No. _____

IN THE
Supreme Court of the United States

BERNSTEIN, SHUR, SAWYER & NELSON, P.A., ET AL.
Petitioners,

v.

SUSAN R. SNOW,
Respondent.

On Petition for a Writ of Certiorari
to the Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

MATTHEW S. HELLMAN
Counsel of Record
ADAM G. UNIKOWSKY
WILLIAM K. DREHER
ANDREW C. NOLL
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

QUESTION PRESENTED

The Federal Arbitration Act ("FAA") provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That provision forbids States from "adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017).

The Maine Supreme Judicial Court here refused to enforce an arbitration provision contained in an attorney-client retention agreement because the attorney did not obtain the client's "informed consent." Pet. App. 12a – 13a. The Court stated that its "heightened standard" of informed consent was "required" because an arbitration agreement "waive[s] a fundamental right": "Maine's 'broad constitutional guarantee of a right to a jury' trial in civil matters." Pet. App. 12a.

The question presented is:

Whether the FAA preempts a state-law rule applying a heightened standard to attorney-client arbitration agreements because they waive the right to a jury trial.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Bernstein, Shur, Sawyer & Nelson, P.A. states that it is a professional association that has no parent company.

PARTIES TO THE PROCEEDING

Petitioners (defendants in Superior Court and appellants in the Maine Supreme Judicial Court) are Bernstein, Shur, Sawyer & Nelson, P.A. ("Bernstein Shur") and J. Colby Wallace ("Wallace"). Respondent (plaintiff in Superior Court and appellee in the Maine Supreme Judicial Court) is Susan R. Snow.

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OPINIONS BELOW

The decision of the Maine Supreme Judicial Court (Pet. App. 1a – 18a) is reported at 2017 ME 239, 176 A.3d 729 (Me. 2017). The Maine Superior Court's Order (Pet. App. 19a – 31a) denying Petitioners' motion to compel arbitration and granting Respondent's motion to stay the commencement of arbitration is unreported.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on December 21, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound hereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by

> arbitration a controversy thereafter arising out of such contract or transaction, … or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

This case presents yet another example of a state court refusing to follow the Federal Arbitration Act. This Court has held that the FAA preempts state-law rules that discriminate against arbitration agreements in that they "apply only to arbitration or … derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Just last Term, this Court reaffirmed that that principle means that States may not "adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017).

Yet here, the Maine Supreme Judicial Court ("Maine SJC") did just that. The court announced that arbitration agreements in attorney-client engagement agreements would be subject to a heightened "informed consent requirement" because those agreements are "waiver[s] of the right to go to court and receive a jury trial." *Id.* That is identical to the reasoning applied by the Kentucky Supreme Court in *Kindred*—in a decision this Court unanimously reversed.

Like the Kentucky Supreme Court in *Kindred*, the Maine SJC tried to skirt the FAA's preemptive effect by claiming that its informed-consent requirement would apply to waivers of other fundamental rights aside from the jury trial right. In *Kindred*, this Court rejected that argument because the state court had never applied its heightened rule to waivers of any other constitutional rights. 137 S. Ct. at 1427-28. That reasoning applies with even greater force here. The Maine SJC not only has never applied its special informed-consent requirement to waivers of any other constitutional right, it did not even purport to identify any other constitutional right to which its rule *would* apply going forward.

In *Kindred*, the petition for certiorari made the case that review was warranted because federal district courts in Kentucky had disagreed with the state court's FAA holding. So too here—and then some. Not only does the decision below conflict with decisions of the Third and Ninth Circuits, but the U.S. District Court for the District of Maine has squarely held that the informed-consent rule adopted by the decision below violated the FAA as applied to *this very arbitration agreement*. Petitioners' rights under the FAA therefore currently turn entirely on whether the lawsuit is in Maine state or federal court.

The Maine SJC's decision exhibits the disregard for the FAA and this Court's precedents that has previously moved this Court to act. *See, e.g.*, *Kindred*, 137 S. Ct. 1421; *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*,

565 U.S. 530 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam). Review and reversal is warranted.

STATEMENT OF THE CASE

1. Petitioner Bernstein Shur is a New England law firm with offices in Maine and New Hampshire. Petitioner Wallace is a shareholder of the firm. One of Petitioners' specialties is representing individuals in trusts and estates disputes.

On May 11, 2012, Respondent Dr. Susan Snow retained Bernstein Shur to represent her in civil proceedings relating to the distribution of the estate of her late father, a prominent Maine businessman. *See* Compl. ¶¶ 4-6, 43, *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, No. cv-2016-74 (Me. Super. Ct. Aug. 16, 2016); Pet. App. 19a. The retainer agreement contained an arbitration provision. Pet. App. 20a. That provision states:

> **Arbitration**
>
> If you disagree with the amount of our fee, please take up the question with your principal attorney contact or with the firm's managing partner. … In the event of a fee dispute that is not readily resolved, you shall have the right to submit the fee dispute to arbitration under the Maine Code of Professional Responsibility. *Any fee dispute that you do not submit to arbitration under the Maine Code of Professional Responsibility, and any other dispute that arises out of or relates to this agreement or the services provided by the law firm shall also, at the election*

> *of either party, be subject to binding arbitration.* Either party may request such arbitration by sending a written demand for arbitration to the other. … The arbitrators shall conduct the arbitration proceedings according to the procedures under the commercial arbitration rules of the American Arbitration Association and shall hold the arbitration hearing in Maine. The arbitrators shall be bound by and follow applicable Maine substantive rules of law as if the matter were tried in court. Either party shall have the right to appeal a decision of the arbitrators on the grounds that the arbitrators failed to properly apply applicable law.

Pet. App. 20a – 21a. The arbitration provision was contained in an attachment to the retainer agreement entitled "Standard Terms of Engagement for Legal Services." Pet. App. 21a. Directly above the signature block where Respondent signed the retainer agreement was the following statement:

> **I AGREE TO THE TERMS OF THIS LETTER INCLUDING THE ATTACHED STANDARD TERMS OF ENGAGEMENT.**

Id. (emphasis added to reflect original).

2. Petitioners represented Respondent in a variety of probate proceedings for several years. Subsequently, Respondent filed a civil suit against Petitioners in Maine Superior Court, alleging, among other things, that Petitioners had committed legal malpractice. Pet. App. 19a.

Shortly after filing her complaint, Respondent moved the Superior Court to preemptively stay arbitration. *Id.* Respondent argued that, under Maine law, attorney-client agreements to arbitrate malpractice claims are invalid unless the attorney obtains the client's "informed consent." Pet. App. 21a – 23a. Respondent further contended that her consent was not informed, because Petitioners had not specifically explained the differences between arbitration and litigation, or that by agreeing to arbitration she was waiving her right to a jury trial. Pet. App. 22a – 23a.

Petitioners opposed Respondent's motion and moved to compel arbitration. Pet. App. 19a. Petitioners argued that "even if Maine law had explicitly adopted the informed consent preconditions urged by Dr. Snow … such a law would be preempted by federal law," because "[S]tate laws may not, under Section 2 of the FAA, impose limitations which are special to arbitral clauses." Defendants' Mem. in Supp. of Mot. To Compel Arbitration 14, *Snow*, No. cv-2016-74 (Me. Super. Oct. 3, 2016) (quoting *Bezio v. Draeger*, 737 F.3d 819, 823 (1st Cir. 2013)).

The Superior Court denied Petitioners' motion to compel arbitration and granted Respondent's motion to stay arbitration. Pet. App. 31a. Relying on the Maine Rules of Professional Conduct, the court concluded that "a lawyer entering into a[n] engagement agreement with a client must explain the scope and effect of an arbitration provision applicable to future disputes between lawyer and client." Pet. App. 28a. The court concluded that Petitioners had not obtained

Respondent's informed consent, and so their arbitration agreement was unenforceable. Pet. App. 28a – 30a.

The court next rejected Petitioners' FAA argument, reasoning that the "informed consent" rule it had applied "does not apply 'specifically and solely' to arbitration provisions but applies generally to any instance in which a lawyer seeks the client's assent and agreement." Pet. App. 30a. The court held that "the applicable provisions of the Maine Rules of Professional Conduct do not single out arbitration provisions for special treatment and are not preempted under the Federal Arbitration Act." *Id.*

3. Petitioners appealed the denial of their motion to compel arbitration to the Maine SJC. Pet. App. 1a. Petitioners again argued that the FAA prohibited the "informed consent" rule applied by the Superior Court because it was specific to arbitration. Pet. App. 16a.

The Maine SJC affirmed the Superior Court's order. Pet. App. 18a. The court first agreed with the Superior Court that attorney-client arbitration agreements are void if the client did not give informed consent. Pet. App. 6a – 13a. The court observed that the ABA Standing Committee on Ethics and Professional Responsibility had previously opined that because arbitration "often results in a client waiving significant rights," attorneys "must 'explain the implications of the proposed binding arbitration provision to the extent reasonably necessary to permit the client to make an informed decision.'" Pet. App. 9a (quoting ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02–425 (2002)).

Acknowledging that the "Maine Rules of

Professional Conduct do not explicitly address the issue," Pet. App. 8a, the Maine SJC then pointed to a comment to Rule 1.8(h) of Maine's Rules, which permits lawyers to agree with clients to arbitrate future malpractice claims "if 'the client is fully informed of the scope and effect of the agreement.'" Pet. App. 10a – 11a (quoting Me. R. Prof. Conduct 1.8 cmt. (14)). The court noted that rule had been interpreted by the Maine Professional Ethics Commission to require the client's "informed consent" when an "attorney seeks to include in an engagement letter a provision waiving the client's right to a jury trial for claims arising out of the attorney's representation." Pet. App. 10a (citing Me. Prof. Ethics Comm'n, Op. No. 202 (Jan. 9, 2011)). Relying on these authorities, the court declared that to enforce attorney-client agreements to arbitrate future malpractice claims, "an attorney must have first obtained the client's informed consent as to the scope and effect of that provision." Pet. App. 12a.

Informed consent, the Maine SJC concluded, required that:

- "The attorney … 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.'" Pet. App. 13a (quoting Me. Prof. Ethics Comm'n, Op. No. 202).
- "[T]he attorney … take into account the particular client's capacity to understand that

> information and experience with the arbitration process, as these factors may affect both the breadth of information and the amount of detail the attorney is obligated to provide." *Id.*

The court derived these requirements from two sources. First, it thought the rule compelled by "the long-standing principle that attorneys owe a fiduciary duty of 'undivided loyalty' to their clients." Pet. App. 12a (quoting *Sargent v. Buckley*, 1997 ME 159, ¶9, 697 A.2d 1272). Second, the court stated its "policy is also rooted in Maine's 'broad constitutional guarantee of a right to a jury' trial in civil matters." *Id.* (quoting *DiCentes v. Michaud*, 1998 ME 227, ¶ 7, 719 A.2d 509).

Applying its new rule, the court then held that Petitioners' arbitration agreement was unenforceable because Petitioners had failed to obtain Respondent's informed consent. Pet. App. 13a – 16a.

Finally, the court rejected Petitioners' argument that the "informed consent" rule the court had set forth violated the FAA. The court acknowledged that "a contract defense available to a party seeking to invalidate an agreement to arbitrate cannot 'apply only to arbitration or … derive [its] meaning from the fact that an agreement to arbitrate is at issue.'" Pet. App. 16a – 17a (quoting *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015)). But it thought that prohibition did not apply to the "informed consent" rule, which it deemed "rooted in principles unrelated to arbitration in particular and appli[cable] to situations that go beyond arbitration: namely, that as a general matter, an attorney—who stands as a fiduciary to his

client—should fully inform that client as to the scope and effect of her decision to waive significant rights." Pet. App. 17a.

Petitioners timely filed this petition for certiorari.

REASONS FOR GRANTING THE WRIT

In the decision below, the Maine SJC held that arbitration provisions in attorney-client agreements are unenforceable unless the attorney obtains the client's "informed consent." The court explained that that rule meant that an otherwise clear arbitration provision is invalid, unless the client is also provided with a detailed explanation—tailored to the client's ability to understand that explanation—of the many differences, advantage, and disadvantages or arbitration. Pet. App. 12a – 13a. The court openly acknowledged that these "heightened" requirements applied *because* arbitration involves waiver of Maine's state constitutional right to a jury trial. Pet. App. 12a.

That decision flouts this Court's FAA precedents, including most prominently this Court's recent admonition in *Kindred* that States may not "adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." 137 S. Ct. at 1427. The decision below is also irreconcilable with decisions of the Third and Ninth Circuits. And the only federal district court in Maine has concluded that the FAA *does* preempt the very same informed-consent requirement as applied to the very same arbitration agreement addressed in the decision below.

The Maine SJC's decision therefore creates substantial practical problems. Not only will it disrupt the expectations of contracting parties who reasonably expected their arbitration agreements to be enforced, but it will result in forum-shopping based on the diametrically different standards applied in Maine state and federal courts. This Court previously granted certiorari in *Kindred* to review a state-court FAA decision on the basis of a similar in-state conflict. The Court should grant certiorari and reverse.

I. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

Section 2 of the FAA commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law*, … 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2). This Court has interpreted that language to preclude States from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Nor may States apply generally applicable state-law doctrines "in a fashion that disfavors arbitration." *Id.* at 341.

The Maine SJC's decision disregards these principles. It is premised on the notion that agreements to arbitrate require the application of a "heightened standard" of review *because* they are agreements to arbitrate. Pet. App. 12a. But "the FAA forecloses precisely this type of 'judicial hostility towards

arbitration.'" *Nitro-Lift*, 568 U.S. at 21 (quoting *Concepcion*, 563 U.S. at 339).

The SJC did not hide that its primary concern was protecting clients from waiving "Maine's 'broad constitutional guarantee of a right to a jury' trial in civil matters." Pet. App. 12a (quoting *DiCentes*, 1998 ME 227, ¶ 7). But that reasoning runs headlong into the central premise of the FAA: that arbitration carries certain advantages that might outweigh the benefits of litigation, including the right to litigate before a jury. *Concepcion*, 563 U.S. at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

Indeed, this Court's recent decision in *Kindred* squarely rejected a Kentucky rule much like the "informed consent" rule adopted by the Maine SJC here. *Kindred* involved a dispute in Kentucky state court over the validity of arbitration agreements between nursing homes and individuals acting as attorneys-in-fact for nursing home residents. The Kentucky Supreme Court held that the arbitration agreements were not valid, reasoning that because arbitration agreements effectively waive an individual's state constitutional right to a jury trial, an attorney-in-fact could not be presumed to have the authority to waive such rights unless that authority was "unambiguously expressed in the text of the power-of-attorney document." *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328 (Ky. 2015), *rev'd in part, vacated in part*, 137 S. Ct. 1421 (2017). The state court thought its clear-statement rule complied with the FAA because it "would apply not just to [arbitration] agreements, but also to some other

contracts implicating" eight other rights it had deemed "fundamental." *Kindred*, 137 S. Ct. at 1426 (quoting *Extendicare*, 478 S.W.3d at 328).

This Court disagreed. The Court first explained that, in addition to preempting state rules facially discriminating against arbitration, the FAA "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* The Court pointed out that in *Concepcion* it had "described a hypothetical state law declaring unenforceable any contract that 'disallow[ed] an ultimate disposition [of a dispute] by a jury.'" *Id.* (quoting *Concepcion*, 563 U.S. at 342). The Court explained that even if "[s]uch a law might avoid referring to arbitration by name," it "would 'rely on the uniqueness of an agreement to arbitrate as [its] basis'—and thereby violate the FAA." *Id.* (quoting *Concepcion*, 563 U.S. at 341).

Kentucky's rule failed this test. The state court's clear-statement rule applied to arbitration agreements "by virtue of their defining trait": that they waive the right to trial by jury. *Id.* at 1427. Kentucky had thus done "exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.*

Nor did it matter that the Kentucky Supreme Court had attempted "to cast the rule in broader terms" encompassing other fundamental constitutional rights. *Id.* No Kentucky court had "ever before demanded that a power of attorney explicitly confer authority to enter

into contracts implicating constitutional guarantees." *Id.* To be sure, the Kentucky Supreme Court had mentioned eight other fundamental rights to which its new clear-statement rule would apply. But, this Court held, even if there was a class of constitutional rights broader than the jury-trial guarantee to which Kentucky's clear-statement rule would apply, even "[p]lacing arbitration agreements within that class" would itself "reveal[] the kind of 'hostility to arbitration' that led Congress to enact the FAA." *Id.* at 1428.

The Maine SJC's "informed consent" rule is a carbon copy of the Kentucky Supreme Court's clear-statement rule in *Kindred*. Just like the Kentucky Supreme Court, the Maine SJC applied its "informed consent" rule to arbitration agreements because of arbitration's "defining trait"—that it necessarily waives the right to a jury trial. *Id.* at 1427-28. Indeed, the Maine SJC openly acknowledged that the basis for its rule was the State's "'broad constitutional guarantee of a right to a jury' trial in civil matters." Pet. App. 12a (quoting *DiCentes*, 1998 ME 227, ¶ 7). And the rules of professional conduct and ethics opinions on which it relied were specific to arbitration agreements and jury-trial waivers. Pet. App. 8a – 12a. Like the Kentucky Supreme Court, the Maine SJC thus did "exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred*, 137 S. Ct. at 1427.

Of course, as in *Kindred*, here the Maine SJC contended that its "heightened standard" was not limited to waivers of the jury-trial right, but would apply

whenever "an attorney … seeks to have [his or her] client waive a fundamental right through a provision in an engagement letter." Pet. App. 12a; *see Kindred*, 137 S. Ct. at 1427 (noting Kentucky Supreme Court claimed its rule "could also apply when an agent endeavored to waive other 'fundamental constitutional rights' held by a principal"). But, as in *Kindred*, the Maine SJC had not "ever before demanded" that an attorney obtain informed consent from a client before agreeing with the client to waive a constitutional guarantee. 137 S. Ct. at 1427. And unlike in *Kindred*—where the Kentucky Supreme Court specifically mentioned *eight* other fundamental rights to which its clear-statement rule would apply—here the Maine SJC did not identify a single other constitutional right to which its rule would apply. Nor is it clear what other constitutional rights would ordinarily be waived in an attorney-client agreement aside from the client's jury-trial right via an arbitration agreement. The SJC's rule, like that in *Kindred*, is "arbitration-specific." *Id.* at 1428.

Regardless, even if Maine would apply its new informed-consent rule to waivers of some other constitutional rights, that would not save the rule. To the contrary, just as in *Kindred*, even "[p]lacing arbitration agreements within that class" would "reveal[] the kind of 'hostility to arbitration'" that the FAA forecloses. *Id.* The very point of the FAA is to "promote arbitration" as a cheaper, more efficient dispute resolution mechanism that protects individuals' substantive rights every bit as much as litigation. *Concepcion*, 563 U.S. at 345. Treating an arbitration agreement as akin to a waiver of, for example, one's

religious freedom, Me. Const. art. I, § 3, or one's due process rights, *id.* § 6-A, ignores that fundamental point.

The Maine SJC also appeared to think that it could impose heightened standards on attorney-client arbitration agreements because they "concern the profession of law, which is uniquely within the purview of the courts." Pet. App. 8a. Thus, for example, the Maine SJC attempted to justify its rule by referring to the principle that "attorneys owe a fiduciary duty of 'undivided loyalty' to their clients." Pet. App. 12a. But that principle cannot justify the Maine SJC's special treatment of arbitration provisions.

To be sure, if Maine adopted a rule that *all* provisions of an attorney-client engagement agreement are subject to an informed-consent requirement, that rule might comply with the FAA, because it would not "hing[e] on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred*, 137 S. Ct. at 1427. Indeed, at least one other State appears to have adopted such a rule. Washington requires that an attorney "fully disclose[] … arbitration clause[s] to his or her client." *Smith v. Jem Grp., Inc.*, 737 F.3d 636, 641 (9th Cir. 2013). The Ninth Circuit upheld that rule because it requires an attorney to "disclose the arbitration agreement only to the same degree that he or she must disclose all material terms in an [attorney retainer agreement]." *Id.*

But what a State cannot do is apply an arbitration-specific rule—even if it only applies that rule to a particular class of contracts, like consumer contracts or attorney-client agreements. As the Ninth Circuit understood, a State "cannot, consistent with the FAA,

impose a higher burden of disclosure for arbitration clauses in fee agreements than it imposes on the remainder of the agreement." *Mann Law Grp. v. Digi-Net Techs., Inc.*, No. C13-59RAJ, 2014 WL 535181, at *5 (W.D. Wash. Feb. 11, 2014) (describing *Smith*).

That is what Maine did here. Over and over again, the Maine SJC went out of its way to emphasize that its rule did not apply to the retainer agreement in its entirety, but rather was targeted at the arbitration clause because that clause waived fundamental rights. *E.g.*, Pet. App. 17a (lawyer must "fully inform [a] client as to the scope and effect of her decision to waive significant rights," not as to every provision in agreement); Pet. App. 12a (emphasizing that Maine's policy is "rooted in Maine's 'broad constitutional guarantee of a right to a jury' trial in civil matters"); Pet. App. 13a (requiring attorney to "explain, or ensure that the client understands, the differences between the arbitral forum and the judicial forum, including the absence of a jury"); Pet. App. 10a (discussing Maine Professional Ethics Commission opinion applying heightened-consent rule to contract language that "involves the means of resolving disputes" (quotation marks omitted)). That is the precise type of rule that *Kindred* forbids.

Maine's rule is preempted for the additional reason that it has a disproportionate impact on arbitration agreements, and so runs afoul of *Concepcion*. There, this Court addressed a California rule holding that contracts with class-action waivers were unconscionable. 563 U.S. at 340. Critically, that rule was not arbitration-specific—it applied to all class-action waivers,

regardless of whether the dispute would be litigated or arbitrated. *Id.* at 341. Nonetheless, this Court held that it was preempted under the FAA because it had a "disproportionate impact on arbitration agreements," even if it applied to a certain subset of other contracts as well. *Id.* at 342.

Here, the impact of Maine's rule is similarly disproportionate, even if Maine applied it to waivers of some other constitutional rights: Maine's rule would apply to 100% of attorney-client contracts with arbitration provisions, but on only a subset of such contracts without arbitration provisions (those waiving other constitutional rights). A garden-variety attorney-client retention agreement, under which disputes are settled in court, will not be subjected to Maine's heightened rule. Maine's informed-consent requirement would thus be precisely the type of rule of which *Concepcion* warned.

In all these ways, the decision below flouts this Court's clear holdings.

II. The Decision Below Conflicts With Decisions Of Numerous Other Federal Circuit Courts And State Courts Of Last Resort.

The Maine SJC held that it may, consistent with the FAA, impose a heightened informed-consent requirement on attorney-client arbitration agreements because they involve a waiver of the State's constitutional jury right. Several courts—including the U.S. District Court for the District of Maine, the only federal court in the State—have held that the FAA preempts that kind of heightened standard.

1. First, numerous courts have held that it violates the FAA to impose a heightened requirement for consent to an arbitration agreement on the basis that those agreements waive an individual's jury-trial right.

In *Morales v. Sun Contractors, Inc.*, 541 F.3d 218 (3d Cir. 2008), the Third Circuit held that under the FAA, arbitration agreements may not be subjected to "a heightened standard of 'knowing consent' … because of the valuable rights relinquished under the provision." *Id.* at 223. Instead, it held that the FAA forbids "applying a heightened 'knowing and voluntary' standard" requiring "more than an understanding that a binding agreement is being entered and without fraud or duress." *Id.* at 223-24 (quoting *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183-84 (3d Cir. 1998), *overruled on other grounds by Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000)).

This reasoning is in direct conflict with the Maine SJC's decision, which required an understanding of the consequences of signing an arbitration agreement, not merely an understanding that an agreement was being entered into. Pet. App. 25a – 26a. Here, Respondent understood that she was entering a binding agreement and she has not alleged fraud or duress; accordingly, the arbitration agreement would have been enforced in the Third Circuit.

Indeed, just six months ago, the Third Circuit applied *Morales* in the context of attorney-client agreements to arbitrate malpractice claims. In *Smith v. Lindemann*, 710 F. App'x 101 (3d Cir. 2017), the client, like Respondent here, argued that such agreements were unenforceable absent the client's informed consent.

Id. at 104. Also like Respondent here, the client in *Smith* relied on the state Rules of Professional Conduct and the 2002 Opinion by the ABA's Standing Commission on Ethics and Professional Responsibility stating that informed consent was required for agreements to arbitrate malpractice claims. *Id.* The client argued that informed consent required that the attorney "orally warn[] her that she would have to arbitrate any malpractice claims against him." The Third Circuit correctly dismissed that argument, stating that "to the extent Smith seeks a more searching review of the advice attorneys provide new clients when an agreement to arbitrate is at issue, her argument is foreclosed by the FAA." *Id.* The Court went on to reject the client's claim on the ground that, in any event, "informed consent" did not require the type of oral warnings she sought. *Id.* at 104-05. But after *Morales* and *Smith*, there cannot be any doubt that the Third Circuit would find Maine's "informed consent" requirement preempted under the FAA.

The Ninth Circuit has come to the same conclusion. The Montana Supreme Court, like the Maine SJC, had held that because "arbitration agreements constitute a waiver of a party's fundamental constitutional rights to trial by jury and access to courts," consumers had "to be informed of the consequences of [an arbitration] provision and to personally consent to waiver after receiving the proper information." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013). The Ninth Circuit acknowledged that Montana's "rule does not invalidate only [arbitration] agreements," and that "[m]any other types of agreements may be

equally affected by the Montana rule," including "contract provisions requiring bench trials." *Id.* at 1161. Nonetheless, the court held that Montana's rule "runs contrary to the FAA as interpreted by *Concepcion* because it disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions." *Id.* Unlike the Maine SJC, the Ninth Circuit understood even before *Kindred* that a heightened informed consent rule is invalid under *Concepcion*.

Consistent with these decisions from the Third and Ninth Circuits, the First Circuit has reversed a district court decision applying a "heightened notice requirement" for arbitration agreements, explaining that "[e]ven if the district court had identified a principle of state law that imposed a special notice requirement before parties such as these could enter into an arbitration agreement, … such a principle would be preempted by the FAA." *Awuah v. Coverall N. Am., Inc.*, 703 F.3d 36, 45 (1st Cir. 2012).

2. Maine's federal district court has not only disagreed with the Maine SJC on these legal principles. It has specifically disagreed with that court as to whether this very informed-consent requirement as applied to this very arbitration agreement is preempted by the FAA. In *Bezio v. Draeger*, No. 2:12-CV-00396-NT, 2013 WL 3776538 (D. Me. July 16, 2013), *aff'd on other grounds*, 737 F.3d 819 (1st Cir. 2013), the U.S. District Court for the District of Maine concluded that the very same Bernstein Shur arbitration agreement at issue here was enforceable. The plaintiff sought exactly what Respondent obtained below: "a ruling that under

Maine law, [Bernstein Shur] was required to obtain informed consent to the Arbitration Clause." *Id.* at *3. Yet the District Court, unlike the Maine SJC, recognized that such a rule would plainly flout the FAA: "If the Court did find the Arbitration Clause unenforceable on this ground, it would be establishing a requirement applicable only to arbitration clauses. Such a holding would be futile, because the FAA displaces state law to the extent it 'singl[es] out arbitration provisions for suspect status.'" *Id.* (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

III. This Case Is Worthy Of This Court's Review.

This Court's review is needed for two reasons.

1. First, if left unaddressed, the conflict between the Maine SJC and the U.S. District Court for the District of Maine creates the obvious risk of forum-shopping—any time a dispute arises in a case involving an arbitration agreement that does not meet the Maine SJC's "informed consent" requirement, parties seeking to litigate will try their utmost to sue in Maine Superior Court, while parties seeking to arbitrate will attempt to file in federal court in Maine. And whenever a dispute arises, there will be a race to the courthouse, with each party seeking to file in its preferred forum, depending on whether that forum enforces attorney-client arbitration agreements or not. Indeed, to achieve their preferred forum, both parties will have a strong incentive to file immediate, premature lawsuits, even if they might otherwise have preferred to negotiate a settlement before filing suit.

Only some law firms or lawyers, meanwhile, will be

able to avoid Maine state courts' judicial hostility to arbitration. Law firms or lawyers domiciled in Maine will not be able to remove disputes over their arbitration agreements to federal court on diversity jurisdiction grounds. But law firms domiciled elsewhere will be able to remove such cases to federal court and have their arbitration agreements enforced. Those firms will therefore benefit from the many advantages of arbitration, including "lower costs" and "greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Maine law firms and lawyers, meanwhile, will have to proceed in court, notwithstanding their preference for arbitration.

Indeed, this state/federal split will trigger a particularly heated race to the court in light of this Court's decision in *Vaden v. Discover Bank*, 556 U.S. 49 (2009). In *Vaden*, the Court held that if a plaintiff files state-law claims, and the defendant files federal counterclaims, the defendant cannot go to federal court to enforce the arbitration agreement. *Id.* at 62. Thus, if a party with federal claims sues first, he can go to federal court, which will enforce attorney-client arbitration agreements; if the party with state claims sues first, he can go to Maine Superior Court and the court will apply the Maine SJC's "informed consent" rule, likely resulting in litigation in court. Notably, in *Vaden*, this Court acknowledged that a litigant's entitlement to federal court enforcement of an arbitration provision might well depend on the order of filing, *id.* at 68 n.17, but held this did not pose a concern because "[u]nder the FAA, state courts as well as federal courts are obliged

to honor and enforce agreements to arbitrate," *id.* at 71. But that reasoning is of cold comfort to litigants when state courts defy the FAA, as occurred here.

This was the exact argument that the *Kindred* petitioner made in its petition for certiorari. The petitioner did not argue that the Kentucky Supreme Court's decision conflicted with any decision from a federal appellate or state high court. Rather, it contended that "[t]here is a square conflict between the ruling below and decisions on the very same legal issue by the federal district courts in Kentucky—a conflict that produces significant unfairness to litigants, such as petitioners, that are unable to remove cases from state to federal court." Petition for Certiorari, *Kindred*, 137 S. Ct. 1421 (No. 16-32), 2016 WL 3640709, at *17. It argued that "[t]his conflict between Kentucky's state and federal courts will lead to distortions in the marketplace": in-state defendants would be forced to litigate in state court (where "it is clear that the Kentucky state courts will not enforce arbitration agreement"), whereas out-of-state defendants "will be able to remove such cases to federal court and enforce their arbitration agreements." *Id.* at *19. Precisely the same rationales warrant a grant of certiorari here.

2. This Court's intervention is also warranted to remind state courts that they cannot flout this Court's FAA precedents. Indeed, this Court has frequently intervened to remind state courts of their "undisputed obligation" to follow the Court's precedents, *DirecTV*, 136 S. Ct. at 468, even when there was no split of authority on the question presented. *See, e.g.*, *Nitro-Lift*, 568 U.S. at 20 (summarily vacating the Oklahoma

Supreme Court's decision that blatantly "disregard[ed] this Court's precedents on the FAA"); *KPMG LLP*, 565 U.S. at 22 (summarily vacating the Florida District Court of Appeal's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act"). The Maine SJC's decision reflects the same judicial hostility toward arbitration that the Court condemned in these cases, and as in these cases the Court should grant certiorari and reverse.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MATTHEW S. HELLMAN
Counsel of Record
ADAM G. UNIKOWSKY
WILLIAM K. DREHER
ANDREW C. NOLL
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

APPENDIX

Appendix A

Supreme Judicial Court of Maine.

Susan R. SNOW
v.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A., et al.

Docket: Cum–17–54
|
Argued: October 25, 2017
|
Decided: December 21, 2017

Attorneys and Law Firms

Melissa A. Hewey, Esq. (orally), and Timothy E. Steigelman, Esq., Drummond Woodsum, Portland, for appellants Bernstein, Shur, Sawyer & Nelson, P.A., and J. Colby Wallace

Thomas F. Hallett, Esq., and Benjamin N. Donahue, Esq. (orally), Portland, for appellee Susan R. Snow

Panel: SAUFLEY, C.J., and ALEXANDER, MEAD, GORMAN, JABAR, HJELM, and HUMPHREY, JJ.

Opinion

JABAR, J.

[¶ 1] Bernstein, Shur, Sawyer & Nelson, P.A., and J. Colby Wallace (collectively, Bernstein) appeal from a Superior Court (Cumberland County, *Warren, J.*) order denying its motion to compel arbitration in a legal malpractice claim filed against it. Bernstein contends that the court erred when it concluded that Bernstein

failed to obtain informed consent from its client, Susan Snow, to submit malpractice claims to arbitration, and that federal law does not preempt a rule requiring attorneys to obtain such informed consent from their clients. We agree with the Superior Court and affirm the judgment.

I. BACKGROUND

[¶ 2] The following undisputed facts are set forth in Snow and Bernstein's opposing affidavits filed in conjunction with Bernstein's motion to compel arbitration and Snow's motion to stay arbitration.

[¶ 3] In May 2012, Susan Snow retained Bernstein to represent her in a civil action. The firm presented for Snow's signature an engagement letter that, inter alia, set forth the scope of its representation. Located on the last page of that letter was a signature line, above which a bold-faced sentence provided: "I agree to the terms of this letter including the attached standard terms of engagement." Bernstein attached a document to the engagement letter titled "Standard Terms of Engagement for Legal Services." The provision at the heart of this dispute is found on the last page of that document and is titled "Arbitration." That provision provides, in pertinent part:

> If you disagree with the amount of our fee, please take up the question with your principal attorney contact or with the firm's managing partner. Typically, such disagreements are resolved to the satisfaction of both sides with little inconvenience or formality. In the event of a fee dispute that is not readily resolved, you shall have the right to submit the fee dispute to

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

(Emphasis added.)

[¶ 4] Snow subsequently signed the last page of the engagement letter.[1] At no time—before or after signing the letter—did Bernstein explain to her that, by providing her signature, she was agreeing to submit any future malpractice claims against the firm to binding arbitration.

[¶ 5] In August 2016, Snow filed a complaint and jury demand against Bernstein alleging that the firm committed legal malpractice in connection with its handling of her case. Shortly after, Snow filed a motion to stay threatened arbitration pursuant to 14 M.R.S. § 5928(2) (2016). In response, relying on the arbitration provision in the engagement letter, Bernstein filed a motion to compel arbitration.

[¶ 6] The court denied Bernstein's motion and granted Snow's. Relying on the Maine Rules of Professional Conduct, comments to those Rules, and opinions of the Maine Professional Ethics Commission that interpreted the Rules, the court concluded that, to include an agreement to arbitrate future malpractice claims against the firm in an engagement letter, Bernstein was obligated to fully inform Snow of the scope and effect of that agreement. Because Bernstein had failed to obtain informed consent, the court concluded that the arbitration provision violated public policy and was therefore unenforceable. The court further concluded that, because an attorney's obligation to obtain the informed consent of his clients does not apply solely to arbitration agreements, requiring

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[1] The scope of the agreement was later amended, but the arbitration provision was left unchanged.

informed consent in this context was not preempted by the Federal Arbitration Act (FAA), 9 U.S.C.S. §§ 1–307 (LEXIS through Pub. L. No. 115–90). Neither party moved for additional findings of fact pursuant to M.R. Civ. P. 52(b). Bernstein's timely appeal followed. *See* 14 M.R.S. § 5945(1)(A) (2016), (B); M.R. App. P. 2(b)(3) (Tower 2016).[2]

II. DISCUSSION

A. Standard of Review

[¶ 7] "We review the denial of a motion to compel arbitration for errors of law and for facts not supported by substantial evidence in the record." *Saga Commc'ns of New England, Inc. v. Voornas*, 2000 ME 156, ¶ 7, 756 A.2d 954. Here, the facts before the Superior Court were set out in affidavits executed by Snow and Bernstein. Because those affidavits did not contain any disputed facts, we determine de novo whether the court made any errors of law and whether the court's conclusion is supported by the facts. *See id.*

[¶ 8] This appeal requires us to determine whether the court erred when it concluded that (1) Bernstein's failure to obtain informed consent from Snow regarding an arbitration provision rendered that provision unenforceable as contrary to public policy, and (2) the Federal Arbitration Act does not preempt a requirement that attorneys obtain informed consent

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[2] The restyled Maine Rules of Appellate Procedure do not apply because this appeal was filed prior to September 1, 2017. *See* M.R. App. P. 1 (restyled Rules).

from their clients before contracting to submit disputes to arbitration.[3]

B. Enforceability of Agreement to Arbitrate

[¶ 9] Bernstein argues that the court erred in concluding that the arbitration provision concerning malpractice claims against the firm, contained in the engagement letter that Snow signed, is contrary to public policy and therefore unenforceable. Snow counters that the court correctly determined that public policy—as set forth in Maine's Rules of Professional Conduct—required Bernstein to "communicate adequate information and explanation to obtain [Snow's] informed consent to an arbitration." According to Snow, Bernstein's failure to obtain her informed consent rendered the arbitration agreement unenforceable. The parties' arguments before us center on two competing interests: the enforcement of arbitration contracts and the professional standards set forth in the Maine Rules of Professional Conduct.

1. Maine's Uniform Arbitration Act

[¶ 10] Maine's Uniform Arbitration Act (MUAA), 14 M.R.S. §§ 5927–5949 (2016), provides that "[a] written agreement ... or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable." 14 M.R.S. § 5927. Given the "Maine

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[3] Bernstein also argues that the court misapplied the burden of proof by requiring it to prove that the arbitration provision was enforceable. However, Bernstein has only raised that issue for the first time on appeal. Thus, the issue is not properly preserved and is deemed waived. *See Cyr v. Cyr*, 432 A.2d 793, 797 (Me. 1981).

legislature's strong policy favoring arbitration," courts will ordinarily enforce arbitration agreements "if the parties have generally agreed to arbitrate disputes and if the party seeking arbitration is making a claim which, *on its face*, is governed [by the contract]." *Westbrook Sch. Comm. v. Westbrook Teachers Ass'n*, 404 A.2d 204, 207–08 (Me. 1979) (quotation marks omitted). Despite this strong presumption in favor of substantive arbitrability, *see V.I.P., Inc. v. First Tree Dev. Ltd. Liab. Co.*, 2001 ME 73, ¶ 4, 770 A.2d 95, the MUAA provides that agreements to arbitrate may be nullified "upon such grounds as exist at law or in equity for the revocation of any contract," 14 M.R.S. § 5927.

[¶ 11] One "such ground[ ]" upon which a court may invalidate an arbitration provision is where the agreement contravenes public policy. *Id.*; *see Allstate Ins. Co. v. Elwell*, 513 A.2d 269, 272 (Me. 1986) ("A contract that contravenes public policy will not be enforced by our courts."); *Corbin v. Houlehan*, 100 Me. 246, 251, 61 A. 131 (1905) ("It is a fundamental and elementary rule of the common law that courts will not enforce ... contracts which are contrary to public policy ...."). "A contract is against public policy if it clearly appears to be in violation of some well established rule of law, or that its tendency will be harmful to the interests of society." *Elwell*, 513 A.2d at 272 (quotation marks omitted); *see also State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶¶ 42–44, 995 A.2d 651. The question before us, therefore, is whether an attorney's failure to obtain informed consent from a client regarding an arbitration clause for any legal malpractice claim against that attorney is contrary to public policy.

2. Public Policy as Expressed in the Rules of Professional Conduct

[¶ 12] Because nullifying a private, written contract provision should not be undertaken lightly, we look carefully at the argument that a provision contravenes an important public policy. The policy at issue here concerns the profession of law, which is uniquely within the purview of the courts.

[¶ 13] Effective August 1, 2009, we adopted the Maine Rules of Professional Conduct, which are styled after the American Bar Association's (ABA) Model Rules. *See* M.R. Prof. Conduct preamble (1). Our "acceptance of these rules maximizes conformity with those states embracing the ABA Model Rules and also preserves the integrity of the manner in which Maine lawyers practice law." *Id.* Maine Bar Rule 8 establishes the Maine Professional Ethics Commission, a body tasked with rendering "advisory opinions to [this] Court, the Board, Bar Counsel, and the Grievance Commission on matters involving the interpretation and application of the Maine Rules of Professional Conduct." M. Bar. R. 8(d)(1).

[¶ 14] The Maine Rules of Professional Conduct do not explicitly address the issue presented by this appeal: if, and to what extent, an attorney or law firm must inform a prospective client about the effect of a provision that prospectively requires the client to submit malpractice claims against that attorney or firm to arbitration. However, interpretations of the Rules by both the Maine Professional Ethics Commission and the ABA, expressed in advisory opinions, indicate that

for such a provision to comply with the Rules, the client must be fully informed of its scope and effect.

[¶ 15] In 1999, the Maine Professional Ethics Commission concluded in an Opinion that attorneys may enter into agreements to arbitrate malpractice claims arising out of the attorney-client relationship and that, for such an agreement to be enforceable, an attorney need not advise the client to seek independent counsel to discuss the desirability of entering into such an agreement. Me. Prof. Ethics Comm'n, Op. No. 170 (Dec. 23, 1999). However, the opinion did not address whether, and to what extent, the attorney must inform the client of the scope and effect of those agreements. *See id.*

[¶ 16] More than two years later, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion in which it addressed whether, under the Model Rules of Professional Conduct, an attorney has a duty to inform a client of the existence and effect of a provision contained in a retainer agreement that requires the client to submit any malpractice claims against the firm to binding arbitration. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02–425 (2002). The Standing Committee answered that question in the affirmative, concluding that because attorneys serve as fiduciaries to their clients, and because agreeing to arbitration often results in a client waiving significant rights, an attorney must "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." *Id.* (alteration omitted) (quotation marks omitted). To fulfill this duty, the Committee announced, a 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 right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal.

Id.

[¶ 17] In 2011, Maine's Professional Ethics Commission issued an Opinion that addressed a similar issue. *See* Me. Prof. Ethics Comm'n, Op. No. 202 (Jan. 9, 2011). The Commission determined that, when an attorney seeks to include in an engagement letter a provision waiving the client's right to a jury trial for claims arising out of the attorney's representation, that attorney must obtain the client's informed consent in order to comply with the Rules of Professional Conduct. *Id.* The Commission reasoned that "[l]anguage in an engagement agreement waiving the right to a jury trial, like a limitation on venue or a requirement to arbitrate disputes between lawyer and client, involves the means of resolving disputes." *Id.* Noting these similarities, the Commission relied on comment 14 to Maine Rule of Professional Conduct 1.8, which provides that an attorney may permissibly enter into an agreement to prospectively submit malpractice claims to arbitration if "the client is fully informed of

the scope and effect of the agreement." *Id.* (citing M.R. Prof. Conduct 1.8 cmt. (14)). For that reason, the Commission concluded that an attorney must obtain "informed consent as to the scope and effect of an arbitration requirement or a jury waiver clause." *Id.* According to the Commission, this result was warranted in light of an attorney's obligation to render candid advice and inform the client on matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* (citing M.R. Prof. Conduct 1.4(b)); *see* M.R. Prof. Conduct 2.1; see *also Sargent v. Buckley*, 1997 ME 159, ¶ 9, 697 A.2d 1272 ("[A]n attorney and client necessarily share a fiduciary relationship of the highest confidence." (quotation marks omitted)).

[¶ 18] The above-cited rules, together with the guidance provided by Maine's Professional Ethics Commission and by the ABA's Standing Committee on Ethics,[4] reflect the following policy: to enforce a

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[4] Bernstein argues that neither the comments to the Rules of Professional Conduct nor the Commission's interpretation of the Rules can constitute public policy because—unlike the Rules themselves—we have not explicitly adopted them. However, this argument ignores the fact that the Maine Rules are modeled after the ABA Model Rules and that, on several occasions, we have utilized these authorities to interpret the Rules. *See, e.g.*, *Bd. of Overseers of the Bar v. Warren*, 2011 ME 124, ¶ 26, 34 A.3d 1103; *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶ 20, 742 A.2d 933 (adopting a rule that "is consistent with the rule adopted by the [ABA's] committee on Ethics and Professional Responsibility"); *see also* M.R. Prof. Conduct preamble (1). Moreover, although Maine Professional Ethics Commission opinions are not binding, they are promulgated by a body created

contractual provision that prospectively requires a client to submit malpractice claims against the law firm to arbitration, an attorney must have first obtained the client's informed consent as to the scope and effect of that provision. This policy is based on the long-standing principle that attorneys owe a fiduciary duty of "undivided loyalty" to their clients, a duty that is derived from the common law and that "predate[s] and exist[s] despite independent, codified ethical standards." *Sargent*, 1997 ME 159, ¶ 9, 697 A.2d 1272 (quotation marks omitted). This policy is also rooted in Maine's "broad constitutional guarantee of a right to a jury" trial in civil matters. *DiCentes v. Michaud*, 1998 ME 227, ¶ 7, 719 A.2d 509 (quotation marks omitted); *see* Me. Const. art. I, § 20. Therefore, given these considerations, it follows that a heightened standard is required when an attorney—with whom a client has a fiduciary relationship—seeks to have that client waive a fundamental right through a provision in an engagement letter. *See Castillo v. Arrieta*, 368 P.3d 1249, 1257 (N.M. Ct. App. 2016) ("We conclude that if an attorney is going to require his client, within the context of their relationship of trust, to waive the right to a jury trial for a future malpractice dispute, such a waiver should be made knowingly with the client's informed consent.").

[¶ 19] Accordingly, we now implement the public policy reflected by Maine Rule of Professional Conduct 1.8 cmt. (14) and the opinions of the Maine and ABA Ethics Commissions. Maine attorneys must obtain a

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for the purpose of rendering opinions that interpret the Rules of Professional Conduct. *See* M. Bar R. 8(d)(1).

client's informed consent regarding the scope and effect of any contractual provision that prospectively requires the client to submit malpractice claims against those attorneys to arbitration. *See* M.R. Prof. Conduct 1.8 cmt. (14). 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. Furthermore, to ensure the client is informed "to the extent reasonably necessary to permit the client to make [an] informed decision[ ]," the attorney should take into account the particular client's capacity to understand that information and experience with the arbitration process, as these factors may affect both the breadth of information and the amount of detail the attorney is obligated to provide. *See* M.R. Prof. Conduct 1.4(b); *Bezio v. Draeger*, 737 F.3d 819, 823, 825 (1st Cir. 2013) (noting that, although the degree to which an attorney must explain a matter "will vary by client," the appellant seeking to invalidate an arbitration clause in that case "knew very well from his past experience with ... arbitrations what arbitration was and the consequences of signing such a clause").

3. Agreement to Arbitrate

[¶ 20] Reviewing the undisputed facts before us, we conclude that Bernstein did not fully inform Snow of

the scope and effect of the agreement to arbitrate. In her affidavit to the Superior Court, Snow stated that Bernstein did not (1) inform her that the engagement letter contained an arbitration provision, (2) explain to her the scope of that arbitration provision, or (3) explain to her the differences between the arbitral forum and the judicial forum. Bernstein did not dispute these assertions in its own affidavit. Snow also averred that Bernstein failed to inform her that, by signing the engagement letter, she was waiving her right to resolve disputes against Bernstein through the court system, including the right to trial by jury. This assertion is also undisputed.

[¶ 21] Instead, Bernstein argues that the language of the arbitration provision—providing, in part, that "any other dispute that arises out of or relates to this agreement or the services provided by the law firm shall also, at the election of either party, be subject to binding arbitration"—unambiguously informed Snow of the scope and effect of the agreement to arbitrate. Read in context, however, the arbitration provision was not sufficiently clear to inform her that she was agreeing to submit malpractice claims against her attorney to arbitration, let alone to inform her of the scope and effect of any such agreement. The first three sentences of the arbitration provision directly pertained to fee disputes. Aside from fee disputes, no other form of proceeding or conflict is mentioned with any specificity in the arbitration provision.

[¶ 22] Rather, the text purporting to require parties to submit "any other dispute" to binding arbitration is preceded by a more specific directive: "Any fee dispute

that you do not submit to arbitration under the Code of Professional Responsibility, and any other dispute that arises ... shall ... be subject to binding arbitration." Pursuant to the interpretive principle of *ejusdem generis*, "the meaning of a general term in a contract is limited by accompanying specific illustrations. Thus, any meaning given to the general term must have a reasonable degree of similarity" to the more specific term. 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.28 at 309 (rev. ed. 1998); *see New Orleans Tanker Corp. v. Dep't of Transp.*, 1999 ME 67, ¶ 7, 728 A.2d 673. As such, the meaning of the term "any other dispute" may be reasonably interpreted as limited by the provision's reference to "fee dispute." Moreover, although the engagement letter specified such aspects of the parties' relationship as scope of representation, fees and expenses, and termination of the attorney-client relationship, the letter itself failed to specifically emphasize that disputes against Bernstein regarding its legal services would be subject to arbitration. To the contrary, the arbitration provision was only incorporated by way of the engagement letter's reference to "Standard Terms of Engagement," and even then, it was buried on the last page of that document.

[¶ 23] For these reasons, the undisputed evidence supports the conclusion that Bernstein did not fully inform Snow as to the scope and effect of the agreement to arbitrate, as is required by the Maine Rules of Professional Conduct and the Maine Professional Ethics Commission opinions interpreting those Rules. Therefore, the Superior Court did not err in concluding that the arbitration provision was

unenforceable for violating public policy. *Cf. Peaslee v. Pedco, Inc.*, 388 A.2d 103, 107 (Me. 1978) (affirming the rescission of a contract where an attorney breached his duty of loyalty by failing to disclose his personal interest in a transaction involving clients); *see Castillo*, 368 P.3d at 1256–58 (refusing to enforce an agreement to arbitrate malpractice claims, despite the state's "strong public policy favoring arbitration," where the record was unclear as to whether the attorney obtained informed consent).

C. Federal Arbitration Act Preemption

[¶ 24] Bernstein also argues that, even assuming Maine attorneys are obligated to obtain informed consent from their clients regarding arbitration provisions, such an obligation "singles out" arbitration agreements and is thus preempted by the Federal Arbitration Act (FAA).

[¶ 25] The FAA, like the MUAA, provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.S. § 2 (LEXIS through Pub. L. No. 115–90). Although "the FAA contains no express preemptive provision and does not reflect a congressional intent to occupy the entire field of arbitration, it preempts state law to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 431–32 (9th Cir. 2015) (alteration omitted) (citation omitted) (quotation marks omitted). To that end, a contract defense available to a party seeking to invalidate an agreement to arbitrate

cannot "apply only to arbitration or ... derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 432 (quotation marks omitted). By enacting the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (quotation marks omitted). Therefore, in instances where a state law "singl[es] out" arbitration contracts specifically, the FAA will preempt that state law. *See id.*

[¶ 26] Here, the requirement in question—that attorneys fully inform a client of the scope and effect of a contractual provision requiring the client to submit any malpractice claims against the firm to arbitration—does not "singl[e] out" arbitration agreements, and is therefore not preempted by the FAA. This requirement neither "derives [its] meaning from the fact that an agreement to arbitrate is at issue," nor applies strictly to arbitration agreements. *Sakkab*, 803 F.3d at 432 (quotation marks omitted). As explained above, this obligation is rooted in principles unrelated to arbitration in particular and applies to situations that go beyond arbitration: namely, that as a general matter, an attorney—who stands as a fiduciary to his client—should fully inform that client as to the scope and effect of her decision to waive significant rights. *Cf. Casarotto*, 517 U.S. at 683, 116 S.Ct. 1652 (concluding that a state law governing not *any contract*, but specifically and solely contracts *subject to arbitration*, conflicted with the FAA and was therefore preempted). Accordingly, the court did not err in

concluding that the rule requiring Bernstein to fully inform Snow of the scope and effect of the agreement to arbitrate was not preempted by the FAA.

The entry is:

Judgment affirmed.

Appendix B

Superior Court of Maine.
Cumberland County

Susan SNOW, Plaintiff,
v.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A., et al., Defendants.

No. CV-16-319.
January 20, 2017.

Order

Thomas D. Warren, Judge.

In this action plaintiff Susan Snow alleges that defendants Bernstein, Shur, Sawyer & Nelson P.A. and J. Colby Wallace, Esq. (collectively, BSSN), who previously represented Snow in certain Probate and Superior Court litigation involving the distribution of her late father's property, engaged in malpractice in the course of their legal representation. Snow has also brought claims against BSSN for breach of contract, breach of fiduciary duty, and intentional infliction of emotional distress.

Before the court is a motion by BSSN to compel arbitration and a countervailing motion by Snow to stay the threatened commencement of any arbitration proceeding. *See* 14 M.R.S. §§ 5928(1) and (2). Briefly stated, BSSN is seeking to send Snow's malpractice claim to binding arbitration, and Snow seeks to litigate her claim in the courts.

The basis of BSSN's motion to compel arbitration is a provision in the May 11, 2012 engagement letter between Snow and BSSN that states as follows:

Arbitration

If you disagree with the amount of our fee, please take up the question with your principal attorney contact or with the firm's managing partner. Typically, such disagreements are resolved to the satisfaction of both sides with little inconvenience or formality. In the event of a fee dispute that is not readily resolved, you shall have the right to submit the fee dispute to arbitration under the Maine Code of Professional Responsibility. *Any fee dispute that you do not submit to arbitration under the Maine Code of Professional Responsibility, and any other dispute that arises out of or relates to this agreement or the services provided by the law firm shall also, at the election of either party, be subject to binding arbitration.* Either party may request such arbitration by sending a written demand for arbitration to the other. If a demand for arbitration is made, you and the firm shall attempt to agree on the arbitrators. If no agreement can be reached within 30 days of receipt of the demand, the party demanding arbitration may designate an arbitrator by sending a written notice to the other party. Within two weeks of that initial designation, the other party shall designate an arbitrator in writing. Thereafter, those two designated arbitrators shall meet promptly to select a third arbitrator. The arbitrators shall conduct the arbitration proceedings according to the procedures under the commercial arbitration rules of the American Arbitration Association and shall hold the arbitration hearing in Maine. The arbitrators shall be bound by

and follow applicable Maine substantive rules of law as if the matter were tried in court. Either party shall have the right to appeal a decision of the arbitrators on the grounds that the arbitrators failed to properly apply applicable law.

(emphasis added).

The above arbitration provision is contained in a four page attachment to a May 11, 2012 engagement letter entitled "Standard Terms of Engagement for Legal Services." At the end of the engagement letter Snow signed her name under the following statement, which appears in boldface capitals: "I agree to the terms of this letter including the attached Standard Terms of Engagement."

The scope of representation in Snow's May 11, 2012 engagement letter was amended 14 months later, but the arbitration provision was not amended, and there is no evidence that it was discussed or considered at the time of the amendment.

Snow's opposition to the motion to compel arbitration is based on several of the Maine Rules of Professional Conduct and their interpretation by the Professional Ethics Commission of the Board of Bar Overseers.

Rule 1.8(h)(1) of the Maine Rules of Professional Conduct states that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability for malpractice." Comment [14] to that rule states that this provision "does not … 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 as to the scope and effect of the agreement" (emphasis added). Also relevant in this connection is Rule 1.4(b), which states that a lawyer shall explain a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Lastly, the definition of "informed consent" in Rule 1.0(e) of the Maine Rules of Professional Conduct provides as follows:

> "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Whether a client has given informed consent to representation shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice.

Snow has submitted an affidavit stating, inter alia, that no one at BSSN informed her that she was waiving her right to resolve malpractice claims through the court system, that no one at BSSN informed her that she was waiving her right to a jury trial by agreeing to

arbitration, and that no one at BSSN informed her of the pertinent differences between resolving disputes through arbitration and through the court system. Snow Affidavit ¶¶ 3-8.

BSSN does not challenge the statements in Snow's affidavit that she was not informed by anyone at BSSN of the consequences of agreeing to binding arbitration. BSSN does note that Snow is a college graduate with a medical degree (she is a physician) and that Snow's affidavit does not state that she was unaware of the consequences of agreeing to binding arbitration.

Pertinent to the various arguments for and against arbitration are several opinions by Maine's Professional Ethics Commission, the First Circuit's decision in *Bezio v. Draeger*, 737 F.3d 819 (1st Cir. 2013), and the effect of the Federal Arbitration Act.

Professional Ethics Commission Opinion # 170, issued in December 1999, reached the conclusion that an agreement at the outset of representation between lawyer and client to submit all malpractice claims to arbitration did not violate Maine Bar Rule 3.4(f)(2)(v), the predecessor to Rule 1.8(h)(1), which contained identical language precluding agreements "prospectively limiting the lawyer's liability for malpractice." In Opinion # 170 a majority of the Commission stated that there is a strong public policy favoring arbitration and that an arbitrator would not be limited in determining whether malpractice had occurred and in awarding damages. The Opinion stated that the Bar Rules did not implicitly prohibit arbitration just because arbitration might affect the odds of a liability finding or the potential leverage of

the parties in negotiating a settlement. The Opinion also noted that clients might prefer arbitration to avoid private matters and confidences from being placed on the public record. Finally, the Opinion noted that, generally speaking, arbitration is faster and less expensive.

Opinion #170 concluded that any arbitration should be clear and should expressly reserve a client's right to the fee arbitration procedure under the Bar Rules and the client's ability to file grievances with Bar Counsel. Three members dissented, arguing that an arbitration provision constituted an unethical limitation of a lawyer's liability for malpractice in violation of Maine Bar Rule 3.4(f)(2)(v).

Professional Ethics Commission Opinion # 202, issued in January 2011, dealt with the related issue of whether an engagement agreement could ethically include a provision waiving a jury trial in the event of a future dispute between lawyer and client. The Opinion did not find a jury trial waiver to be a per se violation of Rule 1.8(h)(1) but focused on the attorney's obligation—if such a provision were proposed—to fully inform the client of the scope and effect of the provision. It equated such a provision with a provision requiring arbitration and noted comment [14] to Rule 1.8 of the Rules of Professional Conduct—quoted above and implemented after Opinion # 170 had been issued—approving agreements to arbitrate malpractice claims but only with the proviso that the client must be "fully informed" as to the scope and effect of arbitration.

Opinion # 202 went on to state that in order to obtain informed consent to either a jury trial waiver or

an arbitration agreement, a lawyer must discuss with the client the potential effects from both the theoretical and practical point of view—including such issues as timing, cost, appealability, evaluation of evidence and credibility, the chances of a liability finding, and the perceived difference between litigation and arbitration in terms of the potential leverage in negotiating a settlement.[1]

It is apparent from these two opinions that the Professional Ethics Commission's view of the inclusion of arbitration in engagement agreements has evolved from the largely unqualified approval in Opinion # 170 to the rule in Opinion # 202 that arbitration agreements can be included only if the requirement of informed consent is strictly observed. Indeed, many of the arguments offered in Opinion # 202 were points made by the dissenting members of the Commission in Opinion #170.

In part, the evolution of the Professional Ethics Commission's view may result from the 2009 adoption of the Maine Rules of Professional Conduct—with the inclusion of comment [14] to Rule 1.8(h)(1) and the definition of "informed consent"—in place of the former Bar Rules. In part, the evolution of the Commission's view may also result from practical concerns that binding arbitration applicable to future malpractice

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[1] The Opinion further stated that in order to obtain informed consent to a waiver of a client's right to a jury trial, the lawyer must advise the client in writing of the opportunity to seek the advice of independent legal counsel. In this connection it noted that while there is a public policy favoring arbitration, there is no public policy favoring jury trial waivers.

claims would constitute a significant disadvantage to the client.

Although not cited in Opinion # 202, the ABA Standing Committee on Ethics and Professional Responsibility had issued a formal opinion in 2002 stating that before including a mandatory arbitration provision, "[d]epending 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 arbitration. Specified examples of the possible adverse consequences were "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." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 02-425 (Feb. 20, 2002).

In countering this authority, BSSN relies on the First Circuit's 2013 decision in *Bezio v. Draeger*. That case involved the same BSSN arbitration provision at issue in this case. Relying on Maine Professional Ethics Commission Opinion # 170, the First Circuit upheld the arbitration provision. 737 F.3d at 823-25. However, the First Circuit decision does not address or even mention the subsequent Opinion # 202, which had been issued in January 2011. In addition, the *Bezio* case involved a plaintiff "who was no stranger to arbitration," having been the subject of a Financial Industry Regulatory Authority (FINRA) arbitration proceeding brought against him by former clients and having himself commenced a FINRA arbitration

proceeding against his former employer. 737 F.3d at 821.

In February 2015, subsequent to the First Circuit's *Bezio* decision, an Enduring Ethics Opinion authored by a member of the Professional Ethics Commission, James Bowie, Esq, concluded that Opinion # 202 had not been undermined and requires that a client's informed consent be obtained for any agreement to submit future malpractice claims to binding arbitration. Indeed, the Enduring Ethics Opinion may go farther than Opinion # 202 in suggesting that not only is a client's informed consent required but that the client must be informed in writing of the desirability of seeking the advice of independent legal counsel before agreeing to binding arbitration with respect to future disputes.[2]

The Enduring Ethics Opinion suggests that the First Circuit's *Bezio* decision should be disregarded because it "inexplicably" did not note the adoption of the Maine Rules of Professional Conduct in 2009 or the issuance of Opinion # 202.

While BSSN questions whether an Enduring Opinion authored by one member of the Professional Ethics Commission should be given any authoritative

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[2] Although not entirely clear on this point, Opinion # 202 can be read as only requiring notification of the opportunity to seek the advice of independent counsel with respect to an agreement to waive a jury trial. See n.l at p. 5 above. It is obvious that binding arbitration would necessarily include a jury trial waiver, but, given the public policy favoring arbitration, a distinction can perhaps be drawn between a simple jury trial waiver and a jury trial waiver as part of an arbitration agreement.

weight, the court does not need to resolve that issue because, independent of the Enduring Opinion, it concludes that under the definition of "informed consent" in Rule 1.0(e) and comment [14] to Rule 1.8, a lawyer entering into a engagement agreement with a client must explain the scope and effect of an arbitration provision applicable to future disputes between lawyer and client, including possible malpractice claims. The explanation should at a minimum include the absence of a jury trial, the private vs. public nature of an arbitration proceeding as opposed to a trial, the potential differences in discovery, the limitations on appeal, and the relative expenses of arbitration vs. litigation.[3]

For purposes of this case, the court does not have to consider whether further explanation must be provided on issues such as the odds of prevailing in arbitration, potential settlement leverage, and whether a client should be advised to seek the advice of another lawyer, as proposed in Opinion # 202 and/or in Commission Member Bowie's Enduring Ethics Opinion. There may be room for disagreement on those issues. Regardless of whether additional explanation would have been required, BSSN in this instance did not provide Snow with the minimum amount of explanation that the court has concluded above would have been required to elicit informed consent.

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[3] Although Opinion # 170 states that arbitration is generally faster and less expensive, counsel for Snow argues that arbitration would involve greater upfront costs than retaining a lawyer on a contingency fee to pursue a malpractice claim. *See* Plaintiff's Motion to Stay Arbitration at 12 n.4.

Under Rule 1.4(b), the amount of information that would be required to elicit informed consent may vary depending on the sophistication and experience of the client. *See* ABA Formal Opinion 02-425; *Bezio*, 737 F.3d at 823. However, except in a case such as *Bezio*, where the client had actually participated in arbitration on one or more prior occasions, this would not excuse a lawyer from the obligation to outline the scope and effect of an arbitration provision and to make sure the client is informed about the legal and practical consequences of arbitration. If the lawyer asks if the client has had any experience with arbitration and learns that the client has previously participated in one or more arbitrations, this might eliminate some of the need for further explanation. There is no evidence such an inquiry was made in this case.

Just because Snow had a medical degree and may have understood the concept of arbitration in theory does not mean she was aware that, in the specific context of a claim that BSSN had engaged in professional negligence, arbitration would entail the waiver of a jury trial. It also does not mean that she appreciated the private nature of arbitration proceedings, the effect of arbitration in terms of discovery and appeal, and the upfront expenses that might be involved. In this case, moreover, the boilerplate arbitration provision refers generally to any "dispute" that might arise out of BSSN's services but did specifically advise Snow that a "malpractice" claim would be subject to binding arbitration.

Under the Rules of Professional Conduct and Opinion # 202, the onus is on the lawyer to communicate

adequate information and explanation to obtain informed consent to an arbitration provision. That was not done in this case. Accordingly, the arbitration provision in Snow's engagement letter violated public policy, and the court will not enforce that provision.

BSSN also argues that failing to enforce the arbitration provision in this case would be inconsistent with U.S. Supreme Court precedent finding certain state law to be preempted under the Federal Arbitration Act. *See Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681 (1996). In *Casarotto*, the Supreme Court held that state law, "whether of legislative or judicial origin," 517 U.S. at 685, may be preempted if it applies "specifically and solely" to the enforceability of arbitration clauses. 517 U.S. at 688. This was emphasized more than once in the *Casarotto* opinion. *See, e.g.*, 517 U.S. at 687: "Courts may not… invalidate arbitration agreements under state laws applicable *only* to arbitration provisions" (emphasis in original).

The rule that lawyers must provide adequate information and explanation to obtain the "informed consent" of their clients does not apply "specifically and solely" to arbitration provisions but applies generally to any instance in which a lawyer seeks the client's assent and agreement. Accordingly, the applicable provisions of the Maine Rules of Professional Conduct do not single out arbitration provisions for special treatment and are not preempted under the Federal Arbitration Act.

The entry shall be:

Defendants' motion to compel arbitration is denied, and plaintiff's motion to stay the commencement of threatened arbitration by defendants is granted. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: January 20, 2017

/s/ Thomas D. Warren

Thomas D. Warren

Justice, Superior Court