Illinois Official Reports

Appellate Court

***Dick-Ipsen v. Humphrey, Farrington & McLain, P.C.*,**
2024 IL App (1st) 241043

Appellate Court Caption	BRYAN DICK-IPSEN and KAREN DICK-IPSEN, Plaintiffs-Appellees, v. HUMPHREY, FARRINGTON & McCLAIN, P.C.; ANDREW SMITH; RUBENS KRESS & MULHOLLAND; and TOBY MULHOLLAND, Defendants (Humphrey, Farrington & McClain, P.C., and Andrew Smith, Defendants-Appellants).
District & No.	First District, Second Division No. 1-24-1043
Filed	August 30, 2024
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 23-L-6958; the Hon. Catherine A. Schneider, Judge, presiding.
Judgment	Affirmed and remanded.
Counsel on Appeal	Daniel F. Konicek and Amanda J. Hamilton, of Konicek & Dillon, P.C., of Geneva, for appellants. Mark A. Brown and Kellie J. Snyder, of Lane Brown, LLC, of Chicago, and Jeffrey J. Lowe and Andrew J. Cross, of Carey Danis & Lowe, of St. Louis, Missouri, for appellees.

Panel PRESIDING JUSTICE HOWSE delivered the judgment of the court, with opinion.
Justices McBride and Ellis concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff retained the defendant-attorneys to represent him in a tort case against certain chemical manufacturers and suppliers after he developed Parkinson's disease. After the case was filed, several of plaintiff's claims were determined to be untimely and were dismissed on statute of limitations grounds.

¶ 2 Plaintiff filed this case against his former attorneys, claiming that they committed malpractice during the representation. Defendants moved to compel arbitration, relying on the retainer agreement that plaintiff signed at the outset of the representation, which contains an arbitration provision. Plaintiff opposed the motion to compel arbitration, arguing the arbitration agreement is procedurally and substantively unconscionable. The trial court found the arbitration provision to be procedurally unconscionable and denied defendants' motion to compel arbitration. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff Bryan Dick-Ipsen[1] was diagnosed with Parkinson's disease. Plaintiff believes that he developed Parkinson's disease because he worked as a dry cleaner and was exposed to harmful chemicals—namely, perchloroethylene and trichloroethylene—during the course of his employment. Plaintiff contacted defendant Andrew Smith, an attorney at the firm Humphrey, Farrington & McClain, P.C. (Humphrey firm), to represent him in a case against the manufacturers and suppliers of the chemicals, among other defendants.

¶ 5 Smith and the Humphrey firm had experience handling cases for exposure to the same toxic chemicals that plaintiff was exposed to in his work. The Humphrey firm is located in Independence, Missouri, while plaintiff was living in Johnsburg, Illinois—locations that are 500 miles away from each other. After their preliminary discussions about representation, Smith told plaintiff that the firm would represent plaintiff on a contingency basis.

¶ 6 Smith informed plaintiff that the firm would take the case with a 45% contingent fee, the firm advancing all expenses, and the firm being paid for its services only if there was a recovery on plaintiff's claims. Smith sent plaintiff an "Attorney-Client Agreement." In that retainer agreement, drafted by defendants, plaintiff agreed to the terms he had previously discussed with Smith. The agreement states that plaintiff is retaining the Humphrey firm to investigate and prosecute his claims for exposure to toxic and hazardous chemicals. The agreement sets forth the amount of the contingency fee, 45%, and describes the nature of the work that defendants would be performing for plaintiff.

[1]Plaintiff Karen Dick-Ipsen is Bryan's wife, and her claim in this case is for loss of consortium. Because the facts related to this appeal primarily concern only Bryan, we refer to him as "plaintiff" and we will refer to Karen by name so as not to confuse the issue.

¶ 7 The attorney-client agreement contains some other provisions to define the parties' rights and obligations, including the provision that is relevant to this case, an arbitration provision. The agreement provides that any claims between the Humphrey firm and plaintiff must be resolved in binding arbitration.

> "ARBITRATION. Claims, disputes or controversies between [the law firm] and [plaintiff] arising out of or relating to this Agreement or breach thereof shall be subject to non-binding mediation. In the event no mediated resolution is reached, then the claim, dispute or controversy shall be resolved *exclusively* by arbitration before a single arbitrator in Kansas City, Missouri, in accordance with the Rules of the American Arbitration Association currently in effect. The determination of the arbitrator shall be *final and binding* on us, and may be entered in any court of competent jurisdiction to enforce it." (Emphases in original.)

Plaintiff signed the agreement on May 7, 2018, and sent it to defendants by e-mail. After receiving the agreement with plaintiff's signature, Smith alerted plaintiff that his wife, Karen Dick-Ipsen, needed to sign the agreement too. The following day, on May 8, 2018, plaintiff returned the agreement to defendants with his wife's signature included. The representation commenced, and defendants began to investigate and do the necessary work to pursue plaintiff's claims.

¶ 8 At some point either during the representation or during the preliminary discussions about the representation, Smith told plaintiff that the Humphrey firm had obtained a jury verdict for another client against one of the manufacturers of trichloroethylene in an amount in excess of $20 million. However, according to plaintiff, defendants failed to identify the relevant chemical manufacturers in a timely fashion and instead focused on pursuing recovery from the suppliers only. Defendants attempted to interpose claims against certain of the chemical manufacturers later in an amended complaint, but the claims were ultimately dismissed as barred by the statute of limitations. After facing several different motions to dismiss and motions for summary judgment, plaintiff was left with claims against just three of the defendants in the underlying case. Plaintiff settled his claims with two of the defendants, and he had one claim outstanding at the time he filed this case.

¶ 9 In this case, plaintiff alleges that his attorneys in the underlying case, defendants, committed legal malpractice. He claims that defendants allowed the statute of limitations to lapse against several manufacturers of the chemicals that caused him to develop Parkinson's disease. Plaintiff also contends, among other things, that defendants failed to timely appeal the decisions made on dispositive motions, which caused him to lose his right to appeal certain decisions made by the circuit court. Defendants also allegedly neglected to add Karen Dick-Ipsen's claim for loss of consortium to her husband's case, and the claim was lost because it became untimely.

¶ 10 Defendants filed a motion to compel mediation or binding arbitration. In their motion, defendants argued that the attorney-client agreement between plaintiff and defendants contains an arbitration provision, which "requires plaintiffs to first mediate their dispute with the Humphrey Defendants and, if no agreement could be reached, submit to arbitration." Plaintiff responded to the motion to compel arbitration and argued that the provision should not be enforced because it is procedurally and substantively unconscionable.

¶ 11 In support of his response in opposition to defendants' motion to compel arbitration, plaintiff filed an affidavit. Plaintiff avers that neither Smith nor anyone else at the Humphrey

firm ever informed him that any disputes arising out of the representation needed to be mediated or arbitrated. Plaintiff avers that, at the time he signed the agreement, he did not know what mediation or arbitration meant. Plaintiff states in his affidavit that defendants never informed him that he was giving up significant rights by signing the representation agreement, such as the right to a jury trial, the right to appeal, and the right to the discovery process typically available in judicial proceedings. Plaintiff further states in his affidavit that he was not informed by defendants that he would be required to travel over 500 miles to Missouri to arbitrate, and he points out that his driver's license was taken away due to his Parkinson's diagnosis. He was similarly not informed that the case would be decided by a single arbitrator from Missouri or that he would have to pay half of the costs for resolving the dispute in mediation or arbitration. In fact, plaintiff avers, neither Smith nor anyone else at the firm ever mentioned the arbitration provision at all or explained anything about it to him in any way either before or during the course of the representation.

¶ 12 The trial court issued a written decision finding the arbitration provision not to be substantively unconscionable. However, the trial court held the arbitration provision to be procedurally unconscionable and, therefore, denied defendants' motion to compel arbitration. According to its written order, the trial court reasoned that plaintiff was not "fully informed" of the scope and the effect of the arbitration provision. Using the Illinois Supreme Court Rules of Professional Conduct as a guide, the trial court found plaintiff could not be held to an agreement to arbitrate a legal malpractice claim without being informed about the scope and effect of the agreement. Thus, the trial court found the arbitration provision to be unenforceable. Defendants now appeal the denial of their motion to compel arbitration.

¶ 13 II. ANALYSIS

¶ 14 Defendants argue that the trial court erred when it denied their motion to compel arbitration. The denial of a motion to compel arbitration is analogous to a denial of injunctive relief and is appealable on an interlocutory basis under Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017). *Federal Signal Corp. v. SLC Technologies, Inc.*, 318 Ill. App. 3d 1101, 1105 (2001). Generally, the standard of review of an order granting or denying a motion to compel arbitration is whether the trial court abused its discretion. *Id.* (citing *Brooks v. Cigna Property & Casualty Cos.*, 299 Ill. App. 3d 68, 71 (1998)). Where, however, the circuit court does not hold an evidentiary hearing on a motion to compel arbitration, we review the circuit court's judgment *de novo. Id.* at 1105-06; *Fahlstrom v. Jones*, 2011 IL App (1st) 103318, ¶ 13. Here, as in *SLC Technologies*, the evidence, as it relates to the motion to compel arbitration, was not disputed and the trial court did not make any findings as to any factual issues (see *SLC Technologies*, 318 Ill. App. 3d at 1105-06). Moreover, the case requires us to review whether a contractual provision is unconscionable, which is a question of law subject to *de novo* review. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 22 (2006). Accordingly, our review in this case is *de novo*.

¶ 15 Defendants brought their motion to compel arbitration under section 2-619 of the Code of Civil Procedure, which provides for dismissal of a claim when the claim is barred by an affirmative matter defeating or avoiding the legal effect of the claim. See 735 ILCS 5/2-619(a)(9) (West 2022). A motion to compel arbitration and dismiss the lawsuit is essentially a motion under section 2-619(a)(9) to dismiss the complaint based on the exclusive remedy of arbitration. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101 (2009)

(citing *Griffith v. Wilmette Harbor Ass'n*, 378 Ill. App. 3d 173, 180 (2007)). The right to arbitration is treated as an "affirmative matter" that defeats the claim. *Id.* A motion to dismiss under section 2-619 should be granted only where no material facts are in dispute and the movant is entitled to dismissal as a matter of law. *Sanders v. Oakbrook Healthcare Center, Ltd.*, 2022 IL App (1st) 221347, ¶ 17 (citing *Gelinas v. Barry Quadrangle Condominium Ass'n*, 2017 IL App (1st) 160826, ¶ 14).

¶ 16 In deciding whether to grant a motion to dismiss under section 2-619, all well-pleaded facts are to be taken as true. *Id.* When the defendant files a motion under section 2-619, he admits for purposes of the proceedings on the motion that the complaint is legally sufficient. *Id.* In this case, defendants did not file any counteraffidavits or otherwise contest the evidence submitted by plaintiff, further supporting the proposition that plaintiff's attestations are to be taken as true for purposes of this motion to compel arbitration. See *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 352 (2010) ("The failure to challenge or contradict supporting affidavits filed with a section 2-619 motion results in an admission of the facts stated therein.").

¶ 17 As both parties recognize, agreements to resolve disputes through arbitration, rather than litigation, are favored under both Illinois and federal law. *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶¶ 14-15. Where there is a valid arbitration agreement and the parties' dispute falls within the scope of that agreement, arbitration is mandatory, and the trial court must compel it. *Hollingshead*, 396 Ill. App. 3d at 1102. Nonetheless, an arbitration agreement may be invalidated by state law contract defenses of general applicability, such as fraud, duress, or unconscionability. *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶ 18.

¶ 18 The trial court denied defendants' motion to compel arbitration after finding that the arbitration provision in the parties' agreement was procedurally unconscionable. Both here and in the trial court, the predominant focus of the parties' arguments concern the Illinois Supreme Court Rules of Professional Conduct. Under the Rules of Professional Conduct, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Ill. R. Prof'l Conduct (2010) R. 1.4(b) (eff. Jan. 1, 2010). The rules further mandate that "[a] lawyer shall not: make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Ill. R. Prof'l Conduct (2010) R. 1.8(h)(1) (eff. Jan. 1, 2010). The comment to Rule 1.8 specifically touches upon the issue in this appeal—the viability of an agreement requiring arbitration of legal malpractice claims.

> "Limiting Liability and Settling Malpractice Claims
>
> [14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement 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.) Ill. R. Prof'l Conduct (2010) R. 1.8 cmt. 14 (eff. Jan. 1, 2010).

¶ 19 According to the comment to the rule, there is no general prohibition on a lawyer entering into an agreement with the client to arbitrate legal malpractice claims, but the client must be fully informed of the scope and effect of the agreement. *Id.* The American Bar Association has similarly provided guidance on the ethical considerations surrounding an attorney reaching an agreement to arbitrate legal malpractice claims with his client. An ABA formal opinion to the Model Rules for Professional Conduct states that

> "[i]t is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims *provided that (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement* ***." (Emphasis added.) ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02-425, at 7 (2002).

¶ 20 The uncontested evidence in this case, principally plaintiff's affidavit, shows that defendants never discussed the arbitration provision with plaintiff. Plaintiff avers that he did not know what the terms meant, did not know what he was giving up by agreeing to submit to arbitration, and overall was not fully informed about the effect of the arbitration provision. Based on the evidence, which is taken as true and from which we are to draw all reasonable inferences in plaintiff's favor, it is clear that plaintiff was neither apprised of the advantages and disadvantages of arbitration nor was given sufficient information by defendants to permit him to make an informed decision about whether to agree to the arbitration provision. Defendants submitted no evidence to the contrary.

¶ 21 Defendants nevertheless contend that the arbitration provision is enforceable because "state law ethical rules cannot invalidate an arbitration provision." Defendants observe that no court in Illinois has addressed the issue of what, if any, impact the Illinois Rules of Professional Conduct have upon the enforceability of an arbitration provision.

¶ 22 Defendants rely on an unpublished decision from the United States Court of Appeals for the Third Circuit in which the court upheld an arbitration provision in a retainer agreement that was challenged under the Rules of Professional Conduct in New Jersey. *Smith v. Lindemann*, 710 F. App'x 101, 102 (3d Cir. 2017). In *Smith*, the plaintiff made two arguments against the enforcement of an arbitration provision in the retainer agreement she signed with the defendant-attorney. The plaintiff first argued that "New Jersey law prohibits the enforcement of arbitration provisions by attorneys facing malpractice claims brought by former clients." *Id.* at 103. The Third Circuit rejected that claim without any substantive analysis of New Jersey law, finding that even if New Jersey law barred an arbitration agreement covering legal malpractice claims, the Federal Arbitration Act (Act) (9 U.S.C. § 1 *et seq.* (2012)) would preempt such a law. *Smith*, 710 F. App'x at 103.

¶ 23 Second, the plaintiff in *Smith* argued that "the arbitration provision cannot be enforced because its inclusion in the representation agreement violated the New Jersey Rules of Professional Conduct." *Id.* at 104. The Third Circuit likewise rejected that argument. The *Smith* court pointed out that the plaintiff was arguing that the arbitration agreement could not bind her for a malpractice claim because the arbitration provision did not specifically use the word "malpractice." *Id.* The court rejected the plaintiff's argument as attempting to have the contract construed more narrowly than was clearly intended. *Id.* The court also explained that the plaintiff could not rely on the narrow interpretation she was proffering because plaintiff herself

had invoked the arbitration clause when the defendant-attorney filed a complaint against her for failing to pay her legal fees. *Id.* at 105. The plaintiff submitted no evidence that she did not understand the arbitration provision, and the record, in fact, demonstrated that the plaintiff "was aware of the arbitration provision's meaning and consequences." *Id.*

¶ 24 The *Smith* court did not truly address the question presented in this case. There are several critical distinguishing features between *Smith* and the facts in this case. Here, we have specific, uncontradicted evidence that plaintiff did not understand the arbitration agreement and did not understand its implications. Plaintiff did not ever try to invoke the arbitration provision against defendants, as the evidence shows plaintiff did not even know what arbitration and mediation meant. Plaintiff is not arguing that the language of the provision would not include a malpractice claim; he is arguing that he could not have given the requisite consent because he was not fully apprised of the advantages and disadvantages of arbitration and was not given sufficient information to permit him to make an informed decision about whether to agree to the arbitration provision.

¶ 25 Defendants, relying on *Smith*, argue that the Act preempts a state's rules of professional conduct if there is any conflict between the two. They, therefore, argue that the Rules of Professional Conduct cannot be used to invalidate the arbitration provision. However, even if we accept that the Act applies here and preempts Illinois's Rules of Professional Conduct, under the Act, an arbitration provision may be set aside "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (West 2012). Agreements to arbitrate can be "invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." (Internal quotation marks omitted.) *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Similarly, under Illinois law, an arbitration agreement may be invalidated by state law contract defenses, such as fraud, duress, or unconscionability. *Calusinski v. Alden-Poplar Creek Rehabilitation & Health Care Center, Inc.*, 2022 IL App (1st) 220508, ¶ 11. So even if the Act applies, we still must determine whether the agreement to arbitrate is enforceable, *i.e.*, whether it survives against the contract defenses plaintiff asserts.

¶ 26 Here, the trial court found the arbitration provision to be procedurally unconscionable. We make the same finding here. Critical to our finding is the failure of defendants to fully inform plaintiff about the meaning and consequences of the arbitration clause. We do not find that the Rules of Professional Conduct themselves serve to make the arbitration agreement unenforceable. Instead, we find that the Rules of Professional Conduct provide guidance on the existing standards for attorney conduct in Illinois and serve as a lens through which we can review the circumstances of the contract formation to decide whether enforcing an arbitration provision would be unconscionable.

¶ 27 Procedural unconscionability generally refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it. *Kinkel*, 223 Ill. 2d at 22. "This analysis also takes into account the disparity of bargaining power between the drafter of the contract and the party claiming unconscionability." *Id.* When deciding whether a contract or a provision thereof is procedurally unconscionable, courts may consider

> "all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a

> maze of fine print; both the conspicuousness of the clause and the negotiations relating to it are important, albeit not conclusive factors in determining the issue of unconscionability." *Id.* at 23.

Procedural unconscionability results from some impropriety during the process of forming the contract that deprives a party of a meaningful choice. *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989 (1980).

¶ 28 The arbitration provision at issue here was drafted by defendants and was never discussed with plaintiff. While defendants discussed several of the other material terms of the attorney-client agreement with plaintiff—such as the amount of the fee, the nature of a contingent fee agreement, and the intended scope of work—defendants never mentioned anything about the arbitration clause. Plaintiff, a disabled individual with a progressive neurological disease, turned to defendants to help him obtain redress from those parties who allegedly caused his injury. Plaintiff worked as a dry cleaner since graduating from high school and defendants are sophisticated attorneys who have earned multi-million-dollar settlements and verdicts in high-profile litigation. Although plaintiff was only a prospective client at the time of executing the retainer agreement, defendants were nonetheless in a position of trust under which they owed plaintiff certain ethical duties. Defendants made no effort to inform plaintiff about the terms or the implications of the arbitration provision and all of the rights and benefits plaintiff would be waiving or foregoing by executing the agreement.

¶ 29 As defendants point out, the violation of a Rule of Professional Conduct does not, on its own, give rise to a legal malpractice claim nor does it create any presumption that a legal duty has been breached by the attorney. *In re Estate of Weber*, 2021 IL App (2d) 200354, ¶ 21. We also note defendants' correct observation that it is the Illinois Supreme Court's exclusive power to prescribe the rules governing the conduct of attorneys and to discipline attorneys who violate those rules. *Id.* However, as stated above, we are not proclaiming any rule to govern the conduct of attorneys, nor are we imposing any type of discipline on defendants for their failure to comply with the rule. We simply hold that, under the totality of the circumstances in this case, the arbitration provision is not enforceable against plaintiff. The Rules of Professional Conduct merely illuminate our analysis that enforcing the arbitration provision here would be unconscionable.

¶ 30 The totality of the circumstances shows that plaintiff cannot fairly be said to have been aware that he was agreeing to waive several rights by agreeing to arbitrate any potential claim for legal malpractice.

¶ 31 We find *Hodges v. Reasonover*, 2012-0043, p. 1 (La. 7/2/12); 103 So. 3d 1069, and *Castillo v. Arrieta*, 2016-NMCA-040, ¶ 2, 368 P.3d 1249, to be persuasive. In both *Hodges* and *Castillo*, the courts were tasked with deciding whether to enforce arbitration provisions between attorneys and their clients. The arbitration provisions in those cases are similar to the arbitration clause at issue here. The courts both analyzed the arbitration agreements in view of similar rules of professional conduct as are in force in Illinois, as well as the ABA Model Rule and the applicable formal ethics opinions.

¶ 32 In *Hodges*, the Louisiana Supreme Court began by explaining that an attorney must give a client enough information for the client to make informed decisions about the representation. *Hodges*, 2012-0043, at 11 (citing Model Rules of Prof'l Conduct R. 1.4(b) (Am. Bar Ass'n 1983), and La. R. of Prof'l Conduct R. 1.4(b) (eff. Apr. 1, 2006)). The court explained that "[i]n the context of attorney-client arbitration clauses, *** the lawyer has an obligation to fully

explain to the client the possible consequences of entering into an arbitration clause, including the legal rights the client gives up by agreeing to binding arbitration." *Id.* at 12. The *Hodges* court further explained that "[w]ithout clear and explicit disclosure of the consequences of a binding arbitration clause, the client's consent is not truly 'informed.' " *Id.* Because the attorneys in the case did not make a full and complete disclosure to the client about the potential effects of the arbitration clause, the Louisiana Supreme Court held the arbitration provision to be unenforceable. *Id.* at 14.

¶ 33 The court in *Castillo* took a similar approach and found the arbitration provision at issue would be unenforceable absent the client's informed consent. *Castillo*, 2016-NMCA-040, ¶ 15. The court explained that the enforceability of arbitration agreements between attorneys and their clients "has been carefully examined by the American Bar Association (ABA) and by state bar ethics committees, with the majority concluding that such a clause is at least ethically permitted, provided certain requirements typically involving the client's informed consent, are met." *Id.* ¶ 18 (citing ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02-425, at 7 (2002)). The *Castillo* court explained that, in 2002, the ABA's Standing Committee on Ethics and Professional Responsibility addressed the issue of arbitration clauses in retainer agreements. *Id.* ¶ 19 (citing ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02-425). The court noted that the ABA decided that,

> "[s]ince arbitration typically results in a client's waiver of significant rights, including the right to a jury trial, the right to broad discovery, and the right to an appeal on the merits, *** an attorney should fairly explain those consequences, as well as the benefits of agreeing to arbitrate in order to comply with the Model Rules." *Id.*

¶ 34 The *Castillo* court relied heavily on the Louisiana Supreme Court's decision in *Hodges* and held 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." *Id.* ¶ 23. The *Castillo* court explained that "[a]t a minimum, the attorney should inform his client that arbitration will constitute a waiver of important rights, including, the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits." *Id.* The court concluded that,

> "[i]f [the plaintiff] truly was never warned that he 'was waiving [his] right to a trial by jury' if he sued his attorneys for malpractice, as he stated in his affidavit, then inclusion of such a broadly worded and unexplained material term was an overreach by his attorneys that will not be enforced in this Court." *Id.* ¶ 24.

¶ 35 We agree with those courts that have held that a plaintiff must understand the implications of an agreement to arbitrate before being held to have agreed to arbitrate any legal malpractice claim. Because plaintiff was not informed about any of the material terms of the arbitration provision in this case, it would be unconscionable for us to enforce the provision against him. Plaintiff cannot be held to have understood what he was agreeing to waive and otherwise obligate himself when he executed the agreement. Defendants have presented no evidence to show that plaintiff knew or should have known the implications of agreeing to arbitrate malpractice claims. Attorneys who have drafted a retainer agreement have the burden to show that the contracts are fair, reasonable, and fully known and understood by their clients. *Wong v. Michael Kennedy, P.C.*, 853 F. Supp. 73, 80 (E.D.N.Y. 1994). Defendants failed to meet the burden in this case.

¶ 36 Defendants argue that plaintiff is charged with having read and understood the agreement, since he signed it (citing *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 150 (2006) ("[A] party to an agreement is charged with knowledge of and assent to the agreement signed.")). Defendants contend that plaintiff's affidavit indicates that he had the opportunity, over the span of several days, to read, review, and understand the terms of the contract. However, plaintiff has submitted uncontradicted evidence that he did *not* understand the arbitration provision. Plaintiff has made the case that he was not fully informed, or informed at all, about the implications of the provision such that he cannot be held to have agreed to it. Typically, in a standard contract case, plaintiff's argument would fail to have any effect on the enforceability of the contract. However, due to plaintiff's specific circumstances, the disparity in sophistication between the parties, and the unique aspects of the attorney-client relationship, plaintiff cannot be held to the same standard as is applied to parties generally executing contracts. See *Castillo*, 2016-NMCA-040, ¶ 16 (the agreement to arbitrate between an attorney and client is not an ordinary contract, and typical arm's-length principles that are appropriate in ordinary transactions may not be appropriate in dealings between an attorney and client).

¶ 37 Defendants also argue that the Rules of Professional Conduct relied upon by plaintiff apply only to current clients and not prospective clients who are in the process of retaining an attorney. We reject that interpretation, as the rules clearly address the formation of retainer agreements. The Illinois rules, the ABA Model rules, and the formal opinions all address the issue of forming an attorney-client relationship through an agreement where an arbitration provision is present.

¶ 38 We are cognizant that different courts around the country have reached different conclusions on this issue. The Ninth Circuit Court of Appeals has held that an arbitration clause in a retainer agreement is unenforceable unless the attorney has fully disclosed the arbitration clause to his or her client. *Smith v. Jem Group, Inc.*, 737 F.3d 636, 641 (9th Cir. 2013) (applying Washington law). The Eighth Circuit Court of Appeals, meanwhile, has taken the opposite approach, finding that an arbitration provision would not be set aside on the basis of procedural unconscionability or public policy grounds where the arbitration provision itself informed the client of its effect and the client did not lack meaningful choice about whether to accept the provision. *Plummer v. McSweeney*, 941 F.3d 341, 347-50 (8th Cir. 2019) (applying District of Columbia law). In a case in the federal district court for the Northern District of Illinois, the court reviewed a retainer agreement in which the client signed the agreement on the last page, acknowledging that "*the parties have read and understood the foregoing terms* and agree to them as of the date attorney(s) first provided services." (Emphasis added and internal quotation marks omitted.) *Davis v. Fenton*, 26 F. Supp. 3d 727, 738 (N.D. Ill. 2014). The *Davis* court thus held that the plaintiff-client could not prevail on a claim of procedural unconscionability because she "acknowledged that she read and understood the terms of the agreement including the arbitration clause." *Id.* Therefore, according to the *Davis* court, the plaintiff's argument that no one informed her about the existence of the arbitration clause in the agreement or what that arbitration clause meant was immaterial and the clause was enforceable. *Id.* Along with the cases we discussed earlier, *Hodges*, 103 So. 3d at 1071, and *Castillo*, 2016-NMCA-040, ¶ 2, we think the Ninth Circuit's decision in *Smith*, 737 F.3d at 641, is the most persuasive and is the proper outcome under the circumstances presented here.

¶ 39 In this case, we are presented with an individual client who has not been shown to have any sophistication with regard to legal matters. See Matthew K. Corbin, *Finding A Safe Harbor*

for Arbitration Clauses in Attorney-Client Engagement Agreements, The Brief, Summer 2023, at 54 ("The less experienced a client is, both generally and with respect to legal matters, the greater the lawyer's duty to clarify in advance the importance of the arbitration clause."); see also *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 16-17 (2004) (the Rules of Professional Conduct reflect the principle that the practice of law is a public trust and lawyers are the trustees of the judicial system). Defendants opted not to provide plaintiff with any information about what the terms of the contract meant and, instead, simply sent the agreement to plaintiff for his signature. See Corbin, *supra* at 54 (" 'a lawyer who does not personally inform the client *** assumes the risk that the client *** is inadequately informed and the consent is invalid' " (quoting Model Rules of Prof'l Conduct R. 1.0 cmt. 6 (Am. Bar Ass'n 1983))). Plaintiff provided a sworn statement that he was totally uninformed about the effect of the arbitration provision and did not understand any of the consequences of the agreement to arbitrate. See *id.* at 55 ("The hallmark of informed consent is communicating adequate information to allow the client to make an educated decision."). Defendants' failure to inform plaintiff about any of the potential effects of the arbitration provision constitutes an infirmity during the process of contract formation, such that plaintiff lacked the requisite knowledge to make a meaningful choice (*Frank's Maintenance*, 86 Ill. App. 3d at 989). Therefore, we affirm the trial court's order denying defendants' motion to compel arbitration and remand this case for further proceedings.

¶ 40 III. CONCLUSION

¶ 41 We affirm the judgment of the trial court and remand for further proceedings.

¶ 42 Affirmed and remanded.