Forum Selection Clauses in Attorney-Client Agreements: The Exploitation of Bargaining Power

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FORUM SELECTION CLAUSES IN ATTORNEY-CLIENT AGREEMENTS:
THE EXPLOITATION OF BARGAINING POWER

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I. INTRODUCTION

Use of a forum selection clause\(^1\) in a contract is one way that parties attempt to protect themselves from future litigation arising from the contract. However, these clauses have the potential for one party to abuse his or her bargaining power against another less sophisticated party. A different problem occurs when one party to the contract has a fiduciary relationship with the other party. Although a forum selection clause in a contract may be appropriate in some contracts in which there is a fiduciary relationship between the parties, this Note argues that the attorney-client relationship is not one of them. Courts must decide whether to enforce forum selection clauses in attorney-client agreements. Without a discussion of the ethical issues involved, courts will give attorneys an open avenue to write legalese into the attorney-client agreement without explaining the consequences of those clauses to a client.

Given the nature of the fiduciary relationship between attorneys and clients,\(^2\) attorneys must adhere to higher ethical standards than other parties when forming an attorney-client contract. An attorney-client relationship is one built on trust in which lay people encounter legal problems that they cannot solve without an attorney’s knowledge. Thus, clients seek the help of an experienced, knowledgeable lawyer who will have the expertise to solve their legal problems. They place their confidence, money, and sometimes their lives in their lawyer’s hands. When an attorney exploits the unequal bargaining power that often arises in the attorney-client relationship, clients become frustrated with their attorney and often the legal system in its entirety. The consequence is severe: attorneys will be permitted to shop for a forum inconvenient to the client and exploit the fiduciary relationship that clients depend upon to settle disputes regarding their money, their families, and their lives.

Lay people who infrequently create contracts are unlikely to understand the components of a forum selection clause and, even worse, will not understand why the person they entrusted with their money or their lives would take advantage of them. This is not to say that forum selection clauses are always inappropriate in the attorney-client agreement or that they are always written in order to deceive the client. However, to continue to apply current analysis to forum selection clauses without an additional ethical component would allow an attorney to take advantage of his or her client’s unequal bargaining position.

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1. A forum selection clause “designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship.” 17A AM. JUR. 2d Contracts § 259 (2011).

The current state of forum selection clause analysis is in disarray. Part II of this Note addresses the development of forum selection clauses and courts' tendency to enforce them. It also addresses the current problems resulting from the use of both federal law and state law to determine the enforceability of forum selection clauses. As courts employ different standards, they create less predictable outcomes and encourage forum shopping. Without a clear standard to apply to attorney-client agreements, both parties are left with uncertainty. State law, specifically West Virginia law, provides more safeguards and has proven, thus far, more workable than the federal standard.

Part III of this Note argues that the forum selection clause is a smart tool for modern society's business person, but its enforceability should be limited. Courts should more closely scrutinize agreements between parties to a fiduciary relationship than agreements between parties making a business transaction because the relationship is founded on trust. Such trust-based relationships should not be so easily affected by provisions in a contract. In deciding whether to apply federal or state law and after reviewing ethical issues implicated, courts must add additional safeguards to protect clients from their attorneys' exploitation of unequal bargaining power. Specifically, courts should analyze whether an attorney has communicated with the client about the meaning of a forum selection clause written into the attorney-client agreement.

II. DEVELOPMENT OF FORUM SELECTION CLAUSES

With an increase in globalization, the general public has access to more business and personal opportunities than ever before. As a result, businesses and lay people alike enter contracts with strangers across the world, and these parties seek ways to adjust to these estranged relationships. By entering these distant relationships, lay people and businesses become subject to unfamiliar courts. A contract is one method of protection that lay people and businesses alike can use to protect their interests. By writing a contract, parties bargain for its terms, thereby decreasing the "significant and ultimately costly complications due to their uncertain ability to enforce their contractual rights." Parties can further protect their contractual rights by including a forum selection clause in the contract, which adds an additional layer of protection. In other words, parties write forum selection clauses in a contract to limit one or both parties to bringing disputes arising from the contract in the future to one jurisdiction or venue.

For lay people who are already unfamiliar with the law, this unfamiliarity lessens their bargaining power even more when they negotiate with more educated parties, such as attorneys who know that courts typically enforce fo-

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3 See Edward A. Purcell, Jr., Litigation and Inequality 244 (1992).
4 See infra Part II.A.
rum selection clauses. In the past, courts often found such clauses unenforceable.\(^6\) However, courts today are, seemingly, more willing to enforce them. Therefore, to understand why this lack of bargaining power should cause the courts concern, one must first understand how forum selection clauses have developed and the reason why courts enforce them against parties with equal bargaining power.

A. **Jurisdictional Standards**

The legal framework for forum selection clauses begins with jurisdictional standards. The basic standard for a court to exercise jurisdiction over a litigant derives from the Due Process Clause of the Fourteenth Amendment.\(^7\) Without jurisdiction over a party, the court “violate[s] the defendant's right not to be deprived of property without due process.”\(^8\) For a court to have personal jurisdiction over a person, the defendant must have sufficient minimum contacts with the state wherein the court sits.\(^9\)

A court can obtain jurisdiction over a party without minimum contacts, however, when the party consents to personal jurisdiction of a particular court.\(^10\) Consent is “either implied, by voluntarily appearing to litigate the action without raising lack of personal jurisdiction . . . or express, by expressly agreeing to submit to the court's jurisdiction.”\(^11\) A party's express consent to jurisdiction is a powerful means for a court to obtain jurisdiction because there is no question as to the fundamental fairness of hailing an out-of-state litigant into court.

One way that parties may consent to jurisdiction before a dispute arises is by writing a forum selection clause into an agreement, thereby agreeing to litigate any disputes arising from the contract before a particular court. As a result, the parties consent to personal jurisdiction.\(^12\) This often occurs when parties enter into a contract and attempt to resolve any uncertainties about where litigation arising from the formation of the contract would take place. The parties usually attempt to choose a forum that applies the law favorably to that party.\(^13\) Therefore, a more educated party, such as an attorney, has an opportunity

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\(^6\) *See infra* Part II.B.1.

\(^7\) ROBERT A. SEDLER, *ACROSS STATE LINES* 126 (1989). This Note is limited to a brief discussion of jurisdiction only as it relates to the enforceability of forum selection clauses.

\(^8\) 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 108.11 (3d ed. 2010).

\(^9\) *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). A defendant has sufficient minimum contacts with the forum state if “the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.” *Id.* at 319.

\(^10\) *See* MOORE ET AL., *supra* note 8, § 108.53.

\(^11\) *Id.*

\(^12\) *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964).

\(^13\) *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 70 (2009).
to exploit the uneven bargaining power between the parties before the contractual relationship begins.

There are other ways that parties attempt to reduce the uncertainty of entering into a contractual relationship that raise jurisdictional questions. Choice-of-law and arbitration provisions are also common in contracts. In fact, forum selection clauses and choice-of-law clauses often appear hand-in-hand in contracts.  By including a choice-of-law provision, the parties agree to which state’s laws “should be applied to determine the validity of the cause, regardless of the forum where it was heard.” In addition to jurisdiction clauses, parties may also include contract clauses in which they agree to arbitrate any disputes arising from the relationship because arbitration may be “a friendlier means of resolving disputes than litigation.”

By including forum selection clauses, choice-of-law clauses, or arbitration clauses in a contract, parties agree beforehand how to settle any issues arising from the contractual relationship. Inclusion of these clauses can potentially cause trouble for lay people, especially clients contracting with more sophisticated parties in another state. Lay people who do not understand these legal phrases and do not have the financial means to hire an attorney to review the contract are left with unequal bargaining power. Initially, courts took note of the lack of certainty associated with forum selection clauses and, as a result, have not always been very eager to enforce them.

B. The History of Forum Selection Clauses

1. History

Historically, courts did not favor forum selection clauses. They were often unenforced because, in the courts’ view, they took away a court’s jurisdiction. Until the 1950s, courts determined whether jurisdiction was appropriate under the ouster doctrine. Under this doctrine, “agreements in advance to oust the courts of the jurisdiction conferred by law [were] illegal and void.” Freedom of contract was undervalued, and some courts determined that stipulating to jurisdiction before litigation undermined the court’s authority. Under the interpretation of the United States Constitution during the ouster era, courts had

14 See id. at 73.
15 See PURCELL, supra note 3, at 179.
16 BROWER & SMUTNY, supra note 5, at 38.
17 See Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 335 (W. Va. 2009) (“While forum-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable . . . .”).
18 See O’HARA & RIBSTEIN, supra note 13, at 72.
a duty to enforce proper jurisdiction over a party.\textsuperscript{21} As a result, courts prohibited a party to a contract from binding himself “in advance by agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.”\textsuperscript{22}

With an increase in the number of international contracts, the courts’ attitude toward forum selection clauses began to change. Some courts began to deviate from the ouster doctrine as interstate litigation expanded. Afterwards, federal case loads grew, courts began to accept the doctrine of forum non conveniens, and parties increasingly forum shopped.\textsuperscript{23} Courts no longer disfavored the idea of transferring jurisdiction over a party to a different court. Foremost, the idea of judicial efficiency motivated many courts to decrease growing dockets.\textsuperscript{24} With the typical backlog of cases, courts looked for methods to dismiss or transfer cases elsewhere\textsuperscript{25} and a forum selection clause was the perfect vehicle to accomplish that goal.

Second, courts applied contract principles or, more prominently, forum non conveniens analysis to enforce forum selection clauses. Under the doctrine of forum non conveniens, courts can transfer a case to a more appropriate, alternative jurisdiction.\textsuperscript{26} In 1947, the United States Supreme Court approved of the dismissal of cases based on forum non conveniens grounds in Gulf Oil Corp. v. Gilbert.\textsuperscript{27} Enforcement on this ground reflected a change in the judicial attitude and a “commitment to the idea of an integrated national judicial system” to give federal judges the discretion to transfer or dismiss cases for “‘efficiency’ and ‘convenience’” purposes.\textsuperscript{28} With an increase in international contracts and parties who wanted more certainty in these unfamiliar business relationships, the Court was faced with the decision of whether forum selection clauses were enforceable. As further discussed below, the Supreme Court changed judicial treatment of forum selection clauses when it decided in Bremen v. Zapata Offshore Co.\textsuperscript{29} that forum selection clauses were presumptively valid.

\begin{thebibliography}{29}
\bibitem{Lakos} Lakos v. Saliaris, 116 F.2d 440, 444 (4th Cir. 1940).
\bibitem{Ins} Ins. Co., 87 U.S. at 451.
\bibitem{Purcell} See Purcell, supra note 3, at 247.
\bibitem{Park} See Purcell, supra note 3, at 247.
\bibitem{Supra} William W. Park, The Relative Reliability of Arbitration Agreements and Court Selection Clauses, in INTERNATIONAL DISPUTE RESOLUTION, supra note 5, at 8.
\bibitem{Id} Id.; see also O’HARA & RIBSTEIN, supra note 13, at 71.
\bibitem{Moore} 17 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 111.71 (3d ed. 2010). Transfers based on forum non conveniens are no longer used since the enactment of 28 U.S.C. § 1404 (2006). Id.
\bibitem{Purcell} Purcell, supra note 3, at 247.
\bibitem{U.S.2} 407 U.S. 1 (1972).
\end{thebibliography}
2. Today’s Analysis: Fairness in Freedom of Contract

The interpretation of forum selection clauses has developed significantly in the twentieth century. Courts no longer look unfavorably upon the clauses, parties are free to stipulate to a designated forum before entering into the contract, and courts decline to enforce the clauses only under limited exceptions. Therefore, a lay person who signs a contract containing a forum selection clause and later argues that the contract is unfair will face a tough day in court.

a. Forum Selection Clauses Are Presumptively Valid

The Court changed the interpretation of forum selection clauses when it held that they are presumptively valid in *Bremen v. Zapata Off-Shore Co.* In *Bremen*, an American corporation contracted with a German corporation to tow a ship from Louisiana to Italy. The parties agreed to include a forum selection clause in the contract that required any dispute arising from the contract to be resolved in London. While being towed, the ship was damaged and took refuge in Florida. The American corporation ignored the forum selection clause and brought suit in Florida.

The Court held that forum selection clauses, including this one, are prima facie valid and should be enforced unless the opposing party “could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid.” Underlying its decision, the Court gave weight to the parties’ ability to contract for a particular forum because it wanted to encourage international business: “The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”

The Court’s decision in *Bremen* illustrates an economical decision between one business located in the United States and another business located in Germany. Both relied on the contract to protect their interests, but the defendant relied on the forum selection clause to enforce its contractual rights. Because

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30 *Id.*
31 *Id.* at 2.
32 *Id.*
33 *Id.* at 3.
34 *Id.* at 3–4.
35 *Id.* at 15.
36 *Id.* at 9. For some time, courts considered limiting their application of *Bremen* to admiralty cases because different laws apply to them. Nonetheless, courts apply its analysis outside the admiralty context. For example, in *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315 (4th Cir. 1982), the United States Court of Appeals for the Fourth Circuit applied the presumptive validity requirement of *Bremen* and enforced a forum selection clause in a contract between a West Virginia company and a New York company that required the parties to litigate all disputes in the courts of New York. *Id.*
businesses compete with each other in the marketplace and are more familiar with contracts than lay people, it is reasonable to expect businesses to make an arrangement that is the most favorable to them in terms of finance and convenience. In other words, bargaining power between businesses is likely to be equal. Conversely, bargaining power between a business and a lay person is likely to be unequal.

b. Forum Selection Clauses Apply to Contracts Involving Lay People

The Court pushed the limits of a party’s freedom to contract when it extended the enforceability of forum selection clauses to those appearing in contracts between businesses and lay people in Carnival Cruise Lines, Inc. v. Shute.\(^{37}\) In Carnival Cruise, two Washington residents bought tickets from Carnival Cruise Lines. In small print on the back of the ticket, a provision stated:

8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.\(^{38}\)

After Mrs. Shute slipped and fell on the cruise ship and became injured, she attempted to sue the cruise line for negligence in a Washington federal court.\(^{39}\) However, the forum selection clause required that litigation take place in Florida.\(^{40}\)

The Court avoided jurisdictional analysis altogether and based its decision to enforce the forum selection clause on freedom of contract and notice principles. The unequal bargaining power between Carnival Cruise Lines and Mrs. Shute was a nonissue because, as the Court stated, Carnival Cruise Line has an interest in limiting potential suits from passengers who reside across the country; courts limiting the jurisdiction for disputes reduces confusion and increases judicial efficiency; and customers benefit from the clauses because Carnival Cruise Line’s litigation costs will decrease and, therefore, it will be able to reduce fares.\(^{41}\) As a result, the Court extended Bremen to contracts involving lay people. This case is a reflection of a business’s attempt to protect its interests when its consumers have reasonable notice of the forum selection clause.


\(^{38}\) Id. at 587–88.

\(^{39}\) Id. at 585.

\(^{40}\) Id. at 588.

\(^{41}\) Id. at 593–94.
c. Exceptions to Presumptive Validity

In addition to extending the scope of the enforceability of forum selection clauses, the Court in Carnival Cruise also announced exceptions to the presumptive reasonableness of the clauses. Courts apply the following exceptions that stem from the opinion:

(1) its formation was induced by fraud or overreaching; (2) the complaining party “will for all practical purposes be deprived of his day in court” because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) its enforcement would contravene a strong public policy of the forum state.\(^{42}\)

In the United States, an unsophisticated party to a contract faces a difficult task of arguing against its enforceability under the exceptions stated in Carnival Cruise. For example, consider Mrs. Shute’s inability to bring a claim against Carnival Cruise Lines merely because she had notice that the ticket contained the provision. There is no evidence in Carnival Cruise indicating that she understood the meaning of the clause or that she had the ability to bargain with the cruise line to remove it.\(^{43}\) Regarding the plaintiff’s inconvenience of travelling from Washington to Florida to litigate her claim, the Court dismissed such an allegation because, in the Court’s view, there was no evidence that the plaintiff did not have the financial means to litigate her case in a Florida court.\(^{44}\) Therefore, unsophisticated parties agree to terms in a contract in which they do not understand, and those parties who do not have the financial means to travel across the country to litigate in court no longer have a legal remedy.

Successful opponents of such clauses are successful because of extenuating circumstances. Often, the contract is written in a different language or requires the parties to litigate in a different country. For example, in Sudduth v. Occidental Peruana, Inc.,\(^{45}\) American employees successfully challenged a forum selection clause in their employment contract in which they agreed to perform work for one of the defendant’s companies in Peru.\(^{46}\) The contract was written in Spanish,\(^{47}\) and the forum selection clause required all disputes to be


\(^{43}\) The Supreme Court does note, however, that because Mrs. Shute had notice of the forum selection clause that she “presumably retained the option of rejecting the contract with impunity.” Carnival Cruise, 499 U.S. at 595.

\(^{44}\) See id. at 594.

\(^{45}\) 70 F. Supp. 2d 691 (E.D. Tex. 1999).

\(^{46}\) Id. at 694.

\(^{47}\) Id.
adjudicated in Peru. The employees later sued the defendants in Texas federal court for benefits they had not received. The court refused to enforce the forum selection clause for two reasons. First, the employer forced the plaintiffs to sign a contract that was written in a foreign language. Second, the clause required the plaintiffs to travel to Peru and would implicitly deprive them of any opportunity to seek damages.

For unsophisticated parties who sign a contract containing a forum selection clause and no extenuating circumstances existed at the time of signing, there may still be relief in court if the parties can show that they are physically and financially incapable of travelling across the country. For example, in *Murphy v. Schneider National, Inc.*, the United States Court of Appeals for the Ninth Circuit reversed the lower court’s dismissal of the plaintiff’s suit because a forum selection clause in an employment contract obligated the parties to litigate in a different state. The plaintiff was injured while driving a truck for the defendant. The employment contract read,

This agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin and all suits with respect hereto shall be instituted exclusively in the Circuit Court of Brown County, Wisconsin. Independent Contractor consents to the exercise of jurisdiction by this court and the vesting of venue therein.

The plaintiff-employee, who had only a tenth grade education, did not sign the contract until he had been employed by the defendant for two months and the defendant forced him to sign or otherwise lose his job. Because of his physical disability and lack of financial income, both of which resulted from the injury, he was unable to travel to the selected forum.

In determining the plaintiff’s inconvenience of litigating the case in a distant forum, the court considered the power differential between the parties, educational background of the party challenging the clause, the business expertise of that party, and the financial ability of that party to bear the litigation costs. Although these factors were insufficient to invalidate the forum selection clause, the court considered the second exception in *Bremen*: denying the

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48 Id.
49 Id.
50 Id. at 695.
51 See id.
52 362 F.3d 1133 (9th Cir. 2003).
53 Id. at 1136.
54 Id.
55 Id. at 1137.
56 Id. at 1141.
party his or her day in court. Because the plaintiff was not physically able to sit in a car or plane for the duration of a trip to the selected forum and could not afford such a trip, the court reversed the district court's ruling on this exception and remanded with instructions that the lower court hold an evidentiary hearing to determine if the plaintiff's physical condition prevented him from travelling. Therefore, sophistication of the party challenging the clause was insufficient to invalidate the forum selection clause; only physical disability was sufficient.

d. Consequences of the Current Analysis

Enforcement of forum selection clauses in contracts often results in harsh consequences. For example, in Sheldon v. Hart, a district court in West Virginia enforced a forum selection clause in a hospital-patient agreement. The plaintiff, a resident of West Virginia, contracted with German doctors and hospitals to perform a risky back surgery. The contract required the parties to litigate any disputes arising from the contract in “German Courts or the European Courts of Justice.” The surgery failed, and the plaintiff suffered severe medical consequences.

The plaintiff filed suit in West Virginia federal court, but the court granted the defendant’s motion to dismiss based on the forum selection clause. The court rejected the plaintiff’s argument that the defendants did not reasonably communicate the clause to her because it appears in regularly sized font and its language is unambiguous. The court gave no weight to the relationship between the parties. Furthermore, the plaintiff did not show that she would be deprived of her day in court because the forum choice was not a “remote alien forum”; Germany is where the defendants reside and where they performed the surgery. Although enforcement of the forum selection clause required the plaintiff to litigate in another country, the court enforced it because the forum chosen was a common ground between the parties. After expending all of her resources in traveling and medical expenses, the plaintiff had no remedy.

57 Id. at 1141–45.
58 Id. at 1141–43.
60 Id. at *1.
61 Id.
62 Id. at *2.
63 Id. at *3.
64 Id.
65 Id. at *6 (citing Carnival Cruise, 499 U.S. 585, 594 (1991)).
66 Cf. Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133 (9th Cir. 2003) (denying enforcement of the forum selection clause because the plaintiff was physically unable to travel to the chosen forum due to his injuries).
Aside from plaintiffs being left with no remedy, there are both obvious and hidden consequences to the use of forum selection clauses in a contract. After the agreement is signed, the parties waive personal jurisdiction.\textsuperscript{67} Next, parties can only guess whether the chosen court has the requisite expertise to decide the issue.\textsuperscript{68} While parties may look to precedent to determine the laws of a particular forum, the law changes as it develops. Ironically, the development of the enforceability of forum selection clauses is one example.

Finally, the chosen forum may affect the outcome of the case in a number of ways, whether it is a substantive or procedural difference.\textsuperscript{69} For example, one statistical study conducted over thirteen years shows how the inclusion of a forum selection clause benefits defendants.\textsuperscript{70} In three million cases filed in United States federal courts, "the plaintiff win rate dropped from [fifty-eight] to [twenty-nine] percent for cases that were transferred from plaintiff’s to defendant’s chosen forum, despite the fact that federal rules ensure application of the same law after a case is transferred."\textsuperscript{71} Therefore, courts should be leery of forum selection clauses because they can serve as a vehicle for a sophisticated party who is knowledgeable of the benefits of a forum selection clause and willing to exploit the other party’s lack of the same knowledge. In civil cases involving a business-defendant and a lay-plaintiff, the defendant can gain an advantage through the inclusion of a forum selection clause.

The existence of a forum selection clause encourages forum shopping even if states typically do not enforce them.\textsuperscript{72} Consider a lawsuit in which the plaintiff and defendant included a forum selection clause in a contract that limits any future suits to a particular court. An issue arises from the contract, and the plaintiff then sues the defendant in state court. The defendant knows that the state disfavors forum selection clauses and wants to remove the case. The defendant can remove the case to federal court if it meets the diversity requirements. In federal court, the defendant knows that the court generally will look more favorably upon forum selection clauses than state courts and, therefore, has increased his or her chances that it will be enforced.

Forum shopping is especially problematic in disputes arising from an attorney-client relationship. The client consults an attorney because he or she has expertise in the law. Attorneys exploit lopsided bargaining power when they require clients to agree to litigate prospective malpractice claims in federal courts that favor enforcement of forum selection clauses. Attorneys who forum shop for a federal court because of that court’s known support for forum selec-

\textsuperscript{67} See O’HARA & RIBSTEIN, supra note 13, at 70.

\textsuperscript{68} Id. at 71.

\textsuperscript{69} Id.

\textsuperscript{70} Id. (citing Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 80 CORNELL L. REV. 1507 (1995)).

\textsuperscript{71} Id.

\textsuperscript{72} Id. at 72.
tion clauses and with that knowledge writes a clause in the attorney-client contract has exploited his or her bargaining power over the client.

C. A Modern Problem: Federal Versus State Law

Another component of forum selection clause analysis that will complicate a court’s decision whether to enforce clauses in the future is whether courts should apply federal or state law. “The sticky question of which law, state or federal, will govern various aspects of the decisions of federal courts sitting in diversity” has sent courts into turmoil. This question has serious consequences in attorney-client agreements because both the attorney and the client who agree to write a forum selection clause in the contract need to be certain that the litigation will occur in the agreed upon forum. The attorney needs to be certain in order to adequately advise the client. The client needs to be certain so that he or she can make an informed decision whether to agree to the contract.

Typically, courts apply state law in contract disputes, but federal courts often apply the Bremen standard. One important consideration is that federal courts enforce forum selection and choice-of-law clauses more often than state courts. Therefore, even if the analysis does not significantly differ, the effects of forum shopping in federal and state court will create inconsistency and result in unfairness.

1. The Erie Hurdle

The Erie doctrine is one of the first hurdles that courts must overcome in their interpretation of forum selection clauses. Many cases involving disputes over forum selection clauses are settled in a federal court exercising diversity jurisdiction. The Erie inquiry is important in forum-selection-interpretation cases because these clauses are not governed by statutes, and whether they are substantive or procedural is unclear; therefore, whether to apply state or federal law is also unclear.

74 See id. at 36 (Scalia, J., dissenting).
75 O’HARA & RIBSTEIN, supra note 13, at 69.
76 See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts sitting in diversity must apply state, not federal substantive law, and may apply federal procedural law).
77 Diversity jurisdiction requires diversity of citizenship and a dispute that involves more than $75,000. 28 U.S.C. § 1332(a) (2006).
78 Depending on the type of motion the defendant files, the court must jump through several hoops to determine what type of law, and more importantly what analysis, to apply to the enforceability of the forum selection clause. A defendant wishing to enforce a forum selection clause can choose from a variety of motions to transfer or dismiss the case. Because of the number and frequency that defendants file a variety of motions to achieve the same result, recent opinions have muddled this area of law.
2. **Stewart Organizations**

In *Stewart Organizations v. Ricoh*, the Supreme Court held that lower federal courts sitting in diversity should apply federal law to cases arising from venue disputes.79 The plaintiff, an Alabama corporation, brought suit against the defendant, an international company with its principal place of business in New Jersey, in Alabama federal court.80 A forum selection clause in the parties’ contract stipulated that the parties bring any suit arising from the contract in only a Manhattan court.81 The defendant moved to transfer the case under 28 U.S.C. § 1404(a),82 and the Alabama court denied the motion because the controlling Alabama substantive law disfavored the enforcement of forum selection clauses.83 However, as the Court’s splintered cases often do, the majority, concurring, and dissenting opinions in Stewart created mass confusion in lower courts. Under each opinion, the court articulated a different standard and all three have been applied by the lower courts, especially in the Fourth Circuit Court of Appeals.

The Supreme Court disagreed with the Alabama court, holding that § 1404(a) is a federal statute and, as such, Congress intended that it have certain federal effects. Furthermore, the federal statute controlled the issue of venue,84 and it constituted a “valid exercise of Congress’ authority under the Constitution.”85 Under the *Van Dusen v. Barrack*86 rule, a court analyzes the convenience, fairness, parties’ bargaining power, and the forum selection clause to determine whether to transfer the case.87 The Court rejected any analysis under *Bremen*.

In Justice Kennedy’s concurrence, he agreed with the majority’s application of § 1404(a), but disagreed with the majority’s rejection of the *Bremen* analysis.88 At least Justice Kennedy gave lower courts guidance in interpretation of forum selection clauses, even if that guidance is to apply federal law in transfer cases under the *Bremen* analysis.

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80 *Id.* at 24.
81 *Id.*
82 Defendants in diversity cases often move to transfer the case based on 28 U.S.C. § 1404(a), which states, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . .” 28 U.S.C. § 1404(a) (2006).
83 *Stewart*, 487 U.S. at 24.
84 *Id.* at 26 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980)).
85 *Id.* at 27 (citing *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)).
87 *Stewart*, 487 U.S. at 29; see also *Van Dusen*, 376 U.S. at 622 (holding that motions to transfer require an “individualized, case-by-case consideration of convenience and fairness”).
88 *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring).
In the dissent, Justice Scalia argued that state law should govern the motion to transfer cases in forum selection clauses for three reasons. First, the majority's rejection of the Bremen analysis and focus on the Van Dusen factors will only confuse lower courts on which analysis to apply because defendants file motions to transfer venue and motions to dismiss interchangeably. Second, analyzing the enforceability of a forum selection clause in a contract under federal law "wrench[s] [contract analysis] from state control in absence of a clear conflict with federal law." Finally, under Erie analysis, applying federal law encourages litigants to forum shop.

Because the majority's opinion is based on the interpretation of a federal statute, lower courts have misinterpreted the application of this case to disputes arising from a forum selection clause. As Justice Kennedy explains in his concurring opinion, the Bremen factors should inform the analysis under § 1404(a), but the court declines to push the analysis that far. As a result of the three opinions written in Stewart Organizations, courts, not just parties, are uncertain whether to apply federal or state law to decide whether a forum selection clause is valid. As a basic step in determining the validity of the clauses in attorney-client agreements, courts must sort out this issue. For the reasons that follow, state law, specifically West Virginia law, may provide the best solution because its analysis is more detailed.

3. West Virginia Law

Although many courts, including the Stewart Organizations Court, argue that federal law applies to the enforceability of forum selection clauses, courts follow the principle that contract disputes are settled by interpreting state law.

89 Id. at 35 (Scalia, J., dissenting). "[T]he Court's description of the issue begs the question: what law governs whether the forum-selection clause is a valid or invalid allocation of any inconvenience between the parties." Id. In Stewart, the Court did not address the motion commonly filed by defendants: the motion to dismiss for improper venue under 12(b)(3). One commentator argues that a motion to dismiss for improper venue is an inappropriate way to dismiss the case on forum selection grounds if venue is proper under the statutory scheme in the court where the plaintiff originally filed suit. Leandra Lederman, Viva Zapate: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases, 66 N.Y.U. L. Rev. 422, 445 (1991). Furthermore, whether courts should apply state or federal law in a motion to dismiss is still unresolved under the Erie doctrine. Id. The Court further confused lower courts when it based its decision in Carnival Cruise just three years later on notice and fundamental fairness while ignoring the issue of the appropriate motion to enforce a forum selection clause. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991).

90 Stewart, 487 U.S. at 36.

91 Id. The twin aims of Erie are "discouragement of forum-shopping and avoidance of inequitable administration of the laws." Id. (citing Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

92 Id. at 26 ("This question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute.").

93 Id. at 33 (Kennedy, J., concurring).
law. In these cases and in West Virginia state courts, the standard for interpretation differs from the federal standard announced in Bremen. In 2008, in Caperton v. A.T. Massey Coal Co., the Supreme Court of Appeals of West Virginia announced its standard for interpreting forum selection clauses. West Virginia courts enforce forum selection clauses "so long as the clause is fair and reasonable . . . . [A] clause or provision unreasonably or improperly attempting to deprive a court of its jurisdiction will not be enforced." In addition to the reasonableness requirement that stems from federal analysis, the Supreme Court of Appeals of West Virginia adopted the Second Circuit's test for assessing the enforceability of forum selection clauses:

The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement . . . . The second step requires classification of the clause as mandatory or permissive, i.e., . . . whether the parties are required to bring any dispute to the designated forum or are simply permitted to do so. The third inquiry asks whether the claims and parties involved in the suit are subject to the forum selection clause . . . .

If the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable . . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."

The West Virginia standard for interpretation of forum selection clauses fleshes out the federal standard in several respects. The state adds additional requirements to the federal standard to ensure that a forum selection clause is fair to both parties. Due to these differences, a party objecting to a forum selection clause may receive additional protection in a West Virginia court than in federal court.

First, the West Virginia standard requires that the clause be reasonably communicated to the party arguing against its enforcement. The Court explained that a "plainly worded forum-selection clause, which 'clearly convey[ed] to any reader that any action regarding the [contract] must be brought in a specific

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94 See id. at 35 (Scalia, J., dissenting).
95 690 S.E.2d 322 (W. Va. 2009).
96 Id. at 335.
97 Id. at 336 (citing Phillips v. Audio Active Ltd., 494 F.3d 378, 383–84 (2d Cir. 2007)).
court, and the location of that court [is] readily ascertainable"98 meets this standard. In contrast to the federal standard that does not require the party seeking to enforce the clause to reasonably communicate its meaning to the other party, the West Virginia standard ensures that a party with more bargaining power at least brings the clause to the other party’s attention.

Next, the West Virginia standard requires determination of whether the clause is mandatory, meaning the language is clear that the clause restricts the parties to bringing suit in a designated forum.99 For example, words like “shall” indicate mandatory clauses, and words like “may” indicate permissive clauses. In addition, words like “exclusive” indicate that the parties intended for the selected forum to be the only available forum. The mandatory language in a forum selection clause should cause an unsophisticated party to take note of the seriousness of the language, and hopefully, he or she will attempt to determine its meaning.

The final difference in the articulation between the West Virginia standard and the federal standard is that the claims and parties must be subject to the suit. To determine whether the forum selection clause governs the claims in the suit, the court “must base its determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.”100 In Caperton, the court notes that any action, including the plaintiff’s tort action, falls within the bounds of the forum selection clause because the language indicates that “any action” must be brought in a particular court.101

West Virginia’s fourth requirement that the party challenging the clause must prove that the clause is unfair or is the product of fraud or overreaching is similar to the federal standard’s requirements that the formation be induced by fraud or overreaching or that the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy.102 These blanket requirements allow the opponent to prove that the contract was fraudulently formed or otherwise unfair.

98 Id. at 337 (quoting Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 433 (2007)).
99 Id. at 338. “A mandatory forum-selection clause contains clear language indicating that jurisdiction is appropriate only in a designated forum. A permissive forum-selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere.” Id. (citing Litigation Handbook on West Virginia Rules of Civil Procedure § 12(b)(3)(5), at 376 (2d ed. 2006)); see also K&V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft, 314 F.3d 494, 498 (10th Cir. 2002).
100 Caperton, 690 S.E.2d at 340.
101 Id. at 341.
102 See supra Part II.B.2.c.
4. Confusion in the Fourth Circuit Court of Appeals and West Virginia Courts

There is a split in the courts on whether to apply federal law or state law, although most courts seem to apply federal law. To illustrate the confusion of the appropriate standard to apply to forum selection disputes in contract claims, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has sent mixed signals to lower courts.

First, in Nutter v. New Rents, Inc. and Bryant Electric Co. v. City of Fredericksburg, the Fourth Circuit addressed the issue by declaring state law to be the appropriate standard when the defendant files a motion to dismiss on the basis of a forum selection clause. In Nutter, the Court analyzed West Virginia's conflicts laws and determined that Louisiana law should govern even though Louisiana had not clearly articulated whether it applies federal or state law. As a result, the Court applied Bremen analysis and enforced the forum selection clause.

In Vulcan Chemical Technologies, Inc. v. Barker, the Fourth Circuit cited both Bremen and Justice Kennedy's concurrence in Stewart Organizations in applying the federal standard. The court enforced an agreement to arbitrate any disputes in California courts.

Although the Nutter decision is not binding precedent, district courts in the Fourth Circuit and West Virginia courts cite both of these decisions when determining whether to apply state and federal standards. West Virginia


105 762 F.2d 1192, 1197 (4th Cir. 1985) (affirming the lower court's application of Virginia's state law, although Virginia applies the federal standard).


107 Id.

108 297 F.3d 332 (4th Cir. 2002).

109 Id. at 339.

110 Id.

111 Although unpublished opinions are not binding precedent, they "are entitled to consideration as an indication of what state law is." 19 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4507, at 163 (2d ed. 1996).

courts and courts in the Fourth Circuit have attempted, with no success, to determine the appropriate standard to apply to the interpretation of forum selection clauses. The Northern District of West Virginia noted that "[w]hile it is well settled law that parties may agree to forum selection through private contracts, in this circuit it is unresolved whether a federal court sitting in diversity applies state or federal law when reviewing the validity of a forum selection clause."^113

To further illustrate the confusion, some district courts in the Fourth Circuit based their decision on both the federal and state standard, holding that the result is the same either way.\textsuperscript{114} In \textit{Sheldon v. Hart},\textsuperscript{115} the court combined both the federal and state standards and analyzed the forum selection clause under both. To begin, the court articulated the West Virginia standard announced in \textit{Caperton v. A.T. Massey Coal Co.},\textsuperscript{116} and completed the first three steps of the analysis: whether the clause was reasonably communicated, whether the clause was mandatory or permissive, and whether the clause governed the parties and claims.\textsuperscript{117}

The court began to combine its state law analysis with the federal law analysis when it reached the final step: whether the party opposing the forum selection clause had rebutted the presumption of reasonableness by showing that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."\textsuperscript{118} Determining whether the parties created the clause due to fraud overlaps with the first step of \textit{Bremen} analysis, and the court next began applying this analysis to the plaintiff's case. In short, the court assessed the presence of fraud, whether the plaintiff would be deprived of her day in court, deprivation of any remedy, and whether the clause contravenes the forum state's public policy.\textsuperscript{119}

Picking up where \textit{Sheldon v. Hart} left off, the Northern District of West Virginia also combined the federal and state law analysis into a piecemeal of both in \textit{Brown v. Partipilo}.\textsuperscript{120} First, the court combined some of the components

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\item \textsuperscript{114} \textit{Carmichael}, 2009 WL 3517671, at *2. (applying state law because the outcome would be the same regardless of the law applied); Rice Contracting Corp. v. Callas Contractors, Inc., No. 1:08cv1163, 2009 U.S. Dist. LEXIS 3, at *7–8 (E.D. Va. Jan. 2, 2009) (applying federal law because the Virginia law and federal law are the same); \textit{Sheldon}, 2010 WL 114007, at *2 (finding the outcome to be the same regardless of the law applied).
\item \textsuperscript{115} \textit{Sheldon}, 2010 WL 114007, at *2.
\item \textsuperscript{116} See supra text accompanying notes 95–101.
\item \textsuperscript{117} \textit{Sheldon}, 2010 WL 114007 at *3–4.
\item \textsuperscript{118} \textit{Id.} at *3 (quoting Caperton v. A. T. Massey Coal Co., 679 S.E.2d 223, 236 (W. Va. 2008)).
\item \textsuperscript{119} \textit{Id.} at *5–7.
\item \textsuperscript{120} No. 1:10CV1110, 2010 WL 3979802 (N.D. W. Va. Oct. 8, 2010). "[W]hether analyzed under West Virginia . . . or federal law, the enforceability of a choice of venue provision is subject to
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of the West Virginia standard to create a new initial inquiry: a forum selection clause is presumptively reasonable if it is mandatory and covers the parties and claims.\textsuperscript{121} After determining that this requirement was met, the court began analyzing whether the opponent had rebutted the presumption under the \textit{Bremen} components and the \textit{Caperton} components.\textsuperscript{122} However, instead of applying each factor, the Court analyzed those most relevant to the case: whether the forum selection clause was the result of fraudulent actions, whether the plaintiffs would be denied a remedy, whether the clause was reasonably communicated to the plaintiffs, and whether the clause violated any of West Virginia’s public policies.\textsuperscript{123}

As illustrated by the decisions in \textit{Sheldon} and \textit{Brown}, the Fourth Circuit’s confusion of whether to apply federal or state law created an unnecessary series of hoops for the lower courts to jump through in order to complete its analysis. Why should courts be required to apply two standards when judicial efficiency was one of the reasons courts began enforcing forum selection clauses?\textsuperscript{124} These opinions create the risk of inconsistency in forum selection clause disputes because lower courts must piece together the appropriate standards under state and federal law. Although the courts noted that they would reach the same conclusion regardless of the standard applied, the bad precedent has been set for a different result. If the state and federal courts in one state apply the same analysis, then a party to a contract will forum shop for a court that will apply the law favorably to his or her position. Although this problem is unavoidable in the typical business contract, the problem is magnified when attorneys forum shop against their clients. Courts must place additional safeguards in forum selection clause analysis to protect clients from the possibility of their attorney’s act of overreaching in this manner.

When comparing West Virginia’s approach to the federal approach to analyzing the validity of forum selection clauses, West Virginia’s approach provides more detailed guideposts. For example, requiring that the proponent of the clause reasonably communicate the clause to the other party is easy to satisfy and equalizes the bargaining power between the parties. On the other hand, the federal approach has proven unworkable unless extenuating circumstances exist.\textsuperscript{125} Courts have been unwilling to invalidate forum selection clauses when the proponent fails to discuss the clause with the other party or when travelling to the distant forum would cause serious inconvenience to the opponent of the

\textsuperscript{121} \textit{See id.} at *2 (citing \textit{Sheldon}, 2010 WL 114007, at *2) (holding that the results of state law analysis and federal law analysis are the same and the Fourth Circuit had yet to decide the issue).

\textsuperscript{122} \textit{Id.} at *3.

\textsuperscript{123} \textit{Id.} at *4–5, 7.

\textsuperscript{124} \textit{See supra} text accompanying note 24.

\textsuperscript{125} \textit{See supra} text accompanying note 24.
clause. Therefore, where applicable, courts should be more willing to apply state laws.

III. AVOIDING AN ABUSE OF BARGAINING POWER IN CONTRACTS

A. Contracts Involving Fiduciary Duties

After the Supreme Court decided \textit{Bremen} in 1972, courts across the United States followed suit in holding that forum selection clauses are presump-
tively valid in contracts of all types. Unfortunately, even in fiduciary contracts, courts generally enforce forum selection clauses absent some extraordinary fac-
tor of unfairness. Courts should be leery of forum selection clauses in contracts involving a fiduciary because the potential for an abuse of bargaining power is very high.

What is a fiduciary relationship and how does it differ from other business relationships? Courts have struggled to determine the exact definition of a fiduciary and the legal consequences of the title, and when they “speak in the language of fiduciary duties, they often talk in sweeping terms about exacting standards.”\textsuperscript{126} Black’s Law Dictionary defines a fiduciary duty as one “of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary . . . [and] a duty to act with the highest degree of honesty and loyalty toward another person and in the best inter-
est 
of the other person.”\textsuperscript{127} Loyalty is the staple of a fiduciary duty. A fiduciary should avoid any selfish components in contracts because he or she has a “duty not to engage in self-dealing or otherwise use his or her position to further personal interests rather than those of the beneficiary.”\textsuperscript{128}

For example, a commodities broker has a duty not to engage in self dealing because of the fiduciary nature of his or her relationship with a client. In \textit{Farmland Industries, Inc. v. Frazier-Pa\l{}ott Commodities, Inc.},\textsuperscript{129} the plaintiff opened two commodities future trading accounts with the defendant, Heinold Commodities, to handle its future petroleum trading.\textsuperscript{130} The agreement contained a forum selection clause to litigate any disputes in Illinois.\textsuperscript{131} The plaintiff

\textsuperscript{126} \textit{Susan Saab Fortney & Vincent R. Johnson, Legal Malpractice Law} 101 (2008).
\textsuperscript{127} \textit{Black’s Law Dictionary} 581 (9th ed. 2009).
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} 806 F.2d 848 (8th Cir. 1987).
\textsuperscript{130} \textit{Id.} at 849.
\textsuperscript{131} The undersigned (“Customer”) agrees to bring any judicial action . . . related to or from this Agreement or any transaction covered hereby or otherwise arising in connection with the relationship between the parties including any action by Customer against Heinold or any person who is an officer, agent, employee or associated person of Heinold at the time the cause of action arises,
suspected that a sham corporation was created to receive kickbacks from its contracts and sued the commodities brokerage firm, its parent corporation, and its employees in Missouri, alleging fraud, breach of fiduciary duty, and violations of various acts.\(^{132}\)

The court refused to enforce the forum selection clause because the contract was allegedly formed from fraudulent acts performed by a fiduciary: "we believe that in a situation where a fiduciary relationship (such as between a commodities broker and its customer) is created by a contract tainted by fraud, the person defrauded cannot be held to the contractual forum selection clause."\(^{133}\) Allowing a person in a fiduciary position to take advantage of the other party would be "grossly unfair,"\(^ {134}\) especially when fraud is involved, because the bargaining power between the two parties is generally uneven. Therefore, extra precautions should be taken to safeguard clients when dealing with their fiduciary: the attorney.

B. \textit{Forum Selection Clauses in Attorney-Client Agreements}

The attorney-client relationship is a fiduciary relationship as a matter of law, and, as such, it brings certain responsibilities. The attorney-client relationship is "of the highest fiduciary nature, calling for the utmost good faith and diligence on the part of the attorney."\(^ {135}\) As eloquently stated by a Wisconsin Supreme Court Justice, "Attorneys are ministers of justice as well as courts, and justice will not be contented with half-hearted service on the part of her ministers, nor will she tolerate a bargain counter within her temple."\(^ {136}\) Courts should supervise the formation of an attorney-client relationship because attorneys have an additional duty of good faith when contracting with a client.

Aside from the obligations associated with additional fiduciary duties, public policy is another reason that courts must supervise the attorney-client relationship. Every state bar has the power to discipline its attorneys for wrongdoing. The relationship between a client and his or her attorney requires extra attention because clients place their confidence, money, and sometimes their lives in an attorney’s hands.

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\(^{132}\) Id. at 849.

\(^{133}\) Id. at 851.

\(^{134}\) Id.


\(^{136}\) Young v. Murphy, 97 N.W. 496, 497 (Wis. 1903).
With the use of form contracts, some law firms now include forum selection clauses in their attorney-client agreements. Although not yet heavily litigated, courts will face the decision of whether to enforce forum selection clauses against clients who may not understand the meaning of these clauses. At the time this Note was written, Ginter v. Belcher, Prendergast, & Laporte is the only case decided by a United States Court of Appeals that has ruled on the issue.

1. Analysis in Ginter v. Belcher, Prendergast & Laporte Falls Short

In Ginter v. Belcher, Prendergast & Laporte, the United States Court of Appeals for the Fifth Circuit enforced a forum selection clause in an attorney-client agreement. The plaintiffs, a married couple residing in South Carolina, hired the defendant, attorney Belcher, whose firm is located in Louisiana, to represent them in an adoption proceeding in Louisiana. The attorney-client agreement contained a forum selection clause, stipulating that the parties must bring any claims arising from the attorney-client contract in Louisiana state court instead of federal court. Attorney Belcher did not advise the Ginters to seek independent counsel to review the attorney-client contract, but "[t]he Ginters, however, did have the opportunity to ask questions."

After adopting a girl, they discovered she had fetal alcohol syndrome and sued Attorney Belcher in Louisiana federal court, alleging misrepresentation of the birth mother’s health and breach of fiduciary duty. Attorney Belcher moved to dismiss the Ginters’ suit, arguing that the forum selection clause in the attorney-client contract obligated the Ginters to bring suit in Louisiana state court. The district court denied attorney Belcher’s motion because

137 536 F.3d 439 (5th Cir. 2008).
138 Id.
139 Id. at 440.
140 Id. Attorney Belcher represented the Ginters in two adoption proceedings. Id. The Ginters agreed to adopt the second child on the condition that he or she is born healthy. Id. at 445 (Dennis, J., dissenting). The forum selection clause appeared in the contract regarding the second representation. Id. at 440 (majority opinion).
141 Id. at 440. "Any action at law, suit in equity, or other judicial proceeding for the enforcement and/or breach of this contract, or any provision thereof, shall be instituted only in the 19th Judicial District Court of the State of Louisiana." Id. The contract also contained a choice-of-law provision, stipulating that Louisiana law would govern any disputes arising from the contract. Id.
142 Id.
143 Id.
144 Id. at 441.
his failure to advise the Belchers to seek independent counsel to review the forum selection provision constituted an act of overreaching.\textsuperscript{145}

The Fifth Circuit Court of Appeals disagreed and enforced the forum selection clause because it did not reflect any overreaching on the attorney’s part and it did not limit the attorney’s malpractice liability.\textsuperscript{146} The court analyzed the enforceability of the forum selection clause based on federal law,\textsuperscript{147} noting that forum selection clauses are presumptively valid unless the clauses are unreasonable\textsuperscript{148} due to overreaching or the clauses violate “a strong public policy of the forum state.”\textsuperscript{149} The court rejected the overreaching argument because the Ginters had previously characterized the contract as nothing more than a document embodying the agreement between the attorney and client, emphasizing that the contract is not a business transaction.\textsuperscript{150}

The court also rejected the Ginters’ argument that the clause violated Louisiana public policy because it acted as a means for the attorney to limit his professional malpractice liability under the Louisiana Rules of Professional Conduct.\textsuperscript{151} The court had “some conceptual difficulty in stretching the concept of limiting liability to cover situations where an attorney selects a forum where he or she might have some conceivable advantage.”\textsuperscript{152} Instead, the court compared it to Maine’s enforceability of mandatory arbitration provisions in attorney-client agreements so long as the agreement was not a “sham”\textsuperscript{153} because it “does nothing more than set the litigation arena.”\textsuperscript{154} As a result, the inclusion of a forum selection clause “is only a limitation when the selected forum has rules expressly limiting liability or if litigating in that forum would be so unfair as to be a practical limitation on liability.”\textsuperscript{155} Here, Louisiana substantive law would govern either way.

\textsuperscript{145} Id. The district court cited Louisiana State Bar Ass’n v. Bosworth, 481 So. 2d 567, 571–72 (La. 1986), in which an attorney wrote a loan agreement for his client without advising him or her to seek independent counsel to review the agreement. Id. The court upheld the agreement because a lawyer is obligated to advise the client to seek independent counsel when the lawyer enters into a business transaction in which the lawyer and client have differing interests. Id.

\textsuperscript{146} Ginter, 536 F.2d at 441.

\textsuperscript{147} Id.

\textsuperscript{148} Id. (citing Haynsworth v. Corp., 121 F.3d 956, 962 (5th Cir. 1997)).

\textsuperscript{149} Id. (citing Haynsworth, 121 F.3d at 962).

\textsuperscript{150} Id. at 442.

\textsuperscript{151} Id. The Ginters argued that a Louisiana state court would favor the in-state resident more than the out-of-state plaintiffs. Id. Louisiana Rule of Professional Conduct 1.8(h)(1) states that a lawyer shall not “make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” Id. at 442 n.10.

\textsuperscript{152} Id. at 442.

\textsuperscript{153} Id. at 443 (citing Me. Prof’l Ethics Comm., Op. 170 (1999)).

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 444.
The majority mischaracterized the general nature of attorney-client agreements by allowing the attorney to choose a more favorable forum without explaining the consequences to his clients. The dissent correctly characterizes the forum selection clause in the agreement as "a product of overreaching [because it was] designed to favor the attorney's interests in pursuing his adoption agency business to the disadvantage of the interests of his clients, the plaintiffs." Attorney Belcher acted as "both an adoption broker (or agency) and an attorney" in representing the Ginters because he released all liability thirty days after the birth. This constituted a business transaction, and as a result, the attorney overreached in making the agreement.

The court improperly focused its analysis on the presumptive validity of forum selection clauses. Basing its decision in federal law, the court analyzed whether the clause was a product of overreaching or it violated public policy. Providing the client an opportunity to ask questions about the attorney-client contract is not sufficient to prevent overreaching. Furthermore, courts will reject the argument that forum selection clauses violate public policy because courts begin their analysis with the premise that the clauses are presumptively valid. While more analysis is needed, two district courts rejected the notion that forum selection clauses are presumptively valid and pushed the analysis a step further.

2. Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equipment
Properly Weighs the Fiduciary Nature of the Attorney-Client Relationship

The Fifth District Court of Appeals of Texas refused to enforce a forum selection clause because its provision, which contained a typographical error, was confusing and the unsophisticated client did not understand it. In Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equipment, the Court characterized the client, the president of Pinkston's Lawnmower and Equipment, a North Carolina corporation, as unsophisticated and inexperienced in forming contracts. He hired Falk, an attorney whose firm is located in Texas, to represent him in litigation occurring in a North Carolina federal court. Attorney Falk billed the client for almost 100 hours before giving him the attorney-client agreement with the following forum selection provision: "[y]ou agree our relationship and our agreement is controlled by Texas law, and the applicable courts of Dallas, Texas shall be the for a [sic] for all attorney-client disputes."

156 Id. at 445 (Dennis, J., dissenting).
157 Id. at 449–50.
159 Id.
160 Id.
161 Id. The attorneys intended the language "for a" to be interpreted as "forum." With respect to the typographical error in the forum selection clause, the court held that the provision is not clear.
The attorney did not explain to the client that he must litigate any future disputes in Texas. The client did not understand the clause and believed he would be able to litigate any disputes in a North Carolina court. The relationship worsened, and Attorney Falk filed suit in Texas on the basis that the client consented to jurisdiction in the state via the forum selection clause in the attorney-client agreement. The court refused to enforce the forum selection clause and dismissed Attorney Falk’s case for three reasons. First, the forum selection clause’s language was unclear due to the typographical error. Instead of stipulating that Texas shall be the forum for all disputes, the attorney wrote “for a.” This oversight indicates that Attorney Falk did not explain the agreement and its terms to the contract. With that assumption, one can assume that if Attorney Falk had explained it to the client, he would have noticed the typographical error and corrected it.

Second, the court added an ethical component to analyzing the attorney-client agreement instead of basing its decision solely on contract principles: “an attorney has a special responsibility to maintain the highest standards of conduct and fair dealing when contracting with a client or otherwise taking a position adverse to the client’s interests.” Furthermore, the court added that “the contracts between an attorney and client should first be construed from the standpoint of a reasonable person in the client’s circumstances.” As a fiduciary, the attorney had the duty to explain the contract to the client. The record does not reflect any attempt to negotiate the contract. However, the record does reflect that the client was “unsophisticated and inexperienced.” To determine whether the client is unsophisticated, the court looked to the circumstances of the formation of the contract, the manner the client selected the attorney, the client’s experience in hiring attorneys, and the lack of negotiation. Without explaining the meaning of an ambiguous forum selection clause to an unsophisticated

The clause is ambiguous because the language “for a” does not definitively indicate a forum selection clause. See supra note 153 and accompanying text.
client whose interests may be adverse to those of his attorney, the attorney abuses his superior bargaining position.

Third, the attorney presented the client with the contract six months after the representation began and after Attorney Falk billed the client for almost 100 hours.\(^\text{172}\) Therefore, the client was more likely to accept the attorney's terms rather than incur more expense by hiring another attorney in the middle of a transaction or litigation. As a result, whether the court based its decision not to enforce the forum selection clause may have changed if the timing of the contract were different.

The court properly weighed the attorney's fiduciary duties to his client in refusing to enforce the forum selection clause. This case highlights the requirement that attorneys reasonably communicate the clause to the clients. Finally, the court properly construed the contract from the standpoint of the client, an unsophisticated party.\(^\text{173}\)

3. \textit{Brown v. Partipilo} and the Reasonably Communicate Requirement

Next, a district court in West Virginia refused to enforce a forum selection clause in an attorney-client agreement because the attorneys failed to explain the meaning of the clause and how it limited the client's ability to litigate any claims arising from the contract. In \textit{Brown v. Partipilo},\(^\text{174}\) the plaintiff faced several criminal charges in Monongalia County Circuit Court and his family sought an attorney with an excellent reputation to represent him.\(^\text{175}\) His mother, a New York resident, discovered the website of America's Criminal Defense Group (''ACDG''), a law firm based in California that claimed to represent criminal defendants across the United States.\(^\text{176}\) His family retained ACDG to represent him in West Virginia for a nonrefundable attorney's fee of $27,900.\(^\text{177}\) The attorney-client contract contained a forum selection clause limiting jurisdiction and venue to Los Angeles, California.\(^\text{178}\)

\(^\text{172}\) \textit{Id.} at 528 (citing \textsc{Restatement (Third) of the Law Governing Lawyers} § 18 cmt. c (2000)).
\(^\text{173}\) \textit{See infra} Part III.C.4.
\(^\text{175}\) \textit{Id.} at *1.
\(^\text{176}\) \textit{Id.}
\(^\text{177}\) \textit{Id.}
\(^\text{178}\) \textit{Id.} at *2.
Thereafter, he and his family became dissatisfied with their attorneys from California. The plaintiff and his family filed suit against ACDG in West Virginia court for fraud, breach of contract, recovery of unreasonable attorney’s fees, and negligence.\textsuperscript{179} ACDG moved to dismiss the claim brought in West Virginia court based on the forum selection clause.\textsuperscript{180}

The court applied West Virginia law\textsuperscript{181} to invalidate the forum selection clause. The first and most relevant factor the court considered was whether the attorneys adequately explained the forum selection clause to the clients who were lay people and whether the attorney explained the clause’s implications to the case.\textsuperscript{182} The court held that the clause is not ambiguous, but “[t]he words ‘jurisdiction and venue’ . . . are not in common usage outside of the legal world . . . and the plaintiffs’ averments that none of them understood the provision’s consequences supports a conclusion that the provision was not adequately communicated to the plaintiffs.”\textsuperscript{183} An attorney is obligated to explain these terms because an attorney “necessarily” develops a conflict of interest when he or she writes an attorney-client contract because he or she seeks to fulfill a fiduciary obligation and to make a profit from it.\textsuperscript{184}

The court held that attorneys are obligated to maintain fair dealings when creating an attorney-client agreement and must explain the provisions so that a lay person would be able to understand them.\textsuperscript{185} Attorneys should not presume that lay people understand the meaning of legalese such as jurisdiction and venue. Here, the attorneys did not explain those terms to their clients and asked them to sign the attorney-client agreement anyway. Because the attorneys failed to reasonably communicate and explain the forum selection clause, it was unreasonable in the circumstances and, thus, unenforceable.

The West Virginia court also highlights the attorney’s duty to reasonably communicate the forum selection clause to the client. This is important because lay people do not understand legalese. In applying this requirement, the court follows state law.

\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} See supra Part II.B.2.C.
\textsuperscript{182} Brown, 2010 WL 3979802 at *5.
\textsuperscript{183} Id. at *5.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at *6. The defendants argued that the following language relieved them of any responsibility to explain the forum selection clause:

\begin{quote}
Please read this agreement carefully. It is important that our agreement be totally complete and that the undersigned understands everything before signing. If you have any questions regarding this agreement now is the time to ask. Once this agreement has been signed it will be concluded that the undersigned completely understands it.
\end{quote}

Id. The Court rejected the defendant’s argument that this clause acted as a shield to the attorney’s duty to ensure that the client understands the language. Id.
4. Proposed Analysis of Forum Selection Clauses in Attorney-Client Agreements

As a result, communication between attorneys and their clients is key to determining whether a forum selection clause in an attorney-client agreement is ethical. For this reason, West Virginia's standard is preferable because it requires attorneys to reasonably communicate the clause to the client. Whether the court applies the federal or state standard, all courts should add this component to the analysis in these circumstances due to the fiduciary nature of the agreement. To hold otherwise would allow attorneys to take advantage of their clients and reshape the nature of the relationship to a mere contract for services rather than the creation of a fiduciary relationship.

The guidepost of the requirement that attorneys reasonably communicate the meaning of a forum selection clause to clients is the language used and whether it is written in a way that the client could easily understand it without explanation. For example, lawyers should not expect lay persons to understand the legal terms such as "jurisdiction" and "venue." Because these words appear in forum selection clauses, lawyers must explain these concepts to clients and courts must impose a duty on lawyers to do so.

As an emerging issue, explanation as to what constitutes reasonable communication is lacking. Thus far, two options have been discussed. First, in Brown, the court suggested that an attorney can meet this standard if he or she explains the effects of the clause to the client. 186 In addition, the attorney should document the conversation by sending a letter to the client and keeping a copy in an office file. Attorneys who disagree with this approach can choose the second option: to advise the client to seek independent counsel. Under the court's interpretation of the reasonably communicated requirement in Electroplated Metal Solutions v. American Services, 187 the party objecting to the enforcement of the forum selection clause must have been provided an opportunity to review it. 188 To apply this principle to enforcement of forum selection clauses in attorney-client agreements, the court should, in this alternative, require the attorney to advise the client to seek independent counsel to review the agreement. If attorneys can write a forum selection clause in an attorney-client agreement to protect their interests, then clients should be afforded some opportunity to protect their interests by discussing the contract with another attorney. This option is, admittedly, the less favorable option because it requires the client to spend more money in order to seek legal representation. This situation also presents an

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186 Id. at *5–7. The court clarified that an absence of any explanation of a forum selection clause will fail the reasonably communicated prong: "A lawyer is free to draft such exculpatory language for a client, but not to shield himself with the legal fiction that, by signing a document, his client actually understands each provision. He cannot disclaim his burden to explain the agreement to the lay client." Id. at *6.
187 500 F. Supp. 2d 974 (N.D. Ill. 2007).
188 Id. at 976.
opportunity for an attorney to abuse his or her position because clients are not likely to seek independent counsel.

On the other hand, attorneys arguing for enforcement of forum selection clauses in attorney-client agreements are likely to argue that a client consents to the terms of the contract when he or she signs it. Under basic contract principles, two parties are free to contract for any lawful service, and construction of the contract is "within the contractual capacity of the parties" and can be accounted for in the contract by including a forum selection clause or a choice of law clause.\(^{189}\)

A party is presumed to have freely negotiated for the terms in a contract if he or she signed the contract. Although the Fifth Circuit Court of Appeals failed to address the issue of notice in Ginter, courts enforce forum selection provisions outside the attorney-client context because a party who signs a contract has sufficient notice of its contents.\(^{190}\) Otherwise, parties are free not to sign a contract. Therefore, an attorney seeking to enforce a forum selection clause in an attorney-client agreement would argue that a client who signs the contract assents to its terms, including a forum selection clause.

The contention that every client who signs an attorney-client agreement containing a forum selection clause assents to its terms is wrong because unsophisticated clients are unlikely to understand the terms of the provision. Clients sign the contract without understanding its terms only because they trust their attorneys. As a result, clients unknowingly consent to litigate any future disputes in a distant forum. An attorney arguing for enforcement of a forum selection clause in an attorney-client agreement will likely refute such an argument because courts generally bind parties to a signed contract even if they claim not to understand its terms.\(^{191}\)

The court's analysis should not end there. Should courts treat the attorney-client relationship the same as any other business relationship? The answer is no because the "creation of the relation involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent . . . the agent is under a duty to deal fairly with the principal in arranging the terms of the employment."\(^{192}\) There should be a special rule that applies in the attorney-client

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\(^{189}\) Sedler, supra note 7, at 72. Although the United States enforces these contract provisions, other countries, such as France and Germany, prohibit their enforcement because it would otherwise require consumers to litigate away from home. Id.

\(^{190}\) See D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 103 (2d Cir. 2006) (holding that a forum selection clause was reasonably communicated to the plaintiff-brokers because it was printed in the Cash Account Agreement). In Effron v. Sun Line Cruises, 67 F.3d 7 (2nd Cir. 1995), the Court held that the forum selection clause was reasonably communicated to the plaintiff because it was printed on the Passenger Ticket Contract in readable print with a bold heading to draw the reader's attention. Id. at 9–10. Additionally, the language, "any action against the Carrier must be brought only before the courts of Athens[,] Greece" was clear and unambiguous. Id. at 8.


\(^{192}\) Restatement (Second) of Agency § 390 cmt. e (1958).
context because clients place more trust in attorneys than the trust established between businesses. Courts should protect clients from attorneys who exploit their bargaining power. Due to the nature of the relationship, there is an additional ethical component to the fiduciary relationship—an attorney must reasonably communicate the meaning of forum selection clauses if the attorney chooses to write such a provision in the attorney-client contract.

C. Forum Selection Clauses in Attorney-Client Agreements and Ethics

While representing clients, attorneys must perform according to their ethical requirements and courts must hold attorneys accountable for their failure to do so. Due to the fiduciary relationship, clients are unlikely to question the terms of an attorney-client contract because they trust that their attorneys will act in their best interests. Courts should, when appropriate, impose a special rule on attorneys seeking to enforce a forum selection clause against their clients because of the ethical requirements that states impose on attorneys. In addition to requiring the attorney to reasonably communicate the clause to the client, courts should construe the contract in the same way as a reasonable person in the circumstances of the client would construe it. There is ample support in the law governing attorney ethics to add this requirement.

1. Scope of Representation

An attorney’s fiduciary duty involves decisions regarding communication, money, and the scope of representation. “For lawyers, fiduciary duty means that disclosure must occur whenever the client has a right to decide; specifically, reasonable disclosure of material risks and alternatives must occur to enable the clients to determine the goals of the representation . . . and to legitimate any breach of confidentiality or loyalty.”193 Clients, not attorneys, control the scope of representation.

A basic decision regarding the representation involves the creation of the attorney-client agreement. Attorneys are obligated to involve clients in the formation of the attorney-client agreement, or to at least explain the terms of the contract to the client. The client has the right to decide which attorney he or she will choose, and the attorney’s reputation and any potential malpractice is a consideration in making that choice. Certainly, including a forum selection clause in an attorney-client agreement that requires the client to travel across the country is a material risk that an attorney is required to disclose to the client because it may affect the client’s choice in creating the attorney-client relationship.

2. Communication

Communication is essential to the fiduciary relationship. "The duty to communicate with clients is essential to every aspect of every fiduciary duty lawyers owe clients. Clients cannot control the goals of representation without information about feasible options." 194 Without communication, the beneficiary is often uninformed and not able to make necessary decisions regarding the risks of bringing the lawsuit. Under the American Bar Association ("ABA") Model Rules of Professional Conduct, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." 195 Explaining the terms of the contract that may limit the client’s ability to litigate any disputes arising from the contract falls within the category of "regarding representation" because that litigation is a reflection of the attorney’s performance during representation.

The attorney must explain conflicts of interest, fees, the scope of representation, and the effects of the contract on the client, 196 but the level of communication required between the attorney and client to avoid malpractice liability is unclear. The attorney needs only to disclose "sufficient information [for the client] to participate intelligently" in any discussions regarding the attorney’s representation of the client. 197 If the attorney’s client is a lay person who cannot participate intelligently in a conversation discussing the terms of the attorney-client agreement, then the attorney is obligated under the Professional Rules of Responsibility to explain the terms of the agreement to the client so that he or she understands its terms. Failure to explain the terms of an attorney-client contract constitutes a failure of the duty to communicate. Therefore, the attorney violates the Rules of Professional Responsibility and he or she can be sanctioned, suspended, or disbarred.

Attorneys who represent unsophisticated clients are prohibited from overreaching due to the unequal bargaining power between an attorney and his or her client. An additional requirement of reasonable communication "is justified, not only by the attorney’s greater knowledge and experience with respect to such agreements, but also by the trust the client has placed in the attorney." 198 The Restatement of the Law Governing Lawyers describes the effect of an attorney's overreaching on an unsophisticated client:

194 Id.
197 MODEL RULES OF PROF’L CONDUCT R. 1.4(b) cmt. 5 (2008).
Courts are concerned to protect clients, at least those who are unsophisticated, when a lawyer has overreached. One reason is that information about fees for legal services is often difficult for prospective clients to obtain. Many clients have difficulty bargaining effectively because of their need and inexperience. Legal services often vary from case to case. The extent of services required is often unclear beforehand and difficult to monitor as a lawyer provides them. . . . Lawyers, therefore, are fiduciaries who owe their clients greater duties than are owed under the general law of contracts. 199

Similar to an unsophisticated client’s inability to obtain information regarding legal fees, the client would face the same difficulty in obtaining information about a forum selection clause because they are specific to the case and often contain legalese.

Fairness is the rationale for providing extra safeguards for an unsophisticated client’s interests. If one of the parties to the contract is unaware that his or her rights or liabilities are limited by the contract, then the court should consider the ethical components of allowing an attorney to limit the scope of representation. Lawyers cannot generate form contracts and ask clients to sign without explaining each clause containing legalese.

For example, an economic argument for providing unsophisticated consumers more protection than what is afforded to businesses in business-to-business contracts is analogous to providing unsophisticated clients more protection than the protection afforded to sophisticated businesses. 200 The unsophisticated client has no power to negotiate the terms of the contract or may not understand the language of the contract. 201 In response, states regulate consumer contracts between unsophisticated consumers and businesses more closely. 202 Similar to regulation, courts should protect the client by placing more stringent requirements on the party with more bargaining power: the attorney.

3. Conflict of Interest

In creating the attorney-client relationship, the attorney automatically creates a conflict of interest unless he or she represents the client on a pro bono basis because the attorney expects compensation; therefore, the attorney may act in his or her own interest. 203 The attorney experiences two conflicting interests

199 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46 (Tentative Draft No. 4 1991).
200 See O’HARA & RIBSTEIN, supra note 13, at 134.
201 Id.
202 Id. at 143.
that must be balanced in the client’s favor in order for the attorney to meet the requirements imposed by the Rules of Professional Responsibility. The first is the attorney’s interest in receiving compensation and making a profit on the services performed. Although the attorney’s priority should be and probably is to seek justice for his or her client, justice does not pay the office’s bills or feed the attorney’s family.

The attorney’s second interest is his or her fiduciary duty to his or her client to represent the client as a zealous advocate. As a fiduciary, the attorney cannot place his or her interests above the client’s interests. When an attorney and client create an attorney-client agreement, “the creation of the relation involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent, [and a] ... fiduciary relation exists prior to the employment ... [T]he agent is under a duty to deal fairly with the principal in arranging the terms of the employment.” The attorney-client relationship is essentially a principal-agent relationship because the attorney can make tactical decisions without consulting the client, but the client retains ultimate control to determine the scope of the relationship.

As the principal, the attorney must make decisions that further his client’s interests, not just the attorney’s economic interests. In other words, the nature of the attorney-client relationship prohibits the attorney from elevating his or her own interests above the client’s interests because clients trust the fiduciary nature of the relationship. Especially when the client is unsophisticated, the client will often trust the attorney to make the appropriate decisions in place of the client’s best judgment.

4. How Attorney-Client Agreements Should Be Constrained

The goal of enforcing a forum selection clause should be to allow the parties “in the interstate context ... to choose in advance the law that will govern their rights and liabilities under the contract.” Aside from these restrictions, a court should evaluate “a contract between a client and the lawyer as a reasonable person in the circumstances of the client would have construed it.” For example, the court refused to enforce the forum selection clause in dispute in *Falk & Fish* because a reasonable person in the circumstances of

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204 See id.


208 Id.

209 SEDLER, supra note 7, at 72.


the client would not understand the language of the clause. The court in Brown also refused to enforce the clause because lay persons do not understand the meaning of legal words such as “jurisdiction” and “venue.” A lawyer should tailor the contract to the client’s individual needs and take into consideration the client’s understanding of the representation.

The court should consider the typical factors employed in contract interpretation analysis to determine whether a reasonable person in the client’s circumstances would have construed it in the same way: the language used in the contract; the surrounding circumstances when the parties created the contract; the sophistication of the client, including the client’s education and experience in retaining attorneys and in creating contracts in the past; and the parties’ bargaining abilities. In determining sophistication, the court should also consider the amount of bargaining power that the client’s experience or education affords him or her and the relationship between the attorney and client, including how the client chose the attorney.

In determining whether to enforce a forum selection clause in an attorney-client agreement, the court should focus on the unsophisticated client’s understanding of the contract combined with the surrounding circumstances for three reasons. First, the attorney usually writes the attorney-client contract, and a contract is construed against the writer. Second, the attorney is in a better position to detect problems with the language of the contract or to detect any missing elements because the attorney is usually better educated than the client. Third, attorneys are ethically obligated to inform the client about the risks of representation.

Most provisions of the restatements discussed involve regulation of the attorney-client fee contracts. Consider the following example:

P, an ignorant person, visits A, an attorney, asking for advice concerning the prosecution of a claim. A honestly advises P to bring suit but obtains from P a promise to pay A an exorbitant sum in compensation, regarding tacitly that it is the usual fee for such services. The transaction between A and P is rescindable if A has taken advantage of his position as the adviser of P to obtain an unduly large compensation.

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212 Id. at 529 (citing Restatement (Third) of Law Governing Lawyers § 18 cmt. h (2000)) (stating that “the contracts between an attorney and client should first be construed from the standpoint of a reasonable person in the client’s circumstances”).

213 Id.

214 Restatement (Third) of the Law Governing Lawyers § 18 cmt. h (2000) (citing Restatement (Second) of Contracts § 206 (1958)).

215 Id.

216 Id.

217 Restatement (Second) of Agency § 390 illus. 6 (1958).
In this hypothetical, A has exploited his bargaining position as an attorney, a person with superior knowledge of the law, over P, a person with an inferior bargaining position who has no knowledge of the amount of the legal fees attorneys receive for this type of legal claim. The attorney has exploited his position and violated his fiduciary duties to the client although the client signed a contract agreeing to the exorbitant fees.

The inclusion of forum selection clauses in an attorney-client agreement in similar circumstances is analogous to the above example. Consider the same hypothetical, with different facts: A writes a forum selection clause into the agreement, stipulating that the parties must litigate any disputes arising from the contract in a designated federal court in Nevada. A’s clients often sue A for malpractice because A steals P’s money, and A knows that P does not have the financial resources to sue A in Nevada. A fails to explain the clause to P. A has exploited A’s superior bargaining position and violated A’s fiduciary duties to A’s client although P signed the agreement containing the forum selection clause.

Courts should incorporate these restatement provisions into their analysis of whether to enforce a forum selection clause in attorney-client agreements. The requirement that an attorney reasonably communicate to a client an explanation of an attorney-client agreement will equalize the bargaining positions of the attorney and the client.

IV. CONCLUSION

To summarize the issue, courts must determine the appropriate standard to apply to the interpretation of forum selection clauses in attorney-client agreements. Courts must refrain from lumping attorney-client agreements into the same category as agreements between business parties because attorneys have the power to exploit their clients’ unequal bargaining power. Courts need specific guideposts in forum selection clause analysis in order to adequately protect clients. State law, specifically West Virginia’s law, is more likely to provide those guideposts because the analysis is more specific than the federal law’s blanket provisions that have proven unworkable in the past.

Clients are generally more vulnerable than other parties to a contract and reliant on their fiduciary attorney’s communications with them. West Virginia’s law would mandate that the attorney reasonably communicate the clause to the client. Regardless of the standard applied, courts should require that an attorney reasonably communicate to the client the meaning of the forum selection clause in the attorney-client agreement.

In addition, courts should consider, when appropriate, the ethical implications of an attorney’s decision to include a forum selection clause in an attorney-client agreement. The answer can be found in ethical rules that govern lawyers’ conduct. One direction to look is the ABA Model Rules of Professional Conduct’s requirement that a lawyer communicate with a client to give him or her enough information to participate intelligently and make informed decisions.
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about the attorney’s representation. Another route is to require that an attorney advise the client to seek independent counsel to review the contract. These options add more protection for the client by sanctioning lawyers for failing to communicate with the client about matters affecting their representation. In any case, the court should construe the contract in the same manner as a reasonable person in the client’s circumstances would construe it. This requirement gives weight to the client’s sophistication and the circumstances surrounding the formation of the contract. With all of these safeguards in place, clients will be protected from their attorneys’ exploitation of unequal bargaining power.

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