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NOTES

ARBITRATION CLAUSES IN RETAINER AGREEMENTS: A LAWYER'S LICENSE TO EXPLOIT THE CLIENT

Haynes v. Kuder[1]

I. INTRODUCTION

Disputes between an attorney and client over legal fees place a tremendous strain on an attorney's fiduciary obligations to his or her client.[2] These disputes arise more frequently and cause more public resentment than any other issue between an attorney and client.[3] To combat these problems, the legal profession has begun to suggest arbitration as a means to resolve disputes over legal fees.[4] However, certain problems arise when an attorney includes an arbitration clause in a retainer agreement.

An attorney is in an influential and superior position to the client when negotiating fee contracts.[5] Because of this position, an attorney has the opportunity to exploit his or her client.[6] Consequently, courts view agreements between a lawyer and client rather suspiciously and apply a higher standard to these agreements.[7] Furthermore, a lawyer is subject to ethical rules which require a lawyer to meet certain duties, including the duty to inform the client about matters regarding the representation.[8] Because of the higher obligations

1. 591 A.2d 1286 (D.C. 1991).

2. *See* James R. Devine, *Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come*, 14 U. TOL. L. REV. 1205, 1205 (1983); *see also infra* notes 68-70 (discussing the attorney's fiduciary duties).

3. Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 277.

4. *See* Devine, *supra* note 2, at 1222-26.

5. *See* Brickman, *supra* note 3, at 285; Spilker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951); *see also infra* notes 72-76 and accompanying text.

6. *See* Brickman, *supra* note 3, at 286.

7. *See infra* notes 61-67 and accompanying text.

8. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1989) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1986) [hereinafter MODEL CODE]; *see also infra* notes 82-84 and accompanying text.

imposed on an attorney when dealing with a client, any benefit of the doubt should go to the client in matters such as whether a claim is covered by an arbitration clause or whether an attorney fully explained the implications of an arbitration clause.

II. FACTS AND HOLDING

In 1985, Ellen Haynes retained an attorney from Maryland to represent her in a marital dispute with her husband.[9] At the time, she and her husband were both Maryland residents.[10] In 1986, Haynes separated from her husband, and she moved to the District of Columbia.[11] In November 1986, Haynes consulted with Armin Kuder, an attorney licensed to practice in the District of Columbia, to discuss whether Kuder would represent her in her domestic dispute.[12]

Kuder later mailed a proposed retainer agreement[13] and a cover letter to Haynes at her home.[14] The cover letter explained the initial steps that Kuder proposed to take if Haynes did, in fact, decide to retain him.[15] In the letter, Kuder stated that his first step would be to communicate with Haynes' "present counsel" (her attorney in Maryland) in order to learn about the case.[16] Kuder noted that the attorney in Maryland had "indicated a willingness to cooperate fully" with Kuder in his representation of Haynes.[17] The proposed retainer agreement also described in detail how fees would be calculated and billed.[18]

Among the terms of the proposed agreement was an arbitration provision.[19] This provision stated that the parties agreed to submit to arbitration any claims

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9. *Haynes*, 591 A.2d at 1287.

10. *Id.*

11. *Id.*

12. *Id.* Her Maryland attorney had advised her to consult with an attorney from the District of Columbia. *Id.*

13. This document was also referred to as an "engagement letter." *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* Kuder had also attached his firm's current fee schedule to the letter. *Id.*

19. *Id.* at 1287-88. The provision, in full, stated as follows:

> Although we do not anticipate any dispute concerning payment of fees, it is our policy that in case any such disputes arise, they will be handled through the less formal and more expeditious process of arbitration, rather than court action. Accordingly, it is agreed between you and the firm that any claim by the firm for unpaid fees and expenses, *and any defenses or counterclaims to such a claim, whether based on a claim of inadequate representation or any other ground*, shall be resolved exclusively through arbitration in the District of Columbia under the then applicable rules of the American Arbitration Association. Judgment upon an award rendered by the Arbitrator(s) in any such proceeding maybe [sic] entered and enforced in any Court of competent jurisdiction.

Id. at 1288 (emphasis added).

"by the firm for unpaid fees and expenses, and any defenses or counterclaims to such a claim, whether based on a claim of inadequate representation or any other ground."[20] The retainer agreement asked for Haynes' signature of acceptance "[i]f the foregoing terms correctly reflect our agreement and understanding."[21] On December 22, 1986, Haynes signed the agreement to retain Kuder.[22]

In the summer of 1987, Kuder, acting as Haynes' attorney, filed an action for divorce in Maryland.[23] In September 1988, the dispute was settled;[24] at that time, Haynes owed Kuder almost $11,000 in attorney's fees.[25]

On July 20, 1989, Haynes filed suit against Kuder in Superior Court in the District of Columbia.[26] Haynes alleged legal malpractice, and she demanded a jury trial.[27] Within three weeks, Kuder demanded arbitration of the dispute in accordance with the retainer agreement's arbitration clause.[28] Haynes resisted arbitration; Kuder then filed a motion to compel arbitration and to stay the malpractice action in superior court.[29] In an affidavit in support of his motion, Kuder stated that he had "fully discussed with Mrs. Haynes all of the terms of the [retainer agreement], including the arbitration provisions," before she signed the agreement.[30]

In her opposing motion, Haynes challenged the validity of the retainer agreement and the arbitration clause; she alleged that Kuder had fraudulently induced her to hire him and that he had fraudulently procured the arbitration clause through misrepresentation.[31] Haynes stated that Kuder did not

> call my attention to or explain the meaning or significance of the arbitration clause to me. I had never before been involved in an arbitration proceeding or in a civil lawsuit for damages, and had no idea that by signing the retainer agreement I was giving up my right to sue Mr. Kuder for his negligence, or to have a jury determine the merits of my claims. If he had done so, I would have insisted on deleting that clause from the retainer agreement.[32]

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

Haynes also argued that a malpractice claim is outside the scope of the arbitration clause because an agreement to arbitrate malpractice claims violates ethical standards for lawyers.[33]

The trial court granted Kuder's motion to compel arbitration.[34] The judge found that the arbitration clause was valid and enforceable.[35] The judge reasoned that the retainer agreement, on its face, made it clear to Haynes that the "process of arbitration" would be utilized to determine any "dispute[s] concerning payment of fees" and that arbitration would be an alternative to "court action."[36] The judge also found that Haynes had not been pressured by Kuder into agreeing to the arbitration clause.[37] The judge relied on: (1) the fact that Kuder mailed the agreement to Haynes "to read and accept if she so chose;" (2) his perception that "[t]he clause is not couched in arcane legal jargon;" and (3) the fact that Haynes could have consulted another attorney, especially given that she had another attorney at the time.[38] The judge also determined that Haynes' malpractice claim was "clear[ly]" within the scope of the arbitration agreement because the basis of Haynes' claim was the inadequacy of Kuder's legal representation.[39] Finally, the trial court decided that Kuder neither violated any rules of legal ethics nor improperly limited his liability for malpractice by including the arbitration clause to resolve malpractice claims in the retainer agreement.[40]

The District of Columbia Court of Appeals affirmed the trial court's decision.[41] The court of appeals held first that the arbitration clause contained in the retainer agreement was "susceptible of an interpretation" that would include Haynes' claim, which alleged damages in connection with the value of Kuder's services rendered.[42] The court also held that the arbitration clause in the retainer agreement, by itself, "sufficiently appraised Haynes that she was relinquishing her right to sue in court — and hence receive a jury trial — on any claim she might have against Kuder for inadequate representation."[43]

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1288-89 n.3.

39. *Id.* at 1288-89. The judge considered that Haynes' claim was encompassed in the arbitration agreement by that language of "any defenses or counterclaims to such a claim [for unpaid legal fees], whether based on a claim of inadequate representation or any other ground." *Id.* at 1289.

40. *Id.* at 1289. After a four-day hearing, the arbitrators issued an award dismissing Haynes' malpractice claims. *Id.* n.4. Kuder moved for an order confirming the award, and Haynes moved to vacate the award. *Id.* The trial judge, ruling that Haynes had presented no colorable argument to vacate, confirmed the award and entered judgment for Kuder on June 21, 1990. *Id.*

41. *Id.* at 1292.

42. *Id.* at 1289.

43. *Id.* at 1291; *see also id.* at 1290-91 ("[W]e agree with the trial judge that the written disclosure was sufficient to negate the claim of fraudulent inducement as a matter of law").

III. LEGAL BACKGROUND

A court is faced with two competing policies when it considers a case involving an arbitration agreement between an attorney and his or her client. The first is the strong policy favoring arbitration as a means for resolving disputes.[44] The second involves an attorney's fiduciary duty to a client, whereby the attorney owes the client the duty of protecting the client's best interests.[45]

The United States Supreme Court, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[46] supported the approach that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[47] The Court stated that the Federal Arbitration Act[48] establishes that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[49] The Court, two years later, added that this strong policy favoring arbitration, as expressed in the Arbitration Act, requires that courts "rigorously enforce agreements to arbitrate."[50]

In light of this strong policy favoring arbitration, the Supreme Court has stated that there is a "presumption of arbitrability" when a contract contains an arbitration clause.[51] The Court has also stated that any doubts should be resolved in favor of coverage and that a motion to compel arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[52]

However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed to submit."[53] Therefore, "[t]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."[54] This preliminary question may involve the issues of whether the arbitration clause covers the particular dispute or whether the clause is valid at all.

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44. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

45. *See infra* notes 68-70 and accompanying text.

46. 460 U.S. 1.

47. *Id.* at 24.

48. 9 U.S.C. §§ 1-15 (1988).

49. *Moses H. Cone*, 460 U.S. at 24-25; *see also* Sindler v. Batleman, 416 A.2d 238, 243 (D.C. 1980).

50. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

51. AT & T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986).

52. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). The District of Columbia also applies this "susceptible of an interpretation" standard to determine whether a particular dispute is covered by an arbitration agreement. *See Haynes*, 591 A.2d at 1289; *see also* Carter v. Cathedral Ave. Coop., Inc., 566 A.2d 716, 717 (D.C. 1989); American Fed'n of Gov't Employees, Local 3721 v. District of Columbia, 563 A.2d 361, 362 (D.C. 1989).

53. *Warrior & Gulf*, 363 U.S. at 582; *accord* Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6, 8 (Ct. App. 1989).

54. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); *see also American Fed'n of Gov't Employees*, 563 A.2d at 362.

If a party can show that there was fraud in the inducement of an arbitration clause, "then there would be no valid agreement to arbitrate, and the policies favoring arbitration would not apply."[55] This rule is based on the idea that there was really no mutual assent if one party obtained the other's consent to a clause in a contract through fraud or even through misrepresentation falling short of fraud.[56] In addition, in a suit against a fiduciary (such as an attorney[57]), it is not necessary to establish all of the elements that would be required for a fraud claim against a party in an arms-length transaction.[58] In a case where a fiduciary has a duty to disclose, the "[n]ondisclosure of material information may constitute fraud."[59] The reason for relaxed requirements in a suit against a fiduciary is that "[c]ourts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his [or her] clients."[60]

In particular, "[f]ee contracts between attorney and client are a subject of special interest and concern to the courts."[61] These contracts are not to be evaluated and enforced according to the standards for ordinary commercial contracts.[62] Instead, a court reviewing fee agreements should apply a standard of good faith and reasonableness.[63] The reason for this higher standard is to protect the client "against the strong influence to which the confidential [attorney-

55. Hercules & Co. v. Shama Restaurant Corp., 566 A.2d 31, 39 (D.C. 1989). The *Hercules* court also noted that when a party makes a claim of fraud in the inducement of the arbitration clause the court is free to adjudicate that claim. *Id.* (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)). However, if the claim were for "fraud in the inducement of the [entire] contract" then the court would have to allow the case to be decided by an arbitrator. *Prima Paint*, 388 U.S. at 404; *accord* McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048, 1050 (D. Colo. 1991).

56. Hollywood Credit Clothing Co. v. Gibson, 188 A.2d 348, 349 (D.C. 1963). However, at least one federal district court has placed emphasis on the fact that a client had another attorney at the time that the client claimed to be fraudulently induced to enter into an arbitration agreement. *McGuire, Cornwell & Blakey*, 765 F. Supp. at 1051.

57. *See infra* note 68.

58. Securities & Exch. Comm'n v. Capital Gains Research Bureau, 375 U.S. 180, 194 (1963). In general, the elements of a fraudulent misrepresentation claim which a plaintiff must prove are: "(1) a false representation, (2) with respect to a material fact, (3) made with knowledge of its falsity, (4) and with the intent to deceive, (5) with action taken in reliance upon the representation." Rothenberg v. Aero Mayflower Transit Co., 495 F. Supp. 399, 406 (D.D.C. 1980) (citing Nader v. Allegheny Airlines, 512 F.2d 527, 541 n.32 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976)); *see also* Pyne v. Jamaica Nutrition Holdings Ltd., 497 A.2d 118, 131 (D.C. 1985). Silence may be a "false representation" where the party has a duty to disclose certain information. *Rothenberg*, 495 F. Supp. at 406.

59. *Pyne*, 497 A.2d at 131.

60. *Capital Gains Research Bureau*, 375 U.S. at 194 (quoting WILLIAM L. PROSSER, LAW OF TORTS 534-35 (1955)); *see infra* notes 68-70 and accompanying text.

61. *Spilker*, 188 F.2d at 39.

62. *Id.*

63. Saul v. Blumenfeld, 445 A.2d 613, 614 (D.C. 1982); *see also* Brickman, *supra* note 3, at 284 (stating that the standard applied by courts is a "fairness-in-fact" standard).

client] relation naturally gives rise."[64] Furthermore, courts should closely scrutinize contracts, beneficial to a lawyer, that are "executed long after the attorney-client relationship has commenced, when the position of trust is well established."[65] In California, all transactions "between an attorney and his [or her] client that are beneficial to the attorney are closely scrutinized with the utmost strictness for any unfairness."[66] One court, in fact, has recognized that although arbitration clauses offer benefits to both a lawyer and client, an attorney's objective in including such a clause in the retainer agreement is usually to avoid a jury trial and thereby hopefully to minimize losses and to reduce a client's recovery for any legal malpractice claim.[67]

In evaluating contracts between a lawyer and a client, a court must consider the attorney's fiduciary, or trustee, relation to the client.[68] As a fiduciary, the lawyer has a duty to the client "to exercise the highest degree of good faith, honesty, integrity, fairness, and fidelity."[69] Furthermore, the attorney owes the client "a duty of full and fair disclosure of facts material to the client's interests."[70]

The fiduciary relationship also precludes an attorney "'from having personal interests antagonistic to those of his [or her] client or from obtaining personal advantage or profit out of the relationship without the knowledge or consent of his [or her] client.'"[71] The making of a formal contract between the lawyer and

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64. *Spilker*, 188 F.2d at 39 (citation omitted).

65. *Id; see also* Pete v. United Mine Workers, 517 F.2d 1275, 1291 (D.C. Cir. 1975); *Saul*, 445 A.2d at 614-15. The *Spilker* court discusses the various approaches taken by different jurisdictions in these situations. *See Spilker*, 188 F.2d at 39. Some courts treat these kind of contracts as void. *Id.* (quoting *In re* Howell, 109 N.E. 572, 574 (N.Y. 1915)). Others categorize them as affirmatively invalid on the ground of fraud, and these courts subsequently place the burden on the attorney to prove the fairness of the agreement. *Id.* (quoting *Howell*, 109 N.E. at 574). Many other jurisdictions treat these contracts with a presumption of invalidity. *Id.*

In *Saul*, the District of Columbia Court of Appeals emphasized that a contract entered into two weeks after the initial consultation and before litigation began was subject only to the standard of good faith and reasonableness and not to the higher standard applied to contracts executed long after the attorney-client relationship is established. *Saul*, 445 A.2d at 615.

66. Clancy v. State Bar, 454 P.2d 329, 333 (Cal. 1969); *see also* Hawk v. State Bar, 754 P.2d 1096, 1101 (Cal. 1988).

67. *Lawrence*, 256 Cal. Rptr. at 10 n.5 (quoting Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 786 (Ct. App. 1976)).

68. *See* Sweeney v. Athens Regional Medical Ctr., 917 F.2d 1560, 1573 (11th Cir. 1990) (attorneys had a fiduciary relationship to their client); Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) ("A lawyer's duty to his [or her] client is that of a fiduciary or trustee."); Hendrickson v. Sears, 310 N.E.2d 131, 135 (Mass. 1974) ("The relation of attorney and client is highly fiduciary in its nature."); *see also* Brickman, *supra* note 3, at 282-84.

69. Condren v. Grace, 783 F. Supp. 178, 182 (S.D.N.Y. 1992); *see also* Udall v. Littell, 366 F.2d 668, 675 (D.C. Cir. 1966) (an attorney is "bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client"), *cert. denied*, 385 U.S. 1007 (1967); Paul G. George, Comment, *Arbitration of Attorney Fee Disputes: New Direction for Professional Responsibility*, 5 UCLA-ALASKA L. REV. 309, 311 (1976).

70. *Hendrickson*, 316 N.E.2d at 135.

71. *Condren*, 783 F. Supp. at 182 (quoting Hafter v. Farkas, 498 F.2d 587, 589 (2d Cir. 1974)).

client presents special problems because the lawyer "is dealing in an area in which he [or she] is expert and the client is not and as to which the client must necessarily rely on the attorney."[72] One particular concern which arises is the fear that attorneys will use their superior knowledge and their superior bargaining position to take advantage of their clients.[73] When the client puts trust in the attorney, the attorney then has the opportunity to exploit the client.[74] As one court has noted, the confidential, fiduciary relationship between an attorney and a client is "fraught with the dangers of imposition and overreaching."[75] "The overreaching can arise purely and simply from the position of responsibility entrusted to attorneys generally."[76]

With consultation prior to a retainer agreement, an important determination is when the attorney-client relationship actually begins since the lawyer does not formally represent the client until after the retainer agreement is signed.[77] In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[78] the Seventh Circuit recognized that "[t]he fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer" even if actual employment does not result.[79] One federal district court has noted that the above statement from *Westinghouse Electric* is the "emerging general rule"[80] and that "the test for determining the existence of [the attorney's] fiduciary relationship is a subjective one."[81]

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72. *Udall*, 366 F.2d at 676.

73. *See* Brickman, *supra* note 3, at 285.

74. *See id.* at 286.

75. *In re* Will of Tank, 503 N.Y.S.2d 495, 497 (Civ. Ct. 1986).

76. *Id.*

77. *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1316-19 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

78. 580 F.2d 1311.

79. *Id.* at 1319 (relying on MODEL CODE, *supra* note 8, EC 4-1); *accord* Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982) ("The fiduciary relationship between an attorney and his [or her] client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention."); *see also* Pacific Dunlop Holdings, Inc. v. Barosh, Nos. 91 C 2 & 91 C 25, 1992 WL 168535, at *4 (N.D. Ill. July 14, 1992); Liu v. Real Estate Inv. Group, Inc., 771 F. Supp. 83, 86 (S.D.N.Y. 1991) (confidentiality privilege extends to preliminary consultation by a prospective client); Benge v. Superior Court, 182 Cal. Rptr. 275, 280 (Ct. App. 1982) (same); New York Univ. v. Simon, 498 N.Y.S.2d 659, 661 (Civ. Ct. 1985) (same) (relying on the language "or sought to employ him" from MODEL CODE, *supra* note 8, EC 4-1); Taylor v. Sheldon, 173 N.E.2d 892, 895 (Ohio 1961) (same); *cf.* Miller v. Metzinger, 154 Cal. Rptr. 22, 27 (Ct. App. 1979) (the absence of a retainer agreement "does not prevent the [attorney-client] relationship from arising"); Maryland State Bar Ass'n Comm. on Ethics, Op. 85-50 (1985) ("A lawyer may not conclude that a lawyer-client relationship did not exist [with] a corporation merely because a financial relationship did not exist."). *But see McGuire, Cornwell & Blakey*, 765 F. Supp. at 1051 (the attorney's fiduciary relationship did not arise until the client signed the fee agreement); Bingham v. Zolt, 683 F. Supp. 965, 976 (S.D.N.Y. 1988) (same); Zych v. Jones, 406 N.E.2d 70, 74 (Ill. App. Ct. 1980) (attorney-client relationship is created only by a retainer, an offer to retain, or a fee paid).

80. Green v. Montgomery County, Alabama, 784 F. Supp. 841, 845 (N.D. Ala. 1992).

81. *Id.*

Another illustration of a lawyer's heightened duty to the client may be seen in certain rules regulating the lawyer's conduct.[82] For example, Rule 1.4(b) of the Model Rules of Professional Conduct states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[83] The Comment to this rule adds that a lawyer may not withhold information to serve his or her own interest.[84] Ethical Consideration 7-8 of the Model Code of Professional Responsibility states: "A lawyer should exert his [or her] best efforts to insure that the decisions of his [or her] client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so."[85]

The Model Code of Professional Responsibility discusses the issue of clauses in a retainer agreement to limit the lawyer's liability for malpractice. Disciplinary Rule 6-102 provides that "[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice."[86] Ethical Consideration 6-6 adds that a lawyer who does not properly handle the affairs of the client should not be permitted to limit his liability for his professional activities.[87] A District of Columbia ethics opinion provides that arbitration agreements which cover all disputes between an attorney and client are unethical "unless the client is represented by independent counsel in entering the agreement."[88] An earlier opinion in the District of Columbia states that an attorney may include an arbitration clause in a retainer agreement as long as, *inter alia*, "the lawyer makes no false or misleading representations about the agreement, and the lawyer fully discloses to the client all of the implications of the arbitration provision, including loss of the client's right to sue in court and have a jury trial."[89]

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82. MODEL RULES, *supra* note 8, preamble; MODEL CODE, *supra* note 8, preamble.

83. MODEL RULES, *supra* note 8, Rule 1.4(b).

84. MODEL RULES, *supra* note 8, Rule 1.4 cmt. This Comment also explains that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests." *Id.*

85. MODEL CODE, *supra* note 8, EC 7-8.

86. MODEL CODE, *supra* note 8, DR 6-102; *see, e.g.*, Alabama State Bar General Counsel, Op. 83-05 (1983); State Bar of California Standing Comm. on Professional Responsibility & Conduct, Formal Op. 1977-47; Virginia State Bar Standing Comm. on Legal Ethics, Op. 638 (1984).

87. MODEL CODE, *supra* note 8, EC 6-6.

88. District of Columbia Bar Legal Ethics Comm., Op. 211 (1990).

89. District of Columbia Bar Legal Ethics Comm., Op. 190 (1988); *see also* Virginia State Bar Standing Comm. on Legal Ethics, Op. 638 (1984) (the lawyer must provide "full disclosure of the effect of such a provision" and must "advise[] the client to seek independent counsel regarding the advisability of the provision"); *cf.* State Bar of California Standing Comm. on Professional Responsibility & Conduct, Formal Op. 1981-56 ("An attorney may not require as a condition of employment that a client accept binding arbitration in advance of a dispute arising over fees.").

IV. THE INSTANT DECISION

A. Whether the Claim Was Within the Scope of the Arbitration Clause

The court of appeals recognized that the trial court decides as a matter of law whether a particular dispute is arbitrable and that an appellate court reviews that determination under the *de novo* standard of review.[90] In determining whether a particular dispute is covered by an arbitration agreement, a court must merely find that the arbitration clause is "susceptible of an interpretation" that covers the dispute.[91]

The court noted that the arbitration clause in the retainer agreement between Haynes and Kuder provided for arbitration of any disputes arising from attorney fee claims including "any defenses or counterclaims to such a claim [for unpaid fees], whether based on a claim of inadequate representation or any other ground."[92] The court then stated that Haynes' claim involved the value of Kuder's legal services and included allegations of "inadequate representation."[93] The majority added that Haynes' claim was for money damages consisting of Kuder's legal fees and money lost in the divorce settlement because of Kuder's negligence.[94] Therefore, the court of appeals concluded that the arbitration clause in the retainer agreement was "susceptible of an interpretation" that included Haynes' claim for monetary damages concerning the value of Kuder's legal services rendered to her.[95]

B. Whether the Terms of the Arbitration Agreement Were Fully Disclosed to Haynes

The court next discussed Haynes' allegation that Kuder had fraudulently induced her and misled her into agreeing to the arbitration clause by failing to disclose the ramifications of arbitration and other facts that he, as an attorney on the verge of an attorney-client relationship, had a particular duty to disclose.[96] The court stated that a claim of fraudulent inducement of an arbitration clause will effectively deny the existence of an arbitration agreement such that a court is not necessarily required to order arbitration.[97] After a denial is asserted, a court makes a summary inquiry of the issue and decides whether the dispute should be

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90. *Haynes*, 591 A.2d at 1289.
91. *Id.*
92. *Id.* (alteration in original).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1289-90.
97. *Id.* at 1290.

sent to arbitration.[98] In this summary inquiry, a court first determines if there is a factual dispute. The court of appeals added that if a factual dispute does exist, then a court must conduct an "expedited evidentiary hearing" to resolve the dispute.[99]

Turning to the case at bar, the court of appeals explained that the trial judge had found it unnecessary to resolve the disputed issue of whether Kuder had explained arbitration to Haynes.[100] According to the court of appeals, the trial judge had instead decided that the written retainer agreement itself sufficiently informed Haynes of the nature of arbitration and the limits arbitration places on her ability later to challenge Kuder's performance.[101] The court of appeals then admitted that there are "substantial ethical concerns" and that the written agreement was "somewhat terse in explaining the rights Haynes would relinquish by agreeing to arbitration."[102] However, the court agreed with the trial judge that the written arbitration clause itself "was sufficient to negate the claim of fraudulent inducement as a matter of law."[103]

The court recognized that agreements between an attorney and a client "are governed by the standard of good faith and reasonableness."[104] According to the court, this standard is higher than the standard for an ordinary commercial contract, and it implies a heightened obligation of attorneys to be fair and frank when specifying the terms of their relationship to the client.[105] The court distinguished between agreements which are executed long after the attorney-client relationship has been established and those which occur early in the attorney-client relationship.[106] In the former situation, such agreements will be scrutinized closely, and the burden of proof of reasonableness is allocated to the attorney.[107] In the latter situation, such as this case, the court decided that there were no added restrictions beyond the standard of good faith and reasonableness.[108]

The court next discussed an opinion issued by the District of Columbia Bar Legal Ethics Committee.[109] That opinion stated that when a retainer agreement includes an arbitration clause, the attorney has the obligation "to disclose fully to the client all of the implications of the arbitration provision, including loss of the

98. *Id.*

99. *Id.* (citations omitted). The court added that the procedure for resolving the denial of an arbitration agreement is similar to the summary judgment procedure. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1290-91.

104. *Id.* at 1291.

105. *Id.*

106. *See id.*

107. *Id.*

108. *See id.*

109. *See id.*

client's right to sue in court and have a jury trial."[110] The court found that the written retainer agreement adequately informed Haynes that she was relinquishing her right to a jury trial even though there was no express language to this effect in the agreement.[111] Furthermore, the court rejected Haynes' argument that the clause controlled only claims serving as a set-off and not those for independent damages.[112] The court added that Haynes was still represented by an attorney in Maryland when Kuder sent the proposed retainer agreement to Haynes and that she was consequently free to get consultation.[113] Therefore, the court held that the retainer agreement "sufficiently apprised Haynes that she was relinquishing her right to sue in court — and hence receive a jury trial — on any claim she might have against Kuder for inadequate representation."[114] The court then affirmed the lower court's order confirming the arbitration award.[115]

C. The Dissent

Associate Judge John M. Steadman conceded that the question of attorney fees was subject to arbitration.[116] He instead focused on whether the arbitration agreement subjected Haynes' $1 million malpractice claim to arbitration,[117] and he argued that this question should not have been decided without an evidentiary hearing.[118]

Judge Steadman found the arbitration clause unclear as to whether it covered the malpractice claim.[119] It was particularly unclear since the context of the entire letter was devoted almost entirely to matters of fees and billings.[120] Judge Steadman argued that, because the clause was so unclear, it could not serve on its face as full disclosure of all of its ramifications.[121] He added that, given the special nature of attorney-client agreements, there should have been a hearing to get a "fuller understanding and exploration of the circumstances leading to the execution of the agreement."[122] Judge Steadman also doubted the applicability

110. *Id.* This opinion was No. 190. *Id.*; *see* District of Columbia Bar Legal Ethics Comm., Op. 190 (1988). However, as the court stated in a footnote, the District of Columbia Bar Legal Ethics Committee, in Opinion No. 211, reconsidered Opinion No. 190. *Haynes*, 591 A.2d at 1291 n.11. The court then suggested that Opinion No. 211, since it was issued more than three years after Haynes and Kuder entered into this arbitration agreement, was not relevant to this decision. *Haynes*, 591 A.2d at 1291.

111. *Haynes*, 591 A.2d at 1291.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1292.

116. *Id.* (Steadman, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* n.1.

122. *Id.* at 1292.

of the normal "susceptible to an interpretation" rule to the attorney-client relationship.[123]

V. COMMENT

A. Was the Claim Within the Scope of the Arbitration Clause?

Haynes first claimed that the arbitration clause was limited to the arbitration of fee disputes and that it therefore did not cover her claim of malpractice.[124] The District of Columbia Court of Appeals holds that the arbitration clause itself[125] is "'susceptible of an interpretation' that would include [the] claim for damages."[126] Judge Steadman, in his dissent, disagrees with this conclusion; he notes that "even with [his] lawyer's eye," the arbitration clause is unclear.[127]

The majority spends only one paragraph in dismissing this first claim,[128] but the issue deserves more than the cursory analysis which the court gives it. First, in passing over this issue, the *Haynes* court ignores the literal language of the arbitration clause, which seems *not* to include Haynes' claim. Second, given the heightened duties that a lawyer has to his or her client, it seems inconsistent to apply a weak standard such as "susceptible of an interpretation" in determining if Haynes' claim was within the terms of the arbitration clause.

Although there is a strong federal policy in favor of arbitration,[129] a party to a contract "cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit."[130] Consequently, a court's first inquiry must be whether the parties actually agreed to submit the particular dispute to arbitration.[131] In this case, it seems doubtful that the arbitration clause covered a claim for malpractice.[132] Haynes' malpractice claim is not a claim based on

123. *Id.* n.2.

124. *Id.* at 1289.

125. For the full text of the arbitration clause, see *supra* note 19.

126. *Haynes*, 591 A.2d at 1289.

127. *Id.* at 1292 (Steadman, J., dissenting). Judge Steadman states that the arbitration clause is made even more ambiguous by the context of the entire agreement, which was "devoted . . . almost entirely to matters of fees and billings." *Id.*

128. *See id.* at 1289.

129. *See supra* notes 46-50 and accompanying text.

130. *Warrior & Gulf*, 363 U.S. at 582.

131. *See supra* note 54 and accompanying text.

132. From a strict interpretation of the clause, Haynes' malpractice allegation was a claim and not a defense or counterclaim, and, therefore, it was not covered by the literal language of the clause. *See supra* note 19 (listing the text of the arbitration clause). According to a literal reading of this clause, Haynes agreed to submit to arbitration only her "defenses or counterclaims" to a claim by the firm for unpaid fees and expenses, "whether based on a claim of inadequate representation or any other ground." *See supra* note 19. While this writer feels that it would be form-over-substance to make a distinction based on whether Haynes' allegation was a claim or a counterclaim, such a distinction may have some merit in light of the rule of construction which interprets language of a

unpaid fees or expenses. As Judge Steadman suggests in his dissent, Haynes' $1 million malpractice claim is quite different from a dispute over the $11,000 which Haynes owed Kuder in legal fees.[133] In any event, this issue is far too unclear for the court to dismiss it in one short paragraph.

The "susceptible of an interpretation" test which the court employs is the main reason that the court can summarily dispose of Haynes' assertion that the arbitration clause did not cover her malpractice claim. The court concludes that Haynes' claim is based in part on "money damages consisting of fees paid to Kuder" and that the "arbitration clause is thus 'susceptible of an interpretation' that would include Haynes's monetary damage claim regarding the value of Kuder's services rendered."[134] This reasoning is not very convincing, especially in light of the attorney's fiduciary duty[135] and his or her duty of disclosure[136] to the client. Since the law requires an attorney to meet these heightened standards when dealing with a client, it seems inconsistent to require only that the arbitration clause in the retainer agreement be "susceptible of an interpretation" which includes the client's claim. As evidenced by the *Haynes* decision, this test can be easily met, and it gives too much deference to the lawyer. It gives the benefit of the doubt to the lawyer, and it allows the lawyer to fashion the arbitration agreement in a way that takes advantage of the client.[137]

The arbitration clause in *Haynes* provided for arbitration of claims whether they were "based on a claim of inadequate representation or *any other ground.*"[138] As long as Haynes had any legal fees outstanding to Kuder, it seems that the court would have found the arbitration clause "susceptible of an interpretation" which included any malpractice claim that Haynes raised. Furthermore, based on the "or any other ground" language in the arbitration clause, the court may have also sent *any* claim Haynes raised against Kuder to arbitration.[139] Because of these possible conclusions, the *Haynes* decision seems even more unsound. In particular, the decision may conflict with Ethics Opinion 211 from the District of Columbia, which states that arbitration agreements

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contract against the party who drafted the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

133. *See Haynes*, 591 A.2d at 1292 (Steadman, J., dissenting).

134. *Id.* at 1289.

135. *See supra* notes 68-70 and accompanying text.

136. *See supra* notes 70, 83-85 and accompanying text.

137. *See infra* text accompanying notes 162-65 (discussing how this test allocates the burden of persuasion).

138. *Haynes*, 591 A.2d at 1288 (emphasis added); *see supra* note 19 (listing this arbitration clause).

139. This is true because, under the logic of the opinion, any claim could "involve[] the value of Kuder's expenses" and could therefore "include[] allegations of 'inadequate representation.'" *Haynes*, 591 A.2d at 1289.

covering all disputes between an attorney and client are unethical "unless the client is in fact counselled by another attorney."[140]

In addition, the arbitration clause in Kuder's retainer agreement may conflict with Disciplinary Rule 6-102 of the Model Code of Professional Responsibility[141] to the extent that it limits Kuder's liability for malpractice. In arbitration proceedings, many of the arbitrators are themselves lawyers who may be reluctant to find that another lawyer has committed malpractice. These lawyer-arbitrators may also be less likely to award the same amount of damages as a disinterested judge may award if the case were in court.[142]

This discussion also raises the problem of allowing the lawyer essentially to choose his or her forum. The *Haynes* court does not address the issue of unequal bargaining position,[143] but at least one court has noted that the lawyer has the opportunity to take advantage of the client when entering the retainer agreement since the lawyer is an expert in this area while the client is probably relying on the lawyer's expertise.[144] Assuming that the lawyer is in a better bargaining position than the client, the lawyer has an opportunity to include the arbitration clause in the retainer agreement to the client's detriment.[145]

Furthermore, the "susceptible of an interpretation" standard seems even more questionable in light of an attorney's superior bargaining position. For instance, a client may not realistically have the chance to bargain about the terms of the retainer agreement with one who is an expert on such an agreement.[146] In fact, the attorney may be able to require the client to submit to the arbitration clause if the client really wants this particular lawyer's representation.

140. District of Columbia Bar Legal Ethics Comm., Op. 211 (1990). This opinion is discussed in more depth later in this Note. *See supra* notes 158-60 and accompanying text.

141. This rule states: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." MODEL CODE, *supra* note 8, DR 6-102.

142. Two particular concerns for a client would be that arbitrators are not required to follow substantive law and that the findings and rulings of arbitrators are generally insulated from appellate review. *See* Brickman, *supra* note 3, at 280.

143. *See generally Haynes*, 591 A.2d 1286.

144. *Udall*, 366 F.2d at 676; *see supra* notes 71-76 and accompanying text. If the lawyer is indeed in a position of superior bargaining position, this makes the *Haynes* court's reliance on the "susceptible of an interpretation" test even more suspect.

145. If the lawyer's duties to the client arise before a retainer agreement is entered, *see supra* notes 77-79 and accompanying text, then this proposition would be subject to the lawyer's duty of disclosure. *See supra* note 70 and accompanying text.

146. *See Udall*, 366 F.2d at 676.

B. Should an Attorney be Allowed to Meet His or Her Duty of Disclosure Through the Language of Arbitration Agreement Itself?

According to an ethics opinion from the District of Columbia, a lawyer who includes an arbitration clause in a retainer agreement has an obligation to disclose fully "*to the client all of the implications* of the arbitration provision, including loss of the client's right to sue in court and have a jury trial."[147] The *Haynes* court announces that this ethics opinion is its "polestar."[148] However, the court then proceeds virtually to ignore this opinion when it holds that the agreement itself "sufficiently apprised Haynes that she was relinquishing her right to sue in court."[149] In effect, the court decides that the arbitration clause itself is sufficient to meet Kuder's duty of full disclosure. Judge Steadman, in his dissent, claims that, because of its ambiguities, the arbitration clause "cannot . . . serve on its face as full disclosure of all its ramifications."[150] In relying solely on the language of the arbitration clause, the *Haynes* court creates precedent for a lawyer to use his or her expertise in the language of retainer agreements in order to exploit the client.[151] The court also undermines the fiduciary duty which an attorney owes his or her client.[152]

Haynes questioned whether Kuder had adequately explained the clause to her, and the court appears to give the benefit of the doubt to the attorney. Kuder stated in an affidavit that he had "fully discussed with Mrs. Haynes all of the terms of the [retainer agreement], including the arbitration provisions," before she signed the agreement.[153] However, Haynes claimed that Kuder did not "explain the meaning or significance of the arbitration clause" to her and that she did not understand that the arbitration clause removed her right to sue Kuder in court for his negligence.[154] Haynes also argued that the arbitration clause did not cover her malpractice claim.[155]

147. District of Columbia Bar Legal Ethics Comm., Op. 190 (1988) (emphasis added); *see supra* note 89.

148. *Haynes*, 591 A.2d at 1291. "Polestar" refers to the star Polaris (the North Star), WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1113 (1989 ed.), and the word means "something that serves as a guiding principle," *id.*

149. *Haynes*, 591 A.2d at 1291.

150. *Id.* at 1292 n.1 (Steadman, J., dissenting). Judge Steadman added that the majority opinion is inconsistent in that the court relies on the language of the clause to serve as adequate notice of its effect after the court had felt it necessary to resort to a rule of construction (the "susceptible of an interpretation" test) to resolve the ambiguity in the clause. *Id.*

151. *See Udall*, 366 F.2d at 676. Additionally, when a client signs a retainer agreement, he or she is relying on the attorney, *id.*, which seems to place the client in an unequal bargaining position.

152. *See supra* notes 68-76 and accompanying text.

153. *Haynes*, 591 A.2d at 1288.

154. *Id.*

155. *Id.*

The effect of relying solely on the language of the retainer agreement may be twofold. First, the *Haynes* court essentially ignores the duty of disclosure which an attorney owes a client.[156] Second, the court misappropriates the burden of persuasion to the client and establishes dangerous precedent.[157]

A 1990 District of Columbia Ethics Opinion states that an arbitration agreement which covers *all* disputes between the attorney and client is unethical "unless the client is represented by independent counsel in entering the agreement."[158] According to the District of Columbia Bar Legal Ethics Committee, which issued this opinion, the reasoning behind the opinion is that it is "unrealistic to expect lawyers to be able to provide enough information about arbitration in a first visit to allow the client to make an informed decision."[159] The *Haynes* court proceeds to rely on the fact that Mrs. Haynes had another attorney at the time that she entered the retainer agreement and on the fact that Kuder sent the agreement to her home, at which time she was free to consult with her other attorney.[160] However, the court cites no evidence which shows that she did *in fact* consult with her Maryland attorney.

The *Haynes* court's reliance on the fact that Haynes had another attorney in Maryland at the time the agreement with Kuder was executed is preposterous and cannot be taken seriously. First, the court does not refer to any evidence that Haynes did in fact turn to her old attorney for advice on this agreement. Second, Haynes may have felt that her relationship with her Maryland attorney had concluded since that attorney had advised her to consult another attorney.[161] Third, it seems bizarre to assume, when a client is switching lawyers, that the client will return to the old lawyer for reassurance that the new lawyer is not taking advantage of him or her. Fourth, there could be a very good reason that the client is changing lawyers, such as that the client no longer trusts the old

156. *See supra* text accompanying note 70. Additionally, the weight of authority seems to indicate that this duty of disclosure to a client would extend to the consultation before the execution of a retainer agreement. *See supra* notes 77-79 and accompanying text.

157. A third possible effect of relying solely on the language of the arbitration clause may be to give arbitration clauses heightened status; however, this Note will not address this topic.

158. District of Columbia Bar Legal Ethics Comm., Op. 211 (1990) (emphasis added). The *Haynes* court claims that it has "no occasion here to consider the soundness of this opinion," *Haynes*, 591 A.2d at 1291 n.11, presumably because the opinion was issued "more than three years after the [retainer] agreement" in this case was executed. *Id.* (Mrs. Haynes signed the retainer agreement on December 22, 1986. *Id.* at 1288.) However, this makes no sense since the court uses as its "polestar" a 1988 ethics opinion, *id.* at 1291, which itself would have been issued over a year after the retainer agreement in this case was executed.

159. District of Columbia Bar Legal Ethics Comm., Op. 211 (1990); *see also Haynes*, 591 A.2d at 1291 n.11.

160. *Haynes*, 591 A.2d at 1291.

161. *Id.* at 1287. It is not clear from the opinion whether her Maryland attorney advised her to go to Kuder or generally to get an attorney in the District of Columbia. *See id.* However, if the Maryland attorney had suggested Haynes go to Kuder himself, it would be even more ridiculous to rely on the existence of the Maryland attorney since Haynes may have assumed that her Maryland attorney, merely by suggesting Kuder, had already approved of Kuder's work.

lawyer. Fifth, and probably most important, the simple fact that Haynes had another lawyer at the time of preliminary consultation does not give Kuder a license to exploit her in the retainer agreement unless she is smart enough to have another lawyer check the agreement. It is entirely inconsistent with a lawyer's fiduciary duty to the client to dispose of this duty simply by assuming that the prospective client will be protected by a previous lawyer. Realistically, a prospective client will probably rely on the new lawyer and not on a lawyer in a different state to explain the agreement between the client and the new lawyer. It hardly seems unreasonable for a client to rely on a professional with a duty of disclosure to explain an agreement which that professional has drafted.

This decision also seems to shift the burden of persuasion to the client to prove that an attorney met his duty of disclosure. The *Haynes* court concludes that the retainer agreement itself met Kuder's duty of disclosure,[162] and, by reaching this result, the court essentially allocates the burden to the client to prove that the attorney did *not* fully disclose the terms or effects of the agreement. This allocation is completely inconsistent with the attorney's duty of "full disclosure"[163] because it seems to presume that the attorney *did* disclose unless the client can prove otherwise.[164] An attorney should not be able to dismiss his duty to disclose the nature of an arbitration clause simply by including the arbitration clause itself in the retainer agreement, particularly because the complex nature of arbitration cannot be easily understood by a lay client.[165] It seems that the client, instead of the lawyer, should be entitled to the benefit of the doubt because of the higher standards that lawyers must meet.

VI. CONCLUSION

To give an attorney the benefit of the doubt in disagreements between an attorney and client is completely inconsistent with the higher standards imposed on an attorney when dealing with a client. If courts choose to disregard the higher standards imposed on attorneys, or if they choose not to consider the implications of an attorney's fiduciary obligation to the client, then the courts in effect give an attorney a license to exploit his or her client when entering into the retainer agreement. As a fiduciary to the client, a lawyer should not be able to exploit a client through the lawyer's expertise in retainer agreements and his or her superior bargaining position. It is the client and not the attorney who deserves the benefit of the doubt when questions arise as to whether the arbitration clause in the retainer agreement covers a particular dispute or whether

162. *See id.* at 1291.

163. *Id.* at 1291 (quoting District of Columbia Bar Legal Ethics Comm., Op. 190 (1988)); *see supra* notes 69-70, 83-85 and accompanying text.

164. This would be even harder for the client to prove since the client would be required to prove the negative — that the attorney did *not* disclose.

165. *See* District of Columbia Bar Legal Ethics Comm., Op. 211 (1990).

an attorney fully disclosed to the client the ramifications of such an arbitration clause.

The *Haynes* court first decides that the dispute between Haynes and Kuder is covered by the arbitration clause simply because there is some interpretation of the clause which "would include [the] claim for damages."[166] The court next determines that, regardless of what Kuder did or did not tell his client, the arbitration clause itself served to meet Kuder's duties of disclosure to his client. In reaching these conclusions, the *Haynes* court gives deference to the lawyer and establishes dangerous precedent that may allow a lawyer to use his or her expertise with retainer agreements to exploit the client in the retainer agreement.

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166. *Haynes*, 591 A.2d at 1289.