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Confidentiality in Arbitration: Beyond the Myth

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Richard C. Reuben[*]

I. INTRODUCTION

Confidentiality has long been part of the mythology of alternative dispute resolution (ADR). That is to say, one of the apparent virtues of ADR is that its processes have been viewed as confidential.[1]

This aspect of the mythology has come under more scrutiny in recent years, particularly in the mediation context.[2] This is not surprising considering the popularity of mediation[3] and the centrality of confidentiality to the mediation process.[4] Confidentiality was the primary thrust of the Uniform Mediation Act (UMA),[5] and in their

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1. *See* LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 13–18 (3rd ed. 2005); KATHERINE V. W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 2–8 (2000) (noting the growth of conflict resolution in private tribunals); STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 210 (4th ed. 2003) ("privacy" of the process is one of the "theoretical advantages of arbitration"); CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 449 (2005) (stating "arbitration is often a private process"); ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 601 (3d ed. 2002) (stating "the privacy of the process may also contribute to a lessening of hostility and confrontation. An arbitration hearing (unlike a trial) is not open to the public"); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648–58 (1995) (decrying privatized justice).

2. A Westlaw search of articles in the JLR database mentioning "mediation confidentiality" in the title found fourteen articles published in the decade between Jan. 1, 1986, and Jan. 1, 1996. By contrast, more than sixty articles were published between Jan. 1, 1996 and Jan. 1, 2006, according to the same search. Search conducted Jan. 23, 2006.

3. Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54 (describing emergence of mediation as the leading form of alternative dispute resolution in the United States).

4. *See* RISKIN ET AL., *supra* note 1, at 439–64; SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE 9:1–9:2 (2d ed. 2005).

5. UNIF. MEDIATION ACT (amended 2003), 7A U.L.A. 104, 106 (Supp. 2005) (stating in the Prefatory Note that "a central thrust of the Act is to provide a privilege that assures confidentiality in

supporting research, the UMA drafters took a hard look at the law of mediation confidentiality and found a much more nuanced picture than the mythology would suggest.

In fact, the UMA research found little legal support for the familiar proposition that everything "stays in the room" in mediation.[6] To the contrary, it found that the law distinguished between private promises not to disclose mediation communications to third persons (agreements that the law would enforce through the law of contract) and promises to keep mediation communications from being discovered or introduced into evidence (agreements that the law would not enforce on grounds of public policy).[7] A primary goal for the drafters was therefore simply to make state law consistent with widely held expectations with respect to confidentiality by enacting an evidentiary privilege for mediation communications and reaffirming state laws permitting parties to contract for non-disclosure agreements as to third parties.[8]

Confidentiality in arbitration has not yet received similar scrutiny. Prior to this symposium, there was not a single law review article dedicated to the discussion of arbitration confidentiality and familiar arbitration treatises considered it only in passing.[9] But the time has come for a principled and rigorous analysis of arbitration confidentiality. Like mediation, arbitration has become a permanent fixture of the landscape of civil justice.[10] Like mediation, arbitration is often promoted as a "private" or "confidential" process, raising some moral and perhaps ethical obligations on the part of the profession to be candid with consumers as to the meaning and limitations of arbitration confidentiality.[11] Such candor is important because courts have begun to

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legal proceedings (*see* Sections 4–6)"). In the interest of full disclosure, I served as a reporter for the Act.

6. *Id.* § 4 cmt. 2(a).

7. *Id.* §§ 4–6 (privilege) and § 8 (confidentiality).

8. *Id.* at 109.

9. *See, e.g.*, 3 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 32.6.1 (Supp. 1999) ("A much-vaunted advantage of arbitration is the relative privacy of the proceedings . . . . There is, however, no absolute right to confidentiality.").

10. *See* RISKIN ET AL., *supra* note 1, at 507–10; STONE, *supra* note 1, at 303 (arbitration is used frequently in commercial disputes and in collective bargaining settings).

11. *See, e.g.*, MACNEIL ET AL., *supra* note 9 ("Although a party maybe protected to some degree[,] . . . parties may still be able to obtain transcripts of sworn testimony, if any, from the arbitration for use in later proceedings."); Andre R. Imbrogno, *Arbitration as an Alternative to Divorce Litigation: Redefining the Judicial Role*, 31 CAP. U. L. REV. 413, 418–19 (2003) (noting that arbitration provides "the opportunity for resolution of sensitive matters in a private and informal forum"); Josef Rohlik, *Arbitration as a Model for Resolution of Health Care Disputes Between Health Care Professionals and Health Care Organizations*, 41 ST. LOUIS U. L.J. 1005, 1006–07 (1997) (discussing reasons for the recent increase in arbitration hearings).

receive challenges to arbitration confidentiality,[12] and more can be expected in the future as both voluntary and mandatory arbitration continue to expand and become more institutionalized.[13] For all of these reasons, more descriptive and normative analysis of arbitration confidentiality is timely and important, so that wise legal policy may follow.

This Article takes a look at the assumption of confidentiality in arbitration. I focus in particular on the question of whether an arbitration may be invaded for the purpose of discovering and admitting "arbitration communications"—statements made in arbitration and documents introduced in arbitration—in other formal legal proceedings.[14] For example, may an attorney engaged in employment litigation against a corporation subpoena documents, records, and testimony from an arbitration involving that corporation and a different employee? The question is deceptively simple, with potentially significant ramifications for the integrity of the arbitration process. If the answer is yes, and arbitrations may be freely canvassed for evidence that may be useful in other cases, then arbitrations conducted in good faith can become fishing holes for well-funded litigants in other cases—to the exploitation of the parties and the process. If on the other hand the answer is no, and arbitration communications are protected against discoverability and admissibility, then arbitrations can be exploited as safe havens in which to hide evidence that might be helpful or necessary for litigants and courts. Because both of these prospects undermine the legitimacy of the arbitration process, I will propose that arbitration policy steer a middle path, one that respects both the justice system's need for relevant evidence and the need of parties in arbitration to a reliable level of confidentiality.

There are a few important limitations to this inquiry. Initially, I do not consider the capacity of private parties to agree by contract not to disclose arbitration communications to third persons outside the context

12. *See infra* discussion Part II.

13. Indeed, one study has found that mandatory arbitration provisions are now found in more than one-third of the standard form contracts analyzed. *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience,* 67 LAW & CONTEMP. PROBS. 55, 62–64 (2004).

14. To develop this term, I borrowed from the language used to describe mediation communications in the Uniform Mediation Act. UNIF. MEDIATION ACT § 2 (amended 2003). The Administrative Dispute Resolution Act also uses this convention to describe "dispute resolution communications." Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C.A. § 571 *et seq.* (1996)).

of formal legal proceedings. The Article in this symposium by Professor Schmitz addresses that topic well, allowing me to limit my consideration of arbitration confidentiality to the discovery and admissibility of arbitration communications evidence.[15] I further limit my focus to arbitrations conducted under the Federal Arbitration Act (FAA)[16] and related state laws, which are generally modeled after the Uniform Arbitration Act,[17] and therefore do not consider arbitrations arising under collective bargaining statutes, the Federal Railway Labor Act, or any other federal or state arbitration statutes. While these other contexts are important, the FAA by far has been the source of the most significant growth in recent years, especially in the employment and consumer areas.[18] Finally, I give only limited consideration to international arbitration in my analysis, as that topic is given more focused study in this symposium by Professors Rogers and Coe.[19]

In Part II of this Article, I provide an overview of the present state of the law of arbitration confidentiality and find that there are relatively few statutory or other prohibitions on the discovery or admissibility of arbitration communications. In Part III, I turn to the normative question of whether arbitration communications under the FAA should be confidential when individuals seek to discover and admit arbitration communications in other formal proceedings. To this end, I discuss the key characteristics of the arbitration process affecting confidentiality, the history, structure, and doctrine of the Federal Arbitration Act, as well as pragmatic and democratic considerations. I conclude that permitting broad discovery and admissibility of arbitrations would frustrate the unambiguous intent of Congress in enacting the FAA, contradict well-established doctrine that has arisen under the FAA, thwart the reasonable expectations of parties in arbitration, and give rise to potential abuses of the arbitration process.

I then explore the ways in which evidence law has protected the confidentiality of communications in other alternative dispute resolution

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15. Amy Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006).

16. 9 U.S.C. § 1 et seq. (1999 and Supp. 2003).

17. UNIF. ARBITRATION ACT, 7 U.L.A.1 (2005). Since there are some variations among state adoptions of the Uniform Arbitration Act, and the Act itself was significantly revised in 2001 but has not been adopted in its revised form by a significant number of states as of this writing, I will use the Uniform Arbitration Act as the touchstone of analysis throughout this article.

18. *See* RISKIN ET AL., *supra* note 1, at 582–607 (providing excerpts of cases arising under the FAA); Stephen K. Huber & E. Wendy Trachte-Huber, *Top 10 Developments in Arbitration in the 1990s*, DISP. RESOL. J., Jan. 2001, at 24, 30–31 (discussing consumer arbitration).

19. Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes–Adoption, Adaptation and NAFTA Leadership*, 54 U. KAN. L. REV. 1339 (2006); CATHERINE A. ROGERS, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006).

processes, specifically negotiation and mediation, and find those evidentiary structures—the settlement discussions rule and the privilege—unsuitable for extension to arbitration. In discerning a more appropriate vehicle, I underscore the importance of integrating arbitration confidentiality into the fabric of the law in a way that preserves and enhances arbitration's virtues, while at the same time doing no harm to the arbitration process or the values of public law.[20] This leads me to suggest the modest step of raising the burden of proof for the admission of evidence sought from arbitration proceedings by requiring the proponent of such evidence to demonstrate that it is otherwise unavailable and necessary for the resolution of the case.

II. AN OVERVIEW OF THE CURRENT LAW OF ARBITRATION CONFIDENTIALITY

The notion of arbitration confidentiality is inherently ambiguous and therefore potentially confusing. This Part addresses that ambiguity before proceeding to discuss the contours of the statutory and common law environment of arbitration confidentiality.

A. Arbitration and the Meaning of Arbitration Confidentiality

Arbitration under the FAA and related state laws is an adjudicatory process, meaning that it is a process in which a neutral third party renders a final and binding decision upon a dispute that has been submitted to the arbitrator by disputing parties.[21] Its adjudicatory nature makes it similar to public trial, but it is less formal in a number of important respects. For example, formal rules of evidence and civil procedure generally do not apply in FAA arbitrations.[22] Similarly, FAA arbitration is generally considered a "private" process.[23] What that means, however, is less clear.

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20. For an example of this kind of process-sensitive integration in the constitutional context, see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1046–1101 (2000) [hereinafter Reuben, *Constitutional Gravity*].

21. *See* RISKIN ET AL., *supra* note 1, at 506–11.

22. STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.37 (2001); MARVIN F. HILL JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 4 (2d ed. 1980).

23. For an argument that arbitration under the FAA can be a public process, see generally Richard C. Reuben, *Public Justice: Toward a State Action Theory of ADR*, 85 CAL. L. REV. 577 (1997) [hereinafter Reuben, *Public Justice*]; Reuben, *Constitutional Gravity*, *supra* note 20, at 989–1017.

At a minimum, it means that arbitration proceedings are not conducted in public, unlike public trials. This understanding only scratches the surface. A crucial distinction, for example, must be drawn between the "privacy" of the arbitral proceeding and the "confidentiality" of the proceeding.[24] The privacy of the proceeding refers to the ability of uninvited third parties—such as former spouses, business partners, and the media—to access and observe the proceedings, and perhaps disclose those observations, without the consent of the disputing parties, and possibly the arbitrator.[25] The confidentiality of the proceeding, however, refers to the ability of the disputing parties, the arbitrator, witnesses, and others who attended the arbitration to disclose publicly oral statements made in arbitration, documents tendered in arbitration, or observations of conduct by parties, witnesses, and arbitrators during the course of the arbitration.[26]

When considering confidentiality of arbitration communications, yet another important distinction must be drawn between disclosures to third persons in the general public and disclosures to institutions in the context of formal legal proceedings. Disclosures to third persons in the general public include a wide range of possibilities—from disclosures to spouses, family members and friends to business partners and competitors, and students in classrooms and training sessions. Since these disclosures are in the private realm, the law historically has permitted parties to regulate them through the law of contract,[27] and that law is generally well-developed.[28] Disclosures in the context of formal legal proceedings can also take many forms, such as disclosure pursuant to a deposition or in

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24. Schmitz, *supra* note 15, at 1214. Most ADR casebooks treat privacy as a possible advantage of arbitration. *See supra* note 1, and sources cited therein.

25. The question of who would have the power to exclude third persons has not yet been considered by courts or scholarly literature. Both the FAA and the UAA give arbitrators broad discretion to run arbitration proceedings. *See, e.g.*, FAA, §§ 7 and 10; UAA §§ 5, 7, and 12. However, the arbitrator's authority to act derives from the parties' submission of the dispute to the arbitrator. While it is clear that the parties can agree to withdraw all or part of the dispute from the arbitrator, whether the parties can agree to override the arbitrator's judgment on a procedural issues—such as the presence of a third party—is an interesting question worth further study, but is beyond the scope of this article.

26. Observation evidence is more controversial than verbal or written statements in that an observation generally is not considered a statement unless intended as a statement. *See, e.g.*, FED. R. EVID. 801(a)(1) (defining "statement" for purposes of hearsay rule); UNIF. R. EVID. 801 (a)(3) (same).

27. *See* Schmitz, *supra* note 15, at 1241–42. As Professor Schmitz rightly observes, important questions can be raised about the degree to which private parties may contract for non-disclosure of arbitration communications, and thereby use the arbitration proceedings to prevent the public from learning about matters of public concern, such as threats to health and safety. Such questions are beyond the scope of this article. *Id.*; *see also* MACNEIL, ET AL., *supra* note 9, § 32.6.2 (explaining standard arbitration rules).

28. Schmitz, *supra* note 15, at 1241–42.

response to a discovery request, testimony during a trial, as well as the work of other public bodies, such as investigations and hearings by administrative agencies, legislatures, and grand juries. Unlike disclosures to third persons generally, which implicate private interests, disclosures in formal legal proceedings implicate public interests—specifically, the public's interest in accessing the information pursuant to governmental fact-finding, adjudication, or policy development and legal regulation. These disclosures in formal legal proceedings are the focus of this Article, and as we will see, the law has given scant consideration to the availability of seemingly private arbitration communications evidence in this public context.

B. Statutes and Court Rules

The Federal Arbitration Act and related state laws provide a basic structure for arbitrations conducted under them, but generally do not address issues of arbitration confidentiality.[29] There has been some federal and state regulation, but it has been minimal.

1. The Federal Sphere

Apart from a small handful of local rules,[30] there are no meaningful federal court rules on confidentiality in arbitration.

Congress, however, has provided some guidance, at least with respect to arbitrations involving federal agencies. The confidentiality provisions of the Administrative Dispute Resolution Act of 1996 (ADR Act) apply to all federal administrative agencies, and regulate the discovery and admissibility of arbitration communications as "dispute resolution communications."[31] Section 574 of the Act provides a general rule that neither parties nor arbitrators may be compelled to disclose arbitration communications without consent,[32] prior disclosure,[33]

29. MACNEIL ET AL., *supra* note 9, § 32.6.1.

30. *E.g.*, D. IDAHO R. 16.5(j) (2005) (arbitration proceedings confidential); D. MASS. BANKR. R. 7016-1(a) (bankruptcy), *available at* http://www.mab.uscourts.gov/pdfdocuments/LR05.pdf; E.D. TENN. R. 16.5(h) (court-related), *available at* http://www.tned.uscourts.gov/documents/local_rules/localrules.pdf; S.D. TEX. R. 16.4.1 (court-related) *available at* http://www.txs.uscourts.ogv/dclclrl/dclr2005.pdf.

31. 5 U.S.C. §§ 571–84 (2000). The Act does not address disclosures to the general public.

32. § 574(a)(1), (b)(2).

33. § 574(a)(2), (b)(3).

statutory obligation,[34] or judicial determination that such disclosure is necessary.[35]

While the Act appears quite strong, its force in the arbitration context is blunted significantly by its practical operation. Most agencies do not use arbitration for a variety of historical, cultural, and legal reasons. Those seeking to do so under the ADR Act's authority must, "in consultation with the Attorney General . . . issue guidance on the appropriate use of binding arbitration" unless the agency has other explicit statutory authority to use arbitration.[36] Only a very small handful of agencies have sought or received this authority.[37]

Even then, there are significant constraints on the protections of Section 574. For one, the Act has potentially broad exceptions, such as to "prevent a manifest injustice" or to "help establish a violation of law."[38] More importantly, perhaps, the scope of the protection against compelled disclosure by a party (as opposed to disclosure by a neutral) extends only to communications that are not "available" to both parties.[39]

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34. § 574(a)(3), (b)(4).

35. § 574(a)(4), (b)(5).

36. 5 U.S.C. § 575(c). *See generally* JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION 41–45 (2004) (discussing process for arbitration in cases involving federal government); PHYLLIS HANFLING & MARTHA MCCLELLAN, DEVELOPING GUIDANCE FOR BINDING ARBITRATION (DOJ 1999), *available at* http://adr.gov/arbitra.htm (last visited Nov. 30, 2006). Binding arbitration occasionally is authorized by an agency's organic statute. *See, e.g.*, 26 U.S.C. §7123(b)(2) (authorizing Internal Revenue Service to enter into binding arbitration for certain tax disputes); 42 U.S.C. § 9622(h)(2) (authorizing the Environmental Protection Agency to enter into binding arbitration for certain cost-recovery claims under the Comprehensive Environmental Response, Compensation and Liability Act); and 5 U.SC. §7101 (authorizing binding arbitration for certain disputes arising under the Civil Service Reform Act of 1978).

37. *Id.* at 41–42, n.34. Only three agencies have received approval for arbitration programs: The Federal Motor Carrier Safety Administration, The Federal Deposit Insurance Corporation, and the Federal Aviation Administration. SENGER, *supra* note 36, at 352 n. 34.

38. 5 U.S.C. § 574(a)(4) and (b)(5) permit courts considerable latitude in lifting the veil of confidentiality upon a finding that "such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential."

While the language of the three categories of exceptions is broad, it is important to note that the balancing requirement that follows them applies to all three categories and does help to mitigate the potential breadth of the exception. Moreover, the courts have generally respected the Act's clear intention that such communications not be received into evidence unless necessary. Email from Charles Pou, Jr., Dispute Resolution Services, Washington, D.C.; former director, Dispute Resolution Program, Administrative Conference of the U.S., to Richard C. Reuben (Nov. 30, 2006, 09:35 EST) (on file with author).

39. 5 U.S.C. § 574(b)(7) provides an exception to the general rule of confidentiality if "the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding" unless "the dispute resolution communication was generated by the neutral." The operation of this provision is easier to understand in the mediation context, where it protects the

In other words, if the communication is made in the presence of two or more parties, then the protections of the Act do not apply. Since most arbitration hearings are conducted in joint session (unlike many mediations that use the private caucus format), the protection of Section 574 would only be available for responses to questions asked by the arbitrator during the typical joint arbitration session. It would not apply to preclude discovery or admissibility of other communications rendered during the arbitration joint session, such as normal testimony and documents—arguably the majority of arbitration communications.

In sum, arbitration is relatively rare in the federal government. When it is used, arbitration communications are protected under the ADR Act. But that protection is constrained, generally limited to communications responding to questions by the arbitrator because of the structure of most arbitrations. Even then, the confidentiality of the arbitration communication is subject to significant discretion vested in courts to receive such evidence.

2. The State Sphere

There is surprisingly little protection for arbitration confidentiality in the states. Fewer than half of the states address the issue in either statutes or court rules; a couple of jurisdictions even make it clear that arbitrations are not confidential.[40] This is in stark contrast to the more than 250 state statutes and court rules affecting mediation confidentiality.[41]

Only seventeen states have statutes that provide any protection to arbitration confidentiality with respect to discovery and admissibility. Of these, only four have statutes that apply to arbitrations generally, regardless of subject matter: Arkansas,[42] California,[43] Missouri,[44] and Texas.[45] The other thirteen states have enacted legislation providing

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communications made in private caucuses between the mediator and a party, but not communications that are made in joint session.

40. GA. DEKALB COUNTY INTERNAL OPERATING P. APP. B R. (8), *available at* http://www.co.dekalb.ga.us/superior/index.htm; GA. FULTON COUNTY R. 1000 8(a), (c), *available at* http://fultoncourt.org/lawlibrary/pdf/localrules.pdf; N.C. GEN. STAT. § 132-1.3 (2005) (state agencies).

41. UNIF. MEDIATION ACT (amended 2003), 7A U.L.A. 104, 106 (Supp. 2005).

42. ARK. CODE ANN. § 16-7-206 (1999).

43. CAL. EVID. CODE § 703.5 (West 1995).

44. MO. ANN. STAT. § 435.014 (West 1992).

45. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 2005).

such protections for specific types of arbitrations, such as court-related,[46] consumer, or health-care arbitrations: California,[47] Connecticut,[48] Georgia,[49] Kansas,[50] Maryland,[51] Missouri,[52] Nebraska,[53] New Jersey,[54] North Carolina,[55] South Carolina,[56] Tennessee,[57] Utah,[58] Virginia,[59] and Wisconsin.[60] Both general and subject-matter-specific statutes include exceptions that vary widely. Not one has been interpreted judicially as of this writing.

Court rules are similarly sparse: only sixteen states have at least one court rule affecting arbitration confidentiality, many of which are limited to attorneys fees, or in the case of South Carolina, law firm disputes.[61]

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46. Court-related arbitrations are almost always non-binding because of constitutional concerns. *See* RISKIN ET AL., *supra* note 1, at 714–15; Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 502–05 (1989) (discussing the right to jury trials).

47. CAL. BUS. & PROF. CODE § 471.5 (West 2006) (consumer affairs); CAL. GOV'T CODE § 11420.30 (West 2005) (administrative adjudications); CAL. BUS. & PROF. CODE § 6200 (h) (West 2006) (attorney fees).

48. CONN. GEN. STAT. ANN. § 52-195b (West 2006) (motor vehicle).

49. GA. CODE ANN. § 43-34A-3 (2005) (health care); GA. ALT. DISP. RESOL. R. VII (2005) (court-related).

50. KAN. STAT. ANN. §§ 5-512, 60-452a (2005) (court-related).

51. MD. ALT. DISP. RESOL. R. 17-105.1(c)(2) (West 2005) (permitting parties to contract for arbitration privilege in court-related cases); MD. CODE art. 49B, § 48 (2006) (human relations).

52. MO. REV. STAT. § 436.362 (West 2005); MO. SUP. CT. R. 17.06 (a) (West 2006) (residential construction defects). Note that Missouri appears on both the general and subject-matter specific lists because it has both types of statutes.

53. NEB. REV. STAT. § 48-168 (2005) (worker's compensation).

54. N.J. STAT. ANN. §§ 17:48A-7.12 (e)(3), 17:48F-8.4(e)(3), 17:48E-10(1)(e)(3), 17:48F-13.1, 26:2J-8.1 (West Supp. 2005) (medical claims, if provider rules permit); N.J. STAT. ANN. § 52:9DD-10 (West 2001) (civil rights).

55. N. C. GEN. STAT. ANN. § 132-1.3 (West 2005) (government actions involving medical malpractice).

56. S.C. CIR. CT. R. 9(c) (2005) (court-related program arbitrators not to be called as witness).

57. TENN. CODE ANN. §§ 63-1-138(b), 63-4-115(g), 63-6-214, 63-7-115 (West 2004 & Supp. 2005) (complaints against physicians, chiropractors, surgeons, and nurses).

58. UTAH CODE ANN. § 78-31b-5(3)(m), 3(n) (2002) (court-related); UTAH CT. R. 102(k) (2005) (court-related).

59. VA. CODE ANN. § 8.01-576.10 (West Supp. 2005) (court-related civil remedies) (theoretically applicable to arbitration but programs covered by statute do not offer arbitration as dispute resolution option).

60. WISC. STAT. ANN. § 93.50 (e) (West Supp. 2005) (farming).

61. CAL. CIV. PROC. CODE § 1284.3(b)(4) (2006) (consumer); CAL. BUS. & PROF. CODE § 6200(H) (2006) (attorneys fees); FLA. B. R. 14-7.1(b) (West Supp. 2006) (attorneys fees); GA. R. & REGS. ST. B. R. 6-701 (2005) (attorneys fees); IND. A.D.R. 3.4(E) (LexisNexis 2006) (court-related arbitrations confidential and treated like settlement discussions); ME. R. CIV. PRO. 16B(k) (court-related); ME. B. R. 9(j) (2005) (attorneys fees); MT. R. ON ARB. OF FEE DISP. 9.1 (2005) (attorneys fees); N.H. SUPER. CT. R. 170 (F)(1) (2005) (court-related non-binding arbitration); N.Y. R. § 137.10 (McKinney 2005) (attorneys fees); N.C. B. R. Ch. 1, Subchap. E, § .0409 (2005) (law firm disputes); S.C. R., CIR. CT. A.D.R. 9(c) (2005) (court-related); TENN. S. CT. R. 31, App. B (2005) (court-related); UTAH R.C.A.D.R. 102 (2006) (court-related non-binding arbitration); VT. R. CIV. PRO. 16.3(g) (2005) (court-related).

Also, court rules whose protections are limited to court-related non-binding arbitration programs show up in five states: Georgia, Indiana, New Hampshire, Rhode Island, and Vermont.[62]

The context limitations of the court rules are significant. While several are in states that also provide some statutory protections, arbitrations in those states that have only court rules have no prohibitions on discovery or admissibility for arbitrations that are not specifically covered by the court rule. The same holds true for subject matter specific statutes. For example, the state of New York—a major locus of U.S. arbitration—has no statutory protections, and its statewide court rule is limited to arbitrations of disputes over attorneys fees. This means that communications arising from commercial, consumer, employment, and other arbitrations covered under the FAA may be fully discoverable and admissible in New York

In sum, the pattern in the states appears to be that the discovery and admissibility of arbitration communications is generally unconstrained by statutes, with the exception of some court-related arbitration and attorney-fee dispute programs. Only a small handful of states provide general protections by statute, while several provide limited protections in subject-matter-specific statutes and court rules, and the rest—the large majority of states—leave the issue to the common law.

C. The Common Law

To date, few cases address the discovery and admissibility of arbitration communications, all of which have been rulings from the lower federal and state courts.[63]

1. Federal Cases

The federal cases have largely been decided under Federal Rule of Civil Procedure 26(c), which generally permits federal judges to impose protective orders when "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[64]

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62. GA. R. & REGS. ST. B. R. 6-701 (amended 1988); IND. A.D.R. 3.4(E) (amended 2005); N.H. SUP. CT. R. 170(F)(1) (amended 2003); R.I. U.S. DIST. CT. A.D.R. Plan IX(E)(7)(d) (amended 2006); VT. R. CIV. PRO. 16.3(g) (amended 2005).

63. There are also a few cases that deal with the application of attorney-client privilege and the work-product doctrine in arbitration. *See infra* notes 210–16 and accompanying text.

64. FED. R. CIV. P. 26(c).

The leading case—indeed the only reported federal case—is *United States v. Panhandle Eastern Corp.*,[65] in which the court held that arbitration communications are discoverable and admissible and refused to grant an order protecting them under Rule 26(c).[66] In that case, Panhandle Eastern, a pipeline company, sought to prevent the disclosure of documents relating to an international arbitration held in Geneva, Switzerland, fearing that such disclosure would harm its international business relationships.[67] The discovery request was for "all documents" relating to the arbitration "including briefs, correspondence, and other papers filed" with the arbitrator, depositions, transcripts of hearings, settlement proposals, inter- and intra-company documents, and other communications.[68] Applying circuit authority on the nature of "good cause" under Rule 26(c), including the requirement of specific examples of the harm that will be suffered by disclosure, the district court held that Panhandle Eastern failed to meet its burden of proof in establishing "good cause" for the protective order.[69] In so doing, the court specifically rejected the arguments that internal arbitration rules require confidentiality or that a "general understanding" of confidentiality by the parties could justify a protective order.[70] The court also rejected general assertions of economic harm that might be caused by disclosure as inadequate to establish good cause.[71] The court's rejection of these arguments is significant because they are the types of arguments that are likely to be raised in future cases on arbitration confidentiality, and the court's reflexive repudiation of them suggests other courts may be similarly unreceptive.

Panhandle Eastern Corp. generally has been followed in principle, if not in name, by other federal district courts that have considered the issue in unreported decisions. In *Contship Containerlines, Ltd. v. PPG Industries, Inc.*,[72] the district court compelled the discovery of arbitration communications from an international commercial arbitration held in London. The court rejected the argument that confidentiality is somehow implied at law as a part of the agreement to arbitrate.[73] This holding departs from English decisions holding that the duty of

65. 118 F.R.D. 346 (D. Del. 1988).
66. *Id.* at 349–51.
67. *Id.* at 347.
68. *Id.* at 348.
69. *Id.* at 349 (citing Cippolone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986)).
70. *Id.* at 350.
71. *Id.*
72. No. 00 Civ. 0194 RCCH BP, 2003 WL 1948807 (S.D.N.Y. Apr. 23, 2003).
73. *Id.* at *1.

confidentiality is implied at law from the agreement to arbitrate, as a necessary predicate for the operation of the arbitration process.[74]

In its ruling, the *Contship Containerlines* court also noted the lack of external constraints on the disclosure of arbitration communications by the parties, such as a contractual confidentiality agreement between the parties, or the rule of an arbitral body prohibiting such disclosures. It is unclear what effect such facts, if established, might have had on the court's decision. The *Panhandle Eastern* decision suggests that internal arbitration rules likely would not have been persuasive since the *Panhandle Eastern* court rejected that argument much in the manner of the private arbitration equivalent of local court rules.[75] As a result, if it was decided under *Panhandle Eastern,* the outcome in *Contship Containerlines* would likely have been the same: The arbitration communications evidence would have been discovered and admitted into evidence.

Neither the *Panhandle Eastern* court nor the *Contship Containerlines* court dealt with situations in which the parties had executed a confidentiality agreement. However, in *Lawrence E. Jaffee Pension Plan v. Household International, Inc.*,[76] also an unpublished decision, the parties had an explicit confidentiality provision in the arbitration agreement, and the court still compelled the production of arbitration communications evidence. In that case, the defendant sought to quash a subpoena duces tecum seeking "'all documents in and concerning the [arbitration] entitled Sheila M. Hennessy and Marc B. Tull v. Household Finance . . . .'"[77] The court found that the parties reached an agreement to "treat as confidential" all documents disclosed by the parties in connection with the arbitration, and that the arbitrator

74. *See, e.g.*, Dolling-Baker v. Merrett, 1 W.L.R. 1205, 1213 (A.C. 1990) (Eng.) ("As between parties to an arbitration, . . . their very nature is such that there must . . . be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration . . . ."); Hassneh Ins. Co. of Israel v. Mew, 2 Lloyd's Rep. 243, 246 (Q.B. 1993) (An obligation of confidentiality attaching to documents "can exist only because it is implied in the agreement to arbitrate . . . ."); Ali Shipping Corp. v. Shipyard "Trogir," 1 Lloyd's Rep. 643 (A.C. 1998) (Eng.) (discussing the *Dolling-Baker* and *Hassneh* courts' holdings on the implied duty of confidentiality created by arbitration agreements). For a contrary international decision that is consistent with *Contship Containerlines*, see Esso Australia Resources, Ltd. v. Plowman, 128 A.L.R. 391 (S. Ct. Victoria 1995). For a discussion of these cases, see Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 975–87 (2001).

75. *Panhandle Eastern*, 118 F.R.D. at 349–50.

76. No. Civ. A. 04-N-1228 (CBS, 04-X-0057), 2004 WL 1821968 (D. Colo. Aug. 13, 2004).

77. *Id.*, at *1.

accepted the agreement.[78] However, the court said the defendant would still have to establish "good cause" for a protective order under Federal Rule 26(c) to preclude discovery of the evidence, thus preserving the crucial distinction described above between disclosures to the general public and disclosures in the context of formal legal proceedings.[79] The court acknowledged some tension between the parties' confidentiality agreement and the court's "obligation" to establish good cause to enter the protective order, but ultimately decided that the documents sought to be protected were already subject to disclosure pursuant to another discovery order, thus avoiding a decision on the merits.[80]

Similarly, in another unpublished decision, *Urban Box Office Network v. Interfase Managers*,[81] the Southern District of New York looked beyond the confidentiality provision in an arbitration clause in upholding the discovery of documents produced at an arbitration, rejecting arguments in a later case that they were shielded by the attorney-client privilege and by a confidentiality provision in the arbitration clause.[82] Like the *Jaffee* court,[83] the *Urban Box Office* court found that there was a valid confidentiality agreement in the arbitration clause.[84] However, it also found that the confidentiality agreement did not trump the party's waiver of the attorney-client privilege with respect to certain documents when it disclosed them at the prior arbitration. Again, the demonstrated expectations of the parties were significant to the court, which noted that the parties took no affirmative steps to invoke the confidentiality provisions of the arbitration clause, such as stamping the documents "confidential."[85] Like all of the other federal courts that considered the question, the *Urban Box Office* court permitted the discovery of the arbitration communications evidence.[86]

The scant case law in the federal courts suggests the federal courts may be unwilling to grant protective orders that prevent the introduction of arbitration communications.[87] This is consistent with longstanding

78. *Id.*

79. *Id; see supra* notes 27–28 and accompanying text (distinguishing disclosures to the general public and in the context of formal legal proceedings).

80. *Jaffee*, 2004 WL 1821968, at *2.

81. No. 01 Civ. 8854 (LTS) (THK), 2004 WL 2375819 (S.D.N.Y. Oct. 21, 2004).

82. *Id.* at *2–3.

83. 2004 WL 1821968, at *1.

84. *Urban Box Office*, 2004 WL 2375819, at *5.

85. *Id.*

86. *Id.*

87. For a general discussion of the reluctance of federal courts to recognize new privileges, and the implications of that posture for mediation confidentiality, see Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91 (1999).

judicial policy favoring the admissibility of "every man's evidence."[88] As we see below, state courts have been similarly reticent to provide protections for arbitration communications, although with some variation not yet seen in federal courts.

2. State Court Decisions

As with the federal context, there are few published state court decisions about arbitration confidentiality—only two, one of which upheld the discovery and admissibility of the arbitration communications, the other of which did not.

The decision upholding admissibility, *A.T. v. State Farm Mutual Automobile Insurance Co.*,[89] was a Colorado Appeals Court decision that was analytically similar to the federal cases described above.[90] In that case, the plaintiff, A.T., a self-employed chiropractor, claimed uninsured motorist benefits from State Farm for injuries incurred in an automobile accident.[91] The matter went to arbitration, where the plaintiff provided medical records disclosing that she had been diagnosed with a psychological disorder.[92] The plaintiff later testified as an expert medical witness in unrelated litigation between one of her chiropractic patients and State Farm, and the insurance company introduced evidence from the arbitration of her psychological disorder during its cross-examination of her.[93] She sued State Farm for invasion of privacy and various harms arising from their introduction of the psychological disorder evidence, which she claimed was confidential to the arbitration.[94]

The court of appeals affirmed the trial court's decision to admit the evidence in the later case. As the federal courts had discussed earlier, the appellate court looked to the expectations of the parties for guidance, granting that there was no confidentiality provision in the arbitration

88. JOHN H. WIGMORE, 8 WIGMORE ON EVIDENCE § 2192 (1961); *see also* Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983), *cited in* Domako v. Rowe, 475 N.W.2d 30, 36 (Mich. 1991) ("[N]o party to litigation has anything resembling a proprietary right to any witness's evidence."); JACK B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S FEDERAL EVIDENCE § 501.03[2] [a] (Joseph M. McLaughlin ed., 2000) ("[T]here is a general duty to give testimony, because the public has a right to everyone's evidence.").

89. 989 P.2d 219 (Colo. Ct. App. 1999).

90. *See supra* notes 65–86 and accompanying text.

91. *A. T.*, 989 P.2d at 220.

92. *Id.*

93. *Id.*

94. *Id.*

agreement[95] and that there were no internal arbitration rules that would have established the confidentiality of the proceedings. Rather, it found that the arbitration was conducted under the state's version of the Uniform Arbitration Act (UAA), which permits arbitration awards to be filed, challenged, and enforced in courts, and that the records relating to such an arbitration are public records.[96] Because the psychological disorder records were potentially public and the plaintiff made no effort to secure a protective order to preserve them as confidential "proactively," the court held the records were public, discoverable, and admissible.[97]

By contrast, the decision rejecting admissibility was by the Missouri Court of Appeals in *Group Health Plan, Inc. v. BJC Health Systems, Inc.*,[98] an action by a hospital network against the sponsor of a managed health care plan for breach of contract.[99] At the arbitration, the health plan sponsor sought to introduce a transcript, exhibits, and the arbitration award from one of its prior arbitrations that was subject to both an express confidentiality provision and a protective order.[100] The hospital network moved to quash in state court, arguing that the arbitration was confidential under the state's arbitration law, which provides in relevant part: "No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."[101] With the plain language of the state statute clearly precluding the discovery and admissibility of the arbitration communications, the court of appeals proceeded to rule that the sought-after arbitration communications were not "otherwise discoverable" under the Missouri statute because the parties had sought and received a protective order from the arbitrator to secure their confidentiality.[102] Citing judicial policy favoring the use of arbitration, the court ruled that the protective order should be viewed as an arbitration award entitled to deference from the courts.[103] Because the documents were covered by the protective order, they could not be "otherwise discoverable" under

95. *Id.* at 220–21.

96. *Id.*; *see also* Uniform Arbitration Act of 1975, COLO. REV. STAT. ANN. § 13-22-201 (West 2004).

97. *A.T.*, 989 P.2d at 220–21. Interestingly, the previously discussed cases suggest that the plaintiff might have had a difficult time obtaining such a protective order.

98. 30 S.W.3d 198 (Mo. Ct. App. 2000).

99. *Id.* at 198.

100. *Id.* at 200.

101. *See id.* at 200–03 (citing MO. ANN. STAT. § 435.014 (West 1992)).

102. *Id.* at 203.

103. *Id.* at 204.

the statute, and the arbitration documents were held not to be discoverable.[104]

With only two decisions on arbitration confidentiality, it is far too early to discern any trend that might develop in the state courts. The Missouri court's decision, especially its emphasis on judicial policy favoring arbitration, provides some evidence that state courts may be willing to shield arbitration communications from discovery and admissibility, at least when there is clear statutory authority. As we have seen, however, such authority is rare.

3. Summary of the Current State of the Doctrine

It is difficult to generalize from such a small handful of state and federal cases. In assessing whether arbitration communications are discoverable and admissible, the courts appear mindful of the tension between the judicial system's need for relevant evidence, and the parties' expectations of confidentiality. The judicial system's need for relevant evidence generally has prevailed, especially when there is no confidentiality clause in the agreement to arbitrate or other clear evidence of the parties' expectation of confidentiality. Internal arbitration rules may be a consideration in a court's determination, but have not been persuasive evidence of the parties' expectations. However, where there is evidence of party expectations, such as through the securing of a protective order, courts may be more willing to defer to the protective order if it otherwise meets relevant standards, such as the good cause requirement in Federal Rule of Civil Procedure 26(c). Where statutory law clearly precludes the discovery and admissibility of arbitration communications, such protective orders are likely to be upheld. This sketch of the terrain only provides an initial impression of what the emerging case law on this issue might look like. Many details remain to be filled in by future cases.

D. Arbitrator Institutional and Ethical Rules

The rules of arbitration service providers and professional ethical standards do not constitute positive law, but consistently call upon arbitrators not to disclose arbitration communications, and therefore

104. *Id.* at 203–04.

serves as a constraining force on disclosures of arbitration communications.

However, this constraint is limited to disclosures by arbitrators to the general public, and by their own terms these practice standards would not preclude arbitrators from disclosing arbitration communications in formal proceedings if so compelled by a duly constituted authority. For example, the American Arbitration Association Commercial Arbitration Rules require arbitrators to "maintain the privacy of the hearings unless the law provides to the contrary."[105] Similarly, the arbitration rules of the International Institute for Conflict Prevention and Resolution (CPR) provide that "arbitrators and CPR shall treat the proceedings . . . as confidential . . . unless otherwise required by law or to protect the legal rights of a party."[106] Finally, the oldest and arguably most significant ethics rules for arbitrators also provide that "[a]ll significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law."[107] Just as state and federal statutes and common law generally do not preclude the discovery and admissibility of arbitration communications evidence, it would appear that professional ethical standards would not prohibit the discovery and admissibility of testimony by the arbitrator with respect to arbitration communications.[108] Rather, arbitral ethical rules and the rules of provider organizations thus appear to respect the distinction between disclosures to the general public and disclosures in formal proceedings, generally calling for arbitrators to maintain confidentiality with respect to the former, but to comply with legal requirements with respect to formal proceedings.

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105. AM. ARB. ASS'N, COM. ARB. R. & MEDIATION PROC. R. 23 (amended 2005), *available at* http://www.adr.org/sp.asp?id=22440#R23.

106. INT'L INST. CONFLICT PREVENTION & RESOL., RULES FOR NON-ADMINISTERED ARB. R. 17 (amended 2005), *available at* http://www.cpradr.org/pdfs/arb-rules2005.pdf.

107. CODE PROF. RESP. ARB. LAB.-MGMT. DISP. NAT'L ACAD. ARB., AM. ARB. ASS'N, FED. MEDIATION & CONCILIATION SERV., STD. 2(C) (amended 2003), *available at* http://www.naarb.org/code.html. Interestingly, the relatively new American Bar Association Code of Conduct for Commercial Arbitrators does not provide such excusing language, stating simply "[t]he arbitrator should keep confidential all matters relating to the arbitration proceedings and decision." A.B.A. CODE ETHICS COM. ARB., CANON VI(B) (2004), *available at* http://www.abanet.org/dispute/commercial_disputes.pdf.

108. While it is plausible to argue that the "permitted by law" references in these rules refer only to substantive law and not procedural law, it is unlikely that courts would reach such a conclusion because of the heavy presumption in favor of the admissibility of relevant evidence.

E. Summary of the Law of the Discovery and Admissibility of Arbitration Communications

Contract law may be used to enforce agreements between private parties, including the arbitrator, not to disclose arbitration communications to third parties generally. However, at both the state and the federal level, present law provides little reliable support for arbitration confidentiality when arbitration communications are sought for purposes of discovery or admission at trial. Federal statutory law provides some protections for arbitrations involving administrative agencies, but that is relatively inconsequential since arbitration is rarely used by federal agencies. To date, federal courts have been reluctant to grant orders protecting arbitration communications under Federal Rule of Civil Procedure 26(c), and have rejected arguments that non-disclosure may be compelled by implication of law, internal arbitration rules, and the parties' general understanding that arbitration proceedings are confidential.

The overwhelming majority of states do not have statutes or court rules that generally preclude the admission of arbitration communications in formal legal proceedings, although some have statutes or rules that would bar the discovery or admissibility of arbitration communications for certain arbitrations, such as attorney-fee arbitration. The two state cases on this point are mixed, with one appellate court essentially tracking the federal courts, and one going the other way in permitting the introduction of arbitration communications. Significantly, the case upholding confidentiality, *BJC Health Systems*, was exceptional in that it was from one of only four states that has a statute specifically excepting arbitration communications from discovery or admissibility, and involved parties who had received a protective order from a trial court to preserve the confidentiality of proprietary commercial information.

Assuming *BJC Health Systems* is anomalous, the trend within the courts is nascent but coalescing: Absent specific legislative guidance, courts appear reluctant to preclude the discovery or admissibility of arbitration communications. In the next section, I explore the question of whether such a result is problematic.

III. SHOULD ARBITRATION COMMUNICATIONS EVIDENCE BE SUBJECT TO DISCOVERY AND ADMISSIBILITY?

The normative question of whether arbitration communications evidence should be discoverable and admissible is complex, raising fundamental questions about the relationship between arbitration and the law. More precisely, it reveals the tension between the process needs of trial and arbitration under the Federal Arbitration Act, as well as the expectations of the parties in these processes. These tensions may be resolved by reference to the key characteristics of trial and arbitration respecting confidentiality, the history, structure, and doctrine of the FAA, as well as pragmatic and democratic considerations. Assessment of these factors suggests that at least some limitation on the discoverability and admissibility of arbitration communications is appropriate.

A. Key Characteristics of the Trial and Arbitration Respecting Confidentiality

Trial and arbitration, often perceived as public and private adjudication respectively, are similar in that both are processes in which a third-party adjudicator decides how a dispute will be resolved.[109] This stands in strong contrast to consensual processes, such as interest-based negotiation or mediation, in which the parties seek a resolution of their dispute that will mutually satisfy their needs, interests, and concerns.[110]

Trial and arbitration are also adversarial processes, meaning that the parties are competing against each other for a favorable decision by the third-party adjudicators.[111] Adversarial processes typically share certain characteristics, most notably the strategic management of information and distributive (win-lose) rather than integrative (win-win) outcomes.[112] Parties in an adversarial proceeding generally seek to discover as much as they can about the other side's case while disclosing little about their own case.[113] They also use a wide variety of tactics to further this

109. *See* RISKIN ET AL., *supra* note 1, at 14–15.

110. *See generally* ROBERT J. MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000); ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2nd ed. 1991); Carrie J. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984).

111. *See generally* Robert A. Kagan, *Adversarial Legalism: The American Way of Law (2002);* Herbert M. Kritzer, *American Adversarialism*, 38 LAW & SOC'Y REV. 349 (2004) (reviewing Kagan's book).

112. *See* RISKIN ET AL., *supra* note 1 at 165–67 (discussing the adversarial approach to negotiation).

113. For an example of this in the negotiation context, see Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L. J. 1789, 1792–94 (2000).

adversarial approach, such as framing their positions in the most positive light, if not affirmatively misleading others about their cases.[114] Such tactics are often seen as necessary in adversarial processes because of the distributive nature of the outcome. In a purely adversarial process,[115] integrative results generally are not possible. The decisionmaker must decide which party wins and which party loses.

Arbitration and trial differ, however, in two important respects that have important implications for the confidentiality of arbitration communications evidence: the level of formality of the process and the public/private character of the process.

1. Level of Formality

A pervasive process characteristic of trial is its formality. From the initial discovery into the facts of a dispute to the final confirmation of an adjudicated decision by a reviewing court, the trial process is closely tethered to formal rules of procedural and substantive law. A crucial function of the judge presiding over the process is to assure adherence to such rules. In the main, these rules are intended to provide decisional norms, societally determined through democratic processes,[116] as well as procedural safeguards to assure fairness to the parties as the court fulfills its truth-seeking function by overseeing the introduction of evidence and arguments in the adversarial process. In some important respects, this function lies at the heart of the rule of law.[117]

Arbitration, by contrast, is an informal process that does not rely upon formal rules of law and procedure as these decisional standards are not necessarily applied, absent the agreement of the parties. Moreover, the awards of the arbitrators are generally final and binding without

114. For an argument that attorneys should lie if necessary to advance the interests of their clients, see James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927–29. In arbitration, parties may be more cooperative with discovery requests because of the broad nature of discovery in arbitration. *See* HILL & SINICROPI, *supra* note 22, at 95–99.

115. Not all adversarial processes are purely adversarial because they often include elements of other dispute resolution processes. For example, negotiation is such an important part of the trial, or "litigation," process that some have said the process is better understood as "litigotiation." Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

116. These democratic processes include both legislation, administrative rules, and to a lesser extent, judicial rules.

117. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 34 (2004) (discussing, *inter alia*, the meaning of "legal liberty" as requiring a democratic government to act according to preexisting standards, applied through the principle of equality).

judicial review for correctness.[118] This informality is attractive to some because of its potential to lead to a faster and cheaper adjudication than public trial.[119] While discovery is available,[120] it is not used as much as in public adjudication.[121] Motion practice also is not as common as in public adjudication, and the lack of substantive judicial review discourages costly and time-consuming appeals.[122]

Even though it is informal, the arbitration process has certain needs to operate effectively, efficiently, and legitimately in the sense that it is consistent with principles of procedural justice[123] and democratic values.[124] The real and perceived impartiality of the arbitrator is widely recognized as a core value of the process.[125] Moreover, the absence of constraints on decisionmaking, other than those that might be imposed by the parties themselves, is vital to the arbitration process. Arbitral decisionmaking calls upon the flexibility of worldly judgment, fortified by specialized knowledge, substantive expertise, and experience, rather than on the application of formal legal standards that is the duty of trial courts.[126] It is for this reason that rules of evidence and procedure generally do not apply in arbitration,[127] and that arbitrators instead consider such factors as industry customs and practices, hearsay, and other evidence that may be excluded at trial. The extremely limited nature of judicial review of arbitral awards is an important support for

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118. *See* 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION §§ 33:1–6, 34:1–2 (3d ed. 2005) (detailing current substantive and procedural requirements of commercial arbitration).

119. For a general discussion of advantages of informality in arbitration, see RISKIN ET AL., *supra* note 1, at 653.

120. *See* 9 U.S.C. § 7 (1999 and Supp. 2003) ("Witnesses Before Arbitrators; Fees; Compelling Attendance"); UNIF. ARBITRATION ACT §5, 7 U.L.A. 1 (1997) ("Hearing"); UNIF. ARBITRATION ACT § 17, 7 U.L.A.1 (rev. 2001) ("Witnesses; Subpoenaes; Deposition; Discovery").

121. For a discussion and comparison of discovery in arbitration and trial, see Stephen Hayford and Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue,* 10 OHIO ST. J. ON DISP. RESOL. 343, 367–76 (1995). For a connection of this literature to democratic theory, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (2004) [hereinafter Reuben, *Democracy*].

122. *See generally* RISKIN ET AL., *supra* note 1, at 653.

123. For an exhaustive compilation of the procedural justice literature by one of the architects of the scholarly movement, see TOM R. TYLER, PROCEDURAL JUSTICE (2005). For a concise summary, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It*, 79 WASH. U. L.Q. 787, 817–26 (2001).

124. *See* Reuben, *Democracy*, *supra* note 121, at 285–93 (2004) (discussing democracy in terms of political, legal, and social capital values).

125. *See* Richard C. Reuben, *Impartiality in Arbitration: Accounting for Arbitrator Self-Interest*, 4 J. AM. ARB. 293, 294-304 (discussing impartiality as core arbitration value and problems in defining impartiality).

126. *See* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37–38 (1987) (discussing the role of arbitration in collective-bargaining agreements); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960) (discussing the need for flexibility on the part of arbitrators).

127. *See* RISKIN ET AL., *supra* note 1, at 510–16 (discussing characteristics of arbitration).

the flexibility and informality of judgment that lies at the core of the arbitration process.

2. Public/Private Character

Trial is often called public adjudication because of its public character—that is to say, it is a dispute resolution process that takes place largely in the full view of the public. It also applies publicly derived standards as the basis for decisionmaking.

To be sure, there are many virtues that derive from the public character of trial, although three are worth emphasizing. The public character of trial requires disputes to be resolved by standards that have been promulgated pursuant to a democratic process rather than by the caprice of the decision-maker, which fosters such democratic values as equality and due process.[128] The availability of public witness provides accountability for the judicial process—a crucial public participation function—and helps assure its rationality. Finally, the public character of trial plays an important role in legitimizing the work of the courts in a democratic society.[129] Accountability, rationality, transparency, public participation and the fulfillment of other democratic values in the resolution of disputes inspires confidence in the courts as a democratic institution, as well as acceptance of, and compliance with,[130] judicial decisions by the general public.[131]

Arbitration, on the other hand, is a private process. As noted above, the procedure is generally conducted in private using decisional standards other than those provided by public law. The parties also have the power to determine whether and which outsiders may have access to arbitration hearings and awards.[132] This can be particularly important to parties who are concerned about competitive or other disadvantages if

128. *See* Reuben, *Democracy*, *supra* note 121, at 290–91.

129. For further discussion of the role of courts in democratic governance, see *id.* at 293–95.

130. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (using empirical studies to argue that people obey the law when it is legitimate in that it complies with tested indicia of procedural justice); Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 866–70 (1998) (using empirical data to demonstrate that the most important factor in people's compliance with legal procedures is their trust in legal authorities).

131. I have argued elsewhere that as a dispute resolution process that is supported by the government, arbitration should operate in a way that furthers democratic values rather than undermining them. *See* Reuben, *Democracy*, *supra* note 121, at 295–318.

132. *See supra* notes 21–26 and accompanying text. For a discussion of the capacity of parties to contract for the confidentiality of arbitration communications as to third parties generally, see Schmitz, *supra* note 15.

information about, or arising from, the arbitration is made public.[133] While there does not appear to be empirical data on the point, experience suggests that privacy is one of the more important process values for those who choose to use arbitration to resolve disputes.[134]

3. Implications for Confidentiality of Arbitration Communications

The foregoing discussion of the formal and public characters of trial and arbitration seems to counsel against limitations on the availability of arbitration communications evidence, and in favor of general discoverability and admissibility.

For trial, a fundamental principle of evidence law is the right of all parties to relevant evidence to establish their cases,[135] thus facilitating the truth-seeking function of courts.[136] The Supreme Court has consistently upheld this right to "every man's evidence,"[137] as well as the corollary principle that privileges and exceptions to the right to "every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[138] Under this view, permitting the discovery and admissibility of arbitration communications at trial would encourage consistent and truthful party testimony, arguments, and other communications at both arbitration and trial, thus fostering the normative goals of candor and truth telling in arbitration and public adjudication.

Similarly, arbitration welcomes as much information as it can get to inform the worldly judgment of arbitrators. Discovery and admissibility of arbitration communications would foster truthfulness in arbitration, and also help prevent the abuse of arbitration for normatively undesirable reasons, such as the shielding of helpful or necessary evidence and the

133. *See* RISKIN ET AL., *supra* note 1, at 654.

134. *Id.*

135. *See* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.").

136. *See* MUELLER & KIRKPATRICK, EVIDENCE 1–3 (3d ed. 2003) (explaining the purpose of the Rules of Evidence).

137. 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2192, at 71 (John T. McNaughton ed., 1961) (citing 12 PARL. HIST. ENG. (1742) 643, 693) (citing Lord Chancellor Hardwicke's famous statement during a 1792 Parliamentary debate, "[T]he public has a right to every man's evidence, a maxim which in its proper sense cannot be denied."). This maxim has also long been present in the American legal system: "It is . . . beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." Blackmer v. United States, 284 U.S. 421, 438 (1932).

138. United States v. Nixon, 418 U.S. 683, 710 (1974).

exploitation of power imbalances between the parties.[139] Finally, as I will briefly suggest below, the availability of arbitration communications may be especially important when the government is involved as a party in the arbitration, to monitor the effective exercise of democratic governance.[140]

It can be argued that the arbitration process can function quite well without relief from discovery and admissibility for arbitration communications. While it is an informal process, arbitration remains an adversarial process, and as discussed above, the parties can be expected to guard sensitive information zealously. This caution may seem counter-intuitive to some who might expect arbitration to be a kinder and gentler process precisely because it is an *alternative* dispute resolution process. Arbitration's lack of formality can make it kinder and gentler than public adjudication. But it still differs greatly from mediation, the most significant of the other alternative dispute resolution processes, in a way that is significant for the treatment of confidentiality in each of these processes. While both include a role for a third party, the function that third party performs is dramatically different. In arbitration, the third party decides the dispute. In mediation, however, the third party neutral merely facilitates the parties' own resolution of their dispute. While models for achieving this facilitation vary widely,[141] party autonomy and self-determination in deciding the outcome are the central distinguishing characteristics of mediation.[142] In other words, the structure of mediation is consensual, not adversarial, as it is in arbitration.

The implications of this structural distinction are significant for purposes of considering the process needs of arbitration with respect to confidentiality. In arbitration, the arbitrator merely presides over the adversarial process before making a decision about which party will prevail based upon the positions they argue and the evidence they present to support those positions. In mediation, however, one important role of the mediator is to help parties get beyond their narrowly stated positions

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139. For an important discussion of power imbalances in the ADR context, see Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1076–78 (1984).

140. *See infra* note 175 and accompanying text.

141. For a seminal discussion of the various mediation styles, see generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). For a critique, see generally Joseph B. Stulberg, *Facilitative versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

142. *See* RISKIN ET AL., *supra* note 1 at 338–39; Model Standards of Conduct for Mediators I ("Self-Determination") (amended 2005).

to consider the broader underlying interests that drive those positions.[143] This frequently includes convincing, or cajoling, parties to disclose their needs, interests, and concerns. Styles for doing this vary, but some approaches can be quite coercive in wrenching information from potentially reluctant parties.[144]

Put another way, part of the mediator's job is to get the parties to disclose information that they probably would not disclose in an adversarial process. In this circumstance, it is appropriate for the law to protect the confidentiality of mediation, including prohibitions on the use of mediation communications in formal legal proceedings such as those found in the privileges conferred by the Uniform Mediation Act and state mediation confidentiality acts.[145] Much of that which parties disclose in the mediation may not be disclosed but for the efforts of the mediator. Since society has a strong interest in the resolution of disputes in general, and in mediation in particular,[146] and since the mediation process itself could not function without the assurance of the parties that their mediation communications will not be used against them in court should the mediation fail, it is sensible and appropriate for the law to provide this assurance through the protections of formal law.

As a process, however, arbitration does not require this protection of formal law. Because the process is adversarial in nature, parties already safeguard sensitive evidence, and while the arbitrator, like a judge, is permitted to ask questions and make inquiry, the scope of that inquiry is generally narrower than in mediation.[147] The arbitrator in such circumstances is generally seeking clarification of the facts or the parties' positions and the evidence that supports them, rather than seeking to ascertain the needs, interests, and concerns that lie beneath those positions. For that reason, as a process matter, arbitration, like trial, does not need the confidentiality that mediation requires.

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143. The emphasis on interests in mediation theory is not always born out in practice. In fact, many mediations reflect compromises between positions rather than a true integration of the parties' interests, needs, and concerns. Such a dynamic may be explained by a number of factors, including party capacity, mediator style, and the time available for mediation. Such an inquiry, however, is beyond the scope of this paper.

144. *See* James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991) (exploring "trashing," "bashing," and "hashing" strategies used in court-connected mediations in Florida).

145. *See* UNIF. MEDIATION ACT § 4 (amended 2003), 7A U.L.A. 104, 122 (supp. 2005) (conferring privileges in the context of mediation).

146. *Id.* at 105 (discussing the growth and benefits of mediation).

147. FRANK ELKHOURI & EDNA ELKHOURI, HOW ARBITRATION WORKS 317–18 (ALAN MILES RUBIN ed., 6th ed. 2003).

B. Justifying a Rule of Exclusion

The foregoing discussion suggests that confidentiality is not an essential characteristic of arbitration in that a rule of evidentiary exclusion is not necessary to the functioning of arbitration as an adversarial process. Therefore, a rule of evidentiary exclusion is only justified if compelled by other considerations. In my view, the private character of arbitration provides this justification. Simply put, the promise of a dispute resolution process that operates apart from, but is supported by, the public system of law would prove illusory if communications made in that process were readily subject to discovery and admissibility in other formal proceedings. Once introduced, such documents would become public records, readily available to those seeking them unless properly sealed. In this section, I demonstrate how the history, structure, and doctrine of the Federal Arbitration Act support this view. In enacting the FAA, Congress intended to authorize a private adjudicatory alternative to public trial.[148] A general rule freely permitting the discovery and admissibility of arbitration communications would frustrate this unambiguous congressional intent, upset party expectations of arbitration, create pragmatic problems, undermine public confidence in the arbitration process, and inhibit the democratic legitimacy of arbitration as an alternative dispute resolution process.

1. Historical Considerations

Western courts for centuries were reluctant to enforce agreements to arbitrate, on the theory that such agreements improperly ousted the courts of their right and obligation to apply the law of the sovereign to disputes arising within the jurisdiction of the sovereign.[149] While courts were willing to enforce arbitration awards, they historically had refused to enforce the initial agreements to arbitrate. Under the so-called "ouster doctrine" English courts, and later American courts, regularly found such agreements to arbitrate to be void. Courts generally took the view that disputes needed to be resolved according to public law, ostensibly

148. For an argument that arbitration under the FAA is public for purposes of constitutional due process, see Reuben, *Constitutional Gravity*, *supra* note 20.

149. *See* Reuben, *Public Justice*, *supra* note 23, at 594–605 (discussing the historical relationship between contractual ADR and the courts).

because of the public virtues noted above.[150] They were reluctant to endorse a process that impeded public dispute resolution, and that hesitance was reflected in a general refusal to enforce agreements to arbitrate.

The FAA and related state statutes were the result of a coordinated effort by the commercial community and the legal profession at the turn of the nineteenth century to reverse the ouster doctrine legislatively and to permit the specific enforcement of agreements to arbitrate commercial cases.[151] In so doing, Congress explicitly and effectively provided disputants with a reliable way of opting out of the public system of law while still retaining the ability to have an adjudicated judgment that is legally enforceable by public courts. Indeed, this was the purpose of the Act,[152] and permitting the discovery and admissibility of arbitration communications evidence would frustrate this unambiguous congressional intent.

2. Structural Considerations

This purpose is reflected in the structure of the Federal Arbitration Act. Section 2 is the heart of the Act, and articulates a contractual approach to arbitration that the courts have implemented faithfully. It provides that arbitration agreements will be enforced just like any other contractual agreement, as long as the agreement is enforceable as a matter of contract law.[153] Section 4 of the Act further permits a court to compel an unwilling party into arbitration if it is satisfied that there is an enforceable agreement to arbitrate,[154] and Section 3 permits it to stay related legal proceedings so the dispute may be arbitrated.[155] At that point, the Act contemplates that the dispute will be resolved by an arbitrator acting outside the sphere of public law, with Section 7

150. *See supra* notes 129–32 and accompanying text.

151. *See.* Reuben, *Public Justice, supra* note 23, at 601; *see* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 136 (1983). For a definitive history of the FAA, see IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992).

152. RISKIN ET AL., *supra* note 1, at 516.

153. Section 2 states that "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

154. Section 4 states: ". . .The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* § 4.

155. Section 3 states: ". . . the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . ." *Id.* § 3.

authorizing the arbitrator to summon and hear witnesses during the arbitration,[156] and Sections 9 and 13 permitting the arbitrator to issue an award that may be entered as a court judgment.[157]

Significantly, the Federal Arbitration Act is predicated upon a contract model of structuring human relationships that emphasizes private ordering over public ordering. Arbitration is often called a "creature of contract,"[158] and a central goal of contract law is to reinforce the reasonable expectations of the parties.[159] As noted above, privacy or confidentiality is often a consideration in the disputants' choice of arbitration as a dispute resolution option.[160] Indeed, arbitration is often held out to consumers as a private alternative to trial, creating a reasonable expectation on the part of the consumer that the process is confidential. This expectation is acknowledged by all of the major protocols that have been adopted by the arbitration community as a part of its industry self-regulation. The Employment Due Process Protocol states that the protocol is offered to encourage "expeditious, accessible, inexpensive, and fair *private* enforcement of statutory employment disputes."[161] The Consumer Due Process Protocol specifically

156. *Id.* § 7.

157. Section 9 states: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title . . . ." *Id.* § 9. Section 13 states in relevant part that "The judgment shall be docketed as if it was rendered in an action . . . ." *Id.* § 13.

158. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties . . . ."); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 78 (1999); Alan Scott Rau, *Everything You Really Need to Know about "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 62 (2003); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 709 n.17 (1999) (noting that "A search on July 10, 1998, for the phrase 'arbitration is a creature of contract' in the Westlaw ALLCASES database yielded 177 cases.").

159. *See* 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.1, at 2 (1993) (The heading of this section explains that "The main purpose of contract law is the realization of reasonable expectations induced by promises."); E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 951 (1967) ("The object of contract law is to protect the justifiable expectations of the contracting parties . . . ."); *see also* Catherine Mitchell, *Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law*, 23 OXFORD J. LEG. STUDIES 639 (2003) (examining the varied understanding of the roles of the reasonable expectation in contract law); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984) (explaining how the use of standard form contracts relates to, and can be used to further, the reasonable expectations of the parties).

160. *See supra* note 1 and sources cited therein.

161. DUE PROCESS PROTOCOL FOR THE MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, GENESIS (May 5, 1995) (emphasis

acknowledges this expectation by stating that "*[c]onsistent with general expectations of privacy in arbitration hearings*, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law."[162] Similarly, in describing the principle of a "fair hearing" the Health Care Due Process Protocol states: "The hearing and determination through mediation or arbitration should be private and confidential, unless the parties agree otherwise."[163]

All of these protocols were signed by a wide array of arbitration constituents, including sections of the American Bar Association, major arbitration professional associations and service providers, plaintiffs' and defense lawyers' associations, and consumer groups, among others.[164] While they may not carry the force of law or provide sanctions for their breach, an important critique of these documents,[165] these protocols at the least help establish the reasonableness of party expectations of the confidentiality of arbitration communications. Judicial policy respecting the confidentiality of arbitration communications should reinforce rather than frustrate these reasonable party expectations by allowing for such communications to become court records that may be freely disseminated to the public absent a valid protective order.

3. Doctrinal Considerations

Reflecting the foregoing considerations, the federal and state courts, led by the U.S. Supreme Court, have held that the FAA establishes a strong national policy favoring the use of arbitration to resolve disputes.[166] In a series of decisions in the late 1980s and early 1990s, the

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added), *available at* http://www.bna.com/bnabooks/ababna/special/protocol.pdf (last visited Nov. 28, 2006).

162. NATIONAL CONSUMER DISPUTES ADVISORY COMM., AMERICAN ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (1998) (emphasis added), *available at* http://www.adr.org/sp.asp?id=22019.

163. AMERICAN ARBITRATION ASSOCIATION/AMERICAN BAR ASSOCIATION/AMERICAN MEDICAL ASSOCIATION COMMISSION ON HEALTH CARE DISPUTE RESOLUTION, FINAL REPORT, PRINCIPLE 7(1) (July 27, 1998), *available at* http://www.adr.org/sp.asp?id=28633.

164. Signatories for each of these protocols can be found on the protocols.

165. *See* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 434–45 (2004).

166. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626–28 (1985) (reiterating the policy); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (establishing the policy); *see also* Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 776 F.2d 269, 270 (11th Cir. 1985) ("In light of the federal policy favoring arbitration at work here, our task is to resolve all doubt in favor of the arbitrator's authority to award a particular remedy."). For a critique of the expansiveness with which this policy has been interpreted by some courts and scholars, see Reuben, *Public Justice*, *supra* note 23, and Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 640 n. 18 (1996); *see also* Margaret M. Harding, *The Clash Between Federal and State Arbitration*

Court formally overruled the "ouster doctrine,"[167] which had long survived its legislative reversal in the FAA.[168] In a stark reversal of policy, the Court has come to strongly support arbitration, even when statutory rights are at stake,[169] interpreting the FAA to reflect a strong national policy favoring the arbitration of disputes.[170]

To be sure, as a doctrinal matter, the strong federal policy favoring arbitration developed in the context of the narrower issue of whether a given issue or dispute is "arbitrable," or subject to an arbitration clause.[171] But the Supreme Court has given this policy determination further reach than just arbitrability, including as a justification for broad federal preemption of state law on arbitration issues[172] and the unique establishment of a federal substantive law of arbitration.[173] Although

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Law and the Appropriateness of Arbitration as a Dispute Resolution Process, 77 NEB. L. REV. 397, 455–60 (1998) ("One can only speculate as to where the Court found the strong federal policy favoring arbitration.")

167. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953), an important symbol of the ouster doctrine in American law).

168. Wilko v. Swan, 346 U.S. 427, 435 (1953) (right to select judicial forum not the kind of right that can be waived under Securities Act of 1934).

169. *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). This movement by the Court has been controversial. *See, e.g.*, Sternlight, *supra* note 166; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1 (1996) (urging narrower construction of *Gilmer*).

170. *See* Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (holding that the Arbitration Act establishes a "federal policy favoring arbitration"); *see also* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226 (1987) ("The Federal Arbitration Act thus establishes a 'federal policy favoring arbitration,' requiring that we vigorously enforce agreements to arbitrate." (citations omitted)). *But see* Sternlight, *supra* note 166, at 641 ("Congress did not intend to enforce arbitration agreements that had been foisted on ignorant consumers, and it did not intend to prevent states from protecting weaker parties.").

171. For a discussion of the breadth of the term "arbitrable," see Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contract with Arbitration Provisions*, 56 SMU L. REV. 819, 832–34 (2003) [hereinafter Reuben, First Options].

172. *See* Buckeye Check Cashing, Inc. v. Cardegna, 126 S.Ct. 1204 (2006) (ruling that FAA preempts state usury law for purposes of determining validity of arbitration provision in a contract alleged to be void *ab initio*); Southland Corp. v. Keating, 465 U.S. 116 (1984) (holding FAA preempts state laws restricting arbitrability). For a critique, see David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004). For a defense, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004).

173. Moses H. Cone, 460 U.S. at 24–25 (Section 2 of the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act . . . ." For scholarly commentary see Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197 (2006); Stephen Hayford, *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 69; G. Richard Shell, *Federal Versus State Law in the Interpretation of Contracts Containing Arbitration Clauses: Reflections on Mastrobuono*, 65 U. CIN. L. REV. 43, 50–51 (1996).

they have not been nearly as robust in their enthusiasm, many state courts have also embraced arbitration as a substitute for litigation by deciding cases presented to them with an eye toward the strong national policy favoring arbitration.[174]

The free discovery and admissibility of arbitration communications evidence can reasonably be expected to have a chilling effect on the willingness of parties to use arbitration, and therefore would frustrate this strong national policy favoring the arbitration of disputes.

4. Democratic Considerations

Arbitration under the FAA has a strong democratic character that provides an important subtext of the foregoing discussion. Personal autonomy is an overriding value of democratic governance, and in the dispute resolution context this is manifest in the availability of, and governmental support for, many options for resolving disputes, ranging from avoidance to informal consensual methods such as negotiation to the formality of public adjudication.[175] Put another way, under U.S. democracy, an aggrieved party may seek to publicly adjudicate a dispute, but one is not required to do so.[176] As noted above, Congress intended private arbitration to be one of those process choices. The legislative history of the FAA is sparse, but still reflects several reasons for this endorsement, including judicial efficiency and party preference for the speedier resolution of disputes.[177] These are ample reasons for choosing arbitration, and maintaining the integrity of the arbitration process by reaffirming party expectations of confidentiality would support autonomy and choice in dispute resolution.

5. Synthesis

The foregoing discussion of historical, structural, doctrinal, and democratic considerations of arbitration under the FAA all seem to

174. *See, e.g.*, Moncharsh v. Heily & Blase, 832 P.2d 899, 902–04 (Cal. 1992); Hojnowski v. Vans Skate Park, 901 A.2d 381, 392 (N.J. 2006); Zuver v. Airtouch Communications, Inc., 103 P.3d 753, 758–59 (Wash. 2004); Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh, 391 A.2d 1318, 1322 (Pa. 1978). *But see* Casarroto v. Lombardi, 886 P.2d 931 (Mont. 1994) (rev'd in Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996)); Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. 2005); Reuben, First Options, *supra* note 171, at 852–55 (describing how states have limited federal doctrine of separability, which is predicated on strong federal policy favoring arbitration).

175. *See* RISKIN ET AL., *supra* note 1 at 12–18; DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 189–258 (3rd ed. 2004).

176. Defendants in civil cases are often brought into the legal process against their preference.

177. S. REP. NO. 68-536, at 3 (1924) (statement of Mr. Sterling, Senate Committee on the Judiciary).

counsel in favor of some constraint on the discoverability and admissibility of arbitration communications made under the Act.

Historically, the purpose of the Act is to assure a private adjudicatory alternative to public adjudication, and once arbitration communications are disclosed in formal legal proceedings, they become public records, and therefore may be widely disseminated, despite the presence of an arbitration confidentiality provision barring disclosure to such communications. The private alternative to public adjudication is effectively lost because the proverbial cat is out of the bag.

Structurally, the Act is premised on the foundation of contract law. Barring arbitration communications from discovery and admissibility would reinforce the parties' reasonable and widely recognized expectations with respect to the confidentiality of arbitration. In so doing, it would also strengthen arbitration's connection to contract law more generally,[178] thus leading to decisions by courts that would be more internally consistent and that would provide greater reliability for parties. To the extent that state and federal cases discussed in Part II have obliquely referenced contractual agreements for the confidentiality of the arbitration, one suspects that it was the influence of this rationale, especially since party agreements to withhold evidence from courts would be void as a matter of public policy.

Doctrinally, the U.S. Supreme Court and the lower courts have recognized that the FAA represents a strong national policy favoring the use of arbitration as a dispute resolution process. This policy has significant implications for arbitration confidentiality. The free discovery and admissibility of arbitration communications can reasonably be expected to have a chilling effect on the willingness of parties to use arbitration, thereby frustrating the strong federal policy favoring the arbitration of disputes. Simply put, parties may be reluctant to use arbitration if they know that it is not confidential, if they know that their communications in arbitration can be discovered and admitted into evidence in other legal proceedings.[179] One can forcefully argue that if there is any place that a party may not wish to see an arbitration communication, it is in formal legal proceedings, where such communications can have arguably the most prejudice because of their impact on formal legal rights.

178. For a strong view favoring broad grounding of arbitration in contract law, see Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998).

179. Empirical research on this assumption would be helpful.

Finally, these considerations are all fortified by the practical realities of the situation. A general rule permitting discovery of arbitration communications would have the deleterious effect of distorting the arbitration process and undermining other arbitration process characteristics. Rather than being a private alternative to public adjudication, arbitration under the FAA could become an important source for private information for public use. Well-funded litigants could use arbitrations for fishing expeditions, seeking documents that could be helpful in other litigation.[180] Complying with discovery requests would impose a potentially enormous administrative burden on arbitrators, parties, and providers of arbitration services. It would also subvert the arbitration process goal of efficiency by slowing down the arbitration process if such discovery would be sought during a pending arbitration, and undermine the parties' confidence in the process more generally.

All of these reasons counsel in favor of some constraint on the admissibility of arbitration communication evidence. In the next Subsection, I explore the nature of appropriate limitations in this context in greater detail.

C. Structuring a Rule of Exclusion

Experience with other forms of alternative dispute resolution teach that one must carefully tailor an evidentiary exclusion to the unique requirements of the ADR process. In this section, I look at the primary techniques used in two other major ADR processes—negotiation and mediation—and demonstrate why they are unsuitable for arbitration. I then propose that elevating the burden of proof to require a showing of unavailability and necessity when evidence is sought from an arbitration proceeding provides the right balance between the confidentiality needs of arbitration under the Federal Arbitration Act and the evidentiary needs of the public system of law.

1. Negotiation: The Settlement Discussion Doctrine

Negotiation communications are protected in two ways. The first is by allowing negotiating parties to agree not to disclose statements made during the negotiation to the general public, such as to friends, spouses, business associates, or others who might have an interest in learning

180. The State Farm case, discussed *supra* notes 89–97 and accompanying text, was just such a case.

about what was said in the negotiation. As we have seen, courts routinely uphold such private agreements.[181]

The second way the law protects the confidentiality of legal negotiations is through the regulation of their admissibility in judicial proceedings. The doctrine regarding settlement discussions or offers of compromise on legal claims generally prohibits statements made in settlement discussions from being introduced in a later trial or other legal proceeding to establish the validity or amount of a legal claim. The purpose of the rule is generally to promote settlement by encouraging the parties to be candid during settlement discussions by rendering information exchanged during the settlement discussion inadmissible in subsequent proceedings. The rule is of common law origin, but has been codified by many states, and at the federal level by Rule 408 of the Federal Rules of Evidence, which provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Significantly, the reasoning behind the settlement discussions doctrine is consistent with the establishment of greater protection for arbitration confidentiality in that it recognizes the judicial policy favoring the resolution of disputes by means other than public adjudication. Indeed, the Sixth Circuit relied on this settlement discussion rationale in holding that the media did not have a First Amendment right to cover a summary jury trial in *Cincinnati Gas &*

181. *See supra* note 7 and accompanying text.

Electric Co. v. General Electric Co.[182] The court noted that "[s]ettlement techniques have historically been closed to the press and public," and found that a summary jury trial is more like a settlement than a "real trial":

> In a summary jury proceeding, attorneys present abbreviated arguments to jurors who render an informal verdict that guides the settlement of the case .... [A]ll evidence is presented in the form of a descriptive summary to the mock jury through the parties' attorneys. Live witnesses do not testify, and evidentiary objections are discouraged.... Following counsels' presentations, the jury is given an abbreviated charge and then retires to deliberate. The jury then returns a "verdict." To emphasize the purely settlement function of the exercise, the mock jury is often asked to assess damages even if it finds no liability. Also, the court and jurors join the attorneys and parties after the "verdict" is returned in an informal discussion of the strengths and weaknesses of each side's case. At every turn, the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference.[183]

However, as an alternative method of dispute resolution, arbitration much more resembles a "real trial" than a settlement discussion, making this structure inappropriate for a general protection of arbitration confidentiality. Generally acting through attorneys, the parties present evidence, witnesses, and arguments to a third-party decision maker who renders a decision that is generally binding upon the parties, even if there are mistakes of law.[184] Parties in an arbitration generally are not seeking to reconcile their differences, nor are they exploring their underlying interests and concerns to find an integrated solution to their dispute. Rather, in arbitration, the parties are trying to prevail in a dispute by convincing a third-party neutral to decide in their favor. In short, arbitration is an adversarial adjudicatory process, not a settlement process.[185]

Still, the judicial efficiency rationale that supports the settlement discussion rule can and should be extended to other dispute resolution processes in a manner that is appropriate to those dispute resolution

182. 854 F.2d 900, 903–05 (1988).

183. *Id.* at 904 (citations omitted).

184. *See, e.g.*, Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. 1992) (refusing to review an evidently erroneous arbitration award).

185. One could argue that arbitration is a settlement process because it requires the parties to agree to have their dispute arbitrated rather than tried by a court. The proposition is plausible but not persuasive as the agreement is only the means by which the dispute comes to arbitration. Party agreement is not otherwise necessarily a part of the arbitration process itself.

processes. The *Cincinnati Gas* court's treatment of the summary jury trial provides an example of the easy case because the summary jury trial process is a tool to facilitate negotiated settlement. As such, it comfortably extends the settlement discussion rule to the tools of settlement other than one-on-one negotiation. Similarly, the protections that the UMA and related state laws provide for mediation confidentiality from discovery and admissibility can be thought of as legislatively extending this settlement-discussion rationale to mediation.[186] While the settlement discussion model may not be appropriate as a vehicle for extending the judicial efficiency principle to arbitration, the principle is worth extending nonetheless. Cases that are adjudicated privately preserve judicial resources just as much as cases that are settled privately through negotiation and mediation. Indeed, the strong national policy favoring arbitration discussed above can be seen as an embrace of this judicial efficiency rationale.

2. Mediation: The Privilege

As we have seen,[187] the protections for mediation confidentiality, like negotiation, follow two tracks: the power to contract for confidentiality as against disclosures to third parties, and formal rules limiting the discovery and admissibility of mediation communications. There are several different approaches that the states have used to protect mediation confidentiality. By far, the most common is the privilege structure.[188]

The law of privilege is a doctrine of evidentiary exclusion that precludes the discovery and admissibility of otherwise relevant evidence, but does so for extrinsic policy reasons.[189] In the case of most so-called "communications privileges," the policy reason is to foster candor in certain confidential relationships, such as between attorneys and their clients, doctors and their patients, priests and penitents, and spouses.[190]

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186. *See* UNIF. MEDIATION ACT (amended 2003), 7A U.L.A. 104, 105 (Supp. 2005) ("These laws play a limited but important role in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship of mediation with the justice system.").

187. *See supra* note 7 and accompanying text.

188. UNIF. MEDIATION ACT § 4 cmt. 2(a) (noting that 21 of the 25 states wth general mediation confidentiality laws used the privilege structure).

189. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 72 (5th ed. 1999).

190. *Id.*; *see also* Jaffee v. Redmond, 518 U.S. 1, 10–15 (1996) (recognizing a psychotherapist-patient privilege, extending it to licensed clinical social workers, and articulating factors to be considered in recognizing a privilege).

Because the purpose is to foster communications, communications privileges typically protect the words of the confidential communications, not the information within the communication or conduct that is observed during the communications.[191] Some communications privileges, however, can include information within their sweep, such as the physician-patient privilege,[192] the various government privileges that protect military and state secrets,[193] and the privilege for the identity of informants.[194] The rationale behind these privileges is that the confidentiality of the information itself is a sufficiently vital interest to the individuals or to the country that it is appropriate to withhold the evidence from the courts. Significantly, the ability to assert the privilege is limited to a designated holder for both communications and information privileges, which provides an important limitation on the exclusion of the evidence, providing the availability of the exclusion only to those the law intends to benefit from the exclusion.[195]

In the arbitration context, there have been a few court decisions involving the attorney-client privilege and the related work-product doctrine. These courts generally have assumed that arbitrations are proceedings to which the attorney-client privilege[196] and the work-product doctrine apply.[197] Thus in a business dispute, *Samuels v. Mitchell*,[198] for example, a federal magistrate found that arbitration communications between an attorney and a client were protected from later discovery because the party's attorney-client privilege had not been waived.[199] Similarly, in *Industrotech Contractors Inc. v. Duke University*, a North Carolina state appeal court rejected, but was willing to consider, a claim that certain arbitration documents were privileged

191. *See* STRONG, *supra* note 189, at § 89.

192. *Id.* §§ 89, 100. A physician's diagnosis would be an example of information protected that would be protected by the physician-patient privilege.

193. *Id.* § 107.

194. *Id.* § 111.

195. *Id.* § 73.1.

196. Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 667 (N.Y. 1996) (assuming attorney-client privilege applies); Prospective Inv. & Trading Co. v. GBK Corp., 60 P.3d 520, 524 (Okla. Civ. App. 2002) (assuming attorney-client privilege applied in arbitration but decided on other grounds).

197. Caringal v. Karteria Shipping, Ltd., No. Civ.A 99-3159, 2001 WL 874705, at *1 (E.D. La. Jan. 24, 2001) (upholding magistrate order to produce arbitration documents); Kamyr, Inc. v. Combustion Eng'g, Inc., 554 N.Y.S.2d 619, 620 (N.Y. App. Div. 1990) ("Evidentiary material in an arbitration proceeding is not immune from disclosure."); Milone v. General Motors Corp., 446 N.Y.S.2d 650, 651 (N.Y. App. Div. 1981) (permitting discovery of medical records tendered at no-fault arbitration).

198. 155 F.R.D. 195 (N.D. Cal. 1994).

199. *Id.* at 200.

from later discovery and admissibility as "materials 'prepared in anticipation of litigation,'" or work product.[200] And, in an unpublished opinion, *International Ins. Co. v. Peabody Int'l Corp.*, a trial court judge found that arbitration documents were discoverable up to the point when co-parties became adverse, but were protected afterward under the work-product doctrine.[201]

Such rulings are certainly sensible. Since arbitration is an adversarial adjudicatory process, it is logical for the courts to apply the protections for attorney-client communications and for work product in this context, just as they apply in public adjudication. However, this approach as a general construct for the protection of arbitration confidentiality would have only limited effect on the discovery and admissibility of arbitration communications more generally.

In most cases, the attorney-client privilege presumably would apply only to communications made in confidence between the attorney and the client, but not to other communications made during the arbitration, such as between the attorney and client in the presence of others at the arbitration, between the attorneys, and between the arbitrator and the attorneys and/or the parties.[202] The class of communications protected by the attorney-client privilege, therefore, is a presumably small part of the overall discourse at an arbitration. Since arbitration is an adversarial process that revolves around the presentation of evidence, there are potentially many statements and documents rendered during the arbitration that might be of interest to a third party that would not be protected by the attorney-client privilege or work-product doctrine. Moreover, given that these statements are made in the presence of an adversary and a third party adjudicator, the candor justification that generally supports the law of privilege has little force with respect to these communications.

Similarly, the work-product doctrine is not suitable by itself as a vehicle for general protection of arbitration confidentiality because it would only apply to preclude from discovery documents that were made in preparation for the arbitration by one of the parties.[203] It would not bar the discovery of documents that were not specifically prepared for the arbitration, such as tax, business, medical, or other records.[204] Nor would

200. *See* 314 S.E.2d 272, 274–75 (N.C. Ct. App. 1984).
201. No. 87 C 464, 1988 WL 58611, at *3–*5 (N.D. Ill. June 1, 1988).
202. *See* MUELLER & KIRKPATRICK, *supra* note 136, at 368–74.
203. *Id.* at 324.
204. *Id.*

it preclude discovery of the transcript of the arbitration proceeding because the transcript generally would not be prepared by one of the parties, a requirement for the application of the doctrine.[205] More significantly, perhaps, it would not cover all of the non-documentary communications described above.

By itself, then the work-product doctrine does not provide a suitable vehicle for the protection of arbitration confidentiality. However, it does provide a good vehicle for exploring an alternative approach, which I discuss below.

3. A Proposal for Arbitration: An Elevated Burden of Proof

As with negotiation and mediation, the challenge is to structure protection for the confidentiality of arbitration communications in a way that serves Congress's intent in providing a private adjudicatory alternative to public courts while at the same time providing sufficient access to evidence to permit parties the opportunity to prove their cases at trial. This commitment counsels in favor of a minimal but meaningful approach to exclusion, and one modest approach is simply to elevate the level of proof required for the admissibility of arbitration evidence.

The burden of proof for admissibility in the general case is one of relevance. The proponent of the evidence must establish that the proposed evidence is logically relevant, legally relevant, and competent before it will be received into evidence.[206] The logical relevance test is satisfied if the evidence is material to the factual issues in dispute in that it is of consequence to the determination of the action[207] and has underlying probative value.[208] The legal relevance test is met if the probative value of the evidence outweighs its potential for prejudice,

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205. *Id.; see also* MACNEIL ET AL., *supra* note 9, at § 32.6.1; STONE, *supra* note 1, at 687–89.

206. Evidence law can be found at both the federal and state levels. Because of the wide variation that exists among states on many issues, my analysis will focus on the federal law of evidence, specifically the Federal Rules of Evidence.

207. Federal Rule of Evidence 401 states the general rule of logical relevance, and provides: "'Relevant' evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

208. For a classic statement of relevance, see George F. James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689, 690 (1941):

> Relevancy . . . exists as a relation between an item of evidence and a proposition sought to be proved. If an item of evidence tends to prove or disprove any proposition, it is relevant to that proposition. If the proposition itself is one provable in the case at bar, or if it in turn forms a further link in a chain of proof the final proposition of which is provable in the case at bar, then the offered item of evidence has probative value in the case.

confusion, or to be misleading to the trier of fact.[209] Finally, the evidence is competent when it is not barred by some other rule of evidence, such as the assertion of a privilege. When these conditions are met, the evidence may be received.

The law at times will add additional requirements because of the special character of proffered evidence. A good example is the work product doctrine discussed briefly above, which requires the proponent of the evidence to demonstrate that it is otherwise unavailable and is necessary for the resolution of the case. The doctrine, laid out in *Hickman v. Taylor*[210] and later codified in Federal Rule of Civil Procedure 26(b)(3),[211] provides a shield for discovery for materials that are prepared in anticipation of litigation by or for a party or that party's representative.[212] As the *Hickman* court noted, the purpose of the doctrine is to protect the attorney's privacy in the performance of her duties as a lawyer advancing the rights of her clients.[213] But the court also noted several other interests that are served by a rule that shields lawyers from the possibility of discovery of materials developed in the course of client representation. Specifically, the court was concerned about the potential chilling effect the threat of discovery would have on an attorney's willingness to put sensitive issues in writing, which in turn would have a deleterious effect on the quality of client representation.[214]

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209. *See, e.g.*, FED. R. EVID. 403, which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The concept of legal relevance is often traced to John Henry Wigmore. *See* David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 8–9. The term "legally irrelevant" is sometimes used to describe this evidence. *See, e.g.*, Edwin J. Immwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 MIAMI L. REV. 1069, 1084–86 (1992).

210. 329 U.S. 495 (1947).

211. In relevant part, the rule provides:

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

212. Hickman, 329 U.S. at 510–12.

213. *Id.*

214. *Id.*

The court was also concerned with the "demoralizing" effect on the legal profession that would arise with the free discovery of attorney work product.[215]

It is difficult to draw too much of a comparison between the attorney-client relationship and an arbitration hearing, although some of the concerns articulated in *Hickman* have at least some resonance in the arbitration context. The most significant of these is the potential chilling effect on the willingness of parties to use arbitration if they know that their statements and documents are discoverable and admissible. Just as society benefits from the zealous representation of client interests in the work product context, society also benefits when disputants are able to exercise personal autonomy in the selection of a dispute resolution process.

More important, perhaps, is the intensity of society's interest in the privacy of the forum. In *Hickman*, the court recognized the importance of privacy to the attorney-client relationship, observing:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.[216]

While the arbitration hearing does not rise to the law office's level of privacy sanctity as a matter of process, its privacy sanctity is conferred by act of Congress. As discussed above, the legislature enacted the FAA to reverse the ouster doctrine in order to compel courts to enforce agreements to arbitrate so that parties could, if they so desire, choose a private adjudicatory process for the resolution of their disputes that would be enforceable by the government. Though they come from different sources, the mantle of privacy provides a common baseline for both of these venues of potentially discoverable communications. It also suggests that the exceptions found in the work product doctrine—unavailability and necessity—will also operate effectively in the arbitration context, an issue I turn to next.

215. *Id.*
216. *Id.* at 511.

a. Unavailability

As in the work product context, a requirement that the sought-after evidence is unavailable preserves arbitration confidentiality by ensuring that the arbitration is invaded for evidence only as a last resort, rather than a first resort. This is appropriate because of the premium that has been placed on arbitration confidentiality by Congress's enactment of the FAA to provide a private alternative to public adjudication, by the reasonable expectations of privacy shared by parties who contract for arbitration under the Act, and by the strong national policy favoring arbitration as a dispute resolution policy.

Evidence coming from an arbitration should be viewed as "second class" evidence that is similar in posture to the special set of hearsay exceptions when the declarant is unavailable.[217] Federal Rule of Evidence 804 codifies the common law by providing, for certain types of statements,[218] an exception to the general rule that hearsay cannot be used to prove the truth of the matter asserted in situations, where, for example the declarant is dead,[219] out of the jurisdiction,[220] or is exempted from testimony because of a privilege.[221] The purpose of these exceptions is to provide parties with the access to the evidence that is necessary to prove their cases, while at the same time expressing a preference for live evidence.[222]

In the same way, a requirement that the arbitration communications evidence is otherwise unavailable expresses a preference that the evidence be received from the traditional sources of discovery if at all possible. Letters, records, and other documents that might be sought will often be available from the parties or their counsel, such that there is no need to get them from an arbitrator or service provider. Where the evidence is not otherwise available, however, it should be made available from the arbitration. This element simply requires them to seek the evidence from sources other than the arbitration first.

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217. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 284 (2nd ed. 1987).

218. These statements include former testimony, statements made under the belief in impending death, statements against interest, and statements of personal or family history. FED. R. EVID. 804(b)(1–4).

219. FED. R. EVID. 804(a)(4).

220. FED. R. EVID. 804(a)(5).

221. FED. R. EVID. 804(a)(1).

222. LILLY, *supra* note 217, at 284.

b. Necessity

Similarly, the second threshold requirement—necessity—preserves the confidentiality of arbitration communications by assuring that the arbitration will only be invaded when it is necessary to do so. At the same time, it provides a reciprocal assurance to parties seeking evidence that they will be able to access evidence that is crucial to their case. The standard here is high, and courts should deny such requests when the sought-after evidence is peripheral, duplicative, or otherwise non-essential.[223] Critically, assessment of need is a factual determination that is made on a case-by-case basis.[224] Necessity was not found in *Hickman v. Taylor* by counsel's assertions that he just wanted to make sure he had not overlooked anything.[225] On the other hand, necessity was suggested in *Hickman* by a showing that the material sought would be helpful in impeaching a witness,[226] even though it was not found in another case where counsel merely suspected the material might be helpful in impeaching a witness.[227]

The elevated standard of proof I am proposing strikes the right balance between the competing needs of arbitration and trial by adequately protecting arbitration communications and intruding minimally on the evidentiary needs of trial. It neither categorically exposes nor disables arbitration communications evidence, and instead provides courts with specific guidance in determining whether to admit such evidence. In so doing it also provides parties in arbitration with a basis for confidence that their communications will be received into evidence only if absolutely necessary, and litigants at trial with the comfort of knowing they can access the arbitration communications evidence if they really need it and it is otherwise unavailable. In this sense, the elevated burden of proof functions something like a rebuttable presumption of inadmissibility of arbitration communications evidence,

223. Federal Rule of Civil Procedure 26(b)(2) offers a good model, providing that a federal court may deny discovery requests:

> if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

224. *See* Fletcher v. Union Pac. R.R. Co., 194 F.R.D. 666, 671 (S.D. Cal. 2000) (stating that the element of substantial need may be "demonstrated by establishing that the facts contained in the requested documents are essential elements of the requesting party's prima facie case").

225. 329 U.S. 495, 512–13 (1947).

226. *Id.* at 511.

227. Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1999).

although not in the technical sense of a formal evidentiary presumption that would require rebuttal evidence for the communications to be introduced.[228]

IV. CONCLUSION

Arbitration is an important vehicle for the resolution of disputes, supported by a strong national policy favoring the arbitration of disputes. One of the potential advantages of the process is that it is private. Third parties can be prevented from observing the proceedings. Parties to the arbitration can contract to prevent each other from disclosing arbitration communications to third parties. And arbitrators are ethically bound to preserve this confidentiality unless otherwise required by law.

Less clear is whether the law can require the disclosure of those arbitration communications for purposes of discovery and admission in another legal proceeding. The emerging view of the courts appears to be that such disclosures may be compelled—a position that would undermine congressional intent to endorse a private alternative to public adjudication because once they are introduced, such communications would become public records that may be disseminated freely as a general matter. The continuation of this trend would undermine the national policy favoring arbitration by frustrating the parties' reasonable expectations with respect to the confidentiality of arbitration, ultimately chilling use of the arbitration process.

The law's expectation of access to these materials is not trivial, however, and proper legal policy must reflect a balance of these competing public and private interests. This balance may be struck by raising the burden of proof for the admission of evidence sought from arbitration proceedings by requiring the proponent of such evidence to demonstrate that it is otherwise unavailable and necessary for the resolution of the case.

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228. The evidentiary presumption is a required conclusion in the absence of countervailing evidence. *See* MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 630–32 (2nd ed. 1988); *see also* EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 32 (1963) (defining presumption and articulating reasons for their creation); FED. R. EVID. 301:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

The adoption of an elevated standard will not resolve all questions regarding the confidentiality of arbitration communications. Legitimate questions may be raised, for example, about just who has the power to prevent a third party from attending an arbitration, and how far that power may reach. Can the media, for example, be barred from an arbitration? What if the government is a party? On these questions, there is, again, little statutory or common law at present, and the few court rulings on the question have suggested that there are circumstances under which the media's interest in attending and reporting on an arbitration may trump a confidentiality clause to arbitrate or internal organizational rules calling for the confidentiality of arbitration.[229]

Such issues merit closer attention. As arbitration continues to expand as a fixture on the landscape of civil justice, it becomes more important for participants in the process to be aware of the contours of arbitration's relationship with the law, of the limitations of arbitration as well as its strengths. As with the discovery and admissibility of mediation communications, a rigorous inquiry is a necessary foundation for good legal policy with respect to arbitration communications. Like any alternative dispute resolution process, arbitration does not stand apart from the law, and when the two come into contact, wise policy requires a careful balancing of the needs, interests, and concerns of both institutions.

229. Not surprisingly, there is little statutory or common law at present on the question. The few court rulings on the question have suggested that there are circumstances under which the media's interest in attending and reporting on an arbitration may trump a confidentiality clause in an agreement to arbitrate or internal organizational rules calling for the confidentiality of arbitration. *See, e.g.*, Lederman v. Shapiro, 897 A.2d 362, 371 (2006) ("Public policy favoring arbitration cannot sanction what here became essentially secret proceedings."); Boone v. City of Suffolk, 79 F. Supp. 2d 603 (E.D. Va. 1999) (federal and state common law right of access required city's settlement with a police union to be unsealed).