

2014

## *Bezio v. Draeger: A Missed Opportunity for a Doctrinal Solution to the Jurisdictional Split as to the Arbitrability of Legal Malpractice Claims*

Brian Cressman

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Brian Cressman, *Bezio v. Draeger: A Missed Opportunity for a Doctrinal Solution to the Jurisdictional Split as to the Arbitrability of Legal Malpractice Claims*, 6 *Y.B. Arb. & Mediation* 359 (2014).

This Student Submission - Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

BEZIO V. DRAEGER: A MISSED OPPORTUNITY FOR A DOCTRINAL SOLUTION TO THE JURISDICTIONAL SPLIT AS TO THE ARBITRABILITY OF LEGAL MALPRACTICE CLAIMS

By  
Brian Cressman\*

I. INTRODUCTION

In *Bezio v. Draeger*,<sup>1</sup> the First Circuit Court of Appeals affirmed the holding of the District Court of Maine that pre-dispute malpractice arbitration agreements are valid. In doing so, however, the First Circuit reached its holding on a more conservative rationale than the District Court. The District Court relied on the Federal Arbitration Act (“FAA”)<sup>2</sup> preemption doctrine, while the First Circuit backpedaled from the District Court’s holding, instead relying on state ethical advisory opinions to reach its holding. With this switch in rationale, the First Circuit missed an opportunity to establish a doctrinal resolution to a jurisdictional split defined by state ethics advisory opinions and ABA ethics opinions.<sup>3</sup> Therefore, while *Bezio* established the important holding that in Maine pre-dispute malpractice arbitration agreements are valid, the backpedaling of the First Circuit minimized the effect of the holding.<sup>4</sup> Even though the First Circuit’s holding is consistent with the preemption doctrine, the First Circuit’s result is more a matter of happenstance than sound reasoning. This result likely serves as an inadvertent approval of reliance on state advisory opinions, which in their own right, at times, arguably create a threshold barrier to arbitration that conflicts with the FAA preemption doctrine.<sup>5</sup>

II. BACKGROUND FACTS

Plaintiff Douglas G. Bezio was represented by Bernstein, Shur, Sawyer, and Nelson (“BSSN”) regarding an alleged violation of Maine state security laws brought by the Maine Office of Securities.<sup>6</sup> On September 26, 2011, Bezio signed a consent order in which he agreed not to contest the State’s conclusion that he violated Maine state

---

\* Brian Cressman is an Associate Editor of *The Yearbook on Arbitration and Mediation* and a 2015 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

<sup>1</sup> *Bezio v. Draeger*, 737 F.3d 819 (1st Cir. 2013).

<sup>2</sup> 9 U.S.C. §1 et seq. (2012).

<sup>3</sup> *See infra* notes 43-48.

<sup>4</sup> *See infra* notes 81-84.

<sup>5</sup> *See infra* notes 71-79.

<sup>6</sup> *Bezio v. Draeger*, 2013 U.S. Dist. LEXIS 99291, at \*1, 2 (D. Me. 2013).

securities laws.<sup>7</sup> Bezio, employed with a securities firm in Massachusetts, was fired from his job as soon as the consent order was published.<sup>8</sup> Bezio claimed that BSSN committed malpractice by failing to include his employer in the process of negotiating the consent order, and leading him to believe the consent order would have no impact outside of the state of Maine.<sup>9</sup> Bezio alleged that, because of BSSN's malpractice he lost his livelihood, or at the least the lost value of transferring his book of business.<sup>10</sup>

Upon hiring BSSN, Bezio was sent a three-page engagement letter dated March 18, 2011.<sup>11</sup> Attached, and incorporated by reference in the engagement letter was a four-page document entitled "Standard Terms of Engagement."<sup>12</sup> Bezio executed the engagement letter, and initialed every page of both the engagement letter and standard terms of engagement attachment.<sup>13</sup> The "Standard Term Attachment" included a section entitled "Arbitration," in pertinent part as follows:

If you disagree with the amount of our fee, please take up the question with your principal attorney contact or with the firm's managing partner. Typically, such disagreements are resolved to the satisfaction of both sides with little inconvenience or formality. In the event of a fee dispute that is not readily resolved, you shall have the right to submit the fee dispute to arbitration under the Maine Code of Professional Responsibility. Any fee dispute that you do not submit to arbitration under the Maine Code of Professional Responsibility, and any other dispute that arises out of or relates to this agreement or the services provided by the law firm shall also, at the election of either party, be subject to binding arbitration. Either party may request such arbitration by sending a written demand for arbitration to the other.<sup>14</sup>

BSSN moved for dismissal of Bezio's claim and to compel arbitration.<sup>15</sup> Bezio submitted that fee disputes were arbitrable, but opposed the dismissal of his legal

---

<sup>7</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*2-3. Bezio alleges that at minimum he lost the value of his book of business. His rationalization is that if he were properly informed regarding the ramifications of his consent decree, he could have transferred his book of business in an orderly manner prior to losing his job.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*3.

<sup>14</sup> Bezio, 737 F.3d at 821.

<sup>15</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*4.

malpractice claim.<sup>16</sup> Bezio was not advised to seek outside counsel, nor did BSSN review the arbitration clause included in the Standard Terms Attachment with Bezio prior to Bezio executing the agreement.<sup>17</sup> No one at BSSN alerted Bezio to the consequences of submitting claims to arbitration, including surrendering the right to a trial by jury.<sup>18</sup> In addition, Bezio and BSSN never discussed the possibility of arbitrating his malpractice claims.<sup>19</sup> As a result, Bezio argued that BSSN could not force arbitration of his malpractice claims because BSSN failed to obtain his informed consent to arbitrate those claims.<sup>20</sup> BSSN, for its part, argued that the FAA requires the court to enforce the arbitration clause as written, even though Bezio had not granted informed consent.<sup>21</sup>

The District Court of Maine dismissed Bezio's case and granted BSSN's motion to compel arbitration.<sup>22</sup> The District Court was admittedly reluctant to join the state-by-state debate regarding arbitrability of malpractice claims in an attorney-client arbitration agreement; instead, the District Court found that the FAA governed the case and must be followed.<sup>23</sup> As a result, the District Court's rationale largely relied on the Supreme Court's opinion in *Doctor's Associates, Inc. v. Casarotto*.<sup>24</sup> As the District Court stated, *Casarotto* "instructed that the FAA's goals and policies are considered antithetical to threshold limitations placed specifically and solely on arbitration provisions."<sup>25</sup> Further, a court cannot "effect what...the state legislature cannot," in holding arbitration clauses unconscionable.<sup>26</sup> The District Court stated that if it held the arbitration clause unenforceable because BSSN needed to obtain informed consent from Bezio, "it would

---

<sup>16</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*4.

<sup>17</sup> *Id.*

<sup>18</sup> Bezio, 737 F.3d at 821.

<sup>19</sup> *Id.*

<sup>20</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* at 7 n.3.

<sup>24</sup> See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (invalidating a Montana statute which required special notice in regards to an arbitration agreement in a contract); see also Bezio, 2013 U.S. Dist. LEXIS 99291 at 6-9.

<sup>25</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*7 (citing *Casarotto*, 517 U.S. at 429 n.9).

<sup>26</sup> *Id.* (citing *Casarotto*, 517 U.S. at 689 n.3) (internal citation omitted); see *Casarotto*, 517 U.S. at 687 ("[u]nder *Southland* and *Perry*, state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted." Note 3 of *Casarotto* thus clarifies, a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what...the state legislature cannot.").

be establishing a requirement applicable only to arbitration clauses.”<sup>27</sup> Such a holding would be futile and displaced by the FAA preemption doctrine.<sup>28</sup> As a result of the District Court’s dismissal of Bezio’s case and order to compel arbitration, Bezio appealed to the First Circuit Court of Appeals.<sup>29</sup>

### III. COURT’S ANALYSIS

The First Circuit affirmed the District Court’s holding, but in doing so applied a different rationale. According to the First Circuit, Maine law permits attorneys to enforce arbitration agreements like the one at issue in *Bezio*.<sup>30</sup> The rationale of the First Circuit relied on three prongs: (1) Maine Professional Ethics Commission’s Advisory Opinion 170; (2) the views of the American Bar Association; and (3) the “liberal federal”<sup>31</sup> and state policy favoring arbitration.<sup>32</sup>

Of primacy in the Circuit Court’s rationale, Maine Advisory Opinion 170 states that: “a lawyer and a client may indeed, under the Maine Bar Rules, include in their initial engagement agreement a clause compelling arbitration of any and all malpractice claims as long as the clause does not preclude the client from requiring resolution of any fee disputes pursuant to Rule 9.”<sup>33</sup> Further, a decision inconsistent with Advisory Opinion 170 would be inconsistent with the liberal state and federal policies favoring arbitration.<sup>34</sup> Finally, Advisory Opinion 170 explicitly stated that the “presence of an arbitration clause in an engagement agreement, without more, [does not] require that the client be advised to consult with other counsel.”<sup>35</sup> Thus, according to the First Circuit, the Maine Professional Ethics Commission has “expressly rejected Bezio’s informed consent argument.”<sup>36</sup>

Lastly, the court opined that ABA Ethics Opinions guided to the same result as Advisory Opinion 170.<sup>37</sup> According to the First Circuit, ABA Formal Opinion 02-425

---

<sup>27</sup> *Bezio*, 2013 U.S. Dist. LEXIS 99291, at \*9.

<sup>28</sup> *Id.*; *see infra* notes 71-79.

<sup>29</sup> *Bezio*, 737 F.3d at 820.

<sup>30</sup> *Id.* at 823.

<sup>31</sup> *See Moses H. Cone Mem’l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>32</sup> *Bezio*, 737 F.3d at 823.

<sup>33</sup> *Id.* at 823-24.

<sup>34</sup> *Id.* at 824.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 825.

established that mandatory arbitration provisions were proper, unless the agreement limited the lawyer from liability to which they would otherwise be exposed.<sup>38</sup> As arbitration is simply the choice of “a neutral forum to adjudicate liability...and not an agreement limiting a lawyer’s liability,”<sup>39</sup> an agreement to arbitrate malpractice claims, according to the court, is arbitrable pursuant to ABA guideline opinions.<sup>40</sup>

#### IV. SIGNIFICANCE

While fee dispute arbitration is a generally accepted facet of the attorney-client agreement,<sup>41</sup> the arbitrability of malpractice claims diverges greatly based on jurisdiction.<sup>42</sup> The state to state variation is often the result of differing state bar views as to whether arbitration of malpractice claims “limits a lawyer’s liability.”<sup>43</sup> Some states require that attorneys drafting malpractice arbitration clauses owe a duty to require their potential client to seek independent counsel to review a retainer agreement compelling arbitration of malpractice claims.<sup>44</sup> Other states require an attorney to explain the benefits of arbitration to a client, and obtain informed consent as to arbitrability of

---

<sup>38</sup> *Bezio*, 737 F.3d at 825.

<sup>39</sup> *Id.* at 824.

<sup>40</sup> *Id.* at 825.

<sup>41</sup> THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 361 (5th ed. 2014). Many, if not most, bar associations have implemented arbitral procedures for addressing fee disputes. Rule 1.5 of the Model Rules of Professional Conduct (MRPC) authorizes “fee arbitration programs”; in fact, there are ABA Model Rules for Fee Arbitration. The MRPC, however, does not address instances in which the arbitral procedures apply to malpractice claims.

<sup>42</sup> *See Gorden v. Lloyd Ward & Assoc., P.C.*, No. 31399-9-111 (Wash. App. April 9, 2014) (arbitration clause was unenforceable because it was not explained to clients); *Smith v. Lindemann*, 2014 U.S. Dist. LEXIS 27065 (D.N.J. March 3, 2014) (legal malpractice arbitration clauses are enforceable); *Vandekerckhove v. Scarfone*, 2012 Mich. App. LEXIS 1961 (Mich. App. Oct. 11, 2012) (malpractice arbitration agreement is enforceable); *Hodges v. Reasonover*, 2012 La. LEXIS 1962 (La. July 2, 2012) (pre-dispute agreements to arbitrate legal malpractice claims are enforceable so long as the attorney discloses the waiver of rights in agreeing to arbitrate); *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 2011 Fla. App. LEXIS 8899 (Fla. App. June 18, 2011) (holding that pre-dispute agreements to arbitrate legal malpractice claims are enforceable); *Desert Outdoor Advertising v. Superior Court*, 2011 Cal. App. LEXIS 784 (Cal. App. June 17, 2011) (an arbitration agreement added mid-representation was enforceable); *Broadcast News Networks, Inc. v. Loeb & Loeb, LLP*, 834 N.Y.S.2d 656 (N.Y. App. 2007) (malpractice arbitration agreement enforceable); *Thornton v. Higgins*, 2003 Ohio 7078 (Ohio App. 2003) (pre-dispute agreements to arbitrate malpractice claims are not enforceable).

<sup>43</sup> Louis A. Russo, *The Consequences of Arbitrating A Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 HOFSTRA L. REV. 327, 350 (2006) (see Pennsylvania Rule 1.8(h)(1) of PA disciplinary rules of professional conduct), *but see* MAINE PROFESSION ETHICS COMMISSION, OPINION #170 (1999) (Attorneys’ and Clients’ Agreement to Arbitrate Future Malpractice Claim) (arbitration is a choice of forum and not a “limitation on liability”).

<sup>44</sup> *Id.* at 345 (such states include Texas, Illinois, and Pennsylvania).

malpractice claims.<sup>45</sup> The states requiring informed consent generally rely on the ABA's guidance.<sup>46</sup> The guidance most commonly cited is as follows:

The American Bar Association discussed this matter in a 2002 formal ethical opinion. Essentially, the ABA found that an agreement to arbitrate legal malpractice claims is ethical and permitted when: (1) the client is fully apprised of the advantages and disadvantages of arbitration; (2) the client is given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer; and (3) the arbitration clause does not insulate the attorney from liability or limit the liability to which she would otherwise be exposed under common or statutory law.<sup>47</sup>

Some states, including Maine, find that malpractice claims are fully arbitrable.<sup>48</sup> State rules delineating to what extent an attorney may agree to arbitrate malpractice claims with a client are embodied not in law, but in advisory opinions of state bars. Courts then rely on those opinions, and in doing so establish the law of a particular state as the case presents itself. Thus, the jurisdictional variability on the issue largely is a result of differing professional responsibility rules, differing advisory opinions on those rules, and differing application by courts. At the heart of this balancing is the liberal policy favoring arbitration coming to a head with professional responsibility rules delineating the permitted attorney-client relationship.<sup>49</sup>

*Bezio* is important because the rationale of the District Court of Maine and the First Circuit presents two differing views as to why malpractice claims are arbitrable. The First Circuit based its decision primarily on an analysis of advisory professional responsibility opinions, which is a timid approach. On the other hand, the District Court, in contrasting and more persuasive reasoning, provides an analysis of Supreme Court jurisprudence and the FAA preemption doctrine. The District Court's analysis is free of jurisdictional anchoring, and provides a compelling doctrinal argument that does not shy away from the underlying clash between the liberal federal policy favoring arbitration and responsibilities of attorneys to their clients.

---

<sup>45</sup> Russo, *supra* note 43, at 352 (such states include California, New York, and New Jersey).

<sup>46</sup> ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 02-425 (2002) (discussing retainer agreements requiring the arbitration of fee disputes and malpractice claims).

<sup>47</sup> Russo, *supra* note 43, at 352.

<sup>48</sup> MAINE PROF'L ETHICS COMM'N, OP. #170 (1999) (Attorneys' and Clients' Agreement to Arbitrate Future Malpractice Claim).

<sup>49</sup> See *supra* note 42 for a sampling of cases, including cases finding malpractice claims arbitrable.

## V. CRITIQUE

In affirming the District Court on other grounds, the First Circuit failed to establish a doctrinal answer to the issue of whether the FAA pre-empts professional responsibility rules. Instead, the First Circuit returned to familiar rationale, by leaning on advisory opinions to reach its conclusion. However, these specific advisory opinions relied on by courts with respect to the issue of arbitrability of legal malpractice claims are responsible for the split in authority on the issue.

The First Circuit mentioned the liberal policy favoring arbitration in a token way; however, their answer to the issue of the arbitrability of malpractice claims was fully answered by Advisory Opinion #170, entitled “Attorneys’ and Clients’ Agreement to Arbitrate Future Malpractice Claims.”<sup>50</sup> The only hurdle opined by Maine’s Professional Ethics Commission was whether arbitration “limited the lawyer’s liability” in offense of the rules.<sup>51</sup> However, despite a dissenting view that arbitration did, in fact, limit malpractice liability,<sup>52</sup> the Professional Ethics Commission found that “there is nothing in the language of the rule, or its history, to support the proposition that a mutual agreement on a neutral forum within which to adjudicate a lawyer’s future liability is an agreement limiting the lawyer’s liability.”<sup>53</sup> Additionally, the Professional Ethics Commission found that notions of conflicts of interest in agreeing to arbitrate were unfounded, and thus attorneys are not required to refer clients to independent counsel to review attorney-client engagement letters as they pertain to arbitrating malpractice claims.<sup>54</sup> Therefore, despite contrary holdings in other jurisdictions,<sup>55</sup> Maine’s Professional Ethics

---

<sup>50</sup> Maine Op. #170, *supra* note 48.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The dissenting view posited that arbitration limited the odds of recovery, by its very nature limiting the lawyer’s liability. However the majority responded: “If we were to accept the proposition that agreements that do not limit liability, but that might affect the odds of a liability finding or the leverage of the parties in negotiating a settlement, were implicitly prohibited by the Bar Rules, we would then call into question many well-accepted, even laudable practices.”

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* “Finally, there is the related issue of whether the lawyer must advise the client to obtain independent advice before entering into an agreement to arbitrate prospective disputes. The theory supporting such a requirement would be that the lawyer and client have a conflict of interest on the matter. *See* Maine Bar Rule 3.4(f)(2). Yet this is true in theory of everything that is the engagement agreement, most especially, for example, the percentage fee provision in a contingent fee agreement. We do think that the arbitration clause should be clear and should expressly reserve both the client’s right to compel Rule 9 arbitration over any fee dispute and the ability to file grievance complaints under Bar Rule 7.1(a), but we do not conclude that the presence of such an arbitration clause in an engagement agreement, without more, requires that the client be advised to consult other counsel.”

<sup>55</sup> Maine Op. #170, *supra* note 48. “We do recognize that other jurisdictions are split on the issue at hand. Ohio flatly prohibits such a clause. Ohio Ethics Opinion 96-9. California permits it. California State Bar Formal Opinion 1989-116. Others permit the clause with conditions. Arizona Ethics Opinion 94-05; District of Columbia Ethics Opinion 211, Virginia Legal Ethics Opinion 1707. Coloring some of the various opinions from other states, we think, is a distaste for arbitration. Both Congress and Maine’s Legislature, however, have concluded that arbitration clauses are among the few contractual clauses

Commission concluded that attorney-client malpractice claims were arbitrable and such provisions were valid.

Confusingly, the First Circuit also mentioned that a similar ABA Opinion corroborated the opinion of the Maine Commission.<sup>56</sup> The First Circuit stated that the ABA Opinion stood for the position that “mandatory arbitration provisions are proper unless the retainer agreement insulates the lawyer from liability or limits the liability to which she otherwise would be exposed under common or statutory law.”<sup>57</sup> However, the plain text of ABA Opinion 02-425 states: “it is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.”<sup>58</sup> The ABA Committee then found malpractice claims arbitrable so long as a client makes a decision with informed consent.<sup>59</sup>

The First Circuit seemingly misinterpreted the ABA Opinion as an unqualified endorsement of the arbitration of malpractice agreements, as evidenced by their citation to an opinion that is widely cited in states that require “informed consent” of pre-dispute malpractice arbitration agreements.<sup>60</sup>

The District Court, on the other hand, dismissed a Louisiana case,<sup>61</sup> cited by Bezio, that required informed consent based on the very same ABA Opinion because the FAA demanded the clause be enforced.<sup>62</sup> The District Court considered a special informed consent requirement for arbitration of malpractice claims akin to the threshold limitation placed specifically on an arbitration provision held antithetical to the FAA in *Casarotto*.<sup>63</sup> The District Court squarely addressed the opposing policies of professional

---

meriting statutory approval and mandatory enforcement. We are not comfortable being in the position of suggesting in any way that such a form of dispute resolution is less favored in cases involving lawyers.”

<sup>56</sup> Bezio, 737 F.3d at 823.

<sup>57</sup> *Id.* at 825 (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-425 (2002)).

<sup>58</sup> ABA Op. 02-425, *supra* note 46 (discussing retainer agreements requiring the arbitration of fee disputes and malpractice claims).

<sup>59</sup> A second limitation is also included in ABA Opinion 02-425, namely that the agreement cannot prospectively limit malpractice liability; CARBONNEAU, *supra* note 41, at 360-61. While the committee concluded that such contractual provisions [fee and malpractice arbitration agreements] did not violate ethical standards, it conditioned their ethical acceptability upon a number of factors. First, the client's acceptance of the agreement to arbitrate such disputes must be based upon informed consent. Second, the effect of the arbitration agreement cannot be to limit or exclude the lawyer's liability exposure to the client....The second limitation is based on Model Rule of Professional Conduct Rule 1.8(h) which forbids lawyers from limiting their malpractice liability through contract unless such agreements are recognized at law as lawful and the subscribing client is independently represented.

<sup>60</sup> Bezio, 737 F.3d at 824 (citing *Hodges v. Reasonover*, 103 So. 3d 1069 (La. 2012)).

<sup>61</sup> *Hodges*, 103 So. 3d 1069.

<sup>62</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*7.

<sup>63</sup> *Id.*

responsibility and FAA preemption and declared the FAA the victor.<sup>64</sup> If the District Court had found the arbitration clause unenforceable because BSSN failed to obtain informed consent, “it would be establishing a requirement applicable only to arbitration clauses.”<sup>65</sup> Such a holding would clearly be pre-empted as it “singles out arbitration provisions for suspect status.”<sup>66</sup>

The District Court made a more persuasive and conclusive argument. There is a strong presumption in favor of arbitrability,<sup>67</sup> expressed by Congress in the FAA with its enforcement rooted in the Constitution.<sup>68</sup> With this presumption in mind, Supreme Court jurisprudence establishes a broad view of the substantive claims that can be submitted to arbitration.<sup>69</sup> Thus, by agreeing to arbitrate, a party does not forego rights, but merely submits their resolution to an arbitral forum.<sup>70</sup>

The Supreme Court makes clear that federal preemption is the law until Congress amends the FAA.<sup>71</sup> The Court has stated that, “our cases place it beyond dispute that the FAA was designed to promote arbitration.”<sup>72</sup> With a presumption of arbitrability, FAA preemption applies to any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>73</sup> “In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state

---

<sup>64</sup> Bezio, 2013 U.S. Dist. LEXIS 99291, at \*4-11.

<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.* (citing Casarotto 517 U.S. at 687).

<sup>67</sup> Moses H. Cone, 460 U.S. at 24 (questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration).

<sup>68</sup> Southland Corp. v. Keating, 465 U.S. 1 (1984) The FAA extends to the full limits of the commerce clause, is binding on the states via the Supremacy Clause, and to the extent that state rules and laws conflict with the FAA they are pre-empted. CARBONNEAU, *supra* note 41, at 129 (Court construction—done principally by the U.S. Supreme Court—has modified considerably the language and content of the [FAA]...Moreover, judicial opinions have given the right to arbitrate not only a substantive character, but constitutional standing as well.

<sup>69</sup> Marmet Health Care Center, Inc. v. Brown, 132 S.Ct. 1201 (2012) (personal injury and wrongful-death claims); Casarotto, 517 U.S. 681 (state law regarding franchising); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (Age Discrimination and Employment Act claims); Shearson Lehman/American Exp., Inc. v. Bird, 493 U.S. 884 (1989) (ERISA claims); Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989) (Securities Act of 1933); Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (Securities Exchange Act of 1934); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust claims).

<sup>70</sup> Rodriguez de Quijas, 490 U.S. at 481 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 628 (1985)). By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

<sup>71</sup> McMahon, 482 U.S. at 227. Such an intent “will be deducible from the statutes text or legislative history...or from an inherent conflict between arbitration and the statute’s underlying purposes.”

<sup>72</sup> AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1749 (2011).

<sup>73</sup> Volt Info. Scis. v. Bd. of Trs., 489 U.S. 477 (1989).

legislative attempts to undercut the enforceability of arbitration agreements.”<sup>74</sup> The FAA “mandates enforcement of agreements to arbitrate statutory claims” unless “overridden by a contrary congressional command.”<sup>75</sup> Accordingly, an agreement to arbitrate will be enforced unless Congress alone has created an exception to the FAA.<sup>76</sup>

In order to overcome FAA preemption, the party opposing arbitration must show that Congress intended to exclude a claim from arbitration.<sup>77</sup> Such intent “will be deducible from the statutes text or legislative history...or from an inherent conflict between arbitration and the statute’s underlying purposes.”<sup>78</sup> In the absence of a Congressional intent, the Court has found that a state policy against arbitration cannot supersede Congress’ liberal federal policy favoring arbitration in the FAA.<sup>79</sup> Thus, Congress is the only policy maker that can create an exception to the enforceability of arbitration agreements mandated by the FAA.

Contract gave birth to arbitration as a method of resolving conflicts; as such an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>80</sup> An attorney-client arbitration agreement regarding malpractice claims is plainly an issue of contract. An informed consent requirement, mandated by the court in reliance on a non-binding regulatory opinion, is a specific limitation applied only the arbitrability of malpractice claims and not to the general contracts the arbitration agreements are contained in. Such a requirement is not a ground that exists at law or in equity for the revocation of any contract.

The First Circuit has emphasized the holding of *Casarotto*, saying that a state is “preempted from imposing special restrictions on arbitration [provisions].”<sup>81</sup> The informed consent requirement to arbitrate legal malpractice claims, as espoused by *Bezio*, is a special restriction on arbitration provisions. A proper application of the preemption doctrine, as undertaken by the District Court, easily resolves the issue because the FAA preempts that informed consent requirement. While the First Circuit’s opinion is consistent with the holding dictated by preemption doctrine, this result is just coincidence.

---

<sup>74</sup> *Southland Corp.*, 465 U.S. at 16.

<sup>75</sup> *McMahon*, 482 U.S. at 226.

<sup>76</sup> *See Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013). For a sampling of Supreme Court preemption cases *see Casarotto*, 517 U.S. at 681 (1996) (where a state statute demanding special notice requirements of arbitration agreements was pre-empted.); *Preston v. Ferrer*, 552 U.S. 346 (2008) (where a state law requiring administrative remedies be exhausted before arbitrating was pre-empted).

<sup>77</sup> *McMahon*, 482 U.S. at 227.

<sup>78</sup> *Id.*

<sup>79</sup> *See supra* notes 71-78.

<sup>80</sup> 9 U.S.C. § 2.

<sup>81</sup> *Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 74 (1st Cir. 2011).

The First Circuit's misplaced reliance on state advisory opinions is exactly the rationale subject to FAA preemption. For example, consider states that require informed consent,<sup>82</sup> or third party representation,<sup>83</sup> before a malpractice arbitration clause can be agreed upon. Applying the same rationale of the First Circuit, by relying on an advisory opinion requiring informed consent or third party representation, the court would be basing its holding on an exception espoused by the regulatory opinion of a state overseer instead of the Congressional exception to arbitrability.<sup>84</sup> Such a barrier to arbitration cannot stand in the face of the preemption doctrine.

The procedure for adoption of professional responsibility rules, on a state by state basis, results in jurisdictional variability more expansive than a mere circuit split. States generally fall into three factions: (1) those finding malpractice claims arbitrable; (2) those requiring informed consent; and (3) those requiring independent counsel consultation. Accordingly, the method for adopting their respective rules can result in bordering states adopting widely different rules. This creates troubling variability between states within the same Federal Appellate Circuit. This is particularly disconcerting because courts generally rely on professional responsibility opinions to resolve the issue of malpractice arbitrability, just like the First Circuit did in *Bezio*, by doing so reinforcing instead of resolving a split on the issue.

To highlight this variability, consider the rules in Maine and New Hampshire, both within the First Circuit's jurisdiction. As previously discussed, Maine's Advisory Opinion #170 declares legal malpractice claims arbitrable, without qualification.<sup>85</sup> New Hampshire's respective advisory opinion, however, requires the client's informed consent to make a legal malpractice arbitration agreement enforceable.<sup>86</sup> Therefore, if one were to apply the First Circuit's rationale in *Bezio*, Maine and New Hampshire would have differing rules because the advisory opinions espouse different requirements. The New Hampshire rule, requiring informed consent, would place a special restriction on arbitration provisions that must be preempted by the FAA, but would not be under application of the First Circuit's rationale.<sup>87</sup>

The First Circuit's reasoning relies on state advisory opinions, and thus reinforces the jurisdictional variability on the issue of whether legal malpractice claims are arbitrable. Conversely, the District Court's rationale articulated a uniform preemption rule that is more compliant with the federal policy favoring arbitration codified by Congress in the FAA. In affirming the District Court on other reasoning, the First Circuit merely affirmed the jurisdictional split, thereby not resolving the underlying issue.

---

<sup>82</sup> See *supra* text accompanying note 45 (New York, New Jersey, California); Hodges, 103 So. 3d at 1069 (Louisiana); NEW HAMPSHIRE BAR ASS'N ETHICS COMM. FORMAL OP. INQUIRY #1995-96/10, Incorporation of Mandatory Arbitration Clause Into Attorney-Client Fee Agreements, as Requested by Malpractice Carrier (May 8, 1996) (New Hampshire).

<sup>83</sup> See *supra* text accompanying note 44 (Texas, California, and Pennsylvania).

<sup>84</sup> See *supra* notes 71-79.

<sup>85</sup> See *supra* notes 50-55.

<sup>86</sup> New Hampshire Op. Inquiry #1995-96/10, *supra* note 82.

<sup>87</sup> See Casarotto, 517 U.S. at 681.

Finding resolution by citing the source of the variation is a systemic problem, which will never produce even application of arbitration law. The District Court relied on *Casaratto* and the preemption doctrine, both put forth by the Supreme Court whose purpose it is to ensure even application of law across states, which unequivocally resolves the systemic jurisdictional split. Thus, in stepping back from the District Court's rationale, the Circuit Court avoided a doctrinal solution to the issue.

## VI. CONCLUSION

While this comment does not suggest that the FAA can pre-empt a non-binding, persuasive ABA opinion, if the analysis of the District Court were applied, the FAA would in effect do so by preempting the "informed consent" rule when applied by courts. Thus, although the FAA cannot explicitly preempt these advisory opinions, they can functionally preempt them when courts rely on those opinions in establishing a barrier to arbitration. In failing to affirm the rationale of the District Court, the First Circuit missed an opportunity to establish a doctrinal resolution to the split in authority regarding the validity of pre-dispute malpractice arbitration provisions. Instead, the First Circuit conservatively relied on a state ethics opinion that allowed for the same result, thereby confusing instead of clarifying the jurisdictional variability on this issue. In essence, the reasoning of the First Circuit is the very rationale that creates the split among jurisdictions.