2014 IL App (2d) 130509
No. 2-13-0509
Order filed October 22, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF HARVEY FRASER, Petitioner, and CAROL FRASER, Respondent-Appellant. (Schiller, DuCanto & Fleck, LLP, Appellee).	)))))))))))	Appeal from the Circuit Court of Lake County. No. 10-D-1478 Honorable David P. Brodsky, Charles D. Johnson, Judges, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying a section 2(b) hearing under the Uniform Arbitration Act, because the movant presented a substantial and *bona fide* dispute as to the existence of an agreement to arbitrate. Reversed and remanded.

¶ 2 In 2013, appellant, Carol Fraser, filed a motion pursuant to section 2(b) of the Uniform Arbitration Act (Arbitration Act) (710 ILCS 5/2(b) (West 2012)) to stay binding arbitration with appellee, Schiller, DuCanto & Fleck, LLP (SDF), concerning attorney fees, where she alleged that no valid agreement to arbitrate existed. The trial court summarily denied the motion. It

found controlling its earlier, 2012 order that the parties proceed straight to binding arbitration where mediation was not available. However, we conclude that the court erred in finding that the 2012 order controlled, because that order was not a fully considered determination as to the existence of an agreement to arbitrate.

¶ 3 In her section 2(b) motion contesting the validity of any agreement to arbitrate, Carol argued that SDF breached its fiduciary duty and exerted undue influence in procuring her agreement to waive her statutory right to a fee hearing under section 508 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/508 (West 2012)) in exchange for mediation and, if necessary, binding arbitration. Carol noted, and the existing evidence at this stage supports, that mediation was not available. In Carol's view, SDF, who had a duty to Carol as its client, allowed for Carol to waive a statutory right in favor of a *set* of procedures that SDF should have known were not available. Carol raised a substantial and *bona fide* dispute over the validity of the agreement, and, therefore, she is entitled to a hearing on the matter. Accordingly, we reverse the denial of the section 2(b) motion and remand for further proceedings consistent with this opinion.

¶ 4 I. BACKGROUND

¶ 5 This appeal arises out of a fee dispute between SDF and Carol. SDF, among several other firms, represented Carol during a portion of her divorce proceedings. It requires consideration of two separate fee proceedings, each of which concerned the manner in which the fee dispute would be resolved. The first, initiated by SDF, took place in 2012. The second, initiated by Carol, took place in 2013.

¶ 6 A. SDF's 2012 Fee Petition

¶ 7 On August 15, 2012, SDF petitioned for setting of final fees and costs. In the petition, SDF stated that Carol had incurred $272,722 in fees and costs, of which $176,701.75 remained unpaid. SDF invoked paragraph 6E of the parties' engagement agreement, which, in SDF's view, mandated that any fee dispute be sent to binding arbitration. Paragraph 6E stated:

> "Binding Arbitration. If at the conclusion of SD&F's representation of the Client there is any disagreement as to billing, provided a petition for final setting of fees and costs has been filed *and provided Alternative Dispute Resolution (ADR) procedures under local rules (if utilized) have not led to resolution of the matter(s)*, all unresolved issue(s) shall be submitted to binding arbitration pursuant to the rules of the American Arbitration Association. Such submission shall be in lieu of a court hearing, which the Client and SD&F waive. The Client and SD&F shall jointly select the arbitrator; but, if concurrence cannot be achieved, the Court shall appoint the arbitrator, on motion of either the Client or SD&F. The arbitrator's final decision shall be presented to the Court and shall be incorporated into the Court's judgment or order on the petition for final setting of fees and costs." (Emphasis added).

¶ 8 On September 26, 2012, Carol moved for leave to respond to SDF's fee petition (which she actually filed on October 23, 2012). In the motion, she disputed the fees. She did not deny the existence of an agreement to arbitrate. However, she maintained that paragraph 6E provided for other forms of ADR as a *precursor* to arbitration, and noted that "to date, CAROL has not opted out of alternative dispute resolution ['ADR'] in the form of non-binding mediation ***." (Brackets in original.) Carol requested that the court refer SDF's petition to "a non-binding mediation or similar court-approved alternative dispute resolution procedure."

¶ 9 On October 2, 2012, Judge David P. Brodsky heard SDF's fee petition. Carol's attorney argued that paragraph 6E provided for mediation before proceeding to the "next level" of binding arbitration. SDF's attorney disagreed, arguing that paragraph 6E provided (only) for binding arbitration. He further stated that Lake County local rules do not provide for mediation in the context of attorney fee disputes:

> "Counsel referenced a local rule. I am not sure what local rule he is referring to. *There is no specific Lake County rule concerning [attorney] fee disputes and alternative dispute resolution*. Perhaps, he is referring to the general mediation language in the family law section of the local rules. But, nevertheless, we have a signed agreement between the firm and Ms. Fraser as to binding arbitration." (Emphasis added.)

¶ 10 Carol's attorney reiterated his position that paragraph 6E required binding arbitration only if "local rule mediation" is not utilized. SDF's attorney retorted that "there is no local rule that addresses [attorney] fee disputes."[1]

¶ 11 The trial court agreed that there was no such local rule. It stated that the parties "very clear[ly] agreed" that any fee dispute would be submitted directly to binding arbitration. It then entered its written order, which stated in part:

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[1] The parties represent that Lake County local rule 11.13(c) provides that "mediation may be ordered on *** economic issues," but Lake County judges have interpreted that rule to apply to economic disputes between the two former spouses, not fee disputes between a former spouse and her counsel. For the purposes of this appeal, we accept as true the unavailability of mediation or any precursor to binding arbitration. However, we note that nothing, in the cited rule or elsewhere, seems to *preclude* the court from ordering mediation, and, had it done so, this entire controversy could have been avoided.

"As to [SDF's] petition for setting of final fees, the pending fee dispute between SDF and Carol Fraser shall be resolved through binding arbitration as referenced in the Engagement Agreement between the parties; Carol's request to first exhaust non-binding mediation on the issue of SDF's fees and costs pursuant to Local Court Rules is denied.

***

Carol Fraser is granted leave to [officially] file her [written] response to SDF's petition for setting final fees and costs *** instanter."

¶ 12 On November 20, 2012, the trial court appointed the retired Honorable Terrence Brady to conduct binding arbitration over the fee dispute. At no time during the 2012 fee petition proceedings did either party invoke section 2 of the Arbitration Act to either compel or stay arbitration based on the existence of a valid agreement to arbitrate.

¶ 13 Between January 2013 and April 2013, Carol and Harvey engaged in trial court proceedings concerning the dissolution award, which became the subject of another appeal before this court. See *In re Marriage of Fraser*, 2013 IL App (2d) 130152-U.

¶ 14 B. Carol's 2013 Section 2(b) Petition

¶ 15 On May 3, 2013, Carol moved, pursuant to section 2(b) of the Arbitration Act, to stay binding arbitration and for a determination that the agreement to arbitrate was invalid.[2] 710 ILCS 5/2(b) (West 2012). Carol argued that any agreement to arbitrate set forth in paragraph 6E

[2] In addition to citing section 2(b) of the Arbitration Act, Carol also cited section 2-701 of the Code of Civil Procedure (735 ILCS 5/2-701 (West 2012)), concerning declaratory judgments. However, as will be explained, an independent motion under section 2(b) of the Arbitration Act provides sufficient means by which to seek a declaration that the agreement to arbitrate was invalid.

was unenforceable as against public policy. In her view, SDF breached its fiduciary duty and/or exerted an undue influence upon her in procuring an agreement, where it allowed her to waive her statutory right to a section 508 court hearing in exchange for a *set* of procedures that was not available (*i.e.*, mediation, or similar precursor, and, if that proved unsuccessful, arbitration). Paragraph 6E's requirement that the parties ultimately proceed to arbitration had been conditioned upon the availability of mediation or some precursor, when, in fact, no precursor was available.

¶ 16 That same day, the trial court, now Judge Charles D. Johnson, heard Carol's section 2(b) motion to stay. According to the bystander's report, when the trial court called the motion, SDF answered "ready," even though it had not filed a written answer. SDF argued that paragraph 6E contained a binding arbitration clause, and Carol already had a chance in October 2012 to challenge that clause. SDF urged that the court should not give Carol "two bites at the apple." Carol disagreed, presumably raising the arguments raised in her section 2(b) motion (as discussed above). The court took no evidence, but it reviewed the court file and common law record. The court denied Carol's motion and ordered that the case proceed to arbitration. It stated that the October 2012 order had denied Carol's request for mediation and that order was dispositive. Carol appealed pursuant to Illinois Supreme Court Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. February 26, 2010)), concerning interlocutory orders granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction. See *Grane v. Grane*, 130 Ill. App. 3d 332, 339 (1985). This court stayed arbitration pending the outcome of the appeal.

¶ 17 II. ANALYSIS

¶ 18 Carol's ultimate goal is to receive a section 508 hearing before the trial court, the same court that presided over her divorce case, to decide the reasonableness of SDF's alleged

$272,722 in fees. At this juncture, however, Carol seeks a holding that the trial court erred in failing to conduct a hearing on the merits of her section 2(b) motion to stay arbitration, and, accordingly, she seeks a remand for said hearing.

¶ 19 SDF responds that we should not consider the merits of Carol's appeal, raising mootness and jurisdictional arguments. Each of these arguments ultimately fail, and, due to their length, we chose to address them at the end of the opinion so as not to distract from our main holding.

¶ 20 A. The Merits of Carol's Appeal

¶ 21 Section 2 of the Arbitration Act states:

> "(a) On application of a party showing an [arbitration] agreement described in Section 1, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, *but if the opposing party denies the existence of the agreement to arbitrate*, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
>
> (b) On application, the court may stay an arbitration proceeding commenced or threatened *on a showing that there is no agreement to arbitrate*. That issue, when in substantial and *bona fide* dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration." 710 ILCS 5/2(a), (b) (West 2012). (Emphases added.)

¶ 22 Where a plaintiff presents, in his or her section 2(b) motion to stay arbitration, a "substantial and *bona fide* dispute" as to the existence, validity, and enforceability of the arbitration agreement, he or she is entitled to a hearing on the matter to determine the existence,

validity, and enforceability of the same. *Grane*, 130 Ill. App. 3d at 344-45 (the plaintiff's allegation that the arbitrator failed to disclose that he represented one of the sons standing to benefit from allocation of the family businesses raised a substantial and *bona fide* dispute as to whether the plaintiff was fraudulently induced to sign agreement to arbitrate all family disputes, and trial court erred in denying a hearing on the issue). We take a "substantial" dispute to be one of significance or import, *i.e.*, one upon which the agreement to arbitrate turns. See, *e.g.*, Webster's Third New International Dictionary 2280 (1993) (defining substantial as, *inter alia*, "an important or material matter"). We take a *bona fide* dispute to be one that is "real, actual, genuine, and not feigned." See, *e.g.*, *Cook ex rel Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 49; see also Black's Law Dictionary (9th ed. 2009). Where, as here, the trial court ruled based on the pleadings, our review as to whether Carol presented a substantial and *bona fide* dispute, so as to warrant a hearing, is *de novo*. See, *e.g.*, *Aurelius v. State Farm Fire and Casualty Co.*, 384 Ill. App. 3d 969, 973 (2008).

¶ 23 To better understand Carol's argument, we begin by reviewing the forms of dispute resolution at issue: a section 508 hearing under the Marriage Act, binding arbitration, and mediation. Absent an agreement to the contrary, a party disputing his or her own attorney fees in a divorce case has a statutory right to a section 508 hearing. 750 ILCS 5/508 (West 2012); *In re Marriage of Pagano*, 154 Ill. 2d 174, 184 (1992). At a section 508 hearing, the trial court resolves the fee dispute and determines whether the attorney's requested fees were reasonable. 750 ILCS 5/508(c) (West 2012). The court, in its discretion, considers fair compensation for services, pursuant to contract, that were reasonable and necessary. 750 ILCS 5/508(c)(3) (West 2012). Subsection 508(c)(4)(B) provides that, while the attorney and the client must ordinarily participate first in "mediation, arbitration, or any other court approved alternative dispute

resolution procedure," either party may opt out of ADR and head straight to the trial court (in counties with less than 1 million people, such as Lake). 750 ILCS 5/508(c)(4)(B) (West 2012). Even in counties with more than 1 million people, the parties may go straight to trial if they both opt out. 750 ILCS 5/508(c)(4)(B) (West 2012). Thus, under section 508, absent an agreement otherwise, a client always has, either directly or as a last resort, access to the trial court for a decision on fees. *Id.*

¶ 24 Arbitration is different than the court system in that it does not rely on precedent. *Drinane v. State Farm Mutual Auto Insurance Co.*, 153 Ill. 2d 207, 212 (1992). Instead, an arbitrator decides all questions of law and fact. *Id.* Arbitrators are not foreclosed from employing the rules of procedure, evidence, and discovery, but their only requirement is to conduct the arbitration in a manner not inconsistent with the guidelines of the Arbitration Act. *Id.* "These differences are sanctioned because the parties willingly accept the absence of [procedural] safeguards in return for a final and speedy resolution of their conflict." *Id.* Judicial review of a binding arbitration award is also limited. *United Insurance Co. v. Wilson*, 407 Ill. App. 3d 39, 43 (2011). Whenever possible, the judiciary construes a binding arbitration award so as to uphold it. *Id.* An arbitrator's award will not be set aside for errors in judgment or mistakes of law or fact. *Id.*; *Rauh v. Rockford Products Co.*, 143 Ill. 2d 377, 391 (1991). An arbitrator's award may not be set aside simply because the circuit court would not have been permitted to provide the same relief. 710 ILCS 5/12 (West 2012). Rather, section 12 of the Arbitration Act sets forth the bases for vacating an arbitration award, and these include but are not limited to fraud, corruption, partiality of the arbitrator, improper use of power by the arbitrator, an arbitrator's failure to conduct the hearing per section 5 of the Arbitration Act, and

the absence of an arbitration agreement where that issue has not already been decided by section 2 of the Arbitration Act. *Id*.

¶ 25 Mediation provides a third means to resolve disputes. Whereas a court hearing and arbitration are adjudicative and adversarial in nature, mediation is consensual and non-adversarial. 57 Am. Jur. 2d Trials § 555 (1995). Mediation is defined as "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable resolution." Black's Law Dictionary (9th ed. 2009). It may be thought of as "assisted negotiation." *Id*. Mediation may lead to a binding settlement agreement. See, *e.g.*, *In re Marriage of Akbani*, 2014 IL App (5th) 130266, ¶ 41. However, even if it does not, it has the advantage of educating the client. 57 Am. Jur. 2d Trials § 555. Mediation forces the parties to hear and consider a third party's objective view of the case, thus enabling each party to realistically evaluate its position. *Id*. As such, mediation may lay the groundwork for more effective negotiation in the future or it may narrow the issues for trial. *Id*. For these reasons, mediation is often a precursor to a more adversarial step such as binding arbitration. See, *e.g.*, *Melena v. Anheuser Busch, Inc.*, 219 Ill. 2d 135, 162 (2006) (Justice Kilbride, dissenting) (in general, discussing the uncontested point that nonbinding mediation, if unsuccessful in the sense that it did not culminate in an agreement, serves as a precursor to arbitration).

¶ 26 With these differences in mind, one can see why Carol may prefer one forum over another in disputing a $272,000 attorney fee. Regardless of whether she prefers a section 508 hearing, however, it must be noted that she began with a statutory right to a section 508 hearing. *Pagano*, 154 Ill. 2d at 184. The waiver of said statutory right is not to be taken lightly: "[T]he waiver of important rights such as those granted by section 508 cannot be made unless a client

acts deliberately and understands the rights that he or she is waiving." *Id*. Where a client's waiver of a section 508 hearing was not knowing and, instead, was procured by the attorney's breach of fiduciary duty and/or undue influence, then the agreement to waive a section 508 hearing (here, in exchange for ADR) should be vacated. *Id*. at 178. Therefore, Carol certainly presents a substantial dispute. *If* SDF breached its fiduciary duty and exerted undue influence by enticing Carol to unknowingly waive her statutory right to a section 508 hearing, *then*, per *Pagano*, the agreement should be vacated.

¶ 27 Carol also presents a genuine, *bona fide* dispute. There are at least two reasons we should take seriously Carol's allegations at this stage. These are, first, the nature of Carol's relationship with SDF and, second, the language of the agreement itself. Additionally, Carol's actions in earlier proceedings indicate that she genuinely understood that mediation was available.

¶ 28 The arbitration agreement at issue was not made between two parties of equal sophistication and knowledge of the law. Rather, the agreement was made between an attorney and a client. A fiduciary relationship exists between an attorney and a client, and all transactions between them are "subject to the closest scrutiny." *Pagano*, 154 Ill. 2d at 185. A client in divorce proceedings is particularly vulnerable, because an unscrupulous attorney may unfairly use knowledge of the client's financial and emotional condition. *Id*. When determining whether a transaction between an attorney and a client was fair or whether the attorney abused his or her fiduciary duty and/or exerted undue influence, the court should consider whether: (1) the attorney made a full and frank disclosure of all relevant information; (2) the client's agreement was based on adequate consideration; (3) the client had independent advice before completing the transaction; (4) the agreement was offered by the lawyer with unquestionable good faith and

with complete disclosure; (5) the client entered into the agreement with a full understanding of all facts and their legal importance; and (6) the client's decision was free from undue influence and was fair. *Id*. at 186. This list is non-exhaustive, and the unique circumstances of each case should be considered. *Id*. at 185-86.

¶ 29 Looking to the *Pagano* factors, Carol alleges, and the existing evidence brought forth during preliminary stages suggests, that SDF did not make a full and frank disclosure of all the relevant information (factor 1) and that Carol did not enter into the agreement with a full understanding of all the facts and their legal importance (factor 5) so that she was able to knowingly waive her right to a section 508 hearing. The language of paragraph 6E certainly would lead a client to believe that mediation, or some precursor to binding arbitration, would be available in exchange for the section 508 waiver. Yet, mediation was not available. Again, that paragraph states:

> "If at the conclusion of SD&F's representation of the Client there is any disagreement as to billing, provided a petition for final setting of fees and costs has been filed and *provided Alternative Dispute Resolution (ADR) procedures under local rules (if utilized) have not led to resolution of the matter(s),* all unresolved issue(s) shall be submitted to binding arbitration pursuant to the rules of the American Arbitration Association. Such submission shall be in lieu of a court hearing, which the Client and SD&F waive." (Emphasis added.)

In other words, the agreement can be read to state that a client waives his or her right to a section 508 court hearing (venue A) in exchange for the opportunity to use a less restrictive form of ADR, such as non-binding mediation (venue B), and, as a last resort, binding arbitration (venue

C). The client waives A in exchange for B *and* C. Reading the agreement this way, the client did not knowingly waive A in exchange for *only* C.

¶ 30 SDF argues against this interpretation. SDF does *not* deny that the agreement references mediation or a similar precursor to binding arbitration. Rather, SDF posits that the parenthetical, "(if utilized)," is enough to forewarn a client that a precursor to binding arbitration may not be available. Again, that portion of paragraph 6E stated: "provided Alternative Dispute Resolution (ADR) procedures under local rules (*if utilized*) have not led to a resolution of the matter(s) ***." (Emphasis added.)

¶ 31 We disagree that this single parenthetical is enough to warn a client that a less restrictive form of ADR may not be available. The parenthetical does not specify by what or by whom the ADR must be utilized. If we were to agree with SDF, we would have to find the obvious meaning to be: "provided Alternative Dispute Resolution (ADR) procedures under local rules (if utilized [*by the local court system*]) have not led to a resolution of the matter(s) ***." We would also have to find the obvious meaning of "if utilized by the local court system" to mean "if available through the local court system." To the contrary, the meaning just as likely is: "provided Alternative Dispute Resolution (ADR) procedures under local rules (if utilized [*by the client*]) have not led to a resolution of the matter(s) ***." Under the latter meaning, other forms of ADR are available, but, should the client choose not to utilize them, the parties may save time by proceeding straight to binding arbitration.

¶ 32 Regardless, we need not determine whether Carol or SDF presents the more likely interpretation. It is enough that Carol established a *bona fide* question as to whether she was assured access to mediation in exchange for waiving her statutory right to a section 508 hearing. Here, Carol's position that she understood the agreement to provide for mediation appears

genuine, particularly given that her first tack was to ask for mediation rather than to challenge the validity of the agreement.

¶ 33 Our decision to remand for a hearing is consistent with *Pagano*. In *Pagano*, the appellate court held that a fee hearing was necessary, because the section 508 waiver(s) were part of a set of agreements that appeared, on their face, to violate a public policy against excessive attorney fees. *Pagano*, 154 Ill. 2d at 178. On remand, the trial court found no breach of fiduciary duty and the appellate and supreme courts affirmed. *Id*. This, however, did not diminish the initial ruling that a hearing was necessary to ascertain the legitimacy of section 508 waiver. As in *Pagano*, a hearing is necessary to ascertain whether SDF breached its fiduciary duty and/or exerted undue influence such that Carol did not knowingly waive her statutory right to a section 508 hearing.

¶ 34 We reject SDF's argument that *Pagano* is inapposite because, there, the agreement arose mid-representation rather than at the inception of the relationship. *Pagano*'s emphasis on mid-representation agreements, as opposed to retainer agreements, was relevant to explain a presumption against the attorney. *Id*. That is, at hearing, the attorney would have to rebut a presumption that he breached his fiduciary duty and exerted undue influence in procuring the agreement. *Id*. at 186.

¶ 35 True, *Pagano* hints that retainer agreements are to be treated differently than mid-representation agreements. A retainer agreement is more likely to occur at arm's length and a client is more likely to seek outside counsel to review the agreement. *Id*. However, it would be incorrect to conclude from this that there can never be a presumption of undue influence where the attorney procures certain terms in a retainer agreement. See, *e.g*, *Lustig v. Horn*, 315 Ill. App. 3d 319, 326 (2000) (where the attorney conducted about five hours of work before the

retainer agreement was signed, he had undertaken representation, a fiduciary relationship existed, and there would be a presumption against the attorney in determining whether he exerted undue influence in procuring certain conditions in the retainer agreement); *cf. Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 361-63 (2011) (declining to follow *Lustig* in the absence of an attorney-client relationship at the time of the retainer agreement was signed). An attorney-client relationship can form at the initial consultation, even before the retainer agreement is signed. See, *e.g.*, *In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 31. And, where an attorney-client relationship exists, the attorney has a fiduciary duty to the client. *In re Winthrop*, 219 Ill. 2d 526, 543 (2006). Carol's relationship with SDF at the time of the retainer agreement may be further explored at hearing.

¶ 36 The question of whether to begin with a presumption against the attorney based on an attorney's fiduciary duty and/or use of undue influence constitutes a bit of a gray area in the law. The law is quick to establish the existence of an attorney-client relationship as soon as confidential information has been exchanged. See, *e.g.*, *Newton*, 2011 IL App (1st) 090683, ¶ 31. However, this maxim is frequently cited in cases addressing a potential conflict of interest for the attorney, *id.*, which is not a concern in the instant analysis. *Pagano* implies that retainer agreements are to be treated differently than mid-representation agreements when determining whether the attorney exerted undue influence in securing certain provisions. *Pagano*, 154 Ill. 2d at 185. Still, *Lustig* confirms that this is not an absolute rule, and, where a fiduciary relationship has developed, there still exists a presumption of undue influence regarding the challenged provisions of a retainer agreement. *Lustig*, 315 Ill. App. 3d at 326.

¶ 37 Another nuance to consider is whether, or to what degree, the *content* of the challenged contract term influences the analysis. For example, in *Lustig* and in *Timothy Whelan*, there was

nothing *per se* untoward or ambiguous about the challenged term, *i.e.* that the client would bear the attorney's collection costs. Therefore, the courts looked closely at the nature of the relationship at the time the agreement was signed, as that spoke to whether the attorney pressured the client or failed in his or her duty to protect the client's interest. In contrast, here, the attorney who drafted the contract arguably misrepresented a client's, or a prospective client's, available remedies. More so than proposing an unfavorable term that a client can recognize as such on its face, a misrepresentation as to the nature of the term itself cuts to the core of the concern over attorney and client agreements, *i.e.*, that an attorney may "use a position of trust and power" to an unfair advantage. See *Tower Investors, LLC v. Illinois East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1035 (2007).[3]

¶ 38 That said, the instant disposition does not call for a bright-line rule, particularly where the precise facts at issue have yet to be determined at hearing. Here, it is enough to say that Carol and SDF's respective roles as client and attorney, as well as the language of paragraph 6E itself, gives rise to a substantial and *bona fide* dispute as to whether SDF breached its fiduciary duty and/or exerted undue influence upon Carol in obtaining her agreement to waive a section 508 hearing and as to whether Carol can be said to have knowingly agreed to the challenged term. We remand for a section 2(b) hearing to determine the existence of the agreement to arbitrate.

¶ 39 Before closing, however, we must address the two threshold arguments raised by SDF.

[3] The content of the challenged provision also speaks to a Carol's ability to enter into an agreement at arm's length. Here, it is unlikely that any independent investigation would have alerted Carol that Lake County did not, as a practice, utilize mediation in attorney fee disputes. To the contrary, she may have seen the local rule providing for mediation to resolve "economic disputes" and thought that sufficient.

¶ 40 B. SDF's Mootness Argument

¶ 41 SDF argues that the question of whether the trial court should have granted Carol's section 2(b) motion to stay arbitration is moot. SDF contends that, because this court stayed arbitration pending the outcome on appeal, it is no longer possible for this court to grant effectual relief to Carol, rendering the appeal moot. See, *e.g.*, *In re Donald L.*, 2014 IL App (2d) 130044, ¶ 18 (an appeal is moot where intervening events have rendered it impossible to grant effectual relief to the complaining party).

¶ 42 SDF's mootness argument fails. At the trial court level, Carol sought to stay arbitration pending a section 2(b) hearing and a determination that the agreement to arbitrate was unenforceable. Thus, Carol sought to cancel arbitration, not merely pause it. This court's grant of stay only paused arbitration, pending our determination of several issues. We have resolved those issues in favor of Carol, and we grant her the relief of a section 2(b) hearing.

¶ 43 C. SDF's Jurisdictional Argument

¶ 44 SDF's jurisdictional argument relies on a First District case, *In re Robert Besner & Co. v. Lit America, Inc.*, 214 Ill. App. 3d 619, 624 (1991). In *Besner*, the court's ultimate finding that it did not have jurisdiction was a two-step analysis, and SDF urges that the fact pattern in the instant case requires that we follow the *Besner* court to hold that: (1) the Arbitration Act did not authorize Carol to file a section 2(b) motion to stay, and, therefore, Carol's motion must be characterized as nothing but an untimely motion to reconsider the court's October 2012 decision; and (2) because Carol missed her 30-day window to challenge the October 2012 order and filed no appeal of that order, this court has no jurisdiction to review it.

¶ 45 To better understand SDF's argument, we look to *Besner*. In *Besner*, the defendant filed a motion to compel arbitration pursuant to section 2(a) of the Arbitration Act. In its section 2(a)

motion to compel, the defendant argued that the plaintiff was obligated, as a member of the Chicago Mercantile Exchange, to pursue its action in arbitration at the Exchange rather than in court. The plaintiff filed a motion in response. The trial court granted the motion to compel, finding that the plaintiff was "subject to arbitration" pursuant to the Exchange provisions.

¶ 46 Three months after the trial court granted the motion to compel but before the case had proceeded to arbitration, the plaintiff filed a motion to stay arbitration pursuant to section 2(b) of the Arbitration Act. In its section 2(b) motion to stay, the plaintiff argued that it was not a member of the Exchange, and, therefore, it had not agreed to arbitrate its claims at the Exchange. The trial court denied the motion to stay, finding that the issues of membership had already been resolved, and the motion was, in substance, an untimely motion to reconsider. *Id*. at 622.

¶ 47 The plaintiff appealed the denial of its motion. It argued that the court was wrong to characterize its motion as an untimely motion for reconsideration. Rather, in the plaintiff's view, the motion was "an independent motion within the meaning of section 2(b)." *Id*. at 626. The appellate court disagreed, finding "no support in the Arbitration Act" that the motion to stay arbitration "was proper under the circumstances." *Id*. at 623-24. Looking to the language of subsections 2(a) and 2(b) of the Act, the court stated that:

> "[N]othing in section 2 *** allows [for] more than one application with relief with respect to the propriety of staying or compelling arbitration. To the contrary, the plain language of the statute provides for the filing of only one application which may be filed by either party seeking court relief to either compel or stay arbitration, respectively. Nothing in the Arbitration Act grants a party to the right to a completely new application or hearing *on a determination as to the existence of an arbitration agreement that was*

> *fully considered* or could have been fully considered three months earlier [upon the initial application]." *Id.* at 624. (Emphasis added.)

Critically, the court then limited its interpretation of the Arbitration Act by stating that its holding is premised on the basis that the section 2(b) motion was "successive and repetitive" to the section 2(a) motion. *Id.*

¶ 48 Once the court established that the Arbitration Act did not authorize the plaintiff's "successive and repetitive" motion to decide the existence of an arbitration agreement, it proceeded to reason that plaintiff's motion to stay was, in substance, an untimely motion to reconsider the court's decision to compel arbitration. *Id.* at 625. The decision to compel arbitration constituted an appealable interlocutory order, an appeal from which must be filed within 30 days.[4] *Id.* at 625; Ill. S. Ct. Rule 307 (eff. Feb. 26, 2010). Because the plaintiff did not challenge the decision to compel arbitration within 30 days, the appellate court had no jurisdiction to consider the question, initially decided by the court's resolution of the section 2(a) motion. *Id.*

[4] We appreciate Carol's point that, if a party does not appeal the interlocutory order to compel arbitration within 30 days, it may do so upon a final judgment. See, *e.g.*, *Anderson v. Financial Matters, Inc.*, 285 Ill. App. 3d 123, 135 (1996) (the failure to appeal the order compelling arbitration did not preclude review of that order when the final judgment was entered). We disagree, however, that SDF tried to lead the court astray by failing to mention this caveat, because this caveat is not relevant to the procedural posture of the instant case (as, here, there has been no final judgment on attorney fees). Of course, depending on the outcome of this case, Carol may choose to appeal the October 2012 ruling upon a final judgment.

¶ 49 We disagree that *Besner* controls the instant case. The *Besner* court specified that its holding was limited to circumstances where the second section 2 petition was successive or repetitive to the first. *Id*. at 624. Here, there was not a first section 2 petition. SDF's 2012 fee petition cannot be thought of as a section 2(a) motion to compel arbitration *seeking a determination as to the existence of an arbitration agreement*. Nor can the October 2012 hearing be said to be a *fully considered* hearing on the issue of the existence of an agreement to arbitrate. See *Id*.

¶ 50 To the contrary, the issue raised by SDF in 2012 may more accurately be characterized as one of enforcement of an agreement, the existence of which neither party disputed. Enforcement depended on the trial court's interpretation of the terms of the agreement. Carol's position was that the agreement guaranteed mediation as a precursor to binding arbitration. SDF's position was that, in light of the fact that local rules did not specifically provide for mediation in the context of fee disputes, the agreement directed the parties to proceed straight to binding arbitration. The trial court agreed with SDF that, absent available mediation procedures, the agreement directed the parties to proceed straight to binding arbitration. Although the debate was not couched as such, it was as though the trial court decided that the *availability* of a precursor to binding arbitration was not a condition precedent to binding arbitration.

¶ 51 We find unreasonable SDF's argument that Carol forfeited her right to challenge the validity of the agreement. Carol's position in 2012 was that the agreement guaranteed mediation as a precursor to arbitration. Therefore, where Carol sought mediation as a form of relief, she was in no position to argue that its unavailability invalidated the agreement. Moreover, SDF's fee petition contained no reference to section 2 of the Arbitration Act. If SDF had cited section 2, Carol, with counsel, would have been better able to bring her response into a section 2

framework rather than plainly request mediation. Granted, SDF *did* seek an order to arbitrate, which *arguably* invoked section 2(a). However, unlike the movant in *Besner*, SDF did not seek a declaration that the existing agreement to arbitrate was valid. Under these circumstances, SDF's jurisdictional argument strikes us as a hindsight attempt to recast the nature of the 2012 proceedings as something other than what they were.

¶ 52 Carol's motion to stay arbitration constitutes an independent motion within the meaning of section 2(b). We need not recharacterize it as either: (1) as SDF urges, an untimely motion to reconsider the October 2012 ruling, which would deprive this court of jurisdiction; or (2) as SDF does not appear to consider, a timely petition to vacate the October 2012 ruling on public policy grounds, which would not deprive this court of jurisdiction but which would require a means of review not cited by either party. See, *e.g.*, 735 ILCS 5/2-1203 (West 2012); 735 ILCS 5/2-1401 (West 2012).

¶ 53 Section 2(b) of the Arbitration Act provides that Carol may file her motion to stay arbitration any time arbitration is "commenced or threatened." 710 ILCS 5/2(b) (West 2012). Therefore, we are not concerned with the timeliness of Carol's section 2(b) motion.

¶ 54 III. CONCLUSION

¶ 55 For the aforementioned reasons, we reverse the trial court's denial of Carol's section 2(b) motion and remand for proceedings consistent with this opinion.

¶ 56 Reversed and remanded.