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LYING, STEALING, AND CHEATING: THE ROLE OF ARBITRATORS AS ETHICS ENFORCERS

*Kristen M. Blankley**

I. INTRODUCTION

Q: How can you tell if an attorney is about to lie? A: His lips move.

Upon seeing an elderly lady for the drafting of her will, the attorney charged her \$100. She gave him a \$100 bill, not noticing that it was stuck to another \$100 bill. On seeing the two bills stuck together, the ethical question came to the attorney's mind: "Do I tell my partner?"

Q: The tooth fairy, an honest lawyer, and an expensive, dishonest lawyer are in the same room. There is a \$500 bill on a table in the room. When they leave, the money is gone. Who took it? A: Since there is no such thing as the tooth fairy or an honest lawyer, the answer is obvious.

The National Institutes of Health have announced that they will no longer be using rats for medical experimentation. In their place, they will use attorneys. They have given three reasons for this decision: (1) There are now more attorneys than there are rats. (2) The medical researchers don't become as emotionally attached to the attorneys as they did to the rats. (3) No matter how hard you try, there are some things that rats won't do.¹

"Jokes" such as these regarding lawyers are commonplace and easy to find. A quick search of the internet will uncover dozens of websites with hundreds of lawyer jokes.² Although lawyers are not the only professionals subject to such joking, the public perception of lawyers as willing to lie,

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¹ These lawyer "jokes" were all taken from the following website: 185 LAWYER JOKES, <http://www.stromer.com/jokes/185jokes.html> (last visited Mar. 22, 2014).

² See, e.g., Douglas Adams, *Lawyer Jokes: A Collection*, <http://people.ku.edu/~dadams/lawyers.htm> (last updated Nov. 26, 2001); Peter Tiersma, *Lawyer Jokes: Truth and Nonsense About the Legal Profession*, LANGUAGEANDLAW.ORG, <http://www.languageandlaw.org/JOKES.HTM> (last visited Mar. 22, 2014).

cheat, steal, and live beyond ethical boundaries is troubling and damaging to the profession.³ But as they say, all jokes are based on a kernel of truth.

All joking aside, the availability of an honest, reputable, and impartial tribunal for dispute resolution is essential to build public confidence and trust. Today's American legal system, for the most part, carries the imprimatur of justice and bestows a relative level of confidence on those who seek to resolve disputes in a lawful manner.⁴ Without such confidence, a system of revenge and vigilante justice would likely have become the norm.

The American justice system has certain hallmarks that help foster this sense of justice and give ease to participants that their disputes will be handled in a fair manner. Judges are respected individuals who are either appointed or elected who serve outside of the political system.⁵ Courts and court filings are public and open to the press, which helps ensure the transparency of the process.⁶ Juries of peers must engage in group decision-making to arrive at a consensus or supermajority in order to issue a verdict in a case.⁷ Lawyers must certify that they are acting ethically when filing court documents,⁸ and judges have the ability to sanction lawyers, parties, and witnesses for engaging in wrongdoing.⁹ In addition, judges are required to abide by certain ethical codes¹⁰ and their reasoned opinions (for the most part) clearly show the judges' reasoning in those situations.

The arbitral forum, in contrast, does not command the same type of public trust as the formal court system. Many types of arbitration are conducted outside of the public eye in either confidential proceedings or simply nonpublic proceedings.¹¹ Naysayers often describe arbitration as

³ See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 806-07 (1998).

⁴ See MODEL RULES OF PROF'L CONDUCT pmb1. (2012).

⁵ See generally Peter Paul Olszewski, Sr., *Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1, 4 (2004). Although many state level judges are elected, and the states have differing laws regarding whether those judges may campaign using reference to their political parties, once these people become judges, they are expected to serve outside and "above" the political system.

⁶ See generally *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (discussing the shared right between the public and the accused to a public trial).

⁷ See *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972).

⁸ FED. R. CIV. P. 11(b).

⁹ FED. R. CIV. P. 11(c).

¹⁰ See generally MODEL CODE OF JUDICIAL CONDUCT (2010).

¹¹ See Stefano Azzali, *Confidentiality vs. Transparency in Commercial Arbitration: A False Contradiction to Overcome*, CTR. FOR TRANSNATIONAL LITIGATION, ARBITRATION AND COMMERCIAL LAW (Dec. 28, 2012), <http://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/>. Many arbitrations are confidential because the parties agreed to hold the proceedings in confidence. For some types of cases, such as labor cases, reporters of arbitral awards exist. For many other types of cases, such as consumer cases and business cases, no such reporters exist, and it becomes difficult to locate arbitration awards.

“secret,” and imply that rampant bias and other horrors occur behind the closed doors of the arbitration tribunals.¹² Arbitration has not been immune from criticism, particularly from scholars,¹³ public advocacy groups,¹⁴ and legislators,¹⁵ among others.¹⁶ Although this author has largely been a supporter of the arbitration process,¹⁷ I have only supported the process when that process is fair and conducted in an ethical manner.

Previously, I have written articles on arbitration ethics, uncovering that the arbitration process is not only unregulated but also free from any state oversight.¹⁸ The ethical landscape for arbitration becomes even more troublesome given the rise in the application of judicial immunity for all participants in the arbitral forum, including attorneys, parties, and witnesses.¹⁹ I previously argued that certain legal changes should be implemented in order to allow for greater oversight of the arbitral forum to police unethical behavior.²⁰ These changes included extending criminal

¹² See, e.g., Zachary Gima et al., *Forced Arbitration: Unfair and Everywhere*, PUB. CITIZEN 2 (Sept. 14, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (describing arbitration as “secret” and unfair, particularly to consumers).

¹³ See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249 (2009); David Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 1 BERKELEY J. EMP. & LAB. L. 1, 3 (2003); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 254 (2007); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 (2005).

¹⁴ See Stempel, *supra* note 13, at 254–55.

¹⁵ See, e.g., Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 401 (1992) (stating that many states have precluded enforcement of arbitration agreements in certain contracts).

¹⁶ See, e.g., Sternlight, *supra* note 13, at 1633 (noting the criticism of arbitration by journalists).

¹⁷ See, e.g., Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317, 333 (2011) (explaining that parties who employ the same individual as a mediator and arbitrator may be less candid during mediation for fear of confidentiality breaches); Kristen M. Blankley, *Did the Arbitrator “Sneeze”?—Do Federal Courts Have Jurisdiction over “Interlocutory” Awards in Class Action Arbitrations?*, 34 VT. L. REV. 493, 494 (2010) (arguing for judges to not issue interlocutory appeals when dealing with arbitrations); Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) be Resolved by Class-Action Arbitration*, 20 OHIO ST. J. ON DISP. RESOL. 451, 453 (2005) (arguing that arbitrators should hear class action claims); Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1079 (2009) (finding empirical evidence that arbitration benefits consumers).

¹⁸ Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 U. KAN. L. REV. 925, 932 (2012) (noting that ethical misconduct in arbitral forums becomes increasingly possible without criminal sanctions) [hereinafter Blankley, *Arbitration Ethics I*].

¹⁹ Kristen M. Blankley, *Advancements in Arbitral Immunity and Judicial Review of Arbitral Awards Create Ethical Loopholes in Arbitration* (forthcoming 2013) (manuscript at 2) [hereinafter Blankley, *Arbitration Ethics II*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239182.

²⁰ Blankley, *Arbitration Ethics I*, *supra* note 18, at 929; Blankley, *Arbitration Ethics II*, *supra* note 19 (manuscript at 3).

laws regarding the administration of justice to the arbitral forum²¹ and conforming the standard of review for participant fraud to the same standard as every other grounds for review under the Federal Arbitration Act (FAA).²²

Although I still support advocating for these systematic changes at the legislative and judicial level, my previous research only scratched the surface for another type of ethics enforcement in the arbitral forum—the arbitrators themselves. While not explicit in my previous research, arbitrators can and should be the first line of defense in dealing with participant misconduct.²³ In fact, arbitrators are already equipped with the tools for enforcing their own tribunals, both by their inherent powers as well as by rules of provider organizations.²⁴ My previous writings mistakenly presumed that arbitrators have and should execute these powers to ensure a fair tribunal.²⁵ To date, however, no scholarship has examined the arbitrator's ability to regulate and police the conduct of participants, especially to correct for ethical shortcomings. This Article seeks to fill this void in the scholarship.

Placing greater emphasis on the arbitrator's role as ethics enforcer comports with our deeply held notions of due process and fundamental fairness—both of which are judicially required of the arbitral tribunal.²⁶ As

²¹ Blankley, *Arbitration Ethics I*, *supra* note 18, at 948 (“[E]very state should update its law to include arbitration within the ambit of these criminal laws.”).

²² Blankley, *Arbitration Ethics II*, *supra* note 19 (manuscript at 3) (noting that currently, the standard for vacatur for “fraud” is unreasonably higher than the standard for vacatur under any other grounds for review).

²³ See Blankley, *Arbitration Ethics I*, *supra* note 18, at 926; Blankley, *Arbitration Ethics II*, *supra* note 19 (manuscript at 2).

²⁴ See, e.g., INT’L CHAMBER OF COMMERCE RULES OF ARBITRATION (2012), available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/>.

²⁵ See, e.g., Blankley, *Arbitration Ethics I*, *supra* note 18, at 974–75.

²⁶ See, e.g., *Tempo Shane Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (noting that an arbitral award is subject to vacatur in cases in which the arbitral procedure did not comport with fundamental fairness); *Star Ins. Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, No. 13-13807, 2013 WL 5182745, at *7 (E.D. Mich. Sept. 12, 2013) (finding that fundamental fairness was not present in an arbitral process in which ex parte communications with arbitrators was happening); *Wolf v. Sprenger + Lang, P.L.L.C.*, 70 A.3d 225, 237 (D.C. Cir. 2013) (“Misconduct under section 10(a)(3) of the FAA usually involves the exclusion of pertinent and material evidence that deprives a party of fundamental fairness.”); *Senra v. Town of Smithfield*, 715 F.3d 34, 38–40 (1st Cir. 2013) (discussing the due process rights for an employee in a post-termination arbitration). In addition, some arbitral providers have their own “Due Process Protocols” to govern the proceedings. The American Arbitration Association, for example, has at least three Due Process Protocols for consumer cases, employment cases, and healthcare cases. See generally AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL (2012), available at www.adr.org; AM. ARBITRATION ASS’N, EMPLOYMENT DUE PROCESS PROTOCOL (2011), available at www.adr.org; AM. ARBITRATION ASS’N, HEALTHCARE DUE PROCESS PROTOCOL (2011), available at www.adr.org.

the Supreme Court has repeatedly stated, the arbitral forum is not a waiver of substantive rights, but merely a change in the forum determining whether those rights have been violated.²⁷ If the arbitral forum is intended to be a substitute for the judicial forum, then it must be fair and free from misconduct. Given the lack of institutional controls over the arbitral forum, arbitrators appear to be the first and last resort to protect participants and ensure a fair forum. The arbitrator as “ethics enforcer” may be a new and uncomfortable role, especially considering that arbitrators are hired by the parties and may stand to earn a significant amount of money in present and future assignments from the parties. Despite the potential (and perhaps implicit) conflict, due process and fundamental fairness require arbitrators to stand above the parties, respond to parties’ concerns, and be vigilant to raise concerns *sua sponte*. Anything less would jeopardize the integrity of arbitration and further erode public confidence in the process.

This Article will begin in Part II with a short description of the expansion of judicial immunity, which is one of the biggest motivating reasons for concern for arbitral ethics. If judicial immunity were not extended to the arbitral forum, parties who fall victim to unethical practices in the arbitral forum might have recourse. Immunity for arbitration participants, then, creates a pressing need for other reform. Reform, as noted in Part III, could be achieved through changes to the law—particularly by expanding the criminal laws dealing with crimes against the administration of justice to the arbitral forum or *ever so slightly* loosening the standards of *vacatur* in the event of unethical conduct, or both. Recognizing that these legal reforms are unlikely, Part IV of this Article examines the arbitrator’s role as the ethics enforcer. Part V will consider the historical role of arbitrators in policing the conduct within their tribunals, as well as examine the rules and procedures of the largest arbitration provider organizations. Arbitrators, indeed, should be the first line of defense in dealing with allegations of unethical conduct—as well as being vigilant themselves during their tribunal. Realistically speaking, arbitrators are the only true ethics enforcers in the arbitral forum, a role that they rightly deserve. Without arbitrators taking on this role, the integrity of the arbitration process will be in jeopardy. This Article concludes by acknowledging the role of arbitrator as ethics enforcer while still urging for legal change as an ethics “backstop.”

www.adr.org.

²⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (dealing with claims under the Age Discrimination in Employment Act); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (dealing with claims under the Securities Exchange Act).

II. HOW ARBITRAL IMMUNITY CHANGES THE ETHICS LANDSCAPE

Talking about arbitral immunity at the beginning of the discussion feels almost counterintuitive because it feels as if the discussion is starting at the end. After all, arbitral immunity is a concept that generally figures into a post-arbitration discussion, as opposed to a discussion about unethical conduct occurring during an arbitration. The application of the immunity doctrine, however, to arbitration has dramatically changed the ethical landscape of the arbitral forum in unexpected ways. Although the extension of the immunity doctrine, described more fully below, rightfully should be extended to the arbitral forum, the immunity doctrine frustrates any effort to enforce ethical violations made by arbitration participants. If the process cannot be managed in an ethical manner, then arbitration runs the risk of being a forum lacking due process controls.

Essentially, the concept of absolute,²⁸ sometimes called “judicial,” immunity shields judicial participants (judges, lawyers, witnesses, parties, etc.) from later suit based on comments made and actions taken in the judicial forum.²⁹ The classic application of absolute immunity applies to a suit for defamation based on statements made during a judicial proceeding.³⁰ This “classic” definition of absolute immunity has been extended to any number of other tort claims “sounding” in defamation,³¹

²⁸ Note that the concept of absolute immunity also applies in the legislative and other governmental forums. See 62 C.J.S. *Municipal Corporations* § 500 (2010); 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 133 (2010); Charles W. Johnson IV, *The Doctrine of Official Immunity: An Unnecessary Intrusion into Speech or Debate Clause Jurisprudence*, 43 CATH. U. L. REV. 535, 535 (1994); Jeanine M. Pollitt, *Legislative Immunity and City Councils: Spallone v. United States*, 110 S. Ct. 625 (1990), 13 HARV. J.L. & PUB. POL’Y 1049, 1050 (1990).

²⁹ See, e.g., *Kidd v. Superior Nursing Care, Inc.*, No. 08-504 (JAP), 2008 WL 2945960, at *2 (D.N.J. July 28, 2008) (“A statement made in the course of judicial, administrative, or legislative proceedings is absolutely privileged and wholly immune from liability.”) (citation omitted) (internal quotation marks omitted); *Schultea v. City of Patton Vill.*, H-06-0666, 2006 WL 3063457, at *3 (S.D. Tex. Oct. 27, 2006) (“Statements made in the due course of a quasi-judicial proceeding cannot serve as the basis of a civil action for defamation regardless of the negligence or malice with which they were made.”) (citation omitted) (internal quotation marks omitted).

³⁰ See, e.g., *Kidd*, 2008 WL 2945960, at *2.

³¹ *Mahoney & Hagberg v. Newgard*, 712 N.W.2d 215, 219 (Minn. Ct. App. 2006) (“Even if the claim is not for defamation, if it sounds in defamation, absolute immunity applies. The judicial immunity rule is not to be ‘scuttled’ by pleadings which allege that the wrongful acts resulted from a conspiracy rather than from defamation.”) (citation omitted) (internal quotation marks omitted). The *Mahoney & Hagberg* court noted that, most often, the defense of absolute immunity arises in the context of a defamation claim. *Id.* (“Respondent claims that judicial immunity applies only to defamation claims. Traditionally, judicial immunity has applied to protect participants in the judicial process against claims of defamation. [D]efamatory matter published in the due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation[.] In Minnesota, nearly all

such as intentional infliction of emotional distress, unfair competition, conspiracy, and other similar torts.³² Living up to the title of “absolute,” this immunity applies regardless of the speaker’s intent³³ and whether the statement is written or oral.³⁴ Generally, the only limitations on the privilege are (1) that the statement occurs within a protected proceeding (such as a court or legislative proceeding), and (2) that the statement is pertinent to the claims brought or relief sought.³⁵

Perhaps unsurprisingly, absolute immunity has been applied to the arbitral forum. In many ways, the arbitral forum is similar to the litigation forum, with both proceedings involving a neutral, third-party decision-maker making a binding decision after a presentation of evidence.³⁶ The few cases dealing directly with this issue have all decided to extend immunity to arbitration. Although the cases are factually different, the courts rely on similar reasoning for this application of the law to this new territory.³⁷ These courts rightly extend the doctrine of immunity to arbitration for the following reasons (again, with the caveat that institutional controls can ensure that arbitration is a fundamentally fair forum):

assertions of judicial immunity involve underlying claims for defamation.”) (citations omitted) (internal quotation marks omitted) (citing *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* § 114, at 816–17 (5th ed. 1984)).

³² *See* *Asset Mgmts. Sys., Inc. v. White, Zuckerman, Warsavsky & Luna*, No. B143168, 2002 WL 724925, at *8–9 (Cal. Ct. App. April 25, 2002) (dismissing all of the causes of action on the basis of immunity, including the causes of action for abuse of process and unfair business practice).

³³ *Soliz v. Williams*, 88 Cal. Rptr. 2d 184, 192 (Cal. Ct. App. 1999) (“However, the immunity from a suit for damages at issue is not dependent on the severity of the misconduct.”).

³⁴ *Gallegos v. Escalon*, 993 S.W.2d 422, 424 (Tex. Ct. App. 1999) (“All communications, oral or written, made in the due course of a judicial proceeding are absolutely privileged.”).

³⁵ *Harmon v. Bennett*, 103 Wash. App. 1045 (2000) (“Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief.”) (citing *McNeal v. Allen*, 621 P.2d 1285 (Wash. 1980)). Off-hand comments not fitting this definition are not protected. *See Post v. Mendel*, 507 A.2d 351, 356 (Pa. 1986) (holding that a letter sent by an attorney was not privileged because it was not relevant to the redress or relief sought by the client).

³⁶ *Stephen J. Ware, Similarities Between Arbitration and Bankruptcy Litigation*, 11 NEV. L.J. 436, 446–47 (2011).

³⁷ *Kidwell v. General Motors Corp.*, 975 So. 2d 503, 504 (Fla. Dist. Ct. App. 2007) (“[W]e agree with the trial court that Nichols had immunity for his alleged wrongful actions because they occurred during an arbitration proceeding.”) (involving a dispute over a purchased pickup truck); *Bushell v. Caterpillar, Inc.*, 683 N.E.2d 1286, 1289 (Ill. App. Ct. 1997) (involving an employment grievance); *Odyniec v. Schneider*, 588 A.2d 786, 793 (Md. 1991) (involving a claim against an expert witness for statements made in a medical malpractice arbitration).

A. Promotion of Candor Within the Tribunal

Perhaps the single most important reason for the doctrine of immunity is the policy of promoting candor within the tribunal. In litigation and arbitration alike, the third-party neutral must make decisions based on evidence presented before the tribunal.³⁸ Decision-makers must sort through conflicting evidence in order to determine the truth of what happened in the past. The immunity doctrine aids these decision-makers in finding the truth by encouraging people to come forth to the tribunal with their evidence.³⁹ The ability to encourage parties to speak certainly also promotes fundamental fairness, especially considering that promoting candor helps promote relevant, truthful statements.

A dispute resolution forum without immunity from suit for statements made within it would chill speech. People would be less willing to come forth with their evidence if they potentially faced civil repercussion initiated by the other side, simply for appearing in court and giving testimony.⁴⁰ The rule, while protecting a certain amount of civil harm done to individuals within the fora, encourages speech and helps promote the truth-seeking function of the tribunal.⁴¹ For those claims pursued in the public forums (such as court), the criminal laws regarding perjury, tampering, and obstruction of justice serve as a valuable backstop to deter wrongdoing and prosecute those who engage in criminal conduct injurious to the process.⁴²

³⁸ See 1 JAY E. GREINIG, *ALTERNATIVE DISPUTE RESOLUTION* § 8:41 (3d ed. 2012). Unlike judges, arbitrators are strictly bound by the evidence brought before them. See *id.* Arbitrators who conduct their own research outside of the parties' presentations may have their awards subject to vacatur. See 9 U.S.C. § 10(a)(3) (2012) (stating that arbitration awards may be vacated for any misbehavior causing prejudice to any party's rights); 1 GREINIG, *supra*, at § 8:41 ("An arbitrator cannot take any evidence outside of the hearing without the parties' authorization. It is improper for arbitrators independently to inspect property or to investigate matters involved in a dispute unless all of the parties are fully aware of the investigation and agree to it, or unless the rules under which the arbitration is being conducted permit it.").

³⁹ See, e.g., *Blevins v. Hudson & Keyse, Inc.*, 395 F. Supp. 2d 662, 666 (S.D. Ohio 2004) ("[W]itness immunity fosters the truth-finding judicial function within the context of the adversarial process."); *Chadha v. Charlotte Hungerford Hosp.*, 865 A.2d 1163, 1171 (Conn. 2005) ("Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings.");

⁴⁰ See RESTATEMENT (SECOND) OF TORTS § 895D cmt. b (1977).

⁴¹ See cases cited *supra* note 39.

⁴² See Blankley, *Arbitration Ethics I*, *supra* note 18 at 928–29.

B. Encouraging Parties to Seek Redress

Applying the judicial privilege also allows parties, particularly plaintiffs, to initiate an action without the fear of being sued later for bringing that action.⁴³ For the judicial system to work, parties must have trust in the system, or at least enough trust in the system to not resort to vigilante justice.⁴⁴ Bestowing judicial privilege on participants gives them the security and protection that they need to resort to the usual channels of justice for dispute resolution.⁴⁵ Judicial privilege also protects those who have questionable claims to allow them to bring them up for resolution without fear of future lawsuits based on the bringing of the claim.⁴⁶ Advocates, too, are protected by the judicial privilege, giving them flexibility in their lawyering styles.⁴⁷

Without the privilege, disputants would be less likely to seek redress in the proper channels and more likely to resort to self-help or vigilante justice. Providing a forum for the orderly resolution of disputes is a

⁴³ See, e.g., *Harvey v. Montgomery Cty., Tex.*, No. 11-CV-1815, 2012 WL 12530, at *6 (S.D. Tex. Jan. 3, 2012) (“Policy interests justifying immunity include the fact that the fear of suit may cause the prosecutor to ‘shade his decisions instead of exercising the independence of judgment required by his public trust.’”) (citation omitted) (internal quotation marks omitted); *Ims v. Town of Portsmouth*, 32 A.3d 914, 928 (R.I. 2011) (“The doctrine of absolute privilege exists because it is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy.”) (citation omitted) (internal quotation marks omitted).

⁴⁴ See, e.g., Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 87 (2012) (noting that in today’s modern system, we have a police force that will keep law and order and eliminate the need for vigilante justice); C. Crystal Enekwa, Comment, *Capital Punishment and the Marshall Hypothesis: Reforming a Broken System of Punishment*, 80 TENN. L. REV. 411, 445 (2013) (describing one rationale for the death penalty is to serve a retributive ends and keep people from resorting to vigilante justice).

⁴⁵ See *Ims*, 32 A.3d at 928.

⁴⁶ See *Lambert v. Carneghi*, 70 Cal. Rptr. 3d 626, 644 (Cal. Ct. App. 2008). Of course, some civil penalties may result from certain abuses of the litigation process: Attorneys who violate Rule 11, for example, may be subject to sanctions, see FED. R. CIV. P. 11, and parties who engage in certain abuses could be liable for the tort of abuse of process, see RESTATEMENT (SECOND) OF TORTS § 682 (1977), or violate a statute prohibiting frivolous conduct, see, e.g., CAL. CIV. PROC. CODE § 128.5 (West 2013) (granting trial courts discretion to order party or attorney responsible for frivolous actions or delays to pay expenses); N.H. R. SUPER. CT. R. 59 (granting court authority to assess costs and fees against party responsible for frivolous or unreasonable conduct).

⁴⁷ Ronald S. Canter & Manuel H. Newburger, *Common Law Immunity for Litigation Activities Under the Fair Debt Collection Practices Act*, 61 CONSUMER FIN. L. Q. REP. 29, 39 (2007) (discussing the importance of attorneys exercising sound legal perspective as part of their duty as officers of the court and needing immunity from attempting to help clients achieve representation for their colorable legal claims); Monica R. Nuckolls, *Torts*, 54 WAYNE L. REV. 439, 465 (2008) (noting that absolute privilege exists “to promote the public policy ‘of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients’”) (citation omitted).

laudable goal underlying our entire legal system, including the system of arbitration. Again, the privilege would protect a certain amount of wrongful, hurtful, and damaging conduct, but the protections offered by the privilege far outweigh the potential harm. Provided that the criminal law is available to serve as both a deterrent and a backstop for wrongful conduct, the privilege serves the important policy of encouraging dispute resolution in proper channels.

C. Preventing Endless Satellite Litigation

If judicial privilege did not exist, then one lawsuit could generate multiple lawsuits sounding in defamation just based on the claims in the original lawsuit alone. Without judicial privilege, the winning party in a lawsuit could file a new suit against the losing party for making the allegedly “false” statements during the prior lawsuit.⁴⁸ Unchecked, this type of litigation would spin on into infinity, potentially resulting in inconsistent findings, offsetting obligations, and other complications over the course of generations. Immunity, therefore, helps relieve the courts from a burgeoning docket and protects the finality of judgments.⁴⁹

These three policy reasons for immunity—promoting testimony, encouraging the redress of wrongs, and preventing satellite litigation—all apply equally to arbitration. Arbitrators need to hear evidence and determine the truth of the past.⁵⁰ Participants, including representatives, should be free to present evidence without civil liability, and the awards of arbitrators should be considered final.⁵¹

Of course, one could argue that given the nonpublic nature of arbitration, the harm caused by actions otherwise amounting to “defamation” would arguably be less. In a public proceeding, the harm caused by the statements made in the forum could have wide-reaching and very public effects. If the harm is less, then, immunity would not be

⁴⁸ *Surace v. Wulinger*, 495 N.E.2d 939, 944 (Ohio 1986) (noting that without privilege, court dockets would be burdened by lawsuits based upon statements made in other proceedings).

⁴⁹ *Id.*; see also *Lambert*, 70 Cal. Rptr. 3d at 644 (noting that privilege serves to “promote finality of judgments by discouraging endless collateral litigation.”). Perhaps contract law could protect arbitral participants from engaging in this type of behavior if the parties were to agree that the arbitrator’s decision would be final, binding, and not subject to any type of review or other lawsuit. Whether this type of agreement would be valid, however, is questionable, especially in light of the Supreme Court’s decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), which put limitations on the parties’ ability to expand judicial review.

⁵⁰ See Blankley, *Arbitration Ethics I*, *supra* note 18, at 929.

⁵¹ See discussion *supra* Part II.A–C; discussion *infra* Part II.D.

needed. Immunity however, does not serve to curb the harm of an alleged defamatory statement. Immunity is counterintuitive—it allows some types of bad behavior in order to best preserve other important virtues. These virtues are similarly important in arbitration, whether the magnitude of the harm is the same. Some additional policies underlying the privilege particularly serve the arbitral forum. These next sections discuss those interests.

D. Finality in Arbitration

One of the primary reasons that parties choose arbitration is to have a dispute resolution process that ensures a final and binding decision. Finality is achieved primarily through the limited review provided to parties in the FAA.⁵² Under the FAA, an arbitration award can only be overturned in the most limited of circumstances, including (1) “corruption, fraud, or undue means,” (2) “evident partiality” of the neutral, (3) arbitrator procedural “misconduct,” or (4) arbitrators “exceed[ing] their powers.”⁵³ Congress established this limited review to ensure finality of awards.⁵⁴ These grounds are extraordinarily difficult to meet, and a small number of awards are overturned by the courts on an annual basis.⁵⁵

Given the fact that finality is already an important virtue in arbitration,⁵⁶ extending absolute immunity to the arbitral context makes perfect sense. Immunity serves to protect the finality of judgments.⁵⁷ Finality is a key tenet of arbitration,⁵⁸ so extending judicial immunity to the arbitral forum fulfills these important policy objectives.⁵⁹

E. Decision-Making on a Limited Record

To promote arbitration’s efficiencies in terms of time and money, many participants rightfully truncate prehearing discovery when they participate in arbitration. Although traditional discovery, including depositions and

⁵² See 9 U.S.C. § 10(a) (2012).

⁵³ *Id.*

⁵⁴ See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

⁵⁵ See Julia A. Martin, Note, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 947 n.237 (1997) (noting, at the time, that less than 10% of arbitral awards are overturned each year).

⁵⁶ Blankley, *Arbitration Ethics I*, *supra* note 18, at 931.

⁵⁷ *Lambert v. Cameghi*, 70 Cal. Rptr. 3d 626, 644 (Cal. Ct. App. 2008).

⁵⁸ See *supra* note 56 and accompanying text.

⁵⁹ See discussion *supra* Part II.A–D.

document requests, often occurs prior to an arbitral hearing, often, the parties engage in less formal discovery to adhere to tighter hearing deadlines.⁶⁰ By limiting discovery in this manner, parties have the potential to save considerable time and money compared to traditional litigation.⁶¹

If, however, the parties only engage in limited discovery prior to the hearing, the parties go into the hearing with a less developed record and a greater potential for “surprises.”⁶² Given the limited record, the arbitrator’s assessment of credibility becomes even more important than in civil litigation. Unlike civil litigation, the parties may not have prior deposition testimony or other evidence to demonstrate inconsistent statements.⁶³ The arbitrator, then, might rely more heavily on demeanor and body language to determine the credibility of the witnesses. Given the greater truth-determining function of the neutral in arbitration, absolute immunity, then, encourages parties to put forth evidence and other testimony without fear of reprisal, allowing the arbitrators to do their job.

F. Summary Conclusion

The expansion of immunity to the arbitral forum not only promotes the original policy goals for the privilege but also promotes many of arbitration’s central tenets, such as finality and truth-seeking. Indeed, the doctrine of immunity also promotes some aspects of fairness, namely the goals of truth-telling and encouraging the redress of wrongs.

Others might argue that absolute immunity is less necessary in arbitration given that the harm is less (private dispute resolution vs. public dispute resolution) and that allowing private suits for defamation would be the best way to deal with misconduct in the forum. Allowing judicial recourse for arbitral wrongs, however, would turn a private dispute resolution process into a public one, as well as undermine the finality of the process.

⁶⁰ Edna Sussman & Victoria A. Kummer, *Drafting the Arbitration Clause: A Primer on the Opportunities and Pitfalls*, DISP. RESOL. J., Feb.–Apr. 2012, at 30, 35 (explaining that arbitration is intended to be a “swift and efficient alternative dispute resolution process,” and a truncated discovery period helps promote these efficiencies); see also Judy Rost et al., *Comparative International Perspectives of Arbitration in the Franchising Context*, 31 FRANCHISE L.J. 124, 127 (2012) (noting that discovery can be expensive in U.S. litigation and that the arbitration procedure is intended to cut down on much of that cost).

⁶¹ See Rost et al., *supra* note 60, at 127.

⁶² See Sussman & Kummer, *supra* note 60, at 35 (“Before [measures to limit discovery] are added to the arbitration agreement, care must be taken to think through the nature, size, and complexity of the likely disputes and determine the procedures necessary to obtain a fair result.”).

⁶³ See 29 C.F.R. § 4221.5(a) (2013) (noting that arbitration hearings under this regulation are conducted in the same manner as an arbitration hearing under Title 9 of the United States Code).

The provision of immunity to the arbitral forum, however, shields the participants from litigation for wrongdoing in the forum. If no enforcement mechanism exists for righting “wrongdoing,” then the arbitral forum has the potential to breed unethical behavior. Due to confidentiality associated with the forum and the limited amount of review, unethical behavior in arbitration could go unchecked. In the litigation forum, this type of misconduct is remedied through the use of the criminal law. As the next Part outlines, the rules regarding perjury and tampering do *not* apply to the arbitral forum (or at least, not without some creative lawyering), thus leaving arbitration as a forum in which wrongs cannot be corrected or righted, leaving arbitration in a precarious ethical position.

III. HOW THE CRIMINAL LAW FAILS TO REACH ARBITRATION

The criminal laws play an important function in the American justice system. Witnesses must swear under oath and “penalty of perjury” before providing testimony, and the criminal law further criminalizes the destruction of evidence and tampering with witnesses.⁶⁴ These criminal laws provide a basis for prosecution for wrongdoing and, more importantly, provide a valuable deterrent to keep people from engaging in bad behaviors in the litigation process.⁶⁵ These criminal laws, then, provide a backstop to ensure that the litigation process is fair.

Unfortunately, these criminal laws often do not apply directly to arbitral proceedings. Although creative lawyers can argue that the criminal law *might* apply to arbitration,⁶⁶ none of them apply explicitly to arbitration.⁶⁷ This Part demonstrates the gap in the criminal law in this area, concluding that fundamental fairness requires that the criminal law apply in arbitration.

A. Perjury

Perjury is injurious to any system that engages in the administration of justice. Lying undermines the administration of justice and puts the truthful parties at a disadvantage. In addition, public confidence in dispute

⁶⁴ See Blankley, *Arbitration Ethics I*, *supra* note 18, at 933.

⁶⁵ *Id.*

⁶⁶ Often, the statutes dealing with perjury and tampering are found in a section of the criminal code dealing with “Offenses Against Public Administration.” See MODEL PENAL CODE arts. 240–43 (1962). This terminology stems from the Model Penal Code, which organized these laws under that title. See *id.*

⁶⁷ Blankley, *Arbitration Ethics I*, *supra* note 18, at 933.

resolution decreases if the process does not have procedural safeguards.⁶⁸ Lying in arbitration would presumably be just as injurious to the administration of justice in arbitration as it is in the public system of litigation. The perjury laws, however, do not explicitly apply to the arbitral forum.⁶⁹

Many states' definitions of perjury include a requirement that the lying occur under oath in an "official proceeding."⁷⁰ Often, the definition of "official proceeding" only extends to "legislative, judicial, administrative or other governmental agency" proceedings.⁷¹ States that use this definition of "official proceeding" include: Alabama, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania, Utah, and Washington.⁷² These statutes are ambiguous, at best, as to whether they apply in arbitration. Another handful of states prohibit lying under oath more generally. These states include: Alaska, Arizona, Arkansas, California, Delaware, District of Columbia, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Mississippi, New York, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Virginia.⁷³ These types of definitions are more likely to apply to

⁶⁸ Mark Curriden, *The Lies Have It*, A.B.A. J., May 1995, at 68, 69 (quoting former ABA Section of Litigation chair David Weiner); see also John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in a Civil Proceeding is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 784 (2006) ("While this reluctance to criminally prosecute perjury in civil cases may be understandable, it is regrettable because perjury undermines the real and perceived legitimacy of the civil judicial system.") (citation omitted).

⁶⁹ Blankley, *Arbitration Ethics I*, *supra* note 18, at 933.

⁷⁰ See sources cited *infra* note 72.

⁷¹ See MODEL PENAL CODE § 240.0(4).

⁷² ALA. CODE §§ 13A-10-100, -101 (2010); COLO. REV. STAT. §§ 18-8-501, -502 (2010); CONN. GEN. STAT. §§ 53a-146, -156 (2010); FLA. STAT. § 837.02 (2010); HAWAII. REV. STAT. §§ 710-1000, -1060 (2010); 720 ILL. COMP. STAT. 5/32-3(a) (2010); KAN. STAT. ANN. § 21-5903(a)(1) (2010); KY. REV. STAT. ANN. §§ 523.010(3), .020 (West 2010); ME. REV. STAT. tit. 17-A §§ 451(1), 451(5) (2010); MO. REV. STAT. §§ 492.040, 575.010 (2010); MONT. CODE ANN. § 45-7-201 (2010); NEB. REV. STAT. § 28-915(1), -916 (2010); N.H. REV. STAT. ANN. § 641:1 (2010); N.M. STAT. ANN. §§ 30-25-1, 30-1-12(G) (2010); N.D. CENT. CODE § 12.1-11-01 (2010); OHIO REV. CODE ANN. §§ 2921.01(D), -.11(A) (West 2010); 18 PA. STAT. ANN. § 4902 (West 2010); UTAH CODE ANN. § 76-8-501(1), -502 (West 2010); WASH. REV. CODE §§ 9A.72.010(4), -.020 (2010).

⁷³ ALASKA STAT. § 11.56.200 (2010); ARK. CODE ANN. § 16-2-103 (2010); CAL. PENAL CODE § 118 (West 2010); DEL. CODE ANN. tit. 11, § 1224 (2010); D.C. CODE § 22-2402(a) (2010); IDAHO CODE ANN. § 18-5401 (2010); IND. CODE § 35-44.1-2-1 (a)(1) (2010); IOWA CODE § 720.2 (2010); MD. CODE ANN., CRIM. LAW § 9-101(a) (West 2010); MICH. COMP. LAWS § 750.423 (2010); MINN. STAT. § 609.48(1) (2010); MISS. CODE ANN. § 97-9-59 (2010); N.Y. PENAL LAW § 210.15 (McKinney 2010); OKLA. STAT. tit. 21, § 491 (2010); ORE. REV. STAT. § 162.065(1) (2010); R.I. GEN. LAWS § 11-33-1(a) (2010); S.C. CODE ANN. § 16-9-30 (2010); S.D. CODIFIED LAWS § 22-29-1 (2010); TENN. CODE ANN. §

arbitration. Wisconsin and New Jersey extend the perjury laws to arbitration,⁷⁴ while a minority of jurisdictions have an extraordinarily narrow definition of “official proceedings.”⁷⁵

Although creative lawyers could certainly argue that the definitions of perjury extend to arbitration, a simple change in the law would make this question infinitely clearer. Without a change in the law, however, arbitrators must be keenly aware of the possibility of untruthful testimony and dealing with that testimony in the ways discussed below. Without any enforcement mechanism, arbitral awards based on untruthful testimony would deny participants fundamental fairness and due process.

B. Tampering

Just as with the perjury laws, the tampering laws do not explicitly extend to the arbitral forum. Most tampering laws only apply in an “official proceeding,” and that definition likely does not explicitly extend to the arbitral forum. The states utilizing a definition of tampering that includes the “official proceeding” term include: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and

39-16-702(a)(1) (2010); TEX. PENAL CODE ANN. § 37.02(a) (West 2010); VA. CODE ANN. § 18.2-434 (2010).

⁷⁴ N.J. STAT. ANN. § 2C:28-1(a) (West 2010); WIS. STAT. § 946.31(d) (2010) .

⁷⁵ 18 U.S.C. § 1621(1) (2012); GA. CODE ANN. § 16-10-70(a) (2010) (judicial proceedings only); LA. REV. STAT. ANN. § 14:123 (2010) (judicial or legislative proceedings); MASS. GEN. LAWS ch. 268, § 1 (West 2010) (court proceedings); NEV. REV. STAT. § 199.120 (2010) (when oath required by law); N.C. GEN. STAT. § 14-209 (2010) (same); VT. STAT. ANN. tit. 11, § 2901 (2010) (court and agency proceedings); W. VA. CODE § 61-5-1(a) (2010) (court proceedings); WYO. STAT. ANN. § 6-5-301(a) (2010).

Washington.⁷⁶ In addition, and unlike the perjury laws, a handful of states recognize a civil cause of action for tampering.⁷⁷

Because these laws do not explicitly apply to arbitration, open questions exist as to whether they are applicable in the arbitral forum at all. While arbitrators can, and should, be mindful of the potential for misbehavior in their own tribunals, no outside law requires witnesses and parties to act in an ethical manner.⁷⁸ Arbitrators who must make decisions on limited records because of missing documents may skew the awards in the wrongdoer, which seriously prejudices the victim party and leads to unfairness in the forum. Certainly, the criminal law needs to catch up with

⁷⁶ ALA. CODE § 13A-10-129 (2010); ALASKA STAT. § 11.56.610 (2010); ARIZ. REV. STAT. ANN. § 13-2809 (2010); ARK. CODE ANN. § 5-53-111 (2010); COLO. REV. STAT. § 18-8-610 (2010); CONN. GEN. STAT. § 53a-155 (2010); DEL. CODE ANN. tit. 11, §1274 (2010); D.C. Code § 22-723 (2010); HAW. REV. STAT. § 710-1076 (2010); IDAHO CODE ANN. § 18-2603 (2010); KY. REV. STAT. ANN. § 524.100 (West 2010); MICH. COMP. LAWS § 750.483a(5) (2010); MISS. CODE ANN. § 97-9-125 (2010); MONT. CODE ANN. § 45-7-207 (2010); NEB. REV. STAT. § 28-922 (2010); N.H. REV. STAT. ANN. § 641:6 (2010); N.J. STAT. ANN. § 2C:28:6 (West 2010); N.Y. PENAL LAW § 215.40 (McKinney 2010); N.D. CENT. CODE § 12.1-09-03 (2010); OHIO REV. CODE ANN. § 2921.12 (West 2010); OKLA. STAT. tit. 21, § 454 (2010); ORE. REV. STAT. § 162.295 (2010); 18 PA. STAT. ANN. § 4910 (West 2010); S.D. CODIFIED LAWS § 19-7-14 (2010) (using the term “proceeding,” not “official proceeding”); TENN. CODE ANN. § 39-16-503 (2010); TEX. PENAL CODE ANN. § 37.09 (West 2010); UTAH CODE ANN. § 76-8-510.5 (West 2010) (including a catchall provision of “examination under oath”); WASH. REV. CODE § 9A.72.150 (2010).

⁷⁷ See *Nichols v. State Farm Fire & Cas. Co.*, 6 P.3d 300, 303 (Alaska 2000) (recognizing that the tort of intentional spoliation of evidence exists under state law); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998) (establishing tort); *Dardeen v. Kuehling*, 821 N.E.2d 227, 232 (Ill. 2004) (establishing tort); *Desselle v. Jefferson Parish Hosp. Dist. No. 2*, 887 So. 2d 524, 534 (La. Ct. App. 2004) (recognizing a tort of intentional spoliation); *Manorcare Health Servs. v. Osmose Wood Preserving*, 764 A.2d 475, 479 (N.J. Super. Ct. App. Div. 2001) (noting that destruction of evidence could result in a separate tort for spoliation, discovery sanctions, or an adverse inference); *DiDomenico v. C & S Aeromatik Supplies, Inc.*, 682 N.Y.S.2d 452, 460 (N.Y. App. Div. 1998) (noting availability of tort); *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037, 1038 (Ohio 1993) (recognizing tort); *Hannah v. Heeter*, 584 S.E.2d 560, 568, 571 (W. Va. 2003) (recognizing tort). Some states expressly reject this tort. See *Tobel v. Travelers Ins. Co.*, 988 P.2d 148, 156 (Ariz. Ct. App. 1999); *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998); *Lucas v. Christiana Skating Ctr., Ltd.*, 722 A.2d 1247, 1250 (Del. 1998); *Owens v. Am. Refuse. Sys., Inc.*, 536 S.E.2d 782, 784 (Ga. Ct. App. 2000); *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997); *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 424 (Mass. 2002); *Panich v. Iron Wood Prods. Corp.*, 445 N.W.2d 795, 797 (Mich. Ct. App. 1989); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436–37 (Minn. 1990); *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1135 (Miss. 2002); *Patel v. OMH Med. Ctr., Inc.*, 987 P.2d 1185, 1202 (Okla. 1999); *Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65, 67–68 (Pa. Super. Ct. 1998); *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998); *Estate of Neumann v. Neumann*, 626 N.W.2d 821, 841 (Wis. Ct. App. 2001).

⁷⁸ See Blankley, *Arbitration Ethics I*, *supra* note 18, 926.

modern arbitration practice,⁷⁹ and until that happens, arbitrators must be the first line of defense to ensure a fair forum.⁸⁰

C. Advancements in the Area of Legal Ethics

Although the criminal law has not yet caught up to modern arbitration practice, the world of legal ethics has. Updates to the codes of legal ethics have implemented the change noted above by simply adding the term “arbitration” to the list of forums covered by the rules.⁸¹ While the criminal law focuses on the term “official proceeding,” the legal ethics rules discuss conduct before a “tribunal,” and since 2002, “tribunal” includes the arbitral forum.⁸² When a lawyer practices before a “tribunal,” the lawyer may not make a “false statement of fact or law” or “offer evidence that the lawyer knows to be false.”⁸³ Further, the ethics rules prohibit attorneys from tampering, concealing, or obstructing another party’s access to evidence—whether this evidence be used in a tribunal or not.⁸⁴

⁷⁹ See *id.* at 933.

⁸⁰ See Steven C. Bennett, *Who Is Responsible for Ethical Behavior by Counsel in Arbitration*, DISP. RESOL. J., May–July 2008, at 38, 42.

⁸¹ MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2012) (“‘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.”).

⁸² Blankley, *Arbitration Ethics I*, *supra* note 18, at 926 n.4.

⁸³ MODEL RULES OF PROF’L CONDUCT R. 3.3(a) (2012). The following states adopted this, or a substantially similar rule (found in Rule 3.3 of the respective state’s model rules, unless otherwise noted): Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida (R. 4-3.3), Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa (R. 32:3.3), Kansas, Kentucky (KY. SUP. CT. R. 3.130(3.3)), Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri (R. 4-3.3), Montana, Nebraska (R. 3-503.3), Nevada, New Hampshire, New Jersey, New Mexico (R. 16-303), New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas (R. 3.03), Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (2000).

⁸⁴ MODEL RULES OF PROF’L CONDUCT R. 3.4 (2012); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117 (2000). The following states adopted a version of Model Rule of Professional Conduct 3.4 dealing with candor toward opposing counsel and parties (labeled as Rule 3.4, unless otherwise noted): Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida (R. 4-3.4), Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa (R. 32:3.4), Kansas, Kentucky (Ky. Sup. Ct. R. 3.130(3.4)), Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri (R. 4-3.4), Montana, Nebraska (R. 3-503.4), Nevada, New Hampshire, New Jersey, New Mexico (R. 16-304), New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas (R. 3.04), Utah, Vermont, Washington, West Virginia, and Wyoming.

Clearly, legal ethics have caught up with modern alternative dispute resolution (ADR) practice, and the drafters of Ethics 2000 should be commended for this realization. Despite this advancement, legal ethics rules are only a small piece of the puzzle. These rules only apply to lawyers, not other participants,⁸⁵ and the remedies are usually limited to disciplinary measures against the attorney.⁸⁶ While lawyers should be counted on to act in an ethical manner, they do not always do so.⁸⁷ Small changes to the criminal law would do a lot to fill the gap in the law.

IV. THE HIGH BURDEN OF PROOF ADDS TO THE ETHICAL QUANDARY

Adding to the ethical questions posed by the application of the criminal law to arbitration is the fact that the burden of proof for the ethical wrongdoings of participants is unwarrantedly more stringent than for any other type of judicial review for arbitration awards. While I have previously argued that this review is not supported by policy,⁸⁸ arbitrators must keep this fact in mind when considering what to do with unethical behavior in the forum.⁸⁹ If arbitrators better understand the lack of recourse available for these types of participant infractions, hopefully they will be more inclined to deal with these problems in the first instance.⁹⁰

As a general matter, the law rightfully limits the ability to challenge an arbitration award.⁹¹ Limited judicial review discourages post-award challenges and helps promote finality.⁹² Across the country, less than one in five awards are ever vacated, further discouraging parties from seeking vacatur.⁹³ An award can only be vacated under the most limited circumstances. Those grounds include: (1) when the award is procured by “corruption, fraud, or undue means,” (2) the arbitrators are biased, (3) the arbitrator engages in procedural misconduct, or (4) the arbitrators exceed

⁸⁵ Blankley, *Arbitration Ethics I*, *supra* note 18, at 926 n.4.

⁸⁶ MODEL RULES OF PROF'L CONDUCT Scope cmt. 20 (2012).

⁸⁷ See, e.g., *In re David*, 690 S.E.2d 579, 581–82 (S.C. 2010); *In re Disciplinary Proceeding Against Carmick*, 48 P.3d 311, 323 (Wash. 2002); *In re Jordan*, 623 N.E.2d 1372, 1375 (Ill. 1993).

⁸⁸ See Blankley, *Arbitration Ethics II*, *supra* note 19 (manuscript at 39–40).

⁸⁹ See Bennett, *supra* note 80, at 40.

⁹⁰ See Blankley, *Arbitration Ethics I*, *supra* note 18, at 926 n.4 (noting Model Rules of Professional Conduct apply only to attorneys, not other arbitration participants).

⁹¹ See 9 U.S.C. § 10(a) (2012).

⁹² See *Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., Inc.*, 553 N.E.2d 1284, 1285 (Mass. 1990) (“The policy of limited judicial review is reflective of the strong public policy favoring arbitration as an expeditious alternative to litigation for setting commercial disputes.”).

⁹³ Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23, 24.

their powers.⁹⁴ These statutory grounds largely consider procedural irregularities, as opposed to the correctness of the decision.⁹⁵ Section 10(a)(1) is the only grounds for review based on misconduct on the part of someone *other* than the arbitrator.⁹⁶ In addition, some jurisdictions recognize two additional grounds for review, which are when an arbitrator's award evidences a "manifest disregard of the law" or is "contrary to public policy," although the continuing validity of these judicially-created grounds for review is uncertain given recent Supreme Court precedents.⁹⁷ These two grounds also deal exclusively with arbitrator conduct (i.e., decision-making).⁹⁸

For the most part, district courts review the cases *de novo* to determine whether the grounds for vacatur exist.⁹⁹ This is true for every standard of review *other* than § 10(a)(1), which deals with participant misconduct.¹⁰⁰

⁹⁴ 9 U.S.C. § 10(a).

⁹⁵ See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1116 (2009).

⁹⁶ See 9 U.S.C. § 10(a)(1).

⁹⁷ Over the past few years, the Supreme Court has given indications that only the four enumerated grounds for review listed in § 10(a) of the FAA can be used to vacate an arbitration award, and not these judicially created grounds. In *Hall Street Associates, L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court held that *parties* could not contract for a standard of review greater than that prescribed in § 10(a). See *id.* at 590. The Court left open the possibility that *courts* could review an award based on standards other than those in the statute. See *id.* The Court acknowledged, but did not resolve this issue again in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). See *id.* at 672 & n.3. For the purposes of this Chapter, whether these grounds exist is immaterial because these grounds of review deal with an arbitrator's award, as opposed to the conduct of an opposing party or witness. See generally 9 U.S.C. §§ 1–16.

In the 2012 decision of *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the United States Supreme Court reversed a decision by the West Virginia Supreme Court invalidating certain nursing home contracts as violative of public policy. *Id.* at 1202. While never stating that the public policy exception does not exist, the Court struck down the West Virginia decision as preempted by the Federal Arbitration Act—thus leaving in doubt whether any public policy exception based on state law would not be preempted. See *id.* at 1204.

⁹⁸ See Blankley, *Arbitration Ethics II*, *supra* note 19 (manuscript at 41–42) (“[T]hese two additional grounds delve deeper into the arbitrator’s decision-making power.”).

⁹⁹ Blankley, *Arbitration Ethics I*, *supra* note 18, at 980.

¹⁰⁰ See, e.g., *Stolt-Nielsen*, 559 U.S. at 671–72 (discussing § 10(a)(4) without ever discussing a higher burden of proof); *Rame, L.L.C. v. Popovich*, 878 F. Supp. 2d 439, 443–44 (S.D.N.Y. 2012) (discussing the narrowness of the “manifest disregard” grounds of review without discussing a higher burden of proof); *Crozer-Chester Med. Ctr. v. Crozer-Chester Nurses Assoc.*, No. 11-7300, 2012 WL 2500930, at *4–5 (E.D. Pa. June 29, 2012) (applying a *de novo* standard to determine if the case fell within the narrow review); *Ardalan v. Macy’s Inc.*, No. 5:09-cv-04894 JW, 2012 WL 2503972, at *3–5 (N.D. Cal. June 28, 2012) (utilizing a higher burden of proof under § 10(a)(1) than under § 10(a)(2) for evident partiality); *Urban Assocs., Inc. v. Standex Elecs, Inc.*, No. 4:04-CV-40059, 2012 WL 1079723, at *8–11 (E.D. Mich. Feb. 17, 2012) (applying *de novo* standard of review under § 10(a)(2)); *MPJ v. Aero Sky, L.L.C.*, 673 F. Supp. 2d 475, 484–86 (2009) (applying a higher burden of proof under § 10(a)(1) than under § 10(a)(3)); *In re Arbitration Before the N.Y. Stock Exchange, Inc.*, No. 04 Civ. 488(RWS), 2004 WL 2072460, at *10–11 (S.D.N.Y. Sept. 8, 2004) (applying a *de novo* standard

For cases dealing with participant misconduct, the case law has developed a significantly higher standard of proof, in addition to the narrow grounds for vacatur.¹⁰¹

Under § 10(a)(1), an arbitration award can be vacated if the moving party can establish “corruption, fraud, or undue means” on the part of any arbitration participant—i.e., the section is not limited to arbitrators.¹⁰² These are the only grounds for review available to challenge an award on the basis of participant conduct *other* than the arbitrator.¹⁰³ As the federal common law developed under § 10(a)(1), the courts added a requirement that the standard be met by “clear and convincing evidence.”¹⁰⁴ More than likely, this higher evidentiary burden stems from the fact that to prove a *cause of action* for fraud requires a burden of “clear and convincing” evidence.¹⁰⁵ This heightened burden, however, is completely unwarranted because the parties are seeking no greater relief than vacatur under any other section.¹⁰⁶ Unlike a cause of action for fraud, the parties cannot get civil damages—or punitive damages—on a motion for vacatur based on fraud.¹⁰⁷

As noted in my previous scholarship, removing the heightened burden would best comport with the interests of justice and due process.¹⁰⁸ Being a realist, however, I recognize that the courts are unlikely to change their judicially-created tests. Given these significant ethical questions, this paper recommends that arbitrators take a more active role as the ethics enforcers within their own forum, even when this requirement is uncomfortable or jeopardizes an arbitrator’s future employment as a paid neutral.

under § 10(a)(3)).

¹⁰¹ Blankley, *Arbitration Ethics I*, *supra* note 18, at 932.

¹⁰² 9 U.S.C. § 10(a)(1) (2012).

¹⁰³ *See id.* § 10(a)(1).

¹⁰⁴ *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986) (vacating only if the alleged “fraud” was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence); *see also* Smith West, L.L.C. v. Mohnach Payne Inc., No. 1 CA-CV 09-0568, 2010 WL 2471051, at *2 (Ariz. Ct. App. June 17, 2010) (“[A] party seeking to vacate an arbitration award claiming fraud must show ‘that the fraud was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence.’”) (citing *Lafarge Conseils Et Etudes, S.A.*, 791 F.2d at 1339). This test appears to be the test that a majority of the courts employ when confronted with a motion for vacatur on the grounds of fraud while other tests are employed in a minority of jurisdictions. *See, e.g.*, *Profl Builders, Inc. v. Sedan Floral, Inc.*, 819 P.2d 1254, 1258 (Kan. Ct. App. 1991) (“As a general rule any fraud or misconduct having a tendency to affect the award improperly will vitiate it and render it subject to impeachment.”) (quoting 6 C.J.S. *Arbitration* § 202 (2013)).

¹⁰⁵ *See, e.g.*, *Flora v. Kingsbridge Homes*, 625 N.Y.S.2d 680, 681 (N.Y. App. Div. 1995) (requiring “clear and convincing evidence” to “state a cause of action for fraud”).

¹⁰⁶ Blankley, *Arbitration Ethics I*, *supra* note 18, at 981–82.

¹⁰⁷ *See id.* at 982.

¹⁰⁸ Blankley, *Arbitration Ethics II*, *supra* note 19 (manuscript at 63–64).

V. ARBITRATORS AS ETHICS ENFORCERS

Arbitrators, as hearing presiders, are the natural first line of defense for dealing with unethical conduct within their own forum. Given the uncertainty of the applicability of the criminal law¹⁰⁹ and the extraordinarily high burden for vacatur,¹¹⁰ the arbitrator stands at the perfect position for dealing with ethics abuses. The role of ethics enforcer may be not only unfamiliar for arbitrators but also uncomfortable. Arbitrators who are party chosen and party paid, may be less likely to find unethical conduct for a whole host of reasons, including a belief that the people who hired them are “good” attorneys, a fear (legitimate or not) of fewer future referrals, and a fear (legitimate or not) of disappointing the same people who hired them. In order to provide a fair forum, however, an arbitrator needs to be vigilant and responsive to unethical conduct in the forum.

This Part considers three primary reasons why arbitrators should be acting as ethics enforcers. First, arbitrators have always been put in this role, whether or not they would have called themselves “ethics enforcers.”¹¹¹ Second, arbitrators are in the best position to handle these types of issues, either on motion or sua sponte, because they are closest to the issue and can better assess participant credibility.¹¹² Third, arbitrators have a myriad of tools available at their disposal to deal with participant misconduct that other venues do not have.¹¹³ This Part considers these three areas in greater detail.

A. Historically, Arbitrators Acted in This Role

As a historical matter, the law and the courts have been relatively “hands off” regarding arbitration issues. This treatment is unsurprising given that the primary purpose of arbitration is to provide an alternative forum to resolve disputes. With no one assuming the role of overseeing arbitration, arbitrators must be responsible for managing their own tribunal and correcting wrongdoing within the forum.¹¹⁴

¹⁰⁹ Blankley, *Arbitration Ethics I*, *supra* note 18, at 926.

¹¹⁰ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671 (2010) (“Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle.”).

¹¹¹ *See infra* Part V.A.

¹¹² *See infra* Part V.B.

¹¹³ *See infra* Part V.B.

¹¹⁴ Bennett, *supra* note 80, at 42.

1. Federal Law Provides Little Guidance on Arbitration

The laws governing arbitration are extraordinarily sparse. The FAA for instance, contains a mere sixteen provisions and that have remained largely unchanged since 1925.¹¹⁵ The FAA, for the most part, does not deal with the actions of the arbitrator within the tribunal.¹¹⁶ The first four provisions of the FAA deal with the “front end” of arbitration law—or how a case gets into arbitration.¹¹⁷ These first four sections make agreements to arbitrate enforceable by specific performance,¹¹⁸ provide for a stay of litigation filed in the federal district courts in lieu of arbitration,¹¹⁹ and allow courts to issue orders compelling the parties to arbitrate.¹²⁰ Four of the last provisions of the FAA deal with “back end” issues relating to the confirmation and vacatur of arbitral awards.¹²¹ As discussed above,¹²² arbitration awards *must* be confirmed by a court, unless they are vacated or modified under the narrow grounds provided by the FAA.¹²³

With respect to what actually occurs in arbitration, the FAA is amazingly silent. The FAA provides that a court can appoint an arbitrator if the parties are unable to do so.¹²⁴ In addition, the FAA gives arbitrators a subpoena power that allows them to compel the presence of witnesses and the production of documents for use in an arbitration hearing.¹²⁵ These two

¹¹⁵ As originally enacted, the FAA contained fourteen provisions. Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16 (2012)). In 1970, Congress enacted Chapter Two of the FAA to deal with the enforceability of international arbitration awards. Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201–208 (2012)). Chapter Two, however, does not deal with domestic arbitration or with the workings of the arbitral tribunal at all. *See id.*

¹¹⁶ *See* 9 U.S.C. §§ 1–16.

¹¹⁷ *See id.* §§ 1–4.

¹¹⁸ *Id.* § 2 (“A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”) (emphasis added).

¹¹⁹ *Id.* § 3 (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing . . . , the court in which such suit is pending, . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . .”).

¹²⁰ *Id.* § 4 (“[T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”).

¹²¹ *See id.* §§ 9–12.

¹²² *Id.* § 9.

¹²³ *Id.* §§ 9–11.

¹²⁴ *Id.* § 5 (allowing a court to appoint an arbitrator if the parties’ own selection method does not result in the appointment of an arbitrator or if other reasons exist as to why the parties cannot determine on their own who will arbitrate their dispute).

¹²⁵ *Id.* § 7 (providing subpoena power).

provisions are the only provisions dealing with the hearing itself (and even including § 5 on the appointment of arbitrators is somewhat of a stretch).¹²⁶ Otherwise, the FAA is silent on how an arbitrator should conduct an arbitration hearing.¹²⁷

Notably, the FAA says absolutely nothing about arbitration *procedure* or *evidentiary burdens*. The FAA contains no provisions regarding discovery, besides those noted above regarding subpoenaing persons and documents.¹²⁸ Thus, the FAA gives the arbitrators little guidance on issues such as prehearing exchanges of documents between the parties, depositions, and interrogatories.¹²⁹ In addition, the FAA is silent on the issue of what constitutes admissible evidence.¹³⁰ The only guidance that arbitrators have stems from FAA § 10, dealing with vacatur.¹³¹ Under § 10(a)(3), an arbitration award may be subject to vacatur if the arbitrator refuses to consider evidence that is “pertinent and material to the controversy.”¹³² With this guidance arbitrators are likely to admit all evidence to help insulate the decision from vacatur.¹³³ Citing this section, arbitrators often admit all evidence—with the caveat—“for what it’s worth.”¹³⁴ If a close question exists with respect to allegedly fraudulent evidence or perjured testimony, the unfortunate outcome is that the evidence will likely be admitted “for what it’s worth,” with the hope that the arbitrator would later determine that the evidence actually is not of any probative value. Clearly, though, the pressure felt on arbitrators to admit evidence could have the effect of making the forum even *less* fair, especially if the arbitrators are not vigilant in determining the veracity of witnesses and the genuineness of documents.

¹²⁶ See *id.* §§ 1–16.

¹²⁷ See *id.*

¹²⁸ See *id.* Admittedly, the FAA was enacted prior to our modern rules of procedure, which were first enacted in 1938. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 351–52 (1987). The current system of full discovery before trial was certainly not the norm at the time of the FAA’s passage. See *id.*

¹²⁹ See 9 U.S.C. §§ 1–16.

¹³⁰ See *id.* § 7 (discussing only the materiality of evidence).

¹³¹ See *id.* § 10.

¹³² *Id.* § 10(a)(3).

¹³³ See *id.* § 10.

¹³⁴ See, e.g., *Bernstein v. On-Line Software Int’l, Inc.*, 648 N.Y.S.2d 602, 604 (N.Y. App. Div. 1996); 1 GREINIG, *supra* note 38, § 8:61; Marvin F. Hill, Jr. & Tammy M. Westhoff, “I’ll Take It for What It Is Worth”—*The Use of Hearsay Evidence by Labor Arbitrators: A Primer and Modest Proposal*, 1998 J. DISP. RESOL. 1 (1998); Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 266 (1993).

The FAA does not impose any types of evidentiary burdens of proof or any requirement that the arbitrators follow the law.¹³⁵ Arbitration is known as a tribunal of equity, and the arbitrator's flexibility in applying the law or the business custom has long been a reason why parties choose arbitration.¹³⁶ Unfortunately, this flexibility, if unchecked, could create a forum that is hospitable to ethics abuses.

Just as the FAA fails to address issues regarding procedure and evidentiary burdens, the FAA is also largely silent on the issue of wrongful conduct within the forum. The only hint of federal law dealing with unethical conduct can be found in the review provision, § 10(a)(1), discussed above,¹³⁷ that allows vacatur of an arbitral award for "corruption, fraud, or undue means"¹³⁸ committed by an arbitration participant. Arbitrator misconduct is also grounds for vacatur.¹³⁹ The FAA does not define "corruption," "fraud," or "undue means," or give any guidance as to how these matters should be handled *before* or *during* the arbitration.¹⁴⁰

The FAA's silence on nearly all matters dealing with the arbitral process gives arbitrators and parties flexibility and creativity within the forum.¹⁴¹ Parties can then craft a process that meets their needs, and arbitrators can enforce the procedure chosen by contract in the manner that they see fit.¹⁴² With regard to ethical misconduct, the lack of statutory and common law gives arbitrators great flexibility to police their own tribunals *if they choose* to exercise that flexibility.¹⁴³ If arbitrators abide by their

¹³⁵ See 9 U.S.C. §§ 1–16.

¹³⁶ See John Arrastia, Jr. & Christi L. Underwood, *Arbitration v. Litigation: You Control the Process v. The Process Controls You*, DISP. RESOL. J., Nov. 2009–Jan. 2010, at 31, 32–34; Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 443 (2004); Jessica Richardson & Rebekah Barlow Yalcinkaya, *Speed, Efficiency and Flexibility: A Call to Return to Arbitration's Traditional Roots*, 9 U.C. DAVIS BUS. L.J. 111 (2009).

¹³⁷ See *supra* notes 102–07 and accompanying text.

¹³⁸ 9 U.S.C. § 10(a)(1).

¹³⁹ 9 U.S.C. § 10(a)(2)–(4).

¹⁴⁰ See *id.* § 10.

¹⁴¹ See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989) (noting that the parties have the ability to set their own choice-of-law clause given the FAA's silence on the issue); see also Michelle Eviston & Richard Bales, *Capping the Costs of Consumer and Employment Arbitration*, 42 U. TOL. L. REV. 903, 905 (2011) (noting with criticism that the FAA's silence on the issue of fees consumers can pay for arbitration services leads to a situation in which varying arbitrators and provider organizations charge different amounts for those services); R. Jeremy Sugg, *Interim Relief and International Commercial Arbitration in North Carolina: Where We Are and Where We Should Be Looking*, 30 CAMPBELL L. REV. 389, 398–99 (2008) (noting the wide gaps in the FAA and discussing the need for states to fill in issues of arbitration procedure where the FAA does not specifically speak to the issues).

¹⁴² See sources cited *supra* note 141.

¹⁴³ See *supra* Parts IV, V.A.1.

powers as stated in the contract, they have considerable control over the process.¹⁴⁴ Given their position, they *should* be the first line of defense in dealing with ethical issues arising in the forum. Of course, the arbitrators must recognize this duty and take action despite monetary and social pressure to let things slide.

2. State Law Is Likewise Liberal on Regulating Arbitration Conduct

For the most part, the state law of arbitration mimics the federal law of arbitration. Interestingly, Congress modeled the FAA after the New York Arbitration Act, and the states and the federal government have long simultaneously regulated arbitration.¹⁴⁵ At the time of the enactment of the FAA, the common law of arbitration and state laws governed.¹⁴⁶ By the mid-1950s, the National Conference of Commissioners on Uniform State Laws convened and promulgated the Uniform Arbitration Act (UAA).¹⁴⁷ As this section notes, neither the UAA nor the preceding statutory or common law gave much attention to the issue of participant ethics.¹⁴⁸

3. Early Statutory and Common Law Did Not Address Issues of Ethics

For the most part, the common law and state statutes in place around the time of the passage of the FAA were silent on the issue of ethics. As a practical matter, arbitrations at the time consisted largely of merchant disputes (i.e., business to business disputes) that disputed issues relating to goods sold (quality, timeliness, quantity, etc.).¹⁴⁹ The arbitrators issued

¹⁴⁴ See sources cited *supra* note 141.

¹⁴⁵ See David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 406 (2012) (noting how the drafter of the FAA drafted the legislation modeled on the New York law); Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 395 (2012) (describing the FAA as having been “[m]odeled after statutes enacted in New Jersey and New York”); David M. Sholl, Note, *It’s My Party and I’ll Arbitrate if I Want To: Are We Signing Away Our Right to Litigate Tort Claims?*, 37 NOVA L. REV. 205, 213 (2012) (noting how the FAA was modeled after New York law already in effect at the time).

¹⁴⁶ See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 141 (2002) (noting how “courts used public policy and contract interpretation to prevent arbitration and enforcement of awards under varied state laws that applied before uniform acceptance of the FAA/UAA model.”).

¹⁴⁷ *Id.* at 153.

¹⁴⁸ See *id.* at 154.

¹⁴⁹ See Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 675 (2012) (noting that the “original intended use of the FAA was for the business community to regulate among its members”) (citation omitted) (internal quotation marks omitted); David S. Schwartz, *Claim-Suppressing*

awards based on equity and business norms, not necessarily the law.¹⁵⁰ At that time, arbitrators often worked as full-time tradesmen (not lawyers) who understood the norms of the particular industry at hand.¹⁵¹ Thus, the laws in place retained flexibility to deal with these types of trade and business disputes.¹⁵²

At common law, no subpoena power existed for arbitrators, and arbitrators could not compel the attendance of witnesses or the production of documents.¹⁵³ While many states had statutory law allowing for compulsory process, the right was not uniform across the nation at that time.¹⁵⁴ A treatise from 1930 (published five years after the passage of the FAA) expresses concern about parties trying to curry favor with the arbitrators through bribery and other bad actions.¹⁵⁵ The treatise also mentions that inappropriate contact with the arbitrators—both in terms of hospitality offered and ex parte communications—could subject an arbitration award to later vacatur by the courts.¹⁵⁶ With respect to party misconduct affecting evidence, the treatise contemplates the possibility and guesses that an award based on such trickery and deceit would be subject to vacatur:

It remains to observe the case where a party resorts to false evidence and trickery to win his case. Is a party under any obligation to act in good faith and aid the arbitrators, as lay judges of his own choosing, to an honest judgment upon the merits of the case? Rules of the law of evidence and court procedure . . . are largely removed. If a party may not subserve his own ends by bribes, secret influence and surreptitious reports against the adverse party, may he, notwithstanding, take the benefit of perjured evidence and trickery in the formal presentation of his case before lay arbitrators? Strange as it seems, the cases are not entirely in accord upon this question. The prevailing view, however, is that a party may not have the benefit of his perjury and trickery; his award will be vacated for such

Arbitration: The New Rules, 87 IND. L.J. 239, 240–41 (2012) (noting that traditional arbitration involves self-regulation within the normative community of a trade association).

¹⁵⁰ See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961) (describing arbitration within a trade association).

¹⁵¹ *Id.* at 854 (“Mercantile disputes have been decided by merchants in the Anglo-American world since at least the thirteenth century.”).

¹⁵² See *id.* at 854–55.

¹⁵³ WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 390 (1930).

¹⁵⁴ See *id.* at 391–420 (citing statutes in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, North Carolina, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Washington, Wisconsin, and Wyoming).

¹⁵⁵ *Id.* at 472 (“Bribery, by a party, of any one of the arbitrators is, of course, sufficient cause to invalidate an award rendered in favor of such party.”).

¹⁵⁶ *Id.* at 473–74.

action.¹⁵⁷

This passage is particularly interesting because it recognizes the possibility for participant misconduct, but does not discuss the arbitrator's role in dealing with the wrongdoing.¹⁵⁸ These passages from the 1930 treatise consist primarily of the courts' response to unethical conduct *after the fact* and not on dealing with the conduct in the first instance at the tribunal level.¹⁵⁹

Although arbitrators have significant discretion in conducting their hearings, arbitrators at the time did not believe they had any real discretion to exclude evidence.¹⁶⁰ Because the rules regarding vacatur allow a party to vacate an award on the arbitrator's *refusal* to consider evidence (as opposed to considering improper evidence),¹⁶¹ arbitrators at the time of the passage of the FAA were, like present-day arbitrators, particularly unlikely to exclude evidence under any circumstances.¹⁶² This preference towards admitting evidence particularly hurts parties acting in good faith because they are abiding by the rules, while a less scrupulous participant is stacking the deck in his favor.

Perhaps one of the reasons why the idea of perjury was lacking from the discussion of arbitrator powers at the time of the passage of the FAA was because witnesses at the hearings were not (and still are not) required to testify under oath.¹⁶³ If no oath is given, then witnesses cannot possibly commit perjury, which requires a false statement under oath.¹⁶⁴ Even if an oath was administered, courts at the time of the passage of the FAA were hesitant to find perjury within the arbitral forum.¹⁶⁵ The Sturges treatise cites a Missouri case from 1837, in which the court found that no action for

¹⁵⁷ *Id.* at 474 (citing cases from Alabama, Connecticut, Florida, Georgia, Maine, Michigan, New Hampshire, Oregon, West Virginia, and Tennessee).

¹⁵⁸ *See id.*

¹⁵⁹ *See* source cited *supra* notes 155–58.

¹⁶⁰ STURGES, *supra* note 153, at 480. In fact, many state statutes at the time required arbitrators to hear all evidence brought before the tribunal, using the mandatory “shall” language. *See id.* at 483–86 (citing statutes from Indiana, Kentucky, Minnesota, Mississippi, Missouri, New York, and Wisconsin for the proposition of mandatory consideration of evidence by the tribunal).

¹⁶¹ *See* 9 U.S.C. § 10(a)(3) (2012); *see also* STURGES, *supra* note 153, at 486 (citing the following states as having a vacatur provision similar to FAA Section 10: California, Connecticut, Hawaii, Idaho, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Utah, and Wyoming).

¹⁶² *See* sources cited *supra* note 161.

¹⁶³ STURGES, *supra* note 153, at 486 (“Apparently it is not necessary for witnesses to be sworn in a common law arbitration unless the parties require it.”).

¹⁶⁴ BLACK’S LAW DICTIONARY 1254 (9th ed. 2009).

¹⁶⁵ *See* STURGES, *supra* note 153, at 487.

perjury could exist despite alleged lying “under oath” because the oath was “voluntary,” “extrajudicial,” and otherwise not required.¹⁶⁶ The treatise rightfully expresses concerns about the holding of the Missouri case and posits that an oath administered in a jurisdiction that gives the arbitrators discretion to require testimony under oath might not be considered “voluntary” or “extrajudicial.”¹⁶⁷

Again, these sources largely concern the interplay between the courts and the arbitral tribunal and the effect of wrongdoing on an ultimate arbitral award. These sources do not say anything about the powers of the arbitrators in administering their own tribunals. Perhaps the silence on the issue is obvious in that arbitrators have control over their tribunals and can exercise the authority that they wish, *provided* that it does not include the wrongful exclusion of evidence.¹⁶⁸ Although these sources provide little guidance, they are instructive in that the primary legal concerns were not on the happenings of the arbitral tribunal, but on the legal ramifications of arbitrator actions and awards.¹⁶⁹

4. Uniform Arbitration Act Adds Little Guidance on the Issue

In the 1950s, the National Conference of Commissioners on Uniform State Laws promulgated the UAA, which was approved by the House of Delegates of the American Bar Association in 1956.¹⁷⁰ Ultimately, all fifty states adopted the UAA, or a similar version of the arbitration laws.¹⁷¹

Like the FAA, the UAA is a relatively short piece of legislation that covers the “front end” and the “back end” issues dealing with arbitration. The UAA provides that agreements to arbitrate are valid and specifically enforceable.¹⁷² The UAA allows for the appointment of arbitrators when the parties have been unable to do so,¹⁷³ and it specifies that the decision of a majority of the panel will be controlling on the parties, unless the contract

¹⁶⁶ *Id.* (quoting *Mahan v. Berry*, 5 Mo. 21 (1837)).

¹⁶⁷ *Id.* at 487–88 (citing statutes from Alabama, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Kentucky, Michigan, Missouri, Montana, Nebraska, North Dakota, Oregon, Tennessee, and Washington).

¹⁶⁸ *Id.* at 480.

¹⁶⁹ See sources cited *supra* notes 155–58, 160–61, 163, 165–67.

¹⁷⁰ UNIF. ARBITRATION ACT intro. (1956), available at <https://www.aau.org/media/5046/uniform%20arbitration%20act.pdf>.

¹⁷¹ 83 AM. JUR. PROOF OF FACTS 3D *The Arbitration Contract—Making It and Breaking It* § 32 (2005).

¹⁷² UNIF. ARBITRATION ACT §§ 1–2 (making agreements to arbitrate valid and providing courts a mechanism to compel arbitration).

¹⁷³ *Id.* § 3 (allowing appointment of arbitrators).

between the parties provides otherwise.¹⁷⁴ Unlike the FAA, the UAA provides limited rules for arbitrators creating and changing awards,¹⁷⁵ but like the FAA, the UAA provides for the courts' involvement in confirming, vacating, and modifying an arbitration award.¹⁷⁶

The UAA gives arbitrators *slightly* more guidance on the hearing and prehearing procedures than the FAA. The UAA provides that parties may be represented by counsel,¹⁷⁷ cross-examine witnesses at the hearing, present evidence on their case,¹⁷⁸ and obtain prehearing discovery in the form of subpoenas and depositions.¹⁷⁹ While these statutes provide some guidance on the issue of how arbitrators should preside over their tribunals, that guidance is limited and does not address the issue of ethics violations.¹⁸⁰ Again, the only indication of what to do in the event of ethics issues is in the review provision, which also allows for vacatur on the basis of "corruption, fraud or other undue means."¹⁸¹ This provision, however, does not deal with the actions of the arbitrators at the tribunal, but the interaction between the tribunal and the courts.¹⁸²

Thus, again, the arbitrators do not have a lot of guidance from the states on these issues. Perhaps the reason for the silence is the unspoken assumption that arbitrators are given wide latitude and discretion over the hearings themselves.¹⁸³ Certainly, the statutory law (both federal and state) gives the arbitrators wide discretion due to the silence.¹⁸⁴ In other words, statutory law does not *prohibit* the arbitrators from taking on the role of ethics enforcer. In fact, given the limited guidance on the issue, arbitrators are undoubtedly in the best position to do so. If arbitrators do not assume this role, no one will, and the forum will slowly devolve into one not worth using.

¹⁷⁴ *Id.* § 4 (regarding majority rule of arbitrators).

¹⁷⁵ *Id.* §§ 8–10 (describing requirements for the award; allowing arbitrators to modify or correct awards in certain instances; and requiring the arbitrators to account for the payment of arbitration fees and expenses in the award).

¹⁷⁶ *Id.* §§ 11–13 (dealing with confirmation of award; dealing with vacating an award; and allowing for modification of the award under limited circumstances); *see also id.* §§ 14–18 (dealing with administrative issues relating to court involvement on motions before the court on arbitration issues).

¹⁷⁷ *Id.* § 6 (allowing for representation of counsel throughout the arbitration process).

¹⁷⁸ *Id.* § 5(b) (regarding hearing procedures).

¹⁷⁹ *Id.* § 7 (regarding witnesses, subpoenas, and depositions).

¹⁸⁰ *See id.* §§ 1–25.

¹⁸¹ *Id.* § 12.

¹⁸² *See id.*

¹⁸³ *See infra* Part V.B.1–11. *See generally* UNIF. ARBITRATION ACT §§ 1–25.

¹⁸⁴ *See supra* note 183.

B. Arbitrators Are in the Best Position To Deal with Ethics Issues

Without a doubt, arbitrators are in the best position to deal with ethical issues when they arise. Arbitrators can deal with any ethical issues during the hearing, using a large number of tools to deal with the problems in the first instance.¹⁸⁵ Arbitrators can address any of these issues upon a motion or inquiry by a party, but they are also able to raise the issue *sua sponte* if they choose.¹⁸⁶ Given the extraordinarily limited interaction between the arbitral forum and the courts, including the limited grounds for review, handling wrongful arbitration conduct within the forum itself may be the only way for wrongdoing to be addressed. With the ambiguous nature of the application of the laws on perjury, tampering, and other types of obstruction to the arbitral forum, arbitrators must be vigilant and responsive to participant misconduct.¹⁸⁷ The arbitrators are, for the most part, the first and last stop to deal with these types of issues.¹⁸⁸ Only the rarest of cases are overturned for participant “fraud,”¹⁸⁹ and the criminal law will be of little help for those seeking to right participant wrongs.¹⁹⁰

Arbitrators are well equipped to deal with misconduct in the arbitral forum, and they already have all of the tools that they need, if they choose to do so. Perhaps arbitrators do not currently consider themselves to be “ethics enforcers,” but they should.¹⁹¹ This section details the tools available to arbitrators that can be used in order to best police the arbitral forum—and these types of rules and regulations are already a part of our modern arbitration system. This section first considers the rules of major provider organizations giving the arbitrators considerable flexibility in controlling the tribunal and maintaining decorum within the forum. Arbitrators also have the power to assess credibility of witnesses and other types of evidence, and they can impose certain burden-shifting analyses in order to try to rectify participant misconduct. Finally, arbitrators do have

¹⁸⁵ See *infra* Part V.B.1–11.

¹⁸⁶ See *supra* note 112 and accompanying text.

¹⁸⁷ See *supra* Part III.A–B.

¹⁸⁸ See *infra* Part V.B.9.

¹⁸⁹ Blankley, *Arbitration Ethics II*, *supra* note 19 (manuscript at 44).

¹⁹⁰ See *supra* Part III.A–B.

¹⁹¹ In personal conversations regarding my previous two pieces on this topic, I heard from more than one arbitrator that this type of conduct simply does not happen in arbitration. In fact, one arbitrator noted that no unethical conduct existed in the “thirty years” the person was in the arbitral practice. The idea that not a single person had lied under oath, hid a document, or otherwise acted in an improper manner over the course of thirty years is simply unfathomable to me.

the ability to award sanctions in egregious cases, and those awards will likely be held up by a court if the award is challenged.

If arbitrators utilize these tools, they will help ensure that the forum is fair and comports with the principles of due process and fundamental fairness. While arbitrators bear the majority of the role in this process, the arbitral providers can also help by creating clearer rules and engaging in increased arbitrator education. This section considers these ideas in turn.

1. Provider Organization Rules

Arbitrations can be classified in one of two ways: institutional or ad hoc. An institutional arbitration is administered by a provider organization,¹⁹² such as the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS), the International Chamber of Commerce (ICC), or the London Court of International Arbitration (LCIA), to name a few. Ad hoc arbitration proceedings are simply those that take place outside of an administrative institution.¹⁹³

While the parties ultimately control whether they prefer an institutional or an ad hoc arbitration proceeding, an institutional proceeding can provide the parties with a number of benefits. Using a provider organization can help with administrative tasks¹⁹⁴ and may provide a decision-maker that has been vetted by the institution.¹⁹⁵ Perhaps the biggest reason parties choose to have a provider organization administer the case is to ensure that the proceeding is bound by a certain set of rules.¹⁹⁶ Of course, some parties

¹⁹² See, e.g., Elizabeth Varner, *Arbitrating Cultural Property Disputes*, 13 CARDOZO J. CONFLICT RESOL. 477, 499 (2012) (“The agreement should state whether the parties want to use an arbitral institution or ad hoc arbitration.”).

¹⁹³ S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 129 (2012) (“Arbitrations that are not administered by an institutional body proceed ‘ad hoc.’”).

¹⁹⁴ See Varner, *supra* note 192, at 499–500; see also Joseph T. McLaughlin & Kathleen M. Scanlon, *Updated: A Master Checklist For Drafting Contract Clauses in Transnational Matters*, 27 ALTERNATIVES TO HIGH COST LITIG. 97, 104 (2009) (noting that provider organizations can help with administrative tasks as well as an award likely to withstand judicial scrutiny).

¹⁹⁵ Maya Ganguly, *Tribunals and Taxation: An Investigation of Arbitration in Recent US Tax Conventions*, 29 WISC. INT’L L.J. 735, 740–41 (2012) (noting that in the international sphere, awards of arbitrators on the rosters of arbitral providers will likely be well regarded because of the standards in place by the organizations).

¹⁹⁶ See, e.g., Jack M. Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Legal Rules*, 2 WM. & MARY BUS. L. REV. 227, 278 (2011) (“There is obviously a substantial difference between including fifteen pages of detailed arbitration procedures and agreeing to arbitrate under a well-known set of institutional rules, which happen themselves to be fifteen pages long.”); Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation”*,

choose not to use an institutional provider because of cost and time considerations.¹⁹⁷ Even if parties are engaged in an ad hoc proceeding, they can still choose to be bound to a certain provider organization's rules.¹⁹⁸ For instance, parties to a contract for an ad hoc proceeding might still require that "the arbitrator(s) follow AAA rules."

As a general matter, provider organization rules give arbitrators an extraordinary amount of flexibility in how they run their own tribunal. The flexibility afforded to arbitrators extends to nearly all procedural matters, including ruling on evidence or motions, swearing in witnesses, and other issues relating to the orderly disposition of the arbitral process.¹⁹⁹ This section sets out rules from three major provider organizations, both nationally²⁰⁰ and internationally,²⁰¹ to demonstrate the great amount of discretion afforded to arbitrators.

7 DEPAUL BUS. & COM. L.J. 383, 430 (2009) ("While arbitration need not be 'administered,' many business parties prefer to incorporate the rules of an administering institution or 'provider organization' in their agreement.").

¹⁹⁷ See, e.g., Graves, *supra* note 196, at 278 ("The parties may be attempting to save money by omitting any institutional reference. In fact, this is exactly why parties sometimes choose ad hoc over institutional arbitration.") (citations omitted). A common perception in the arbitration field is that an administered proceeding will be more costly because of the added cost of administrative fees. See, e.g., *id.* Adding an administrator into the dispute resolution process also potentially lengthens the process because of scheduling difficulties. See McLaughlin & Scanlon, *supra* note 194, at 101–02. One study attempted to determine the costs differences in institutional and ad hoc proceedings, but the study found no statistically significant correlation between the cost of arbitration and whether the proceeding was administered by a provider organization. *Big Spends, But Also Big Awards: The Chartered Institute Surveys Arbitration Costs*, 29 ALTERNATIVES TO HIGH COST LITIG. 185, 185 (2011). In the study, approximately two-thirds of the cases used a provider organization, while the remaining one-third were ad hoc arbitrations. *Id.*

¹⁹⁸ Strong, *supra* note 193, at 129 ("[P]arties can decide to adopt procedural rules published by an arbitral institution, even if the process is not administered by that organization. These arbitrations are still referred to as ad hoc proceedings, even though they are governed by published procedural rules. However, most published rule sets require any parties using those rules to have their arbitration administered by the organization that promulgated the rules.").

¹⁹⁹ See *id.*

²⁰⁰ At the time of publication, the United States only has two major arbitration provider organizations, the AAA and JAMS. See JON LEIBOWITZ ET AL., FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION, at *3, *29 (2010), available at 2010 WL 2788172. Previously, a third major provider, the National Arbitration Foundation, was extraordinarily active in the area of consumer arbitration, but the NAF has become largely obsolete following a series of lawsuits claiming that the NAF had improper ties with some of the repeat player debt-collection claimants. *Id.*; see also Nancy A. Welsh, *What is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 405–06 (2010); Carrick Mollenkamp et al., *Turmoil in Arbitration Empire Upends Credit-Card Disputes*, WALL ST. J., Oct. 15, 2009, at A1, available at <http://online.wsj.com/news/articles/SB125548128115183913>.

²⁰¹ See *About ICC*, INT'L CHAMBER OF COMMERCE, <http://www.iccwbo.org/about-icc/> (last visited Mar. 22, 2014).

2. The American Arbitration Association

The AAA is quite possibly the largest arbitration provider organization in the United States, so starting with the AAA makes sense. The AAA develops and maintains over forty different sets of arbitration rules. AAA rules generally apply to subject-matter specific disputes.²⁰² For example, the AAA has rules for commercial disputes, consumer disputes, real estate disputes, insurance disputes, labor and employment disputes, health care disputes, accounting disputes, and the like.²⁰³ Although many sets of rules are similar, they are tailored to meet the special needs of different industries.²⁰⁴ For the purpose of this discussion, however, a handful of rules from across a wide variety of disputes will be used for illustrative purpose to demonstrate the discretion afforded arbitrators as a matter of course.

Arbitrators have powers over their tribunals from the moment that they are appointed. Prior to the hearing, AAA rules allow arbitrators considerable flexibility to require parties to exchange information.²⁰⁵ This type of flexibility allows arbitrators to resolve disputes about missing documents and witnesses that arise prior to the hearing.²⁰⁶ Arbitrators could use these types of rules to compel the production of documents and resolve disputes regarding potential forgeries.²⁰⁷ Many of the AAA codes also provide that an arbitrator can order “interim measures” that would allow for the preservation of evidence.²⁰⁸ If an arbitrator were to hear that one party

²⁰² See *Search Rules*, AMERICAN ARBITRATION ASSOCIATION, <http://www.adr.org/aaa> (follow “Rules and Procedures” hyperlink; then follow “Rules” hyperlink).

²⁰³ See *id.* Currently, the AAA has seventy-four sets of rules. *Id.*

²⁰⁴ See *id.*

²⁰⁵ See, e.g., AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES) R. 21 (2009) [hereinafter COMMERCIAL ARBITRATION RULES] (detailing the “Exchange of Information” rule) (“(a) . . . [T]he arbitrator may direct i) the production of documents and other information, and ii) the identification of any witnesses to be called. . . . (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.”); see also AM. ARBITRATION ASS’N, CONSTRUCTION ARBITRATION RULES AND MEDIATION PROCEDURES (INCLUDING PROCEDURES FOR LARGE, COMPLEX CONSTRUCTION DISPUTES) R. 24 (2009) [hereinafter CONSTRUCTION ARBITRATION RULES]; AM. ARBITRATION ASS’N, HEALTHCARE PAYOR PROVIDER ARBITRATION RULES R. 20 (2011) [hereinafter HEALTHCARE ARBITRATION RULES]; AM. ARBITRATION ASS’N, INS. ARBITRATION RULES AND MEDIATION PROCEDURES R. 16 (2008) [hereinafter INS. ARBITRATION RULES]; AM. ARBITRATION ASS’N, WILLS AND TRUSTS ARBITRATION RULES AND MEDIATION PROCEDURES (INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES) R. 20 (2012) [hereinafter WILLS AND TRUSTS ARBITRATION RULES]. The rules with explicit provisions for “Large, Complex Disputes” contain even more discretion on the issue of pre-hearing evidentiary exchanges. See, e.g., sources cited *supra*.

²⁰⁶ See COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 21.

²⁰⁷ See *id.*

²⁰⁸ *Id.* at O-4 (explaining the “Interim Award” rule) (“If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage

or another might discard or otherwise spoil evidence, the arbitrator would be able to provide for an interim measure to keep the parties from destroying valuable evidence.²⁰⁹

At the hearing, the arbitrator can require witnesses to testify under oath as a matter of course or if they are concerned about the veracity of witness testimony.²¹⁰ In addition to their statutory powers to subpoena witnesses and documents, arbitrators also hold this power by virtue of the arbitral rules.²¹¹ Arbitrators, then, have the power to subpoena witnesses who have been difficult to find or otherwise uncooperative in the prehearing process.²¹² At the hearing, the arbitrator has wide latitude on evidentiary matters and can admit or exclude evidence under a broad, discretionary standard.²¹³ Under this type of rule, an arbitrator has the discretion to refuse

will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.”); *see also* AM. ARBITRATION ASS’N, EMP’T ARBITRATION RULES AND MEDIATION PROCEDURES R. 32 (2009) [hereinafter EMP’T ARBITRATION RULES]; AM. ARBITRATION ASS’N, COMMERCIAL FINANCE RULES (INCLUDING SAMPLE CLAUSES AND MEDIATION AND ARBITRATION RULES) R. 32 (2009) [hereinafter COMMERCIAL FINANCE RULES]; HEALTHCARE ARBITRATION RULES, *supra* note 205, at O-4; AM. ARBITRATION ASS’N, PROF’L ACCOUNTING AND RELATED SERVS. DISPUTE RESOLUTION RULES R. 34 (2009) [hereinafter PROF’L ACCOUNTING DISPUTE RULES]; AM. ARBITRATION ASS’N, REAL ESTATE INDUS. ARBITRATION RULES (INCLUDING A MEDIATION ALTERNATIVE) R. 36 (2009) [hereinafter REAL ESTATE ARBITRATION RULES]; WILLS AND TRUSTS ARBITRATION RULES, *supra* note 205, at R. 34, O-4.

²⁰⁹ *See, e.g.*, COMMERCIAL ARBITRATION RULES, *supra* note 205, at O-4.

²¹⁰ COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 25 (detailing the rule on “Oaths”) (“The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.”); *see also* COMMERCIAL FINANCE RULES, *supra* note 208, at R. 25; CONSTRUCTION ARBITRATION RULES, *supra* note 205, at R. 27; EMP’T ARBITRATION RULES, *supra* note 208, at R. 25; HEALTHCARE ARBITRATION RULES, *supra* note 205, at R. 24; INS. ARBITRATION RULES, *supra* note 205, at R. 20; AM. ARBITRATION ASS’N, LABOR ARBITRATION RULES R. 23 (2013); PROF’L ACCOUNTING DISPUTE RULES, *supra* note 208, at R. 27; REAL ESTATE ARBITRATION RULES, *supra* note 208, at R. 29; WILLS AND TRUSTS ARBITRATION RULES, *supra* note 205, at R. 24; AM. ARBITRATION ASS’N, WIRELESS INDUS. ARBITRATION RULES R. 26 (2009).

²¹¹ COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 31(d) (detailing the rule on “Evidence”) (“An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.”); *see also* CONSTRUCTION ARBITRATION RULES, *supra* note 205, at R. 33(d); HEALTHCARE ARBITRATION RULES, *supra* note 205, at R. 30(d); AM. ARBITRATION ASS’N, HOME CONSTR. ARBITRATION RULES AND MEDIATION PROCEDURES ARB-32(d) (2007) [hereinafter HOME CONSTR. ARBITRATION RULES]; INS. ARBITRATION RULES, *supra* note 205, at R. 25(d); LABOR ARBITRATION RULES, *supra* note 210, at R. 27; PROF’L ACCOUNTING DISPUTE RULES, *supra* note 208, at R. 31; REAL ESTATE ARBITRATION RULES, *supra* note 208, at R. 33; WILLS AND TRUSTS ARBITRATION RULES, *supra* note 205, at R. 31(d); WIRELESS INDUS. ARBITRATION RULES, *supra* note 210, at R. 30.

²¹² *See, e.g.*, COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 31(d).

²¹³ COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 31(b) (explaining further the rule on “Evidence”) (“The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.”); *see also* COMMERCIAL FINANCE RULES, *supra* note 208, at R. 29; CONSTRUCTION ARBITRATION RULES, *supra* note 205, at R. 33(b); HEALTHCARE ARBITRATION RULES, *supra* note 205, at R. 30(b); HOME CONSTR. ARBITRATION RULES, *supra* note 211, at ARB-32(b); INS. ARBITRATION RULES, *supra* note 205, at R. 25(b); LABOR ARBITRATION RULES, *supra* note 210, at R. 27; PROF’L ACCOUNTING DISPUTE RULES, *supra* note 208, at R. 31; REAL ESTATE

to admit evidence that appears to be false or can simply consider the value of the evidence “for what it’s worth” at the time the arbitrators render an award.²¹⁴ With respect to their award, arbitrators have great flexibility to render an award that is “just and equitable,” provided the award falls within the grant of the arbitrators’ powers.²¹⁵ These awards can, therefore, reflect misconduct occurring within the tribunal and right the wrong at the first level.²¹⁶ Finally, the arbitrator has great discretion to interpret the rules “as they relate to the arbitrator’s powers and duties,”²¹⁷ which gives added flexibility to deal with situations, like participant misconduct, not directly addressed in the rules.

The AAA rules, however, suffer from a lack of specificity on the issue of ethics enforcement, and the rules would be greatly improved if they gave arbitrators the specific ability to remedy ethical wrongs in the forum. Once rules are in place, the AAA would also have to educate its arbitrators on those new rules and the continuing obligation on arbitrators to ensure that the process is fair and comports with minimum due process requirements. Given the AAA’s commitment to due process (though the use of Due Process Protocols), this type of change would fit well within the AAA’s mission. Such a simple change would greatly cue arbitrators to their role in the process.

3. JAMS Rules

JAMS is a provider organization specializing in providing former judiciary employees as mediators and arbitrators.²¹⁸ Like the AAA, JAMS

ARBITRATION RULES, *supra* note 208, at R. 33; WILLS AND TRUSTS ARBITRATION RULES, *supra* note 205, at R. 31(b); WIRELESS INDUS. ARBITRATION RULES, *supra* note 210, at R. 30.

²¹⁴ See, e.g., COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 30(b).

²¹⁵ COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 43(a) (detailing the rule for “Scope of Award”); see also COMMERCIAL FINANCE RULES, *supra* note 208, at R. 41; CONSTRUCTION ARBITRATION RULES, *supra* note 205, at R. 45; EMP’T ARBITRATION RULES, *supra* note 208, at R. 39; HEALTHCARE ARBITRATION RULES, *supra* note 205, at R. 42; HOME CONSTR. ARBITRATION RULES, *supra* note 211, at ARB-43; INS. ARBITRATION RULES, *supra* note 205, at R. 35; PROF’L ACCOUNTING DISPUTE RULES, *supra* note 208, at R. 43; REAL ESTATE ARBITRATION RULES, *supra* note 208, at R. 45; WILLS AND TRUSTS ARBITRATION RULES, *supra* note 205, at R. 43; WIRELESS INDUS. ARBITRATION RULES, *supra* note 210, at R. 41.

²¹⁶ See, e.g., COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 43.

²¹⁷ COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 53 (detailing the “Interpretation and Application of Rules”); see also COMMERCIAL FINANCE RULES, *supra* note 208, at R. 16; CONSTRUCTION ARBITRATION RULES, *supra* note 205, at R. 8; EMP’T ARBITRATION RULES, *supra* note 208, at R. 48; HEALTHCARE ARBITRATION RULES, *supra* note 205, at R. 53; HOME CONSTR. ARBITRATION RULES, *supra* note 211, at ARB-49; INS. ARBITRATION RULES, *supra* note 205, at R. 43; LABOR ARBITRATION RULES, *supra* note 210, at R. 47; PROF’L ACCOUNTING DISPUTE RULES, *supra* note 208, at R. 52; REAL ESTATE ARBITRATION RULES, *supra* note 208, at R. 55; WILLS AND TRUSTS ARBITRATION RULES, *supra* note 205, at R. 53; WIRELESS INDUS. ARBITRATION RULES, *supra* note 210, at R. 52.

²¹⁸ About JAMS, JUDICIAL ARBITRATION AND MEDIATION SERVS.,

provides neutrals and administrative support for a wide variety of cases, but JAMS has far fewer sets of rules than the AAA, with a large number of disputes falling under the “JAMS Comprehensive Arbitration Rules and Procedures.”²¹⁹ This set of rules provides the basic outline of an arbitration administered by JAMS, which contains ample flexibility for arbitrators to address ethical issues and other types of participant wrongdoing.²²⁰ Unlike the AAA rules, the JAMS rules have already taken steps to help eradicate unethical conduct in the forum.

Under JAMS rules, prior to the arbitration hearing, the parties have a duty to engage in a “good faith” exchange of documentary evidence, including electronically stored information (ESI).²²¹ Information not exchanged prior to the hearing can be excluded at the hearing as a consequence for nondisclosure.²²² This “good faith” requires participants to act in an ethical manner and not hide documentary evidence, and the arbitrator can certainly remind the parties of their obligation and try to determine whether the parties meet their obligations.²²³ In addition to the parties’ obligations, the arbitrator has discretion to rule on discovery disputes²²⁴ and to issue subpoenas for witnesses and documents.²²⁵

<http://www.jamsadr.com/aboutus/xpqGC.aspx?xpST=AboutUs> (last visited Mar. 22, 2014). JAMS neutrals are not exclusively former judges, but the organization prides itself in having a large roster with judicial experience. *Id.* The organization’s website boasts: “Nearly 300 full-time neutrals, including retired judges and attorneys with proven track records.” *Id.*

²¹⁹ See generally JUDICIAL ARBITRATION AND MEDIATION SERVS., JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES (2010) [hereinafter JAMS COMPREHENSIVE RULES], available at <http://www.jamsadr.com/rules-comprehensive-arbitration/> (follow “English” hyperlink). JAMS does have additional rules for class action, construction, employment, expedited (e.g., streamlined), and international arbitrations. See *ADR Clauses, Rules, and Procedures*, JUDICIAL ARBITRATION AND MEDIATION SERVS., <http://www.jamsadr.com/rules-clauses/> (last visited Mar. 22, 2014).

²²⁰ See sources cited *supra* note 219.

²²¹ JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 17(a); see also JUDICIAL ARBITRATION AND MEDIATIONS SERVS., JAMS STREAMLINED ARBITRATION RULES AND PROCEDURES R. 13(a) (2009) [hereinafter JAMS STREAMLINED ARBITRATION RULES]; JUDICIAL ARBITRATION AND MEDIATION SERVS., JAMS ENG’G AND CONSTR. ARBITRATION RULES AND PROCEDURES R. 17(a) (2009) [hereinafter JAMS ENG’G AND CONSTR. ARBITRATION RULES]; JUDICIAL ARBITRATION AND MEDIATION SERVS., EMP’T ARBITRATION RULES AND PROCEDURES R. 17(a) (2009) [hereinafter JAMS EMP’T ARBITRATION RULES].

²²² JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 17(c); see also JAMS STREAMLINED ARBITRATION RULES, *supra* note 221, at R. 13(b); JAMS ENG’G AND CONSTR. ARBITRATION RULES, *supra* note 221, at R. 17(c); JAMS EMP’T ARBITRATION RULES, *supra* note 221, at R. 17(c).

²²³ See, e.g., JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 17.

²²⁴ *Id.* at R. 17(d); see also JAMS STREAMLINED ARBITRATION RULES, *supra* note 221, at R. 13(c); JAMS ENG’G AND CONSTR. ARBITRATION RULES, *supra* note 221, at R. 17(d); JAMS EMP’T ARBITRATION RULES, *supra* note 221, at R. 17(d).

²²⁵ JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 21 (securing witnesses and documents for the arbitration hearing); see also JAMS STREAMLINED ARBITRATION RULES, *supra* note 221, at R. 16; JAMS ENG’G AND CONSTR. ARBITRATION RULES, *supra* note 221, at R. 17(d); JAMS EMP’T ARBITRATION RULES, *supra* note 221, at R. 21.

Arbitrators who become aware of unethical conduct can deal with these types of issues on motion and try to resolve them even prior to the hearing.

As with the AAA rules, the arbitrators are afforded a great deal of discretion. Unlike the AAA rules, those discretionary rules are largely contained in the same provision.²²⁶ JAMS Comprehensive Arbitration Rules and Procedures, Rule 22 gives the arbitrators a wide scope of power, including: (1) discretion to “vary the procedures if it is deemed reasonable and appropriate,” (2) discretion to require that witnesses testify under oath, (3) flexibility to consult (but not be bound by) court evidentiary codes and procedures, and (4) flexibility to re-open a hearing prior to issuing an award for “good cause shown.”²²⁷ These rules give considerable flexibility and tools for an arbitrator to deal with ethical issues arising during the hearing process.²²⁸ Arbitrators are free to disregard tainted evidence or issue orders to rectify unethical conduct.²²⁹ Arbitrators also have the ability under these rules to issue “whatever interim measures are deemed necessary” to preserve evidence or otherwise maintain a fair forum.²³⁰

The JAMS rules recognize that attorneys and participants may not always act ethically and in good faith. To this end, the JAMS rules allow arbitrators to issue sanctions against parties who do not comply with the rules.²³¹ Rule 29 of the JAMS Comprehensive Arbitration Rules and Procedures gives the arbitrator the following powers:

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys’ fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration

²²⁶ See, e.g., JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 22.

²²⁷ *Id.* at R. 22 (detailing how the arbitration hearing will proceed); see also JAMS STREAMLINED ARBITRATION RULES, *supra* note 221, at R. 17; JAMS ENG’G AND CONSTR. ARBITRATION RULES, *supra* note 221, at R. 22; JAMS EMP’T ARBITRATION RULES, *supra* note 221, at R. 22.

²²⁸ See sources cited *supra* note 227.

²²⁹ See sources cited *supra* note 227.

²³⁰ JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 24 (detailing the “Awards” rule); see also JAMS STREAMLINED ARBITRATION RULES, *supra* note 221, at R. 19; JAMS ENG’G AND CONSTR. ARBITRATION RULES, *supra* note 221, at R. 24; JAMS EMP’T ARBITRATION RULES, *supra* note 221, at R. 24.

²³¹ JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 29 (detailing the “Sanctions” rule); see also JAMS STREAMLINED ARBITRATION RULES, *supra* note 221, at R. 24; JAMS ENG’G AND CONSTR. ARBITRATION RULES, *supra* note 221, at R. 29; JAMS EMP’T ARBITRATION RULES, *supra* note 221, at R. 29.

adversely to the Party that has failed to comply.²³²

This sanctions rule allows arbitrators to right ethical wrongs in the first instance. While the previous rules give arbitrators the ability to require production of documents, support maintaining documents, and encouraging truthful testimony through testimony under oath,²³³ the rule regarding sanctions goes further by giving arbitrators the authority to assess monetary damages or apply burden-shifting presumptions to right ethical wrongs.²³⁴

In this respect, JAMS is ahead of many of its institutional counterparts in terms of regulating participant conduct. These JAMS rules serve as a good starting point for other organizations to consider adding ethical conduct rules. In addition, JAMS would be well served to train their arbitrators on issues of ethical conduct, helping them understand that arbitrators are the first and last true line of defense for a fair forum. Principles of fundamental fairness and due process require that JAMS and other provider organizations keep arbitrators informed of their duties as “ethics enforcer” and ultimate gatekeeper of the process.

4. International Chamber of Commerce

Although this paper concerns domestic arbitration, as opposed to international arbitration, it is worth noting some of the highlights of at least one major international arbitral provider. As noted above,²³⁵ parties can choose to be bound by rules of a provider organization, even if they do not ultimately use that provider organization to administer the proceeding. In other words, parties to a contract could pick an international set of arbitration procedures, but agree to have the “seat” of the arbitration in the United States. This option might be particularly attractive to international parties or parties who are familiar with a specific set of international rules.²³⁶ For illustrative purposes, this section considers the rules of the International Chamber of Commerce, a large organization devoted to

²³² JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 29.

²³³ *See supra* notes 221–30 and accompanying text.

²³⁴ *See* JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 29.

²³⁵ *See supra* note 198 and accompanying text.

²³⁶ *See* source cited *supra* note 195.

worldwide business policy issues.²³⁷ The ICC also provides dispute resolution services through the ICC International Court of Arbitration.²³⁸

Under the ICC rules, arbitrators have great flexibility to design procedures to make arbitration a cost and time-effective manner of dispute resolution for the parties.²³⁹ The arbitrators' primary responsibility is to determine the facts of the case, and they have a number of tools to help them do so.²⁴⁰ As is common in international arbitrations, the arbitrators may consider long affidavits in lieu of directly examining testimony, or they may require the attendance of witnesses at hearings.²⁴¹ Arbitrators concerned about perjured testimony or falsified documents would have the power to independently request additional evidence on those points in order to quell their concerns.²⁴² The ICC rules also have a provision allowing arbitrators to issue interim awards, which, broadly read, could include an award requiring parties to maintain evidence to ensure its preservation.²⁴³ Arbitrators working under these rules can also tax arbitration costs to a party who engaged in certain types of misconduct—especially if the misconduct prolongs the dispute resolution process.²⁴⁴ As with the other sets of rules, the arbitrator has great flexibility to interpret all of the rules—and gaps in the rules—to promote fair dispute resolution.²⁴⁵

²³⁷ See generally INT'L CHAMBER OF COMMERCE (ICC) RULES OF ARBITRATION (Int'l Chamber of Commerce 2010) [hereinafter ICC ARBITRATION RULES], available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/>.

²³⁸ *Functions of the ICC International Court of Arbitration*, INT'L CHAMBER OF COMMERCE, <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/Functions-of-the-ICC-International-Court-of-Arbitration/> (last visited Mar. 22, 2014).

²³⁹ ICC ARBITRATION RULES, *supra* note 237, at art. 22(1) ("The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."); *id.* at art. 24(2) ("During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.").

²⁴⁰ See *id.* at art. 25, 26.

²⁴¹ *Id.* (requiring arbitrators to act in an expeditious manner; giving the arbitrators flexibility over the manner in which they determine facts; giving the arbitrators the power to request additional information or expert opinions; and allowing arbitrators to hold hearings as necessary).

²⁴² See *id.* at art. 25.

²⁴³ See *id.* at art. 28.

²⁴⁴ *Id.* at art. 37 ("In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.").

²⁴⁵ *Id.* at art. 19 ("The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."); *id.* at art. 41 ("In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.").

Thus, arbitrators practicing under a set of rules promulgated by a respected provider organization already have a number of tools to deal with unethical issues. The rules often provide a direct answer—or at least indirect support—to deal with lying witnesses, absent witnesses, tampered documents, hidden documents, and other types of misconduct within the arbitral forum.²⁴⁶ These types of rules give the arbitrators little excuse for not addressing unethical behavior in the first instance prior to or at the hearing, or whenever the issue arises by the parties or sua sponte. The rules, however, could be strengthened by specifically adding provisions regarding participant misconduct and the ability of arbitrators to sanction wrongdoers for violating the rules.

5. Assessing Credibility Through Live Witness Testimony

When arbitrators conduct hearings, they will undoubtedly assess the credibility of witnesses and observe the demeanor of the parties and counselors. Although this particular “tool” for arbitrators may seem obvious, it is a valuable and readily available way for arbitrators to curb lying in arbitration, and may help resolve any lingering questions about the genuineness of documents.²⁴⁷

The tradition in common law countries, such as the United States, is for arbitrators to hold live hearings with witnesses who testify on both direct and cross-examination.²⁴⁸ In contrast, witness testimony plays a less important role in civil law systems and written statements often replace the witness’ direct testimony.²⁴⁹ Arbitration, with roots in both systems, provides parties the option to choose either type of system.²⁵⁰ Arbitrators have great flexibility to hear witness testimony—under direct examination,

²⁴⁶ See *supra* Part V.B.2–4.

²⁴⁷ See Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1, 46–47 (2008).

²⁴⁸ See, e.g., John A. Wolf & Kelly M. Preteroti, *Written Witness Statements—A Practical Bridge of the Cultural Divide*, DISP. RESOL. J., May–July 2007, at 82, 84 (“The right of confrontation has long been a bedrock principle in common law litigation. As a result, written witness statements are generally considered inadmissible hearsay.”).

²⁴⁹ *Id.* at 85 (“Written witness statements replace direct oral testimony of the parties’ witnesses.”); see also Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1, 13–14 (2004) (“[M]ost disputes between customers and brokers involve issues of credibility, and the arbitrator has no opportunity to assess the credibility of the parties. Under the current system, the arbitrator can call a hearing to resolve these issues, but arbitrators understandably may be reluctant to do so, since it defeats the purpose of a simplified arbitration.”).

²⁵⁰ See Kimberly R. Wagner, *The Perfect Circle: Arbitration’s Favours Become Its Flaws in an Era of Nationalization and Regulation*, 12 PEPP. DISP. RESOL. J. 159, 164 (2012).

cross-examination, or both—or to conduct “paper proceedings,” in which no live testimony takes place at all.²⁵¹ While paper proceedings and limited witness testimony promotes the efficiency of the arbitration proceeding, limited contact with witnesses (fact and expert) can deprive the arbitral tribunal of valuable contextual information.²⁵²

Live witness testimony gives the arbitrator a first-hand chance to assess the veracity of the witness. Like trial judges, administrative judges, and other fact finders, arbitrators are in the best position to weigh conflicting evidence and determine the truth amidst varying versions of stories or outright conflicting testimony.²⁵³ If an arbitrator has questions about who to believe, the arbitrator can observe the demeanor of witnesses, including how they answer questions, the tone of their voice, the speed of their speech, and their body language, in order to determine who to believe.²⁵⁴ Of course, none of these methods of assessing credibility and determining the truth are foolproof,²⁵⁵ but the arbitrators will likely be the only people in the room who will be unbiased and in a position to make that assessment.²⁵⁶

²⁵¹ See, e.g., JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 22.

²⁵² Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration*, DISP. RESOL. J., May–July 2005, at 74, 80 (“[Witness statements] do not substitute for a proper examination-in-chief. Second, having a direct examination affords the arbitrator an opportunity to assess the credibility of the witness while presenting evidence in his or her own words, without leading by counsel.”); Wolf & Preteroti, *supra* note 248, at 87 (“For example, if there is a concern that the arbitrators will not have a sufficient opportunity to assess the credibility of a particular witness, the arbitrator could order a brief direct examination.”).

²⁵³ See, e.g., *Jones v. E.P.A.*, No. 2012-3167, 2013 WL 1316940, at *3 n.4 (Fed. Cir. Apr. 3, 2013) (“However, it is not the function of this court to ‘re-weigh conflicting evidence,’ so this argument [regarding credibility] does not provide a basis for upsetting the arbitrator’s factual findings.”); *DuBois v. Macy’s Retail Holdings, Inc.*, No. 11 CV 4904(NGG)(LB), 2012 WL 4060739, at *7 (E.D.N.Y. Aug. 17, 2012) (“It is the role of the arbitrators to make factual findings, weigh evidence, and assess the credibility of witnesses.”) (citation omitted); *Int’l Bhd. of Teamsters, Local 701 v. CBF Trucking, Inc.*, No. Civ. 09-5525, 2010 WL 2400400, at *3 (D.N.J. June 10, 2010) (“However, it is the arbitrator’s role to assess a witness’s credibility and the Court may not overturn an award simply because it may have reached a different determination.”); *Fairchild Corp. v. Alcoa, Inc.*, 510 F. Supp. 2d 280, 288 (S.D.N.Y. 2007) (“The Arbitrator had opportunity to assess the credibility of the witnesses and the reliability of the evidence, taking into account the record as a whole.”).

²⁵⁴ See Ronald J. Allen, *Rationality and the Taming of Complexity*, 62 ALA. L. REV. 1047, 1055 (2011).

²⁵⁵ Consider the following passage cited in Allen, *supra* note 254:

Is the witness sweating or twitching, and if so is it through innocent nerves, the pressure of prevarication, a medical problem, or simply a distasteful habit picked up during a regrettable childhood? Does body language suggest truthfulness or evasion; is slouching evidence of lying or comfort in telling a straightforward story? Does the witness look the examiner straight in the eye, and if so is it evidence of commendable character or the confidence of an accomplished snake oil salesman? Does the voice inflection suggest the rectitude of the

Arbitration offers a relatively unique opportunity for decision-makers to step in and question witnesses directly.²⁵⁷ Although American trial practice generally does not involve judges directly questioning the witness, domestic arbitrators will regularly ask witnesses questions in order to flesh out facts, clarify confusing points, and otherwise aid the arbitrators in making their decisions.²⁵⁸ Some arbitration procedures, such as those conducted by the Financial Industry Regulatory Authority (FINRA) specifically alert participants that the “arbitrators may also question these witnesses.”²⁵⁹ Arbitrators, then, with lingering questions about conflicting testimony or the reliability of evidence cannot only observe witnesses’ testimony but also seek clarification on these issues by questioning witnesses themselves.²⁶⁰

Relying on arbitrators to determine the veracity of witnesses is not without its drawbacks, however. Empirical research demonstrates that trial-level judges are not particularly accurate at determining the truthfulness of witnesses.²⁶¹ If trial judges are not successful at distinguishing between truth tellers and liars, then arbitrators may not be any better. Perhaps, though, vigilance to demeanor, voice tone, hesitations, body language, and contradictions could make all fact-finders more accurate in this regard.

If arbitrators are vigilant during the hearing, then they can best assess the veracity of the witnesses and try to determine who is telling the truth. Perhaps if arbitrators remain constantly aware and critical of the truthfulness of witnesses, they can make more accurate determinations regarding veracity. If arbitrators can accurately distinguish between truth tellers and liars, the arbitral forum will be fairer.

righteous or is it strained, and does a strained voice indicate fabrication or concern over the outcome of the case?

Id. (citation omitted); see also Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 31 (2008) (citing studies showing that even individuals trained in deception techniques have a difficult time in determining whether a person is lying based on the individual’s body language).

²⁵⁶ See Blankley, *Arbitration Ethics I*, *supra* note 18, at 976.

²⁵⁷ J.S. “Chris” Christie, Jr., *Preparing For and Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADVOC. 265, 277 (2008) (“The arbitrator may ask questions of witnesses and is generally given discretion to conduct the arbitration hearing to expedite resolution.”); Levinson, *supra* note 247, at 27 (“Sometimes the arbitrator will intervene with questions for the witnesses.”).

²⁵⁸ See *supra* note 257 and accompanying text.

²⁵⁹ *Hearings*, FINRA ARBITRATION & MEDIATION, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/Hearings/index.htm> (last visited Mar. 22, 2014).

²⁶⁰ See, e.g., *id.*

²⁶¹ See sources cited *supra* note 255.

6. Adverse Inference and Other Presumptions

In the American legal system, if a party withholds documents in bad faith, the “victim” party can move for a jury instruction that the document would have contained information adverse to the nonproducing party.²⁶² The court determines whether the burden is satisfied and considers whether a party acted in bad faith.²⁶³ Awarding one party an adverse inference is a common remedy when a court determines that a party has spoliated evidence.²⁶⁴

Arbitrators, too, can make adverse inferences in the event that a party acts in bad faith and spoliates evidence. Because arbitrations do not involve juries, arbitrators who find that an adverse inference is warranted would simply apply the inference themselves when determining the award.²⁶⁵ In this way, the adverse inference would operate in the same manner as if a judge presiding over a bench trial were to find an adverse inference warranted in a trial proceeding.²⁶⁶ The arbitrator would simply determine if the adverse inference should apply, and if so, apply the inference.²⁶⁷

Some arbitral provider rules, such as JAMS, specifically allow arbitrators to award an adverse inference as a sanction for unethical conduct. As noted above,²⁶⁸ JAMS rules offer arbitrators a wide variety of sanctions, including the possibility of “drawing adverse inferences” in the appropriate cases.²⁶⁹ If other provider organizations incorporated this type of rule, no question would exist with respect to the availability of the

²⁶² See *Reinsdorf v. Sketchers U.S.A., Inc.*, No. CV 10-7181 DDP (SSx), 2013 WL 3878685, at *19–21 (C.D. Cal. July 19, 2013) (describing the standard for spoliation); *Kostic v. A&M Univ. at Commerce*, No. 3:10-cv-2265-M, 2013 WL 3356263, at *2 (N.D. Tex. July 3, 2013) (“Under the spoliation doctrine, a jury may draw an adverse inference ‘that a party who intentionally destroys important evidence in bad faith did so because the contents of those documents were unfavorable to that party.’”); *Research Found. of State Univ. of N.Y. v. Nektar Therapeutics*, No. 1:09-cv-1292 (GLS/CFH), 2013 WL 2145652, at *10 (N.D.N.Y. May 15, 2013) (finding no adverse jury instruction warranted under the circumstances); *Drakeford v. Univ. of Chicago Hosps.*, No. 1-11-1366, 2013 WL 3296586, at *11 (Ill. Ct. App. June 28, 2013) (“In this case, the jury was allowed to draw adverse inferences from the fact that certain hospital documents and alleged handwritten notes were missing from the infant’s medical chart.”).

²⁶³ See *Peeler v. KVH Indus., Inc.*, No. 8:12-cv-1584-T-33TGW, 2013 WL 3871420, at *4 (M.D. Fla. July 25, 2013) (discussing the test for spoliation and the resulting adverse inference if the test is met); *Gen. Motors Acceptance Corp. v. N.Y. Cent. Mut. Fire Ins. Co.*, 961 N.Y.S.2d 142, 144–46 (N.Y. App. Div. 2013) (finding adverse inference warranted under the facts of the case).

²⁶⁴ See Cecilia Hallinan, Comment, *Balancing the Scales After Evidence Is Spolied: Does Pennsylvania’s Approach Sufficiently Protect the Injured Party*, 44 VILL. L. REV. 947, 950 (1999).

²⁶⁵ See Blankley, *Arbitration Ethics I*, *supra* note 18, at 954.

²⁶⁶ See *id.*

²⁶⁷ See *id.*

²⁶⁸ See *supra* note 227 and accompanying text.

²⁶⁹ JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 29.

adverse inference sanction. Other provider organizations and the common law give arbitrators such flexibility (as noted above) to award sanctions, and this authority is well within an arbitrator's inherent powers to manage proceedings.²⁷⁰ As discussed in more detail below, courts will largely affirm an adverse inference drawn by an arbitrator when a party withholds documents in bad faith.²⁷¹

Of course, using adverse inference remedies and other types of evidentiary presumptions are limited measures to deal with unethical conduct in the forum. This type of sanction, traditionally, has only been utilized in the area of document destruction or willful, bad faith nonproduction.²⁷² An adverse inference would not address other types of wrongful conduct, such as lying and falsifying documents, and would provide little help in this situation.²⁷³ But if arbitrators begin to use this type of tool, it would have the effect of leveling the playing field and ensuring that the parties receive a fair forum.

7. Awarding Monetary Sanctions

Another potential sanction for parties who act unethically and otherwise in bad faith could be the imposition of monetary sanctions on the wrongful party or law firm involved. This type of sanction is also available in the American legal system.²⁷⁴ For instance, if attorneys sign a document in bad faith or commit discovery abuses, the law firm or the client may be liable for sanctions, such as attorneys' fees to remedy the wrongdoing.²⁷⁵ Arbitrators are also free to sanction parties for unethical conduct within the forum.²⁷⁶

Much like the ability to apply adverse inferences, some arbitration codes already explicitly allow the use of monetary sanctions in the event of

²⁷⁰ See, e.g., *Seagate Tech., L.L.C. v. W. Digital Corp.*, 834 N.W.2d 555, 563 (Minn. Ct. App. 2013); COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 58.

²⁷¹ See *infra* Part VI.

²⁷² See Wm. Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction is an Effective Sanction in Electronic Discovery Cases*, 64 S.C.L. REV. 681, 685–687 (2013).

²⁷³ Cf. T. Patrick Gumkowski, Note, *Protecting the Integrity of the Rhode Island Judicial System and Assuring an Adequate Remedy for Victims of Spoliation: Why an Independent Cause of Action for the Spoliation of Evidence Is the Solution*, 10 ROGER WILLIAMS U. L. REV. 795, 814–816 (2005); Maria A. Losavio, *Synthesis of Louisiana Law on Spoliation of Evidence - Compared to the Rest of the Country, Did We Handle It Correctly?*, 58 LA. L. REV. 837, 862 (1998).

²⁷⁴ See, e.g., FED. R. CIV. P. 11(c) (allowing a court to sanction “any attorney, law firm, or party that violated the rule or is responsible for the violation” of the rule requiring the filing of pleadings in good faith); FED. R. CIV. P. 37(b) (providing for the possibility of sanctioning a party for disobeying discovery orders).

²⁷⁵ See sources cited *supra* note 274.

²⁷⁶ See, e.g., JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 29.

party or attorney misconduct. The JAMS sanction provisions specifically allow for such financial penalties in appropriate situations: “These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys’ fees.”²⁷⁷ The International Bar Association recently released the IBA Rules on the Taking of Evidence in International Arbitration as a guideline for a single set of rules for those from both common law and civil law countries.²⁷⁸ With respect to discovery issues, the rules require the parties to act in “good faith,” and the “Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of arbitration, including costs arising out of or in connection with the taking of evidence.”²⁷⁹ Other sets of rules give flexibility to the arbitrator that would likely give them plenty of authority to address discovery issues by issuing sanctions.²⁸⁰ If more provider organizations gave explicit flexibility to arbitrators to allow for the award of monetary sanctions, then this would be another tool that all arbitrators could use in order to correct misconduct and ensure a fair forum.

Unlike the remedy of making an adverse inference, the remedy of sanctions could be used for any type of unethical conduct. Sanctions could be appropriate to punish a party giving perjured testimony by awarding a disproportionate amount of costs onto the guilty party. Sanctions for unethical discovery wrongs could include attorneys’ fees for discovery work (such as depositions or fees for preparing discovery motions) or an assessment of costs. The arbitrator has considerable flexibility to right a wide variety of wrongs with financial consequences.²⁸¹ This type of tool helps ensure that the forum is fair by compensating the wronged party for having to defend against unethical tactics.

²⁷⁷ *Id.*

²⁷⁸ See generally INT’L BAR ASS’N, IBA RULES ON THE TAKING OF EVIDENCE IN INT’L ARBITRATION (2010) [hereinafter IBA RULES], available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>.

²⁷⁹ *Id.* at art. 9, cmt. 7. In comment 6, the IBA Rules also note the possibility that the arbitrator could employ an adverse inference or other presumption for wrongful non-disclosure of documentary evidence. *Id.* at art. 9, cmt. 6.

²⁸⁰ See COMMERCIAL ARBITRATION RULES, *supra* note 205, at R. 58.

²⁸¹ See *id.*; JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 29.

8. Sanctioning a Party by Dismissing a Claim or Defense

For very serious wrongs, an arbitrator could impose the ultimate penalty—outright dismissal of a claim or defense. This type of remedy for a wrong is rarely used in the American legal system, but it is an option in extreme cases.²⁸² A court may sanction a party by dismissing a claim or defense if that party engages in serious misconduct, such as fabricated testimony (lay or expert) or reports, or other evidence.²⁸³ If perjury is serious enough, a court could impose this type of sanction if the court found that the remedy was appropriate under the circumstances.²⁸⁴

Arbitrators, too, could dismiss claims or defenses as a remedy for wanton misconduct in the forum. Again, the JAMS rules explicitly give the arbitrator this power, if the arbitrator chooses to exercise it.²⁸⁵ The flexibility in other sets of rules would probably also allow an arbitrator to dismiss a claim or defense for an egregious violation of ethical rules.²⁸⁶ More explicit instruction from other provider organizations to give arbitrators this power would help provide a fair forum. The ability to sanction parties by dismissing claims and defenses would serve both as a deterrent and as a remedial measure.

Although the ability to dismiss a claim or defense is within the realm of what an arbitrator is permitted to do, arbitrators would likely be justifiably hesitant to actually resort to this remedy. Unlike judges, arbitrators do not issue “default” judgments.²⁸⁷ If one party—usually the respondent—fails to appear, the claimant still must make a case and prove entitlement to the

²⁸² See, e.g., *Warren v. Estate of Wade*, No. 12-11037, 2013 WL 3927796, at *1 (5th Cir. July 31, 2013) (“In addition, we warn Warren that frivolous, repetitive, or otherwise abusive filings will invite the imposition of sanctions, including dismissal, monetary sanctions, and/or restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction.”); *Pietraroia v. Ne. Utils.*, 756 A.2d 845, 854 (Conn. 2000) (“[T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of” the other party and the court); *Arzuman v. Saud*, 843 So. 2d 950, 952 (Fla. Dist. Ct. App. 2003) (holding that trial courts should reserve the dismissal sanction “for instances where the defaulting party’s misconduct is correspondingly egregious”).

²⁸³ See, e.g., *Brown v. Oil States Skagit Smatco*, L.L.C., 664 F.3d 71, 77–79 (5th Cir. 2011).

²⁸⁴ *Id.*

²⁸⁵ JAMS COMPREHENSIVE RULES, *supra* note 219, at R. 29 (“The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include . . . , in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.”).

²⁸⁶ See, e.g., FIN. INDUS. REGULATORY AUTH., CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES R. 12212 (2012).

²⁸⁷ See Roger Haydock, *Setting the Record Straight About Contractual Arbitration*, W. VA. LAW., Nov.–Dec. 2006, at 12, 12 (“‘Default’ arbitration awards do not exist under FORUM rules. If a respondent fails to answer, the arbitrator is required to issue an award based upon a ‘timely review of the merits’ of that claim.”) (citation omitted).

relief sought.²⁸⁸ Dismissing a claim or defense as a sanction would be a dramatic step for an arbitrator, and an arbitrator rightfully might refuse to grant this type of remedy on the basis that an award arising out of such a sanction might be subject to vacatur by the courts.²⁸⁹ Specifically, the courts can vacate an award if an arbitrator refused to consider evidence,²⁹⁰ and issuing sanctions might be construed as a refusal to consider certain evidence. The much safer ground for an arbitrator would be to consider the evidence “for what it’s worth” and then find against the party who has engaged in unethical behavior.²⁹¹ The ability to use this remedy, however, is a powerful tool for either deterrent effect or for remedial use. Having this type of extreme tool in the toolbox would help make arbitration a fairer forum able to effectively remedy wrongdoing.

9. Continuum of Possibilities

This section has demonstrated that arbitrators have a wide variety of tools at their disposal to become the first hand “ethics enforcers” of their own tribunals. These measures can be as unobtrusive as asking a witness some clarifying questions to issuing monetary or other types of sanctions upon determining that wrongful conduct has occurred.²⁹² The arbitrators who are on the ground and witnessing the conduct of the attorneys, witnesses, experts, and clients first-hand are in the best position to deal with ethical issues as they arise.²⁹³

Arbitrators must embrace their roles as ethics enforcers and understand how they are likely the first and the last resort for dealing with unethical conduct in the forum. Counselors, too, must become comfortable with taking these types of issues to arbitrators in the first instance because courts will not hear these types of motions while an arbitration is pending, and waiting until after an award is handed down would likely result in a waiver

²⁸⁸ See *id.*; Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, DISP. RESOL. J., Nov. 2006–Jan. 2007, at 9, 14 (noting that there would be little likelihood for an arbitrator to issue a default judgment against a party for failure to produce certain types of electronic data).

²⁸⁹ See *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 78–79 (1st Cir. 2008) (vacating arbitration award based on arbitrator’s improper dismissal of a counterclaim as a sanction). *But see AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85, 96 (E.D.N.Y. 2008) (holding that even if dismissal of counterclaim was a sanction, it did not warrant vacating the arbitration award).

²⁹⁰ 9 U.S.C. § 10(a)(3) (2012) (allowing vacatur of an award when the arbitrators “refus[ed] to hear evidence pertinent and material to the controversy”).

²⁹¹ See *supra* notes 133–34 and accompanying text.

²⁹² See *supra* Part V.B.5–8.

²⁹³ See *supra* notes 186–92 and accompanying text.

of the issue.²⁹⁴ If the arbitrators do not take steps to remedy ethical wrongs, those wrongs will likely go unpunished, creating an injustice for the victim parties.²⁹⁵ If ethical issues on a system-wide basis are not remedied, arbitration would become an unfair forum in which parties could resort to any means in order to “win.”²⁹⁶ Arbitrators, then, must be the first and likely the last resort for dealing with these types of wrongs unless and until the law changes to give additional remedies to deal with participant wrongs, such as changing the criminal laws and slightly loosening the standard for vacatur of awards based on participant misconduct.²⁹⁷

10. Arbitrators Must Step out of Their “Comfort Zone”

Admittedly, acting as an “ethics enforcer” is not a comfortable spot for anyone, much less an arbitrator. As noted above, arbitrators are chosen on the open market, usually by the counsel for the parties. Many people would like to be arbitrators, and the profession is a difficult one to break into.²⁹⁸ For the most part, being chosen as an arbitrator is an honor. Being chosen as an arbitrator is also a potentially lucrative prospect. Arbitrators can charge upwards of \$500 per hour or more, depending on the type of case and the agreements of the parties.²⁹⁹ Arbitrators who perform well have the potential of receiving repeat business from the parties or their counsel.

Given this situation, arbitrators may be hesitant to be as vigilant as they need to be in order to deal with misconduct in the forum. Arbitrators may simply be blind to the fact that the parties who chose them would actually commit unethical conduct. At a more cynical level, a worry exists that arbitrators would intentionally overlook unethical conduct on the part of a

²⁹⁴ If a party does not raise an issue to the arbitrator in the first instance, that issue is waived if an attorney later tries to use that theory as a basis upon which to vacate an award. See *Goff v. Dakota, Minn., & E. R.R. Corp.*, 276 F.3d 992, 998 (8th Cir. 2002); *Porush v. Lemire*, 6 F. Supp. 2d 178, 182 (E.D.N.Y. 1998).

²⁹⁵ See Bennett, *supra* note 80, at 39.

²⁹⁶ In my first paper on this issue, I referred to this potential for creating a landscape of unethical behavior as the “wild west” of adjudication. See Blankley, *Arbitration Ethics I*, *supra* note 18, at 925.

²⁹⁷ See *supra* notes 186–92 and accompanying text.

²⁹⁸ See generally Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators*, N.Y. ST. B.A.J., Jan. 2012.

²⁹⁹ See, e.g., AM. ARBITRATION ASS’N, COMMERCIAL FEE SCHEDULE (2010), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004102; AM. ARBITRATION ASS’N, CONSTRUCTION FEE SCHEDULE (2010), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004254; AM. ARBITRATION ASS’N, LABOR ARBITRATION RULES FEE SCHEDULE (2013), available at <http://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2011024>; AM. ARBITRATION ASS’N, EMPLOYMENT ARBITRATION RULES FEE SCHEDULE (2013), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE_2011226.

party or counsel who is a “repeat player” in arbitration (and likely to re-hire the arbitrator), especially in a case against a “one shot player” who will likely never again employ an arbitrator.

Increased arbitrator education could hopefully alleviate some of these issues. A tightening of the arbitral provider rules would also give increased guidance to the arbitrators about the tools available to them to right ethical wrongs. Increased awareness of the arbitrators’ ethical duties will ensure that arbitration is a forum comporting with due process and fundamental fairness.

11. These Types of Remedies Do Not “Litigationize” the Arbitral Forum

Whenever any proposed changes to the arbitral forum involve the use of judicial remedies and procedures, questions arise as to whether arbitration’s inherent characteristics remain at the center of the process. This proposal does include certain aspects of arbitrators using the same remedies as courts and other adjudicators, but it still remains true to the fundamental goals of arbitration—namely flexibility and finality.³⁰⁰

Flexibility is one of the greatest hallmarks of the arbitral process.³⁰¹ Parties choose arbitration because the parties can design the process and arbitrators have the power to award remedies not available to courts.³⁰² Giving arbitrators a wide array of tools to deal with ethical violations bolsters the flexibility afforded to arbitrators. Arbitrators face similar types of problems as judges and other adjudicators,³⁰³ so it seems fitting that they would be afforded similar tools to deal with ethical transgressions. Given that the arbitral forum is essentially a forum of equity,³⁰⁴ the more tools from which an arbitrator can choose, the easier the arbitrator can customize any type of sanction or penalty to the specific circumstances of the ethical violation.

³⁰⁰ See discussion *infra* Part VI.

³⁰¹ DAVID ST. JOHN SUTTON ET AL., *RUSSELL ON ARBITRATION* 1-024 (23rd ed. 2007).

³⁰² *Id.*

³⁰³ See *Boraks v. Am. Arbitration Ass’n*, 517 N.W.2d 771, 772 (Mich. Ct. App. 1994) (“[T]he function of arbitrators is analogous to that of a court and their duties require the exercise of judgment, like public judicial officers . . .”).

³⁰⁴ The American judicial system, for the most part, is a forum of law; however, arbitrators have considerably more flexibility to act from a theory of equity. Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151, 175–76 (2002) (“Courts, unfamiliar with the structure and procedure of arbitration, would be placed in an awkward position of reviewing the creative and flexible remedies available to arbitrators with experience and expertise very different from that of the judiciary applying traditional theories of remedy and equity in arriving at final judgments.”).

In addition, arbitration is a forum that promotes finality and efficient dispute resolution. Having an arbitrator deal with ethical wrongs firsthand would promote that all of the issues are resolved in one forum, and that multiple, related proceedings are not being undertaken in different forums. If arbitrators take a more active role in policing arbitral conduct, then all issues will be considered at the same time. A losing party in arbitration could then move to vacate the entire award, including the rulings on the ethical issues.³⁰⁵ The reviewing court has limited grounds for vacatur,³⁰⁶ but the court could consider all of the issues at once, with the arbitrator having already passed on the issue.

Of course, not every ethical violation can be addressed to an arbitrator at the time it becomes known. Some ethical wrongs only come to light at a later time after an arbitrator has already heard the case or while a case is pending appeal. In those instances in which a party did not know or could not have known about the ethical wrongs, the wronged party should have the right to either request that the arbitration be reopened or to address the ethical violations with a court.³⁰⁷ Otherwise, the party would have waived the right to have the issue heard at all—either by an arbitrator or by the courts.³⁰⁸ These types of waiver rules, then, also help promote the arbitrator's authority over the tribunal, as well as encourage the arbitrator to have the first opportunity to pass on every issue within the arbitrator's powers.

VI. COURTS AFFORD ARBITRATORS GREAT DISCRETION

As noted above, the limited grounds for review insulate arbitrator awards from attack and promote the finality of the arbitral process. Part of this arbitrator discretion, then, extends to arbitrators' decisions on ethical issues, including the issuance of sanctions and other types of remedies for dealing with misconduct in the arbitral forum.³⁰⁹

³⁰⁵ See 9 U.S.C. § 10(a) (2012).

³⁰⁶ See *id.*

³⁰⁷ See, e.g., *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989) (holding that a party waives an argument in favor of vacatur if the party knew of the argument at the time of the arbitration and failed to make it to the arbitrator); *Amalgamated Meat Cutters & Butcher Workmen of North Am., Local 195 v. Cross Bros. Meat Packers, Inc.*, 518 F.2d 1113, 1121 n.19 (3d Cir. 1975) (noting that a “loser is not permitted for the first time to raise an objection to the arbitration panel after the award has been made”) (citation omitted); *Stone v. Bear, Stearns & Co., Inc.*, 872 F. Supp. 2d 435, 455–56 (E.D. Pa. 2012) (finding that a party can waive an argument for vacatur of an arbitration award if the party “knew or should have known” of the argument but failed to make such argument to the arbitrator in the first instance).

³⁰⁸ See sources cited *supra* note 307.

³⁰⁹ See *supra* Part V.B.5–11.

For instance, in a recent case, the Minnesota Court of Appeals held that the inherent powers of an arbitrator include the ability to sanction a party for misconduct. In *Seagate Technology v. Western Digital Corp.*,³¹⁰ the arbitrator heard an employment dispute for disclosure of trade secrets.³¹¹ At the arbitration, the respondent argued that the trade secrets were actually disclosed to the public, thus taking away their protected status.³¹² The arbitrator found that the “evidence” of public disclosure was fabricated, and the arbitrator sanctioned the offending party for creating fake evidence.³¹³ The arbitrator found that this “misconduct” warranted “severe sanctions,” including the preclusion of any evidence or defense “disputing the validity” of certain trade secrets.³¹⁴ Ultimately, the arbitrator found trade secret violations and ordered damages in the amount of \$525 million, prejudgment interest of nearly \$100 million, and post-award interest of more than \$9 million.³¹⁵ The trial court vacated the decision on the alternative bases that the arbitrator exceeded his powers or misapplied sanction law.³¹⁶

The court of appeals reversed on two grounds. First, the court found that the sanctioned party waived this argument.³¹⁷ The sanctioned party failed to challenge the arbitrator’s authority to issue sanctions at the arbitration hearing and, in fact, requested that the arbitrator sanction the other party.³¹⁸ As to the arbitrator’s authority, the court noted that the arbitration proceeded under AAA rules, which are silent on the issue of the ability of an arbitrator to sanction a party for bad faith conduct.³¹⁹ In this instance, the court found that, given the broad powers of the arbitrator and the failure of the contract to *prohibit* the award of sanctions, the arbitrator had the *inherent* power to issue sanctions.³²⁰ Ultimately, the court upheld

³¹⁰ *Seagate Tech. v. W. Digital Corp.*, 834 N.W.2d 555 (Minn. Ct. App. 2013).

³¹¹ *Id.* at 558. The arbitration agreement between the parties was broad, covering “any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement.” *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 559.

³¹⁶ *Id.*

³¹⁷ *Id.* at 561.

³¹⁸ *Id.*

³¹⁹ See *supra* Part V.B.2. (regarding the AAA rules and the interplay with participant misconduct).

³²⁰ *Seagate Tech.*, 834 N.W.2d at 563. The court also noted that, while the AAA rules do not specifically speak to the ability to award sanctions, Rule 39 of the Employment Arbitration Rules and Mediation Procedures allow an arbitrator to grant “any remedy or relief” available to a party at court, including awards of attorneys’ fees and costs. *Id.* (internal quotation marks omitted).

both the arbitrator's ability to award sanctions as well as the amount of sanctions awarded.³²¹ The *Seagate* case demonstrates both the importance of the waiver and the arbitrator's inherent powers. This Minnesota court recognizes the important policies behind arbitrator autonomy and authority within the forum.³²²

Similarly, in *AmeriCredit Financial Services, Inc. v. Oxford Management Services*,³²³ the Eastern District of New York considered a challenge to an arbitrator's decision to dismiss counterclaims as a sanction for destroying documents relevant to the claims at issue.³²⁴ The underlying dispute involved a question of who had the right to pursue certain collection matters.³²⁵ With regard to the sanctions, the arbitrator found that Oxford "knowingly destroyed records necessary to resolve the disputes between the parties."³²⁶ As a sanction, the arbitrator dismissed Oxford's counterclaims.³²⁷ The court found that, while the contract prohibited the arbitrator from issuing punitive damages, the arbitrator did have the ability to dismiss the counterclaims under the authority granted by contract and in the ambiguity of the AAA rules.³²⁸ Again, decisions like this one preserve the inherent authority that arbitrators have to ensure a fair forum and keep parties from acting in an unethical manner in the process.³²⁹

These sample cases demonstrate the power afforded to arbitrators when those arbitrators take affirmative steps to deal with ethical issues in the first instance. Having the arbitrators address ethical violations as they occur will allow the same decision-maker to rule on all issues relating to the process, provided that the parties do not explicitly remove this ability from the

³²¹ *Id.* at 567.

³²² *See id.*

³²³ *AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85 (E.D.N.Y. 2008).

³²⁴ *Id.* at 90–91.

³²⁵ *Id.* at 89–90.

³²⁶ *Id.* at 91.

³²⁷ *Id.*

³²⁸ *Id.* at 96.

³²⁹ *See also* *Hamstein Cumberland Music Grp. v. Williams*, No. 05-51666, 2013 WL 3227536, at *4 (5th Cir. May 10, 2013) (holding that an arbitrator had inherent powers to sanction a party for discovery abuses); *Jones v. PPG Indus., Inc.*, 393 F. App'x 869, 871 (3rd Cir. 2010); *In re Arbitration Between United Pub. Workers, AFSCME, Local 646, AFL-CIO and City and Cnty. of Honolulu Holiday Pay*, No. 29710, 2011 WL 2696394, at *11 (Haw. App. Ct. July 12, 2011) ("It is within the Arbitrator's authority to impose discovery sanctions."). Interestingly, the *Jones* court involved a claim in which the arbitrator found an adverse inference against the respondent party and then still ruled in favor of the respondent. 393 F. App'x at 871. The trial court and Third Circuit confirmed the arbitral award based a review of the extensive record in the case. *Id.* In *Davis v. Reliance Electric Industrial Co.*, the arbitrator had grave concerns regarding the respondent-employer's failure to provide certain critical documents, so the arbitrator awarded punitive damages against the employer based on a portion of the employer's net worth. 104 S.W.3d 57, 60 (Tenn. Ct. App. 2002).

arbitrators. Parties, as the masters of their agreement and ultimate designers of the process, could attempt to take the ability to sanction parties out of the hands of the arbitrator—but then it would be unclear who would retain that power. As noted above, the courts have little ability to interfere with the arbitral forum—during or after arbitration.³³⁰ If the arbitrator does not deal with the ethical issue, it is very likely that no one will.³³¹

To date, the cases seem to suggest that the arbitrators are dealing with ethical issues regarding abuse of the forum, such as document or witness tampering. These cases appear to center on *parties* who make these issues known to the arbitrator either at a hearing or in a motion before or after the hearing.³³² Given the fact that many arbitrations involve pre-arbitration discovery, counsel and parties will likely be apprised of discovery abuses at an earlier time than the arbitrators. But arbitrators should not rely solely on the parties to remedy unethical behavior in the forum. They need to be watchful and determine whether the parties are acting in a way respectful of each other and of the forum. Arbitrators should not be afraid to deal with unethical conduct *sua sponte* because if arbitrators neglect these types of issues, the ethical wrongs will likely go uncorrected, thus creating an unfair forum for the parties—particularly the parties that are playing by the rules.³³³

VII. PUTTING IT ALL TOGETHER – HOW ARBITRATORS CAN ALSO BENEFIT FROM LEGISLATIVE CHANGE

As mentioned above, I have previously advocated for legislative change in the area of arbitration ethics.³³⁴ This paper on arbitrators as ethics enforcers does not contradict my previous research, but instead explores a facet of participant ethics in arbitration and works in tandem with my previous research. In fact, arbitrators, too, could benefit from a more clearly defined law regarding arbitration ethics.

As things currently stand, the law is altogether murky as to whether wrongful conduct perpetrated in the arbitral forum is even prohibited or punishable by law.³³⁵ Perjury and tampering (both with witnesses and

³³⁰ See *supra* notes 310–29 and accompanying text.

³³¹ See *supra* notes 310–29 and accompanying text.

³³² See *supra* notes 310–29 and accompanying text.

³³³ See *supra* notes 293–97 and accompanying text.

³³⁴ See *supra* notes 18–22 and accompanying text.

³³⁵ See *supra* Part III.

documents) questionably apply to the arbitral forum.³³⁶ Dealing with ethical and potential criminal conduct at the arbitral award confirmation or vacatur stage also leaves a lot of conduct unaddressed because of high burdens of proof and waiver issues.³³⁷ Accordingly, the arbitrators are often the first and last line of defense to deal with wrongful conduct.³³⁸

If the criminal law, however, were to change, this would arguably give arbitrators more authority to exert control over ethical issues in the process and sanction wrongful conduct. Extending perjury and tampering laws to the arbitral forum would give an arbitrator additional gravitas when issuing an award for sanctions because the arbitrator could cite the criminal law as a basis on which to base his or her award. A change in the criminal law would likely have a *de minimis* effect on criminal prosecutions in any event. Urging for a shift (or clarification) of the criminal law is meant to have a deterrent effect on arbitration and give arbitrators the legal backing to impose sanctions—it was not intended to turn arbitration into a police state.

These propositions can work hand in hand. Clarifying the law and modifying some of the review standards will not take powers away from the arbitrators. Instead, extending the criminal law would reinforce arbitrator decisions and give arbitrators additional tools to manage their own forums. A slight shift in the review provisions in the event of participant misconduct—again, simply making the same standard available to all forms of review—would treat arbitrator decisions on ethical issues in the same way as every other arbitral decision. These tools preserve arbitrator autonomy as the first (and likely last) authority on the conduct within the arbitral forum. Utilizing these tools will ensure that arbitration is a fair forum comporting with due process.

³³⁶ See *supra* notes 64–67 and accompanying text.

³³⁷ See *supra* Part IV.

³³⁸ See *supra* Part V.B.9.