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Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not

CARRIE MENKEL-MEADOW*

INTRODUCTION

There is no question that arbitration has captured much of the field of legal disputing, in both domestic and international matters, and in pre-dispute contractual allocations of dispute mechanisms and post-dispute references to arbitration, whether by party agreement or court referral. The legal issues in these different spheres are complex and diverse, and like many, I fear that "arbitration" has become too capacious a term to describe all that fits within its definitional ambit. Arbitration is simply a usually (but not always) private process of adjudication in which parties in dispute with each other choose decision-makers (sometimes one, often a panel of three) and the rules of procedure, evidence, and decision by which their dispute will be *decided*. This is distinguished from mediation in which a neutral third party *facilitates* party negotiations to resolve a dispute, but does not decide the matters in conflict, and adjudication in which an officer of the state (usually a judge) *decides* a matter according to principles of law that are often (but not always) published and available for use as precedent by parties other than the principal disputants.

In recent years a variety of legal, ethical, jurisprudential,¹ and sociological² issues have been raised with respect to the use of arbitration,

* Professor of Law and Director, Georgetown-Hewlett Program in Conflict Resolution and Legal Problem Solving. Because I argue in this essay for the importance of disclosures in judging the fairness of the arbitral process, I must disclose that I serve as the Chair of the CPR-Georgetown Commission on Ethics and Standards in ADR, whose work I discuss in these pages. The work of the Commission is supported by a grant from the William and Flora Hewlett Foundation and the support of Georgetown University Law Center.

Thanks to my friend and colleague Clark Freshman for hospitality and good conversation and for working in this field; thanks to the University of Miami Law Review editors for the invitation, planning, and execution of an excellent symposium, and thanks to John Hart Ely and the Miami faculty for listening to yet another paper of mine (not this one and not yet published) and to me during a multiple day visit to the University of Miami Law School, and for stimulating conversations, as always. This essay is derived from remarks made at the Symposium on Arbitration at the University of Miami School of Law on March 2, 2002.

1. See, e.g., Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

2. See, e.g., YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1995).

especially as it has moved from its primary historical form as a method of consensual dispute resolution between repeat player commercial parties³ to contractually mandated forms of decision-making in disputes⁴ between consumers and banks, hospitals, schools, employers, airlines, securities sellers, and merchants of all sizes and shapes.⁵ In addition, what began as a consensual and private process to avoid courts and litigation has migrated to the courts, where both state and some federal courts now require parties to go to court-annexed arbitration (where the arbitrators are usually lawyers, paid or volunteer) before they will be allowed a trial before either a judge or jury.⁶ These multiple variations and forms of arbitration in increasingly diverse contexts⁷ raise very significant issues about the fairness, justice, and ethicality (at both micro-behavioral and macro-justice levels) of the functioning of arbitration processes.

In this essay, I will briefly review what the ethical issues in arbitration are and who is doing what with respect to those issues. I will also opine a bit, as an ethicist and an Alternative Dispute Resolution (ADR) scholar and practitioner, about where I think the “ethics of arbitration” is going, both in terms of formal regulation and other forces that affect lawyer and party behavior. While some claim that the market will sufficiently discipline a process in which arbitrators must be agreed to by the parties,⁸ I believe it essential that some forms of transparency, disclo-

3. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983).

4. Jean Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

5. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999); David S. Schwartz, *Enforcing Small Print to Protect Big Business Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002).

6. This has been determined by many courts to be constitutional and not a violation of the right to trial by jury. See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989). But see Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

7. See Sarah Randolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001).

8. See, for example, Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999); see also Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L. REV. 493 (1989) for an eloquent argument that a “market” in reputation for ethical conduct will be more effective at regulating lawyer bargaining ethics than formal rule systems. This argument was also made by James J. White in the early 1980s to forestall efforts by the ABA to more fully regulate private negotiation behavior. James J. White, *Machiavelli and the Bar*, 1980 A.B.F. RES. J. 926. Professor White argued that since negotiation

sure, rules, sanctions, and consequences will be necessary for arbitration to maintain any semblance of legal legitimacy and justice. I say this in full recognition of the fact that the United States Supreme Court,⁹ as well as most federal and state courts, are increasingly deferring to private arbitration as a way of reducing court dockets and judicial workload, all in the name of an as-yet-to-be-proven empirical claim of efficiency,¹⁰ party choice, and consent,¹¹ and in opposition to many claims that this judicial preference for arbitration violates due process¹² and other significant legal rights of would-be litigants.

THE ISSUES

The use of arbitration presents a variety of different kinds of ethical issues, ranging from the particular ethical behavioral choices made by the actors inside an arbitration, including the arbitrators, lawyers (or other representatives), parties, and witnesses, to the institutions who choose, administer, and promote arbitration (such as courts, the American Arbitration Association, the Center for Public Resources, the International Chamber of Commerce, and many other "provider" organizations), to the parties or entities who place arbitration clauses in contracts of sale or provision of services, sometimes without fully knowing what they are drafting. In addition to behavioral choices in the conduct of arbitration there are larger, macro or systemic justice issues in how arbitral choices and decisions are made in conjunction with other possible methods of dispute resolution (like comparisons to formal legal

behavior was private and confidential it could not effectively be monitored, regulated, and enforced by formal ethical rules, and a lawyer's private behavior had to be left to internal (read market) discipline. *Id.*

9. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *But see* *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002), *cert. denied*, 122 S. Ct. 2329 (2002) (holding mandatory employment arbitration clause unconscionable after remand by Supreme Court).

10. JAMES S. KAKALIK ET AL., *JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996)*; PUB. CITIZEN, *THE COSTS OF ARBITRATION* (2002).

11. See Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909 (2002).

12. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000).

justice in courts,¹³ or foregoing conflict¹⁴), whether disputing should be public or private,¹⁵ how real or deep the consent in consensual dispute resolution should be, and what kind of formal governmental or other scrutiny there ought to be of privately arranged dispute resolution.

In developing taxonomies of ethical issues it is common to divide such issues, as I often have, into “micro” or individual behavioral issues and “macro” or institutional or social justice issues.¹⁶ In examining the ethical issues that have emerged in the use of arbitration, we are beginning to see proposed rules that attempt to provide formal regulations or suggested “guidelines” and “best practices” at both of these levels—for the individuals involved in arbitration, including both third-party neutrals (arbitrators) and the advocates or representatives of parties in arbitration,¹⁷ and the institutions that administer or construct the process.¹⁸ In examining the kinds of ethical issues that emerge from the practice of arbitration and the bodies that have chosen to attempt to address those issues, it is interesting, instructive, and sometimes ironic to view both the content of the proposed ethical guidelines and the chosen forms of sanctioning, regulation, or “policing.” At the level of enforcement there are important questions about whether the field of arbitration, like the legal profession, should be self-regulating¹⁹ (like the fox guarding the hen house, as some might argue, when the American Arbitration Association (AAA) determines its own conflicts of interest or that of its arbitrators), or whether some outside bodies (courts) or greater public scrutiny of the process might be desirable.

13. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991); Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996).

14. William L.F. Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW & SOC'Y REV. 695 (1975); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81).

15. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 619 (1995).

16. See, e.g., Carrie Menkel-Meadow, *Ethics in ADR: The Many “C’s” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2001); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407 (1997).

17. See, e.g., AMERICAN ARBITRATION ASSOCIATION, *THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* (1977) (currently being revised); Georgetown-Center for Public Resources Commission on Ethics and Standards in ADR, *Proposed Model Rule for the Lawyer as Third Party Neutral*, available at <http://www.cpradr.org>.

18. See, e.g., Due Process Protocol for Mediation and Arbitration of Employment Disputes, 9A LAB. REL. REP. (BNA), 534 Individual Empl. Rts. Manual 401, 404 (May 9, 1995); CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, *Principles for ADR Provider Organizations* (2002), available at <http://www.cpradr.org>; ADR Provider Organization, *Statement of Ethical Principles for the American Arbitration Association* (2002), available at <http://www.adr.org>.

19. David Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992).

I have come to use a simple pneumatic device to delineate the ethics issues presented by the use of arbitration as a device for dispute resolution: the 10 C's of dispute resolution ethics. I present them below, more or less in order of their current importance and controversy.

1. *Choice, Consent and Coercion*

Much of the current outcry and controversy about the use of arbitration is lodged by those (principally on behalf of employees, consumers, and non-merchant contractors for services) who see arbitration being mandated in situations where parties to a contract, or litigants in a court, are being compelled to use arbitration because of a contract clause or court rule that the party probably did not fully understand or agree to. Legal scholars,²⁰ lawyers,²¹ and journalists²² have been arguing in a wide variety of cases and articles that often arbitration clauses appear in adhesion contracts, whether or not so acknowledged by courts,²³ or worse, in employment applications or program descriptions (as in health insurance, medical care, and education) that the parties may not have read and certainly have not understood. To the extent that "consent" is the talisman and motivating impulse behind arbitration, the claim is that it is wrong and unethical for arbitration clauses to be enforced on those who did not willingly submit to them,²⁴ and that lawyers (and judges?)

20. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Jean Sternlight, *supra* note 6.

21. Cliff Palevsky, *Only a Start: ADR Provider Ethical Principles Don't Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18-20.

22. Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1; Caroline Mayer, *Hidden in Fine Print: You Can't Sue Us; Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1; Reynolds Holding, *Private Justice/Millions Are Losing Their Legal Rights: Supreme Court Forces Disputes from Court to Arbitration—A System with No Laws*, S.F. CHRON., Oct. 7, 2001, at A1. *But see* Jackson Williams, *Ganging Up on the Little Guys*, NAT'L L.J., July 22, 2002, at A24 (reporting on *Toppings v. Meritech Mortgage Services*, in which the West Virginia Supreme Court recently held a mandatory arbitration clause to be unconscionable because of the "repeat player" bias created when an arbitrator depends on referrals from the same litigant for future income).

23. *Circuit City v. Adams*, 279 F.3d 889 (9th Cir. 2002) (finding a mandatory employment arbitration clause unconscionable); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) (holding mandatory employment arbitration clause unconscionable); *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997) (voiding mandatory arbitration clause in health insurance without holding contract to be one of adhesion).

24. This proved to be a very controversial point in the drafting of the Due Process Protocol for fairness standards in employment arbitration. In order to achieve a large cross-section of signatories, including representatives of management lawyers, the Due Process Protocol does not fully condemn "mandatory" arbitration clauses, or as Wayne Outten, an employment lawyer, calls them, "cram-down arbitration clauses." *See* JOHN T. DUNLOP & ARNOLD ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 45 (1997); *see also* Menkel-Meadow, *supra* note 5, at 41-48. Similar issues have arisen in the development and drafting of due process protocols for arbitration in the health care field and in consumer litigation more generally. *See, e.g., AAA/*

who attempt to hold disputants to clauses they did not knowingly submit to are behaving unethically and inappropriately (in both the micro-behavioral and larger social justice senses of being ethical). If informed consent and party self-determination²⁵ are the principal values animating “alternative” (or “appropriate,” as we now say) dispute resolution, then uses of arbitration where it is not consented to, but “coerced” by an adhesion contract clause, are highly problematic ethically. Should a management, bank, hospital, manufacturer, or merchant’s lawyer pursue an arbitration when s/he knows the consumer had no idea that an arbitration clause was in a contract for a good or service provided? Should a lawyer even draft such a clause for a form, knowing it will not be read, understood, or appreciated by the likely signatory?

2. Courts or Contracts?

Like the mandatory arbitration clauses that have appeared in so many contracts, many courts at both the federal²⁶ and state court levels now require (or strongly urge) parties (especially in matters below a certain monetary amount, so called “minor disputes” or “small claims”²⁷) to go to arbitration before allowing a case to be placed on the trial docket. While some courts (most federal and many state courts) still require a referral to arbitration to be “voluntary,” others make arbitration or some arbitration-like process (like “Michigan mediation”²⁸ or early neutral evaluation²⁹) mandatory. If parties do not like what happened in the arbitration they usually have the right to a trial de novo, although they often have to post a bond, a practice which has been criticized as

ABA/AMA COMMISSION OF HEALTH CARE DISPUTE RESOLUTION, HEALTH CARE DUE PROCESS PROTOCOL: A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF HEALTH CARE DISPUTES (1998); DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE (1998), available at <http://www.adr.org>. See also Thomas Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, 53 DISP. RESOL. J. 8 (1998). Some private organizations, like Judicial Arbitration and Mediation Services (JAMS), have developed their own internal due process protocols for different case types of mandatory arbitration, available at <http://www.jamsadr.org>. Ironically, in one case, JAMS-Endispute refused to accept a case which did not meet its own due process protocol, but the court ordered the parties to arbitration (with the AAA instead) anyway. *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997).

25. See generally Freshman, *supra* note 11.

26. See, e.g., ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR (2001); 28 U.S.C. §§ 651–658 (Supp. 1998).

27. William Schwarzer, *Let's Try a Small Claims Calendar for the U.S. Courts*, 78 JUDICATURE 221 (1995); William Schwarzer, *Let's Try a Pro Se and Small-Stakes Civil Calendar in the Federal Courts*, 9 FJC DIRECTIONS 14 (1996).

28. The Michigan “mediation” program is really an arbitration program in which three lawyers listen to presentations of the parties and then assess a value for the (civil) case. See Tiedel v. N.W. Mich. Coll., 865 F.2d 88 (6th Cir. 1988).

29. See NIEMIC ET AL., *supra* note 26, at 43.

impairing the right to jury trial.³⁰ If courts are mandating arbitration, there are the same “ethical” (in the jurisprudential sense of the term) issues about whether the parties fully consent to arbitration (as in the private contractual context).

In addition, there are added ethical issues about what rules of “ethics” for the conduct of the arbitration should be applied in court-sponsored settings,³¹ whether there might be special or additional obligations in court-sponsored settings that are not applicable in private settings,³² or whether court-appointed arbitrators are governed by the various “private” ethics codes for arbitrators (discussed below). Some courts with a great deal of experience with ADR like the Northern District of California, have gone so far as to promulgate, as part of their local rules and procedures for court-sponsored ADR programs, their own ethical standards for ADR (including arbitration, conducted under the court’s aegis).³³ What should be the standards for courts which have adopted arbitration programs, but have not clearly demarcated ethical rules for arbitration (or ADR)?³⁴ And, as we shall see in the many attempts at ethical regulation of arbitration by private associations (and some states), attempts to specify ethical rules for arbitration must decide whether to attempt to regulate the conduct of the third party neutrals (arbitrators), the participating lawyers (with any differences from conventional-litigation lawyer ethics), or both.³⁵ Finally, because the New

30. Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993).

31. As discussed in TAN 98-102, the American Bar Association’s recent Ethics 2000 Commission, which re-drafted the Model Rules of Professional Conduct, approved by the ABA House of Delegates, in February 2002, has included “arbitration” in its definition of “tribunal” for purposes of the ethical rules which apply to lawyers (but has excluded, at the present time, mediation). See Report of the Commission on the Evaluation of the Rules of Professional Conduct Definitions, available at <http://www.abanet.org/cpr/ethics2k.html>.

32. For many years, I have suggested my personal favorite ethical conundrum here—does a lawyer with a Rule 3.3 obligation to report an adverse and controlling legal authority to a tribunal have to do so in a court-annexed ADR setting (but not in a private ADR setting, under Rule 4.1)?

33. NORTHERN DISTRICT OF CALIFORNIA, ADR RULES (1998).

34. See, e.g., ADR TASK FORCE OF THE COURT ADMIN. & CASE MGMT. COMM., GUIDELINES FOR ENSURING FAIR AND EFFECTIVE COURT ANNEXED PROGRAMS: ATTRIBUTES OF A WELL-FUNCTIONING ADR PROGRAM AND ETHICAL PRINCIPLES FOR ADR NEUTRALS (1997).

35. Consider also the possibility of “ethics” rules or regulations of experts or witnesses who appear before court arbitral tribunals. Most private arbitration associations that attempt to deal with issues governing experts and witnesses have done so through their procedural, rather than their ethical, “rules” or guidelines. See, e.g., Int’l Bar Ass’n, *Rules on the Taking of Evidence in International Commercial Arbitration*, in GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (2d ed. 2001); see also *International Rules of the American Arbitration Association*, in GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2001).

York Convention,³⁶ internationally, and the Federal Arbitration Act,³⁷ nationally, provide grounds for voiding or vacating arbitral awards for some violations of “due process” or gross improprieties of practice and procedure which render the arbitration invalid (including such “ethical” grounds as “evident partiality,” corruption, fraud, undue means, and arbitrator “misconduct”), courts that review arbitration awards will also be making judgments and writing opinions about what constitutes grossly unethical conduct in the context of substantive review of arbitral awards. As discussed more fully below, the role of “courts” in regulating ethics in arbitration thus also implicates issues of “conflicts of laws” (see section ten below) as different levels of courts, in different contexts (including both local rule promulgation and substantive legal decision-making), rule and opine on ethical issues in different arbitral contexts.

3. *Conflicts of Interest*

After the macro jurisprudential issues about the standards of enforcement and fairness of mandatory arbitration clauses, no issue has received more attention than the growing concerns about arbitrators’ conflicts of interests. Once again, conflicts of interests can be considered to exist at “macro” and “micro” (or individual case) levels. Systemic issues of conflicts of interests occur as those in the field debate whether there is an inherent conflict of interest in the arbitration role where arbitrators are chosen by parties and thus must “satisfy” or please the choosing parties sufficiently to be chosen again, particularly if the arbitrator is more or less a full time arbitrator who depends exclusively on arbitration for income. From the perspective of some parties and arbitrators, this leads to “compromise” awards in which arbitrators are accused of “splitting the baby” to keep both parties reasonably happy (or equally unhappy), and prevents more definitive rulings when those are actually more accurate or “just.” To the extent that arbitrators sufficiently “please” their clients to be chosen again, a different ethical concern arises in the possibility that a “repeat player” effect occurs when one kind of party (such as an employer, major institution, large corporation, or high volume merchant) often uses arbitration (and particular arbitrators) more often than the other side (one-shot litigants, such as consumers, securities purchasers, patients) and knows how to “play” or “work” the system (whether the process itself, or the particular arbitrator).

36. United Nations Convention on the Recognition and Enforcement of Arbitral Awards (1958), codified in United States law in chapter two of the Federal Arbitration Act (art. V, § 1(d)) [hereinafter NY Convention].

37. 9 U.S.C. § 10(a)(1)–(4) (1925).

These discussions of what constitutes a “conflict of interest” are now vigorously played out in demands for ethical standards that require full disclosures of all prior relationships between the putative arbitrator and parties, lawyers, and witnesses to a particular arbitration. In California, where the debate has gone the furthest (with the promulgation of formally approved arbitration standards³⁸), early efforts to regulate arbitrator conflicts of interests demanded disclosure of all cases handled by a particular arbitrator for ten years. While this demand for a very searching and deep disclosure failed in the legislature, the current ethical standards approved by the California Judicial Council require arbitrators to disclose a variety of financial, personal, and prior case history relationships with all parties to a current arbitration (and also includes disclosures of such relationships of family members of the arbitrator and of the provider organization³⁹).

Another significant “conflict of interest” (or “conflict of role”) issue involves the party-appointed arbitrator in three-arbitrator panels (most common in labor and very large and complex commercial disputes). In domestic arbitration in the United States, the practice and understanding (reinforced by the AAA Rules for Commercial Arbitration), has been one of “partisan” arbitration.⁴⁰ The arbitrator selected by a particular party often serves as a behind the scenes advocate for the party that chose him or, in some cases, the arbitrator actually meets *ex parte* with the party selecting him to plan strategy and share information about how the arbitration is proceeding. This practice of partisan arbitration has received much critical commentary in the United States⁴¹ and

38. In April of 2002, the California Judicial Council formally approved ethics standards for arbitrators in California, requiring a variety of disclosures of contractual arbitrators. Some of the disclosures required will not take effect until next year (July 1, 2003) because of a recognition that disclosures of provider organizations in some consumer disputes will take some time to plan and effectuate. CAL. CODE CIV. PROC. § 1281.85 (2002), added by 2001 STATS. 362 § 4 (2002). On July 22, 2002, the National Association of Securities Dealers and the New York Stock Exchange filed a lawsuit in California demanding exemption from these rules of disclosure on the grounds that as self-regulating organizations (and organizations regulated by federal securities laws) their own rules pre-empted (on Supremacy Clause and other grounds) the enacted California standards. See Complaint for Declaratory Relief at 14, NASD Dispute Resolution, Inc. v. Judicial Council of Cal., available at http://www.nasdr.com/pdf-text/072202_ca_complaint.pdf. See also Caroline E. Mayer, *Arbitration Standards Challenged*, WASH. POST, July 30, 2002, at E1.

39. CAL. CODE CIV. PROC. § 1281.85 (2002).

40. AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII (1977); see also *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815 (8th Cir. 2001) (sustaining use of “non-neutral” arbitrator whose non-neutral behavior could not be attacked as “evident partiality”).

41. See, e.g., Lawrence Fox, *The Last Thing Dispute Resolution Needs is Two Sets of Lawyers for Each Party*, in INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING AND ADR (2001); M. Scott Donahy, *The Independence and Neutrality of Arbitrators*, J. INT'L. ARB., Dec. 1992, at 31; Desiree A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749 (1995); James H. Carter,

is not the norm in international arbitration.⁴² Recently, some provider organizations, like the Center for Public Resources, in the United States,⁴³ and several of the international arbitral administrative bodies, have clearly specified that all arbitrators once chosen (even if by a single party) should be neutral and “impartial” while serving on the panel and should refrain from *ex parte* communications with either party or side in the arbitration.⁴⁴ This issue is particularly important when members of arbitral panels have different expectations from each other (serving on domestic arbitration panels or on mixed tradition international panels). There is increasing commentary on the need for more uniform standards⁴⁵ requiring neutrality and impartiality of all arbitrators⁴⁶ if the arbitration system is to maintain its reputation for fairness and integrity.

The conflicts of interests issue also raises very interesting questions of what I would call “sociological ethics.” Particularly in the realm of international arbitration, but also in some specialized forms of domestic arbitration, the field of arbitration has been called a “gentleman’s club” in which the repeat players (large commercial enterprises, their lawyers, and a cadre of “grand old men” from European international arbitral

Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for “Non-Neutrals,” 11 AM. REV. INT’L ARB. 295 (2000).

42. See Andreas Lowenfeld, *The Party Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 59 (1995); James H. Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes, and Practical Advice*, 3 AM. REV. INT’L ARB. (1992).

43. See CPR Rules for Non-Administered Arbitration of International Disputes, Rule 7.1 (2000), available at <http://www.cpradr.org> (“Each arbitrator shall be independent and impartial.”). See also CPR Rule for Non-Administered Arbitration of International Disputes, Rule 7.4 (2000), available at <http://www.cpradr.org> (“No party or anyone acting on its behalf shall have any *ex parte* communications concerning any matter of substance relating to the proceeding with any arbitrator or arbitrator candidate”); see also CPR Rules for Non-Administered Arbitration (domestic not international), Rules 7.1 & 7.4 (2000), available at <http://www.cpradr.org>. Robert Smit, *The Newly Revised CPR Rules for Non-Administered Arbitration of International Disputes*, J. INT’L ARB., Feb. 2001, at 59. Cf. AAA Commercial Arbitration Rules, R-13 & R-14, available at <http://www.adr.org> (assuming that party appointed arbitrators cannot be challenged for “partiality” and permitting *ex parte* communications).

44. See generally Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting, and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT’L 395 (1998); see, e.g., RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE 7 (1998) (“Every arbitrator must be and shall remain independent of the parties involved in the arbitration.”).

45. See Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341 (2002); Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT’L L. (forthcoming 2002).

46. See, e.g., Robert Lutz, “Partisan” Arbitrators and the Case Against Bias in International Arbitration, 23(2) INT’L LAW. NEWSL. 19 (2000). This controversial issue is being vigorously debated as the AAA, now expanded to include the ABA’s Section on Dispute Resolution and the Section on International Law, considers a revision of the AAA’s Code of Ethics for Commercial Arbitrators. See Carter, *supra* note 41, at 304.

panels,⁴⁷ as well as well-known labor and management arbitrators in the labor arbitration world⁴⁸) choose each other precisely because they are embedded in a web of past, present, and future relationships with the parties. This can be seen in the labor arbitration context where the arbitrator's task is to apply "the law of the shop"⁴⁹ and therefore, it is actually helpful for the arbitrator to be a "repeat player" with the applicable contract (the collective bargaining agreement) and the workplace in which it is enforced to understand its meaning, enforcement, history, and "common law." Similarly, in complex commercial cases arbitrators may be chosen precisely because they have experience with the particular industry (particularly important in modern intellectual property and technology disputes) or even with the particular parties. These "grand old men" (and they are mostly men!) are desired as arbitrators because like the "old wise men" of distant cultures and old forms of dispute resolution (including both mediation and arbitration⁵⁰), they do know a lot about the dispute and the disputants. Thus, they are likely embedded in a web of "conflicts of interests" of knowledge, hopes for future business, and personal, as well as financial, interests.

The question for such "embedded" arbitrators is whether they can maintain their integrity and "impartiality" (that is, some form of ability to not pre-judge the case) when they may, in fact, know a great deal about the context of the dispute and the disputants. As arbitration expands in use and as the group of people arbitrating becomes larger, younger, and more diversified, a more modern "technocratic,"⁵¹ litigation-oriented, and ethically trained generation has begun to demand more actual neutrality and arms-length distance of the arbitrator from the disputants and the dispute. Whether demanding adherence to judicial codes of conduct of disinterestedness and disclosure, since arbitrators, like judges, are adjudicators, or suggesting particular ethics codes for arbitrators that are adapted to their particular functions, the younger generation (and the advocates of employees, consumers, patients and franchisees) has urged in cases before legislatures and professional associations of arbitrators that specific codes of conduct, demanding impartiality and neutrality, are a necessary part of maintaining the integrity and legitimacy of the arbitral process.⁵²

If the foundation of arbitration is that decision makers will be fair,

47. See generally DEZALAY & GARTH, *supra* note 2.

48. See Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3.

49. *Id.*

50. See AUERBACH, *supra* note 3; MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 3-8 (1981).

51. DEZALAY & GARTH, *supra* note 2, at 34-41.

52. See Rogers, *supra* note 45.

then the content of what constitutes “fairness,” impartiality, and neutrality is crucial to the development of ethical standards. Since arbitration is also founded on the principle of party consent (which raises issues in the mandatory contractual and court-annexed contexts of arbitration), many have argued that conflicts of interest are best handled by specifying the content of what relationships should be disclosed to the parties. Then, the parties should decide whether to accept or reject particular arbitrators. On the other hand, to the extent that some arbitration is no longer truly consensual, it has also been argued that there may be certain relationships that should be automatically disqualifying (or as in the case of conventional legal ethics, “non-consentable” or non-waivable conflicts).⁵³

The concept of non-consentable⁵⁴ conflicts attaches to the concern of the appearance of a legal process to those outside, as well as inside, of the process—what we called the “appearance of impropriety” in the old Code of Professional Responsibility.⁵⁵ Thus, while the modern treatment of conflicts of interests in most arbitration codes of conduct and procedure is to specify, either with great particularity or broad generality, the kinds of interests that must be disclosed to parties for their choice in considering whether to accept or reject a particular arbitrator (the “disclose and consent” approach), more recent advocates have argued for per se disqualifications in certain circumstances.⁵⁶ While the international rules of arbitration (including the International Chamber of Commerce (ICC), the American Arbitration Association, and the London Court of International Arbitration, among others⁵⁷) tend to provide for very general disclosure requirements,⁵⁸ these international institutions also have clearly delineated procedures for challenges to

53. Such as the obvious conflict of interest when an arbitrator is asked to serve in a case in which his law partner represents one of the parties. See, e.g., Menkel-Meadow, *supra* note 16; CPR-Georgetown Commission on Ethics and Standards, *Proposed Model Rule for the Lawyer as Third Party Neutral*, Rule 4.5.4, available at <http://www.cpradr.org/cpr-george.html>.

54. An example would be the absolute prohibition of the receipt of any item of value, honoraria, or gift by an arbitrator from an entity or party that “might come before the arbitrator within two years after an arbitration concludes.” CAL. ARB. STANDARDS, APPENDIX TO CALIFORNIA RULES OF COURT as authorized by CAL. CIV. PROC. CODE § 1281.85 (2002). This rule was motivated, at least in part, by a scandal that revealed that several arbitrators were given a “gift” of a cruise following their decision on behalf of a party in an arbitration.

55. See MODEL CODE OF PROF'L RESPONSIBILITY CANON 9 (1969).

56. See Menkel-Meadow, *supra* note 5.

57. See collections of international arbitration rules in Born, *supra* note 35; see generally TIBOR S. VARADY ET AL., DOCUMENTS SUPPLEMENT TO INTERNATIONAL COMMERCIAL ARBITRATION (1999).

58. AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL RULES OF 1997, art. 7(1) (1997) (“Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”).

arbitrators about whom there might be “justifiable doubts” as to their “impartiality or independence.”⁵⁹ The well established institutions like the ICC, AAA, and CPR have special courts, committees, or ethics tribunals that may “rule” on such challenges. In ad hoc arbitrations convened without reference to particular rules systems, or increasingly, as parties complain about conflicts of interests not disclosed at the beginning when they are challenging arbitral awards in courts, standards and enforcement mechanisms for determining what is a conflict of interest and what should be disclosed remain somewhat vague and undefined.

The recent California rules and the CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed Model Rule for the Lawyer as Third Party Neutral, are controversial because they are both more explicit about particular disclosures (financial and personal interests in and relationships with parties, lawyers, and witnesses, and both past and possible future business and arbitral or other dispute resolution interests), and because the “interests” are more broadly defined to include law firm partners and members of an arbitrator’s family (including domestic partners in the California rules⁶⁰). While many protest that so much disclosure will be costly and time consuming to complete, others argue that the duty to investigate possible conflicts should fall on the parties themselves.⁶¹ The extent and scope of the duty to investigate conflicts of interests remains one of the interesting, if unsettled, areas of law in arbitration ethics and enforcement, as conflicts of interest are increasingly raised after the fact when the losing party challenges the arbitral award.⁶²

59. AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL RULES OF 1997, art. 8 (1997).

60. CAL. CIV. PROC. CODE, § 1281.9 (2002); CPR-Georgetown Committee on Ethics & Standards in ADR, *Proposed Model Rule for Lawyers as Third Party Neutral*, Rule 4.5.3 and 4.5.4 (2002).

61. See *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (D.C. Cir. 1996).

62. The leading Supreme Court case is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), in which Justice Black, writing for the majority, suggests that the test of arbitrator impartiality should be at least as strong as what judicial ethics requires of judges (or even greater disinterestedness since arbitrators decide fact and law, usually without right of appeal), and Justice White’s concurrence suggests that arbitrators should be held to a different standard because “they are men of affairs, not apart from but of the marketplace,” and may be chosen particularly because of their interests in the business world (and not because they are Article III judges). *Id.* at 50. On the facts presented in *Commonwealth Coatings*, Justice Fortas, writing the dissent, would not have overturned the arbitration award at all (where it was discovered after the fact that the arbitrator had had substantial business dealings with one of the parties) because the arbitral award was unanimous (on a panel of three) and there was no showing of “actual bias.” *Id.* at 152. These three articulations of arbitrator conflicts of interest remain with us today, with Justice White’s formulation of a “different” arbitral standard (from judicial conflicts of interests) having become most dominant (on a “party consent” theory of arbitral choice). Judge Posner has written that even “higher” or more stringent standards of disclosures for conflicts of interest by professional associations “do not have the force of law” for purposes of overturning an arbitral award, suggesting that standards for judicial vacation of an award under

4. Confidentiality

For many who choose to use arbitration, the advantages are not necessarily the oft cited claims of speed and lower cost ("efficiency"), but confidentiality. In major commercial cases, modern intellectual property and high technology cases, and in some more personal matters, like sexual harassment or discrimination, parties desire to resolve disputes without the larger public (including competitors and shareholders) learning about the details of a trade secret or a proposed business plan or a confidential personal fact.⁶³ Unlike mediation, where parties usually sign a formal confidentiality agreement, or these days, are protected by confidentiality evidence rules or privileges, arbitrations are confidential only if the parties so specify in their agreements or particular rule systems provide for it. Unlike in mediation, for example, parties in arbitration are testifying under oath before their adversaries and in the presence of arbitrators and counsel for the other side. Nevertheless, confidentiality agreements are increasingly common in arbitration and the question of how much of the arbitration will remain totally confidential has become an issue, both of ethics and substantive law. Parties may, for example, sign confidentiality agreements with each other and the arbitrators in arbitration, but if one party seeks to vacate an award in court under the Federal Arbitration Act (FAA), the NY Convention, or on some other theory, part or all of the arbitration proceedings may become part of the more public court record in enforcement or challenge proceedings.⁶⁴ Arbitrators, unlike mediators, are not generally protected by

section 10 of the FAA may be "lower" than that of private ethical rules. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983). What constitutes reasonable investigation of an inquiry into the arbitrator's conflicts of interests remains an open question. *See, e.g.,* Al-Harbi v. Citibank, 85 F.3d 680 (D.C. Cir. 1996) (concluding that arbitrator Ken Feinberg did not violate a duty to investigate his former law firm's prior representation of one of the parties).

63. I have arbitrated over 150 health, employment, and discrimination claims (including Dalkon Shield mass tort actions) in which many of the claimants (not defendants or respondents) sought arbitration precisely because they wanted privacy about their health, sex lives, or employment histories. *See generally* Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513 (1998).

64. In the mediation context, this question of what the third-party neutral can be compelled to testify to in open court has been confronted by several courts. *See, e.g.,* Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (forcing mediator to testify despite confidentiality agreement and court rules when party sought to claim coercion in mediated agreement). That question may now be governed by the Uniform Mediation Act wherever it is passed as state law. Parties, are, of course, always free to seek protective orders and sealed records pursuant to the appropriate rule of civil procedure, for example, FED. R. CIV. P. 26(c), but some states now prevent the sealing of records in matters having to do with "public health and safety" or other specifically provided matters. *See* Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11 ALTERNATIVES TO HIGH COST LITIG. 85 (1993); Carrie Menkel-

a privilege granted either statutorily or through common law development in order to further the favored policy of promoting settlements.

5. *Competence and Credentialing*

As is the case with all professional performance and regulation, the question of whether some standard of competence should be part of a formal ethics code or left to “malpractice” or other liability litigation is present in dispute resolution. It is rare, but not unheard of, for arbitrators to be sued directly for some act of incompetence (revealing a promised confidence could be one ground; failing to issue a timely award is another⁶⁵), usually after an attempt to set aside an arbitral award has failed. However, many modern codes of conduct or procedural rules for arbitrators suggest at least some minimal levels of performance, framed in such terms as “diligence” or timely performance of duties, or more recently, the writing of reasoned opinions with awards.⁶⁶ Because arbitrators often enjoy a “quasi-judicial immunity” for performing judicial-like services, their conduct is virtually never reviewed in a legally filed malpractice action.

At the present time most regulation or litigation concerning the conduct of arbitrators occurs in the context of post hoc challenges to arbitral awards on the grounds of arbitral “misconduct,” “fraud” or “corruption,” or one of the other specified standards under section 10 of the FAA or the equivalent terms of the NY Convention for international arbitrations.⁶⁷ Many are reluctant to add substantive “competence” requirements to ethics codes in the fear that this will increase litigation about the conduct of arbitration in a period in which challenges to arbitration are increasing. Given the doctrine of judicial immunity, it is also important to ask how arbitral misconduct should be policed. A recent lawsuit filed by the National Association of Securities Dealers (NASD) challenging California’s attempts to enforce ethical standards on arbitrators⁶⁸ suggests that self-regulating organizations (SROs) want to be left to control their own arbitrators, especially in highly regulated fields like securities. State legislatures are increasingly rejecting such claims as the increased use of compulsory and mandatory arbitration in such a wide variety of contracts and consumer contexts has encouraged more legisla-

Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

65. *Baar v. Tigerman*, 189 Cal. Rptr. 834 (Cal. Ct. App. 1983).

66. See, e.g., CPR INSTITUTE FOR DISPUTE RESOLUTION, *Rules for Non-administered Arbitration*, Rule 13.2, available at <http://www.cpradr.org/welcome.htm> (last visited Sept. 16, 2002).

67. NY Convention, *supra* note 36, art. V.

68. See *supra* text accompanying note 39.

tures to begin to look at the question of regulation of arbitration, as it affects consumer transactions.⁶⁹

The challenge for ethical regulation of competence is both to define it (especially difficult in the arbitration context with so many different forms of procedure and practice) and to develop appropriate methods of enforcement. Ethics codes in the law almost always declaim their irrelevance to formal legal liability standards for malpractice,⁷⁰ yet ethical rules are in fact often cited in legal malpractice actions, as if they were satisfying negligence per se standards. So called SROs or "provider" organizations⁷¹ claim to have both ethics and performance review committees to monitor arbitral performance and then argue, as has the NASD, that as providers of "private consensual services" they should be left alone to privately enforce their own rules and standards.

For many years, private associations, like the Society for Professionals in Dispute Resolution (SPIDR) (now the Association for Conflict Resolution (ACR)), and public entities have explored and debated the question of whether there should be formal credentialing and certification of third-party neutrals, like arbitrators and mediators.⁷² A few states, like Florida, California, and Minnesota, have legislated particular standards for those who mediate or arbitrate in the context of formal court-annexed programs,⁷³ but for the most part the practice of arbitra-

69. Each year for the last ten years or so, bills have also been introduced in Congress to regulate arbitration in a variety of consumer and employment contexts. *See, e.g.*, Consumer Fairness Act of 2002, H.R. 5162, 107th Cong. (2002); Consumer Credit Fair Dispute Resolution Act of 2001, S. 192, 107th Cong. (2001); Preservation of Civil Rights Protection Act of 2001, H.R. 2282, 107th Cong. (2001). So far, none of these bills have been passed. *See* Sternlight, *supra* note 6.

70. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (2002).

71. Although William Slate, the President of the American Arbitration Association, served on the CPR-Georgetown Commission on Ethics and Standards in ADR Committee that drafted the CPR Georgetown Commission's Principles for ADR Provider Organizations, *see supra* note 18, he declined to "endorse the Principles fully" because the "AAA is best served by the AAA Ethical Principles finalized by the Association earlier this year," and which are posted on the AAA web site at <http://www.adr.org>. DISP. RESOL. J. May 2002, at 6. In Commission deliberations, Slate and other AAA and other provider representatives expressed concerns that the CPR-Georgetown Provider Principles might be used to hold large provider organizations to specific standards (of competence, of review of conflicts of interests, etc.) in litigation (developing potential liability standards) that might be difficult to meet. The AAA, like JAMS and other so-called "self-regulating organizations," have promulgated their own "internal" ethical rules of practice to attempt to set their own standards of competence, performance, and monitoring as a preemptive strike against possible liability claims against them in their provider or organizational capacity. *See infra* section 6.

72. *See, e.g.*, Donald Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757 (1996); SPIDR COMMISSION ON QUALIFICATIONS, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES (1989).

73. *See* SARAH COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* (2nd. ed. 2001) for specific state enactments; *see also* CENTER FOR DISPUTE SETTLEMENT AND THE INSTITUTE OF

tion and mediation is unregulated and virtually anyone can “hang out a shingle.” There have been proposals for specific standards for training, certification, and evaluation of mediators,⁷⁴ and less activity for arbitration. Several of the private professional associations, however, like the National Academy of Arbitrators (primarily a group of labor arbitrators), the Center for Public Resources Institute for Dispute Resolution (Distinguished Neutrals Panel—both arbitrators and mediators), and now the Academy of Civil Trial Mediators, claim to do some scrutiny of those they place on their lists. In addition, members are “elected” on the basis of their achievement in the field. These organizations hope to create “honorific” capital in their informal and private “certification” of the “best” in their respective fields. Whether these more selective organizations are doing any better at either insuring quality practice or at developing market power is an untested empirical question.

6. *Corporate-Organizational Liability*

As indicated in the immediately preceding discussion, the question of competence and liability for arbitral performance is more than a question of how individual arbitrators perform their tasks. Although there are no reliable numbers to report, it is clear that the vast majority of arbitrations conducted both domestically and internationally are “sponsored” in some way by “provider” organizations that supply lists of arbitrators, administer arbitrations, and in the most active forms of management, review arbitral awards and fully supervise the process (such as the ICC does in international arbitrations⁷⁵). Following suggestions in legal commentary that entities might be legally responsible for their actions in providing professional services,⁷⁶ the CPR-Georgetown Commission on Ethics and Standards in ADR promulgated the first-ever set of guidelines for ADR Provider organizations, designed to suggest

JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992).

74. See, e.g., CHRISTOPHER HONEYMAN, PERFORMANCE BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING, AND EVALUATING MEDIATORS (1995); MARGARET SHAW, SELECTION, TRAINING, AND QUALIFICATION OF NEUTRALS (State Justice Institute, National Symposium on Court-Connected Dispute Resolution Research, 1993); Margaret Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125 (1988).

75. Rules of ICC in BORN, *supra* note 35.

76. Ted Schneyer was among the first to make such an argument, following law firm misconduct in the OPM and federal savings and loans debacles, that law firms be subject to ethical discipline in appropriate cases. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1992). The New York Bar was the first to act on this suggestion to promulgate rules governing law firm conduct. See generally New York Bar Disciplinary Rules (adopted May, 1996); see also Thomas Stipanowich, *Behind the Neutral: A Look at Provider Issues*, in AAA CURRENTS (Dec. 1998).

“best practices” and “baseline” measures for provider organizations in the provision of arbitration (and other ADR) services.⁷⁷ These standards do not have the force of law (unless some legislative body adopts them), but they have already served as a discussion document for state programs of dispute resolution that supervise and regulate the provision of ADR services in the public sector. The CPR-Georgetown Provider Principles⁷⁸ state that provider organizations have responsibilities to: ensure the quality and competence of those ADR neutrals (such as arbitrators) that appear on their lists or are referred to parties for service; provide accurate and complete information about the services provided; take reasonable steps to make services available to low-income parties; disclose all appropriate conflicts of interests; make available a grievance or complaint mechanism about the services offered; require neutrals to adhere to a reputable internal or external ethics code; avoid making false or misleading statements about services provided; take appropriate steps to ensure confidentiality of processes as agreed to by parties or required by contractual provisions or law; and ensure that services that are provided are done so in a “fundamentally fair and impartial manner.” The Provider Principles also recognize that obligations under these principles may vary with the degree of knowledge and sophistication on the part of parties that actively and thoroughly screen and select particular neutrals.⁷⁹ Given the increased judicial scrutiny of contractual arbitrations and the increased legislative interest in abuses of consumer and employment arbitration, it remains to be seen whether internally promulgated standards of conduct will be enough to protect provider organizations from lawsuits and external regulation on these dimensions (and others), and whether the Provider Principles will be used to set some legal floor or ceiling standards for “repeat player” organizations.

7. *Communication and Counseling*

A moderately controversial issue that has remained mostly under the ethics “radar screen” has been the demand by some in the ADR community that counseling about alternatives to litigation be made part of the lawyer’s formal counseling function. A variety of jurisdictions

77. A prior document attempts to set similar best practices standards for the operation of mediation programs within the context of the court setting. See CENTER FOR DISPUTE SETTLEMENT-INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992); see also ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN (1992).

78. Available at <http://www.cpradr.org> and in Appendix A to this article.

79. CPR-Georgetown Commission on Ethics and Standards in ADR, *Principles for ADR Provider Organizations*, § 1(b)(2002), available at <http://www.cpradr.org/finalProvider.pdf>. (last visited Sept. 16, 2002). The Principles also contain a definitional taxonomy of ADR Provider Organizations. See Appendix A.

have dealt with this issue in different ways, some by making advice and counseling about dispute resolution, settlement,⁸⁰ and “other” ways to resolve disputes by commenting on the lawyer’s duty to completely inform and communicate with the client about “means” of representation as a comment to Rule 1.2. Others have made communication about different forms of dispute resolution mandatory.⁸¹

The communication and counseling function within the ethics of dispute resolution is complicated because of the need to fully explain different process choices and their possible consequences (especially in the context of pre-dispute counseling and contract drafting, as well as in post-hoc (dispute has “ripened”) decisions) about whether to pursue litigation or some other form of dispute resolution like arbitration, mediation, or some other hybrid dispute resolution process, like med-arb, summary jury trial, or a private “mini-trial.” To the extent that lines dividing “means” and “objectives” of legal representation (as allocated to lawyers and clients in ethical decision-making) in Model Rule of Professional Conduct 1.2 have never been clear, the decision about what form of dispute resolution to utilize, both pre and post dispute (ex ante or ex post dispute resolution⁸²), can be considered both a “means” and an “objective” of legal representation.

In addition, the duty to inform clients about the status of their mat-

80. Several years ago a California appellate court made a lawyer’s failure to advise a client about settlement and ADR a cognizable claim in a malpractice action. The case was “depublished” (according to California’s unique procedure for depublishing opinions) in large part because legal malpractice carriers were worried that imposing such a duty on lawyers would result in a massive increase in malpractice litigation. See Forrest S. Mosten, *The Duty to Explore Settlement: Beyond Garris v. Severson*, 12 FAM. L. NEWS, Sept. 1989, at 1 (discussing *Garris v. Severson*, 205 Cal. App. 3d 301 (Cal. Ct. App. 1989)); see also FORREST MOSTEN, *THE COMPLETE GUIDE TO MEDIATION* 98-100 (1997); Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990).

81. For a review of the variations of regulation on this issue, see Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 (2000). See, for example, MINN. STAT. ANN. § 114.03 (2002): “In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.” See also Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895 (2001); Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999); Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, 48 ARB. J. 8 (1993); Frank E.A. Sander & Michael Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options? No, an Unreasonable Burden*, 76 A.B.A. J. 50 (1990).

82. See Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989).

ters and to make choices within the conduct of litigation, arbitration, or other forms of dispute resolution, is also fraught with means-ends false dichotomies and further complications (as well as advantages presented) in those forms of dispute resolution (like arbitration) where the client is likely to be present throughout the proceeding.⁸³ How much can/should an attorney consult a client with respect to every comment made or strategy chosen within the context of an on-going arbitration or other dispute resolution process? Recall that this is particularly problematic in the arbitration context where the role of the party-appointed or “partisan” arbitrator is not clear and rules about when and how *ex parte* communications can be conducted between arbitrators and parties are ambiguous, unknown, or not explicitly provided for.⁸⁴

8. *Costs and Fees*

Whether the costs and fees of private dispute resolution systems should be formally regulated has garnered a great deal of attention in recent years. As the ABA’s Ethics 2000 Commission grappled with issues of lawyer fee requirements (including definitions of “reasonableness” of fees, whether fees should be in written contracts, and whether certain kinds of fees should be prohibited), these same issues have been raised with respect to arbitration and other forms of dispute resolution.⁸⁵ Arbitral fees are generally split between the parties and are most often privately negotiated between the parties and the chosen arbitrators, but in administered arbitrations before the AAA and many international tribunals (such as the ICC), administrative costs and arbitral fees are set according to a fee schedule.⁸⁶ Fees are typically arranged on a daily, hourly, or matter basis. The ICC, which administers very large interna-

83. In this context, mediation probably presents the greatest opportunities, as well as pitfalls, for the lawyer as representative. In mediation, clients are most likely to speak for themselves, without the formality of questioning, evidence rules, and other forms of lawyer “protection,” and especially in sessions conducted with both parties present, clients and parties may say things (apologies, admissions, information revelation) that their lawyers wished they had not said. The role of the lawyer in preparing for mediation has rapidly captured the attention of continuing education programs that increasingly offer training in “Mediation Advocacy” or, as I prefer to call it, “Representation in Mediation.” See, e.g., ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION (1994); cf. JOHN W. COOLEY, MEDIATION ADVOCACY (1996); JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY (1997).

84. See AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon III (1977) (providing that an arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety). The commentary to this Canon allows the parties to agree about their rules of communication, but there is no clarifying rule on the role of party-appointed arbitrators and their communications with parties and cultures of practice vary widely on this score, see TAN 39-44.

85. See, e.g., CPR-Georgetown Commission on Ethics and Standards in ADR, *Model Rule for Lawyer as Neutral*, Rule 4.5.5 (2002).

86. See *International Arbitral Rules*, BORN, *supra* note 35.

tional commercial disputes, has a set fee schedule which is built around percentages of the amount at stake in the dispute.⁸⁷ To the extent that so many arbitral fees are negotiated privately (and it is not uncommon for different panelists on a three-person arbitration panel to receive widely divergent fees⁸⁸), some have argued for more transparency and disclosure of fees and for prohibitions of particular kinds of fees, such as the increasingly popular contingency fee, or “bonus,” in mediation.⁸⁹

The appropriateness and reasonableness of particular fee arrangements are just beginning to garner attention in the professional literature and in some egregious cases, the courts⁹⁰ (such as when “gifts” or “bonus” payments are discovered after the fact and are used as arguments to vacate arbitral awards).

9. *Complaints and Grievance Systems*

As ethicists, consumers, and professionals advocate for more official regulation of the conduct of private dispute resolution, many have suggested that the clients in a dispute resolution process should have a formalized opportunity to raise questions and grievances about how the

87. *Id.*

88. Hourly rates for arbitrators can range from a low of nothing (pro bono) to as high as several thousand dollars an hour (claimed by several prominent former judges and high level government officials who “retire” to careers as arbitrators). A more common hourly rate is typically between \$250-500/hour for experienced lawyer-arbitrators.

89. See CPR-Georgetown Commission on Ethics and Standards in ADR, *Proposed Model Rule for the Lawyer as Third Party Neutral*, Rule 4.5.5 Fees, available at http://www.cpradr.org/cpr_george.html. (requiring written agreements about fees and full disclosures about potential conflicts of interests in contingent fee arrangement). While many advocate for complete prohibitions on contingent fees in ADR, others suggest that such arrangements (providing for payment of a fee to a third-party neutral only upon successful conclusion of a case) are designed to get reluctant parties and lawyers to participate in some forms of ADR. As some argue that ADR has just added another costly layer of litigation fees, the practice of not requiring payment unless the case “settles” or is satisfactorily decided allows parties to participate in ADR in a relatively “cost-less” manner. (This form of payment is much more common in mediation than in arbitration which tends to require greater commitments of time and preparation before the process occurs.)

90. In a recent case a California superior court held that in a situation where a government agency contracted for use of a private hearing officer whom the government said “it might use again . . . the contract is open ended,” the fact that only one party paid the hearing officer (the government) and the hearing officer had a pecuniary interest in garnering future business from the government, the administrative hearing process violated due process and was reversed. See *Hass v. County of San Bernadino*, Cal. Sup. Ct., SO 76868, filed May 6, 2002. Although this case involves a formal government process more akin to adjudication than arbitration or mediation, the court recognized the conflict of interest and possible partiality in a third party neutral who stood to gain more future business with one of the parties (the government) that was a repeat player. Whether this case will spark further attention to similar concerns about conflicts of interest in the possibilities of future business in the private context remains to be seen. See Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-as-You-Go Courts*, 94 HARV. L. REV. 1592 (1981).

process is executed, especially in contexts where professional provider organizations select, list, and often train the neutrals they assign or refer. Most of the more formal ADR provider organizations do provide for grievance committees or ethics committees (or in the case of the ICC, the arbitration “court” itself) to “rule” in some way on challenges to arbitrators’ conflicts of interests, bad practices, or misconduct.⁹¹ There are as yet, however, no formal requirements that such organizations provide such procedures for enforcing even their own rules. The CPR-Georgetown Commission on Ethics and Standards in ADR Principles for Provider Organizations suggests that provider organizations “should provide mechanisms for addressing grievances about the organization and its administration or the neutral services provided and should disclose the nature and availability of the mechanisms to the parties”⁹² To the extent that courts have begun to rule on the acceptability of particular ADR providers,⁹³ especially when a single provider is used throughout a particular industry, the existence of a formal complaint and grievance procedure is likely to render that provider more acceptable to courts.

10. *Conflicts of Laws*

As the current discussion of the complexities and conundrums of ethical issues in arbitration and dispute resolution reveals, there are many potential sources of rules, regulations, and “best practices” for the conduct of arbitration and ADR. This issue of “conflicts of laws” in ethics regulations is quite profound in the ADR area as private and public forms of dispute resolution operate both separately and together in private settings, in federal and state courts, in the shadow of legislative and executive processes, and in “simple” two party and more complex multi-party disputes, in local, national, and international settings. Finding the rule or regulation that applies in a particular arbitral context may be difficult enough, but once found, the potential applicable “rules,” framed in private contracts, private administrative organizations, professional associations, formal ethics rules, statutes, treaties, or court rules may actually conflict with each other or at least present several possible alternatives. Consider differences in the possible rules for confidentiality,⁹⁴ role of the party-appointed arbitrator in communications, conflicts

91. See *ILL Rules*, BORN, *supra* note 35.

92. CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, VI (2002). This principle also suggests that the organization provide a “fair and impartial process” for the affected neutral or other individual against whom a grievance has been made.

93. *Circuit City Stores v. Adams*, 279 F.3d 889 (9th Cir. 2002).

94. The recently passed federal legislation on corporate fraud, for example, requires corporate

of interests, both substantive standards and disclosure rules,⁹⁵ and relative responsibilities of parties, tribunals, panels, organizations, and courts for enforcing whatever rules and standards there might be.

In the hopes of simplifying potential overlaps or conflicts in ethical standards, some private organizations have attempted to work together to draft joint codes, such as the AAA/ABA/SPIDR Joint Model Standards of Conduct for Mediators,⁹⁶ and current efforts to include the ABA's Sections on Dispute Resolution, Litigation, and Business Law in the re-drafting of the AAA's Code of Ethics for Commercial Arbitration. Despite these well-intended efforts to coordinate the activity of the private organizations and professional associations in which many third party neutrals and lawyer representatives participate, increased regulation at formal levels of government (state legislatures,⁹⁷ Supreme Courts

lawyers to whistle blow (and inform corporate boards) of corporate irregularities or unlawful or questionable corporate conduct (such as in the recent audit scandals) despite the fact the ABA itself turned back a proposal to require lawyers to disclose economic fraud on the part of clients this past year when the House of Delegates considered the ABA's Ethics 2000 Commission proposals to revise Rule 1.6. Thus, with the passage of the Corporate Fraud Act (Sarbanes-Oxley Act), federal law may now trump (Supremacy Clause and pre-emption) state's ethics codes on issues of lawyer-client confidentiality and privilege. See James V. Grimaldi, *Congress Steps Up to Force Lawyers to Look Closer at Corporate Clients*, WASH. POST, July 29, 2002, at E1.

The Uniform Mediation Act (recently approved by the National Conference of Commissioners on Uniform State Laws and the ABA) is an effort to make confidentiality rules more uniform in the mediation context. Many commentators note, however, that uniformity will be hard to achieve with federal and state differences and the intersection of mediation (and arbitration) rules with contract and evidence doctrine. See, e.g., Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001); Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001); Ellen Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239 (2002).

95. This concern about "conflicts of laws" in "conflicts of interests" is the basis of NASD's lawsuit against the California Judicial Council, see *supra* note 39, in which it claims that its private practices, as well as its federal oversight by the SEC, should "exempt" the NASD's arbitration practices from California's efforts to regulate arbitration ethics on a state-wide basis. The NASD has announced that while this lawsuit is pending, it is suspending arbitration of claims against securities' brokers in the state of California, see *supra* note 38, but will assign claimants to neighboring states if they request a hearing.

96. These standards are currently being revised as a variety of states and other private associations have drafted newer sets of regulations, see, for example, *CPR Proposed Model Rule for the Lawyer as Third Party Neutral*, *supra* note 17, that deal with the relevant issues more specifically (such as conflicts of interests and disclosures, as well as advice-giving and counseling in the mediation context). See also Richard Chernick & Kimberly Taylor, *Ethical Issues Specific to Arbitration*, in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* (Phyllis Bernard & Bryant Garth eds., 2002).

97. Minnesota, Florida, Texas, California, Virginia, and Massachusetts are among those states which have taken the lead in passing formal rules of ethics and conduct for arbitration and mediation practices, sometimes within ethics rules promulgated by the legislature or courts, and more often within a comprehensive statute on mediation or arbitration, either within the rules of civil procedure or as a separate statutory framework for dispute resolution. See COLE, *supra* note 73.

with supervisory or ethical regulatory authority, administrative agencies, or most recently, state offices of dispute resolution) have increased the amount of regulation, the subject areas which may be touched on in rules and regulations, and in a few cases, the enforcement of ethical standards. Florida and Georgia, for example, have a special body that considers ethical issues in mediation and issues advisory opinions.⁹⁸

In addition to formal (positive law) and precatory (professional associations and private organizations) standards, perhaps the most important source of “law” in ethics and standards in the conduct of arbitration is the contract or agreement that establishes the arbitration in the first place. In some cases, especially with post-dispute election of arbitration, these agreements or “retainers” of the arbitrator can be quite detailed and set forth a veritable constitution for dispute resolution processes.⁹⁹ In those cases in which the arbitrator is selected by or from the lists of well-established provider organizations, the rules and standards of those organizations will also govern the proceeding.

At the conclusion of arbitrations, yet another source of law may be relevant in judging the behavior of arbitrators—the grounds and standards for vacating or voiding arbitral awards (from the Federal Arbitration Act for domestic arbitrations and the New York Convention and “local” (read “national” law) for international arbitrations¹⁰⁰). To the extent that courts examine whether an award was arrived at through “fraud, corruption, or misconduct” of the arbitrators, common law interpretations of those statutory standards adds to the body of law that must be consulted when determining if arbitral conduct is “ethical.” As such cases proliferate, there are interesting questions about what role the formal standards adopted by state laws or private professional associations will play in the application of arbitration enforcement litigation. There have been a few cases at both the national and international level. In *Merit Insurance Co. v. Leatherby Insurance Co.*,¹⁰¹ Judge Posner opined that just because the AAA Rules and Canons of Ethics in arbitration might require a particular disclosure of a conflict of interest, “it does not follow that the arbitration award may be nullified judicially The

98. See, e.g., Florida Rules for Certified and Court-Appointed Mediators, FLA. STATS. ANN. §§ 10.100-10.900 (2000); SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, AND PRACTICE* (2d ed. 2001) (using cumulative supplement for compilation of state laws governing mediation and ADR processes to discuss Georgia’s ruling body).

99. My own retainer agreement for mediation or arbitration services now runs over ten pages (when I am retained privately, in addition to referrals that I receive from the well-known provider organizations, like CPR (which now incorporates the CPR-Georgetown Commission’s *Proposed Model Rule for the Lawyer as Third Party Neutral* in all of its arbitral and mediation referrals).

100. NY Convention, *supra* note 36, art. V.

101. 714 F.2d 673 (7th Cir. 1983).

arbitration rules and code do not have the force of law.”¹⁰²

At the international level the question of who is subject to what rules has been raised more explicitly as commentators and cases have confronted the issue of whether the parties, their lawyers, and even the arbitrators, are bound by ethics rules and standards promulgated by the administering organizations when the “source” of arbitral authority is actually the parties’ contract that contains an arbitration clause.¹⁰³ The analysis has been centered on whether the contract to arbitrate incorporates by reference the arbitral rules and standards of the administering organization, and whether the arbitrator, in agreeing to the appointment by such organizations, has entered into another “contract” which binds him to the ethical standards of the organization and which allows the parties to claim third-party beneficiary status to that contract.¹⁰⁴

In addition to different sources of law at the levels of contract, private organizational rules, and formal positive and state regulation, an even different set of standards may operate at the level of individual and organizational liability and immunity.¹⁰⁵ Different jurisdictions may define “quasi” or full judicial immunity for arbitral processes differently. And, although they have been rare, following the vacation or non-vacation of arbitral awards for arbitrator misconduct, parties may bring malpractice or other misfeasance claims against arbitrators, which gives rise to the question of what standards of law to apply for such rarified and specialized professionals.

Where courts refer parties to court-annexed arbitration there may also be conflicts of laws questions if courts are developing or imposing their own ethics codes (as the Northern District of California has done¹⁰⁶) on top of or along side that of professional ethics regulations (state codes of ethics for lawyers or other dispute resolution professionals) or private association rules. At the federal level there are other interesting issues about whether rules of conduct for arbitrators, parties, and lawyers are “procedural” issues to be decided by federal rules or “substantive” rules, where, according to the *Erie*¹⁰⁷ doctrine, state law

102. *Id.* at 680. Judge Posner’s logic here is the same as that suggested by the Supreme Court’s view of the ABA’s Model Rules of Professional Conduct, even when they are fully enacted by a state. *See, e.g., Nix v. Whiteside*, 475 U.S. 157 (1986) (holding constitutional standards for “effective assistance of counsel” are not determined by ABA or state’s ethics standards).

103. *See VARADY ET AL., supra* note 57.

104. *See, e.g., Philippe Fouchard, Relationships Between the Arbitrator and the Parties and the Arbitral Institution*, ICC INT’L CT. ARB. BULL. 12 (Supp. 1995); *K/S Norjarl A/S v. Hyundai Heavy Indus. Co.*, 1 Lloyd’s Rep. 260 (Q.B. Div’l Ct. 1991).

105. *See* discussion at TAN 59-73.

106. *See supra* note 33.

107. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

would have to be applied.¹⁰⁸

At all levels of ethical scrutiny of arbitration conduct the question will remain whether parties can turn a “conflicts of laws” question into a “choice of law” issue by contracting specifically for particular standards to be applied to their particular arbitration, or whether positive law enactments, from various sources, can “trump” the contract. This, of course, raises the important jurisprudential issue in all of arbitration and its ancillary litigation: Is arbitration purely a creature of private contracting? When and how can the state intervene in and regulate the conduct of private dispute resolution?¹⁰⁹

THE ACTORS

As the above discussion of conflicts of laws makes clear, a wide variety of institutions, public and private, have recently been exploring the issues of developing ethical and conduct standards for arbitrators, parties, and representatives in arbitration, and other forms of dispute resolution.¹¹⁰ The proliferation of actors in this field is both heartening in that ethics and “best practices” are being taken seriously and promise to raise consciousness about these important issues, as well as improve actual practices. On the other hand, with the great variety of actors in the field, there is also likely to be confusion and a lack of clarity and

108. United States Magistrate Judge Wayne Brazil, one of the preeminent founders of the field of court ADR, recently reviewed this issue at length and determined that standards for determining the validity of court mediation agreements, when mediator conduct was implicated, was a question of state law in federal diversity case (enforcement of contracts and evidence and privilege law). *See Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

109. Obviously, this question raises different answers in the contexts of court-annexed (not contractual) arbitration and, as many have argued, in the context of “non-consensual,” imposed contractual arbitration in the consumer, employment and other contexts discussed *infra*, see TAN, 20-37.

110. As I should have made clear at the outset, this paper is primarily concerned with the ethics of arbitrators, though I have written extensively elsewhere on ethics issues for mediators and other ADR participants, both neutrals and representatives. *See, e.g.*, Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999); CARRIE MENKEL-MEADOW, THE LIMITS OF ADVERSARIAL ETHICS IN ETHICS IN PRACTICE (Deborah Rhode ed., 2001); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153 (1999); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631 (1997); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997); Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57 (1996); Carrie Menkel-Meadow, *Ex Parte Talks with Neutrals: ADR Hazards*, 12 ALTERNATIVES TO HIGH COST LITIG. 109 (1994); Carrie Menkel-Meadow, *Professional Responsibility for Third Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG. 129 (1993); Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3.

consensus in the field (note how the C's continue!). While having a "thousand flowers bloom" is one way to encourage creativity and experimentation in the field of ethics, standards, and good conduct, a plethora of standards may also limit the possibilities of ensuring quality performance and services, especially where the existence of many rules can encourage the "technocratic"¹¹¹ arguments of lawyers and arbitrators to justify almost any practice.

Here, I will briefly review who the leading actors are in efforts to develop, improve, or amend ethical standards of conduct as they apply to arbitrators and those who appear in arbitration proceedings.

Although the latest entry to the debates about ethics in dispute resolution is probably the most important, the American Bar Association (ABA) has only recently formally acknowledged that third party neutrals, when also lawyers, might have some different ethical duties and responsibilities than the more conventional litigator or legal counselor.¹¹² The recently concluded deliberations and proposal of the ABA's Ethics 2000 Commission revisions to the Model Rules of Professional Conduct take account of ADR and arbitration in several different places.¹¹³ First, at the symbolic level, the new version of the Preamble to the Rules does recognize the role of lawyers as third-party neutrals who may, like arbitrators, decide legal matters for the parties in dispute, but who also may serve as peacemakers, such as mediators and conciliators: "In addition to these representational functions, a lawyer may serve as a third party neutral, a nonrepresentational role helping the parties to resolve a dispute or transactional matter."¹¹⁴ Second, several rule modifications and revisions formally acknowledge the role of arbitrators, mediators, and other third-party neutrals, such as the rule governing conflicts of interests and imputation of conflicts from one member of a firm (like an arbitrator) to all others (as in partners representing parties to an arbitration in an unrelated matter).¹¹⁵ Third, a new rule, Proposed Rule 2.4, formally acknowledges the role of the lawyer as third party neutral,

111. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996) (arguing that lawyers have used the model rules for technocratic and legalistic arguments about what constitutes ethically acceptable behavior).

112. See Preamble, Rule 1.12, Rule 2.4, in MODEL RULES OF PROFESSIONAL CONDUCT (ABA, approved House of Delegates, Feb., 2002).

113. *Id.*

114. ABA ETHICS 2000 COMMISSION, Feb. 2002, Report 401, as passed by the House of Delegates, Feb. 5, 2002, Preamble.

115. Ethics 2000 Commission Report Rule 1.12, *supra* note 94. Rule 1.12 also allows partisan arbitrators to represent the parties before them in arbitration in subsequent proceedings, placing in the American lawyer ethics code the American practice of partisan arbitration (contrary to the trend developing in international arbitration). See, for example, Rules 1.7 and 1.12, which now permit "screening" of arbitrators and mediators in their law firms so that partners may represent parties to an arbitration (in other matters).

though in substance it does not do more than acknowledge the role and admonish the lawyer-arbitrator or mediator to carefully advise the parties to an arbitration or mediation that he does not represent them.¹¹⁶ Efforts to specify some more specific ethical guidelines on such questions as conflicts of interest, drafting settlement agreements, and whether advice-giving in the context of mediation or arbitration is the practice of law, were avoided and left for another day.¹¹⁷ The final report of Ethics 2000 also provided a definition of "tribunal"¹¹⁸ that includes arbitration, but omits mediation.

The ABA's various sections and committees are also engaged in ethical rule development in several other contexts. While Ethics 2000 attempted to continue the approach to lawyer's ethics that assumes a unitary profession, other committees and ABA efforts recognize that the ethics of lawyer practices may differ in different roles, subject matter expertise, and before different bodies or tribunals.¹¹⁹ The ABA participated in the drafting of the Joint Code of Conduct for Mediators (along with the AAA and SPIDR),¹²⁰ and is currently, through the Section on Dispute Resolution, considering a redraft of that document to take account of the Uniform Mediation Act and more recent efforts to provide ethical standards in the mediation context.¹²¹

The ABA Sections on Dispute Resolution, International Law, and Business Law are participating in a revision, with the AAA, of the AAA's 1977 Code of Ethics for Commercial Arbitration (in which policies about disclosures of conflicts of interests, repeat player arbitrators and parties, the role of the partisan arbitrator, and other controversies reviewed above are being debated).

Unlike the ABA's recent reconsideration of lawyer's ethics rules, the American Law Institute's completion (over a ten year period of drafting and debate) of the Restatement of the Law Governing Law-

116. Rule 2.4, Model Rules of Professional Conduct (2002).

117. I testified several times to the Commission to urge consideration of more specific regulation in these subjects and others. The Commission declined to specify more explicit rules in this (ADR) area, as well as others, (for example, see Nancy Moore, *Who Should Regulate Class Action Lawyers?*, ILL. L. REV. (forthcoming)), because it felt standards were still evolving in this "new" field and that there was not a clear consensus on some of the issues. A great deal of commentary, for example, continues to debate the issue of whether mediators can draft agreements for parties without practicing law and other related issues. See, e.g., SUPREME COURT OF VA. GUIDELINES ON MEDIATION AND UNAUTHORIZED PRACTICE OF LAW (1999).

118. See Ethics 2000 Report, *supra* note 94, at Rule 1.0. Relevant for the ethical duties owed to a tribunal, see, for example, Rule 3.3.

119. See, for example, Sarbanes-Oxley Act requiring potentially different responsibilities for corporate lawyers.

120. See *supra* text accompanying note 94.

121. Uniform Mediation Act, available at <http://www.nccusl.org>.

yers¹²² fails to make any explicit mention of ADR generally¹²³ or specifically,¹²⁴ though it treats arbitration as requiring the same ethical responsibilities as litigation (treating arbitration, but not mediation, as a litigation “tribunal”¹²⁵).

Other private professional associations and provider organizations have engaged in more comprehensive efforts to develop ethical and “best practices” standards for arbitration, mediation, and other forms of ADR. Perhaps the most comprehensive effort has been that of the CPR-Georgetown Commission on Ethics and Standards in ADR¹²⁶ which has developed two leading ethical protocols. The first, the Proposed Model Rule for the Lawyer as Third Party Neutral, is intended to provide with greater specificity than the current ABA rules ethical standards with respect to the mediator and arbitrator’s responsibilities as a neutral on matters of competence, diligence, conflicts of interests, confidentiality, fees, and fairness and integrity of the dispute resolution processes. This rule is intended to comprehensively apply to both mediators and arbitrators, as it provides definitions of these processes.¹²⁷ The Principles for ADR Provider Organizations, discussed above and in the Appendix to this article, is an attempt to provide best practice standards for organiza-

122. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

123. Menkel-Meadow, *supra* note 96, at 631.

124. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 122, at §§ 123-124 (lacking mention of the circumstances in which partners of an arbitrator or mediator may subsequently represent one of the parties to an arbitration or mediation, even though case law on this issue existed at the time of the drafting of the Restatement; see, for example, *Poly Software Int’l, Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995)); see also *Cho v. Superior Court*, 45 Cal. Rptr. 2d 863 (Cal. Ct. App. 1995) (cited in RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. g (2002), Reporter’s Note (commenting on judge’s law firm’s disqualification from case in which judge served as mediator)). A California appeals court has recently ruled that a sitting judge may not sit in a private arbitration—private dispute resolution is to be kept separate from judicial and court sponsored arbitration. See *Heenan v. Sobati*, 96 Cal. App. 4th 995 (Cal. Ct. App. 2002).

125. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 7, intro. cmt. (2000) (“The Chapter addresses situations in which the lawyer is ‘representing a client in a matter before a tribunal.’ . . . Thus, for example, the Chapter would be applicable in contested arbitration and similar trial-type proceedings, but it would not be applicable to a mediation, (except mediation in the form of a mock trial or similar contested proceeding).”). *Id.* Such responsibilities include reporting adverse controlling authority to the tribunal.

126. Once again, I must disclose that I chair this Commission whose members include broad representation from the corporate bar, public officials, consumer advocates, academics, dispute resolution providers, public and private litigators, and public and non-lawyer members. For a current listing of the members of the Commission, see <http://www.cpradr.org>.

127. This proposed rule is not intended to apply, on its terms, to non-lawyer mediators and arbitrators and thus, is not fully comprehensive in its proposed coverage of all who perform these roles. There is also a question of whether these rules can be applied to lawyers or others who perform other third party neutral roles such as conveners or managers of consensus building processes. See Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. (forthcoming).

tions which provide, refer, list, and train arbitrators and mediators in a wide variety of different contexts.¹²⁸ This is the first such effort to provide some standards at the organizational level.¹²⁹

Many private organizations have developed their own ethics codes, most notably the AAA Code of Ethics for Commercial Arbitration, the National Academy of Arbitrators (labor law), and the International Bar Association's Rules of Ethics for International Arbitrators, but these rules only have "force" when placed in arbitral contracts that adopt them or their sponsoring organizations' rules of procedure or conduct. These codes often deal with issues of appointment, diligence, minimal disclosures of potential conflicts, and party communications.

In recent years, the outpouring of criticism about the unfairness of the application of mandatory or compulsory arbitration clauses in the contexts of employment, consumer, and health contracts for products or services has produced efforts at "self-regulation" by a number of interested organizations. Thus, the Due Process Protocol for Mediation and Arbitration of Employment Disputes,¹³⁰ signed by the ABA Section on Labor Law, the AAA, SPIDR, the ACLU, and a variety of labor and management groups, is one such attempt to specify standards for the conduct of employment related arbitrations and mediations (though it does not prohibit pre-dispute mandatory arbitration clauses). Private providers like JAMS-Endispute have drafted their own similar organizational standards for the acceptance and performance of arbitrations in particular areas like employment.¹³¹ And, as discussed above, organizations like the NASD, which provides arbitration services for investors with claims against their stock brokers, have also developed their own internal rules (with some supervision by the Securities Exchange Commission), and are now seeking to avoid further ethical or other regulation by state bodies.¹³² Other joint organizational efforts include a Health Disputes Protocol and a Consumer Disputes Due Process Protocol,¹³³ both of which remain entirely private and limited to those organizations which have signed and approved them (without the force of positive and enforceable law).

At the level of positive law enactments by appropriate governmental bodies, there has been some activity at the state level, notably Flor-

128. See Appendix A to Provider Principles.

129. The effort has resulted in the promulgation of statements of "organizational ethical principles" by a number of private providers, including the AAA, see *supra* notes 18, 24, and 71.

130. See *supra* notes 18 and 24.

131. See *supra* text accompanying note 24.

132. See *supra* text accompanying note 38.

133. See *supra* text accompanying note 24.

ida, Minnesota, California, Massachusetts, and Texas,¹³⁴ all of which have legislated about some ethical matters pertaining to arbitrators and mediators who serve in *court or public settings*.¹³⁵ For the most part these enactments (about conflicts of interests, confidentiality, etc.) do not apply in private arbitral or mediative settings.

The recent adoption by the National Conference of Commissioners on Uniform State Laws of the Uniform Mediation Act and a Revised Uniform Arbitration Act represent efforts to develop some uniformity of regulation of many aspects of arbitration and mediation at the state level, though neither of these acts comprehensively deals with all of the ethical issues listed above.

As discussed above, some of the most comprehensive and in-depth treatments of ethics issues in arbitration and mediation have been developed by courts, such as the Northern District of California and the U.S. Judicial Conference's Committee on Court Administration and Case Management, perhaps because, as Professor Richard Reuben suggests,¹³⁶ courts see their role in the provision of arbitration and other dispute resolution services as "state action" requiring due process and fairness concerns to be realized in practice.¹³⁷

The increased use of various forms of ADR in administrative and public agency contexts (especially, but not exclusively, in the federal government¹³⁸) also has brought to the foreground the need for ethical regulation, especially where there may be conflicting policy interests such as in confidentiality and transparency versus public access to information about "public" disputes.¹³⁹

Perhaps for analogous reasons (court challenges and enforcement) repeat players (both arbitrators and litigators) in both international and

134. See, e.g., COLE ET AL., *supra* note 73.

135. See, e.g., CHARLES POU, *MEDIATOR QUALITY ASSURANCE: A REPORT TO THE MARYLAND MEDIATOR QUALITY ASSURANCE OVERSIGHT COMMITTEE* (2002) (on file with author).

136. See Reuben, *supra* note 12.

137. *Id.*

138. See, e.g., Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709 (2001); ABA, *FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION HANDBOOK* (Marshall Breger et al. eds., 2001); Standards of Practice for Postal Service Mediators, Certification for REDRESS Mediators and Minimum Criteria for Mediators of Postal Service Disputes, available at <http://www.usps.com/cpim/ftp/pubs/pub102.html>.

139. For example, the complexities in the conflicts of promises of confidentiality in dispute resolution and the demands of transparency, public access, and freedom of information in the public disputing contexts. See, e.g., Charles Pou, *No Fear: Confidentiality Day-to-Day in Federal Dispute Resolution*, in *FEDERAL DISPUTE RESOLUTION HANDBOOK*, *supra* note 136, at 75. But see *In re Grand Jury Proceedings*, 148 F.3d 487 (5th Cir. 1998) (authorizing release of confidential dispute resolution materials to Inspector General in U.S. Department of Agriculture investigation of fraud). See also Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

domestic contexts are concerned that ethics rules or standards be developed so that practices within arbitrations do not lead to unnecessary challenges and increased litigation about vacation or enforcement of arbitral awards. Thus, the shadow of court regulation looms large even in the most private of arbitral contexts, namely international arbitrations.

IMPLICATIONS

So, what does all of this activity mean? As any reader can see, the list of potential ethical issues to be discussed and raised in particular cases of arbitration is long and ever more complex as an ever-increasing number of organizations and individuals attempt to raise and urge regulation of these, and other,¹⁴⁰ issues.

Whether it will ever be possible to attain consensus on a "core" set of ethical principles for arbitration (not to mention the challenge of developing rules for mediation and arbitration together¹⁴¹), as I once hoped, I do think that increased discussion of (even if somewhat contentious) these issues raises the standards of ethical consciousness, and hopefully, practice as well. It is clear that the huge advocacy effort of those acting on behalf of consumers and employees against mandatory arbitration clauses in contracts, although so far not hugely successful in either the legislative or litigation domain, has raised the issue publically and repeatedly. With increased journalistic attention and the introduction of bills in Congress and state legislatures virtually every year on this issue, some private arbitration providers at least have developed Due Process protocols and suggestions for good clause drafting (meaning demonstrated fairness to the parties and clear procedures and standards for the conduct of arbitrations and other forms of dispute resolution), on the assumption that this advocacy might some day succeed (whether in court or in legislatures, or as the California Judicial Council's action¹⁴² illustrates, with other regulatory bodies).

It is interesting to note some contrasting developments. In the United States, advocacy on the "macro" issues of lack of fairness in requiring parties to submit to arbitration in adhesive contractual settings is being offered in both judicial and legislative contexts, with legal challenges to compulsory arbitration clauses that already exist and proposed

140. I have no doubt that I have missed some other conceptualizations of ethical issues, especially those that might not be included in my list of "c's."

141. Which is why commentators like myself and Professor Catherine Rogers suggest that ethics rules must relate to the particular contexts of disputes (see, for example, Menkel-Meadow, *supra* note 110) or "function" being performed. See also, e.g., Rogers, *supra* note 45. It may be impossible to develop unitary ethics for the different functions of mediators and arbitrators and representatives or lawyers who appear in these different fora.

142. See, e.g., *supra* text accompanying note 38.

legislation to bar the drafting of or enforcement of such clauses in particular kinds of consumer contracts. For the most part these efforts have been failing, though there is some movement in increased judicial voiding of such clauses,¹⁴³ and increased legislative activity.¹⁴⁴ At the international level, ethics issues come up in challenge proceedings to arbitrators before arbitration (and filed with the appropriate and mostly private arbitral institutions) and in legal proceedings post award (actions to vacate or enforce awards) in public (court) settings, where there is virtually no “legislative” possibility across nation-state disputants.¹⁴⁵ Thus, the relative role of public (court and legislative) and private (associational ethical codes) action in specifying ethical standards in arbitration and dispute resolution may vary domestically and internationally,¹⁴⁶ depending on how deep and wide the shadow¹⁴⁷ of judicial or legislative action is cast on arbitral activities. In the international arena, it is likely that ethical standards will be derived by court pronouncements during rulings on award enforcement or avoidance and through the development of rules by the most frequently used international arbitral organizations (the ICC, LCIA, AAA, etc.). In the domestic area, while professional associations are historically more active and prolific in generating standards, recent activities in the states (like California, Florida, Minnesota, and others) suggest that formal ethical rules or standards of conduct, analogized to Judicial Codes of Conduct, will come from legislatures and courts acting in their regulatory capacity.

And there remain questions about what can be dealt with by rule and what cannot. While the complaints about “repeat players” (both

143. See discussion of *Engalla* and *Circuit City* cases, *supra* note 23.

144. See Consumer Fairness Act of 2002, H.R. 5162, 107th Cong. (2002).

145. Obviously, regional trade entities like the European Union, NAFTA, and Mercosur can act “legislatively” within their regions in these areas, and bodies like UNCITRAL at the United Nations can promote model rules and standards like UNCITRAL’s Model Arbitration Rules or more formal treaties, like the New York Convention, but it is even harder to imagine some international legislative regulation of ethical standards in arbitration than domestically. *Cf.* Rogers, *supra* note 45.

146. See, e.g., *Arbitrators: Qualifications and the Problem of Bias*, 2 *ARB. L. MONTHLY*, June 2002, at 1 (reporting on an “unreported” arbitration case in the United Kingdom in which an arbitrator (judge) had been for many years a partner of solicitors who had acted for parties who were sued by the parties before him in the arbitration matter and relying on United Kingdom decisions on judicial bias).

147. I have used Mnookin and Kornhauser’s “shadow” metaphor of courts’ influence on private dispute resolution, see Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979), but in this case, perhaps “light” would be a better metaphor. It is the possibility of public scrutiny (“lighting up” the private rooms of arbitration) of a private process that leads to reflection on and promulgation of ethical standards. The public influence is to reveal and “light up” what occurs in the darkness of secrecy and privacy in private settings. Privacy, of course, is one of the primary motivations for choice of arbitration and mediation as a means of dispute resolution.

arbitrators and parties) can, to some extent, be dealt with by conflict of interest disclosure requirements (which would at least compel arbitrators to disclose how many matters they have done with the same parties and would less clearly, unless changed, require parties to disclose how often they had used a particular arbitrator or a particular process), the sometimes equally interesting question of “domination” by a clique of “grand old men” (as in international¹⁴⁸ or specialized arbitration) likely would not be affected by regulation—this is the sociology of practice. Such patterns or “cultures” of practice (especially where repeat player parties conform to the patterns) may be less subject to formal regulatory control than to more gradual, demographic, geo-political, economic, or technological changes in the processes of disputing itself.

That we will likely have some serious “choice of laws” problems is clear. With so many different levels of possible regulation in public and private domains at different levels of legal sovereignty (local, state, national, and international), and in such a variety of different subject matters (labor, commercial, international, employment, consumer,¹⁴⁹ health) placed in different legal traditions (common law and civil law) and increasingly, in different media,¹⁵⁰ it is unlikely that “one size can fit all” in arbitration ethics. Nevertheless, I still think that it is possible, by making explicit the issues and illustrating with examples (difficult in a practice that is primarily private and confidential), to develop some common understandings of what good (if not “best”) practices are in the field of arbitration. As examples, I would cite the trend toward full “neutrality” of a panel of arbitrators, even when two are selected by the parties,¹⁵¹ and the pressure from many sources to increase the nature and number of arbitrator disclosures about possible conflicts of interest. Whether the really controversial issues (role of the partisan arbitrator, fairness of mandatory or compulsory arbitral processes¹⁵²) can be resolved by formal ethics regulation, at any level, remains to be seen.

148. See generally DEZALAY & GARTH, *supra* note 2.

149. See *House Bill Would Limit Mandatory Arbitration in Consumer Contracts*, available at <http://www.ADRWorld.com> (last visited July 29, 2002).

150. In this essay I have not even begun to canvass the additional ethical issues that arise with on-line dispute resolution (where the participants may never see each other).

151. I do believe the American tradition of “partisan,” non-neutral arbitrators is being increasingly questioned and is clearly losing its force in international practice and procedure.

152. The question of whether particular arbitration and mediation processes are differentially structured for fairness or bias against particular kinds of claimants is an empirical one. To date, the most sophisticated studies have been conducted by Lisa Bingham, but clearly much more work needs to be done.

APPENDIX A

CPR-GEORGETOWN COMMISSION
ON ETHICS AND STANDARDS IN ADR

Principles for ADR Provider Organizations¹

The CPR-Georgetown Commission on Ethics and Standards of Practice in ADR developed the following Principles for ADR Provider Organizations to provide guidance to entities that provide ADR services, consumers of their services, the public, and policy makers. The Commission is a joint initiative of the CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Commission, which is chaired by Professor Carrie Menkel-Meadow of the Georgetown University Law Center, has also developed the *CPR-Georgetown Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral* (Final, 2002), and provided guidance to the ABA Ethics 2000 Commission in its reexamination of the Model Rules of Professional Conduct on ADR ethics issues.²

1. The Principles are reprinted in their entirety with the permission of Professor Carrie Menkel-Meadow, Chair, CPR-Georgetown Commission on Ethics and Standards of Practice in ADR.

The Principles for ADR Provider Organizations were prepared under the auspices of the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, sponsored by CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation.

The Principles were drafted by a Commission committee co-chaired by Margaret L. Shaw and former staff director Elizabeth Plapinger, who also served as reporter. The Drafting Committee also included: Prof. Marjorie Corman Aaron, Howard S. Bellman, Christopher Honeyman, Prof. Carrie Menkel-Meadow, William K. Slate II (*see note 5 infra*), Prof. Thomas J. Stipanowich, Hon. John L. Wagner, and Michael D. Young. Eric Van Loon and Vivian Shelansky also provided invaluable assistance in the drafting effort.

A second committee of the Commission, chaired by Charles Pou, developed the definition of ADR Provider Organization used in these Principles, as well as a taxonomy of ADR Provider Organizations which helped guide this effort. *See Taxonomy of ADR Provider Organizations*, Appendix A. in a letter of February 4, 2002 to Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution and also a drafting committee member, in a letter of February 4, 2002 to Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution and also a drafting committee member.

2. The final version of the Ethics 2000 proposal specifically addresses the lawyer's expanded role as ADR neutral and problem solver for the first time. It does so in four ways. For a complete version of the Ethics 2000 report and status, *see* <http://www.abanet.org/cpr/ethics2k.html>. First, the Ethics 2000 proposal recognizes the lawyer's neutral, nonrepresentational roles in the proposed preamble to the Model Rules of Professional Conduct. *See* Ethics 2000 Proposal at Preamble para. "[3] In addition to these representational functions, a lawyer may serve

The *Principles for ADR Provider Organizations* were developed by a committee of the CPR-Georgetown Commission, co-chaired by Commission member Margaret L. Shaw and former Commission staff director Elizabeth Plapinger, who also served as reporter.³ The Principles were released for public comment from June 1, 2000 through October 15, 2001⁴. The final version reflects many of the substantive recommendations the Commission received during the comment period.⁵

as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. *Second*, the proposal indicates that a lawyer may have a duty to advise a client of ADR options. The proposed language to Comment 5 of Rule 2.1 states: “. . .when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute alternatives to litigation.” *Third*, the Ethics 2000 proposal defines the various third-party roles a lawyer may play, including that of an arbitrator or mediator. Rule 2.4. (“A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.”) *Fourth*, the proposal addresses the unique conflicts of interest issues raised when lawyers and law firms provide both representational and neutral services. See Rule 1.12 (conflicts of interest proposal including screening procedures for former judges, arbitrators, mediators or other third-party neutrals.)

3. Ms. Plapinger is currently a CPR Fellow and Senior Consultant to the CPR Public Policy Projects, and a lecturer in law at Columbia Law School where she teaches ADR policy and process.

4. The CPR-Georgetown Principles for ADR Provider Organizations have been the subject of several articles and public discussions during the comment period. See, e.g., *Special Feature: The CPR-Georgetown Ethical Principles for ADR Providers*, Disp. Resol. Mag. (ABA Dispute Resolution Section, Spring 2001), including Margaret Shaw and Elizabeth Plapinger, *The CPR-Georgetown Ethical Principles for Providers Set the Bar* at 14; Michael D. Young, *Pro: Principles Mitigate Potential Dangers of Mandatory Arbitration* at 18; Cliff Palesfsky, *Con: Proposed CPR Provider Ethics Rules Don't Go Far Enough* at 18. See also Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 Fordham Urban Law J., 979, 987-990 (April 2001); Reynolds Holding, *Private Justice: Can Public Count on Fair Arbitration*, The San Francisco Chronicle, at A15 (October 8, 2001).

During the comment period, the CPR-Georgetown Provider Principles have also been used as guidelines for consideration of measurement of quality standards of dispute resolution programs in a variety of settings. For example, at the 2000 Annual Meeting of State Programs of Dispute Resolution sponsored by the Policy Consensus Institute in New Mexico, it was noted that a number of states have used the Principles for framing discussions and establishing standards and other evaluative criteria for assessing the quality of dispute resolution development. Additionally, it was suggested that the Provider Principles should serve broadly as templates for development and evaluation of state-sponsored dispute resolution programs. Moreover, the Provider Principles has been translated into Italian and Spanish to provide guidance to relevant groups in Italy and South America.

5. Drafting committee member and President of the American Arbitration Association William K. Slate II has declined to fully endorse the CPR-Georgetown Principles for ADR Provider Organizations, stating that he does not believe the Principles are fully applicable to the American Arbitration Association (AAA) because of its “unique size and complexity.” While “endors[ing] the basic premises of the Principles which encourage transparency and disclosure” Mr. Slate explained his position in a letter of February 4, 2002 to Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution and also a drafting committee member. In the correspondence, which is on file at CPR, Mr. Slate stated, “I believe the [CPR-Georgetown]

PREAMBLE

As the use of ADR expands into almost every sphere of activity,⁶ the public and private organizations that provide ADR services are coming under greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers.⁷ The growth and increas-

Principles will prove to be invaluable and [provide] appropriate guidelines for small provider organizations and for providers who serve in dual roles, by assisting in drafting agreements and then serving as neutrals. Although the AAA does not fall into either of these categories, the AAA endorses the basic premises of the Principles which encourage transparency and disclosure. As a result of my work with CPR on these Principles, the AAA has already developed an organizational ethical statement which has been posted for the past few months on the AAA website that we believe recognizes the unique size and complexity of the AAA in the ADR marketplace, while acknowledging and respecting the basic concerns that guided the CPR Principles." Mr. Slate also thanked the CPR-Georgetown Commission, and its sponsoring institutions, for providing "a true service to the advancement and credibility of alternative dispute resolution by recognizing the serious issues of ADR providers with actual or apparent conflicts of interest and convening a group to address these issues. I was pleased to be a part of this group and appreciate the consideration given to my opinions and perspective." Letter of 2/4/02 from William K. Slate to Thomas J. Stipanowich, on file at CPR.

6. Today, ADR processes or techniques are used in almost every kind of legal and nonlegal dispute and in almost all sectors, including family, school, commercial, employment, environmental, banking, product liability, construction, farmer-lender, professional malpractice, etc. In the past decade, ADR has become a familiar part of federal and state courts, administrative practice, and regulatory and public policy development. The development of ADR systems for public and private institutions, as well as the use of ADR to arrange transactions are also well established. See generally Stephen D. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation and Other Process* (Aspen Law and Business, 3rd ed., 1999).

7. To date, much of the policy and case law development has focused on the fairness and integrity of ADR processes and forums that provide arbitration pursuant to contract in the areas of consumer services, health care and employment. See, e.g., *Circuit City Stores, Inc. v. Saint Clair Adams*, 279 F.3d 889 (9th Cir. 2002) (employment); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (employment); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000) (employment); *Engalla v. Kaiser Permanente Medical Group, Inc.*, 64 Cal. Rptr.2d 843 (1997) (health care); *Ting v. AT&T*, 182 F. Supp.2d 902 (N.D. Cal. 2002) (consumer). See also *Green Tree Financial Corp.-Alabama v. Randolph*, 121 S. Ct. 513 (2002) (Truth in Lending Act claim).

Recent policy directives have recognized the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services. See, e.g., Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (1995)(hereafter cited as Employment Due Process Protocol); Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications, *Ensuring Competence and Quality in Dispute Resolution Practice* (Draft Report 1994)(hereafter cited as SPIDR Report on Qualifications); American Arbitration Association, *Consumer Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Consumer Disputes* (May 1998)(hereinafter cited as Consumer Due Process Protocol); American Arbitration Association, American Bar Association, and American Medical Association, *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes* (June 1998)(hereafter cited as Health Care Due Process Protocol); Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation* (1992); and JAMS Minimum Standards of Fairness for Employment Arbitrations (1995, 1998).

Commentators also have begun to consider the role of ADR provider organizations in the

ing importance of ADR Provider Organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel this effort by the CPR-Georgetown Commission to develop the following *Principles for ADR Provider Organizations*.⁸

The Principles build upon the significant policy directives of the past decade which recognize the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services.⁹ Several core ideas guide the Commission's effort, namely that:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR Provider Organizations and to inform consumers, policy makers and the public generally.
- The most effective architecture for maximizing the fairness, impartiality and quality of dispute resolution services is the meaningful *disclosure* of key information.
- Consumers of dispute resolution services are entitled to sufficient information about ADR Provider Organizations, their services and affiliated neutrals to make well-informed decisions about their dispute resolution options.
- ADR Provider Organizations should foster and meet the expectations of consumers, policy makers and the public generally for fair, impartial and quality dispute resolution services and processes.

In addition to establishing a benchmark for responsible practice, the CPR-Georgetown Commission hopes that the Principles will enhance understanding of the ADR field's special responsibilities, as justice providers, to provide fair, impartial and quality process. This document hopes also to contribute to the ADR field's commitment to self-regulation and high standards of practice.

delivery of private justice and the procedural fairness of ADR forums, *see generally*, Carrie Menkel-Meadow, *Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration, The Repeat Player Effect*, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, Currents 1 (AAA, December 1998) ("All providers, whether for-profit or non-profit, facilitate and implement ADR in one or more forms and for good or ill, they all compete in the marketplace without significant outside regulation."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33.

8. In publishing these standards, the drafters also note the increasing recognition of entity or organizational ethical responsibility or liability. *See generally* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 Cornell L. Rev. 1 (Nov. 1992); New York Bar Disciplinary Rules governing law firm conduct, adopted May 1996.

9. *See supra* 7.

SCOPE OF PRINCIPLES

The following Principles were developed to offer a framework for responsible practice by entities that provide ADR services. In framing the nine Principles that comprise this document, the drafters tried to balance the need for clear and high standards of practice against the risks of over-regulating a new, diverse and dynamic field.

The Principles are drafted to apply to the full variety of public, private and hybrid ADR provider organizations in our increasingly intertwined private and public systems of justice.¹⁰ A single set of standards was preferred because the Principles address core duties of responsible practice that apply to most organizations in most settings. The single set of Principles may also help alert the many kinds of entities providing ADR services of their essential, common responsibilities. Additional sector-specific obligations will likely continue to develop for particular kinds of ADR provider organizations, depending on their sector, nature of services and operations, and representations to the public. The proposed Principles were developed to guide responsible practice and, like ethical rules, are not intended to create grounds for liability.

DEFINITION

The proposed Principles are intended to apply to entities and individuals which fall within the following definition:

An ADR Provider Organization includes any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services.

10. For an overview of the array of organizations that offer dispute resolution services, see *Taxonomy of ADR Provider Organizations, infra* at Appendix A (“‘ADR provider organizations’ come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals, and in their resources and management philosophies.”); see also Thomas J. Stipanowich, “Behind the Neutrals: A Look at Provider Issues,” *Currents 1* (AAA, December 1998) (Noting that “[t]he contemporary landscape of ADR ranges from complex, multi-faceted organizations of national and international scope to ad hoc arrangements among individuals” and includes “more specialized services marketing particular procedures, groups that have evolved to serve the special needs of a community, industry, or business sector; and mom-and-pop mediation services.”)

The *Taxonomy of ADR Provider Organizations*, included as Appendix A, analyzes these diverse organizations along three major continua: the organization’s structure, the organization’s services and relationships with neutrals, and the organization’s relationships with users or consumers.

COMMENT

This definition of an ADR Provider Organization includes entities or individuals that manage or administer ADR services, i.e., entities or individuals who serve as ADR “middlemen.”¹¹ The definition intends to cover all private and public entities, including courts and public agencies, that provide conflict management services, including roster creation, referral to neutrals, administration and management of processes, and similar activities. It is not intended to govern the individuals who provide direct services as neutrals;¹² rather this definition addresses the entities (either organizations or individuals) that administer or manage dispute resolution services.

The definition excludes persons or organizations who *do not hold themselves out* as offering conflict management services, although their services may incidentally serve to reduce conflict. These may include persons or organizations whose primary activities involve representing parties in disputes, providing counseling, therapy or similar assistance, or offering other services that may incidentally serve to reduce conflict. Importantly, however, if a law firm, accounting or management firm, or psychological services organization *holds itself out* as offering conflict management services as defined herein, it would be considered an ADR Provider Organization and fall within the ambit of these Principles.

Principles for ADR Provider Organizations

I. Quality and Competence of Services

The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary.

a. Absent a clear and prominent disclaimer to the contrary, the ADR Provider Organization should take all reasonable

11. See also Consumer Due Process Protocol, *supra* note 7 (“An Independent ADR Institution is an organization that provides independent and impartial administration of ADR Programs for Consumers and Providers, including, but not limited to, development and administration of ADR policies and procedures and the training and appointment of Neutrals.”).

12. There are a number of ethics codes for ADR neutrals promulgated by national ADR professional organizations (e.g., the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (1977, under revision), the CPR-Georgetown Commission’s Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final, 2002); and the transdisciplinary ABA/AAA/SPIDR Model Standards of Conduct for Mediators (1995)), by state-wide regulatory or judicial bodies (e.g., Florida Rules for Certified and Court-Appointed Mediators (Amended Feb. 3, 2000); Minnesota Rule 114; Virginia Code of Professional Conduct), as well as by individual court or community ADR programs (e.g., D. Utah Code of Conduct for Court-Appointed Mediators and Arbitrators) and individual ADR provider organizations (e.g., JAMS Ethics Guidelines for Mediators and Arbitrators).

steps to maximize the likelihood that (i) the neutrals who provide services under its auspices are qualified and competent to conduct the processes and handle the kind of cases which the Organization will generally refer to them; and (ii) the neutral to whom a case is referred is competent to handle the specific matter referred.

- b. The ADR Provider Organization's responsibilities under Principles I and I.a decrease as the ADR parties' knowing involvement in screening and selecting the particular neutral increases.
- c. The ADR Provider Organization's responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.

COMMENT

[1] With the growth of voluntary and mandatory ADR use in all kinds of private and public disputes, the Drafting Committee believes it is essential to hold the ADR Provider Organizations, which manage these fora and processes, to the highest standards of quality and competence. This Principle thus establishes that ADR Provider Organizations are responsible, absent specific disclaimer, for taking all reasonable steps to maximize the quality and competence of the services they offer.

The Principle holds ADR Provider Organizations responsible for the quality and competence of the services they render, but articulates a rule of reason in determining the precise contours of that responsibility for each Organization. The nature of this obligation will vary with the circumstances and representations of the organization. The Drafting Committee adopts this approach over a more prescriptive rule, because of the vastly different organizations that currently provide ADR management services.¹³

Understanding that ADR Provider Organizations come in a variety of forms and hold themselves out as offering different levels of quality assurance, this Principle permits the Organization to limit its quality and competence obligation by a clear and prominent communication to that effect to the parties and the public. Specifi-

13. See *supra* note 10 for a discussion of the varied landscape of ADR provider organizations; see also *Taxonomy of ADR Provider Organizations, infra* at Appendix A; Stipanowich, *supra* note 7, at 14 ("The provider's 'administrative' role varies greatly; in NASD arbitrations, case managers routinely sit in on hearings; at the AAA, case managers facilitate many aspects of the ADR process, while the CPR Institute for Dispute Resolution offers 'non-administered' procedures with minimal involvement by its employees.")

cally, the Principle provides that the ADR Provider Organization can diminish these obligations by a clear and prominent representation that the Organization intends a minimal or no warranty of quality or competence. Such a disclaimer may be appropriate, for example, where a bar association assembles a roster of available neutrals as a public service, but establishes only minimal criteria for inclusion and engages in no screening or assessment of the listed neutrals.

[2] Maximum quality and competence in the provision of neutral services has two main components under this Principle. The Organization is required to take all reasonable steps to maximize the likelihood that neutrals affiliated with the organization are qualified and competent (1) to conduct the processes and handle the kind of cases which the organization will generally refer to them;¹⁴ (2) to handle the specific matter referred.¹⁵

[3] This Principle advisedly uses the related concepts of both qualification and competency. In the multidisciplinary field of conflict resolution, where neutrals come from a variety of professions of origin, there is no bright line between the concept of qualifications and competence. Unlike single disciplinary fields, where there are specific entry qualifications and examinations that certify that a practitioner is generally qualified to work in the field, no such universal entry standard exists in the conflict resolution field.

14. As the dispute resolution field grows and becomes more specialized, ADR Provider Organizations are developing specialized panels or groups to handle disputes in particular subject areas, such as insurance or employment conflicts, or specific kind of processes, such as multiparty mediation. This principle provides that neutrals be competent and qualified in their areas of general substantive and process expertise, as well being competent and qualified to serve in the specific matter referred. It does not suggest that all neutrals affiliated with an Organization must be competent and qualified in all substantive areas and processes covered by the ADR Provider Organization.

15. While there continues to be limited understanding about the mix and types of training, personal attributes and experience that predict effective performance, there is a growing willingness in the field to contemplate some objective criteria for judging competence. Howard S. Bellman, *Some Reflections on the Practice of Mediation*, *Negotiation J.* 205 (July 1998). The current best practices standard for promoting competence relies on "some combination of training, experience, skills-based education, apprenticeships, internships, mentoring and supervised experience" and that "the appropriate combinations must be linked to the practice context." SPIDR Report on Qualifications, *supra* note 7, at 11-12. *See also* Margaret Shaw, *Selection, Training, and Qualifications of Neutrals*, National Symposium on Court-Connected Dispute Resolution Research (1994); Christopher Honeyman, *The Test Design Project: Performance-Based Assessment: A Methodology for Use in Selecting, Training, and Evaluating Mediators* (NIDR, 1995); Consumer Due Process Protocol, *supra* note 7, ("Elements of effective quality control include the establishment of standards for neutrals, the development of a training program, and a program of ongoing performance evaluation and feedback.")

Accordingly, the Principle uses the twin concepts of qualification and competency, as they are generally understood in the field today, as including a combination of process training and experience, and substantive education and experience.¹⁶

[4] Principle I.b reflects, and is consistent with ADR standards honoring party autonomy and knowing choice.¹⁷ It provides that when knowledgeable parties have meaningful choice in the identification and selection of individual neutrals, the duty for assuring the quality or competence of the neutral chosen transfers in part from the administering Organization to the parties themselves. Where party choice is limited by contract, statute or court rules, the ADR Provider Organization retains responsibility for maximizing the likelihood of individual neutral competence and quality.

[5] Under Principle I.c, the ADR Provider Organization has a continuing duty to take all reasonable steps to oversee, monitor and evaluate the quality and competence of affiliated neutrals.¹⁸ Determination of the specific monitoring and evaluation measures needed to fulfill this obligation will turn on the circumstances of each ADR Provider Organization. Currently, a spectrum of organizational oversight practice exists from extensive to modest monitoring of neutral performance. Some oversight measures used by Organizations include user evaluations, feedback forms, debriefings, follow-up calls, and periodic performance reviews.¹⁹

II. Information Regarding Services and Operations

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

16. See, e.g., SPIDR Report on Qualifications, *supra* note 7 and note 15 generally. For an example of how these combined concepts are used in the development of a roster of neutrals, see the roster entry criteria established by the U.S. Institute for Environmental Conflict Resolution for environmental mediators, at www.ecr.gov/r_entry.htm.

17. See, e.g., SPIDR Law and Public Policy Committee, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1991).

18. See, e.g., National Standards for Court-Connected Mediation Programs, Standard 16, Evaluation ("Courts should ensure that the mediation programs to which they refer cases are monitored adequately on an ongoing basis, and evaluated on a periodic basis and that sufficient resources are earmarked for these purposes.")

19. See SPIDR Report on Qualifications, *supra* note 7, at 12 (ADR Provider Organization should "be assessed on a regular basis," through such means as "consumer input, review of complaints, self-assessment, trouble-shooting, regular audits, peer review and visiting committees from other programs.")

- a. **The nature of the ADR Provider Organization's services, operations, and fees;**
- b. **The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;**
- c. **The ADR Provider Organization's policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;**
- d. **Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and**
- e. **The method by which neutrals are selected for service.**

COMMENT

[1] Reasonable and meaningful disclosure of key information about the ADR Provider Organization is the cornerstone of this document. In conformity with established ADR standards,²⁰ this Principle underscores the importance of clear, accurate and understandable information to informed decision-making by consumers of dispute resolution services and the public generally.

[2] This Principle, like this document generally, applies the rule of reason to the extent and form of the required disclosure. While some may prefer an absolute rule, the drafters believe that requiring reasonable disclosure consistent with the nature, structure and services of the organization and the knowledge base of the individual user, is more appropriate in this evolving field. Currently, ADR Provider Organizations come in a wide variety of organizational forms, provide a variety of services, and operate in an array of disparate settings.²¹ These entities can differ considerably in their services, policies, relationships with the affiliated neutrals, affiliation criteria, markets, and their approaches to listing and referring cases to affiliated neutrals. A principle establishing an affirmative obli-

20. See, e.g., SPIDR Report on Qualifications, *supra* note 7, at 6 ("It is the responsibility of . . . programs offering dispute resolution services to define clearly the services they provide . . . and provide information about the program and neutrals to the parties."); National Standards for Court-Connected Mediation, *supra* note 7, Standards 3.1-3.2.

21. See *Taxonomy of ADR Provider Organizations*, *infra* at Appendix A; see also *supra* note 10 and accompanying text.

gation to provide key information should recognize these differences, as well as differences in effective means of disclosure.²²

[3] This Principle calls for reasonable disclosure of information about relevant financial relationships between the affiliated neutrals and the ADR Provider Organization. Information about specific compensation arrangements is not contemplated under this section. Rather, general statements of the existence or absence of consequential financial links, either direct or indirect, between the affiliated neutral and the ADR provider organization that may have an impact on the conduct of the Organization or the neutral, or may be reasonably perceived as having such an effect, are expected.²³

III. Fairness and Impartiality

The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.

COMMENT

ADR parties and the public are entitled to fair processes and impartial forums. As justice providers, ADR Provider Organizations have an obligation to take all reasonable steps to ensure the impartiality and fundamental process fairness of their services. This mandate may have particular importance when the ADR Provider Organization undertakes to administer an in-house dispute resolution program, another organization's process or policy, or processes designed or requested by one party to a dispute.

Recent ADR policy directives and case law provide the field, courts and regulators with important baselines of fundamental fairness and impartiality.²⁴ To date, key indicia of fair and impartial processes and fora include: competent, qualified, and impartial neutrals; rosters of neutrals that are representative of the community of users; joint party selection of neutrals; adequate representation; access to information; reasonable cost allocation; reasonable

22. We recognize that the kinds of disclosures advocated by this Principle will be different, for example, for a large international organization, like the American Arbitration Association, and a small mediation firm.

23. In some organizations, there is no financial relationship with affiliated neutrals other than their inclusion on a roster. In other entities, affiliated neutrals are owners, employees, contributors, franchisees, independent contractors or stand in other consequential economic relationship to the ADR organization. See *Taxonomy of ADR Provider Organizations, infra* at Appendix A.

24. See *supra* note 7.

time limits; and fair hearing procedures.²⁵ Building on these standards, this Principle establishes an across-the-board obligation on the part of the ADR Provider Organization to ensure the impartiality and fundamental process fairness of its services.

IV. Accessibility of Services

ADR Provider Organizations should take all reasonable steps, appropriate to their size, nature and resources, to provide access to their services at reasonable cost to low-income parties.

COMMENT

As the profession and business of dispute resolution grows, ADR Provider Organizations have a responsibility to provide services to low-income parties at reasonable or no costs. This access-to-services obligation can be satisfied in various ways, depending on the circumstances of the ADR Provider Organization. For example, the Provider Organization can offer pro bono neutral services or sliding scale fees. The entity could also require its affiliated neutrals to participate as neutrals in dispute resolution programs offered by the courts, government, nonprofit groups or other institutions at below market rates or as volunteers.

V. Disclosure of Organizational Conflicts of Interest

- a. **The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a de facto stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartial-**

25. See, e.g., Employment Due Process Protocol, *supra* note 7; Consumer Due Process Protocol, *supra* note 7; and the Health Care Due Process Protocol, *supra* note 7. See also, *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Engalla v. Kaiser Permanente Medical Group*, 15 Cal. 4th 951 (1997).

- ity or might reasonably create an appearance of partiality or bias.
- b. **The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.**

COMMENT

Reflecting the field's longstanding reliance on reasonable disclosure to address the existence of interests or relationships which may effect fairness and impartiality,²⁶ this Principle imposes an independent duty of disclosure on the Organization to provide information about significant *organizational* relationships with a party or other participant to an ADR process. As with these Principles generally, the rule of reason is intended to apply to this provision.²⁷

At issue is the potential for actual or perceived conflicts of interest involving ADR participants (such as, businesses, public institutions, and law firms) that have continuing professional, business or other relationships with the ADR Provider Organization. For example, an ADR Provider Organization may be under contract to an institutional party to provide a volume of ADR services; or a law firm may regularly choose a particular ADR Provider Organization to resolve disputes repeatedly, or represent a client or clients that does so; or a public institution may send most or all its employment disputes to a particular ADR Provider Organization by contract or de facto business relationship. Under this Principle, disclosure of such relationships between the Organization and repeat player parties or other repeat players to the other parties to the dispute would be required.

This Principle reflects the evolving concept of "organizational conflict and relationship."²⁸ Since ADR Provider Organizations

26. See ABA/AAA *Code of Ethics for Arbitrators in Commercial Disputes* (1977, under revision); *Commonwealth Coatings Corp. v. Continental Co.*, 393 U.S. 145, 151-52 (1968)(concurring opinion); Christopher Honeyman, *Patterns of Bias in Mediation*, J. of Dispute Resolution 141 (1985); CPR-Georgetown Commission on Ethics and Standards in ADR, *Proposed Model Rule for the Lawyer as Third Party Neutral* (Final, 2002).

27. As with Principle II, we recognize that the extent and form of disclosures advocated by this Principle will be different depending on the nature of the ADR Provider Organization and is subject to the rule of reason. See generally, Principle II, Comment [2].

28. For an analysis of recent case law and repeat player issues in ADR, see generally, Carrie Menkel-Meadow, *Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio J. Dispute Res. 19 (Fall 1999); Lisa Bingham, *Focus on Arbitration*

perform functions which may have a direct or indirect impact on the dispute resolution process (in the creation of lists of neutrals for selection, scheduling or other administrative functions), concerns about organizational impartiality have begun to be raised by courts, policy makers and commentators.²⁹ While the drafters understand that this disclosure obligation may impose some additional costs, particularly for large ADR Provider Organizations, we believe that disclosure of organizational relationships and interests is critical to preserving user and public confidence in the independence and impartiality of ADR Provider Organizations and services.

VI. Complaint and Grievance Mechanisms

ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.

After Gilmer: Employment Arbitration, The Repeat Player Effect, 1 Employee Rights and Employment Policy J. 189 (1997); Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, Currents 1, 15 (AAA, December 1988) (“providers should recognize that an ongoing, close connection between a provider and regular user may be a source of concern to the incidental user who is drawn into an ADR process by a pre-dispute ADR clause in a contract of the other party’s devising.”) See also JAMS Conflicts Policy, addressing both organizational conflicts and individual conflicts.

29. See, e.g., Consumer Due Process Protocol, *supra* note 7, at 18 (“The consensus of the Advisory Committee was that the reality and perception of impartiality and fairness was as essential in the case of Independent ADR Institutions as it was in the case of individual Neutrals. . . . In the long term, . . . the independence of administering institutions may be the greatest challenge of Consumer ADR.”) In *Engalla v. Kaiser Permanente Medical Group, Inc.*, 64 Cal. Rptr. 2d 843 (1997), the California Supreme Court strongly criticized the fairness and enforceability of Kaiser Permanente’s mandatory malpractice self-administered arbitration program, and remanded the case for further factual consideration of claims of fraud. For an analysis of *Engalla*, see Carrie Menkel-Meadow, *California Court Limits Mandatory Arbitration*, 15 Alternatives 109 (September, 1997). While the suit filed by the family of the deceased lung cancer patient has since settled, the *Engalla* case has led to a comprehensive assessment and restructuring of the Kaiser arbitration process. See The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration, *The Kaiser Permanente Arbitration system: A Review and Recommendations for improvement* (January 5, 1998). Kaiser has since hired an independent ADR provider organization to administer its formerly in-house program. See Justin Kelly, *Case Study Shows Consumer Confidence in Kaiser Arbitration Program*, *adrworld.com*, April 22, 2002; Davan Maharaj, *Kaiser Hires Outside to Oversee Arbitrations*, *Los Angeles Times*, November 11, 1998, at C11.

COMMENT

This Principle requires ADR Provider Organizations to establish and provide information about mechanisms for addressing grievances or problems with the Organization or individual neutral. Organizations should develop policies and procedures appropriate to their circumstances to provide this complaint review function.³⁰ The organizational oversight provided through these mechanisms is concerned primarily with complaints about the conduct of the neutral, or deficiencies in process and procedures used. The complaint and grievance mechanisms are not intended to provide an appeals process about the results or outcome of the ADR proceeding.

VII. Ethical Guidelines

- a. **ADR Provider Organizations should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.**
- b. **ADR Provider Organizations should conduct themselves with integrity and evenhandedness in the management of their own disputes, finances, and other administrative matters.**

COMMENT

[1] Absent a controlling statutory or professional code of ethics, this Principle directs the ADR Provider Organization to require its neutrals to adhere to a reputable code of conduct. The purpose of this Principle is to help ensure that neutrals affiliated with the ADR Provider Organization are familiar with and conduct themselves according to prevailing norms of ethical conduct in ADR. To this end, ADR Provider Organization should take reasonable steps on an ongoing basis to educate its neutrals about the controlling code and ethical issues in their practices. An ADR Provider Organiza-

30. For example, an organization may provide a complaint form, and/or designate an individual within the entity to receive and follow up on complaints. Another organization may develop a more formal procedure for filing, investigating and resolving complaints. *See, e.g.*, JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. In some states, disciplinary bodies have been established to review the conduct of state-certified ADR neutrals. For example, the Florida Mediator Qualifications Board was established by the Florida Supreme Court to govern the discipline of state-certified mediators in Florida. In the federal courts, the Northern District of California recently modified its local rules to provide that any complaint alleging a violation of ADR rules should be presented in writing and under seal directly to the U.S. Magistrate Judge who oversees the ADR programs in that court. (Local rule, effective May 2000).

tion may elect to develop an internal code, which conforms to prevailing ethical norms, or to adopt one or more reputable external codes.³¹

[2] As the numbers of ADR Provider Organizations increase, it is particularly important that Organizations attend to issues of their own managerial, administrative and financial integrity. To this end, ADR Provider Organizations should consider adopting ethical guidelines for employees or other individuals associated with the Organizations who provide ADR management or administrative services, addressing such issues as impartiality and fair treatment in ADR administration, privacy and confidentiality, and limitations on gifts and financial interests or relationships.³²

VIII. False or Misleading Communications

An ADR Provider Organization should not knowingly make false or misleading communications about its services. If settlement rates or other measures of reporting are communicated, information should be disclosed in a clear, accurate and understandable manner about how the rate is measured or calculated.

COMMENT

As providers of neutral dispute resolution services, ADR Provider Organizations should be vigilant in avoiding false or misleading statements about their services, processes or outcomes. With ADR Provider Organizations assuming greater prominence in the

31. For examples of codes of conduct developed by an ADR Provider Organization, see JAMS's Ethical Guidelines for Mediators, Ethical Guidelines for Arbitrators, and the JAMS Conflicts Policy addressing both organizational and individual conflicts issues. See Principle V, Disclosure of Organizational Conflicts of Interest, *supra*. In addition, JAMS designated a senior executive as the organization's arbiter of service complaints, and has developed procedures for handling ethics-based complaints against panelists. See JAMS, Internal Procedures for Review and Resolution of Complaints Against Panel Members, Including Alleged Ethics Violations. See also Principle VI, Complaint and Grievance Mechanisms.

32. The American Arbitration Association recently adopted a Code of Ethics for Employees which addresses the ethical responsibilities of AAA employees in administering cases and other responsibilities. In the area of impartiality, for example, the Code provides, "[t]he appointment of neutrals to cases shall be based solely on the best interests of the parties." In the areas of Financial Transactions, the Code provides, *inter alia*, "[e]mployees shall avoid any financial or proprietary interest in contracts which the employee negotiates, prepares, authorizes or approves for the Association and shall not contract with family members." Additionally, the Code prohibits gifts to employees, stating: "Employees shall also observe the gift policy of the Association which prohibits the acceptance of gifts from neutrals, parties, advocates, vendors, or from firms providing services, regardless of the nature of the case or value of the intended gift." *Code of Ethics for Employees of the American Arbitration Association* (1998).

delivery of ADR, it is important that organizations take care not to foster unrealistic public expectations about their services, processes or results.

The reporting of settlement rates and other measures of reporting by ADR Provider Organizations and individual neutrals raises concern. Settlement rates can be calculated in various ways and reflect various factors (including the number of cases, the difficulty of cases, the time frame for inclusion, and the definition of settlement). This Principle calls for disclosure of how the settlement rates and other key reporting measures (such as “number of cases”) are determined when ADR Provider Organizations use these measures to market their services.

IX. Confidentiality

An ADR Provider Organization should take all reasonable steps to protect the level of confidentiality agreed to by the parties, established by the organization or neutral, or set by applicable law or contract.

- a. **ADR Provider Organizations should establish and disclose their policies relating to the confidentiality of their services and the processes offered consistent with the laws of the jurisdiction.**
- b. **ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the neutrals associated with the Organization.**
- c. **ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the ADR participants.**

COMMENT

This Principle establishes the protection of confidentiality as a core obligation of the ADR Provider Organization. Given the varied sources of confidentiality protections, unsettled case law, and diverse regulatory efforts,³³ this Principle imposes a general

33. See, e.g., Kathleen M. Scanlon, *Primer on Recent Developments in Mediation*, ADR Counsel In Box, No. 6, Alternatives (February 2001 and October 2001 Update)(overview of current ADR confidentiality policy, practice, case law and uncertainties)(October 2001 update at www.cpradr.org, Members Only section); *Special Issue: Confidentiality in Mediation*, Disp. Resol. Mag., Winter 1998 (for a review of policy issues and uncertainties, regulatory reforms, and case law); Uniform Mediation Act drafted by the National Conference of Commissioners on Uniform State Laws and the ABA Section of Dispute Resolution (2001); Rule 4.5.2 of the CPR-Georgetown Commission on Ethics and Standards in ADR's Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final 2002); and Christopher Honeyman,

obligation on the part of the ADR Provider Organization to establish, disclose and uphold governing confidentiality rules, whether set by party agreement, contract, policy or law. The Principle also makes it a core organizational obligation to communicate the Organization's confidentiality policies to neutrals and parties.³⁴

Taxonomy of ADR Provider Organizations³⁵

I. Definition of "ADR Provider Organization"

See Definition and Comment in the Principles for ADR Provider Organizations, supra at 7-8.

II. Taxonomy of ADR Provider Organizations

ADR provider organizations come in a wide variety of forms. These range from solo arbitrators and very small mediation firms to nationwide entities providing the gamut of neutral and management services. They also vary from new programs with short, informal referral lists to established public and private sector institutions that annually furnish thousands of disputants with panels of neutrals. These providers can differ considerably in their structures; in the kinds of neutrals they refer, parties they serve, and cases they assist with; in their relationships with the neutrals they refer and with one or more of the parties using their services; in their approaches to listing, referring, and managing neutrals; and in their resources and management philosophies.

To help organize our understanding of this diverse and dynamic field, we believe it is useful to categorize ADR Provider Organiza-

Confidential, More or Less: The Reality, and Importance, of Confidentiality is Often Oversold by Mediators and the Profession, Disp. Resol. Mag., Winter 1998, at 12. *See also generally*, Uniform Mediation Act & Reporter's Notes (jointly drafted by National Conference of Commissioners on Uniform State Law and ABA Section of Dispute Resolution) (adopted and recommended for enactment in all states by NCCUSL at 2001 Annual Meeting on August 10-17, 2001; adopted by ABA House of Delegates in February 2002).

34. For an example of a public ADR Provider Organization's statement of confidentiality policy and rules, *see* U.S. Institute for Environmental Conflict Resolution, Confidentiality Policy and Draft Rule (1999).

35. CPR-Georgetown Commission member Charles Pou headed the Commission's effort to develop a taxonomy of ADR Provider Organizations, *see Principles for ADR Provider Organizations, supra* at note 1 (hereinafter referred to as ADR Provider Principles), convened a subcommittee. The Commission's goal in developing the taxonomy was to describe, group and provide a framework for analysis of the many different kinds of entities that fall within the rubric of ADR Provider Organization. Mr. Pou is the primary author of the taxonomy. Commission members Bryant Garth and Michael Lewis also contributed to its development. The Taxonomy committee also played the lead role in formulating the definition of ADR Provider Organization included in the ADR Provider Principles.

tions according to (i) their organizational structures, (ii) the nature of their services and relationships with neutrals, and (iii) the nature of their relationships with users or consumers. The following discussion looks closely at each of these three main categories and tries to identify the major distinguishing factors in each area. We hope this discussion helps to provide a framework for understanding and guiding the diverse entities which manage or administer dispute resolution and conflict management services.

A. Organizational Structures

Nine distinguishing factors related to the organizational structure of ADR Provider Organizations were identified:

- Overall Organizational Status
- Overall Organizational Structure
- How Neutrals are Listed
- How Neutrals are Referred
- Organization's role in quality control
- Organization's stake in dispute or substantive outcome
- Organization's size
- Organization's resources
- Organization's operational transparency

1. Organizational Status

Court - Public regulatory agency - Public dispute resolution provider agency - Other public entity (State dispute resolution agency, University, Administrative support agency, Office of Administrative Law Judges, Shared neutrals program) - Quasi-public (e.g., community dispute resolution programs) - Private not-for-profit - Self-regulatory entity - Private industry programs for intra-industry disputes, franchisee disputes, consumers, employees, clients - Private for-profit.

A variety of different kinds of organizations currently provide dispute resolution services. In recent years, many public entities have been established, or extended their activities, to serve as ADR provider organizations. These include court-annexed systems individually or centrally managed by a judge or an administrator, programs run in-house by government agencies with regulatory duties, programs in government agencies that employ staff neutrals, shared neutrals programs, expedited government contracting vehicles, and activities at government, academic, or other public entities interested in conflict management. On the private side, provider

organizations include private sector non-profit entities and for-profit entities. Some private groups also serve as contractors to assist public agencies or others wishing to employ ADR more effectively.

2. Organizational Structure:

Corporation - limited liability company - partnership - franchise - law firm - membership organization - other entities

A variety of structures are used to arrange the business or other dealings of private provider organizations, including corporations, limited liability companies, partnerships, franchises, law firms, and membership organizations.

3. How Neutrals are Listed:

Pure clearinghouse - Selective listing (objective) - Selective listing (subjective)

The ADR provider organization may list all neutrals who provide required data and serve simply as a clearinghouse. Alternatively, it may employ objective criteria and list all who are found to comply; or it may selectively limit listed neutrals in explicitly or implicitly subjective ways.

4. How Neutrals are Referred:

Nonselective - Random panel selection - Subjective panel selection - Party-identified panels - Assignor of neutral - Mixture

The organization may refer all of its listed neutrals to users requesting a panel of neutrals, or all who meet users' stated criteria, or a randomly selected subset of responsive neutrals; alternately, it may subjectively select a panel, or a single neutral, from among those that it (or the parties) deems appropriate for a given case. Some organizations employ a mix of these referral or selection techniques.

5. Organization's Role in Quality Control:

Certification of listed neutrals - Qualifications and selection process - Conflicts check - Performance evaluation - Discipline - Training - No role

Some management entities certify or otherwise indicate that the neutrals to whom they refer cases or employ are qualified, or even

superior. Others offer no warranties of qualifications beyond the general accuracy of the information they supply about potential neutrals. Whatever warranties or disclaimers are made, a variety of informal and formal approaches to quality control are used. These generally include one or more of the following: requiring affiliated neutrals to receive approved training courses; requiring neutrals to show that they have certain kinds of experience, training, or references; providing ongoing in-service or other training and education to affiliated neutrals; offering informal, case-specific advice to neutrals; evaluating performance based on observation by the ADR provider organization's personnel or users' questionnaire responses; offering processes for receiving complaints, assessments, or other feedback from users; removing listed neutrals who, over time, are not selected by parties; and disciplining or removing neutrals who fail to meet ethical or other standards.

6. Organization's Stake in Dispute or Substantive Outcome:

None - Full party to dispute - Good will, future business - Membership organization - Non-profit mission - Administrative charge for matchmaking - Portion of neutral's fee - Other

Most ADR provider entities are explicitly independent and have no stake in the dispute. A few may be parties to cases for which they provide referrals, as in ADR programs that are managed internally by the private or public organization involved in the dispute (e.g., an internally-managed corporate, university or governmental dispute resolution. Other ADR provider organizations may have some attenuated or perceived interest (programs using collateral duty or shared neutrals from the same, or another, agency). Some managing organizations provide ADR services as a public service, pursuant to a statutory mandate, as a means of improving or supplementing other services or activities, or as a way to fulfill other non-profit missions. Others provide services primarily in return for fees. Several other benefits may accrue to an ADR provider organization: service to members, good will that may influence other activities, or access to additional cases or clients.

7. Organization's Size:

Organization's size: Individual part-time solo - Individual full-time solo - Small entity - Large entity - Regional organization - National organization - International organization

ADR provider organizations may include a single individual for

whom mediation, arbitration, or management or administrative services are a sideline, a full-time practitioner, a small specialized entity with several neutrals, a large entity that offers a diverse array of services and neutrals in several parts of the U.S., or a national or international organization with hundreds or thousands of available neutrals.

8. Organization's Resources:

Substantial paid staff and related resources devoted to program -
Limited volunteer staff and few other resources

Staff and other resources available for operating a program vary dramatically and can have an impact on the nature and quality of services. A few providers devote no full-or part-time staff to their activities; they may, for example, use volunteers, simply provide a list of neutrals without more, or respond to requests on a "catch-as-catch can" basis. At the other extreme, some have substantial full-time staffs devoted to one or more provider roles (e.g., setting standards for listing neutrals, admitting listed neutrals, furnishing panels, advising parties, assessing or disciplining listed neutrals).

9. Organization's Operational Transparency:

Opaque - Open decision making - Rules of procedure defining required competencies, disclosing standards and/or methods for selecting neutrals in individual cases

Some ADR provider organizations operate as black boxes, with little or no provision for oversight or openness; others are relatively more open and explicit about the processes by which neutrals are selected, assigned, and monitored; a few seek explicitly to assure openness and regularity via rules, standards, or methodologies.

B. ORGANIZATION'S SERVICES AND RELATIONSHIPS WITH NEUTRALS

Five key attributes of ADR Provider Organizations were identified in this area:

- Nature of Organization's Services
- Nature of Cases
- Nature of Process Assistance Furnished by Neutral
- Relation of Listed Neutrals to ADR Provider Organization
- Status of Neutral

1. Nature of Organization's Services:

Neutral who assists disputants - Clearinghouse list of available neutrals - Management service - Full service administration - Assignor of neutrals - Advisor - System design - Other consultant - Mixture

Some ADR provider organizations offer only certain limited kinds of neutral services; others offer a menu of ADR options, which may include training and consulting. A few operate purely as clearinghouses that do little beyond offering a list of neutrals for users to review, perhaps accompanied by a short brochure or generalized advice. Some court programs, for instance, simply maintain a binder containing resumes sent in by local neutrals. Many ADR provider organizations, however, offer a range of administrative, management, and consulting services, including helping parties select or design appropriate processes, finding suitable neutrals, and managing the case during the ADR process. Some provider organizations offer set management choices, while others offer parties tailored management (from full-service to self-administration) depending on the users' request. A few offer all of these neutral and management services, sometimes in settings where the Organization both manages a roster and provides neutrals' services for the same client.

2. Nature of Cases:

Number of parties (multiparty or two-party) - Complexity - Length - Subject matter (environmental/ policy - civil enforcement - mass tort, insurance, product liability, or similar litigation - commercial/ business conflicts - small claims litigation - workplace/employment - family - consumer - labor-management - neighborhood - other)

ADR provider organizations assist parties in cases that vary in size, complexity, length, and number of parties, as well as in their subject matter. A few provider organizations offer services for cases involving a wide array of settings or subjects. Other provider organizations tend to specialize by subject matter. For instance, some organizations deal mainly with environmental matters; others tend to focus primarily on a broad range of business, commercial, employment and public disputes. Most public provider organizations—for example, entities managing court-annexed ADR programs, state-wide court management organizations, and user-specific entities (like the FDIC's roster of neutrals for litigation stemming from bank closings)—deal mostly, or exclusively, with

the kinds of cases they were established to support, though this may encompass a broad array of subject areas.

3. Nature of Process Assistance Furnished by Neutral:

System design - Other consulting - Training - Facilitation - Mediation - Case evaluation - Binding arbitration - Private judging - Specialized expertise in specific subject area - Hybrid ADR Processes - Mixture

The ADR provider organization may refer listed neutrals who offer a range of ADR processes and related services. The neutral's roles may also range from a brief consultations to extended conflict resolution interventions. Training and design consulting assignments may also include short or longer tenures.

4. Relation of Listed Neutrals to Organization:

Independent - Contractors - Franchisee - Staff - Other

Some management organizations have few, or no, dealings with neutrals beyond listing them. Other organizations work primarily, or exclusively, with neutrals who are contractors, subcontractors, employees, members or franchisees. Several provider organizations require most of their listed neutrals to pay a fee.

5. Status of Neutral:

Private full-time professional neutral - Private part-time - Public collateral duty - Public full-time - Judicial officer - Lawyer - Other professionals

An ADR provider organization may offer services from private full-time or part-time dispute resolution practitioners, public full-time practitioners, private individuals who serve occasionally as neutrals, public employees who offer neutral services on a collateral duty basis, or judicial officers whose activities as neutrals may be related to official duties. Apart from their employment status, neutrals referred by a provider organization may also come from a variety of professional or other backgrounds (e.g., lawyer, judge, engineer, environmental scientist, social worker, therapist, among others).

C. ORGANIZATION'S RELATIONSHIPS WITH USERS OR CONSUMERS

Two key factors were identified in this area:

- Characteristics of Parties or Representatives.
- Organization's Prior Relationship with a User or Representative.

1. Characteristics of Parties or Representatives:

Unsophisticated/vulnerable/pro se/novice parties or representatives
- Experienced/fully represented parties or representatives - Individual v. Organization - Individual v. Individual - Other

ADR provider organizations deal with a variety of users. Organizations handling neighborhood, consumer, or family cases may often deal with cases involving exclusively first-time participants or similarly unsophisticated users. In many court programs and other settings, the provider organization may deal with some parties who are novices on one side and well-represented organizations, or ones that have great experience with ADR processes, on the other. These and other provider organizations—particularly in large commercial or labor disputes—deal largely with sophisticated repeat players (as parties and/or representatives) on one or all sides.

2. Organization's Prior Relationship with a User or Representative:

None - Repeat contractor - Long-term contractor - Financial dealings - Other (e.g., board member)

An ADR provider organization may have had no dealings with any party or representative; may have worked one or more times with a party or with both parties, or their representatives; or may have a long-term service contract or other relationship with one party or law firm. A provider organization may also have certain types of prior, ongoing, or intermittent professional relations with parties or representatives, such as providing training, consulting, or systems design services. In some instances, a provider organization may have financial, business, professional or personal dealings with a party or representative.