroactively impose disclosure obligations on law firms that have never been understood by the Bar to be required by those Rules.

The retainer agreement at issue in this case - signed by a sophisticated and litigious client who has refused to pay nearly half a million dollars in billed legal fees - was a standard and unremarkable agreement, which contained an arbitration provision that informed the client, among other things, that he was waiving all rights to a jury trial. An addendum provided that all claims would be governed by the JAMS rules that the client could have accessed through a website link provided in the Addendum.

The Appellate Division invalidated the arbitration clause, finding that it violated the RPCs because the law firm had a duty to explain the arbitration clause - and, for that matter, other provisions -- to the client. Although the court acknowledged that the "explanation could be set forth in the retainer agreement," it

nevertheless faulted the firm for failing to explain the clause orally to the client. The Appellate Division further held that the reference in the arbitration clause to the JAMS rules and the web address where those rules could be accessed was insufficient; instead, the law firm should have provided the 33-page JAMS rules to the client, along with an oral explanation of those rules.

Those requirements have never been mandated by any rule or case law. Rather, the only disclosure required, until now, was the warning that an agreement to arbitrate would waive the client's right "to bring her claims in court or have a jury resolve the dispute," Atalese v. O.S. Legal Services Group, L.P., 219 N.J. 430 (2014), a disclosure included in the retainer agreement here. The effect of the Appellate Division's opinion was to create new, albeit amorphous disclosure requirements in attorney retainer agreements and apply them retroactively to the instant retainer agreement, and presumably to all existing retainer agreements between lawyers and their clients.

Amicus Bergen County Bar Association (BCBA) recognizes that a lawyer-client agreement mandating arbitration for disputes, including malpractice claims, may raise important questions about the extent of required disclosures. However, the imposition of any such disclosure requirements should occur prospectively, not retroactively, and only after appropriate determinations through the rulemaking process by the Professional Responsibility Rules

Committee, or such other body as this Court shall designate. Cf. Balducci v. Cage, No. 081877, 2020 WL 464933 (N.J. 2020) (delegating to newly established *ad hoc* committee responsibility for addressing ethical issues raised by the appeal.)

Amicus is especially concerned that the Appellate Division's opinion here, and portions of the Balducci opinion, are likely not consistent with the common practice of law firms and lawyers who typically mail or email retainer agreements to clients with a communication suggesting that the client call with any questions, or absent questions sign and return the agreement. The Appellate Division opinion was expressly critical of the law firm's failure to explain the arbitration clause and the JAMS rules and, more generally, its failure to provide an explanation of the terms of the retainer agreement. In Balducci, the Court noted that "[m]eaningful communication with the client and transparency are necessary for the client to make an informed decision." To the extent those observations imply that the Bar's customary practice in obtaining executed retainer agreements from clients may be inadequate, the Bar urges the Court to clarify its expectations prospectively through the rulemaking process. Because the process by which lawyers are retained is such a basic and recurring aspect of practice, the Bar needs clarity and guidance if the Court intends to impose new requirements on the Bar's existing and widespread methodologies.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

In September 2015, Sills Cummis & Gross P.C. (Sills) was consulted by Plaintiff Brian Delaney (Delaney) to consider representing him in two pending lawsuits with his business partners. (Aa6)[2] Although Sills' partner Trent Dickey initially was consulted, Sills' partner Thomas Della Croce met with Delaney on September 16, 2015 and presented him with a three-page Retainer Agreement. (Id.) That agreement's last clause was an Arbitration clause that stated that "any dispute with respect to the Firm's legal services and/or payment by you" would be "determined by Arbitration in accordance with the provisions set forth on attachment 1 to the retainer letter." (Aa7; Pa12)[3] The Arbitration clause stated that Delaney was waiving "any and all statutory and other rights that you may have to a trial by jury in connection with any such dispute, claim or controversy." (Id.) The clause also stated that "the decision of the Arbitrator will be final and binding and neither the Firm nor you will have the right to appeal such decision, whether in a court or in another arbitration proceeding." (Id.) The clause further informed Delaney that in

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[1] Because the facts and procedural history are inextricably intertwined, they are combined for ease of reference by the Court.

[2] Aa refers to the Appendix attached to the Defendants' Petition for Certification. The only document referenced by Aa citations in this brief is the Appellate Division's decision.

[3] Pa refers to the Plaintiff's Appendix on Appeal before the Appellate Division.

the event of an Arbitration he would "need to engage separate counsel to represent your interests and you would incur additional expense in connection with such arbitration." (Id.)

There was a one page attachment to the Retainer Agreement, entitled "Attachment 1 to Engagement Letter - Arbitration Provisions." (Pa13) That attachment noted that any disputes arising out of the engagement letter will be conducted "pursuant to the JAMS/Endispute Arbitration Rules and Procedures (JAMS Rules) then in effect." (Id.) In addition, the attachment stated that the Arbitration would 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. It also provided that "the Arbitrator will not award punitive damages to either party and we and the company will each be deemed to have waived any right to such damages." (Id.) The attachment also noted that "the award rendered by the Arbitrator may include the costs and expenses of arbitration, reasonable attorneys' fees and reasonable costs for expert and other witnesses." (Id.) The attachment stated that "the Arbitration proceeding will be confidential." (Id.)

The attachment included the website reference to the JAMS Rules but the JAMS Rules were not attached to the Retainer Agreement. (Aa8; Pa13)

Delaney, a prior felon, whom the Appellate Division described as a "sophisticated businessman," (Aa6) was told that Della Croce

would answer any questions he may have had about the retainer agreement. Delaney asked no questions, signed the agreement and gave Della Croce a check for $5,000 as a "consultation retainer" with the understanding that an additional $30,000 was to be paid to Sills if the Firm agreed to be substituted as counsel in the two pending cases involving Dickey and his partners. (Pa11; Aa9)

Subsequently, Sills expended substantial resources representing Delaney in two lawsuits, one in Morris County and one in Sussex County. Delaney decided to settle the Morris County lawsuit on the eve of trial and a settlement agreement, subject to further conditions, was placed on the record on April 27, 2016. (Pa31)

On July 21, 2016, after reaching final agreement on the settlement terms in the Morris County suit, Delaney terminated Sills without explanation, at which time there were unpaid invoices due to Sills amounting to $439,000. (Id.)

In August 2016, Sills initiated a JAMS Arbitration to recover the unpaid attorneys' fees and expenses after Delaney had declined the right to proceed under the Fee Arbitration Rules. (Pa32; Aa10) The JAMS Arbitration proceeded between August 2016 and September 2017, with the parties exchanging discovery and the Arbitrator resolving discovery disputes. (Pa33-34; Aa10) In September 2017, shortly before the Arbitration hearing was to commence, Delaney

filed a malpractice complaint against Sills, Petitioner Trent S. Dickey and others in the Essex County Law Division. (Pa34; Aa10)

The JAMS Arbitrator informed the parties that the Arbitration hearing on the fee dispute scheduled for October 10 - 12, 2017, would proceed notwithstanding the filing of a malpractice complaint. (Pa34; Aa10) Delaney then filed a new lawsuit in the Essex County Chancery Division seeking a stay of the JAMS Arbitration and seeking for the first time a judicial declaration that the Arbitration clause in the Retainer Agreement was unenforceable. (Pa15-21; Aa11)

In November 2017, the Trial Court in the Essex County lawsuit ruled that the Arbitration clause was valid and enforceable, and that Delaney was required to arbitrate his malpractice claim against petitioners. (Aa25) In August 2019, the Appellate Division reversed the Trial Court, determining that the Arbitration clause was unenforceable as violative of several rules of professional conduct.

In its opinion the Appellate Division was critical of the fact that Delaney had been provided with no information by Sills that would allow him to estimate the cost of the Arbitration. The court also noted that the JAMS Rules stated that "[e]ach party may take one deposition of an opposing party or of one individual under the control of the opposing party," with the need for additional depositions to be determined by the Arbitrator. (Aa20)

The court stated that while it was "not suggesting an attorney must explain the JAMS Rules to a prospective client", at least the 33 pages of rules should have been presented to the client with the Retainer Agreement. (Id.) The court also noted that JAMS Rule 24(g) permitted the Arbitrator to award attorneys' fees to the prevailing party. (Aa21) The Attachment to Sills' Retainer Agreement specifically authorized such an award by stating that the "award rendered by the Arbitrator may include the costs and expenses of Arbitration, reasonable attorneys' fees and reasonable costs for expert and other witnesses." The attachment also stated that the "arbitrator will not award punitive damages to either party" and that both parties will "be deemed to have waived any right to such damages."

The Appellate Division specifically found that the Retainer Agreement violated RPC 1.8(h)(1), which prohibits an attorney from making an agreement with a client that prospectively limits the attorney's liability to the client for malpractice. (Aa22) The court concluded that the fact that the Attachment to the Retainer Agreement included a waiver of punitive damages was a violation of that RPC.

In summarizing its holding, the Appellate Division stated the following:

> We do not hold that all Retainer Agreement clauses that mandate Arbitration of legal malpractice claims are per se invalid. Nor do we hold that the "reasonable

> explanation" required of an attorney by RPC 1.4(c) cannot be contained in the written Retainer Agreement. Rather, we hold that when an attorney incorporates by reference in a Retainer Agreement a document that contains material terms concerning mandatory arbitration of legal malpractice claims (the JAMS Rules), does not provide the incorporated document to the client, gives the client no explanation about material terms contained in the document, and asks the client to sign the Retainer Agreement without reading the incorporated documents, the Agreement runs afoul of the RPC and is invalid.

(Aa23)

This Court granted Sills' Petition for Certification.

LEGAL ARGUMENT

POINT I

NEW JERSEY LAW IN EFFECT WHEN THE RETAINER AGREEMENT WAS SIGNED DID NOT INFORM LAW FIRMS OF THE DISCLOSURE REQUIRED TO ENFORCE THE ARBITRATION CLAUSE IN THE SILLS' RETAINER AGREEMENT

Prior to the execution by Delaney of the Sills' Retainer Agreement, there were very few New Jersey cases that considered the disclosures required by lawyers who sought to enforce Retainer Agreements with clients requiring all disputes between them to be arbitrated. In an early decision, Daly v. Komline-Sanderson Engineering Corp., 40 N.J. 175 (1963), a case that was cited in the parties' appeal briefs but not mentioned in the Appellate Division's decision, this Court expressed a view favorable to the use of arbitration to resolve attorney-client disputes:

> Defendant contends the arbitration agreement is void because it invades our exclusive jurisdiction over practice of the law. We see no substance in this objection. We think we should encourage arbitration of

> disputes between attorney and client, and to that end should uphold an award in the absence of good reason to reject it. Whether an award in a dispute of this kind should be vulnerable on grounds which are not available in attacks on arbitration awards generally, we need not decide.

Id. at 177.

In Atalese v. U.S. Legal Services Group, L.P., supra, 219 N.J. 430 (2014), Plaintiff contracted with Defendant U.S. Legal Services Group (USLSG) for debt-adjustment services pursuant to a contract with an arbitration provision for the resolution of any disputes. The provision did not state that plaintiff waived her right to seek relief in court.

Plaintiff sued USLSG for violation of two consumer protection statutes, alleging that USLSG misrepresented that the $5,000 fee she paid to it was used to pay lawyers that had negotiated with her creditors, and failed to disclose that it was not licensed as a debt adjuster.

The Trial Court granted USLSG's motion to compel arbitration and dismissed the complaint. The Appellate Division affirmed, noting that the arbitration clause gave the "parties reasonable notice of the requirement to arbitrate all claims under the contract," and that plaintiff should have understood that "arbitration is the sole means of resolving contractual disputes." Id. at 438.

Reversing, the Supreme Court noted that the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, and its New Jersey counterpart, N.J.S.A. 2A:23B-1 to 32, articulate federal and state policies favorable to arbitration. The Court noted the FAA requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." Id. at 439 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. ____, ____, 131 S.Ct. 1740, 1745-46, 179 L.Ed.2d 742, 751 (2011)), and that therefore "a state cannot subject an arbitration agreement to more burdensome requirements than" other contractual provisions. Id. (quoting Leadori v. CIGNA Corp., 175 N.J. 293, 302 cert. denied 540 U.S. 938, (2003)). Nevertheless, the Court noted that 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." Id. at 441 (quoting Martindale v. Sandvick, Inc., 173 N.J. 76, 92 (2002) (quoting 9 U.S.C.A. §2)).

The Court emphasized that, in reaching its decision, it was not singling out arbitration clauses "for more burdensome treatment than other waiver-of-rights clauses under state law." . . . Nevertheless, "when a contract contains a waiver of rights - whether in an arbitration or other clause - the waiver must be clearly and unmistakably established." Id. at 444 (quoting

Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001)).

Applying neutral principles of contract law, the Supreme Court unanimously held that the Arbitration provision was unenforceable:

> Nowhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights. The contract states that either party may submit any dispute to "binding arbitration," that "[t]he parties shall agree on a single arbitrator to resolve the dispute," and that the arbitrator's decision "shall be final and may be entered into judgment in any court of competent jurisdiction." The provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law. Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights. The clause here has none of the language our courts have found satisfactory in upholding arbitration provisions - clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief.

Id. at 446 (emphasis added).

The only other reported New Jersey decision concerning the enforceability of an arbitration clause in a lawyer-client retainer agreement is Kamaratos v. Palias, 360 N.J. Super. 76 (2003). There, plaintiff and his wife, minority shareholders in a construction company, retained Attorney Frank Araps to represent them in a dispute with the majority shareholders. The retainer agreement included an arbitration clause that did not inform Kamaratos that he waived his right to sue in court, to a jury trial

and to appeal the arbitrator's decision. Nor did the clause specifically preserve his right to proceed under the Fee Arbitration Rule. R. 1:20A-2(b)(4).

About two years after retaining Araps, Kamaratos discharged him and retained new counsel. Araps, who was owed over $115,000 in fees, petitioned to establish an attorney's lien on the file. Kamaratos sought relief through the Fee Arbitration Committee process, but the Committee declined to hear the matter because of the amount in controversy. Araps moved to compel arbitration of the fee dispute, and the trial court granted the motion. Kamaratos appealed, contending that the arbitration clause in the retainer agreement was contrary to public policy and therefore unenforceable.

The Appellate Division reversed, concluding that the disclosures in the retainer agreement about the consequences of arbitration were inadequate:

> If [resolution by the Fee Arbitration Committee] is unavailable, we do not consider it appropriate to hold a client to the limited appealability of a commercial arbitration award . . . . Here, although the retainer agreement referred to the arbitration statute, it did not clearly state the consequences of an agreement to arbitrate disputes over legal fees. The potential effect of an agreement to arbitrate must be clear to the client to be binding upon him. Haynes v. Kuder, 591 A.2d 1286 (D.C. App. 1991) ("[W]hen a retainer agreement contains an arbitration clause, 'the attorney has the obligation to make full disclosure to the client of all the ramifications of an agreement to arbitrate, including eliminating the right to sue in court and have

a trial jury.'") Id. at 87 (quoting D.C. Bar Comm. on Legal Ethics Op. No. 190 (1988)).

Other authorities outside New Jersey also inform Amici's view on the prospective requirements for communicating to clients the consequences of an arbitration clause. For example, the American Bar Association's Standing Committee on Ethics and Professional Responsibility in February 2002 issued its Formal Opinion 02-425, entitled *Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims*. Referring to Rule 1.4(b) of the Model Rules of Professional Conduct (which is identical to New Jersey's RPC 1.4(c)), the Opinion states:

> Rule 1.4(b) requires the lawyer to "explain" the implications of the proposed binding arbitration provision "to the extent reasonably necessary to permit the client to make (an) informed decision" about whether to agree to the inclusion of the binding arbitration provision in the agreement. Depending on the sophistication of the client and to the extent necessary to enable the client to make an "informed decision," the lawyer should explain the possible adverse consequences as well as the benefits arising from execution of the agreement. For example, the lawyer should make clear that arbitration typically results in the client's waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal. The lawyer also might explain that the case will be decided by an individual arbitrator or panel of arbitrators and inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration.

The Formal Opinion concludes with the following statement:

> It is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that (1) the client has been fully

> apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law.

In addition to the ABA Standing Committee's Opinion, a number of other State Ethics Committees have issued opinions on the same issue. See Ariz. Ethics Op. 94-05, at 5 (Mar. 1, 1994) (requiring client's informed consent after full disclosure of advantages and disadvantages of arbitration); Tex. Ethics Op. 586, 72 Tex. B.J. 128, 129 (Prof'l Ethics Comm. 2009) (same); Cal. Ethics Op. 1989-116 (St. Bar. Comm. on Prof'l Responsibility & Conduct 1989), 1989 WL 253264, at *5) (same, but distinguishing to some extent between existing and prospective clients); Conn. Ethics Op. 99-20 (Bar Ass'n Comm. on Prof'l Ethics Jun. 22, 1999), 1999 WL 958027, at *2 ("With respect to arbitration clause[,] a lawyer will satisfy his ethical duty to [a] client by using plain and intelligible wording in the clause, by directing the client's attention to the clause, and by fairly answering any questions the client asks concerning the clause."); NYCLA Ethics Op. 723 (Cty. Lawyers' Ass'n Comm. Prof'l Ethics July 17, 1997), 1997 WL 419331, at *4 (stating that the attorney must "fully disclose[ ] the consequences" of the provision, and allow the client an opportunity to seek independent counsel); Okla. Adv. Op. 312 (Bar Ass'n Legal Ethics Comm. Aug.

18, 2000), 2000 WL 33389634, at *6 (same); Vt. Adv. Ethics Op. 2003-7, at 1 (Comm. Prof'l Responsibility 2003) (If client declines independent counsel, attorney must fully apprise client of advantages and disadvantages of binding arbitration and obtain client's consent in writing to inclusion of breaching arbitration clause.)

A number of out-of-state courts also have addressed the issue. Among the more significant cases is the Supreme Court of Louisiana's decision in Hodges v. Reasonover, 103 So.3d 1069 (La. 2012). In 2007, Plaintiffs hired the Reasonover law firm to sue MedAssets, Inc., a company to which Plaintiffs' company had sold its assets for cash and a portion of future sales of the acquired software. The retainer agreement provided for the law firm to be paid a reduced hourly rate in exchange for a contingent fee interest in the result. The agreement included the following arbitration clause:

> Any dispute, disagreement or controversy of any kind concerning this agreement, the services provided hereunder, or any other dispute of any nature or kind that may arise among us, shall be submitted to arbitration, in New Orleans, Louisiana. Such arbitration shall be submitted to the American Arbitration Association.

In 2009 the Retainer Agreement was revised and converted to a contingent fee agreement with no obligation for fees if the suit were unsuccessful. The original arbitration clause was retained, and the Agreement included the following language:

> Because this agreement involves the acquisition of an additional interest in your case, and your interests in this transaction are adverse to ours, you should review this agreement with independent counsel.

Id. at 1071. Plaintiffs' lawsuit was unsuccessful, and they sued the law firm for malpractice. Relying on the arbitration clause, the law firm moved to dismiss the malpractice claim. The District Court declined to enforce the arbitration clause because Plaintiffs were not represented by independent counsel when they signed the retainer agreement, and also because the court found that the arbitration clause was a prospective limitation of the firm's liability to a client for malpractice in violation of the Louisiana Rules of Professional Conduct. Id.

On appeal, the Louisiana Supreme Court affirmed the District Court's ruling that the arbitration clause was unenforceable, but on the ground that the Law Firm's disclosures to the client were inadequate. The court held that, "at a minimum, the attorney must disclose the following legal effects of binding arbitration, if they are applicable:

- Waiver of the right to a jury trial;
- Waiver of the right to an appeal;
- Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or Federal Rules of Civil Procedure;
- Arbitration may involve substantial upfront costs compared to litigation;

- Explicit disclosure of the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;

- The arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities;

- The client has the opportunity to speak with independent counsel before signing the contract.

Id. at 1077.

In Castillo v. Arrieta, 368 P.3d 1249 (Ct. App. N. Mex. 2016), the issue concerned the enforceability of an arbitration clause in a retainer agreement. The trial court enforced the agreement but the New Mexico Court of Appeals reversed, concluding that the attorney's disclosures to the client were inadequate:

> [F]or the purpose of obtaining informed consent, adequate communication will ordinarily include disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. Spencer v. Barber, 2013-NMSC-010, ¶34, 299 P.3d 388. At a minimum, the attorney should inform his client that arbitration will constitute a waiver of important rights, including, the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits.

Id. at 1257.

Similarly, in Snow v. Bernstein, Shur, Sawyer & Nelson, P.A., 176 A.3d 729, 737 (ME 2017), the critical issue also concerned the adequacy of the attorney's disclosure about the effect of the

arbitration clause. Affirming the trial court's refusal to enforce the arbitration clause, the Supreme Court of Maine observed:

> To obtain the client's informed consent, the attorney must effectively communicate to the client that malpractice claims are covered under the agreement to arbitrate. The attorney must also explain, or ensure that the client understands, the differences between the arbitral forum and the judicial forum, including the absence of a jury and such 'procedural aspects of forum choice such as timing, costs, appealability, and the evaluation of evidence and credibility.' Me. Prof. Ethics Comm'n, Op. No. 202.

Id. at 737; see also In re Pamela Godt, 28 S.W. 3d 732, 738-39 (Ct. App. Tex. 2000) (refusing to enforce under Texas Arbitration Act retainer agreement requiring arbitration of client's malpractice claim because client lacked independent counsel); Lawrence v. Walzer & Gabrielson, 207 Cal. App. 3d 1501, 1505-06 (Ct. App., 2d Dist. Cal.) (holding that retainer agreement arbitration provision stating "[i]n the event of a dispute between us regarding fees, costs or any other aspect of our relationship, the dispute shall be resolved by binding arbitration," did not adequately warn client that malpractice claims were required to be arbitrated).

Other out-of-state decisions have been more lenient in upholding arbitration clauses covering malpractice claims without mandating specific disclosures. See, e.g., Mt. Holyoke Homes, L.P. v. Jeffer, Mangels, Butler & Mitchell, 219 Cal. App. 4th 1299, 1310 (Ct. Appeal, 2d Dist. Cal 1013) (citing Powers v. Dickson, 63

Cal. Rptr. 2d 261 (Cal. App. 1992) and stating "Powers did not hold or suggest that an attorney has a duty to point out and explain to an existing client an arbitration provision in a new retainer agreement. In the circumstances of this case, we conclude that Defendants had no such duty); Powers v. Dickson, Carlson & Campello, 54 Cal. App. 4th 1102, 1115 (Ct. Appeal, 2d Dist. 1997) (upholding retainer agreement requiring that any dispute other than attorneys' fees be resolved by arbitration; concluding that arbitration clause unambiguously applied to malpractice claims, and counsel not required to inform client that right to jury trial was waived); Johnson, Pope, Bokor, Ruppel & Barns, LLP v. Forier, 67 So. 3d 315, 318-19 (Fla. 2011) (reversing trial court decision invalidating clause mandating arbitration of malpractice claims as against public policy and holding that client was a sophisticated businessman, clause was not unconscionable and attorney had no duty to "point out" arbitration clause to client); Haynes v. Kuder, 591 A.2d 1286, 1288, 1291 (D.C. App. 1991) (noting that retainer provision stated that firms policy is to resolve disputes through arbitration rather than court action and "any claim by the firm for unpaid fees and expenses, and any defenses to such a claim, whether based on a claim of inadequate representation or any other ground shall be resolved through arbitration . . ."; holding that agreement was enforceable and sufficiently apprised [client] that "she was relinquishing her right to sue in court - and hence

receive a jury trial - on any claim she might have had . . . for inadequate representation; Menche v. Meltzer, Lippe, Goldstein & Bratstone, 129 A.D. 3d 682 (N.Y. App. Div. 2d Dep't 2015) (holding that retainer agreement provision stating that parties agree to binding arbitration of "any dispute arising out of or relating to this agreement and/or legal services rendered hereunder" was "clear, explicit and unequivocal" and concluding that "legal malpractice and breach of fiduciary duty causes of action fall within the broad scope of this provision."); Broadcast News Networks, Inc. v. Loeb & Loeb, 834 N.Y.S. 2d 656 (App. Div. 2007) (same); Masso v. Loeb & Loeb, L.L.P., 796 N.Y.S. 2d 256 (App. Div. 2005) (same).

In the Appellate Division, Sills relied on a recent Third Circuit decision, Smith v. Lindeman, 710 Fed. Appx. 101 (2017) to establish that the Federal Arbitration Act (FAA) would preempt a New Jersey ethics determination that would prohibit attorney-client retainer agreements from including mandatory arbitration clauses. In that case, one of the plaintiff's four matrimonial attorneys sought arbitration of plaintiff's malpractice claim against him. The Agreement provided:

> Should any difference[ ], disagreement, or dispute between you and the Law Firm arise as to its representation of you, or on account of any other matter, you agree to submit such disagreements in binding arbitration.

It also stated that:

> [s]igning of this Agreement will be deemed your consent to the methods of alternative dispute resolution set forth in this Section, and constitutes a waiver on your part and on the part of the Law Firm to have such disputes resolved by a court which might include having the matter determined by a jury.

Id. at 103.

Plaintiff first contended that New Jersey law prohibits enforcement of arbitration clauses by attorneys confronted with a client malpractice claim. The court noted that no New Jersey decisions had taken that position, and that in any event the FAA would preempt a blanket prohibition of attorney-client arbitration clauses. Plaintiff also argued that because New Jersey's Rules of Professional Conduct (RPC 1.4(c)) require lawyers to "explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation," the explanation in her case was deficient because counsel failed to inform her specifically that malpractice claims had to be arbitrated. Id. at 104.

The Third Circuit explained that notwithstanding the preemptive effect of the FAA, "an arbitration provision may be set aside 'upon such grounds as exist at law or equity for the revocation of any contract.'" Id. at 103 (quoting 9 U.S.C. § 2). The court noted:

> This savings clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or

> that derive their meaning from the fact that an agreement to arbitrate is at issue.

Id. (quoting Doctor's Associates, Inc. v. Casarotto, 516 U.S. 681, 687 (1996)). The opinion observed that "[t]he Supreme Court has held that the FAA requires courts to put arbitration agreements 'on equal footing with all other contracts' and that they may not interpret state law differently in the context of arbitration." Id. at 104 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

Rejecting Plaintiff's objections and enforcing the arbitration clause, the Third Circuit found the arbitration clause to be "unambiguous," that it informed her that she waived the right to sue in court, and that it clearly was broad enough to cover malpractice claims:

> But the provision here makes plain that arbitration means giving up the right to have a dispute resolved by a judge and jury.
>
> . . . .
>
> Despite her contention that she did not give informed consent to the arbitration provision, Smith does not argue that it is too narrow to cover malpractice claims. Although she contends Calello should have used the word "malpractice" orally or in the agreement itself, she never claims not to have known malpractice claims would fall within the provision's definition.
>
> . . . .
>
> Although she claims her attorney failed to advise her of the arbitration provision's meaning, its language is unambiguous. And Smith never says what wasn't clear to her. Indeed, if the record suggests anything, it's that

she was aware of the arbitration provision's meaning and consequences.

Id. at 104-05; see also Smith v. Jenn Group, 737 F.3d 636, 642 (2013) (holding that State of Washington procedural unconscionability law precludes enforcement of arbitration clauses in attorney-client retainer agreements unless attorney provides "full disclosure" of provision to client, and holding that Washington rule does not violate Federal Arbitration Act or unduly burden arbitration.

That review of out-of-state cases demonstrates that the state of the law nationally is unsettled, with some state courts emphasizing the need for adequate disclosure of the effect of attorney-client arbitration clauses and other state courts permitting limited or no disclosure of the impact of arbitration.

POINT II

A. AMICUS IS CONCERNED THAT THE APPELLATE DIVISION'S DECISION AND THE COURT'S RECENT OPINION IN BALDUCCI V. CIGE MAY NOT BE CONSISTENT WITH THE BAR'S CURRENT PRACTICE CONCERNING SUBMISSION AND EXECUTION OF RETAINER AGREEMENTS

Amicus Bergen County Bar Association, reflecting the interests of its membership, believes the Court's disposition of this appeal should be informed by the clearest possible understanding of the Bar's current practice in obtaining executed retainer agreements from clients. Understandably, this is a routine and everyday occurrence for lawyers and law firms.

Typically, retainer agreements are sent to clients by email or regular mail, with a covering communication that invites 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, without asking any questions. To be clear, it is not standard practice for lawyers to explain the terms of an engagement letter absent specific questions or concerns being raised.

Both the Appellate Division's decision in this case, and this Court's opinion in Balducci v. Cige (A-84-18) (081877), include language implying that the Bar's current practice may not be appropriate. The Appellate Division Opinion states:

> We conclude that because Sills gave plaintiff no explanation about the retainer agreement's or arbitration provision's terms, did not provide plaintiff with the JAMS rules, provided no explanation about the JAMS rules, and watched plaintiff sign the agreement knowing he had not assented to the JAMS rules, this otherwise enforceable agreement runs afoul of two of the ethical rules governing the attorney-client relationship. Accordingly, we find the agreement invalid. (Slip Op. at 19)

In Balducci, supra., in the context of a discussion about retainer agreements in fee-shifting cases, the Court observed:

> Meaningful communication with the client and transparency are necessary for the client to make an informed decision (Slip Op. at 36).

Amicus appreciates that this Court's observation may have been confined to the context of contingent fee agreements in fee-

shifting cases. But the combined effect of both opinions is to raise concerns for practicing lawyers about whether the Bar's current practice for obtaining signed retainer agreements is consistent with the Court's expectations.

The out-of-state ethics opinions and decisions concerning retainer agreements with mandatory arbitration clauses imply that certain "non-standard" or "atypical" provisions in attorney-client retainer agreements may warrant special disclosures. In the event that is the conclusion of the Court, then the Balducci opinion, as well as the Appellate Division decision in this matter, prompt the need for guidance from the Court through prospective rulemaking identifying those non-standard retainer agreement provisions and providing guidance about the scope of disclosures that are ethically required of practitioners in order to ensure enforceability and ethical compliance. Until now, New Jersey courts have not set forth any concrete standard concerning the propriety and scope of disclosures, and the Appellate Division's opinion in this case muddied the waters by pronouncing requirements that are unclear and inconsistent. That is why clear guidance is needed from this Court that strikes a fair balance between the need for disclosure and the Bar's need for practical and uncomplicated processes for the submission and execution of retainer agreements.

B. AMICUS BERGEN COUNTY BAR ASSOCIATION IS SUPPORTIVE OF REASONABLE DISCLOSURE REQUIREMENTS CONCERNING ARBITRATION CLAUSES IN RETAINER AGREEMENTS THAT APPLY PROSPECTIVELY AND ARE ADOPTED THROUGH THE RULEMAKING PROCESS

In Balducci v. Cige, (A-54-18), decided January 29, 2020, the Supreme Court observed in an opinion reviewing the enforceability of an attorney's retainer agreement relating to a lawsuit pursuant to the Law Against Discrimination, that "this Court generally establishes professional standards governing attorneys through the rulemaking process." (Slip Op. at 41) As emphasized in Point III of our brief, Amicus BCBA strongly disagrees with the Appellate Division's retroactive application of new standards governing lawyers and law firms in the case at bar. In our view, that aspect of the Appellate Division's opinion is unfair to the Bar and constituted an unwarranted departure from the prior process used to establish professional standards for the Bar.

Nevertheless, the BCBA recognizes the need for prospectively applied Rules that require reasonable disclosures to clients presented with Retainer Agreements that include mandatory arbitration clauses. In its view, any such prospective disclosure requirements should be capable of being satisfied by explanations included in the retainer agreement itself. The BCBA respectfully submits that the examples of disclosure set forth in the February 2002 Formal Opinion of American Bar Association's Standing Committee on Ethics and Professional Responsibility provide a

useful example of the balance to be struck between appropriate guidance to the bar and protection to the public. That Opinion states:

> For example, the lawyer should make clear that arbitration typically results in the client's waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal. The lawyer also might explain that the case will be decided by an individual arbitrator or panel of arbitrators and inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration.

It also would seem appropriate to impose an additional disclosure setting forth the nature of the claims covered by the arbitration clause, such as fee disputes and malpractice claims. A statement that the arbitration clause does not preclude a client's access to the Fee Arbitration procedure authorized by R. 1:20A might also be constructive. Amicus is confident that the Rulemaking process authorized by this Court will consider carefully the balance to be struck between the legitimate needs of clients asked to sign retainer agreements with arbitration clauses and the interests of the Bar in including such clauses in Retainer Agreements without being required to provide clients with warnings so complex or alarming as to render the document unduly perplexing and unreasonably discourage their acceptance.

POINT III

THIS COURT'S HOLDING CONCERNING THE SCOPE OF APPROPRIATE DISCLSOURE REQUIREMENTS EMBEDDED WITHIN THE RULES OF PROFESSIONAL CONDUCT SHOULD BE APPLIED PROSPECTIVELY

As set forth at length in Point I, supra, little guidance exists in New Jersey that informs attorneys of the appropriate scope of disclosure requirements that must be communicated to clients in connection with an arbitration clause in a retainer agreement. Other states' ethics opinions and decisions are informative, but they too vary on the requirements deemed adequate for communicating to clients the consequences of an arbitration clause. To the extent that this Court clarifies RPC 1.4(c) and 7.1(a) to impose certain disclosure requirements for arbitration of client disputes, that holding should receive prospective application and should not, as the Appellate Division did, retroactively invalidate the arbitration clause in Sills' retainer agreement with Delaney.[4]

"[A]ppellate courts in this State and elsewhere have long regarded themselves as empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness

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[4] Although it is Amicus's position that the Appellate Division wrongfully invalidated the Arbitration clause, Amicus agrees that guidance is needed on whether the Arbitration clause may permissibly encompass a waiver of punitive damages and prospective fee shifting.

and justice, related to reasonable surprise and prejudice of those affected, seem to call for such treatment." Oxford Consumer Disc. Co. of N. Philadelphia v. Stefanelli, 104 N.J. Super. 512, 520 (App. Div. 1969), aff'd, 55 N.J. 489 (1970); Montells v. Haynes, 133 N.J. 282, 297 (1993) (stating "[o]ur tradition is to confine a decision to prospective application when fairness and justice require.").

This Court's decision in Montells is illustrative on prospective application of a newly clarified rule. In Montells, a former employee who was discharged following complaints of sexual harassment and hostile work environment sued her employer, supervisor, and others, alleging common law claims and claims under the Law Against Discrimination (LAD). The Law Division dismissed the common law claims, finding that they were barred by the two-year statute of limitations, but, characterizing the LAD claim as statutory, concluded that the claim was governed by the six-year statute of limitations. In reaching that result, the Law Division relied on the Court's then-recent decision, Shaner v. Horizon Bancorp, 116 N.J. 433 (1989), which held that a LAD claim was equitable in nature and that a LAD claimant is not entitled to a trial by jury.

Thereafter, the Legislature amended the LAD to, among other things, provide for a jury trial in LAD cases and award "[a]ll remedies available in common law tort actions" to prevailing

plaintiffs. Id. at 287. After an appeal and remand, the Law Division ultimately determined that the two-year statute governed Plaintiff's claim, declined to apply its decision prospectively, and granted summary judgment for the defendants. The Appellate Division affirmed, reasoning that for statute-of-limitation purposes, "the gravamen of plaintiff's complaint is injury to the person," which was governed by, and barred by, the two-year statute of limitations for common-law actions.

Although this Court agreed that the applicable limitations period would be the two-year statute of limitations for personal injury claims, rather than the general six-year statute of limitations, it applied that ruling prospectively to cases in which the operative facts arose after the date of its decision. The Court noted that when plaintiff filed her complaint, few cases had considered the issue of the appropriate statute of limitations under LAD and the law was unclear; plaintiff understandably could have concluded that, notwithstanding contrary law, she had six years within which to file her claim. This court further stated:

> To restrict plaintiff to the two-year statute would be unfair. Our tradition is to confine a decision to prospective application when fairness and justice require. The tradition is particularly appropriate when 'a court renders a first-instance or clarifying decision in a murky or uncertain area of the law ...,' . . . or when a member of the public could reasonably have 'relied on a different conception of the state of the law.'

Id. at 282 (emphasis added) (quoting Oxford Consumer Discount Co. 104 N.J. Super. at 521 (applying prospectively the Court's prior decision interpreting the New Jersey Secondary Loan Act)); see also Tax Auth., Inc. v. Jackson Hewitt, Inc., 187 N.J. 4, 22 (2006) (applying prospectively the Court's ruling because "[t]his is the first opportunity for this Court to interpret RPC 1.8(g)"); Town of Secaucus v. City of Jersey City, 19 N.J. Tax 538, 542 (2001) ("I conclude that my interpretation of the certification requirement in N.J.S.A. 40:55C-65 and N.J.S.A. 40A:20-12 constitutes a "clarifying decision in a murky or uncertain area of the law . . . it would be unfair and unjust to deprive those projects of their tax exemption based on the absence of the certification required under my statutory interpretation").

Considerations of injustice caused by justifiable reliance upon the absence of settled precedent or a contrary interpretation of the law clearly justify a prospective application of a new, judicially created change in the law. That is the reason this Court repeatedly has applied its interpretation of the RPCs prospectively, finding that it would be unfair to impose discipline where the conduct alleged to have been unethical presents a novel issue. See, e.g., In re Hyderally, 208 N.J. 453 (2011); In re Seelig, 180 N.J. 234 (2004); In re Goldstein, 116 N.J. 1 (1989); In re Hinds, 90 N.J. 604 (1982); In re Rachmiel, 90 N.J. 646 (1982), Tax Authority Inc., 187 N.J. 4.

For example, in Rachmiel, 90 N.J. 646, the Court held that respondent may have violated the Disciplinary Rule as newly interpreted, but declined to apply its ruling retroactively, noting:

> This case is the first opportunity we have had to explain the balancing test and the presumption that must be invoked in determining what speech violates DR 7-107(B)(6). Also, our opinion today constitutes the first occasion on which we have determined that DR 7-107(B)(6) applies to attorneys who are no longer officially, formally, or functionally participating in a continuing criminal trial. We are engaged here not in the enforcement of the criminal laws but in the shaping of disciplinary rules, the purpose of which is to protect the public and to edify and improve the legal profession, rather than to punish. And just as important, the case involves speech, a matter of strong constitutional solicitude that should, only with the utmost reluctance, be the subject of disciplinary sanctions.

Id. at 660. Because of the novelty of the issue in the case, the Court held that the Rule, as interpreted, "be given prospective effect only" and "as matter of fairness, Rachmiel should not be found guilty of violating that disciplinary rule. Id.; see also Hinds, 90 N.J. 604 (In ethics charges against attorney for criticizing trial judge during ongoing criminal trial, declining to retroactively apply the Court's new balancing test for when extrajudicial speech of an attorney is reasonably likely to interfere with a fair trial).

In R.M. v. Supreme Court, 185 N.J. 208 (2005), in determining whether to apply the new rule with respect to confidentiality prospective or retroactively, the Court held that

> the confidentiality rule serves to protect the First Amendment rights of grievants while preserving the disciplinary system's ability to conduct investigations. Although retroactivity may promote free expression and does not frustrate currently pending investigations, participants have placed great reliance on the prior rule of confidentiality. Before the current rule change, grievants and witnesses participated in ethics investigations with the understanding that their identity would remain confidential unless a formal complaint was filed. Retroactively applying the new rule would reveal their identities and statements despite those assurances of confidentiality. Furthermore, attorneys accused of minor wrongdoing have accepted diversion on the condition of confidentiality. We find that full retroactivity would impose an undue hardship on participants who justifiably relied on the old confidentiality rule. Accordingly, the preexisting confidentiality rule shall remain in effect in previously concluded matters, whether dismissed, diverted, or otherwise resolved. A purely prospective application, however, would unnecessarily inhibit speech that would otherwise be free. Thus, we hold instead that the new rule of confidentiality shall be given "pipeline retroactivity," id. at 249, 678 A.2d 642, and shall apply in all future cases and in matters that are still pending in the disciplinary system. R.M. is entitled to the benefit of this ruling.

Id. at 230-31.

This Court has a long-standing history of applying new interpretations of the RPCs prospectively, much like its prospective application of "clarifying decision[s] in a murky or uncertain area of the law," or where it was reasonable to have relied "on a different conception of the state of the law." Oxford, 104 N.J. Super. at 520-21. Such is the case here.

As explained in detail above in section I, supra, at the time Sills entered into the retainer Agreement with Delaney, New Jersey

courts had held that arbitration provisions between attorney and client are lawful, and even encouraged (Daly, supra); that an arbitration clause must contain clear and unambiguous language that the client is waiving his or her right to sue in court, Atalese, supra; and that the potential effect of an agreement to arbitrate must be clear to the client to be binding upon him, Kamaratos, supra. There were no reported or unreported decisions or ethics opinions in this State discussing specifically what disclosures are required by the attorney, or whether if the retainer agreement references a separate document the document must actually be re-printed and provided to the client, or what terms need to be explained to the client.

The Arbitration clause in Sills' retainer agreement advised Delaney, described as a "sophisticated businessman," that he was waiving all rights to a jury trial, that the decision of the Arbitrator would be final and binding with no right to appeal and that he would engage separate counsel and incur additional expense in connection with the arbitration. Those disclosures, Amicus submits, clearly and unambiguously apprised Delaney that he was waiving his right to sue in court under Atalese, and constituted reasonable disclosures in the context of requirements imposed by out-of-state decisions and Ethics Opinions. It bears mention, as a matter of equity, that in the view of Amicus BCBA the record amply supports a conclusion that Mr. Delaney's lawsuit was

motivated not by a good faith belief that the disclosures were insufficient but rather by abject opportunism. In the absence of any guiding authority concerning the appropriate scope of disclosure requirements in a retainer agreement, the reliance by Sills in this case and members of the Bar in general until this time "on a different conception of the state of the law," Oxford, supra, was appropriate. Considerations of "fairness and justice" require that any decision by this Court to amend or clarify existing RPCs governing retainer agreements receive prospective application.

The retroactive application of any newly clarified rules concerning retainer agreements could potentially invalidate hundreds if not thousands of existing such agreements as non-compliant with the new disclosure requirements under the RPCs. Arbitration provisions in engagement letters are not uncommon; their existence and propriety have been recognized in our case law for decades. The effect of a retroactive application of the ruling in this case would inevitably impose an unreasonable and unworkable burden on practicing attorneys by placing in question any retainer agreement that deviates ever so slightly from what might be considered "standard" and would require counsel to provide every client who signed such an agreement with an explanation that would comport with this Court's new requirements and obtain every client's assent to same. Retroactive application also would, in

turn, substantially impact the judiciary, as the courts would become inundated with satellite litigation over whether previously executed retainer agreements are enforceable. This Court should not impose such a burden on the attorneys and courts of this State.

CONCLUSION

Amicus urges the Court to reverse the Appellate Division's retroactive invalidation of the Sills Retainer Agreement's arbitration clause, except with regard to the punitive damages waiver and the fee-shifting provisions of the JAMS Rules, and to provide prospective guidance to the Bar if in the Court's view it is necessary to modify the Bar's current practice for submission and execution of retainer agreements.

Respectfully submitted,

By _____
Michael S. Stein

Dated: February 18, 2020

EXHIBIT B

PROPOSED DISCLOSURES FOR A MANDATORY ARBITRATION PROVISION

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. 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 law 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 attorney and client are waiving their right to a trial by jury in a courtroom open to the public, and they are both giving up their right to seek relief in civil court except in very limited circumstances.

3. **Confidentiality.** The entire arbitration—including any claims the attorney might have against the client and any claims the client might have against the attorney—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 we 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.** The client shall retain its 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 attorney before executing this retainer agreement.