

The Failure of Legal Ethics to Address the Abuses of Forced Arbitration

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The use of arbitration clauses has exploded in American society in the consumer and employee context. As a result, the average individual has lost access to the public court system and is instead stuck in private arbitration tribunals with limited procedural protections. This widespread use of arbitration has transformed America's legal system. Because of the unprecedented role that arbitration now plays in the administration of justice in the United States, it is critical to examine the ethical duties of attorneys who draft arbitration clauses. The main thesis of this Article is that ethics rules are supposed to guide attorneys in their vital role in enhancing the administration of justice in the United States, and lawyers involved in drafting oppressive arbitration clauses are undermining the administration of justice and should be disciplined. However, to date, there have been no reported cases of an attorney being disciplined for such conduct. This Article sets forth two novel, complementary frameworks that use legal ethics to redress arbitration abuse. The first framework uses existing ethical prohibitions against fraud and abuse to ban certain extreme arbitration clauses that can be considered fraudulent. The second framework applies an attorney's duties to a tribunal and role as an officer of the legal system to ban the attorney from drafting or implementing a consumer or employment arbitration clause involving any unfair terms or a lack of meaningful consent. The former approach is more modest because it relies on existing rules, while the latter approach would require the adoption of a new round of legal ethics rules.

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I. INTRODUCTION

There has been a seismic shift in America's civil justice system in recent years. If you are reading this Article, you are most likely

bound by an arbitration clause, like millions of other American consumers and employees. As a result, you are completely blocked from access to the traditional court system for any dispute covered by the arbitration contract you entered. If you have ever shopped on Amazon.com,¹ used Uber for a car ride,² used a credit card,³ paid for something through PayPal,⁴ or engaged in any one of numerous other daily consumer transactions, such as enrolling in school,⁵ playing video games on a Sony PlayStation or Nintendo Wii or Nintendo Switch,⁶ joining a gym,⁷ or purchasing a subscription to Netflix,⁸ you are probably bound by an arbitration clause hidden in fine print. In addition to consumer transactions, the use of arbitration clauses has exploded in the employment context. By one estimate, more than sixty million American workers are covered by individual arbitration agreements, and eighty percent of America's largest companies use arbitration clauses for workplace-related disputes.⁹ Because of the widespread use of arbitration clauses, workplace claims involving lost wages, overtime, working conditions, discrimination, and harassment may never see the light of day in a courthouse. As a result,

1. See *Conditions of Use*, AMAZON, <https://www.amazon.com/conditionsofuse>, [https://perma.cc/5C4N-53BZ] (last updated May 21, 2018).

2. See *U.S. Terms of Use*, UBER, <https://www.uber.com/legal/terms/us> [https://perma.cc/7JT6-T4WX] (last updated Dec. 13, 2017).

3. See, e.g., *Schardan v. Allied Interstate, LLC*, No. 4:15CV1613 HEA, 2017 WL 513022 (E.D. Mo. Feb. 8, 2017) (enforcing arbitration clauses in J.C. Penney and Walmart credit card agreements).

4. See *PayPal User Agreement*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/ua/useragreement-full> [https://perma.cc/F47G-2V42] (last updated Nov. 13, 2018).

5. See, e.g., *Tyus v. Virginia Coll.*, No. 2:15-CV-211-WKW, 2015 WL 4645513 (M.D. Ala. Aug. 4, 2015) (enforcing an arbitration clause in enrollment documents for nursing school).

6. See *Terms of Service and User Agreement*, PLAYSTATION, <https://www.playstation.com/en-us/network/legal/terms-of-service> [https://perma.cc/2WZT-JD7P] (last updated Sept. 20, 2018); see also *End User License Agreement*, NINTENDO, https://www.nintendo.com/consumer/info/en_na/docs.jsp?menu=wii&submenu=rvl-doc-eula [https://perma.cc/YYQ6-PNGZ] (last updated June 22, 2010).

7. See, e.g., *Cronin v. Cal. Fitness*, No. 04AP-1121, 2005 WL 1515369 (Ohio Ct. App. June 28, 2005) (enforcing arbitration clause in gym membership agreement).

8. See *Netflix Terms of Use*, NETFLIX, <https://help.netflix.com/legal/termssofuse> [https://perma.cc/V648-BL9X] (last updated May 11, 2018).

9. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration>; Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, EMP. RIGHTS ADV. INST. FOR LAW & POL. (Mar. 2018), <http://employeeightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf> [https://perma.cc/S4MXYQN3].

employers may not be held publicly accountable. Arbitration agreements in the workplace, which often impose strict confidentiality terms and thereby help conceal sexual harassment and other wrongdoing in the workplace, also clash with the values of the #MeToo movement.

No other country in the world uses pre-dispute arbitration agreements in such an expansive manner in the consumer and employment contexts. This far-reaching, explosive growth of arbitration is transforming America's legal system. The average individual in America has lost access to the third branch of government for many workplace and consumer disputes. Consequently, a diminished judiciary undermines our constitutional system of three co-equal branches of government. Today, the average American is stuck in private tribunals created by corporate America, with procedures often designed for the benefit of corporate America.

However, arbitration does have some benefits. When the arbitration process is undertaken in good faith with fair procedures, an expert arbitrator, and mutual, meaningful consent, arbitration can be superior to litigation in court. When used appropriately, arbitration has the potential to produce a faster, more efficient, and cheaper resolution of a dispute by an expert. In addition, arbitration can relieve the burdens of an overwhelmed court system. However, meaningful consent and fair procedures can often be lacking in consumer and employment arbitration agreements. Instead of using arbitration as a good faith method to resolve disputes, stronger corporate parties, with the assistance of their attorneys, sometimes abuse the arbitration process by drafting harsh, one-sided arbitration clauses that tend to tilt the process in favor of the corporate party at the expense of the consumer or employee. As explored in more detail below, corporate attorneys can devise oppressive arbitration clauses to undermine the enforcement of laws designed to protect vulnerable workers or consumers.

How did this transformation of America's legal system take place, and what is the appropriate, ethical role of a lawyer involved in drafting or implementing arbitration clauses that can block access to the courts? Because of the increasing, pervasive, and unprecedented role that arbitration now plays in the administration of justice in the United States, it is critical to examine the ethical duties of attorneys in designing this private, parallel system of justice. Legal ethics rules should be re-calibrated to encourage the fair, good faith use of arbitration, as opposed to the abuse of arbitration to undermine laws and suppress the rights of individuals.

This Article addresses how the framework of legal ethics rules should apply in the context of drafting and implementing forced arbitration clauses for consumers and employees. Historically, legal ethics rules in America have focused on litigation in court. Developing reactively rather than proactively, legal ethics rules have slowly evolved in stages, playing catch-up to address changing conditions or developments in society and our legal system. With the growth of forced arbitration since the 1980s, a seismic shift has occurred in the civil justice system, yet legal ethics rules have not been amended to specifically address the abuses that can arise from the widespread use of harsh arbitration clauses. Nevertheless, core principles can already be found in existing ethics codes to address these serious problems plaguing our legal system.

The main thesis of this Article is that ethics rules are supposed to guide attorneys in their vital role in enhancing the administration of justice in the United States, and that lawyers involved in drafting oppressive consumer or employment arbitration clauses are undermining the administration of justice and should therefore be disciplined. However, to date, no cases of attorneys being disciplined for the drafting of a harsh arbitration clause have been reported; this misconduct seems to fly beneath the radar of state bar disciplinary committees. As the use of arbitration clauses continues to explode across American society in connection with virtually every type of transaction, blocking millions of Americans from the traditional court system, state bar disciplinary committees should become more attuned to the potential ethics problems arising from the drafting of harsh arbitration clauses. This Article provides guidance in applying legal ethics principles to attorneys who are involved in drafting or implementing harsh arbitration clauses.

To help understand the potential harms from harshly drafted arbitration clauses, and to see how an attorney can in effect rig the system unfairly in favor of a corporate client, consider the case of a low-wage worker at a fast-food restaurant bound by an arbitration clause. Assume that the worker has suffered wrongdoing, such as harassment, discrimination, assault by a coworker, or the failure of the employer to pay overtime wages. At some point during the orientation or hiring process, perhaps long before the wrongdoing occurred, the worker may have been given an employee handbook containing an arbitration clause. Or, if the hiring process was conducted online, one of the many screens the worker clicked through

may have contained an arbitration clause. Pursuant to this hypothetical arbitration clause, the worker would lose the right to bring a lawsuit in court, with all the broad procedural protections available in court, such as broad discovery rights to collect evidence about the employer's wrongdoing, a right to a jury trial, public proceedings, the ability to proceed collectively as a class, and broad appellate rights in case there is an error at trial. Instead, the employer's attorney may have designed the arbitration clause so that the process is slanted in every way in favor of the employer. For example, an arbitration clause may purportedly require a worker to file claims before a private arbitrator within a heavily-abbreviated time frame of merely thirty days after the alleged wrongdoing.¹⁰ However, in court, one would normally have a year or more to file a claim, depending on the type of claim at issue. To select and hire an attorney, investigate the wrongdoing, attempt to collect evidence, and then draft and file a complaint in arbitration within thirty days of an act of harassment or assault would be challenging and not feasible. Furthermore, the employer's attorney may have drafted the arbitration clause to require the worker to pay significant fees to the arbitrator and pay the legal fees of the employer.¹¹ To further benefit the employer and burden the employee, the employer's attorney may have drafted the arbitration clause to require that the arbitration proceedings take place at the company's headquarters located across the country.¹² To make matters worse, the employer's attorney may have also drafted the arbitration clause to include limitations on damages the worker can

10. *See, e.g.*, *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (finding a 30-day limitations provision in arbitration clause unconscionable, where normally the claim at issue could be brought in court within 4 years of the alleged wrongdoing); *Flores v. Prime Time Prod., Inc.*, No. D052205, 2008 WL 4616801 (Cal. Ct. App. Oct. 20, 2008) (finding a 30-day limitations period in arbitration clause unconscionable).

11. *See, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 925 (9th Cir. 2013) (finding an arbitration agreement in employment application requiring employee to pay \$3,500 to \$7,000 for each day of arbitration to be unconscionable); *Yalowitz v. Prudential Equity Grp. LLC*, 807 N.Y.S.2d 72, 73 (App. Div. 2006) (upholding an arbitration clause providing for payment of an employer's attorneys' fees); *Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal. Rptr. 3d 42, 49-54 (Cal. App. 2014) (finding a similar clause unconscionable).

12. *See, e.g.*, *Montgomery v. Solomon Edwards Grp. LLC*, Nos. B260421, B259810, 2015 WL 5839047 (Cal. Ct. App. Oct. 7, 2015) (arbitration clause requiring the employee, a Colorado resident, to arbitrate in Pennsylvania, where the employer is headquartered).

seek.¹³ The arbitration clause may also contain broad, strict confidentiality provisions and severe limitations regarding discovery.¹⁴ As a result of the strict confidentiality terms in the arbitration clause and severe discovery limits, the worker would be forbidden from discussing the case with coworkers. The worker would also not be allowed to ask other coworkers to assist in testifying as a witness in support of the case. By contrast, if no arbitration clause existed and the worker could pursue a claim in court, the worker would have the right to demand documents from the employer and interrogate the employer, key managers, or other coworkers under oath pursuant to the court system's broad discovery rules. By drafting a harsh arbitration clause limiting discovery and imposing strict confidentiality requirements, the employer's attorney undermines the ability of the worker to collect evidence to support his or her claims.

The attorney drafting this hypothetical arbitration clause rigged the process at virtually every step to favor the corporate client over the vulnerable worker, who is not likely to be represented by an attorney in connection with his or her hiring. This harsh arbitration clause is not designed to administer justice or to resolve a dispute in good faith. By purposefully designing a harsh system with limited procedural rights, the attorney drafted the clause to undermine the enforcement of workers' rights. An injured worker who is bound by a harsh arbitration clause and who has been the victim of harassment or assault or cheated out of wages may have little or no recourse, with no ability to go to court. Instead, the employee may be stuck in a daunting arbitration system heavily skewed in the employer's favor and specifically designed by the employer's attorney to suppress employees' legitimate claims.

Because the explosive growth of arbitration is intricately intertwined with the administration of justice, the current failure of legal ethics to address the duties of an attorney in drafting arbitration clauses is a significant gap in ethics law that needs to be remedied.

13. *See, e.g.,* *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 775 (Cal. App. 2012) (finding an arbitration agreement limiting damages unconscionable); *see also* *Catastrophe Servs., Inc. v. Fouché*, 145 So. 3d 151 (Fla. Dist. Ct. App. 2014).

14. *See, e.g.,* *Folck v. Lennar Corp.*, No. 3:17-cv-00992-L-NLS, 2018 WL 1726617 (S.D. Cal. Apr. 10, 2018) (arbitration agreement requiring confidentiality); *Bohart v. CBRE, Inc.*, No. 17-cv-00355-RM-KMT, 2018 WL 1135535 (D. Colo. Feb. 28, 2018); *DeGraff v. Perkins Coie Cal. P.C.*, No. A148405, 2018 WL 992193 (Cal. Ct. App. Feb. 21, 2018); *Worman v. FedEx Ground Package Sys. Inc.*, 76 Pa. D. & C.4th 292 (2005) (arbitration clause limiting discovery); *Rondeau v. Ducommun Aerostructures, Inc.*, No. B198379, 2008 WL 4381304 (Cal. Ct. App. Sept. 29, 2008).

This Article demonstrates that attorneys involved in drafting oppressive arbitration clauses in the employment or consumer contexts, such as the one-sided arbitration clause in the above hypothetical, should be disciplined. The legal profession must re-examine and update legal ethics rules to address the drafting of arbitration clauses because of the modern reality that the explosion of forced arbitration clauses throughout American society has diminished access to the courts for millions of Americans. Ethics codes have traditionally focused on litigation conduct involving courts, but a litigation-focused model of ethics rules is now outdated. This Article proposes a new, robust ethics framework imposing broad duties on attorneys involved in creating private tribunals through the drafting of consumer or employment arbitration clauses. Under this novel proposal, attorneys have to take reasonable steps to ensure that meaningful consent to arbitrate exists, and any provision in an arbitration clause that undermines a fair hearing should be viewed as unethical drafting. Ethically, a lawyer should not be able to assist with the drafting or implementation of a consumer or employment arbitration clause involving unfair terms or a lack of meaningful consent.¹⁵

15. Several older articles have addressed the ethical duties of attorneys in drafting arbitration clauses. *See generally, e.g.*, Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002); Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRAND. L.J. 779 (2003); Amy J. Schmitz, *Ethical Considerations in Drafting and Enforcing Consumer Arbitration Clauses*, 49 S. TEX. L. REV. 841 (2008). I am indebted to these earlier works, upon which this Article builds. However, this Article differs from the earlier articles in several ways—most significantly, the ethical duties of attorneys proposed in this Article are more robust than the duties proposed in these prior articles. Also, the framework set forth in Professor Malin’s article focuses on employment arbitration, and Professor Schmitz’s article focuses on consumer arbitration. This Article proposes an ethical framework for the drafting of both employment and consumer arbitration clauses. Professor Carrington’s article is not focused solely on ethics; he discusses ethics in one section of his article, which relies on just a few ethics rules for its analysis. This Article finds support in multiple ethics rules. Also, Professor Carrington suggests that ethics rules forbidding illegal or fraudulent activities could possibly serve as the basis for discipline for drafting harsh clauses. *See* 19 GA. ST. U. L. REV. at 380–81. This Article relies on fraud as one theory for discipline, but also sets forth additional, more aggressive theories for lawyer discipline. Similarly, Professor Schmitz’s article suggests that discipline is only warranted in limited circumstances under existing ethics rules. *See* 49 S. TEX. L. REV. at 870 (“[The ABA’s Model Rules] preclude only intentional or knowing conduct that is clearly calculated to achieve illegal or fraudulent objectives.”). Likewise, Professor Malin’s article suggests that discipline is only warranted in limited circumstances. Professor Malin concludes that if a corporate client desires a harsh arbitration clause with procedures skewed in its favor, a lawyer may draft such a clause as long as the corporate client assumes moral responsibility for the harsh terms and does not convey that the lawyer approved such terms. However, this Article proposes a more stringent ethical framework and broader ethical duties when compared to these prior articles. Under this

Section II of this Article examines how the development of arbitration law has led to a transformation of America's civil justice system. This Section also demonstrates how some companies have abused arbitration by designing heavy-handed arbitration clauses to suppress the claims of consumers and employees. Section II also discusses examples of harsh arbitration terms. Section III of this Article then explores the evolution of legal ethics rules in America, with a particular emphasis on how each stage of evolution has related to (or more accurately, has often failed to address) arbitration. For purposes of this Article, a key moment in this evolutionary history of legal ethics was the American Bar Association's Ethics 2000 Commission's amendment of the definition of "tribunal" in the ethics code to specifically include binding arbitration proceedings. This amendment has significant, but largely unnoticed, ethical implications for the drafting of arbitration clauses. Section IV of this Article concludes by setting forth two complementary frameworks regarding legal ethics to demonstrate that attorneys should be subject to discipline for drafting oppressive arbitration agreements in the employment or consumer setting. Under this first framework, certain extreme arbitration clauses are considered fraudulent or in bad faith and thus unethical. The second framework, based on duties to a tribunal and the role of attorneys as officers of the legal system, would ban an attorney from drafting or implementing a consumer or employment arbitration clause that includes unfair terms or lack of meaningful consent. This second framework is more expansive compared to the first framework because a broader array of arbitration clauses would raise ethical concerns pursuant to this second framework. Also, this second framework is more normative in nature compared to the first, in the sense that it relies more heavily on principles or values underlying existing ethics rules. Whereas the first framework is based on existing ethics rules, the second framework builds on policies that undergird existing rules and would necessitate amendments to those

Article's proposal, any provision in an arbitration clause that undermines a fair hearing should be viewed as unethical drafting, and a lawyer cannot assist with such drafting. Furthermore, none of these prior articles take into account that the American Bar Association amended its ethics rules to define the term "tribunal" as including arbitration, and this redefining of the term tribunal has significant implications for an ethics analysis of designing arbitration proceedings, as explained in Section III.C. This Article also differs from prior articles by providing more specific guidance to disciplinary authorities, including specific examples of problematic, unfair arbitration terms in consumer and employment agreements.

rules. To help implement this second framework, disciplinary authorities should develop more explicit ethics rules to clarify an attorney's duties when drafting arbitration clauses.

The ultimate goal of these proposed ethical frameworks is to discourage abuse of arbitration and instead to support the good faith use of arbitration. When consumers or employees are held hostage in private, harsh arbitration tribunals with unfair procedures and a lack of meaningful consent, the individuals have been twice injured—once in connection with the underlying alleged wrongdoing, and again, when they are shut out of the traditional courthouse with its broad procedural protections. The abuse of arbitration to suppress claims undermines public confidence in our legal system. The ethics proposals in this Article are presented with the hope that they will enhance the administration of justice and build up public confidence in our broader legal system through the fair, good faith use of arbitration to resolve disputes.

II. HOW THE DEVELOPMENT OF ARBITRATION LAW TRANSFORMED AMERICA'S CIVIL JUSTICE SYSTEM AND ENABLED THE SUPPRESSION OF CONSUMER AND EMPLOYEE CLAIMS

This Section of the Article provides an overview of the Federal Arbitration Act (FAA), the primary federal law governing arbitration in the United States. This Section also describes how the Supreme Court of the United States has expanded and changed the original meaning of the law, leading to the widespread use of arbitration agreements and the transformation of America's legal system. The Section concludes by discussing how some parties abuse arbitration by drafting severe arbitration clauses in order to suppress claims.

A. *The Need for the Federal Arbitration Act*

To understand the explosive growth of arbitration in modern American society, it is helpful to examine the development of arbitration laws during the early 1900s. Prior to the 1920s, courts generally refused to enforce pre-dispute arbitration agreements.¹⁶ Pursuant to the "ouster doctrine," courts would refuse to enforce an agreement whereby private parties could improperly control or limit government

16. See IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 19–20 (1992) (noting that although pre-1920s arbitration laws in America were generally supportive of arbitration after an arbitrator issued an award, there was a "relative lack of enforceability of such agreements before an award was made").

authority by “ousting” a court of jurisdiction.¹⁷ However, due to changing societal circumstances such as increased interstate commercial trade, a broken federal court system, and a broad movement for procedural reform, Congress statutorily reversed the ouster doctrine by enacting the FAA in 1925.¹⁸ Merchants and commercial interests heavily lobbied for the FAA in order to make commercial arbitration agreements fully enforceable.¹⁹

To help understand the concerns underlying this Article, it is important to stress that the FAA was originally intended in 1925 to have a limited scope when compared to how courts construe the FAA today. In 1925, the FAA was construed as applicable solely in federal courts, not state courts;²⁰ solely for contractual disputes arising from interstate shipments, not statutory claims of public interest;²¹ solely for arbitration agreements between parties of relatively co-equal bargaining power, not take-it-or-leave-it, non-negotiable agreements between companies and vulnerable workers or consumers;²² and solely for commercial disputes, not employment disputes.²³

B. *The Supreme Court’s Erroneous Transformation of the Federal Arbitration Act*

Through a long series of flawed decisions from the United States Supreme Court beginning during the 1980s, the Supreme Court has expansively and erroneously construed the FAA so that virtually every type of claim is covered by the statute. Contrary to the text, history, and purpose of the FAA, the Supreme Court has completely

17. *Atl. Fruit Co. v. Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924) (“[A]ny agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted.”).

18. See generally IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013).

19. *Id.*

20. See generally MACNEIL, *supra* note 16; 9 U.S.C. § 4 (referencing federal courts).

21. See 9 U.S.C. § 2 (declaring fully enforceable a “written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . .”) (emphasis added). One’s right to be free from discrimination or harassment or tortious conduct does not arise out of a contract, and the FAA, by its very terms, only applies to disputes arising out of a contract. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483–86 (1989).

22. SZALAI, *supra* note 18, at 192–98.

23. *Id.* at 191–92; 9 U.S.C. § 2 (exempting from coverage of the FAA arbitration clauses contained in “contracts of employment” of workers involved in interstate commerce).

transformed the statute so that the FAA applies in both state and federal courts.²⁴ The FAA now also covers arbitration clauses in all types of agreements, including take-it-or-leave-it employment agreements and consumer agreements where meaningful consent is often lacking.²⁵ Through decades of flawed decisions, the Supreme Court has construed the FAA to embody a strong national policy in favor of arbitration and broad preemptive powers over any state regulations undermining arbitration.²⁶ Through this judicial rewriting of the FAA and development of pro-arbitration law, courts now recognize and apply a strong presumption in favor of arbitration in connection with virtually every possible claim in any type of transaction.²⁷

The heart of the FAA, Section 2 of the statute, states that arbitration agreements are generally “valid, irrevocable, and enforceable.”²⁸ Through the other provisions of the FAA, courts help facilitate arbitration by issuing orders enforcing arbitration agreements, confirming arbitration awards, and vacating awards only under extremely limited circumstances.²⁹ For example, if a consumer or employee files a lawsuit in court against a company in violation of a purported agreement to arbitrate, the defendant company can invoke the FAA in seeking a court order dismissing the lawsuit and compelling the individual to submit his or her claims to arbitration.³⁰ Pursuant to Section 4 of the FAA, the court, “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,” is required to issue “an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”³¹ Legal proceedings like these occur every day across America: a consumer or employee files a lawsuit in court and then the corporate defendant responds by asking the court to compel arbitration and dismiss the lawsuit.

24. See *Southland Corp. v. Keating*, 465 U.S. 1, 10–11, 16 (1984).

25. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 123 (2001); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340, 352 (2011).

26. See *Preston v. Ferrer*, 552 U.S. 346, 352–53, 359 (2008) (relying on national policy favoring arbitration and overriding jurisdiction of state administrative agency).

27. See, e.g., *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1287 (11th Cir. 2011) (recognizing strong presumption in favor of arbitration); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004) (“[T]here is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.”) (citation omitted).

28. 9 U.S.C. § 2.

29. See, e.g., 9 U.S.C. §§ 4, 9–11.

30. *Id.* § 4.

31. *Id.*

The FAA is written in fairly general terms, allowing the Supreme Court to develop several judicial glosses and doctrines with a strong pro-arbitration bias over the years. For example, the Supreme Court interprets the FAA as embodying the doctrine of separability, which requires courts to conceptualize arbitration clauses as separate from the rest of the broader contract in which they appear.³² As a result of this doctrine, if the larger contract is infected by some flaw, like duress or unconscionability, such a flaw generally does not impact the enforcement of the arbitration clause buried within the larger contract.³³ Additionally, the Supreme Court has created a presumption in favor of arbitration when there are any doubts regarding the scope of arbitrable issues,³⁴ elevated the role and enforceability of delegation clauses, or arbitration clauses for threshold issues of arbitrability,³⁵ and developed and applied a broad, expansive preemption test whereby the FAA overrides any state law or interpretation that potentially undermines, interferes with, or has a disproportionate impact on arbitration.³⁶ Arbitration has become sacred in the Supreme Court's eyes.

Encouraged by the Supreme Court's pro-arbitration decisions transforming and expanding the FAA far beyond its original intent, companies have increasingly used arbitration clauses in all types of consumer and employment settings.³⁷ Companies particularly favor the Supreme Court's recent rulings that a bilateral agreement to arbitrate between a consumer or employee, on one side, and a company, on the other, can preclude the individual's ability to proceed as part of a class or collective action.³⁸ The ability to block a class action through the use of an arbitration clause is a significant, if not the most significant, reason why companies like to include arbitration

32. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402, 406–07 (1967).

33. See, e.g., *Gunasekera v. Chippewa Cty. War Mem'l Hosp., Inc.*, No. 2:17-cv-163, 2018 WL 1974992, at *3–4 (W.D. Mich. Apr. 6, 2018) (allegations of fraudulent inducement directed to the entire contract, as opposed to the arbitration clause, are to be determined by the arbitrator, not the court).

34. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .”).

35. See *Rent-A-Ctr., Inc. v. Jackson*, 561 U.S. 63, 68–73 (2010).

36. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343, 351–52 (2011) (FAA overrides state law); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (FAA overrides state court's interpretation of the parties' contract).

37. See, e.g., *supra* notes 1–9.

38. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630–31 (2018); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–44 (2011).

clauses in their consumer or employee contracts.³⁹ Given the heavy pro-arbitration spin and pro-arbitration doctrines the Supreme Court has overlaid onto the FAA's general text, parties who wish to invalidate or challenge an arbitration clause in court face an uphill battle.⁴⁰ From time to time, courts do invalidate arbitration agreements, but for the most part, a court is likely to enforce arbitration agreements in light of the existing pro-arbitration framework erected by the Supreme Court.⁴¹ Every day across the country, state court and federal court judges issue orders pursuant to the FAA, compelling consumers and employees to submit their claims to arbitration instead of proceeding in court.⁴²

39. A leading attorney for the financial services industry testified at a hearing held by the Consumer Financial Protection Bureau (CFPB) that if the CFPB banned the use of class action waivers in arbitration clauses, many companies would simply stop using arbitration clauses: "Although the CFPB's proposal reflects an inclination not to outright prohibit the use of arbitration, let's make it perfectly clear. By requiring companies to insert in their arbitration provisions language excepting class actions from arbitration, the Bureau is in reality proposing an outright ban. If this proposal becomes a final regulation, most companies will simply abandon arbitration altogether." *CFPB to Consumer Financial Services Companies: Prepare to Wave Goodbye to Class Action Waivers*, BALLARD SPAHR LLP (Oct. 7, 2015), <https://www.ballard-spahr.com/alertspublications/legalalerts/2015-10-07-cfpb-to-consumer-financial-services-companies-prepare-to-wave-goodbye.aspx> [<https://perma.cc/9L6G-D3RE>] (last visited Jan. 23, 2019).

40. See *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004) ("[T]here is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.") (citation omitted); *Gunn v. NPC Int'l, Inc.*, 625 F. App'x 261, 263 (6th Cir. 2015); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997) ("The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements.").

41. See, e.g., *Defina v. Go Ahead and Jump 1, LLC*, No. A-1861-17T2, 2018 WL 2770613 (N.J. Super. Ct. App. Div. June 5, 2018) (invalidating an arbitration clause in consumer contract on the grounds that the contract does not explain that, by arbitrating, the party gives up the right to be heard in court). In *Defina*, the court invalidated the arbitration clause based on a line of authoritative cases in New Jersey holding that arbitration clauses are invalid if the clause fails to clearly explain that by arbitrating, the party is giving up the right to be heard in court. However, the FAA arguably preempts such a state law. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) (holding that the FAA preempted a state law conditioning the enforceability of arbitration agreements on compliance with special notice requirements imposed by a state).

42. See, e.g., *Ace Am. Ins. Co. v. Guerriero*, No. 17-2893, WL 3057005 (3d Cir. June 20, 2018) (compelling arbitration of employment dispute); *Maher v. Microsoft Corp.*, No. 17-CV-00753, WL 1535043 (N.D. Ill. Mar. 29, 2018) (compelling arbitration of consumer dispute).

C. Arbitration's Impact on the Civil Justice System

The widespread use of arbitration agreements in virtually every setting of American life has transformed America's civil justice system. Millions of American consumers and employees can no longer access the public courts, with their broad procedural protections, to hold corporate wrongdoers publicly accountable. This broad, sweeping shift to arbitration can conceal wrongdoing and undermine the enforcement of critical rights. For example, the use of harsh arbitration clauses with broad confidentiality provisions likely helps mask sexual harassment at the workplace and makes it more difficult for victims to prove their cases.⁴³ Also, the widespread use of arbitration can undermine our common law traditions rooted in the establishment of precedent because *stare decisis* principles typically do not apply to arbitration awards, which may not even include reasoned opinions.⁴⁴ With the spread of arbitration, society also loses the many benefits of having reported, public judicial decisions, such as the punitive and deterrent effects on wrongdoers and potential wrongdoers and the development, pronouncement, and clarification of legal doctrines which can serve as a published guide to others.⁴⁵ For example, if every Title VII discrimination claim were covered by arbitration agreements and no such claims were ever litigated in court, society would lose the benefit of having reported judicial decisions, subject to

43. Attorneys for the victims of widespread sexual harassment at the nationwide chain of jewelry stores, Jared and Kay Jewelers, observed that “[m]ost of them [the victim employees] had no way of knowing that the others had similar disputes, because that was all kept confidential.” Yuki Noguchi, *No Class Action: Supreme Court Weighs Whether Workers Must Face Arbitrations Alone*, NPR MORN. ED. (Oct. 6, 2017), <https://www.npr.org/2017/10/06/555862822/no-class-action-supreme-court-weighs-whether-workers-must-face-arbitrations-alon> [<https://perma.cc/A3FU-GRHH>].

44. See *Parratt v. Taylor*, 451 U.S. 527, 531 (1981) (“For better or for worse, however, our traditions arise from the common law of case-by-case reasoning and the establishment of precedent.”), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330–31 (1986); *Conn. Light & Power Co. v. Int’l Bhd. of Elec. Workers*, 718 F.2d 14, 20 (2d Cir. 1983) (“Courts reviewing inconsistent arbitration awards have generally concluded that arbitrators are not bound by the rationale of earlier decisions and that inconsistency with another award is not enough by itself to justify vacating an award. Principles of *stare decisis* and *res judicata* do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings.”) (citations omitted).

45. Of course, arbitration is not the only possible factor contributing to fewer judicial decisions. Other factors may have contributed to the erosion of judicial decision-making, such as expansive discovery and high costs associated with discovery, or the role of FED. R. CIV. P. 16 in empowering judges to manage cases and facilitate settlements. See, e.g., James E. McGuire & Frank E.A. Sander, *Some Questions About “The Vanishing Trial”*, DISP. RESOL. MAG., Winter 2004, at 17.

corrective appellate review, identifying wrongdoers and clarifying and developing how this critical law applies to particular situations. Furthermore, in a modern society with corporate actors engaging in business across the country, in which those actors bring about widespread, small-dollar harms, it is impractical for an individual to pursue his or her small claim alone. For example, Wells Fargo engaged in widespread fraud and wrongdoing by imposing unauthorized fees on individual customers.⁴⁶ Class action procedures available in court could help solve this collective action problem, but agreements to arbitrate on an individual basis block class actions and provide de facto immunity from class action liability.⁴⁷ Also, as a general matter, there is very little oversight regarding this private system of justice to ensure that laws are being applied correctly and uniformly and that justice is being done. As recognized by the Supreme Court and other courts, “an arbitrator’s error—even his grave error—is not enough” for a court to reverse an arbitrator’s award,⁴⁸ and “the scope of judicial review for an arbitrator’s decision is among the narrowest known at law.”⁴⁹ Furthermore, because meaningful consent is often lacking with consumer and employment arbitration agreements, individuals may feel a loss of dignity and loss of confidence in the legal system when they eventually learn, after they have been injured, that they are unable to access the courts and the government will not assist them by hearing their claims. Instead, millions of Americans are stuck in a system that is, for the most part, designed by and for the alleged wrongdoers. Some wrongdoers attempt to tilt the system in their favor by designing procedural advantages in the arbitration process that tend to benefit only the wrongdoer.

In sum, the widespread growth of arbitration is having a profound effect on our legal system. Such a system of justice, with all of its limitations, such as extremely limited judicial review, is arguably appropriate for a small set of disputes, such as contractual disputes regarding payments, delivery times, or the quality of goods.

46. See, e.g., Samantha Masunaga & James Rufus Koren, *Wells Fargo’s Estimate for Unauthorized Accounts Jumps 67%, to 3.5 Million*, L.A. TIMES (Aug. 31, 2017), <http://www.latimes.com/business/la-fi-wells-fargo-accounts-20170831-story.html> [https://perma.cc/9ZED-QRJD].

47. See *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”) (emphasis in original); *but see* *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013).

48. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013).

49. *Barranco v. 3D Sys. Corp.*, 734 F. App’x 885, 887 (4th Cir. 2018) (citation omitted).

The FAA was originally intended to have such a limited scope.⁵⁰ Today, however, as a result of flawed Supreme Court decisions expanding the FAA, many claims by vulnerable workers and consumers that would otherwise be heard by courts are now subject to arbitration. Legal ethics rules have not yet evolved to address abuses that may occur with this seismic shift to arbitration.

It is important to stress that not all arbitration is problematic, and not every corporate actor abuses arbitration. When arbitration is used appropriately, in good faith, and with meaningful consent and fair procedures, arbitration can rival litigation for resolution of disputes. The concerns of this Article involve the heavy-handed, oppressive abuse of arbitration in the consumer and employment setting to suppress claims and the failure of legal ethics to fully address arbitration abuse.

D. *Examples of Problematic Arbitration Terms*

Attorneys for corporate parties sometimes attempt to hijack the arbitration process and slant the process in favor of corporate clients by slipping oppressive terms into an arbitration clause presented to consumers and employees on a take-it-or-leave-it basis. Some examples of these one-sided terms include:

- *Abbreviated statute of limitations*: For any given type of legal claim, there is typically a deadline by which a party must commence legal proceedings. For example, for overtime or wage claims, the Fair Labor Standards Act allows two years for an employee to bring a claim; the deadline for an employee to bring a claim is extended to three years if the employer engaged in a willful violation.⁵¹ However, some employers or companies use arbitration agreements to shorten the time period allowed by law in order to tilt the playing field in their favor and discourage any claims. For example, some attorneys for corporate clients draft arbitration agreements requiring that all claims be submitted to arbitration within a substantially shortened time period, perhaps

50. See *supra* notes 20–23 and accompanying text.

51. See 29 U.S.C. § 255(a) (2012); see also *Amponsah v. DirecTV, LLC*, 278 F. Supp. 3d 1352, 1371 (N.D. Ga. 2017) (describing statute of limitations analysis for FLSA claims).

within a few months of the alleged wrongdoing, instead of a longer period established by law.⁵²

- *Limitation on damages or remedies*: Some companies or employers add to their arbitration agreements provisions limiting the remedies or damages an arbitrator may award to a consumer or employee in arbitration.⁵³
- *Prohibitive costs or fees*: Some arbitration agreements impose prohibitive costs or fees on consumers or employees.⁵⁴
- *Location*: Some companies include harsh provisions in their arbitration agreements requiring consumers or employees to arbitrate in a distant, inconvenient location.⁵⁵
- *Prospective waiver of rights*: Some companies try to avoid the application of governing United States laws by drafting arbitration agreements requiring arbitrators to apply the substantive laws of another jurisdiction.⁵⁶
- *Limitation on discovery rights*: Arbitration agreements typically limit the ability of employees or consumers to collect evidence from the employer or company.⁵⁷
- *Confidentiality*: Arbitration clauses can sometimes contain strict confidentiality provisions that prevent a consumer or employee from communicating with others about a dispute. Through strict confidentiality terms, consumers or employees may be unable to seek witnesses, such as other customers or co-workers, who could otherwise support the allegations of the claimant. Also, confidentiality provisions may prevent the

52. See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 259 (3d Cir. 2003) (thirty-day limitation); *Cox v. Station Casinos, LLC*, 2014 WL 3747605, at *5 (D. Nev. June 25, 2014) (sixty-day limitation).

53. See, e.g., *Obolensky v. Chatsworth at Wellington Green, LLC*, 240 So. 3d 6, 8 (Fla. Dist. Ct. App. 2018) (capping non-economic damages and prohibiting the award of punitive damages).

54. See, e.g., *Champness v. J.D. Byrider Sys., LLC*, No. 1:14-cv-730, 2015 WL 247924, at *4–5 (S.D. Ohio Jan. 20, 2015) (finding cost-shifting, pay-to-play, and loser-pays provisions to be prohibitively excessive for former employee); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003).

55. See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007) (requiring consumer from Pennsylvania to engage in arbitration in California).

56. See, e.g., *Rideout v. CashCall, Inc.*, 2018 WL 1220565, at *5–7 (D. Nev. Mar. 8, 2018) (arbitration clause purported to waive federal statutory rights); *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 785 (E.D. Pa. 2016) (“The purpose of the arbitration agreement at issue here is not to create a fair and efficient means of adjudicating Plaintiff’s claims, but to manufacture a parallel universe in which state and federal law claims are avoided entirely.”).

57. See, e.g., *Baxter v. Genworth N. Am. Corp.*, 224 Cal. Rptr. 3d 556, 568–70 (Cal. Ct. App. 2017) (arbitration agreement with harsh discovery limitations); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 97–100 (Cal. Ct. App. 2004) (same).

public from discovering the underlying wrongdoing or the result of an arbitration proceeding.⁵⁸

Note that these terms are not necessarily harmful when there is mutual, meaningful consent between sophisticated parties. However, in the consumer or employment context, these terms can be used to suppress claims. By drafting an arbitration agreement with such harsh, one-sided terms, corporate attorneys are able to tilt the playing field in favor of their corporate clients by disadvantaging consumers and employees. When promoting arbitration in the consumer and employment context, corporate interests typically tout the efficiency of arbitration as a major advantage of the process over litigation. However, most of the harsh terms above, such as the inconvenient location for the hearing, confidentiality provisions, excessive fees, and abbreviated statutes of limitation, have nothing to do with “efficiency” and do not appear to significantly reduce the process costs of arbitration proceedings when compared to litigation proceedings.⁵⁹ Many harsh arbitration terms serve no efficiency purpose. Terms that require arbitration in a distant location, impose a severe limitation period, or force a consumer or employee to pay a prohibitive fee do nothing to streamline the actual arbitration proceedings or provide efficiency advantages over litigation. Instead, companies use oppressive terms to discourage or suppress the filing of claims.

What happens when an attorney drafts an arbitration clause on behalf of a corporate client with harsh, one-sided provisions designed to disadvantage consumers or employees? Arbitration law does not provide a clear answer. There are at least three possible outcomes from the perspective of the courts: invalidation of the arbitration clause after a lengthy court challenge, severance of the harsh terms after a lengthy court challenge, and judicial enforcement of the harsh terms.⁶⁰ Some individuals may challenge the arbitration clause in

58. *See, e.g.*, DeGraff v. Perkins Coie California Cal. P.C., No. A148405, 2018 WL 992193, at *9 (Cal. Ct. App. Feb. 21, 2018) (“[confidentiality] provision [in an arbitration clause] hampers an employee’s ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations”) (citation omitted); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1320 (11th Cir. Sept. 26, 2017) (severing confidentiality provision from arbitration clause).

59. The harsh terms do not appear to significantly streamline or reduce the process costs of arbitration, as compared to litigation, except for the possibility of discovery limitations. *See* Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 *CARDOZO J. CONFLICT RESOL.* 653, 668–76 (2018) (discussing in more detail why these provisions are unjustified or unfair in employee or consumer arbitration clauses).

60. *See generally id.* (discussing the different approaches courts employ when addressing harsh provisions within an arbitration clause).

court, asking a judge to find the arbitration clause to be unconscionable and unenforceable because of the harsh terms. After months or years of litigating the issue of whether a binding arbitration agreement exists, a judge may ultimately find that the arbitration clause is not enforceable.⁶¹ As a result, an individual may eventually pursue his or her claims against the company in court, with corresponding broad procedural protections. However, this ability to eventually access the courts after prolonged litigation to invalidate the arbitration clause may be costly and time-consuming, without any guarantee that the court would invalidate the arbitration clause. Instead of invalidating an arbitration clause after lengthy litigation, a second approach involves severance of harsh terms after lengthy litigation.⁶² An individual may challenge a harsh arbitration clause in court, and after months or years of litigation, a judge may eventually sever one or more harsh terms within the arbitration clause and enforce the rest of the arbitration agreement. As a result, the individual still loses the right to bring claims in court and must bring his or her claims in arbitration. The individual may have spent months or years in court trying to litigate the enforcement of the arbitration clause, only to have a few harsh provisions severed at the end of the litigation process. Some judges believe that arbitration law requires this severance approach.⁶³ However, this approach is problematic because it encourages companies to continue drafting arbitration agreements with harsh terms. Some individuals may completely forego bringing any claims because they are afraid of harsh terms forcing them to arbitrate in a distant city with excessive, prohibitive fees. Other individuals may be daunted by the headache and uncertainty of having to fight over the clause in court, only to have a few terms severed at the end of a lengthy process. A third outcome regarding a harsh arbitration clause is that a court, after lengthy litigation, may enforce the harsh clause in its entirety, finding that the individual somehow agreed to the terms.⁶⁴

The existing legal framework of arbitration law is not effective, consistent, or fair when addressing the problem of arbitration agreements drafted with harsh, one-sided terms to disadvantage consumers or employees. Part of this problem is due to the fact that the FAA

61. *Id.*

62. *Id.* at 677.

63. *Id.* at 683 (citing *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 464–66 (9th Cir. 2014) (Gould, J., dissenting)).

64. *See generally* Szalai, *supra* note 59.

was enacted almost one hundred years ago and was originally intended to apply in a much narrower setting involving contractual, commercial disputes between merchants.⁶⁵ The FAA was never designed or fine-tuned to address problems that can arise with consumer or employment arbitration. The existing legal framework of arbitration law does not consistently or adequately address concerns about unequal bargaining power and the abuse of weaker parties in these settings. However, as explored in more detail below, existing principles from legal ethics can be used to address the conduct of attorneys involved in such abuse.

III. THE DEVELOPMENT AND REACTIVE EVOLUTION OF LEGAL ETHICS STANDARDS

This Section addresses the evolution of legal ethics standards and the regulation of attorneys, with an emphasis on how legal ethics rules developed slowly over time to address certain aspects of arbitration. As demonstrated below, a theme regarding the development of legal ethics rules has been that such rules tend to lag behind changes in society and the practice of law. The development of legal ethics rules tends to be reactive, instead of proactive, with ethics codes being amended over time to play catch-up and grapple with new developments. While arbitration has grown rapidly and exponentially in American society, the legal profession has amended its ethics codes at a relatively slow pace, and only to address minimal aspects of arbitration. However, ethics codes have not yet explicitly addressed significant areas of abuse involving the drafting of arbitration clauses.

A. *Early Ethics Codes Focused Almost Exclusively on Litigation*

The regulation and discipline of attorneys has always occurred primarily at the state level, with the judiciary typically having the ultimate power to regulate the admission and practice of law.⁶⁶ As

65. See *supra* notes 20–27 and accompanying text.

66. See *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (“States traditionally have exercised extensive control over the professional conduct of attorneys [in order to protect the public] The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.”) (citations omitted); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467 (1978) (recognizing that States have a “strong interest in regulating members of the Bar”); *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977) (stating that “the regulation of the activities of the bar is at the core of the State’s power to protect the public,” especially because of the special role of attorneys in helping with the administration of justice).

part of a larger, nationwide trend to increase professionalism in the legal community, Alabama became the first state to officially adopt a legal ethics code in 1887. Several states, and eventually the American Bar Association (ABA), followed Alabama's lead in developing ethics codes for attorneys.⁶⁷ The ABA's first ethics code, however, made no mention of arbitration. Although arbitration occurred at the time, pre-dispute arbitration agreements were generally not enforceable during the early 1900s; arbitration agreements had not yet exploded throughout every segment of American society as they have today.

The ABA adopted its first national code of legal ethics in 1908, the ABA's Canons of Ethics ("1908 Canons of Ethics" or "Canons"),⁶⁸ which were based in part on the earlier Alabama code.⁶⁹ The preamble of the 1908 Canons of Ethics explains the justification for adopting a code of conduct for attorneys:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.⁷⁰

The preamble's opening reference to the "stability of the Courts" and the Canons' repeated emphasis on a lawyer's duties regarding litigation in court reflect the central role of courts in the legal system of the time. Although commercial arbitration existed during this time period, its use was limited during the early 1900s.

The 1908 Canons of Ethics, which consist of thirty-two separate canons, contain several provisions discussing litigation in court, such as a lawyer's duty to maintain a "respectful attitude" toward the

67. See Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 504 (1998).

68. See CANONS OF ETHICS (AM. BAR ASS'N 1908). For a copy of the 1908 Canons of Ethics, please see the appendix to James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2400 (2008).

69. See Marston, *supra* note 67; see also Altman, *supra* note 68.

70. CANONS OF ETHICS Preamble (AM. BAR ASS'N 1908); see Altman, *supra* note 68.

courts and to avoid “unjust criticism” of the judiciary.⁷¹ Also, the Canons prohibit improper attempts to exert influence on a court, such as through “unusual hospitality” toward the judge, *ex parte* communications, or “any device or attempt to gain from a Judge special personal consideration or favor.”⁷² Additionally, lawyers had to give candid advice regarding the “probable result of pending or contemplated litigation,” and lawyers had to refrain from engaging in abusive behavior toward witnesses and opposing litigants.⁷³ As an “officer of the law . . . charged with the duty of aiding in the administration of justice,” lawyers owed a duty of candor and fairness before the court.⁷⁴ For example, during litigation, lawyers could not cite repealed statutes or overruled cases or misquote the testimony of a witness.⁷⁵ Lawyers had to be candid regarding the facts of a case.⁷⁶ Furthermore, the Canons prohibited lawyers from “stirring up” litigation through improper solicitation.⁷⁷

The 1908 Canons of Ethics tend to focus more on litigation or the role of attorneys serving as advocates, rather than doing transactional work. In addition to addressing conduct involving the representation of clients before the judiciary, the Canons also addressed other issues, such as disclosures regarding conflicts of interest, attorney’s fees, advertising, and media statements.⁷⁸ The concluding section of the Canons summarized an attorney’s duty as avoiding any service or advice involving “disloyalty to the law,” “disrespect of the judicial office,” corruption, and “deception or betrayal of the public.”⁷⁹ Instead, a lawyer’s “highest honor” involved developing a “reputation for fidelity to private trust and to public duty.”⁸⁰

The 1908 Canons of Ethics do not specifically mention arbitration. The most relevant reference to out-of-court dispute resolution is found in Canon 8, which states that “[w]henever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.”⁸¹ Although this statement encourages the resolution of disputes out of court, there is no explicit mention of arbitration

71. *Id.* Canon 1.

72. *Id.* Canon 3.

73. *Id.* Canons 8, 17, 18.

74. *Id.* Canon 22.

75. *Id.*

76. *Id.*

77. *Id.* Canon 28.

78. *Id.* Canons 6, 12–14, 20, 27.

79. *Id.* Canon 32.

80. *Id.*

81. *Id.* Canon 8.

or any particular method of adjustment. Most likely, this reference in Canon 8 was intended to cover the settlement of a claim through bilateral negotiation, but the statement does not exclude the possibility of adjusting a dispute through a third-party neutral, such as an arbitrator or mediator. Although this one provision of the 1908 Canons of Ethics seems to encourage out-of-court settlement, ethics regulation at the time focused on the role of lawyers litigating in court and offered no direct consideration of arbitration.

It is not surprising that the 1908 Canons of Ethics do not specifically mention any special rules regarding arbitration. Although arbitration existed in America before the Revolutionary War,⁸² arbitration agreements were generally not enforceable in 1908; the widespread use of arbitration agreements in the consumer and employment settings did not exist at the time.⁸³ Arbitration proceedings that did occur were more likely to be consensual or voluntary. In that context, there would be less concern about abusive behaviors. By contrast, with the modern, widespread use of arbitration clauses where meaningful, voluntary consent is often lacking, it is easier for a drafting party to slip in abusive arbitration provisions.

B. *Later Ethics Rules Accounted for Changes in the Justice System, But Failed to Adequately Address Arbitration*

The next major milestone in the development of legal ethics occurred in 1969 when the ABA adopted the Model Code of Professional Responsibility (the "1969 Model Code") to replace the 1908 Canons of Ethics.⁸⁴ An ABA report explained that the new standards were developed, in part, because "there were important areas involving the conduct of lawyers that were either only partially covered in or totally omitted" from the earlier 1908 Canons.⁸⁵ The report further explained that "changed and changing conditions in our legal system and urbanized society required new statements of professional principles."⁸⁶ Like the 1908 Canons of Ethics, the 1969 Model Code was intended to serve as a guide for professional conduct, but without any force or effect until officially adopted by the judicial authority of each

82. See SZALAI, *supra* note 18, at 16–21.

83. See *supra* notes 16–23 and accompanying text.

84. MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969). A copy of the original 1969 Model Code without subsequent amendments can be found in *Report of the Special Committee on Evaluation of Ethical Standards*, 94 ANN. REP. A.B.A. 729 (1969).

85. *Report of the Special Committee on Evaluation of Ethical Standards*, 94 ANN. REP. A.B.A. 729 (1969).

86. *Id.*

state.⁸⁷ The 1969 Model Code offered many improvements to its predecessor. However, while the 1969 Model Code mentioned arbitration, its treatment of arbitration was extremely minimal.

The 1969 Model Code is structured differently from the 1908 Canon and consists of three related parts: canons, which set forth axiomatic norms; ethical considerations, which are aspirational in nature and capture the objectives lawyers should strive for; and disciplinary rules, which are mandatory in nature and set forth the minimum requirements attorneys must comply with.⁸⁸ The Model Code contains nine broad canons, each of which discusses detailed ethical considerations and disciplinary rules supporting the related canon.

The first six canons do not directly or specifically address litigation before a tribunal. The first canon focuses on maintaining the integrity and competence of the bar, details considerations and rules regarding moral character, prohibits false statements in connection with bar admissions, and defines the concept of misconduct, which involves any acts of fraud or deceit.⁸⁹ The second canon broadly addresses a lawyer's duty to make legal counsel available, particularly in light of changed circumstances in society involving increased specialization of law, the lack of public knowledge regarding the reputation of attorneys, and the lack of sophistication of many members of the public regarding legal services.⁹⁰ Ethical considerations and rules supporting the second canon address the importance of truthfulness in advertising, the use of referral services, the need for reasonable fees, and the appropriateness of declining or withdrawing from representations.⁹¹ The third canon addresses the unauthorized practice of law.⁹² The fourth canon focuses on confidentiality.⁹³ The fifth canon

87. ABA Comm'n on Ethics and Prof'l Responsibility, Informal Op. 1420 (1978) ("The [1908] Canons of Professional Ethics and the succeeding [1969] Code of Professional Responsibility have been drafted, promulgated, and amended by agencies of the American Bar Association within the context of understanding that such codes might serve only as exemplars for the proper conduct of legal practitioners but that the power of disciplinary enforcement rests with the judiciary."); ABA Comm'n on Ethics and Prof'l Responsibility, Informal Op. 1442 (1979) ("The [1969] Code of Professional Responsibility is intended to point the way to the aspiring practitioner . . . and to provide standards by which to judge the transgressor," but the Code has "no force and effect" because enforcement of legal ethics standards are "local matters securely within the jurisdictional prerogative of each State and the District of Columbia.").

88. See MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (AM. BAR ASS'N 1969).

89. *Id.* Canon 1.

90. *Id.* Canon 2.

91. *Id.*

92. *Id.* Canon 3.

discusses the duty to exercise independent professional judgment when representing a client, including several concerns regarding conflicts of interest in different settings.⁹⁴ Canon 6 focuses on providing competent representation to clients.⁹⁵

The first six canons and related considerations and rules were not specifically designed to focus on litigation issues or issues before a tribunal. Canon 7, which addresses zealous advocacy, discusses several considerations and rules regarding the representation of clients in adversarial adjudication.⁹⁶ For example, there are rules regarding fairness and candor before a tribunal, including prohibitions against offering perjured testimony and prohibitions against improperly influencing jurors and witnesses or judges.⁹⁷ Canon 7 does not specifically mention arbitration, but some language in the discussion of considerations and rules related to Canon 7 speak more broadly of an adversarial, adjudicatory process. In theory, Canon 7's principles could be applied to an arbitration proceeding. However, it appears that most language within Canon 7 was designed specifically with litigation in mind, with references to jurors, which do not exist in arbitration, and rules of evidence,⁹⁸ which typically do not apply in the more relaxed setting of arbitration. With other references to "delay of trial," "filing suit," "trial conduct," and "trial publicity," it seems that the drafters of Canon 7 were primarily, if not exclusively, focusing on litigation in court.⁹⁹ Although Canon 7 recognizes the possibility of legislative bodies acting in an adjudicative capacity,¹⁰⁰ there is no express indication in the text that the drafters had arbitration in mind when drafting the principles in Canon 7.

The remaining canons in the 1969 Model Code do not specifically mention arbitration. Canon 8 recognizes that lawyers should assist in improving the legal system, such as by seeking legislative or administrative change and by ensuring that judicial and administrative officials are qualified.¹⁰¹ The final section, Canon 9, emphasizes that lawyers should avoid the appearance of impropriety.¹⁰² For example, it would be unethical for a lawyer to state or imply that he or she can

93. *Id.* Canons 4.

94. *Id.* Canon 5.

95. *Id.* Canon 6.

96. *Id.* Canon 7.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* Canon 8.

102. *Id.* Canon 9.

improperly influence a tribunal. Lawyers must also appropriately safeguard funds or property belonging to a client.¹⁰³

The ABA's 1969 Model Code explicitly addresses arbitration only in one place. Ethical Consideration (EC) 5-20, which is related to the canon of exercising independent professional judgment, addresses conflicts of interest where a lawyer serves as an arbitrator. The consideration states that a lawyer should not serve as an arbitrator in a matter involving a current or former client, unless that fact is disclosed.¹⁰⁴ Similarly, after serving as an arbitrator in a matter, a lawyer should not subsequently represent any of the parties in connection with the same dispute.¹⁰⁵

Overall, the 1969 Model Code represents an improvement over the 1908 Canons of Ethics because the 1969 Model Code is more thorough in addressing concerns in settings beyond the courtroom. However, except in one small provision involving conflicts of interest, the 1969 Model Code does not explicitly address the issue of arbitration, or the modern concerns that arise from the drafting of harsh, take-it-or-leave-it arbitration agreements in consumer and employment settings.

The 1969 Model Code does discuss several duties of an attorney appearing before a tribunal, and the Model Code defines tribunal to include "all courts and all other adjudicatory bodies."¹⁰⁶ Because arbitration involves adjudication of rights, the Model Code's provisions discussing duties of an attorney appearing before a tribunal would apply, in theory, to an attorney appearing before an arbitrator. However, the provisions of the Model Code related to tribunals use terms related to court, such as "judge," "juror," and "trial."¹⁰⁷ Thus, although the definition of tribunal is broad enough to cover arbitration settings, it appears that the drafters were envisioning primarily, if not exclusively, litigation in court when developing the 1969 Model Code. In addition, even if these duties set forth in the 1969 Model Code apply to a lawyer's representation of someone before an arbitral tribunal, such duties still do not address the more modern problem or concern of designing an arbitral tribunal for employees or consumers at the drafting stage. During the late 1960s, arbitration was not as

103. *Id.*

104. *Id.* EC 5-20 at 765.

105. *Id.*

106. *Id.* at 796.

107. *Id.* EC 7-33 at 778 (discussing "jurors" in the context of a tribunal); EC 7-35 at 778 (discussing "judge" and "litigants" in the context of a tribunal); DR 7-106 at 779 (discussing "trial conduct" and "admissible evidence" in the context of a tribunal).

widespread in the consumer or employment setting as it is today; the Supreme Court's transformation and expansion of arbitration law did not really begin until the 1980s. Although the 1969 Model Code and its predecessor 1908 Canons of Ethics were not specifically drafted to deal with the problems and potential abuses of widespread, forced arbitration, a few principles from these ethics codes regarding the fairness of tribunal proceedings are relevant to addressing concerns with forced arbitration, as explained below in the final Section of this Article.

In the following decade of the 1970s, recognizing that commercial arbitration was a "significant part of the nation's system of justice," representatives of the ABA and the American Arbitration Association developed a Code of Ethics for Commercial Arbitrators.¹⁰⁸ One concern of the joint committee was that arbitrators often engage in other occupations, so arbitrators could be selected from the same trade or industry as the parties.¹⁰⁹ The Code of Ethics contains seven different canons, addressing topics like upholding the integrity and fairness of the arbitration process, disclosures and conflicts of interest, maintaining confidentiality, and special considerations regarding non-neutral, party-appointed arbitrators.¹¹⁰

This Code of Ethics was intended to apply to commercial arbitrators, not attorneys. Also, this Code of Ethics was drafted before the Supreme Court's transformation of arbitration law during the 1980s. Finally, this Code of Ethics suffers from the same problems as earlier codes in failing to address the drafting of arbitration agreements.

The next major update to the ABA's ethics rules occurred in 1983, with the adoption of the Model Rules of Professional Conduct (the "1983 Model Rules" or "Model Rules").¹¹¹ The 1983 Model Rules did not maintain the structure of the 1969 Model Code's canons, ethical considerations, and disciplinary rules. Structurally, the 1983

108. See CODE OF ETHICS FOR COM. ARB. (AM. BAR ASS'N 1977). A copy omitting subsequent amendments can be found in the appendix of *Report of the Special Committee on Code of Ethics for Commercial Arbitrators*, 102 ANN. REP. A.B.A. 709 (1977).

109. *Id.* at 711.

110. See CODE OF ETHICS FOR COM. ARB. (AM. BAR ASS'N 1977). This Code was amended in 2004 with several revisions, including a new provision recognizing that arbitrators can engage in advertising and promotion of arbitral services. For a discussion of the differences between the original version and the 2004 amendments, see Stephen B. Yusem, *Comparing the Original with the Revised American Bar Association - American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes*, METROPOLITAN CORP. COUNS. 38 (July 2004), <http://cbjournal.com/pdf/2004/July/38,39,63.pdf> [<https://perma.cc/SL5U-7MAM>].

111. See MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983). A copy of the 1983 Model Rules can be found in 69 A.B.A. J. 1 (Nov. 1983).

Model Rules are divided into eight main sections dealing with the following topics: the client-attorney relationship, lawyer as a counselor, lawyer as advocate, transactions with persons other than clients, law firms and associations, public service, information about legal services, and maintaining the integrity of the legal profession.

Similar to the 1969 Model Code, the only place where the 1983 Model Rules explicitly address arbitration is in the context of an improper conflict of interest. Pursuant to Model Rule 1.12, an attorney who served as an arbitrator in a matter cannot subsequently represent any party involved in that matter.¹¹² Although the same prohibition existed in the 1969 Model Code,¹¹³ the 1983 Model Rules are more detailed regarding such a conflict. The Model Rules recognize that this improper conflict involving a former arbitrator can be waived if all parties consent, and the Model Rules also explain the imputation of this conflict to the rest of the members of a law firm.¹¹⁴ Furthermore, the Model Rules recognize that if an attorney is a partisan arbitrator serving in a multi-member arbitration panel, the attorney is not prohibited from subsequently representing that party.¹¹⁵ Additionally, the Model Rules state that an attorney serving as an arbitrator cannot negotiate for employment with any person who is a party or a lawyer for a party in a matter in which the lawyer is currently participating as an arbitrator.¹¹⁶ Thus, the 1983 Model Rules continue to address improper conflicts of interest involving an attorney serving as an arbitrator, but in more detail compared to the ethical considerations found in the 1969 Model Code.

Rule 2.2 of the 1983 Model Rules discusses the role of an attorney serving as an intermediary between two clients who have conflicting interests.¹¹⁷ The comments to Rule 2.2 explain that intermediation can take different forms, such as “informal arbitration” or mediation.¹¹⁸ The comment also clarifies that this rule does not apply to situations where a lawyer is serving as an arbitrator for parties who are not clients of the lawyer.¹¹⁹ Thus, this rule does not address the common present-day situation in consumer or employment arbitration where the arbitrator is not representing either party to the arbitration. Instead, Rule 2.2 is limited to the special

112. *Id.* r. 1.12.

113. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-20 (AM. BAR ASS'N 1969).

114. MODEL RULES OF PROF'L CONDUCT r. 1.12 (AM. BAR ASS'N 1983).

115. *Id.*

116. *Id.*

117. *Id.* r. 2.2.

118. *Id.* r. 2.2 cmt.

119. *Id.*

situation where a lawyer is serving as an intermediary between two clients.¹²⁰

The 1983 Model Rules also continue to address the role and duties of an attorney appearing before a tribunal, just like the 1969 Model Code.¹²¹ Similar to the 1969 Model Code, the 1983 Model Rules also tend to use terminology related to courts when discussing tribunals, such as “judge,” “juror,” pre-trial procedures such as “discovery,” and “litigation.”¹²² Thus, it appears that the 1983 Model Rules discuss predominantly, if not exclusively, adjudication before a court, not arbitration.

The timing of the 1983 Model Rules helps to explain its improved but still limited treatment of arbitration. The 1983 Model Rules appeared right at the cusp of the Supreme Court’s radical transformation and expansion of arbitration law, which arguably began with some dicta in 1983 and with a watershed case in 1984 expanding the reach of the FAA.¹²³ The Supreme Court’s transformation of the FAA beginning in the 1980s brought about a seismic shift in America’s legal system and access to justice for consumers and employees. But it is unlikely that the 1983 Model Rules envisioned or were designed to address the many concerns or abuses arising from the dramatic expansion of arbitration laws and related explosive growth of arbitration agreements that were on the horizon.

C. *Amendments from the Ethics 2000 Commission: The Most Significant Progress Regarding Arbitration in the ABA’s Ethics Codes for Attorneys*

As explained in the prior Sections, the ABA slowly amended its ethics codes over the decades to address changes in the legal system and society at-large. Prior versions of these rules increasingly, but still minimally, addressed certain aspects of arbitration. The next major development regarding legal ethics occurred as a result of the ABA’s Ethics 2000 Commission, which was established in 1997 to, among other things, address growing disparity in state ethics rules,

120. The ABA eventually deleted Rule 2.2 because the concept of intermediation between two current clients was not “well understood” and because conflicts of interest rules could more appropriately address the concepts expressed in Rule 2.2. Ethics 2000 Commission, *Model Rule 2.2: Reporter’s Explanation of Changes* (AM. BAR. ASS’N, Oct. 5, 2011), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule22rem/ [<https://perma.cc/FV4L-LWRD>].

121. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.3–5 (AM. BAR ASS’N 1983).

122. *Id.*

123. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22–23 (1983); see also *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

fix the lack of clarity in some existing rules, consider the influence of technological developments on the delivery of legal services, and address the “changing organization and structure of modern law practice.”¹²⁴

The work of the Ethics 2000 Commission occurred in the midst of the Supreme Court’s radical transformation of the FAA and the increasing growth of consumer and employment arbitration. The 2000 amendments represent the first significant overhaul of the ABA’s ethics codes following the Supreme Court’s transformation of arbitration law. Compared to the prior versions of the ABA’s ethics codes, the amendments arguably represent the most significant progress in these ethics codes with respect to arbitration. However, glaring gaps still remain.

The work of the Ethics 2000 Commission brought about two important changes to the legal ethics framework with respect to arbitration. First, the Commission proposed a new rule addressing lawyers serving as arbitrators: Rule 2.4.¹²⁵ Pursuant to this new rule, lawyers serving as arbitrators, or as a third-party neutrals such as mediators, are required to clarify their role to the parties involved.¹²⁶ More specifically, if an unrepresented party appears before a lawyer serving as an arbitrator, the lawyer serving as an arbitrator is ethically required to disclose that he or she is not representing the unrepresented party.¹²⁷ Along the same lines, if the unrepresented party develops any misunderstandings about the role of the attorney serving as the arbitrator, the attorney serving as the arbitrator is required to explain the differences between serving as an arbitrator and representing a client.¹²⁸

For purposes of this Article, the most significant change in the ABA’s ethics codes relevant to arbitration involves the addition of a

124. *Overview of Ethics 2000 Commission and Report*, AMERICAN BAR ASSOCIATION, CENTER FOR PROFESSIONAL RESPONSIBILITY, POLICY & INITIATIVES, ETHICS 2000 COMMISSION, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/e2k_migated/e2k_ov_mar02.doc (last visited Jan. 17, 2019).

125. See REPORTER’S EXPLANATION OF CHANGES REGARDING MODEL RULE 2.4, REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT (Ethics 2000 Commission, Am. Bar. Ass’n).

126. See MODEL RULES OF PROF’L CONDUCT r. 2.4 (AM. BAR ASS’N 1980).

127. *Id.*

128. *Id.*

new rule, Rule 1.0, which contains and defines certain terms appearing throughout the Model Rules.¹²⁹ Although the inclusion of definitions may at first glance seem trivial, this seemingly insignificant change represents a major shift or advance of the ABA's ethics rules with respect to arbitration. Rule 1.0 contains definitions for many key terms found throughout the rules, such as "knowledge," "reasonable belief," "consent," and "firm." Rule 1.0 also provides the following definition of "tribunal":

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.¹³⁰

The 1969 Model Code contained a shorter, less detailed definition of "tribunal," which covered courts or "other adjudicative bodies."¹³¹ For the first time, the Ethics 2000 Commission amendments explicitly define tribunal to include an "arbitrator in a binding arbitration proceeding."¹³² This definition of "tribunal" also sets forth three components or characteristics of an adjudicative proceeding: a neutral official, the presentation of evidence or legal arguments, and a binding judgment impacting a party's interests in a particular matter.

Defining the term "tribunal" to include binding arbitration proceedings and setting forth core characteristics of a tribunal are consequential changes for several reasons. First, from the perspective of arbitration law, the FAA, the key federal statute regarding arbitration, never defines this key term of arbitration. This has caused confusion and inconsistent judicial interpretations over time. For example, there are conflicting judicial decisions as to the meaning of arbitration and whether non-binding proceedings constitute arbitration pursuant to the FAA.¹³³ The definition of "tribunal" in Rule 1.0

129. See REPORTER'S EXPLANATION OF CHANGES REGARDING MODEL RULE 1.0, REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT (Ethics 2000 Commission, Am. Bar. Ass'n).

130. See MODEL RULES OF PROF'L CONDUCT r. 1.0 (AM. BAR ASS'N 1980).

131. See MODEL CODE OF PROF'L RESPONSIBILITY Definitions (AM. BAR ASS'N 1969).

132. MODEL RULES OF PROF'L CONDUCT r. 1.0(m) (AM. BAR ASS'N 1980).

133. Compare *Advanced Bodycare Solutions, Inc. v. Thione Int'l*, 524 F.3d 1235, 1240 (11th Cir. 2008) (holding that FAA does not cover mediation clauses), with *Fisher v. GE Medical Systems*, 276 F.Supp.2d 891, 893 (M.D. Tenn. 2003) (holding that the FAA covers mediation clauses); *AMF Inc. v. Brunswick Corp.*, 621 F. Supp.

suggests one possible answer to this ongoing debate in arbitration law.

By placing the institution or process of arbitration under the definition of a “tribunal,” Rule 1.0 is also significant for expanding or clarifying the ethical duties of an attorney with respect to arbitration. By expanding the definition of “tribunal,” several existing rules defining an attorney’s duties with respect to a court became immediately applicable to attorneys participating in arbitration proceedings.¹³⁴ Prior rules from the 1969 Model Code and the 1983 Rules tended to focus on conflicts of interest arising from the role of an attorney serving as an arbitrator, not an attorney appearing before an arbitration tribunal.¹³⁵ Although the 1969 Model Code defines tribunal to include “all courts and all other adjudicatory bodies,” and such a definition is arguably broad enough to cover arbitration, the 1969 Model Code did not clearly or explicitly provide that arbitration falls under this concept of a tribunal. However, the definitional amendments brought about by the Ethics 2000 Commission clarified the ethical duties of attorneys appearing in arbitration proceedings, not just attorneys serving as arbitrators. The significance of this new definition of tribunal for purposes of the new reality in American society regarding the widespread use of arbitration agreements cannot be overstated: all prior ethics rules developed for attorneys to guide their litigation conduct before a court now automatically and explicitly apply to attorneys representing clients in arbitration proceedings.

The definition of “tribunal” in Rule 1.0 is also significant for a different reason. This new definition recognizes the growing significance of arbitration in America’s legal system and the impact of arbitration on society and individual rights. By defining tribunal to include binding arbitration, the framework of legal ethics conceptualizes arbitration, not as an inferior alternative to litigation, but on par with litigation in terms of its impact on the rights of individuals. Today, arbitration is a core part of our legal system, embracing virtually all types of claims, including claims of critical public interest.¹³⁶ Many individuals have completely lost access to the courts because of

456, 459–60 (E.D.N.Y. 1985) (explaining that “[a]rbitration is a term that eludes easy definition” and FAA can cover non-binding processes).

134. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.3 (candor to a tribunal), r. 3.4 (fairness to opposing party and counsel), r. 3.5 (impartiality and decorum of a tribunal) (AM. BAR ASS’N 1980).

135. See *supra* notes 104–05 and 112–16 and accompanying text.

136. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–27 (1991) (finding that all types of statutory claims, including civil rights claims, can generally be arbitrated under the framework of the FAA).

binding arbitration agreements found in all types of daily consumer and employment transactions. Legally, an arbitrator's award is just as, if not more, binding or impactful on a person's rights than a court order. For example, an arbitrator's award can be entered and recognized as a court judgment pursuant to the FAA.¹³⁷ Furthermore, a court's judgment can generally be appealed if it is flawed, but an arbitrator's award is even more final than a judge's order and generally cannot be reviewed or reversed, even if it is infected with a serious error made by the arbitrator.¹³⁸ Because there is effectively no right to appeal an adverse arbitration decision, arbitration awards can have a greater impact on one's rights than court orders. For many individuals bound by a forced arbitration clause, arbitration—not the court system—provides the only realistic possibility of justice that a person can obtain.¹³⁹ Because arbitration forms an integral part of today's legal system, it was therefore a necessary leap forward, and a realistic reaction to changed conditions in our society, for the ethics rules to include arbitration within the definition of a tribunal. Lawyers have been traditionally viewed as officers of the legal system, with special duties such as the duty to avoid and correct perjury and to refrain from conduct disruptive to a tribunal. Now, through the incorporation of arbitration as part of the definition of tribunal, attorneys are recognized as officers of a broader legal system, which includes both court proceedings and arbitration proceedings. Attorneys now owe duties in connection with both court proceedings and arbitration proceedings in furtherance of the administration of justice. This definition of tribunal to include arbitration represents a significant advance from the earlier versions of ethics rules, which were more litigation-focused.

In existing arbitration law, many appellate courts hold that arbitration, conceptualized as a private process, is not government action and does not trigger due process concerns.¹⁴⁰ However, this view has

137. See 9 U.S.C. § 9.

138. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013) (ruling that “an arbitrator’s error—even his grave error—is not enough” for a court to reverse an arbitrator’s award); *Barranco v. 3D Sys. Corp.*, 2018 WL 2446661, at *1 (4th Cir. May 31, 2018) (“[T]he scope of judicial review for an arbitrator’s decision is among the narrowest known at law.”) (citation omitted).

139. Of course, the government is not bound by an arbitration clause between an individual consumer or employee and a company. The government can bring prosecutions or enforcement actions against wrongdoers despite the existence of an arbitration clause between two private parties. See generally, e.g., *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

140. See *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (ruling that “the state action element of a due process claim is absent in private arbitration

been challenged given that arbitration today is often forced upon consumers and employees without their meaningful consent.¹⁴¹ Despite the clear appellate holdings to the contrary, some courts have applied due process concepts to private arbitration proceedings.¹⁴² These courts appear to conceptualize arbitration as a type of government-sanctioned proceeding requiring due process protections. These conflicting decisions reflect an ongoing, unresolved tension involving the protection of vulnerable individuals in arbitration. Should arbitration be viewed as a private, consensual process, whereby individual consumers or employees are presumed to have voluntarily given up broader due process protections available in court? Or should arbitration be viewed as more of a public or semi-public institution because of its broad scope and its use to resolve critical claims of public interest? As a result of the Ethics 2000 amendments, the ABA's ethics code now recognizes that both court and arbitration proceedings operate as components of the same justice system and can impact the rights of individuals. Attorneys now owe the same ethical duties in connection with both litigation and arbitration.

D. *The Failure of the ABA's Existing Ethics Code to Comprehensively Deal With Arbitration*

As demonstrated above, the ABA's ethics codes have slowly evolved to address the use of arbitration to resolve disputes. The growing role of arbitration in American society in recent decades represents a seismic shift in the civil justice system. The equal treatment of arbitration and court proceedings by the Ethics 2000 Commission was at once an important, ground-breaking, realistic, and much-needed step for ethics rules. Despite this progress, the rules still fall short of addressing the proper role of attorneys when designing arbitration proceedings through the drafting of arbitration clauses. Because of the extent of arbitration clauses today in American society, arbitration is arguably more significant than courts in

cases"); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) (“[C]ourts have consistently held that private arbitration lacks any element of state action.”).

141. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1017–18 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 5–7 (1997).

142. See, e.g., *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (recognizing “a minimum level of due process for parties to an arbitration”).

the life of an average American. While our federal and state governments can apply due process protections and create fair procedures protective of individual rights in government-run tribunals, these safeguards can be evaded and superseded through an insidiously drafted arbitration clause with procedures created by a corporate party and designed for its sole advantage. Democratic processes and constitutional due process principles help shape government-run tribunals, and ethics codes presume such structural protections exist with more formal bodies like courts and administrative bodies. However, with respect to private arbitration, such structures or protections are not available to help ensure fairness. At a minimum, all the ethics rules applicable to attorneys appearing before courts and administrative agencies should also generally apply to arbitration proceedings. In addition, heightened ethical duties beyond those applicable to courts should apply to arbitration because of special concerns regarding the private design of arbitration tribunals, because of the growth of arbitration with respect to potentially vulnerable consumers and employees, and because of the potential impact of arbitration on one's rights.

The ABA should be commended for its work through the Ethics 2000 Commission. However, fairness issues regarding an attorney's *appearance* before an arbitral tribunal (such as prohibitions of false testimony to an arbitrator) are different from fairness issues that can arise from the initial *design* of an arbitral tribunal (such as drafting of an arbitration clause requiring that all claims must be filed before an arbitrator within thirty days of the alleged wrongdoing). The ABA's current ethics code merely addresses the former, not the latter. The next and final Section of this Article addresses how the ethics framework should be interpreted, applied, and expanded to address potential problems with this changing system of justice arising from an attorney's role in designing arbitration tribunals through the drafting of consumer or employee arbitration clauses.

IV. ETHICS PRINCIPLES AND EVOLVING INTERPRETATIONS: A PROPOSAL TO ADDRESS OPPRESSIVE CONSUMER AND EMPLOYMENT ARBITRATION CLAUSES

This final Section sets forth two legal ethics frameworks to demonstrate that attorneys should be subject to discipline for drafting oppressive arbitration agreements in the employment or consumer setting. The first framework is based on ethical prohibitions against fraud and bad faith, and the second framework is based on

the role of attorneys as officers of the legal system and an attorney's duties to tribunals.

Pursuant to the first framework, attorneys should be disciplined for drafting extreme arbitration clauses containing several harsh provisions in the consumer or employment context. Such extreme clauses with multiple harsh provisions are not designed to resolve disputes in good faith. Instead, such clauses serve the purpose of claim suppression, instead of claim resolution. Portraying such extreme clauses as a legitimate method of dispute resolution is misleading and should subject attorneys to discipline.

The second framework, which would probably require amendments to existing ethics rules to implement fairly, relies on values and principles underlying existing rules. Pursuant to this second, more aspirational framework, the drafting of a consumer or employment arbitration clause containing a single harsh term should give rise to attorney discipline.

A. *By Drafting Harsh Arbitration Clauses, An Attorney Can Violate Ethics Rules Prohibiting Fraud and Bad Faith*

From the perspective of legal ethics, what duties does an attorney owe to a consumer or employee when the attorney is drafting an arbitration clause for a corporate client?¹⁴³ An attorney owes several duties to his or her client, such as competency, diligence, adequate communication, confidentiality, the exercise of independent professional judgment, and the avoidance of conflicts of interest.¹⁴⁴ However, the consumer or employee subject to arbitration is not the client

143. This Article focuses on duties that may arise from the framework of legal ethics. However, one may argue that similar or analogous duties to refrain from drafting harsh arbitration clauses can also arise from other sources, such as contract law, which imposes a covenant of good faith and fair dealing, or tort law involving fraud. These duties may even arise from the FAA itself. For example, the vacatur provisions of the FAA recognize principles of fairness that should exist in arbitration proceedings. See 9 U.S.C. § 10(a)(1) (2012) (providing for vacatur of an arbitration award procured through "fraud" or "undue means"). If such misconduct during a proceeding provides a basis for throwing out an arbitration award pursuant to the FAA, then, *a fortiori*, an attempt to create such a tribunal involving fraud or undue means should also be unenforceable under the FAA. Furthermore, a duty to refrain from drafting harsh arbitration clauses can also be found in the policies of other substantive laws. For example, one may be able to argue in certain contexts that drafting abusive arbitration clauses in employment agreements undermines the enforcement of critical statutes, such as federal civil rights laws.

144. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3, 1.4, 1.6, 1.7, 2.1 (AM. BAR ASS'N 2016) (regarding competency, diligence, communication, confidentiality, conflict of interest, and duty to exercise independent professional judgment, respectively).

of the attorney drafting the arbitration agreement on behalf of a corporate client. Thus, the various rules discussing duties to a client are not directly applicable. Instead, the main concerns of ethics codes with respect to a non-client third party involve prohibitions against fraud and abuse. This subsection discusses how an attorney violates ethics rules prohibiting fraudulent, deceitful conduct by drafting extreme arbitration clauses for consumers or employees.

In an arm's-length transaction or business deal, an attorney does not generally owe comprehensive duties to third parties. Similarly, an attorney drafting an arbitration agreement, or any agreement, on behalf of a corporate client generally does not owe to a third party the same ethics duties owed to clients. Nonetheless, there are a few core principles of legal ethics with respect to non-client third parties—duties to avoid fraudulent, deceitful, or abusive conduct.

One of the most extensive duties recognized by the ABA's Model Rules of Professional Conduct involves an attorney's duty to avoid fraudulent or deceitful conduct, which can be found in Rule 8.4 and several other rules. The duty imposed by Rule 8.4 is broad and somewhat unusual compared to most of the ABA Model Rules. Most of the other rules directly address the lawyer-client relationship and the practice of law. However, Rule 8.4 is drafted in expansive terms as a duty to avoid *all* "conduct involving dishonesty, fraud, deceit or misrepresentation," regardless of the context. In other words, this rule is not limited to an attorney's relationship with a client. This rule can apply to conduct with third parties, and more broadly, to conduct entirely outside the context of the practice of law. Attorneys should not engage in deceitful, fraudulent conduct in any aspect of their lives, regardless of whether the conduct occurs in the practice of law or not. One purpose of this expansive rule is to help maintain the integrity of the legal profession. In addition to Rule 8.4, other rules recognize a duty to avoid fraud in more specific contexts. For example, pursuant to Model Rule 4.1, a lawyer representing a client is prohibited from making a "false statement of material fact or law to a third person." Similarly, a lawyer cannot counsel a client to engage in, or assist a client in, fraudulent conduct pursuant to Model Rule 1.2.¹⁴⁵

Consider how these ethics rules prohibiting fraud would apply to the following situation. Suppose a client is trying to sell a business

145. Other ethics rules embody this prohibition against fraud, but in specific contexts, such as advertising or in the context of presenting evidence or arguments before a tribunal. *See, e.g., id.* r. 3.3(a)(1), 7.1, 7.2 (Rule 3.3(a)(1) prohibits false statements to a tribunal, and Rules 7.1 and 7.2 prohibit false or misleading communications in lawyer advertising).

that has never been profitable and has lost significant amounts of money every year of its existence. Further suppose that the seller client desires to misrepresent the profitability of the business to potential buyers, perhaps through the use of fabricated financials or a false prospectus, to be drafted by an attorney. A lawyer cannot be involved in counseling or providing assistance to the client in connection with such a fraudulent business transaction pursuant to several rules, such as Rules 1.2, 4.1, and 8.4.¹⁴⁶ If the client insists that the lawyer provide assistance with fraudulent conduct, the lawyer must withdraw from the representation pursuant to Rule 1.16.¹⁴⁷ A lawyer cannot assist in a fraudulent business deal.¹⁴⁸ The lawyer cannot make, directly or indirectly through the client, false representations about the business to the buyer.¹⁴⁹ Doing so would violate Rule 1.2 (prohibition against assisting a client with fraudulent conduct), Rule 4.1 (prohibiting false statements of material fact to a third person), and Rule 8.4 (prohibiting all conduct involving “dishonesty, fraud, deceit or misrepresentation”).

Consider a second example of deceptive conduct. Suppose an attorney drafts a contract on behalf of a client who operates a nursing home, and the contract will be signed by individuals living in the nursing home. The attorney drafts an agreement with separately titled and numbered paragraphs, with each paragraph focusing on one particular topic, such as a description of the nursing home’s services; the duration or term of the contract; fees, including how to make payments and due dates; government taxes; and the right to terminate the contract. Suppose that the nursing home wants the contract to include a non-disparagement provision, a harsh term protecting the interests of the nursing home by forbidding the individual from publishing any negative, online reviews of the nursing home. If the individual does publish a negative review on an online platform such as Yelp, the non-disparagement provision requires the individual to pay

146. *Id.* r. 1.2(d), 4.1(a), 8.4(c) (Rule 1.2(d) prohibits lawyers from assisting clients with fraudulent conduct, Rule 4.1(a) prohibits false statements to third parties, and Rule 8.4(c) prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation”).

147. *Id.* r. 1.16(a)(1) (a lawyer is obligated to withdraw from the representation of a client if the continued representation would result in the violation of the rules of professional conduct).

148. *Id.* r. 1.16(a)(1), 1.2(d) (although it is permissible for a lawyer to merely discuss with a client the legal consequences of a fraudulent transaction proposed by the client, a lawyer cannot assist a client in carrying out the fraudulent transaction).

149. *Id.* r. 4.1, 8.4.

a penalty of \$1,000 for every negative review.¹⁵⁰ Acting with intent to mislead and deceive, the attorney drafts the contract so that the one sentence prohibiting disparagement is buried and mislabeled at the end of the seemingly innocuous section titled “Duration of Agreement,” which states that the contract duration is for one year. Every other provision of this hypothetical contract is correctly and accurately titled in separately numbered paragraphs. Such concealment should be conceptualized as misleading, deceitful conduct, prohibited by several ethics rules, like Rules 1.2, 4.1, and 8.4.

In both hypothetical examples above, the attorney acted in bad faith by creating false financial documents to misrepresent the profitability of the company and by deceitfully concealing and falsely mislabeling a harsh contractual provision. The same principles prohibiting fraud should also apply when an attorney drafts an extremely harsh, one-sided arbitration clause in the consumer and employment contexts, as explained in the next hypothetical below.

Suppose an attorney, acting in bad faith to suppress claims, designs an oppressive employee arbitration agreement on behalf of a corporate client similar to the agreement described in the introduction of this Article:

An agreement to “arbitrate”

You agree to arbitrate any claims you may have against the company, and you must assert these claims before an arbitrator selected solely by us within thirty days of your claim arising. The company, however, is free to litigate and is not obligated to arbitrate any claims the company may have against you. You agree to pay all the arbitrator’s fees, and the arbitration shall take place at our company’s headquarters [in a distant state across the country]. The arbitrator shall not have the power to award any punitive damages, and any damage award issued by the arbitrator shall not exceed \$500. During the hearing, you are only allowed to call one witness. You must also prove any violations of law or legal obligations pursuant to a clear and convincing standard. Your statement of claim, to be filed no later than thirty days of your claim arising, must set forth all facts you plan to rely on at the arbitration hearing. Facts not included in the statement of claim cannot be raised during the arbitration. You are not allowed to have a lawyer represent you in connection with this arbitration proceeding. The arbitration proceeding shall be conducted only on an individual basis and

150. In 2016, Congress enacted the Consumer Review Fairness Act, which bans businesses from including such non-disparagement provisions in consumer contracts. See Consumer Review Fairness Act, Pub. L. No. 114-258 (2016).

not as a class, consolidated, or representative action. You also agree to waive the protections of all federal and state law. The sole standards to be applied by the arbitrator in determining your rights and resolving any dispute are found in the company's separate Terms & Conditions Agreement, which the company can amend at any time. Additionally, this arbitration proceeding, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration shall be held in the strictest confidence and discussed with no one other than a company representative, and you shall have no right to engage in any discovery in connection with the arbitration. You also waive any right to have a court review, confirm, vacate, or modify in any manner any award issued by the arbitrator.

In this hypothetical contract, every step of the process appears calculated or specifically designed to burden a vulnerable consumer or employee and thwart them from bringing a legitimate claim. Like the attorneys drafting the other hypothetical clauses, the lawyer drafting the above clause did not design the agreement to resolve a dispute in good faith. Instead, the lawyer drafted these numerous harsh terms in bad faith to discourage or suppress the filing of claims in order to provide de facto immunity for corporate wrongdoing.

One specific problem with the above hypothetical clause is that the use of the term "arbitration" to describe the one-sided, harsh process set forth in the clause is deceitful or fraudulent. The term arbitration should not be used to describe a bad faith process to suppress claims. Labeling the above provisions "arbitration" is just as wrong or misleading as labeling the provisions "mediation," "pricing terms," or equally wrong and absurd, "a recipe for chocolate cake." The lawyer who drafted such a one-sided clause should be subject to discipline for engaging in fraudulent or deceptive conduct.

The text, structure, and history of the FAA support the argument that the one-sided process described above should not constitute "arbitration." Section 2, the heart of the FAA, sets forth the core principle that pre-dispute agreements to arbitrate are fully binding; the remainder of the statute helps implement this core principle.¹⁵¹ For example, from the beginning of a dispute, if one party refuses to honor an agreement to arbitrate, Section 4 of the FAA allows the other party to seek a court order enforcing the agreement to arbitrate.¹⁵² The FAA also provides arbitrators with subpoena powers,

151. See Federal Arbitration Act, 9 U.S.C. § 2 (2012).

152. *Id.* § 4.

which can be enforced through the courts.¹⁵³ The FAA also allows courts to step in and appoint a substitute arbitrator in cases of vacancies.¹⁵⁴ Additionally, when an arbitrator issues an award, the FAA provides for the judicial confirmation of the arbitral award so that the award can be entered as a judgment in court.¹⁵⁵ Finally, if serious misconduct occurs in connection with an arbitration proceeding, the FAA allows a court to vacate an arbitrator's award.¹⁵⁶ Looking at the structure and text of the FAA, the statute is designed to facilitate a final award resolving a contractual dispute between the parties through a fair process. However, the agreement set forth in the above hypothetical is not designed to produce an award in good faith. The hypothetical provision above is harshly designed to suppress the bringing of claims by requiring the proceeding to take place in a distant location, before an arbitrator selected by the company, with harsh fees, limited damages, an abbreviated time frame, strict confidentiality, no discovery, and other severe restrictions. This process, devised to provide *de facto* immunity, should not be construed as arbitration pursuant to the FAA.

Similarly, the history surrounding the FAA's enactment demonstrates that the FAA embodies a policy to promote the integrity of arbitration as a good faith, fair, efficient process to resolve disputes, not as a tool for oppression. During Congressional hearings regarding the bills that would become the FAA, the drafters stressed the good faith qualities of a mutual agreement to arbitrate:

[Commercial arbitration] saves time, saves trouble, saves money It preserves business friendships [W]e do not permit any abuse by one side or the other. Friendliness is preserved in business. It raises business standards. It maintains business honor¹⁵⁷

The drafters of the FAA conceptualized arbitration as a good faith, mutual undertaking to resolve disputes in an equitable manner

153. *Id.* § 7.

154. *Id.* § 5.

155. *Id.* § 9.

156. *Id.* § 10.

157. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1003 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary, 68th Cong. 7 (1924); see also id. at 24 (commercial arbitration is "expeditious, economical, and equitable, conserving business friendships and energy"); id. at 31 (commercial arbitration offers "an efficient, expeditious, and inexpensive adjustment" of disputes arising in the "daily business transactions" of merchants so that they can be "equitably disposed of").*

between co-equal parties. A harsh process calculated to scare away vulnerable consumers or employees from pursuing a claim should not be considered arbitration.

Additionally, during Congressional hearings regarding the FAA in the 1920s, a Senator raised concerns about enforcing arbitration agreements drafted by a stronger party and presented on a take-it-or-leave-it basis.¹⁵⁸ The Senator mentioned standard, non-negotiable contracts drafted by insurance companies or railroad companies as examples of contracts lacking consent.¹⁵⁹ The Senator emphasized that such adhesionary contracts drafted by the insurance companies and railroad companies are “not really voluntary” contracts.¹⁶⁰ A lawyer from the American Bar Association involved with the drafting of the FAA, in his testimony in favor of the FAA, agreed with the Senator and explained that the FAA was not intended to apply to such take-it-or-leave-it documents.¹⁶¹ Instead, the FAA was designed to facilitate the resolution of contract disputes between parties who knowingly agreed to arbitrate. The legislature that passed the FAA did not intend to include as “arbitration” examples of corporate parties drafting oppressive dispute resolution process in adhesion contracts.¹⁶² The legislative history of the FAA demonstrates that arbitration is supposed to involve a good faith, mutual undertaking to use fair procedures to resolve disputes equitably. Arbitration was never supposed to be used as an oppressive tool to evade legal responsibility and gain an unfair advantage over weaker parties through claim suppression.¹⁶³

158. See *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations, Hearings on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong. 9 (1923) [hereinafter 1923 Hearings]*.

159. *Id.* at 9–11.

160. *Id.* at 9 (“The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily things at all.”); *id.* at 10 (referring to take-it-or-leave-it, standard contracts given by railroad companies and insurance companies as “not really voluntary contracts, in a strict sense”).

161. *Id.* at 10 (“I would not favor any kind of legislation that would permit the forcing a man to sign that kind of a contract . . . I think that ought to be protested against . . .”).

162. Also, it is clear that the FAA was never designed for employment disputes or statutory claims. See *supra* notes 20–23 and accompanying text.

163. Cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (stating arbitration cannot involve the deprivation of any rights and merely represents a change of forum).

Returning to the hypotheticals presented at the beginning of this section, it is fraudulent and unethical for a lawyer to falsify financial records and present a failing company as profitable. Similarly, it is fraudulent to mislabel and conceal a harsh non-disparagement clause under the misleading heading of contract duration. Likewise, it is equally misleading and unethical for a lawyer to falsely use the term “arbitration” to describe a bundle of oppressive procedures specifically designed to suppress claims in bad faith. Arbitration involves a mutual commitment to resolve disputes in good faith through a neutral, fair process. It is unethical and misleading for an attorney to draft harsh, oppressive procedures and to present them disguised as a legitimate arbitration system.

One can imagine a spectrum of clauses organized according to fairness or harshness of procedures. At one extreme, there is a mutual promise to submit a dispute in good faith to a neutral arbitrator pursuant to fair, balanced, neutral arbitral procedures. At the other extreme of this spectrum is a take-it-or-leave-it clause, where meaningful consent does not exist for the consumer or employee, and which sets forth multiple procedural hurdles designed in bad faith to suppress claims in favor of the corporate party. Between these two extremes, there is a continuous spectrum of harshness or fairness of arbitration clauses, such as an arbitration clause containing ten one-sided terms, nine one-sided terms, eight one-sided terms, and so on.¹⁶⁴

Under existing ethics codes, an attorney involved in drafting or implementing a harsh clause that falls near one end of this spectrum should be subject to discipline for engaging in false, deceptive conduct, in violation of multiple ethics rules described above. Even if an attorney carefully and artfully tries to avoid using the term “arbitration” in connection with a harsh bundle of procedures, the attorney should still be subject to discipline for engaging in misleading conduct and operating in bad faith to suppress claims and provide *de*

164. The harshness of a given clause may also vary depending on the nature of the substantive claim at issue. For example, limited discovery may have a harsher impact on very fact-intensive claims where the defendant is likely in possession of the critical facts regarding the wrongdoing, such as a discrimination claim against an employer where the employer is in possession of key emails demonstrating discriminatory intent. Limited discovery may be less problematic if the claimant is already in possession of key evidence, such as a defective product. This exercise of plotting hypothetical clauses on a spectrum of fairness is in some sense analogous to an attempt to define the concept of due process, which can be fact-specific. See *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (adopting a balancing test for due process arguments). However, at the far extreme of this spectrum, a clause with multiple harsh provisions may be unfair in most scenarios involving a consumer or employee.

facto immunity to the stronger corporate party. Other legal ethics principles prohibiting an attorney's abuse of third parties should also apply to such hypothetical cases. For example, pursuant to Rule 4.4, attorneys have an ethical obligation to respect the rights of third parties by avoiding "means that have no substantial purpose other than to embarrass, delay, or burden a third person." One can argue that a sham clause designed to suppress claims in bad faith, while disguised as a legitimate attempt to resolve a dispute in good faith, is an abusive act designed to burden a consumer or employee in violation of Rule 4.4.

An example of a clause that would fall near the "harsh" end of the spectrum, thereby subjecting a drafting attorney to discipline, is the clause addressed in *Hooters of America, Inc. v. Phillips*.¹⁶⁵ In this infamous case, the Fourth Circuit upheld the lower court's refusal to compel arbitration in connection with a clause described by the Fourth Circuit as setting forth a "dispute resolution process utterly lacking in the rudiments of even-handedness."¹⁶⁶ The Fourth Circuit described the procedures in the agreement, "when taken as a whole [as] so one-sided that their only possible purpose is to undermine the neutrality of the proceeding."¹⁶⁷ As part of the agreement, an employee had to provide detailed facts about her claim from the beginning of the arbitration, together with a witness list, but the company was not required to reciprocate by providing a responsive pleading or its own list of defense witnesses.¹⁶⁸ Additionally, the method for selecting the panel of three arbitrators was "crafted to ensure a biased decisionmaker" because the list of possible arbitrators was created exclusively by Hooters.¹⁶⁹ Most notably, the agreement gave Hooters the ability to vacate an arbitral award if Hooters could demonstrate, by a preponderance of the evidence, that the panel exceeded its authority while denying the employee a concomitant right to vacate.¹⁷⁰ The agreement also gave Hooters the ability to cancel or modify the arbitration agreement at any time.¹⁷¹ Testimony from experts declared that the Hooters' agreement involved a significant "deviat[ion] from minimum due process standards," "without a doubt the most

165. 173 F.3d 933 (4th Cir. 1999).

166. *Id.* at 935.

167. *Id.* at 938.

168. *Id.*

169. *Id.* at 938–39.

170. *Id.* at 939.

171. *Id.*

unfair arbitration program” witnessed by one of the experts, and “deficient to the point of illegitimacy.”¹⁷² The court found that Hooters had engaged in bad faith conduct and the agreement was a “sham system unworthy even of the name of arbitration.”¹⁷³

Similarly, in *Jackson v. Payday Financial, LLC*,¹⁷⁴ the Seventh Circuit addressed a provision in a payday loan agreement purporting to require arbitration “conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules.”¹⁷⁵ However, the Cheyenne River Sioux Tribe had no existing arbitration mechanism or consumer dispute rules, and “tribal leadership . . . ha[d] virtually no experience in handling claims made against defendants through private arbitration.”¹⁷⁶ The Seventh Circuit found that the arbitration clause involved a proceeding with “no rules, guidelines, or guarantees of fairness,” and the clause set forth “a process that [was] a sham from stem to stern.”¹⁷⁷ The clause was designed to “lull” the consumer into believing a legitimate, good faith arbitration process existed, but this representation was false.¹⁷⁸ Accordingly, the arbitration clause was not enforceable.¹⁷⁹

Attorneys drafting such extreme “arbitration” clauses on behalf of corporate clients for use in consumer or employment contracts, like the attorneys in the *Hooters* case or *Payday Financial* case, have likely violated multiple legal ethics rules prohibiting fraud and abuse of third parties. Although there have been no reported cases of a disciplinary authority taking action against an attorney under similar circumstances, the existing framework of legal ethics rules would justify such action when an attorney drafts a consumer or employment arbitration clause falling near one end of the spectrum of harshness or one-sidedness discussed above.

This discussion raises a line-drawing problem: at what point should the dividing line exist between ethical and unethical conduct in drafting an arbitration clause? It is difficult to determine exactly how many harsh provisions should be required in a purported arbitration clause to be reasonably classified as fraudulent, misleading conduct. Similarly, it is difficult to tell how harsh one provision can

172. *Id.*

173. *Id.* at 940.

174. 764 F.3d 765 (7th Cir. 2014).

175. *Id.* at 769.

176. *Id.* at 776, 770 (ellipsis in original).

177. *Id.* at 779.

178. *Id.* at 781.

179. *Id.*

be before it should violate ethics rules. For example, a clause with one arguably harsh term requiring the proceeding to take place 100 miles away from the county where the claimant resides may or may not be considered overly harsh or in bad faith. But at some point, which is not clear (maybe 200 miles, 300 miles, or even 1,000 miles away from the claimant's hometown), one can argue that the inclusion of a far-away location for a hearing would be unduly burdensome. Where to draw the line would likely require a consideration of multiple factors, such as the amount at stake in the controversy, the nature of the claim, and the resources of the claimant. Ultimately, any line-drawing for what counts as an unethical clause giving rise to attorney discipline would have to be determined by individual state bar disciplinary authorities. Provided such authorities give clear warnings regarding the ethical boundaries of drafting arbitration clauses, discipline of attorneys would be justified for clauses falling at the extreme end of the spectrum because of the ethical prohibitions against abuse and fraud.

To summarize this Section, pursuant to the first model of attorney discipline proposed by this Article, attorneys should be disciplined if the attorney drafts or implements a "sham" or extremely one-sided arbitration clause. This first model of discipline is mainly grounded in existing, broad ethical duties to refrain from misleading, deceitful, or fraudulent conduct, or duties to refrain from engaging in fraud or abusive conduct with respect to third persons stemming from existing ethics rules, such as Rules 1.2, 4.1, 4.4, and 8.4. A second, more aggressive model of discipline, described in the next Section and based on duties to a tribunal and the role of attorneys as officers of the legal system, would ban an attorney from drafting or implementing a consumer or employment arbitration clause that includes unfair terms or lack of meaningful consent. This second framework is more expansive compared to the first framework because a broader array of arbitration clauses would raise ethical concerns pursuant to this second framework.

B. Attorneys Should Be Disciplined for Drafting Harsh Arbitration Clauses Based on an Attorney's Duties to a Tribunal and an Attorney's Role as an Officer of the Legal System

In the prior Section, this Article describes one model of attorney discipline, whereby a lawyer can be subject to discipline for fraud for drafting extreme, "sham" "arbitration" clauses, although there has never been a reported case of such discipline. This Section, based on the role of attorneys as officers of the legal system and their duties to

tribunals, sets forth a second framework to analyze the drafting of arbitration clauses. The second framework would prohibit an attorney from drafting or implementing a consumer or employment arbitration clause containing any single unfair term or involving a lack of meaningful consent. While the first model imposes discipline in extreme circumstances where an arbitration clause contains multiple harsh terms and falls at one extreme of the spectrum of harshness discussed above, the second model would impose discipline for using a single harsh provision within an arbitration clause. The principles underpinning this second framework are already recognized in existing ethics rules. However, disciplinary authorities can develop more explicit ethics standards based on these principles in order to clarify an attorney's duties under this second framework. This subsection first explores the principles underlying existing ethical duties related to tribunals and then recommends an extension of these principles to the drafting of arbitration clauses.

Several existing rules address the topic of fairness toward a tribunal. For example, Model Rule 3.4 addresses "fair competition" in the adversarial setting of a tribunal.¹⁸⁰ Such fairness "is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."¹⁸¹ In prohibiting obstruction or destruction of evidence, Rule 3.4 requires that parties have access to evidence and diligently comply with discovery requests. Rule 3.4 appears to presume a certain level of available discovery as part of a fair process before a tribunal. Similarly, to promote fairness, evidence cannot be falsified, and it is unethical to assist a witness to testify falsely.¹⁸² Also, to help promote fairness during the proceedings and ensure that the tribunal is not misled, Rule 3.4 prohibits an attorney from making certain statements or making improper allusions during a proceeding, such as statements about inadmissible or irrelevant evidence.¹⁸³ Rule 3.4 requires attorneys to engage in fair play before a court or arbitral tribunal.

Building on the duties in Rule 3.4, Rule 3.5 is designed to help promote the "impartiality and decorum" of a court or arbitral tribunal. The Rule strives to eliminate improper influences that could compromise the fairness of a tribunal. For example, the Rule broadly

180. MODEL RULES OF PROF'L CONDUCT r. 3.4 cmt. 1 (AM. BAR ASS'N 1983).

181. *Id.*

182. *Id.* r. 3.4.

183. *Id.*

bans all *ex parte* communications, even if seemingly innocent or unrelated to the proceeding, in order to help ensure that the tribunal's decision-making process is not tainted in any manner.¹⁸⁴ Thus, even if an attorney has a seemingly innocent conversation with a jury member about a local sports team, which is completely unrelated to the adjudicative proceeding, the attorney is subject to discipline. Although such a conversation would not directly harm or interfere with the adjudicative process, the Rule still bans the exchange in order to eliminate the mere risk that a seemingly innocent conversation can blossom into other conversation that could interfere with the fairness of proceedings, or the risk that the exchange can give rise to an appearance of impropriety and undermine confidence in the legal system. Additionally, to help protect the fairness of the tribunal, Rule 3.5 bans any conduct designed or "intended to disrupt the tribunal."¹⁸⁵ Rule 3.5 contains broad duties to help ensure fairness during court or arbitral proceedings.

Rule 3.3 "sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process."¹⁸⁶ More specifically, Rule 3.3 imposes special duties on the legal profession to ensure that the adjudicative process before a court or arbitral tribunal is not compromised in any manner through false statements of fact or law that could undermine the process of resolving a dispute.¹⁸⁷ If improper evidence or statements are provided to the tribunal, Rule 3.3 requires attorneys to take affirmative, remedial, corrective action.¹⁸⁸

184. *Id.* r. 3.5.

185. *Id.*

186. *Id.* r. 3.3 cmt. 2. There appears to be some tension between the comment and the rule in Rule 3.3. Rule 3.3 sets forth duties that apply to tribunals, which include binding arbitration proceedings. Rule 3.3's comments recognize the role of an attorney as an "officer of the court" as giving rise to these special duties applicable to all tribunals. Although not explicitly stated in the comments or rule, one can justify duties to an arbitral tribunal based on duties of attorneys as officers of the court in the following manner. Arbitration, although viewed as private, is part of the broader legal system involving courts. Courts have a special facilitating and supervisory, although limited, role with respect to arbitration proceedings pursuant to the FAA, and awards from an arbitration proceeding can be entered as a final judgment in court pursuant to the FAA. Also, arbitration helps alleviate the burdens of a court system and thereby supports the court system. Therefore, both arbitration proceedings and court proceedings can be viewed as integral parts of our legal system. In any event, the expansive definition of a tribunal ensures that all duties towards a court also apply to arbitration proceedings. Attorneys also serve as officers and guardians of the administration of justice in a broader legal system encompassing courts, administrative tribunals, and arbitration proceedings.

187. *Id.* r. 3.3.

188. *Id.*

These rules, which are designed to help promote the integrity and fairness of proceedings before a tribunal and which recognize the special role of attorneys in the administration of justice, tend to focus on regulating the conduct of an attorney with respect to a *pre-existing* tribunal. In other words, these ethics rules appear to presume the existence of a tribunal, with an established, already-existing framework of procedural rules that are presumptively fair. The ethics rules embody protective principles to prevent attorneys from trying to corrupt the fairness of a tribunal. The focus of these ethics rules regarding a tribunal is on the attorney and the possibility that an attorney could engage in improper behavior with respect to an existing tribunal with its established rules.

When ethics rules regarding fairness before a tribunal were first adopted, beginning with the earliest ethics codes, the definition of a tribunal did not explicitly include private arbitration proceedings.¹⁸⁹ These ethical obligations regarding tribunals were originally developed and drafted primarily, if not exclusively, for the litigation context. Since the 1930s and to the present day, the procedural rules of court tribunals, at least for the federal courts and likely for any state courts following the federal system, have been relatively stable over time.¹⁹⁰ In more recent decades, federal procedural court rules have developed through a democratic, transparent rule-making process, which helps ensure a fair playing field comporting with due process.¹⁹¹ In other words, ethical duties regarding judicial or court tribunals are drafted against the backdrop of existing government-created tribunals with their own established, relatively stable procedural rules comporting with constitutional due process.

A significant difference between today's legal system, as compared to the legal system of forty or fifty years ago, is that the rules of a tribunal are no longer stable or fair, nor are they established by

189. As explained above regarding the evolution of ethics standards, beginning with the 1908 Canons of Ethics and continuing to the present day, the earliest ABA ethics codes addressed several duties designed to promote the fairness in a tribunal. *See supra* Section III.

190. Although rule changes routinely occur in the federal court civil justice system, the existing federal procedural rules are mainly based on an overall framework dating back to 1938 and involving core features like liberal pleading, broad discovery, and liberal joinder.

191. For a helpful description of the transparent, democratic, multi-stage review process for amending a procedural rule for the federal courts, *see* James C. Duff, *How the Rulemaking Process Works, Overview for the Bench, Bar, and Public*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works/overview-bench-bar-public.aspx#summary-procedures> [https://perma.cc/X29H-3YZH] (last visited Dec. 20, 2018).

democratic processes. An attorney today can create his own tribunals virtually out of thin air and with a broad range of procedural rules through the drafting of an arbitration clause. Ethics rules in the past mainly focused on an attorney's interactions with already-established tribunals, and the existing rules of a government-created tribunal were mainly taken as a given. Today, attorneys can play both the role of an actor within a tribunal and the creator of that tribunal. Like never before, attorneys are now actively and more directly involved in shaping and creating tribunals. Unfortunately, the ABA's ethics codes do not explicitly address the ethical duties of attorneys in designing tribunals or drafting arbitration agreements. Nonetheless, the values or principles found in existing rules can provide some guidance in developing rules to deal with the drafting of arbitration clauses.

As officers of the legal system, attorneys have special obligations or duties designed to uphold the integrity and fairness of the tribunal. As noted above, after amendments from the Ethics 2000 Commission, the term "tribunal" now includes arbitration proceedings. These duties to the fair functioning of existing arbitral or judicial tribunals include:

- to take remedial measures if their clients provide false testimony or evidence to the existing arbitral or judicial tribunal;¹⁹²
- to disclose adverse precedent to the existing arbitral or judicial tribunal not disclosed by the opposing party;¹⁹³
- to refrain from offering false evidence to the existing arbitral or judicial tribunal;¹⁹⁴
- to avoid the destruction or alteration of evidence in connection with a proceeding before an existing arbitral or judicial tribunal;¹⁹⁵
- to refrain from asserting personal knowledge of facts at issue during a proceeding before an existing arbitral or judicial tribunal;¹⁹⁶ and
- to promote the impartiality and decorum of an existing arbitral or judicial tribunal by avoiding ex parte communications,

192. *Id.* r. 3.3.

193. *Id.*

194. *Id.*

195. *Id.* r. 3.4.

196. *Id.*

improper influence of a decisionmaker, and conduct disruptive to the existing tribunal.¹⁹⁷

These ethics rules prohibit an attorney from interfering with or undermining the fairness and integrity of an existing arbitral or judicial tribunal. It would make no sense for an attorney to escape ethical discipline by interfering with the fairness of an arbitral tribunal at the time of the tribunal's creation by drafting harsh, one-sided arbitration procedures. The principles or values of existing ethics rules requiring fairness during a court or arbitration proceeding should apply *a priori* to an attorney's initial design of a tribunal. If it is unethical to interfere with or undermine the fairness of an arbitration tribunal while a proceeding is ongoing, it should similarly be unethical to interfere with or undermine the fairness of an arbitration tribunal through the design of harsh procedures. For example, if it is misconduct pursuant to Rule 3.4 to obstruct access to evidence during an arbitration proceeding, it should similarly be misconduct to design an arbitration tribunal that frustrates access to evidence by imposing severe discovery limits or strict confidentiality terms that prevent a claimant from obtaining supporting witnesses.¹⁹⁸ Similarly, if the ethics rules broadly prohibit any conduct that is intended to be disruptive of the functioning of the arbitral tribunal during an arbitration proceeding, that same concern for fairness should animate an ethics rule that broadly prohibits any conduct at the creation of the tribunal that is intended to disrupt the tribunal's functioning. Such conduct includes requiring consumers or employees to travel to an inconvenient location across the country for a hearing, imposing oppressive fees, or prohibiting a claimant from submitting certain testimony necessary to prove a claim such as the testimony of an expert witness. The same principles underpinning existing rules regarding conduct before a tribunal should apply to the creation and design of tribunals.

197. *Id.* r. 3.5.

198. In a dissent in one case, Justice Kagan recognized an analogous concept: that one can frustrate the fairness of an arbitration proceeding with the creation of unfair pre-hearing arbitration rules (such as high upfront forum fees or short statutes of limitations), unfair post-hearing arbitration rules (such as prohibiting the arbitrator from granting meaningful relief after a hearing takes place), and unfair arbitration rules for the hearing itself (such as prohibiting economic expert testimony in an anti-trust case). See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 241–42 (2013) (Kagan, J., dissenting). Similarly, an attorney can undermine the fairness of a tribunal through the attorney's unfair actions in presenting or defending a claim during an arbitration proceeding, as well as by drafting harsh, one-sided arbitration provisions.

The previous Section of this Article proposed that it is fraudulent and unethical for an attorney to classify as “arbitration” a purported dispute resolution agreement that falls at the extreme end of a spectrum of harshness. However, under the second framework described in this Section, which is based on the role of attorneys as officers of the legal system, any attorney conduct that could undermine the fairness or integrity of arbitration proceedings should be viewed as an unethical, unfair, unjust interference with the administration of justice.¹⁹⁹ Within this framework, an attorney who drafts an arbitration clause with a severely curtailed limitations period makes it challenging for claimants to assert successful claims and is thus engaging in conduct that is designed or intended to undermine the fairness of the proceedings. Thus, the attorney should be disciplined under the spirit, if not the letter of, Model Rule 3.5(d), which prohibits attorney conduct intended to disrupt arbitral or judicial tribunals.

Furthermore, Rule 8.4, one of the ABA’s core foundational ethics rules, broadly defines attorney misconduct as any “conduct that is prejudicial to the administration of justice.” Attorneys should avoid conduct that undermines or tarnishes the administration of the justice system, or which can undermine public confidence in the legal system. Under the second framework presented in this Section, an attorney who designs an arbitration clause with a harsh term designed to tilt the playing field and provide an advantage to a corporate client directly and prejudicially interferes with the administration of justice.

To summarize, the principles of fairness underpinning various ethics rules like 3.3, 3.4, 3.5, and 8.4 can form the basis or justification for new rules requiring attorneys to draft fair consumer or employment arbitration clauses. A state bar may be able to bring a disciplinary proceeding for drafting unfair arbitration clauses based on these existing principles, but to give fair notice to attorneys, state bars should consider developing more explicit rules addressing the drafting of harsh arbitration clauses. Furthermore, in addition to requiring fair terms in arbitration clauses, these principles of fairness should also be interpreted to require attorneys to undertake reasonable steps to ensure that both parties provide meaningful, voluntary

199. This second model, which recognizes that the inclusion of any harsh term is prejudicial, is consistent with the view of the FAA as a binary, “on-off switch,” pursuant to which an arbitration clause is either fully enforceable, or not enforceable at all if it contains a single harsh term. *See generally* Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 *CARDOZO J. CONFLICT RESOL.* 653 (2018).

consent. Meaningful consent could be achieved through a combination of disclosures about the arbitration process and an opt-in choice for consumer and employee arbitration agreements, whereby consumers and employees would have the option to reject an arbitration clause while at the same time accepting employment or purchasing a product or service.²⁰⁰ If a consumer or employee is compelled to arbitrate where no meaningful consent exists, the public may view the traditional courts as only available and open for the benefit of corporate America. Being compelled to arbitrate where no meaningful, voluntary consent exists can undermine public confidence in the legal system and can be prejudicial to the administration of justice, in violation of Model Rule 8.4. Ethically, lawyers should not be involved in conduct that can undermine trust and public confidence in the legal system.

Admittedly, this novel interpretation of ethics rules to ban the inclusion of any harsh or one-sided term within consumer or employee arbitration agreements is broader in nature compared to the first model discussed above. Also, both of these models would bring about a sea change in curtailing the abuse of arbitration in the consumer and employment settings.²⁰¹ However, the currents already

200. Cf. Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195 (2017) (exploring how to promote meaningful consent with consumer or employee arbitration agreements).

201. Using state ethics rules in this way to impact arbitration would appear to conflict with the Supreme Court's strong affinity for arbitration and its FAA preemption rulings. If these ethics rules are applied as proposed above, corporate interests will likely argue that the FAA preempts application of these ethics rules. However, preemption should not be a strong concern. Disciplining an attorney for drafting an arbitration clause with heavy-handed, oppressive terms is fully consistent with the fundamental attributes of arbitration under the FAA, which is supposed to involve a good faith, mutual undertaking to use fair procedures to resolve disputes. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (holding that FAA preemption applies when a state law "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA"). Furthermore, it is well-established that attorney discipline is a matter for the states. See *Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers."). Thus, federal preemption should not present a problem for implementing the ethics framework suggested by this Article.

appear to be shifting. There has been a stronger backlash against arbitration in recent years, resulting in part from the #MeToo movement;²⁰² bipartisan bills in Congress to ban arbitration of sexual harassment claims;²⁰³ a startling bipartisan call from every state attorney general to ban arbitration of sexual harassment claims;²⁰⁴ a resolution from the ABA House calling for law firms not to require employees to arbitrate sexual harassment claims;²⁰⁵ and major law firms dropping forced arbitration clauses from employment contracts after public pressure.²⁰⁶ In this current climate, perhaps some states would be willing to implement one or both of the suggested frameworks above.

V. CONCLUSION

Through the explosion of arbitration agreements in all aspects of American society, a seismic shift has occurred in both the legal system and in the role of attorneys designing tribunals. No longer is an attorney solely an advocate for his or her client within the framework of an existing court tribunal, where procedural rules are developed to satisfy constitutional due process through a democratic rule-making process. And no longer is an attorney solely an officer of an existing court system created by and for the people. Now, attorneys are designing from scratch private, binding arbitral tribunals. For many consumers or employees, such tribunals provide the only avenue for seeking any justice for a wide variety of claims. The traditional judicial tribunals are no longer accessible to many because of forced arbitration clauses, through which attorneys have broad discretion in designing arbitral tribunals on behalf of corporate clients.

202. See Gretchen Carlson, *The Supreme Court Tried to End #MeToo. Here's How We're Fighting Back*, FORTUNE (May 31, 2018), <http://fortune.com/2018/05/31/gretchen-carlson-supreme-court-ruling-arbitration-metoo> [https://perma.cc/525S-SWGS] (last visited Aug. 13, 2018).

203. See Ending Forced Arbitration of Sexual Harassment Act of 2017, S.2203, 115th Cong. (2017-2018); Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R.4734, 115th Cong. (2017-2018).

204. See Emily Peck, *All 50 State AGs Demand An End To 'Culture Of Silence' Surrounding Sexual Harassment*, HUFFINGTON POST (Feb. 13, 2018), https://www.huffingtonpost.com/entry/attorneys-general-forcedarbitration_us_5a83484fe4b0cf06751f5abe [https://perma.cc/2BNM-5EDK] (last visited Dec. 20, 2018).

205. See AM. BAR ASS'N, H.D. RESOLUTION 300 (Aug. 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/300.pdf> [https://perma.cc/GK7B-29QG].

206. See Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, ABA J. (June 2018), http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses [https://perma.cc/6KZC-MS4D] (last visited Dec. 20, 2018).

The preamble of the ABA's first ethics code, the 1908 Canons of Ethics, calls to mind the purpose of ethics rules and the role of attorneys in American society:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.²⁰⁷

Today, because of the growth of arbitration, the main system for "establishing and dispensing Justice" for millions of American consumers and employees is no longer the courts. Therefore, the ethics rules should expand to take into account arbitration as the increasingly exclusive mode for the delivery of justice.

After a few decades, the 1908 Canons of Ethics were eventually replaced and updated with the ABA's 1969 Model Code of Professional Responsibility. The preface to the 1969 Model Code recognized that the attorney's role should include a critical self-examination and an examination of how the legal profession's activities can impact the welfare of society:

Before the Bar can function at all as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationships of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era. Largely in that spirit, [the ABA has developed new updates through the adoption of the 1969 Model Code.]²⁰⁸

Legal ethics rules in America have evolved and been shaped by a periodic re-evaluation of the "changed and changing conditions in our legal system" and American society.²⁰⁹ Given the modern realities of

207. CANONS OF ETHICS Preamble (AM. BAR ASS'N 1908); see Altman, *supra* note 68.

208. MODEL CODE OF PROF'L RESPONSIBILITY Preface (AM. BAR ASS'N 1969).

209. *Id.*

the shift that has occurred in our legal system through the growth of arbitration and a shrinking traditional court system, legal ethics rules must evolve to address the role and duties of attorneys in creating and designing arbitration tribunals.

