No. 22-cv-0894

In the

District of Columbia Court of Appeals

KAISERDILLON, PLLC

Appellee,

v.

CORBETT DALY AND TUNAY KURU, M.D.,

Appellants.

Appeals from the Superior Court of the District of Columbia, Civil Division No. 2021CA004343 *(Hon. Robert R. Rigsby, Judge)*

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INTRODUCTION

This appeal raises two critically important questions pertaining to this Court's oversight of the legal profession in the District of Columbia. First, in order for a lawyer (or law firm) to fulfill its fiduciary obligations to a client, what information must be conveyed and what type of discussion must occur in order for a mandatory arbitration provision in an engagement agreement to be enforceable? And, second, does the D.C. Bar's Attorney Client Arbitration Board ("ACAB") rule that forbids the transcription of hearings deny a client due process and fundamental fairness by unduly limiting the statutory right of the client to challenge an ACAB award?

In this case, Appellants, Corbett Daly and Tunay Kuru (hereinafter "the Dalys"), were not adequately informed by their then counsel, KaiserDillon, PLLC, of the scope and effect of the mandatory arbitration provision in the firm's Engagement Agreement so that the Dalys could make a meaningful informed decision to sign the agreement. Then, when a dispute arose over the payment of KaiserDillon's exorbitant fees, the Dalys were denied due process and fundamental fairness in the ACAB proceedings in which KaiserDillon was awarded $280,000. The rules for those proceedings forbid transcription of the arbitration hearing, and as a result, the Dalys were prevented from effectively exercising their statutory right to challenge the arbitration award because, as the Superior Court ruled, the

issues the Dalys raised to challenge the ACAB award required a transcript of the hearing.

These issues are especially noteworthy inasmuch as the D.C. Bar Board of Governors, which approved the ACAB rules allowing mandatory arbitration provisions in engagement agreements and prohibiting the transcription of ACAB hearings, is empowered and operates under the aegis of the District of Columbia Court of Appeals. See D.C. Code § 11-2501. To ensure that the rules of the ACAB prescribe a fundamentally fair process and do not violate the due process rights of clients, this Court should reverse the Superior Court's confirmation of the arbitration award against the Dalys and vacate that award.

JURISDICTIONAL STATEMENT

This is an appeal from the September 21, 2022 final order of the Superior Court in *KaiserDillon, PLLC v. Daly, et al.*, Case No. 2021 CA 004343 B, which confirmed an ACAB arbitration award in favor of KaiserDillon and disposed of all other issues in the case. Jurisdiction is founded upon D.C. Code § 11-721 (a)(1).

STATEMENT OF ISSUES

1. Did the Superior Court commit reversible error by confirming the ACAB arbitration award even though KaiserDillon failed to fulfill its fiduciary obligation to sufficiently discuss and explain the effect of the mandatory arbitration provision

in its Engagement Agreement so that the Dalys would make an informed decision in signing the Agreement?

2. Did the Superior Court commit reversible error by confirming the ACAB arbitration award where the ACAB rules that prohibit the transcription of ACAB hearings denied the Dalys' due process by preventing them from challenging the award on the statutory grounds set forth in the D.C. Code?

STATEMENT OF THE CASE

On November 18, 2021, KaiserDillon filed a Motion to Confirm Arbitration Award in the Superior Court seeking confirmation of the ACAB award against the Dalys for $280,000, which the firm claimed were its outstanding fees and costs. J.A. 6-25. In response, the Dalys filed a motion to vacate the award. J.A. 49-75. On September 18, 2022, the Superior Court, the Honorable Robert B. Rigsby presiding, granted KaiserDillon's motion to confirm and denied the Dalys' motion to vacate. J.A. 172-75. On October 24, 2022, the Dalys timely filed their Notice of Appeal. J.A. 176.

STATEMENT OF FACTS AND UNDERLYING PROCEEDINGS

A. BACKGROUND FACTS

1. The Dalys Retain KaiserDillon

In November, 2019, the Dalys retained KaiserDillon to defend them in a lawsuit that had been brought in the Superior Court for the District of Columbia

and to seek recovery from third parties. J.A. 10-15. That lawsuit, styled *Julia Marans & John Marans v. Tunav Kuru and Corbett Daly*. Supr. Ct. Case No. 2019 CA 003156 B, arose out of Tunay Kuru's purchase of a home in the District and involved the improper conduct of various third parties, including the real estate attorney who assumed multiple conflicting representations. J.A. 186-204 (Under Seal). Although the complaint against the Dalys included several counts and sought hundreds of thousands of dollars in purported damages, as well as additional punitive damages, the underlying dispute between the parties had a value in the neighborhood of only $45,000. *Id.*

2. KaiserDillon's Engagement Agreement

The Engagement Agreement ("Agreement") that KaiserDillon had the Dalys sign to retain the firm was a multi-page document with nine specific provisions. J.A. 10-15. One of those provisions required mandatory arbitration as to any dispute over the fees or expenses that KaiserDillon charged. The Agreement stated that by agreeing to binding arbitration, the client was "waiving certain important rights and protections that otherwise may have been available if a dispute were determined by a judicial action, including the right to a jury trial and right to appeal." J.A. 12, The Agreement also provided a link to the D.C. Bar's web page for information about the D.C. Bar's ACAB procedures and stated that if the Dalys had any questions concerning arbitration, they should contact the D.C. Bar. *Id.*

Importantly, no member of KaiserDillon personally spoke to the Dalys or provided information about the pros and cons of agreeing to mandatory arbitration under the ACAB arbitration rules. J.A. 337-43 (Under Seal). And, critically for purposes of the Dalys' appeal, the Engagement Agreement did not inform the Dalys that a transcription of ACAB hearings was prohibited and that, without a transcript, certain statutory bases for vacating an arbitration award under D.C. Code § 16-4423 were substantially curtailed. Most notably, these include situations where "[a]n arbitrator . . . refused to consider evidence material to the controversy . . . so as to prejudice substantially the rights of a party to the arbitration proceeding" and "on other reasonable ground[s]." D.C. Code, §§ 16-4423(a)(3), (b).

3. KaiserDillon's Claim for Exorbitant Fees

After the Dalys signed the Engagement Agreement, KaiserDillon racked up what the firm claims constituted over $300,000 in fees:

Invoice Ending	Hours	Attorney Fees Claimed on Invoices	Costs
11/30/2019	87.70	$35,073.20	$ 0.00
12/31/2019	73.70	$30,383.87	$318.57
01/31/2019	249.10	$101,388.01	$637.61
02/29/2020	235.50	$101,017.04	$111.04

03/31/2020	65.00	$34,344.88	$ 38.88
Total	711	$302,207.00	$1,103.66

J.A. 284, 291, 303, 315, 321 (Under Seal).

Even though the complaint against the Dalys was dismissed in mid-December, 2019 after approximately $40,000 in fees charged by KaiserDillon, the firm's billings did not end. Instead, KaiserDillon continued to press claims against third parties – all of which proved unsuccessful. The Superior Court dismissed the existing third party and, then, denied KaiserDillon leave to file an amended complaint against another other third party. J.A. 155-59. In doing so, the Court found that KaiserDillon's motion to amend was untimely and indicated the "presence of bad faith or dilatory reasons" for KaiserDillon's request. See Order, *Marans v. Kuru,* No. 2019-CA-003156 B (March 18, 2020) at 4. All of the work undertaken by KaiserDillon in this regard was of no benefit to the Dalys, but still was billed to them in full without any reduction for the lack of success. J.A. 303, 315, 321 (Under Seal).

Notwithstanding the significant amount of fees KaiserDillon charged, the Dalys made payments to the law firm of approximately $65,000. J.A. 284, 292, 303 (Under Seal). However, when the Dalys fell behind on their payments and no longer had the financial wherewithal to pay the exorbitant fees the firm demanded, KaiserDillon moved to collect the amount the firm claimed the Dalys still owed,

and in May, 2020, the firm filed a Statement of Claim with the D.C. Bar ACAB. J.A. 7.

B. THE ACAB PROCEEDINGS

1. The Panel Denies the Dalys' Motion to Dismiss.

Prior to the commencement of the ACAB proceedings, the Dalys filed a Request to Dismiss KaiserDillon's petition on the basis that the law firm had failed to satisfy the D.C. Bar Rules of Professional Conduct requirement that the client be advised of the mandatory arbitration process where it is included in an engagement agreement. J.A. 325-341 (Under Seal). As the Dalys pointed out to the ACAB panel, KaiserDillon failed to provide (beyond brief references in the Engagement Agreement) information necessary for the Dalys to make a considered evaluation of whether to agree to mandatory ACAB arbitration and how their rights to seek judicial review of an arbitration award would be limited. *Id.*

In response, KaiserDillon did not dispute that the Dalys were not advised that not having a transcript would have a detrimental impact on their right to appeal under the D.C. Code, and the firm did not even attempt to argue that the Dalys had made a considered decision to agree to arbitration. Instead, the firm took the position that the statements in their Engagement Agreement were sufficient. J.A. 102.

The arbitration panel did not afford the Dalys a hearing on their motion, and simply denied the motion in a summary fashion. J.A. 50.

2. The Panel Strikes the Dalys' Designated Expert.

As part of the pre-hearing arbitration process, then counsel for the Dalys designated Dawn Stewart, Esq. as an expert witness. KaiserDillon moved to strike Ms. Stewart, arguing that expert testimony is not allowed at an ACAB hearing and that Ms. Stewart's designation was belatedly submitted by four days. In support of its motion, KaiserDillon argued that "the rules not only do not provide for expert testimony; they offer none of the protections that accompany such testimony in venues (such as D.C. and federal courts) where such testimony is available." Ex. 11 to Reply in Support of KaiserDillon PLLC's Motion for Summary Affirmance, *Daly v. KaiserDillon, PLLC,* No. 22-CV-0894 (filed, Feb. 1, 2023) ("KaiserDillon Reply") at 6.[1] Again, in a summary fashion, the ACAB panel granted KaiserDillon's motion to strike, stating only that Ms. Stewart "is not an appropriate witness for Respondent." Ex. 4 to KaiserDillon Reply.

3. The Panel Denies the Dalys' Requests for Transcription of the Hearing.

Prior to the start of the arbitration hearing, newly retained counsel for the Dalys requested that the hearing be recorded or transcribed. The panel, however,

[1] Significantly, KaiserDillon's Engagement Agreement made no mention that expert testimony is not allowed at ACAB hearings. J.A. 12.

denied that request out of hand, citing ACAB Rule 19(m) as prohibiting the recording or transcription of hearings. J.A. 72. That rule states in full as follows:

> Hearings are neither transcribed nor recorded by the ACAB. Requests by a party to have the ACAB transcribe or record the hearing will be denied. The parties are prohibited from transcribing or recording the hearing using their own or third-party resources (note-taking by hearing participants is not prohibited, however).[2]

The Dalys renewed their request for transcription of the hearing at the beginning of the hearing, but once again, the request was denied. J.A. 50.

4. KaiserDillon's Failure of Proof During the Hearing[3]

a. KaiserDillon Was Required to Establish That Its Fees Were Reasonable

Early in the arbitration hearing, the Dalys pointed out that under relevant case law and of the ACAB rules, KaiserDillon bore the burden of proving the reasonableness of their bills.[4] Thus, regardless of the client's agreement to the terms of an engagement, reasonableness under D.C. Bar Rule 1.5 is incorporated into every

[2] The ACAB Rules are available at https://www.dcbar.org/for-the-public/resolve-attorney-problems/fee-dispute-program.

[3] Because the Dalys' requests to have the hearing transcribed were denied, they are not able to provide transcript cites for the what transpired during the hearing.

[4] This burden flows from the bedrock principle that merely because the attorney and client have a meeting of the minds on a fee agreement, that does not render the fees charged *per se* reasonable. *In re Sinnott*, 176 Vt. 596, 845 A.2d 373 (Vt. 2004) (affirming finding of unreasonableness of fees even though the fees were based on a valid contract knowingly signed by the client).

contract for legal services. That rule specifies that the factors to be considered in determining the reasonableness of a fee include the following:

i. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
ii. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
iii. The fee customarily charged in the District of Columbia for similar legal services;
iv. The amount involved and the result obtained;
v. The time limitations imposed by the client or by the circumstances;
vi. The nature and length of the professional relationship with the client;
vii. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
viii. Whether the fee is fixed or contingent.

D.C. Bar Rules of Professional Conduct, Rule 1.5, available at https://www.dcbar.org/for-lawyers/legal-ethics/rules-of-professional-conduct.

The ACAB rules recognize that the statutory and common law principles applicable in the District of Columbia to fee arrangements between lawyer and client may be used by the arbitrators. See ACAB Rule 20(i). Thus, in assessing the reasonableness of attorney fees in ACAB proceedings, Rule 20(h) sets forth the same considerations as those contained in D.C. Bar Rule 1.5, including "the amount involved and the results obtained."

Moreover, the weight that a tribunal is to give to each reasonableness factor depends upon the circumstances of each case. See *International Comm'n On English in the Liturgy v. Schwartz*, 573 A. 2d 1303 (D.C. 1990) (assessing reasonableness is required in all cases where the fees are awarded pursuant to contractual provisions between private parties, and not fee shifting statutes). And, in considering those specific circumstances, it always is "counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero." *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 993 (D.C. 2007).

Thus, it was KaiserDillon, not the Dalys, who at the ACAB arbitration bore "the burden of demonstrating the reasonableness of each element of [its] fee request," *Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 912 (D.C. Cir 1996) (citation omitted). That burden includes "documentation of appropriate hours" expended and justifying "the reasonableness of the billing." *Adolph Coors Co. v. Truck Ins. Exch.*, 383 F.Supp.2d 93, 95 (D.D.C. 2005) (internal quotations and citations omitted).[5]

[5] See also *Williams v. Johnson*, 174 F. Supp. 3d 336, 345 (D.D.C. 2016), citing *Eley v. District of Columbia*, 793 F. 3d 97, 98, 417 U.S. App. D.C. 97 (D. C. Cir. 2015); *Muldrow v. Re-Direct, Inc.*, 397 F. Supp. 2d 1 (D.D.C. 2005), citing *Covington v. District of Columbia*, 57 F. 3d 1101, 1107, 313 U.S. App. D.C. 16 (D.C. Cir. 1995).

b. KaiserDillon Failed to Establish the Reasonableness of Its Fees

Notwithstanding the legal requirements, during the ACAB hearing, the panel Chair expressed the belief that the Dalys bore the burden of challenging KaiserDillon's claim for fees. Moreover, the Chair limited the Dalys to making only line item challenges to the bills, even though KaiserDillon engaged in block billing, which made it nearly impossible for the Dalys to challenge various items for which they were charged.

Moreover, at the ACAB hearing, KaiserDillon's sole witness (William Pittard) never testified that the fees charged by KaiserDillon were reasonable. To the contrary, Mr. Pittard testified that clients may pay unreasonable fees if they so choose. And, in neither his testimony nor his argument to the panel did Mr. Pittard address any of the eight factors specified in both the D.C. Bar and ACAB Rules for assessing the reasonableness of its fees. Indeed, Mr. Pittard admitted in his testimony that he was not familiar with those factors as being the basis for judging reasonableness.[6]

Accordingly, in closing argument, counsel for the Dalys argued that KaiserDillon's claim for attorney fees should be denied because not once during

[6] In the proceedings below, KaiserDillon challenged the Dalys' characterization of Mr. Pittard's testimony, which only serves to demonstrate the importance of allowing a party to have the arbitration proceedings transcribed. JA. 96.

the proceedings did KaiserDillon introduce evidence that its billings were reasonable or even address the factors for judging reasonableness.

c. The Arbitration Panel Ignored the Disproportionality of the "Amount Involved and the Result Obtained" to the Fees KaiserDillon Sought

Notwithstanding KaiserDillon's belief that it may charge whatever the market will bear, such an unfettered laissez-faire position is not the law. The law requires that the attorney fees charged must be reasonable and proportionate. As the Seventh Circuit explained in *In re: Taxman Clothing Company*, 49 F.3d 310 (7th Cir. 1995), where the court deemed $85,000 in fees unreasonable on a potential $33,000 recovery, the factors to be considered in determining the reasonableness of a fee include "the amount involved and the results obtained." Thus, when the amount at stake or amount recovered is eclipsed by the attorney fees, courts frequently find that this factor alone renders the fees unreasonable. *Att'y Grievance Comm'n of Maryland v. Harris*, 371 Md. 510, 533 810.A.2d 457 (Md. 2002) (considering this factor and determining that an $11,000 fee on an $11,000 settlement was unreasonable).[7]

[7] See also *Next Day Motor Freight, Inc. v. Hirst*, 950 S.W.2d 676, 680 (Mo. Ct. App. 1997) ($20,000 in fees to pursue a $2,000 claim was unreasonable); *Clemens v. New York Central Mutual Fire Insurance Company*, 2018 U.S. App. LEXIS 25803 (3d Cir. 2018) (denying an award of fees altogether, based on counsel's "outrageously excessive" request for $900,000 in fees based on a $100,000 award at trial); *In re: Disciplinary Action Against Hellerud*, 714 N.W. 2d. 38, 41-42 (N.D. 2006) (giving significant weight to the amount involved and

Indeed, at the arbitration hearing, KaiserDillon admitted that it should have declined further litigation activity given the substantial fees that were accruing compared to the amount at stake. This is an admission that the fees the firm was charging did not justify "the amount involved" or the "results obtained." Yet, KaiserDillon did not decline to litigate further (and now seeks to absolve itself from its dereliction by blaming the Dalys, who are not lawyers). To the contrary, the firm went on to incur thousands of dollars in litigation fees, which it now seeks to extract from the Dalys.

In short, at the ACAB hearing, not only did KaiserDillon fail to prove the reasonableness of its fees under D.C. Bar Rule 1.5 and ACAB Rule 20(h), the Dalys demonstrated that KaiserDillon's bloated fees of over $300,000 were totally unreasonable in light of "the amount involved and the results obtained." This critical factor should have been given controlling weight by the arbitrators; but like KaiserDillon's other failures, this one too was ignored by the panel.

d. The Panel Denies the Dalys' Request for Post-Hearing Briefing.

At the close of the arbitration hearing, counsel for the Dalys requested that the panel allow the filing of post-hearing briefs where they could set forth in writing (and thus memorialize) the deficiencies in KaiserDillon's presentation that

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results obtained where attorney charged $15,000 to administer an estate worth $65,000).

mandated the denial of the law firm's claim for fees. The panel, however, denied the request, thereby further limiting the Dalys' ability to challenge any award pursuant to D.C. Code § 16-4423.

e. Arbitration Award

Even though KaiserDillon failed to present evidence as to the reasonableness of its bills and, indeed, on their face, the amounts charged were excessive and disproportionate to the sums involved and the results KaiserDillon obtained, the ACAB panel granted virtually all of KaiserDillon's requested fees and entered an award in its favor for $280,000, which was over and above the approximately $65,000 already paid by the Dalys. J.A. 17.

C. SUPERIOR COURT'S CONFIRMATION OF ACAB AWARD

On November 18, 2021, KaiserDillon filed a motion in Superior Court to have the Court confirm the ACAB award. J.A. 6-25. The Dalys, in response, filed a motion to vacate based upon five grounds:

1) The failure to permit a transcript of the proceedings effectively denied the Dalys any right to appeal under even the narrow grounds for vacating an award
2) The failure to give the Dalys notice of the effect of having no transcript on their right to appeal requires that the award be vacated
3) The failure of the law firm to meet its burden of proof as to the reasonableness of its billings
4) The failure of the arbitrator to permit post hearing briefs
5) The ruling denying the Dalys motion to dismiss because KaiserDillon had not provided requisite information about the arbitration process and how the Dalys' right to seek judicial review would be adversely affected

J.A. 51.

On September 26, 2022, the Superior Court granted KaiserDillon's motion to confirm and denied the Dalys' motion to vacate the award. J.A. 172-75. In its Omnibus Order, the Court ruled that it was not fundamentally unfair for the ACAB rules to prohibit transcription of arbitration hearings. J.A. 174. In reaching this conclusion, the Superior court relied upon this Court's decision in *Zegeye v. Liss,* 70 A.3d 1208 (D.C. 2013), in which this Court found that a law firm's client had waived his right to challenge the ACAB rule prohibiting transcription where the client had signed an engagement agreement that included a provision for arbitration under the ACAB rules.[8]

Because, in the Superior Court's view, the Dalys' remaining challenges to the arbitration award involved "information discussed at the arbitration proceedings," the Court determined that those challenges could not be considered without a transcript, and accordingly, its authority was limited to vacating awards for "corruption, fraud, or other undue means" under D.C. Code § 16-4423. J.A. 175. Since there was no evidence that the arbitrators had engaged in such unlawful

[8] As discussed *infra,* in likening this case to *Zegeye*, the Superior Court disregarded the fundamental differences between that case and the one at bar. For example, the client in *Zegeye* had initiated the ACAB proceedings, and there was no indication that the client challenged the prohibition upon transcription during the course of the ACAB proceedings. The client raised the issue only after an adverse arbitration decision had been issued and the client was seeking to have the award set aside.

or untoward conduct, the Superior Court entered its order confirming the award. *Id.* [9]

SUMMARY OF ARGUMENT

For a mandatory arbitration provision in an attorney's engagement agreement with a client to be valid and enforceable, the client must have been "fully informed about the 'scope and effect'" of arbitration and given his or her "informed consent." KaiserDillon asserts that it was sufficient for its Engagement Agreement with the Dalys merely to state that by agreeing to arbitration a client waives certain rights (including a jury trial and appeal) and to refer the client to the D.C. Bar's web page discussing the arbitration proceedings and rules. While such disclosure might be sufficient in the ordinary commercial context, the attorney/client context is distinctly different because an attorney stands in a fiduciary relationship to the client. To fulfill its fiduciary obligations, this Court should hold that the attorney has an obligation to fully discuss as part of a dialogue with the client the advantages and disadvantages of mandatory arbitration. Additionally, the attorney also should advise the client to consider retaining independent counsel before agreeing to an arbitration provision. Because

[9] The Superior Court did not directly address the Dalys' argument that KaiserDillon had failed to sufficiently explain the scope and effect of the arbitration provision in the Engagement Agreement to render the provision binding and enforceable by Kaiser Dillon.

KaiserDillon failed to satisfy these requirements, this Court should hold that the Dalys did not enter into an enforceable arbitration agreement, and therefore, the ACAB award was a nullity.

Moreover, even if the Dalys agreed that KaiserDillon could pursue its claim for fees through the D.C. Bar arbitration process, the arbitration rules prohibiting the transcription of the arbitration hearing prevented the Dalys from exercising their right to challenge the arbitration award on the grounds allowed under the D.C. Code, i.e., where the arbitrator "refused to consider evidence material to the controversy" or conducted the hearing in a manner as to "prejudice substantially the rights of a party" or on another "reasonable ground." Because the D.C. Bar fee arbitration rules denied the Dalys' rights afforded under the D.C. Code, the Superior Court's order confirming the ACAB award should be reversed and the award vacated on due process grounds.

LEGAL STANDARD OF REVIEW

The issues raised in this appeal involve questions of law, and hence, this Court's review of the Superior Court's Omnibus Order confirming the ACAB arbitration award is *de novo.* As this Court has explained, "[*d*]*e novo* review, otherwise referred to as 'independent' or 'plenary review', empowers the appellate court, based on an original appraisal of the record, to reach a different result from the trial court without deference to that court's findings." *Davis v. U.S.,* 564 A.2d

31, 35 (D.C. 1989). This Court has recognized that "[a]rbitrability – whether there was an agreement to arbitrate a particular dispute – is a question of law that we review *de novo*." *Giron v. Dodds*, 35 A.3d 433, 437 (D.C. 2012). Also, as this Court pointed out in *BiotechPharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 993 (D.C. 2014), the validity of a D.C. Bar Rule "is a purely legal issue."

ARGUMENT

I. KaiserDillon Failed To Fulfill Its Fiduciary Obligations And Sufficiently Discuss And Explain To The Dalys The Advantages And Disadvantages Of Arbitration.

Rule 8(b)(iii) of the ACAB Rules of Procedure provides that for the ACAB to enforce an attorney/client agreement to arbitrate a fee dispute "the client must have been adequately informed of the scope and effect of a mandatory arbitration provision consistent with D.C. Bar Legal Ethics Committee Opinion 376." That opinion requires that a client must give his or her "informed consent" to a mandatory arbitration provision in an engagement agreement and be "fully informed about the 'scope and effect' of a mandatory arbitration provision." D.C. Bar Ethics Opinion 376, available at https://www.dcbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-376. In order for that to occur, "a lawyer should communicate adequate information and explanation about the material risks and reasonably available alternatives to entering into a fee agreement that contains such a provision." Additionally, the Opinion states:

> [T]he lawyer must provide a client with sufficient information about the differences between litigation in the courts and arbitration proceedings. As a general matter, a discussion regarding at least the following differences between the two methods of dispute resolution is prudent: (1) the fees incurred; (2) the available discovery; (3) the right to a jury; and (4) the right to an appeal. As with the application of the informed consent standard, the scope of this discussion depends on the level of sophistication of the client.

Id. [10]

In the proceedings below, KaiserDillon took the position that to require the Dalys to submit to arbitration before the ACAB, it was sufficient for its Engagement Agreement merely to refer the Dalys to the D.C. Bar's web page discussing the ACAB proceedings and its rules and to state that by agreeing to arbitration, the Dalys were waiving certain rights, including a jury trial and appeal. J.A. 102. In affirming the ACAB Award against the Dalys, the Superior Court did not specifically address this issue, presumably because the court considered KaiserDillon's statements in its Engagement Agreement to be sufficient. This was error.

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[10] A prior D.C. Bar ethics opinion states that a fee agreement providing for mandatory arbitration of fee disputes before the ACAB is ethically permissible if the agreement "informs the client in writing that counseling and a copy of the ACAB's Rules are available through the ACAB staff and further that the lawyer encourage the client to contact the ACAB for counseling and information prior to deciding whether to sign the agreement." That opinion, Ethics Opinion 218, however, was superseded by Ethics Opinion 376, and as explained by the New Jersey Supreme Court in *Delaney, infra,* such limited written disclosure fails to satisfy the heightened fiduciary responsibilities of an attorney to the client.

While KaiserDillon's disclosures with respect to arbitration might be sufficient in an ordinary commercial agreement, a retainer agreement between an attorney and the client should not be judged like an ordinary contract governed by the rules of the marketplace. Rather, an attorney's fiduciary obligations require scrupulous fairness and transparency in dealing with clients – requirements far different from the typical norms that regulate arms-length commercial transactions. See Black's Law Dictionary, 770 (11th ed. 2019) (stating that a fiduciary owes the beneficiary of his or her concern the duty "of good faith, loyalty, due care, and disclosure."). And, this should be the case particularly with respect to a mandatory arbitration provision in an engagement agreement, which by its very nature constitutes an acknowledgment that the attorney and the client may become adversaries in the future. Since a mandatory arbitration provision seeks to control the dispute resolution forum and its procedures, the specter of conflicting interests between the attorney and the client is present. Accordingly, an attorney should take extra care to ensure that the client is provided with sufficient information about the nature of arbitration and fully understands the consequences of foregoing the rights and protections of a judicial action in order to make an informed decision as to whether to agree to an arbitral forum.

What constitutes the sufficient discharge of an attorney's fiduciary duty to a client in explaining the benefits and disadvantages of mandatory arbitration of

future disputes was addressed by the New Jersey Supreme Court in *Delaney v. Dickey,* 244 N.J. 466, 242 A.3d 259 (N.J. 2020). In that case, a law firm was retained by what the court termed a "sophisticated business man" to represent him in an ongoing commercial lawsuit. 244 N.J. at 471. The law firm's retainer agreement included a one-page attachment requiring mandatory arbitration of any dispute that might arise. Like KaiserDillon's Engagement Agreement, the law firm's retainer agreement stated that by agreeing to arbitration, the client waived the right to trial by jury and, additionally, advised the client that the "arbitral result would be final and non-appealable." *Id.* at 472. Like KaiserDillon's Engagement Agreement, the law firm's retainer also informed the client of the organization that would conduct the arbitration (JAMS) pursuant to its rules and procedures and contained a hyperlink to those rules. In addition, on the day the client signed the retainer, the attorney with whom the client was dealing, offered to answer any questions the client might have.

Notwithstanding the law firm's written disclosures provided to the client about the nature of arbitration and the rights that the client would be waiving by agreeing to arbitration, as well as providing the client with a link to the arbitral rules and offering to answer any questions the client might have, the New Jersey Supreme Court held that "[t]he heightened professional and fiduciary responsibilities of an attorney . . . demand more – an explanation of the differences

between an arbitral and judicial forum." 244 N.J. at 473. As the New Jersey Supreme Court explained, "[g]iven the lawyer's fiduciary duties of loyalty and candor to the client, there should never be a perception that a lawyer is exalting his own self-interests at the expense of the client." *Id.* at 496.[11] "Yet, the insertion of an arbitration provision in a retainer agreement indicates that the lawyer has given thought to the prospect that the client may be a future adversary and has selected the forum in which potential disputes . . . will be resolved." *Id.* at 496-497. Thus, the fiduciary obligations imposed on attorneys "requires that the lawyer discuss with the client the basic advantages and disadvantages of a provision in a retainer agreement that mandates the arbitration of a future fee dispute or malpractice claim against the attorney." *Id.*, at 496.[12]

[11] The court noted, however, that the law firm's written information pertaining to arbitration would "satisf[y] the requirements for a typical consumer or commercial agreement." *Id.* at 473.

[12] The New Jersey Supreme Court stated that the explanation could "be conveyed in an oral dialog or in writing, or by both, depending on how the attorney chooses best to communicate it," but what is important is that the explanation be sufficient for the client "to make an informed decision." *Id.* at 474. The New Jersey Supreme Court came to this conclusion even though the client "was a sophisticated business man and not unfamiliar to litigation." *Id.* at 500. Nonetheless, the court recognized that it could not "ascribe to him the knowledge of attorneys whose training and experience make them keenly aware of the fine distinctions between an arbitral and judicial forum." *Id.*

In its *Delaney* opinion, the New Jersey Supreme Court requested additional guidance from the New Jersey Advisory Committee on Professional Ethics as to the inclusion of mandatory arbitration in an attorney's engagement agreement. In response, on January 18, 2022, the Advisory Committee issued its Report and Recommendations with a majority of the Committee asking the Court to consider banning altogether mandatory arbitration provisions in engagement agreements for the following reasons:

> The majority finds it fundamentally unfair to require a client to agree to binding arbitration of disputes at the very outset of a representation. The lawyer and the client have a power imbalance at the initiation of representation. They are not in equivalent bargaining positions; the lawyer has the upper hand. Including an arbitration provision in the retainer agreement, to which the client is asked to agree at the beginning of the relationship, appears to a majority of the Committee as an opportunity for the lawyer to overreach.

Advisory Committee on Professional Ethics, Report and Recommendations (Jan. 18, 2022) at 3, available at www.njcourts.gov/files/sccr.

Should the New Jersey Supreme Court not agree to prohibit an attorney from including in engagement agreements a mandatory arbitration provision, the Committee Report went on to provide guidance on the scope of a lawyer's disclosure requirements for a client's acceptance of mandatory arbitration to be given effect. In this regard, the full Committee unanimously concluded that safeguards should be imposed similar to those required when an attorney enters into a business relationship with a client. Accordingly, the Committee

recommended that engagement agreements contain a separate rider to be signed by the client that includes boxes to be checked by the client to assist client comprehension. Further, in addition to any written disclosures, the full Committee recommended that an attorney not only have an oral discussion with the client about the advantages and disadvantages of binding arbitration, but also advise the client to consider retaining independent counsel to review the arbitration provision. *Id.* at 10.[13]

The requirement that a client be advised to obtain independent legal counsel is the approach the Florida State Bar has taken in mandating the type of disclosure that an attorney must make to a potential client about mandatory arbitration in order to fulfill the attorney's fiduciary obligations. In that regard, Florida Bar Rule 4–1.5(i) states as follows:

> **(i) Arbitration Clauses.** A lawyer shall not make an agreement with a potential client prospectively providing for mandatory arbitration of fee disputes without first advising that person in writing that the potential client should consider obtaining independent legal advice as to the advisability of entering into an agreement containing such mandatory arbitration provisions. A lawyer shall not make an agreement containing such mandatory arbitration provisions unless the agreement contains the following language in bold print:
> **NOTICE: This agreement contains provisions requiring arbitration of fee disputes. Before you sign this agreement, you should consider consulting with another lawyer about the advisability of making an agreement with mandatory arbitration requirements. Arbitration proceedings are ways to**

[13] D.C. Bar Rule 1.8. "Conflict of Interest: Specific Rules," similarly, requires that before a lawyer may enter into a business transaction with a client, the client must be given a reasonable opportunity to seek the advice of independent counsel.

> **resolve disputes without use of the court system. By entering into agreements that require arbitration as the way to resolve fee disputes, you give up (waive) your right to go to court to resolve those disputes by a judge or jury. These are important rights that should not be given up without careful consideration.**

Florida Rules of Professional Conduct, Rule 4-1.5(i), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiG9Pir46L_AhXjnGoFHUMJBLUQFnoECFMQAQ&url=https%3A%2F%2Fjcorsmeier.wordpress.com%2Fcategory%2Fmandatory-arbitration-florida-bar-rule-4-1-5i%2F&usg=AOvVaw0rWPcdIWo_lElVA6wbcCSl.

Importantly, the Florida courts construe this disclosure requirement strictly, and if a mandatory arbitration provision in a fee agreement "does not conform with Rule 4–1.5(i), the provision may be unenforceable on its face." *Feldman v. Davis*, 53 So.3d 1132, 1137 (Fla. 4th DCA 2011). See also *Owens v. Corrigan*, 252 So.3d 747 (Fl. 4th DCA 2018); *Burri Law, P.A. v. Byzantine Catholic Eparchy of Phoenix*, 488 F. Supp.3d 1185 (M.D. Fla. 2020) (noncompliance with the mandatory bold type requirement of Fla. Bar R. 4-1.5(i) rendered the arbitration provision unenforceable).

Here, KaiserDillon never recommended that the Dalys have independent counsel advise them on whether to agree to mandatory arbitration. Moreover, like the law firm in *Delaney*, KaiserDillon did not even engage in an informed discussion with the Dalys as to the advantages and disadvantages of arbitration sufficient for the Dalys to make an informed decision before signing the firm's Engagement Agreement. In particular, the Dalys never were informed as to the adverse effect on

their statutory right to challenge an arbitration award due to the ACAB rule prohibiting the transcription of the arbitration hearing. Hence, the Superior Court committed reversible error by confirming the ACAB arbitration award instead of vacating the award because the Dalys never entered into an enforceable arbitration agreement in the first place.

II. The Dalys Were Denied Fundamental Fairness And Due Process In The ACAB Proceedings Because They Were Prohibited From Transcribing The ACAB Hearing.

A. This Court Has Not Decided That The ACAB's Rule Prohibiting Transcription Of Hearings Does Not Violate Due Process.

In granting KaiserDillon's motion to confirm the ACAB award, the Superior Court erroneously interpreted this Court's decision in *Zegeye* as holding that ACAB Rule 19(m) prohibiting transcription of arbitration hearings does not violate a party's right to due process or fundamental fairness where the lack of a transcript prohibits a party from challenging an arbitration award under D.C. Code § 16-4423 on any grounds requiring a transcript. J.A. 174. This Court made no such determination in that case.

Rather, this Court merely ruled that given the specific factual circumstances, the plaintiff, who was seeking to vacate an adverse ACAB award, had waived his right to challenge the ACAB rule prohibiting transcription of hearings. *Zegeye,* 70 A.3d at 1212. Critically, the plaintiff in *Zegeye* had initiated arbitration before the ACAB and did not claim until after the arbitration panel issued its award that he

had been denied fundamental fairness due to the rule prohibiting transcription of proceedings. By contrast, the Dalys protested the prohibition on transcription both prior to the commencement of proceedings and during the ACAB hearing itself. By doing so, the Dalys have preserved their right to raise the issue in opposing confirmation of the ACAB's award.

B. Signing An Agreement To Arbitrate Does Not Prevent A Court From Assessing The Legality Of The Arbitration Procedures.

In the proceedings below, KaiserDillon argued that merely by signing KaiserDillon's Engagement Letter, the Dalys waived their right to challenge any of the ACAB rules, including Rule 19(m) prohibiting transcription of the arbitration hearing. J.A. 100. In other words, KaiserDillon's position is that when parties sign an agreement to arbitrate under certain rules or procedures, the courts are divested of undertaking any review whatsoever of whether the agreement is fundamentally unfair or violates due process. That is not the law.

In *Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465, 323 U.S. App. DC 133 (D.C. Cir. 1997), the D.C. Circuit assessed whether the provisions of an arbitration agreement were valid and enforceable even though the employee had signed the agreement. In its decision, the circuit court found that a provision in the agreement concerning responsibility for payment of the arbitrator could be interpreted as requiring the employee to pay, which would render the agreement invalid as being fundamentally unfair because many employees could not afford this expense.

Therefore, the appeals court held that the agreement must be interpreted to require the employer to pay the arbitrator's fees. The fact that the employee had signed the agreement did not prevent the court from reforming the agreement. See also *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (holding that arbitration agreement that employee signed was unenforceable because provisions of the agreement were both procedurally and substantively unconscionable).

Similarly, in the present context, the fact that the Dalys signed KaiserDillon's Engagement Letter providing for ACAB arbitration does not foreclose this Court from scrutinizing and considering whether the ACAB rules, and in particular Rule 19(m), are in accord with fundamental fairness and due process. And, as explained below, by barring the transcription of ACAB hearings, ACAB Rule 19(m) violates the due process rights of the parties and is fundamentally unfair.

C. Allowing Transcription Of The ACAB Proceedings Is Essential To Preserving A Party's Right To Challenge An Award On All Of The Grounds Set Forth In The D.C. Code.

In *Zegeye,* this Court recognized that a transcript is essential to any arbitration appeal that is "grounded in the conduct of the proceedings." 70 A.3d at 1211, citing *Dolton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 935 A.2d 295 (D.C. 2007). *Dolton* involved an appeal by investors who had sought to vacate an arbitration award rendered under the National Association of Securities Dealers

Dispute Resolution procedures, which allow a party to transcribe the proceeding. The award had denied the investors' claims against a brokerage securities firm. This Court noted the limited grounds to vacate an arbitration award (including a panel exceeding its powers, demonstration of "evident partiality," demonstration of "manifest disregard of the law," acting arbitrarily or making a "gross mistake") and held that, due to the need for an "adequate record" to review an arbitration award, it was "stymied in its review" by the failure of the investors to provide a transcript when they could have done so. *Id*. at 298. ("[T]here being no dispute that a transcript could have been prepared.")

The D.C. Code expressly provides that "the court shall vacate an award" where the arbitrator "refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to § 16-4415, so as to prejudice substantially the rights of a party in the arbitration proceeding" or on another "reasonable ground." D.C. Code § 16-4423(a)(3), and (b). For a party to challenge an arbitration award on these grounds, as this Court stated in *Dolton,* requires a transcript.

The prohibition in ACAB Rule 19(m) on the transcription of hearings rendered a nullity the Dalys' statutory right to challenge the ACAB award on those statutory bases founded on what transpired during the course of the ACAB

hearing.[14] In other words, the due process right of the Dalys to a transcript is founded on the right to challenge an award under D.C. Code § 16-4423(a)(3) and (b).

Significantly, the ACAB Rule prohibiting the transcription of hearings is not in accord with the ABA's Model Rules for Fee Arbitration, which were adopted by the ABA House of Delegates on February 15, 1995. Model Rule 5 provides that "a party to the proceedings may make arrangements to have a hearing reported at the party's own expense, provided notice is given to the other parties and the panel at least [5] days prior to the scheduled hearing." Additionally, the Model Rules state that the arbitration "panel, in its discretion, may make arrangements to have a hearing recorded and the parties may obtain a copy at their own expense." See American Bar Association, Model Rules for Fee Arbitration available at https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/farule5/.[15]

[14] Indeed, in the proceedings below, KaiserDillon took the position that "The Lack of a Hearing Transcript Squarely Forecloses All of Defendants' Claims." J.A. 100.

[15] The Florida State Bar, which, as discussed above, imposes significant client safeguards for the inclusion of a mandatory arbitration provision in an engagement agreement, also recognizes the importance of having a transcript of fee arbitration hearings by providing that a party may retain the services of a stenographer to record the arbitration proceedings. Florida State Bar Fee Arbitration Procedural Rules (July 29, 2022), available at https://www.media.foridabar.org/2022/08.

That the judicial review of arbitration awards "is extremely limited" (*A1 Team United States Holdings, LLC v. Bingham McCutchen LLP*, 998 A.2d 320, 326 (D.C. 2010)) makes it even more important that the ACAB rules not impair a party's ability to challenge an arbitration award on the limited grounds allowed under D.C. Code § 16-4423. That review of arbitration awards is "extremely limited" cannot mean that the ACAB may follow procedures that limit even further judicial review under the D.C. Code.

In sum, by being prohibited from having the ACAB hearing transcribed, the Dalys were deprived of their ability to adequately challenge the ACAB award on the very grounds that the D.C. Code permits for vacating an award: the failure of the arbitrator to consider evidence material to the controversy, in this case, evidence that KaiserDillon failed to prove (1) that the fees sought were reasonable and (2) that "the amount involved and the results obtained" justified the fees KaiserDillon charged – each of which failures of proof would require a court to vacate the ACAB award.

CONCLUSION

For the reasons set forth above, Corbett Daly and Tunay Kuru, respectfully submit that this Court should reverse the Superior Court's confirmation of the ACAB arbitration award in favor of KaiserDillon, LLC and vacate the award.

DATED: June 12, 2023 Respectfully submitted,

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Bernard J. DiMuro	22-cv-0894
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