IN THE SUPREME COURT OF THE STATE OF VERMONT

Lesley Adams, William Adams, and Adams Construction VT, LLC, Appellants

v.

Russell Barr and the Barr Law Group, Appellees

Supreme Court Docket No.: 2017-224

APPEALED FROM

The Superior Court of Vermont, Civil Division, Lamoille Unit

Docket No.: 41-2-17 Lecv

BRIEF OF THE APPELLANTS

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Statement of the Issues Presented for Review

1. Is a predispute, mandatory arbitration clause inserted into an attorney's retainer agreement with existing clients invalid and unenforceable when the attorney did not (a) advise the clients of the clause's legal effects and obtain their informed, written consent or (b) advise the clients to seek the advice of a second attorney about the wisdom of agreeing to such an arbitration clause?

2. Is a predispute, mandatory arbitration clause in an attorney's retainer agreement provided to an existing client *per se* invalid and unenforceable because it is an inherent breach of the attorney's fiduciary duty of undivided loyalty?

3. Is the arbitration clause in this case invalid and unenforceable because Russell Barr obtained the Adams's signatures on the retainer agreement through misrepresentation?

4. Given that the Adamses fully complied with 12 V.S.A. § 5677(a)(5) by objecting to and moving to dismiss the arbitration one week before the start of the arbitration hearing, did the trial court commit reversible error by ruling that they waived their objection by not raising it earlier in the arbitration proceeding?

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Statement of the Case

This appeal from the trial court's denial of the Adams's application to vacate an arbitration award is a case of first impression in which the Court must decide whether a Vermont attorney may include a predispute, mandatory arbitration clause in a retainer agreement entered into with existing clients after they had been represented by him with no retainer agreement for 10 years, without first obtaining the clients' separate written consent after full disclosure pursuant to the Vermont Rules of Professional Conduct and a Vermont Bar Association 2003 ethics opinion and consistent with other state courts and state ethics committees.

Despite a pre-hearing objection and motion to dismiss, the arbitrator adjudicated a fee dispute between the parties as well as the Adams's counterclaims, in which the Adamses appeared *pro se*. (PC 24)[1] Based on the testimony of a nationally renowned expert on legal fees, the Adamses argued that the Barr Law Group collected unreasonable fees and initiated the arbitration to collect additional unreasonable fees, many of which were based on unnecessary and duplicative activity, including billing for time spent not working on the Adams's case. (PC 29, 31)

Following the issuance of an arbitration award in favor of Russell Barr, the Adamses filed an application to vacate the arbitration award, arguing that the arbitration agreement was invalid and unenforceable, and that they had objected to the arbitration proceeding on that basis during the proceeding, as required by 12 V.S.A §§ 5677(a)(5). (PC 14, 32-56).

[1] Both Lesley and Billy Adams affirmed the truth of the Statement of Facts in the Memorandum in Support of Application to Vacate by sworn affidavits. (PC 71 and 72).

Attorney-client Relationship between Barr Law Group and the Adamses

Lesley and Billy Adams are residents of Stowe, Vermont. Adams Construction VT, LLC (ACVT), is a small, family construction company that specializes in building and renovating residential homes. (PC 25)

Before the lawsuit giving rise to the current dispute, the Adamses and ACVT had been clients of Barr & Associates (later Barr Law Group) since 2004 when lawyers at the firm helped them set up the LLC. No one at Barr & Associates had ever asked the Adamses to sign a retainer agreement or engagement letter. (PC 25)

Underlying Lawsuit

In May 2015, the Adamses and ACVT were sued by former construction clients of ACVT. (PC 25) Shortly after receiving the summons and complaint in the lawsuit, the Adamses sought the Barr Law Group's help in defending it. (PC 25)

The Arbitration Clause

Two days after the Adamses began working with Mr. Barr to prepare a defense and counterclaim, Mr. Barr presented the Adamses with a retainer agreement containing the Arbitration Clause at issue in this application. (PC 26-27) He told them that the Federal Court required him to have a retainer agreement so that he could represent them in the case. (PC 26) The Retainer Agreement contained the following arbitration clause:

> In the event of a dispute concerning any matter covered by or related to this Agreement, the parties agree to make a good faith effort to resolve the problem. If the parties are unable to do so, the parties agree to have the matter resolved by arbitration, in accordance with the applicable rules of the American Arbitration Association in effect as of the date of this Agreement. The award of the arbitrator or arbitrators shall be final, binding, and conclusive on the parties, and the parties agree to sign all appropriate documents necessary to make such proceedings final, binding, conclusive and to make any award enforceable by a judgment entered at the request of either party by a court of competent jurisdiction.
>
> ACKNOWLEDGEMENT OF ARBITRATION
>
> I UNDERSTAND THAT THIS AGREEMENT CONTAINS AN AGREEMENT TO ARBITRATE. AFTER SIGNING THIS DOCUMENT, I UNDERSTAND THAT I WILL NOT BE ABLE TO BRING A

> LAWSUIT CONCERNING ANY DISPUTE THAT MAY ARISE WHICH IS COVERED BY THE ARBITRATION AGREEMENT, UNLESS IT INVOLVES A QUESTION OF CONSTITUTIONAL OR CIVIL RIGHTS. INSTEAD, I AGREE TO SUBMIT ANY SUCH DISPUTE TO AN IMPARTIAL ARBITRATOR.

(PC 27) Mr. Barr never explained any of the following legal effects of the arbitration clause:

- loss of the right to a jury trial;
- loss of the right to an appeal;
- loss of the right to broad discovery under the Vermont Rules of Civil Procedure;
- arbitration may involve substantial upfront costs compared to litigation;
- the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;
- that the Vermont Bar Association provides a no-cost arbitration for fee disputes; and
- that the arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities.

(PC 28)

Mr. Barr also did not advise the Adamses to seek the counsel of another attorney about the wisdom of signing a retainer agreement containing this specific Arbitration Clause, nor did he tell them that the costs of an arbitration proceeding could well exceed those of a court proceeding because the parties would need to hire an arbitrator and pay administrative expenses in addition to any legal counsel they might engage. (PC 28)

However, after the Adamses had signed and returned the retainer agreement to Mr. Barr, he remarked, cryptically, “Now, you can't sue me.” (PC 28) The Adamses did not comprehend what he meant by that or why he had said it. (PC 28)

When they signed the retainer agreement, neither Lesley nor Billy Adams had any experience with or knowledge of arbitration proceedings. (PC 28) ACVT construction projects

consisted almost exclusively of work on single-family residences. (PC 28) Construction project documents were custom-made to reflect the individual needs of each client. (PC 28) They did not contain arbitration clauses. (PC 28) Neither of the Adamses knew that by signing the retainer agreement they would lose the rights listed above, nor were they aware of any of the other legal and financial implications of the arbitration clause. (PC 28)

Barr Law Group's Services

During the course of representing the Adamses, the Barr Law Group consulted with the Adamses, prepared and filed an answer, affirmative defenses, counterclaim, and objection to a motion for writ of attachment, communicated with opposing counsel, prepared for a hearing on the motion for writ of attachment, traveled to Rutland for the hearing (which was cancelled by agreement), prepared for the mediation, attended the mediation, and supervised the drafting and execution of various settlement documents. (PC 29)

During the Healy case, no discovery requests were exchanged, no depositions were taken, no hearings were held, and no court proceedings occurred. (PC 29)

For its work on the case, the Barr Law Group charged over $100,000. (PC 29)

Dispute Over Legal Fees

In January 2016, Billy Adams met with Mr. Barr to discuss the outstanding balance of the firm's invoices. (PC 29)

The retainer agreement stated: "In the event of a dispute concerning any matter covered by or related to this Agreement, the parties agree to make a good faith effort to resolve the problem." (PC 29) Mr. Barr seemed not to be aware of what his firm had charged or what it was owed. Among other things, Mr. Adams raised a question about being charged for Ben Novogroski when he did nothing, to which Mr. Barr responded, "We needed muscle." (PC 29)

Mr. Barr was not willing to discuss the invoices and charges. (PC 29) Instead, he kept saying, "Just pay us." (PC 29)

Commencement of Arbitration Proceeding

In March 2016, Mr. Barr commenced the underlying arbitration proceeding by filing a request with the American Arbitration Association. (PC 29)

The Adamses were not aware and were not advised at any time that the Vermont Bar Association, of which Mr. Barr is a member, provides an arbitration service with three arbitrators without charge to lawyers and their clients for resolution of fee disputes. (PC 30)

Mr. Barr did not mention the VBA's free arbitration service to the Adamses. (PC 30)

Already over-extended financially, Mr. and Ms. Adams defended themselves and pursued their counterclaims against Mr. Barr *pro se*. (PC 30)

Motion to Dismiss Arbitration Proceeding

On October 4, 2015, before the arbitration hearing began, Mr. and Ms. Adams filed a written motion with the arbitrator to dismiss the arbitration, in which they argued that the arbitration clause was invalid because Mr. Barr had obtained their signatures in violation of his fiduciary duty and had not disclosed the legal ramifications of arbitration nor recommended that they meet with another attorney to get advice on that subject. (PC 30)

The Arbitrator denied the motion in an oral ruling on the first day of the hearing without addressing the fiduciary duty, disclosure, or informed consent issues. (PC 30) The Arbitrator stated that "no binding Vermont law has been cited to the arbitrator indicating in any way that the facts presented to him and the arguments presented to him would support his finding that the arbitration clause in question is not valid. The arbitrator finds that the ethics opinions cited by respondents are not dispositive and the arbitrator has no jurisdiction over professional conduct or

disciplinary matters in Vermont. There must be a forum for that, but this is not it." (PC 30) At the time, the Adamses were unaware that the arbitrator's own firm included an arbitration clause in its standard retainer agreement that had twice been the subject of litigation with its clients. (PC 31) The arbitrator did not disclose these facts at any time. (PC 31)

Standard of Review

This appeal presents only questions of law, which the Court reviews *de novo*, under a non-deferential and plenary standard. *Vt. Transco LLC v. Town of Vernon*, 2014 VT 93A, ¶ 8, 2014 WL 4723620 (Sept. 19, 2014); *Vt. Alliance of Nonprofit Orgs. v. City of Burlington*, 2004 VT 57, ¶ 5, 857 A.2d 305; *Thompson v. Dewey's So. Royalton. Inc.*, 169 Vt. 274, 276, 733 A.2d 65, 66 (1999); *State v. Koch*, 169 Vt. 109, 112, 730 A.2d 577, 580 (1999). The trial court correctly treated the application to vacate in this case as tantamount to a motion for summary judgment, (PC 7), which the Court reviews *de novo* as well. V.R.C.P. 56(c)(3); *Cate v. City of Burlington*, 2013 VT 64, ¶ 11, 194 Vt. 265, 79 A.3d 854; *Mellin v. Flood Brook Union Sch. Dist.*, 173 Vt. 202, 211, 490 A.2d 408, 417 (2001); *White v. Quechee Lakes Landowners Ass'n*, 172 Vt. 25, 28, 742 A.2d 734, 738 (1999).

Argument

Summary of Argument

1. The attorney-client relationship is primarily a creation of law, not contract.
2. By law, the attorney has a fiduciary duty of undivided loyalty to the client.
3. The attorney's duty of loyalty precludes use of the attorney's superior knowledge and position to advance the attorney's interests over those of the client, a principle codified in (but not limited to) specific rules of the Vermont Rules of Professional Conduct.

4. A predispute, mandatory arbitration clause advances the attorney's interests over those of the client in ways that the client cannot appreciate without receiving independent legal advice about the legal effects of arbitration.
5. In recognition of this fact, the majority of state courts and ethics boards have ruled that predispute, mandatory arbitration clauses are invalid and unenforceable absent full disclosure and written consent, with at least one ethics board declaring that they are *per se* unethical.
6. Because the Barr Law Group did not provide any disclosures or obtain the Adams's separate, written consent, the arbitration clause is invalid and unenforceable. Under 12 V.S.A. § 5677(a)(5), this Court must, therefore, vacate the arbitration award and permanently enjoin appellees from attempting to resolve their dispute by arbitration.
7. Additionally, because Mr. Barr obtained the Adams's signatures by falsely telling them that the federal court required him to have them sign a retainer agreement before he could represent them in the federal case, notwithstanding over 10 years of an attorney-client relationship without a written retainer agreement, the retainer agreement, including the arbitration clause, is invalid and unenforceable.

I. The arbitration award must be vacated because the arbitration clause is invalid and unenforceable.

Because this is a case of first impression in Vermont, the following discussion summarizes the decisions of courts and ethics boards in other states in addition to Ethics Opinion 2003-7 of the Vermont Bar Association and then applies that analysis to the facts of this case.

The substantive law governing a fiduciary's duty of undivided loyalty compels a decision that Mr. Barr's arbitration clause is invalid and unenforceable. As argued herein, the rules of professional conduct, which make the broader fiduciary duty explicit in specific contexts,

including the use of predispute, mandatory arbitration clauses being one, require the same result. Thus, the Court, bearing in mind its regulatory function over the profession as well its responsibility to interpret substantive law, should rule that the arbitration clause in this case is invalid and unenforceable.

A. Absent full disclosure and informed written consent, most authorities agree that predispute, mandatory arbitration clauses in retainer agreements are invalid and unenforceable.

Like physicians and other professionals whose expertise gives them an advantage in dealing with patients and clients, lawyers have special knowledge they can use to advance their own interests over those of their customers. For these and other reasons, the basic contours of the attorney-client relationship have for hundreds of years been a creature of law, not contract. *See, e.g., Udall v. Littell*, 125 U.S. App. D.C. 89, 96, 366 F.2d 668, 675, 676 (1966) (Burger, J.), *cert. denied*, 385 U.S. 1007, 87 S. Ct. 713 (1967) (attorney is bound to highest duty of fidelity, honor, fair dealing and full disclosure to a client. . . . the very making of a formal contract and its performance impose a high duty on the attorney because he is dealing in an area in which he is expert and the client is not and as to which the client must necessarily rely on the attorney. . .. a formal contract superimposed on the normal attorney-client relationship alters the relationship only by adding new dimensions of duties and obligations on the attorney); *In Re Estate of Kurrelmeyer*, 895 A.2d 207, 215 (Vt. 2006) ("A fiduciary duty of loyalty is implied in every agency as a matter of law."); *see also Restatement (Third) of Agency* § 8.01 (2006) (once agency relationship is formed, agent "has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."); *see generally* Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 34 (1953).

By imposing a fiduciary duty of undivided loyalty on lawyers as a matter of law, the law governing lawyers, whether in the form of court decisions, the rules of professional responsibility, or legislative statutes, generally constrains the lawyer's ability to further the lawyer's own interests over those of the client and specifically prohibits some contractual arrangements that would either directly conflict with that duty or would risk doing so. *See, e.g.,* Vermont Rule of Professional Conduct 1.8, which addresses conflicts of interest with current clients. It covers business transactions between the attorney and client (1.8(a)), the disclosure of information that could disadvantage the client (1.8(b)), soliciting substantial gifts from clients (1.8(c)), literary rights based on the representation (1.8(d)), providing financial assistance with respect to pending or contemplated litigation (1.8(e)), accepting compensation from someone other than the client (1.8(f)), making an aggregate settlement or plea bargain with respect to two or more clients simultaneously represented (1.8(g)), and prospective limitation of the lawyer's liability for malpractice (1.8(h)).

As with other actual or potential conflicts of interest, therefore, whether a lawyer may include a predispute, mandatory arbitration clause in a retainer agreement should be decided in light of the broader public policy requiring an attorney's overriding fiduciary duty of undivided loyalty to the client and not simply as a matter of contract law.

For this reason, the ethics boards considering the issue as well as the ABA's standing committee on ethics have stated that predispute, mandatory arbitration clauses are either unethical *per se* (Ohio) or unethical absent full disclosure (often through independent counsel) and informed written consent. It is why John Dzienkowski, one of the leading ethics professors, argues in favor of such limits. And it is why most recent state court decisions on the matter hold

that, without full disclosure and written consent, such arbitration clauses are invalid and unenforceable.

Ethics Boards and Bar Committees

In Opinion 2003-7, the Vermont Bar Association's ethics committee concluded that "Attorneys may include general binding arbitration clauses in their representation agreements, so long as the potential client is advised that he or she or it is encouraged to seek independent counsel before agreeing to the arbitration terms of the representation agreement." As part of its rationale, the committee stated:

> The putative client normally is unrepresented when presented with a representation agreement. In order to avoid having the agreement's terms vitiated due to an attorney's having been found to have unfairly utilized his or her favorable bargaining position, the attorney should, in writing, advise the putative client that he or she [the client] may seek independent counsel before agreeing to the arbitration terms of the employment agreement. **If the prospective client declines to seek independent counsel, the attorney nevertheless must** (1) fully apprise the client as to the advantages and disadvantages of binding arbitration, and (2) obtain the client's informed consent in writing to the inclusion of the binding arbitration clause in the representation agreement.

Id. (emphasis added)

Contrary to the VBA opinion's mandate, Mr. Barr did not advise the Adamses to "seek independent counsel;" nor did he himself provide the required disclosures. (PC 28)

The Vermont committee's conclusion is consistent with that of all other ethics committee rulings the Adamses have found on the subject (except a Maine ethics opinion of 1999 that was superseded in 2011). *See* State Bar of Michigan Ethics Op. R-23 (July 2016) ("A provision in a fee agreement for legal services purporting to require the parties to arbitrate any future dispute relating to the representation that might arise between them is not ethically permissible unless, prior to signing the fee agreement, the client either consults with independent counsel or consults with the contracting lawyer and is fully informed in writing regarding the scope and practical

consequences of the arbitration provision."); Maine Prof'l Ethics Comm'n, Op. 202 (2011) ("A client's informed consent to a jury trial waiver in an engagement agreement must be confirmed in writing; prior to agreeing to such a limitation, the client must be advised in writing of the desirability of seeking, and given a reasonable opportunity to seek, the advice of independent legal counsel."), *superseding* Op. 170 (1999); Tex. Comm. on Prof'l Ethics, Op. No. 586 (2008) ("In order to meet the requirements of Rule 1.03(b), the lawyer should explain the significant advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes is necessary for an informed decision by the client."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02–425 (2002) ("It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, 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."); DC Bar Ass'n Ethics Op. 211 (1990) ("A lawyer may not insist that a client enter into a fee agreement containing a clause mandating arbitration of fee and malpractice disputes unless the client is represented by other counsel."); Cal. Compendium on Prof. Responsibility, pt. IIA, State Bar Formal Op. No. 1981-56 (1981) ("An attorney may not condition employment on a client's acceptance of binding arbitration in advance of a dispute arising over fees. A client and an attorney may voluntarily agree in writing to arbitrate a fee dispute and waive their right to appeal the arbitrator's decision only after a fee dispute arises."); Cal. Compendium on Prof. Responsibility, pt. IIA, State Bar Formal Op. No. 1977-47 (1977) (client must be given opportunity to consult with independent counsel and be fully advised of the possible consequences of arbitration agreement), *superseded* by Formal Opinion No. 1981-56; Florida Rules of Prof'l Conduct, Rule 4-1.5(i) Arbitration Clauses ("A

lawyer shall not make an agreement with a potential client prospectively providing for mandatory arbitration of fee disputes without first advising that person in writing that the potential client should consider obtaining independent legal advice as to the advisability of entering into an agreement containing such mandatory arbitration provisions.");

The only contrary ethics opinion the Adames have found is Maine Ethics Opinion 170 (1999), which was issued before adoption in Maine of Rules 1.4(b) and 1.8 of the Model Rules of Professional Conduct and which was superseded in 2011 by Maine Ethics Opinion 202.

In Opinion 96-9 (Dec. 6, 1996), the Ohio Ethics Board concluded that a predispute, mandatory arbitration clause is *per se* unethical. *See* discussion *infra* at 23-24. In Formal Ethics Opinion 1981-56, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California ruled that a client and attorney may agree to arbitrate a fee dispute only after the dispute arises.

Scholarly Articles

Law professors have also concluded that predispute, mandatory arbitration clauses in retainer agreements without some form of disclosure and informed consent are unethical and should be unenforceable. *See* John Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships, and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. Tex. L. Rev., 967, 995 (1995) (desire to arbitrate must be tempered with the special fiduciary relationship that attorneys owe to their potential clients; in the case of the unsophisticated client, attorneys should be able to enter into predispute malpractice arbitration agreement only if the client has actually met with independent counsel); Marc G. Anderson, *Arbitration Clauses in Retainer Agreements: A Lawyer's License to Exploit the Client*, 1992 J. Disp. Res. (1992); *see also* Comment, *An Ethics Analysis of*

Arbitrating Malpractice Claims, 27 J. Acad. of Matrim. Lawyers 445 (2015); Case Note, *Arbitration Clauses in Fee Retainer Agreements*, 3 St. Mary's J. Legal Mal. & Ethics 330 (2013); Note, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 5 Hofstra L. Rev. 327 (2006); Comment, *Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 St. Mary's L.J. 909, 919 (2002).

Concerning predispute, mandatory arbitration clauses in retainer agreements with unsophisticated clients, Professor Dzienkowski asked:

> Can attorneys be trusted to fully explain the ramifications of the mandatory arbitration clause-to discuss the meaning of the loss of a jury trial and the manner in which courts are often more favorable to clients and place more taxing burdens on the accused attorney? Can we truly believe that such clients will be able to evaluate the disclosure properly in light of the significant pressure that they may face to engage an attorney? These questions lead to the conclusion that, in the case of the unsophisticated client, attorneys should only be able to enter into [a] predispute malpractice arbitration agreement if the client has actually met with independent counsel.

Dzienkowski, *supra,* at 995.

State Court Decisions

Most state appellate courts considering the question have ruled that predispute, mandatory arbitration clauses in attorney retainer agreements are valid only if either (a) the client receives the advice of independent counsel or (b) the attorney fully discloses the legal effects of arbitration and obtains the client's informed written consent. *See Castillo v. Arrieta et al.*, 368 P.3d 1249, 1255-56 (N.M. Ct. App. 2016) (arbitration clause invalid because client did not receive full disclosure and give his written consent); *Hodges v. Reasonover*, 103 So.3d 1069, 1077–78 (La.2012) (same); *Thornton v. Haggins*, Unpub. Dec. (12-24-2003) No. 83055. (Ohio Ct. App., Dec. 24, 2003) (upholding denial of motion to compel arbitration, holding that "the best interests of the client require consultation with an independent attorney in order to determine

whether to prospectively agree to arbitrate attorney-client disputes."); *In re Godt*, 28 S.W.3d 732 (Tex. App. Corpus Christi 2000) (arbitration provision was not enforceable because the client did not act on the advice of independent counsel, nor did independent counsel sign the agreement); *Lawrence v. Walzer Gabrielson*, 207 Cal.App.3d 1501 (Cal. Ct. App. 1989) (quoting with approval Cal. Ethics opinion requiring independent counsel and full advice of possible consequences of arbitration agreement); *cf. Watts v. Polaczyk*, 619 N.W.2d 714, 717–18 (Mich. Ct. App. 2000) (holding an arbitration clause enforceable in a retainer agreement when the attorney advised the client in writing to obtain independent counsel before signing the agreement).

State courts that have upheld predispute, mandatory arbitration clauses have examined them as standard contracts without addressing the lawyer's fiduciary duty of loyalty or the constraints of Rule 1.8(h) of the Rules of Professional Conduct, an analysis the Adames believe is fundamentally flawed because it ignores the legal foundation of the attorney-client relationship. *See Royston, Rayzor, Vickery, & Williams v. Lopez*, 467 S.W.3d 494 (Tex. 2015); *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 67 So. 3d 315, 318–19 (Fla. Dist. Ct. App. 2011); *Desert Outdoor Adver. v. Superior Court*, 127 Cal. Rptr. 3d 158, 163–65 (Ct. App. 2011).

Noting that their training and experience give attorneys an advantage over clients, who may not understand the arbitration process and the full effects of an arbitration clause, the court in *Hodges v. Reasonover* held that "[a]t a minimum, the attorney must disclose the following legal effects of binding arbitration, assuming 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.

Hodges v. Reasonover, supra, at 1077-78.

The court rejected the argument that the clients in *Hodges* were sophisticated business people who did not need the disclosures required by the disciplinary rules:

> We decline to find the extent of an attorney's fiduciary duty depends on the sophistication of the client. To do so would create two classes of clients and implicitly hold that well-educated, business-savvy clients are somehow less deserving of an attorney's full candor and loyalty. **This rule would be directly contrary to the high ethical standards set forth in the Rules of Professional Conduct and repugnant to Louisiana public policy**. Thus, the Hodges' alleged sophistication and familiarity with arbitration are irrelevant; they are entitled to the same warnings and disclosures as any client.

Id. (emphasis added).

The *Hodges* court based its conclusion, in part, on the duty of candor and loyalty articulated in Rule 1.4(b):

> An attorney's fiduciary duties include the duties of candor and loyalty in all dealings with a client. The duty of candor requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

ABA Model Rule of Professional Conduct 1.4(b); *see also* Louisiana Rule of Professional Conduct 1.4(b) [identical to the Vermont Rule].

* * *

> Inherent in these duties is the principle that an **attorney cannot take any action adversely affecting the client's interest** unless the client has been fully apprised, to the extent reasonably practicable, of the risks and possible consequences thereof — that is, the client must give informed consent.

Id. (emphasis added).

B. The arbitration clause is invalid and unenforceable because Mr. Barr included it in the retainer agreement in violation of his fiduciary duties to the Adamses as exemplified in the Vermont Rules of Professional Conduct.

1. Mr. Barr violated Rule 1.4(b) by failing to explain the legal effect of the arbitration clause.

Vermont Rules of Professional Conduct 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Comment [7] to Rule 1.4(b) states: "A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."

Ethical Consideration 7-8 of the former Model Code states that "[a] lawyer should exert his [or her] best efforts to insure that the decisions of his [or her] client are made only after the client has been informed of relevant considerations. A lawyer **ought to initiate this decision-making process** if the client does not do so. . . . A lawyer should advise his client of the possible effect of each legal alternative." ABA Model Code of Professional Responsibility, adopted by the House of Delegates of the American Bar Association on August 12, 1969 (as amended through August 1980) (emphasis added).

Mr. Barr did not even point out the arbitration clause in his retainer agreement, much less disclose anything about its legal effects. Indeed, he falsely told the Adamses only that the federal court required him to have them sign a retainer agreement. (PC 26) After they signed and returned it, he remarked, "Now, you can't sue me." (PC 26)

By having the Adamses sign the retainer agreement without telling them anything about the legal effects of the arbitration clause, therefore, Mr. Barr withheld "information to serve [his] own interest" in violation of Rule 1.4(b).

2. Mr. Barr violated Rule 1.8(h)(1) by including the Arbitration Clause in the Retainer Agreement without providing full disclosure and obtaining the Adams's informed written consent.

Courts and state ethics boards have also analyzed the validity of arbitration clauses in the context of the prospective limitation of malpractice liability prohibited by Vermont Rule 1.8(h)(1), which states: "A lawyer shall not . . . (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."

Comment [14] specifically addresses the applicability of Vermont Rule 1.8(h)(1) to pre-dispute, mandatory arbitration agreements (emphasis added): "**[M]any clients are unable to evaluate the desirability of making [an agreement limiting liability] before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement** . . . This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, **provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement**." (emphasis added.)

Referring to this rule, the VBA's ethics committee concluded that a predispute, mandatory arbitration clause would violate the Vermont Rules if the attorney does not advise the

client to seek the advice of another lawyer or fully inform the client about the legal effects of arbitration and obtain the client's informed consent in writing. Opinion No. 2003-7.

As summarized above, several courts, ethics boards, and scholars have concluded that a predispute, mandatory arbitration clause violates Rule 1.8(h)(1) if the attorney (a) has not made sure (either through separate counsel or full disclosure) that the client is fully informed of the scope and effect of the agreement and (b) has not obtained the client's consent in writing. *See, e.g., Castillo v. Arrieta et al., supra,* at 1256-57); *Hodges v. Reasonover, supra,* at 1077-78; *Thornton v. Haggins, supra,* at ¶ 10 ; Formal Op. 02-425, ABA Committee on Ethics & Professional Responsibility (2002) (discussing when an agreement to arbitrate malpractice claims is ethical and permissible).

Because Mr. Barr did not fully inform the Adamses of the scope and effect of the Arbitration Clause, Mr. Barr violated Rule 1.8(h)(1) by including it in the retainer agreement. It is, therefore, invalid and unenforceable, and this Court must vacate the arbitration award. *See, e.g., Valley/50th Ave., v. Stewart*, 159 Wn.2d 736, 743 (Wash. 2007) ("Attorney fee agreements that violate the [Rules of Professional Conduct] are against public policy and unenforceable.") (citations omitted).

C. The Court should rule that the arbitration clause in this case is *per se* invalid and unenforceable because it is an inherent breach of the attorney's fiduciary duty of undivided loyalty that cannot be cured by disclosures or outside advice.

While the majority rule requiring full disclosure and informed written consent is a sufficient basis for vacating the arbitration award in this case, for the reasons set forth in this section, the Adamses believe the better rule is that adopted in 1996 by the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, under which "an engagement letter between a lawyer and a client should not contain language requiring a client to

prospectively agree to arbitrate professional ethical misconduct disputes." Opinion 96-9, Ohio Ethics Board (Dec. 6, 1996).

A *per se* rule is particularly appropriate in this and similar cases because an attorney-client relationship had existed for over 10 years before Mr. Barr put a written retainer agreement in place, for the purpose—as his "[n]ow, you can't sue me" remark makes clear—of subjecting the Adamses to the predispute, mandatory arbitration clause.

Citing both Rule V § 4(D)(1) of the Ohio Supreme Court Rules for the Government of the Bar and the ABA Model Rules for Fee Arbitration, Rule 1(C) (1995), the Ohio Ethics Board stated that "the decision to arbitrate must be entered into voluntarily by the client." *Id.* The Board added:

> An engagement contract requiring an individual client to prospectively arbitrate all fee disputes makes such decision less voluntary. The client must sign the agreement in order to receive legal services. The agreement attempts **to prospectively eliminate** a client's opportunity to consider particular facts and circumstances of a dispute and to seek independent advice as to the matter. When a fee dispute overlaps with claims of ethical misconduct such as inadequate representation or charging a clearly excessive fee, there is the danger that **an attorney might attempt to mask the ethical misconduct by enforcing the prospective agreement to arbitrate the fee issue**.

Id. (emphasis added).

The Board's language presciently describes Mr. Barr's conduct in this case. The fee dispute "overlaps with claims of ethical misconduct" and, by enforcing the arbitration provision, Mr. Barr is attempting "to mask" his ethical misconduct. His comment, "Now, you can't sue me," (PC 26), reveals that to have been his purpose in including the arbitration clause in the first place.

Referring to the decisions of ethics boards in other states that allow arbitration clauses on the condition that the attorney refer the client to another attorney and obtain the client's informed consent in writing, the Ohio Ethics Board wrote:

> It is impractical to require a client to seek independent counsel before signing an engagement contract with a lawyer—the client would need to "**hire a lawyer to hire a lawyer**." It sends the wrong message to the public: **Beware, the lawyer you are hiring to protect your interests may be trying to take advantage of you in the engagement contract**.

Opinion 96-9, *supra* (emphasis added).

The Ohio Ethics Board captured the essence of the problem: A client should not have to "hire a lawyer to hire a lawyer." Opinion 96-9, *supra*. And if the client were to hire a second attorney, the second attorney would likely tell the client that there is no benefit to the client to committing to arbitrate a dispute before the nature and contours of that dispute are known.

To provide disinterested advice about the legal effects and wisdom of a predispute, mandatory arbitration clause, the second lawyer would need to explain that in the event of a later dispute, the client would not have the right to have that dispute heard in a regular court of law. Instead, it would be decided by a private arbitrator who is not subject to any judicial oversight and who is not even bound by law. The lawyer would need to tell the client that the arbitrator can award things like attorney's fees that courts in most cases could not. If the arbitrator is a practicing attorney, unlike jurors, he or she may have a subconscious bias in favor of attorneys in the matter. The arbitrator's decision will be final and cannot be appealed to a higher court. Even if the arbitrator makes a grave error of law, the client would not be able to ask a higher court to correct the error. In providing disinterested advice, the second lawyer would need to tell the client that she would not be able to have her case heard by a jury if she thought her lawyer had committed malpractice. Moreover, the potential costs of arbitration to the client could be substantial compared with the nominal court costs.

In response to questions by the client, the lawyer would need to explain that the parties could agree to arbitration after a dispute arises—over fees, for example—if the client thought it in her best interests to do so at the time. If the client asked why the lawyer would propose including the arbitration clause, the second lawyer would need to explain that including a predispute, mandatory arbitration clause in the retainer agreement protects the lawyer from having a jury decide a dispute in a public hearing in court, which could expose the lawyer to negative publicity and possibly damage the attorney's reputation.

As this summary shows, the primary (arguably sole) beneficiary of a predispute, mandatory arbitration clause is the attorney, not the client. An honest conversation between an attorney and the attorney's existing or prospective client would unfold in roughly the same way as in a consultation with a second attorney. But just as with other conflicts governed by Rule 1.8, it is cognitively impossible for the attorney to provide this disinterested advice to the attorney's existing or prospective client. It would be like trying to play chess with yourself. In the instant case, Mr. Barr did not even attempt to provide such advice.

Only by ruling that the predispute, mandatory arbitration clause in Mr. Barr's retainer agreement is *per se* invalid can this Court truly protect the Adamses and other clients and adequately guard against the potential abuse of the lawyer's superior knowledge and position.

Such a rule would also uphold the prohibition of the impairment of the right to trial by jury under Article 12 of the Vermont Constitution, which states: "That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." Vt. Const. art. 12. *See Plimpton v. Town of Somerset*, 33

Vt. 283, 288 (Vt. 1860) (*citing* Vt. Const. Art. 12) ("The right of trial by jury of matters of fact, being secured by the constitution, it cannot be taken away or impaired by any act of the legislature. The constitution secures the right in full with all its privileges and advantages as it existed at the time of the adoption of the constitution, and consequently any act which in the slightest degree impairs, abridges or lessens this right, is in direct conflict with the constitution and consequently is void."); *cf Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 442-443 (2014) (because average members of public may not know that arbitration is substitute for right to have claim adjudicated in court of law, waiver of statutory or constitutional right implicit in arbitration clause is invalid absent knowing assent and clear mutual understanding of ramifications of that assent).

D. The arbitration clause in this case is invalid and unenforceable because Mr. Barr obtained the Adams's signatures through misrepresentation.

As summarized in the statement of facts above, Mr. Barr told the Adamses that the federal court required him to have them sign a retainer agreement before he could represent them in the federal case. (PC 26) In their opposition memorandum to the application to vacate, Mr. Barr and the Barr Law Group did not dispute the sworn affidavits of the Adamses asserting this fact. (PC 71 and 72)

Mr. Barr's statement was false. The Local Rules of the Federal District Court for the District of Vermont do not require or even mention a written agreement with a client before an attorney may represent a client in a federal lawsuit. *See generally* Local Rules of Procedure, United States District Court for the District of Vermont ((March 1, 2017).

Mr. Barr knew or should have known that the statement was false. He should also have known that the Adamses, who had no litigation experience, would believe him.

Under the Vermont Consumer Protection Act, a plaintiff proves a deceptive act with evidence that (1) there was a representation, practice, or omission likely to mislead the consumer; (2) the consumer interpreted the message reasonably under the circumstances; and (3) the misleading effects were material, that is, likely to affect the consumer. *Peabody v. PJ'S Auto Village, Inc*., 569 A.2d 460, 462 (Vt. 1989). "Deception is measured by an objective standard focusing 'on risk of consumer harm' in a particular case. *International Harvester Co*., 104 F.T.C. at 1056. '[A]ctual injury need not be shown,' *id.*, because 'representations made [with the] capacity or tendency to deceive' satisfy the standard." *Id.*

To prove common law fraud in Vermont, the plaintiff must show (1) that the defendant misrepresented an existing fact, (2) that the defendant did so intentionally, (3) that the misrepresentation was false when made and known at the time to be false by a defendant, or that the representation was recklessly made as being within the defendants' own knowledge without defendant in fact knowing whether it was true or not. *Follo v. Florindo*, 2009 VT 11, 404-5 (Vt. 2009) (quoting the trial court's instructions to the jury with approval).

In *Follo*, the Court stated that "[f]raud exists not only when speakers know their statements are false, but also when the statements are 'made in such a reckless manner that the law will presume them to be made with knowledge.' *Id*. at 405; *see also Bennington Housing Auth. v. Bush*, 2007 VT 134, 137 (Vt. 2007) (fraud can consist in making a false statement with reckless indifference as to its truth).

When Mr. Barr told the Adamses that the federal court required him to get them to sign a written retainer agreement before he could represent them in the federal lawsuit, they believed that it was something required by the court and that it was another legal document they needed to sign in order to proceed with their defense. (PC 26) Mr. Barr's unsolicited statement explained

why, after being represented by Barr & Associates for over 10 years, he was asking them to sign a retainer agreement. (PC 26)

The Adamses reasonably relied on Mr. Barr's representations about their having to sign a retainer agreement before he could represent them in federal court and they have been seriously harmed as a result of their reliance on Mr. Barr's statement.

"It is well established that a party induced into a contract by fraud or misrepresentation can rescind the contract and avoid liability for any breach thereon. *See Negyessy v. Strong*, 136 Vt. 193, 194 (1978) (where a party was induced to enter into a contract by fraud or misrepresentation, 'the deceived party may seek the remedy of being excused from the contract through rescission, or seeking the damages occasioned by the fraud.')." *Sarvis v. Vermont State Colleges*, 772 A.2d 494, 498 (Vt. 2001).

Because Mr. Barr's false statement to the Adamses constitutes an actionable misrepresentation under both the Vermont Consumer Protection Act and the elements of common law fraud, the retainer agreement is void, and the Court must, therefore, vacate the arbitration award.

II. The Adamses objected before the arbitration hearing began, making their objection timely under the statute.

12 V.S.A. § 5677(a)(5) states: "Upon application of a party to confirm, modify or vacate an award, the court **shall vacate** an award where: . . . (5) a court has found that there was no arbitration agreement and **the party did not participate in the arbitration hearing without raising the objection**." 12 V.S.A. § 5677(a)(5) (emphasis added).

No one disputes that the Adamses filed and argued a written objection and motion to dismiss the arbitration proceeding before the arbitration hearing began. (PC 30-31, 98-106) Thus, they "did not participate in the arbitration hearing without raising the objection." *Id.*

Under the statute, the trial court had no discretion to rule, as it did, that the Adamses waived their objection by not raising it earlier in the arbitration proceeding. The trial court's reliance on *Joder Building Corp. v. Lewis*, 153 Vt. 115, 118 (1989), was misplaced. In contrast to the Adams case, the objecting party in *Joder* fully "participate[d] in the arbitration hearing, without raising a defect in the acknowledgement, and then on receiving an unfavorable result challenge[d] the award by raising the acknowledgement issue for the first time in court." *Id.* at 119-120. In *Joder,* this Court stated unequivocally that "where a court finds 'there was no arbitration agreement,' it shall vacate the arbitration award as long as the party seeking relief 'did not participate in the arbitration hearing without raising the objection.' 12 V.S.A. § 5677(a)(5)." *Id.* at 119 (Vt. 1989); *accord N.J. Manufacturers Insurance Co. v. Franklin*, 160 N.J. Super. 292, 300 (N.J. Super. App. Div. 1978) ("If the objection to the arbitrator's jurisdiction is made known, participation in the merits of the controversy does not dictate a finding of waiver."); *American Bakery and Confectionery Workers v. National Biscuit Co*., 378 F.2d 918, 921-922 (3 Cir. 1967).

The trial court committed reversible error, therefore, by ignoring the plain meaning of section 5677(a)(5) and refusing to examine the validity of the arbitration clause.

Conclusion

For the reasons set forth above, this Court should reverse the trial court's denial of the Adams's application to vacate and remand with instructions to grant the application and permanently enjoin appellees from attempting to resolve their dispute through arbitration.

Dated on August 1, 2017

Respectfully submitted,

_____ _____

Richard T. Cassidy Michael Palmer

Certificate of Compliance

I certify under Vermont Rules of Appellate Procedure 32(a)(7)(B) that this brief was typed using Microsoft Office Word 2017 and that the word count, exclusive of the cover page, table of contents, and table of authorities, is **7924** words.

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Michael Palmer

In the
Supreme Court of Vermont

Lesley Adams et al., appellants,	]	
	]	
v.	]	Docket No. 2017-224
	]	
Russell Barr et al., appellees	]	

Certificate of Service

Michael Palmer certifies that he served the attached Brief of Appellants by mailing a physical copy together with a copy of the Printed Case and by emailing an electronic version of the brief on August 1, 2017, to:

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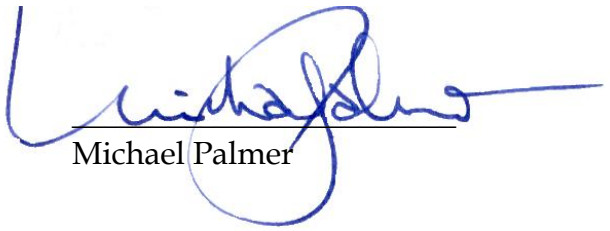

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