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## Dispute Resolution Neutrals' Ethical Obligation to Support Measured Transparency

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# DISPUTE RESOLUTION NEUTRALS’ ETHICAL OBLIGATION TO SUPPORT MEASURED TRANSPARENCY

NANCY A. WELSH\*

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### *Introduction*

In 2016, the Consumer Financial Protection Bureau (CFPB) issued proposed rules regarding the use of mandatory pre-dispute arbitration clauses in consumer contracts for financial goods and services. One of these rules—barring class action waivers in mandatory pre-dispute arbitration clauses—attracted substantial attention. Much less noticed was the CFPB’s second proposed rule (“Arbitration Reporting Proposal”) requiring regulated providers of financial products and services to report to the CFPB regarding their use and the outcomes of arbitrations conducted pursuant to mandatory pre-dispute arbitration clauses. The Arbitration Reporting Proposal also proposed to make such information public, with appropriate redactions.<sup>1</sup>

The American Bar Association Section of Dispute Resolution (“the Section”) submitted comments strongly supporting the CFPB’s Arbitration Reporting Proposal. In the course of preparing the Section’s comments, it also became clear to the author of this Article that dispute resolution neutrals and organizations should have an affirmative ethical obligation to

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1. There have also been legislative efforts to increase the transparency of mandatory pre-dispute arbitration. *See, e.g.*, H.R. 832, 115th Cong. (1st Sess. 2017) (also known as the “Arbitration Transparency Act”) (proposing to amend section 2 of the Federal Arbitration Act to require arbitrations between financial institutions and consumers to be open to the public); S. 647, 115th Cong. (1st Sess. 2017) (known as the “Mandatory Arbitration Transparency Act”) (proposing to amend Title 9 to ban pre-dispute agreements that provide for arbitration of employment, consumer, or civil rights if the agreements bar parties from contacting state or federal agencies regarding unlawful conduct or other issues of public policy or public concern, deeming such agreements to be “unfair or deceptive act[s] or practices” under the Federal Trade Commission Act, instructing the FTC to issue new rules and punish violators, and creating a private right of action for aggrieved consumers).

support responsible—“measured”—transparency regarding the use and outcomes of the processes they provide and promote in order to protect the public and these processes’ integrity. Most particularly, dispute resolution neutrals (including mediators, arbitrators, ombuds, and providers of online dispute resolutions services) should have an ethical obligation to support transparency when their processes are imposed upon people pursuant to judicial or legislative mandates or by contracts of adhesion, and when the outcomes that dispute resolution neutrals help to produce will be granted the privileges of narrow and deferential judicial review and expedited judicial enforcement.<sup>2</sup>

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2. Professor Judith Resnik has also recently called for increased transparency regarding ADR, observing:

[H]ere, as part of a larger project addressing the impact of new procedural forms, I argue for shaping First Amendment doctrine in light of commitments that courts function as open, egalitarian venues. Even if the parties, judges, and other neutrals believe in the benefits of closure, and even when parties consent, court promotion of ADR, as a matter of constitutional interpretation, ought to be accompanied by public accountings of what transpires. . . . [T]he presence of the state infuses all these forms of ADR, which are mandated, advocated, and structured through hundreds of court rules, government manuals, and websites, and are commended to litigants by judges. The result of these many new rules is not “bargaining *in the shadow of the law*,” but bargaining *as a requirement of the law*. . . . As procedure is increasingly becoming contract, state-promoted contracting—produced at the behest of the state and shaped through judicial intervention—needs regulation through public oversight and participation. . . . The issue is which activities ought to have what Justice Brennan termed the “public character of judicial proceedings.”. . . Chief Justice Burger, writing for the plurality in [Richmond Newspapers], spoke about the “nexus between openness, fairness, and the perception of fairness.” He commented further that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing”. . . . When [judges] convene meetings in courts, when they take on the role of “neutrals” or authorize others to do so with “quasi-judicial” status, their decisions and their procedures are the state, in action. As more of the activity of “the judicial” moves to become “quasi-judicial,” the public needs to be built in, so as to be able to be present [for] at least some aspects of the proceedings and to know the results.

Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L. J. 1631, 1683-85 (2015) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570, 572, 592 (1980)) [hereinafter Resnik, *The Contingency of Openness*]; see also Laurie Kratky Dore, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 465-66 (2006) (suggesting that courts’ increased

Now is a particularly good time to consider the ethical obligations of one set of dispute resolution neutrals: mediators. This is because the Section, the American Arbitration Association (“AAA”), and the Association for Conflict Resolution (“ACR”) are currently considering whether to review and revise the Model Standards of Conduct for Mediators. Courts and legislatures regularly mandate parties’ participation in mediation. Mandatory pre-dispute mediation clauses are now turning up in the same contracts that contain mandatory pre-dispute consumer arbitration clauses.<sup>3</sup> Courts reliably enforce mediated settlement agreements, generally with little review.<sup>4</sup> Mediation is also the subject of substantial recent international activity. On December 20, 2018, the United Nations General Assembly adopted an international convention for the expedited enforcement of mediated settlement agreements. The convention will be open for signatures in Singapore in August 2019.<sup>5</sup>

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commitment to transparency may have had the unintended effect of diverting more cases to arbitration and mediation); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 485, 494 (2011) (pointing to delegation of legislative power to a private party, also pointing out lack of transparency, opacity); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 629-30 (2018) [hereinafter Resnik, *A2J*] (“My focus is on the impact of these shifts to [mediation, arbitration, early neutral evaluation, ODR, and settlement] on access to knowledge about justice-seeking [processes].”).

3. See Alliance for Justice, *Lost in the Fine Print (HD)*, YOUTUBE (Oct. 6, 2014), <https://www.youtube.com/watch?v=tgC3N802Sjk> (picturing a contract that includes a mediation clause just before the arbitration clause).

4. See James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 Y.B. ARB. & MEDIATION 162, 168-69 (2013) (describing cases in which courts state that class action settlements are entitled to a presumption of fairness if they were reached in mediation); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 59-78 (2001) [hereinafter Welsh, *Thinning Vision*]; James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 74 (2006).

5. The United Nations Convention on International Settlement Agreements Resulting from Mediation will be known as the “Singapore Convention on Mediation.” See *General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation* at <http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html>. The Singapore Convention is modeled upon the New York Convention, which requires signatory nations’ courts to recognize and enforce international commercial arbitration awards with only narrow grounds for the denial of such enforcement. Article 1 of the Singapore Convention specifically excludes employment, family, and consumer matters. See REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE

This Article will begin by describing the event that triggered the Section's consideration of transparency—the CFPB's announcement of its Arbitration Reporting Proposal. The Article will also detail the Proposal's subsequent history, including its promulgation and repeal. The Article will then turn to the transparency that exists or has been proposed for various dispute resolution processes. For example, the Article will consider the transparency that (1) federal and state courts provide regarding their court filings and outcomes; (2) some states, some federal agencies, and some domestic and international dispute resolution organizations now require or provide regarding the use and outcomes of arbitration (and to a lesser degree, mediation); (3) some users of dispute resolution achieve through "self-help" initiatives; and (4) some commentators have proposed for online dispute resolution. Finally, the Article will consider whether the ethical principles that currently apply to mediators establish an affirmative ethical obligation to support transparency, at least under certain circumstances. Concluding that the Model Standards of Conduct for Mediators do not establish such an ethical obligation, the Article will end with a proposal to establish mediators' ethical obligation to support transparency to a responsible degree when mediations are mandated by courts, legislatures, or contracts of adhesion and the resulting mediated settlement agreements are subject to only narrow and deferential judicial review or are granted expedited judicial enforcement. In particular, the Article will argue for the creation of a set of customized Model Standards for "imposed mediation."

### *I. The Precipitating Event: The CFPB's Arbitration Reporting Proposal*

The use of mandatory pre-dispute arbitration agreements in consumer transactions and employment contracts has elicited substantial controversy in the general public, the courts, and the dispute resolution field. It has also been the subject of countless articles in law reviews<sup>6</sup> and professional journals.<sup>7</sup>

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WORK OF ITS FIFTY-FIRST SESSION: REPORT OF THE SIXTH COMMITTEE 11 (Nov. 7, 2018) at <https://undocs.org/en/A/73/496>. The UNCITRAL Working Group's documents regarding the Singapore Convention are available at *Working Group II: 2000 to Present: Arbitration and Conciliation / Dispute Settlement*, UNCITRAL, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Oct. 31, 2018). For additional resources regarding the Singapore Convention, see *infra* note 153.

6. Regarding the general topic of mandatory pre-dispute arbitration in a disparate party context, see, for example, Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939 (2014); Lisa Blomgren Amsler, *Combating Structural Bias*

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in *Dispute System Designs that Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. ARB. & MEDIATION 32 (2014); Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 5–6 (2008); Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN'S L. REV. 99 (2007); Darren P. Lindamood, Comment, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291 (2010); Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV. 2119, 2146 (2017) (reporting empirical research showing that as members of the public learn more about mandatory pre-dispute arbitration, the more they believe it to be unjust and illegitimate, and urging the adoption of a more inclusive, more virtuous ethical ideal for transactional attorneys to encourage them to “craft and design adhesion contracts [that] balance both the interests of their client with the needs and perspective of the public”); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (2004); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29 (2017); Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010).

Regarding mandatory pre-dispute consumer arbitration in particular, see Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051 (2009); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011); Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77 (2011); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111 (2015); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) [hereinafter Resnik, *Diffusing Disputes*]; Amy J. Schmitz, *Curing Consumers' Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627 (2008); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115 (2010); Jeff Soeren et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1 (2015); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012);

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Congress specifically authorized the CFPB to issue regulations that would “prohibit or impose conditions or limitations” on mandatory pre-dispute consumer arbitration clauses in contracts for

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THOMAS J. STIPANOWICH ET AL., AM. BAR ASS’N, NATIONAL ROUNDTABLE ON CONSUMER AND EMPLOYMENT DISPUTE RESOLUTION: CONSUMER ARBITRATION ROUNDTABLE SUMMARY REPORT (2012), [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/roundtable2012.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/roundtable2012.authcheckdam.pdf); Nancy A. Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. ST. THOMAS L.J. 381 (2017) [hereinafter Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses*]; Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187 (2012) [hereinafter Welsh, *Mandatory Predispute Consumer Arbitration*]; Nancy A. Welsh, *What Is “(Im)partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395 (2010) [hereinafter Welsh, *What Is “(Im)partial Enough”*]; Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration* 44–45 (Univ. of Kan. Sch. of Law, Working Paper No. 2011-4) [hereinafter Drahozal & Zyontz, *Private Regulation*].

Regarding mandatory pre-dispute employment arbitration, see Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Employment Discrimination Claims*, 31 RUTGERS L.J. 399, 454–59 (2000); Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 59 (2007); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 312 (2012); Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985 (2012) [hereinafter Stipanowich, *The Arbitration Fairness Index*].

Regarding mandatory pre-dispute arbitration clauses in social media agreements, see Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643 (2012); Michael L. Rustad & Thomas H. Koenig, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341 (2014).

7. See, e.g., Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG., Fall 2008, at 30; David B. Lipsky, *The New York Times’ Attack on Arbitration*, DISP. RESOL. MAG., Summer 2016, at 6; Lisa Renee Pomerantz, *Consumer Arbitration: Pre-Dispute Resolution Clauses and Class Action Waivers*, ACRESOLUTION MAG., Fall 2015, at 16; Nancy A. Welsh & David B. Lipsky, “*Moving the Ball Forward*” in *Consumer and Employment Dispute Resolution: What Can Planning, Talking, Listening and Breaking Bread Together Accomplish?*, DISP. RESOL. MAG., Spring 2013, at 14 [hereinafter Welsh & Lipsky, “*Moving the Ball Forward*”]; Nancy A. Welsh & Stephan J. Ware, *Ross et al. v. American Express et al.: The Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements*, DISP. RESOL. MAG., Fall 2014, at 18.



financial products or services as long as the CFPB found that doing so was “in the public interest and for the protection of consumers.”<sup>8</sup> Congress also required the CFPB to conduct a study of mandatory arbitration. Any regulatory findings made by the CFPB had to be consistent with the study.<sup>9</sup> The CFPB conducted its empirical study and issued its final, voluminous report in March 2015 (“March 2015 Report”).<sup>10</sup> In May 2016, the CFPB announced its proposed rules.<sup>11</sup>

One portion of the CFPB’s proposed rules—in which the CFPB barred class action waivers in mandatory pre-dispute consumer arbitration clauses—garnered substantial attention. The other portion of the CFPB’s proposed rules—section 1040.4(b), or the Arbitration Reporting Proposal—remained largely under the radar. This portion dealt with the issue of transparency. The CFPB proposed to require regulated providers of financial products and services to report information regarding their use and the outcomes of arbitrations conducted pursuant to mandatory pre-dispute arbitration clauses. Specifically, the Arbitration Reporting Proposal required submission, with redaction of individuals’ names and other information, of the following five types of documents:

- (1) the initial claim (whether filed by a consumer or by the provider) and any counterclaim;
- (2) the pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator;
- (3) the award, if any, issued by the arbitrator or arbitration administrator;
- (4) any communications from the arbitrator or arbitration administrator with whom the claim was filed relating to a refusal to administer or dismissal of a claim due to the

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8. 12 U.S.C. § 5518 (2012). The Dodd-Frank Act also amended the Truth in Lending Act to impose a ban on the use of mandatory arbitration clauses in certain residential mortgage loan agreements.

9. See CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED (2015), [http://files.consumerfinance.gov/f/201510\\_cfpb\\_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf](http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf) [hereinafter CFPB, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS].

10. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [hereinafter CFPB Report].

11. This step was preceded by the CFPB’s submission of its tentative proposed rules to a Small Business Review Panel in November 2015.

provider's failure to pay required fees; and (5) any communications related to a determination that an arbitration agreement does not comply with the administrator's fairness principles.<sup>12</sup>

The CFPB also proposed to publish these materials on its website in some form, with appropriate redaction or aggregation.<sup>13</sup>

For most of the CFPB's proposed requirements, the agency's reasoning was, and remains, fairly apparent. However, the required reporting of communications regarding failure to comply with dispute resolution administrators' fairness principles deserves further explanation. In April 1998, the AAA's National Consumer Disputes Advisory Committee produced *A Due Process Protocol for Mediation and Arbitration of Consumer Disputes* to guide the use of ADR processes to resolve consumer disputes.<sup>14</sup> The Protocol's Statement of Principles asserted parties'

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12. Arbitration Agreements, 81 Fed. Reg. 32,830, 32,868-69 (proposed May 24, 2016) (to be codified at 12 C.R.F. pt. 1040).

13. *See id.*; *see also* CFPB, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS, *supra* note 9, at 20 ("The Bureau is considering a proposal to require covered entities that use arbitration agreements in their contracts with consumers to submit initial claim filings and written awards in consumer finance arbitration proceedings to the Bureau through a process the Bureau would expect to establish as part of this rulemaking. The Bureau is also considering whether to publish the claims or awards to its website, making them available to the public. Before collecting or publishing any arbitral claims or awards, the Bureau would ensure that these activities comply with privacy considerations.") The CFPB anticipates that regulated entities would be required to submit to the Bureau "an electronic file with documents that the entity already possesses" that may also be redacted. *Id.* at 25.

The CFPB currently makes data publicly available regarding the complaints it receives from consumers about financial services companies' alleged unfair, deceptive, or abusive acts or processes. Researchers have used this database in order to identify demographic differences in consumer complaints and in companies' responses to consumer complaints. *See, e.g.*, Ian Ayres, Jeff Lingwall & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 FORDHAM J. CORP. & FIN. L. 343, 363-67 (2014) (reporting that mortgage complaints per mortgage were significantly higher in ZIP codes with larger proportions of African Americans, Latinos, and senior citizens, and that companies were less timely in responding to consumers located in areas with higher concentrations of college students).

14. *See* NAT'L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 1, 1-3 (1998), [https://www.adr.org/sites/default/files/document\\_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf) [hereinafter CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES]; *see also* AM. BAR ASS'N, ADDRESSING DISPUTES IN ELECTRONIC COMMERCE:

entitlement to a “fundamentally-fair ADR process,” with the Principles serving as “embodiments of fundamental fairness.”<sup>15</sup> The Protocol provided, among other things, for “independent and impartial” neutrals and administration; consumers’ continued access to small claims court; reasonable costs for consumers (including consideration of their ability to pay); “arbitrator-supervised exchange of information”; consumers’ access to all remedies available in courts of law and equity; and consumers’ access (upon request) to written explanations of arbitral awards.<sup>16</sup> The Protocol also strongly encouraged the use of mediation.<sup>17</sup> It did not address class action waivers. The AAA subsequently conditioned its provision of service upon compliance with the Protocol<sup>18</sup> and, over the years, has been removed

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FINAL RECOMMENDATIONS AND REPORTS OF THE AMERICAN BAR ASSOCIATION’S TASK FORCE ON ELECTRONIC COMMERCE AND ALTERNATIVE DISPUTE RESOLUTION 36 n.50 (2002); Resnik, *Diffusing Disputes*, *supra* note 6, at 2852–53 (observing that the AAA’s decisions to produce the protocol “imposing fee schedules with caps, to create ethical standards, and to revise its rules and fee schedules” represented “matters of ‘internal policy’” while other self-regulatory initiatives—like the adoption of ethical principles, the commitment to diversity, and information disclosure and dissemination—also represent “choices” that are not universally followed by ADR providers; also reporting that many social media arbitration clauses do “not meet the ‘due process fairness tests’ of the AAA”).

15. CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, *supra* note 14, at 1, 9.

16. *Id.* at 1–3.

17. *Id.* at 2. The complete list of principles contained in the Protocol are:

1. Fundamentally fair process
2. Access to information regarding ADR program
3. Independent and impartial neutral; independent administration
4. Quality and competence of neutrals
5. Small claims
6. Reasonable cost
7. Reasonably convenient location
8. Reasonable time limits
9. Right to representation
10. Mediation
11. Agreements to arbitrate
12. Arbitration hearings
13. Access to information
14. Arbitral remedies
15. Arbitration awards

*Id.* at 1–3. The Protocol does not address class action waivers.

18. See *AAA Statement of Ethical Principles*, AM. ARB. ASS’N, <https://www.adr.org/StatementofEthicalPrinciples> (last visited Dec. 11, 2018). It provides:

- For consumer cases with claims under \$75,000, the AAA reviews the

from some consumer agreements due to businesses' unwillingness to abide by the principles contained in the Protocol.<sup>19</sup> Presumably, such removals involved communications regarding the AAA's determination that the businesses' consumer arbitration clauses did not meet the requirements of the Due Process Protocol. The CFPB proposed to require the submission of these communications.<sup>20</sup>

The ABA Section of Dispute Resolution had examined mandatory pre-dispute consumer arbitration at various points over the years.<sup>21</sup> With some limited exceptions for particular applications,<sup>22</sup> the Section's Council had

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contract clause to determine if it substantially and materially deviates from the Consumer Due Process Protocol. The AAA reserves the right to refuse to administer arbitrations with consumer clauses that violate the Consumer Due Process Protocol.

- Pursuant to the AAA's National Rules for the Resolution of Employment Disputes, employers submit pre-dispute, corporate employment programs naming the AAA to the AAA for review to determine that the programs do not substantially and materially deviate from the Employment Due Process Protocol. The AAA reserves the right to decline its administrative services if the employer does not submit its plan for review or if the program does not comply with the Due Process Protocol.

*Id.*; see also Drahozal & Zyontz, *Private Regulation*, *supra* note 6, at 91 (reporting the results of first empirical study of the AAA's enforcement of its Consumer Due Process Protocol and finding that the AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations); Horton & Chandrasekher, *supra* note 6, at 91 (observing that the "prophylactic steps" resulting from the AAA's adoption and enforcement of its Consumer Due Process Protocols may make the AAA "more amenable to consumer plaintiffs than other venues"); STIPANOWICH ET AL., *supra* note 6, at 48 ("Importantly, AAA reviews arbitration clauses for their compliance with the Due Process Protocol. When AAA has found deviation from the Protocol, it has rejected cases or has required the company to agree to correct deficiencies.").

19. See CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, *supra* note 14, at 11.

20. *Id.* at 10.

21. See, e.g., Herbert M. Kritzer, *To Regulate or Not to Regulate, or (Better Still) When to Regulate*, DISP. RESOL. MAG., Spring 2013, at 12 (part of a themed issue entitled "Considering Regulation of ADR"); STIPANOWICH ET AL., *supra* note 6; SECTION OF DISPUTE RESOLUTION, AM. BAR ASS'N, REPORT OF THE DISCUSSION OF THE CONSUMER ARBITRATION STUDY GROUP (2010).

22. For example, the Section's Council voted to support a proposed ABA House of Delegates resolution (Resolution 111B) opposing the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and residents or their agents and supporting legislation and regulations invalidating such arbitration agreements. The House of Delegates

been unable to achieve a general consensus on whether to support or oppose mandatory pre-dispute consumer arbitration.<sup>23</sup> Due to the importance of the CFPB's proposed rules to the dispute resolution field, however, the Section decided to try again. The Section's Council established a CFPB Review Task Force, composed of experienced and well-respected dispute resolution practitioners and academics knowledgeable regarding mandatory pre-dispute arbitration (particularly consumer arbitration),<sup>24</sup> to review the CFPB's proposals<sup>25</sup> and provide advice to the Section. The subsequent deliberations of the Section's Executive Committee and Council were informed by the Task Force's report.<sup>26</sup>

After such deliberations, the Section's Council voted to express its strong support for the CFPB's Arbitration Reporting Proposal. In comments submitted to the CFPB in July 2016,<sup>27</sup> the Section noted the current lack of complete and consistent information regarding consumer arbitration and the need for such information. The Section referenced the CFPB's March 2015 report, in which the agency concluded that although it had a "reasonably complete picture of the claims that consumers are willing to file in arbitration where arbitration is an available option,"<sup>28</sup> its analysis was

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adopted this resolution in February 2009. More recently, the Section's Council also voted to support a proposed ABA House of Delegates resolution (Resolution 300) urging legal employers not to require mandatory arbitration of claims of sexual harassment. The House of Delegates adopted this resolution in August 2019.

23. See Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses*, *supra* note 6, at 381-86 (describing history of Section's attempts to develop a policy and protocols on mandatory pre-dispute consumer arbitration); Welsh & Lipsky, "Moving the Ball Forward," *supra* note 7, at 14 (describing position taken by Section Council on Arbitration Fairness Act and its aftermath).

24. The CFPB Review Task Force consisted of Nancy Welsh (Chair), Lisa Amsler, Louis Burke, Ben Davis, Homer Larue, Bruce Meyerson, Lawrence Mills, Peter Phillips, Colin Rule, Jean Sternlight, Thomas Stipanowich, and Beth Trent.

25. At this point, the CFPB had released tentative proposals as part of a review by the Small Business Review Panel. See CFPB, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS, *supra* note 9 (regarding Small Business Review Panel).

26. WELSH ET AL., CONSUMER FIN. PROT. BUREAU, REPORT TO THE COUNCIL OF THE DISPUTE RESOLUTION SECTION FROM THE CFPB REVIEW TASK FORCE (on file with author).

27. Pursuant to Council direction, the Section sought and won permission from the ABA (through its "blanket authority" procedure) to submit comments to the CFPB. See Nancy A. Welsh, ABA Section of Dispute Resolution, Comment Letter on Proposed Rule of Arbitration Agreements (July 29, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-5905> [hereinafter Welsh, Comment Letter].

28. CFPB REPORT, *supra* note 10, § 5.1, at 4.

subject to limitations. To a large extent, these limitations derived from the paucity of complete and consistent information regarding the numbers, types of claims, outcomes, arbitrators, parties, and party representatives involved in arbitrations conducted pursuant to mandatory pre-dispute consumer arbitration clauses. The Section concluded that “despite the prevalence of mandatory pre-dispute consumer arbitration clauses, the public generally has little information regarding use of the process or its outcomes.”<sup>29</sup>

Specifically, the Section noted that the CFPB had been forced to rely on data from a single source—the AAA—that “voluntarily provided its case filings to the CFPB pursuant to a non-disclosure agreement.”<sup>30</sup> While there was “substantial evidence that the AAA dominate[d] the administration of consumer financial arbitration cases[,]”<sup>31</sup> the CFPB had pointed out in its March 2015 report that other dispute resolution organizations also administered consumer financial arbitration.<sup>32</sup> The Section found it significant that “only 18.3% of storefront payday-loan contracts, 16.7% of private student loan contracts, and 37.3% of prepaid cards studied by the CFPB provided for the AAA as the *sole* administrator, while most contracts identified the AAA as *either* the sole administrator or one of the available choices.”<sup>33</sup> The CFPB had noted that “the types of claims handled by other providers might differ from the claims evidenced in the AAA filings, but due to the lack of required reporting, the CFPB had no means to determine whether such differences existed.”<sup>34</sup> As a result, “the AAA might not be the

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29. Welsh, Comment Letter, *supra* note 27, at 2.

30. *Id.* at 2-3.

31. *Id.* at 3, 10 n.10 (“[T]he AAA is specified as at least one potential choice of contractually-specified arbitration administrators in 98.5% of the credit card market we studied; 98.9% of the checking account market we studied; 100% of the GPR prepaid card market we studied; 85.5% of the storefront payday loan market we studied; and 66.7% of the private student loan agreements we reviewed. The AAA is specified as the *sole* choice in 17.9% of the GPR prepaid card market that we studied; 44.6% of the checking account market we studied; and one of the private student loan agreements we reviewed. With that said . . . when we reviewed the court records of class cases in which parties moved to compel arbitration, we found five records indicating a subsequent filing with the AAA and four indicating a filing in JAMS.” (quoting CFPB REPORT, *supra* note 10, § 5.1, at 4 n.5)).

32. *Id.* at 3, 10 n.11 (“The CFPB specifically named JAMS, Inc., but it is very likely that there are also other dispute resolution providers handling these cases.”).

33. *Id.* at 3 (citing CFPB REPORT, *supra* note 10, § 2.5.3, at 35-39).

34. *Id.*

dominant administrator of arbitration in consumer financial contexts that were not studied by the CFPB.”<sup>35</sup>

The CFPB acknowledged other difficulties with the data upon which it relied for its report, including the following shortcomings: ambiguity in defining what should count as a “win” for a consumer or company; a lack of information regarding the cases in which arbitrators did not make awards or in which the parties settled;<sup>36</sup> and a lack of information regarding the outcomes of cases that did not proceed to arbitration or did not result in awards.

Ultimately, the Section was troubled by the lack of complete and consistent information regarding consumer arbitration and believed there was a need for such information.

The Section also found that the experience of quasi-public dispute resolution organizations, private organizations, and states demonstrated the value of collecting and publishing arbitration-related information, suggested specific information that would benefit from disclosure, and evidenced a developing trend toward transparency. The Section acknowledged that some dispute resolution professionals and organizations had raised legitimate concerns regarding the costs of complying with the CFPB’s Arbitration Reporting Requirement<sup>37</sup> and the potential loss of confidentiality for processes that many describe as “private” dispute resolution. Nonetheless, the Section urged that transparency was essential to protect the integrity of arbitration and that:

[the] reporting and publication proposed by the CFPB—and the consequent availability of the information for those participating in consumer arbitration, those researching consumer arbitration, and those overseeing consumer arbitration—will help to protect the integrity of arbitration and, by extension, the integrity of the

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35. *Id.*

36. CFPB REPORT, *supra* note 10, § 5.1, at 5-6 (observing that most state and federal courts also do not require reporting regarding settlements).

37. *See, e.g.*, Letter from Nessa Feddis, Vice President & Senior Counsel, Ctr. for Regulatory Compliance, Am. Bankers Ass’n; Steven I. Zeisel, Exec. Vice President & Gen. Counsel, Consumer Bankers Ass’n; and K. Richard Foster, Senior Vice President & Senior Counsel for Regulatory & Legal Affairs, Fin. Servs. Roundtable, to Richard Cordray, Dir., CFPB (Aug. 22, 2016).

strong federal policy in favor of arbitration that has been expressed by the Supreme Court.<sup>38</sup>

The Section then specifically identified the use of arbitration at issue here and explained the factors that demanded modification of the usual understanding of arbitration as a “creature of contract” that could and should be entirely private.

[T]ransparency is particularly important when, as here, one of the parties to a dispute is imposing a dispute resolution process upon the other party and the courts may be asked to enforce—and thus lend their coercive power and legitimacy to—the award produced by the process.<sup>39</sup>

In sum, the Section strongly supported the CFPB’s proposal to require regulated entities to submit arbitration claim filings, awards, and other documents to the CFPB, and to publish such information. The Section also urged the CFPB to consider how quasi-public and private organizations had structured their databases to ensure easy access, searchability, and an overall sense of the dispute resolution system and its outcomes. The Section was particularly struck by those organizations that provided for both an online searchable database of individual awards and useful aggregated data (including data regarding mediation and different types of arbitral panels).

The Section also proposed a few modifications, based on the importance of assuring parties and the public that “individual arbitrators and dispute resolution providers offer an effective and impartial forum.”<sup>40</sup> Regarding impartiality, the Section advocated for a searchable database of claim filings and awards that would reveal the number of times that a regulated entity had been a party in an arbitration filed with or administered by a particular dispute resolution provider, the number of times that a regulated entity’s arbitration had been conducted by a particular arbitrator, and the number of times that particular lawyers had represented clients in such arbitrations and before particular arbitrators. Thus, a searchable database would reveal repeat players of various types and potential conflicts of

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38. Welsh, Comment Letter, *supra* note 27, at 2. Notably, defenders of arbitration have also remarked upon “the need for more thorough empirical research into the dynamics of arbitration specifically and the resolution of disputes more generally.” Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 *CARDOZO J. CONFLICT RESOL.* 267, 281 (2008).

39. Welsh, Comment Letter, *supra* note 27, at 8.

40. *Id.*



interest. The database proposed by the CFPB did not, however, include information regarding “prior *mediation* experience with a particular dispute resolution organization or neutral, or the financial interests that might exist among dispute resolution organizations, parties, and legal representatives.”<sup>41</sup> The Section urged the CFPB to require disclosure regarding such prior experience and relationships to further assist with protecting the impartiality, effectiveness, and integrity of arbitration, and recommended considering the experience of the states in requiring disclosures regarding prior mediations<sup>42</sup> and financial interests that might represent conflicts of interest. Finally, the Section urged the CFPB to consider specifying the mechanisms it would use to enforce its reporting requirements.

The election of Donald Trump as President in November 2016 apparently scuttled any chance that the CFPB’s proposed rules would be made effective.<sup>43</sup> Nonetheless, on July 10, 2017, the CFPB announced its new rule barring mandatory pre-dispute consumer arbitration clauses that included class action waivers and requiring the reporting of arbitration claim filings, pre-dispute arbitration agreements, awards, and communications regarding compliance with fairness principles and payment requirements.<sup>44</sup> The rule also provided for making such information public after appropriate aggregation or redaction.<sup>45</sup>

There were only a few differences between the Arbitration Reporting Proposal and the final rule announced in July 2017. Most notably, the CFPB had added two more reporting requirements. Providers of financial services and goods would be required to submit the answer to any initial claim or counterclaim and, “[i]n connection with any case in court by or

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41. *Id.* (emphasis added).

42. See Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. DISP. RESOL. 19, 34 n.71 (1999) (“Beyond the use of one ADR firm as a repeat provider, this law firm represented to me that a single mediator had been used over 300 times in one year! The repeat play law firm (by specialty) was able to maximize its use of a single repeat play mediator. So far, neither ethics regulations nor other rules require the law firm or the mediator to disclose to one-shot litigants that he had performed for this firm before.”).

43. See Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses*, *supra* note 6, at 431 (expressing doubts regarding the likelihood that the CFPB would announce final rules).

44. Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

45. *Id.*

against the provider . . . [a]ny submission to a court that relies on a pre-dispute arbitration agreement in support of [an] attempt to seek dismissal, deferral, or stay . . . and [t]he pre-dispute arbitration agreement [itself].”<sup>46</sup> The final rule also provided for the CFPB’s posting of the redacted records (with possible additional redactions by the CFPB) on a publicly available website that the CFPB would establish and maintain, with easy access and retrieval functions.

Opponents quickly mounted legal<sup>47</sup> and legislative<sup>48</sup> challenges. Before the end of July 2017, the House of Representatives voted to nullify the CFPB’s new rule.<sup>49</sup> On October 24, with a tie-breaking vote cast by Vice President Pence, the U.S. Senate joined the House.<sup>50</sup> On November 1, President Trump signed the repeal of the CFPB’s rule.<sup>51</sup>

A surprisingly broad swath of the media covered the Senate’s and the President’s action nullifying the CFPB’s final rule.<sup>52</sup> As before, though, almost no attention was paid to the reporting provisions in the rule. Few

46. *Id.* at 33,430.

47. See Complaint for Declaratory and Injunctive Relief, U.S. Chamber of Commerce v. Consumer Fin. Prot. Bureau, No. 3:17-cv-02670-D (N.D. Tex. Sept. 29, 2017).

48. See Lisa Lambert, *House Votes to Kill Consumer Lawsuit Rule*, REUTERS (July 25, 2017, 5:12 PM), <https://www.reuters.com/article/us-usa-congress-arbitration/house-votes-to-kill-consumer-lawsuit-rule-idUSKBN1AA2SI>.

49. *Id.*

50. See Gillian B. White, *Congress’s Late-Night Vote to Protect Banks from Lawsuits*, ATLANTIC (Oct. 25, 2017), <https://www.theatlantic.com/business/archive/2017/10/cfpb-mandatory-arbitration/543918/> (noting opposition to the CFPB rule from the Treasury Department “headed by the former Goldman Sachs banker Steve Mnuchin” and the “Office of the Comptroller of the Currency, currently led by the one-time Wells Fargo defense attorney Keith Noreika”).

51. See Sylvan Lane, *Trump Repeals Consumer Arbitration Rule, Wins Banker Praise*, HILL (Nov. 1, 2017, 4:43 PM), <https://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking>.

52. See, e.g., Chris Arnold, *Senate Kills Rule on Class-Action Lawsuits Against Financial Firms*, NAT’L PUB. RADIO (Oct. 25, 2017, 4:43 PM ET), <https://www.npr.org/2017/10/25/560089065/senate-kills-rule-on-class-action-lawsuits-against-financial-firms>; Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html>; Megan Leonhardt, *Lawmakers Just Made It Nearly Impossible for You to Sue Companies Like Equifax and Wells Fargo*, MONEY (Oct. 25, 2017), <http://time.com/money/4996613/senate-kills-cfpb-arbitration-rules/>; Jim Spencer, *Class-Action Rule’s Defeat Came Despite Widespread Appeal*, MINNEAPOLIS STAR TRIB. (Oct. 28, 2017, 12:28 AM), <http://www.startribune.com/class-action-rule-s-defeat-came-despite-widespread-appeal/453692293/>.

noticed when the CFPB first proposed to require reporting. Few noticed when the CFPB announced its reporting requirements. Few noticed when the reporting requirements were repealed. Regardless, by the end of this saga, the opportunity to bring some measure of transparency to mandatory pre-dispute consumer arbitration was dead.

Why, at this point, should anyone care?

## *II. The Experience of Federal and State Courts with the Collection and Publication of Information Regarding Civil Litigation*

Professor Judith Resnik has observed recently that judges regularly “posit that openness supports informed discussions of government, fosters perceptions of fairness, checks corruption, enhances performance, facilitates accountability, discourages fraud, and permits communities to vent emotions.”<sup>53</sup> Perhaps the courts’ appreciation of the benefits of openness, particularly in a democracy, helps to explain federal and state courts’ general history of ensuring access to information regarding their operations.<sup>54</sup>

Of course, court filings have long been presumed to be accessible to the public. As a result, information regarding the claims in individual cases, relief sought, counterclaims, defenses, parties, lawyers, and court judgments have been available to those willing to undertake the effort and time required to travel to individual courthouses and page through court files.<sup>55</sup> Access to federal filings became much easier in 1990 with the creation of PACER (Public Access to Court Electronic Records), an online system maintained by the Administrative Office of the U.S. Courts.<sup>56</sup> Access is not free, however,<sup>57</sup> which has placed limits on the availability of

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53. Resnik, *The Contingency of Openness*, *supra* note 2, at 1671-72.

54. *See id.* at 1636 (“Judges gain legitimacy from being embedded in public exchanges.”); Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1355-57 (2015) (tracing transparency of the courts back to Medieval Europe and Colonial America).

55. *See* David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1817-18 (2015); *see also* Elizabeth Figueroa, *Transparency in Administrative Courts: From the Outside Looking In*, 35 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1, 36-37 (2015) (regarding administrative courts).

56. *See* Stevenson & Wagoner, *supra* note 54, at 1357-59.

57. The cost is ten cents per page, with a thirty-page cap on such costs for documents and case-specific reports. This cap does not apply to other searches. *See Frequently Asked Questions*, PACER, <https://www.pacer.gov/psc/faq.html> (last visited Nov. 27, 2018); *see also* Stevenson & Wagoner, *supra* note 54, at 1359-62 (regarding complaints about pay wall,

this resource for empirical research.<sup>58</sup> In addition, as Peter Rutledge has observed, “the litigation system is not always bathed in sunshine—protective orders, closed proceedings, filings under seal, and settlements all reduce the degree of public scrutiny of the system.”<sup>59</sup>

Both federal and state courts make aggregate information available regarding their operations. Interestingly, the Attorney General of the United States was responsible for the first publication of statistical tables regarding the federal courts in 1871.<sup>60</sup> Today, the Administrative Office of the U.S. Courts produces and publishes annual reports that discuss the federal courts generally, with separate sections devoted to component parts of the federal judiciary. The reports provide aggregate numbers regarding complaints against judges and their disposition.<sup>61</sup> They also highlight and explain unusual increases or declines in civil filings or dispositions.<sup>62</sup> These

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free-access pilot program, subsequent hacking of PACER, and creation of web application, RECAP, which saves duplicates of downloaded documents). Recently, Congressman Greg Collins introduced the Electronic Court Records Reform Act (H.R. 6714, 115th Cong. (2018)), which would require documents downloaded from the PACER database to be free. See Jason Tashea, *Proposed Legislation Would Eliminate PACER Fees*, ABA J. (Sept. 18, 2018, 10:55 AM CDT), [http://www.abajournal.com/news/article/new\\_bill\\_wants\\_to\\_end\\_pacer\\_fees](http://www.abajournal.com/news/article/new_bill_wants_to_end_pacer_fees).

58. See Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 537 (2009) (urging that federal courts should require the use of data-enabled PDF forms) (“Policymakers, litigants, and the public could see the amounts of damages granted in personal-injury cases, the lengths of criminal sentences, the likelihood of success on various kinds of motions, the differences in outcomes among courts, the relative effectiveness of lawyers and expert witnesses, and the answers to a myriad of other questions.”); see also Stevenson & Wagoner, *supra* note 54, at 1359-60.

59. Rutledge, *supra* note 38, at 276-77 (urging that “the virtues of confidentiality at least counterbalance some of the loss of transparency”); see also Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 685-86 (2018) (reporting results of empirical research showing that many federal circuit court decisions on immigration appeals are unavailable and essentially invisible to the public).

60. See Resnik, *A2J*, *supra* note 2, at 627 (citing PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 91-95 (1973); David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 97 (1981)).

61. See, e.g., *Judicial Business 2016*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/judicial-business-2016> (last visited Nov. 27, 2018).

62. See, e.g., *U.S. District Courts—Judicial Business 2017*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017> (last visited Nov. 27, 2018) (explaining significant increases or drops in case numbers, and regional variations, due to claims arising out of foreclosures, purchases of genetically modified corn seeds from

explanations alert interested parties to trends throughout the federal courts or in particular jurisdictions. Twice each year, the Administrative Office of the U.S. Courts also publishes the most frequently requested tables of statistics regarding the workload of the federal courts. These tables contain aggregate data regarding a variety of information: numbers of cases filed, terminated, and pending by jurisdiction; numbers of cases filed by jurisdiction, nature of suit, and district; numbers of cases terminated, by nature of suit and action taken; and median time from filing to disposition of civil cases, by action taken.<sup>63</sup> Both the annual reports and the semi-annual tables of statistics are available online at no cost.

These reports and statistical tables are not perfect. Concerns have been raised regarding the accuracy and consistency of the data input by court clerks.<sup>64</sup> In addition, there are some notable exclusions in the data captured for aggregation and publication. For example, while the reports and tables reveal the occurrence of dispositions, they do not provide information regarding the terms of such dispositions. Further, while the reports and tables show the number of civil cases terminated during a twelve-month period and provide some breakdowns regarding the actions taken that resulted in termination,<sup>65</sup> such breakdowns are extremely limited. For example, there is no information regarding the number of terminations resulting from judicial settlement conferences, mediation, other facilitated settlement procedures, or traditional bilateral negotiations between the lawyers.<sup>66</sup> Notably, a few district courts have taken the initiative to provide

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Syngenta AG, Deepwater Horizon's oil spill, and use of pelvic repair products, the cholesterol drug Lipitor, and Skechers Toning Shoe Products).

63. See *Statistical Tables for the Federal Judiciary—June 2016*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2016> (last visited Nov. 27, 2018).

64. See, e.g., Gillian K. Hadfield, *Judging Science: An Essay on the Unscientific Basis of Beliefs About the Impact of Legal Rules on Science and the Need for Better Data About Law*, 14 J.L. & POL'Y 137, 156 (2006); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 722 (2004).

65. The tables indicate how many civil cases are terminated with no court action and with court action occurring before trial, during or after pretrial, during or after a non-jury trial, and during or after a jury trial. See, e.g., *Table C-4—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2017), <http://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2017/12/31>.

66. Nancy A. Welsh, *Magistrate Judges, Settlement and Procedural Justice*, 16 NEV. L.J. 983, 1044-45 (2016) (“While much is reported about magistrate judges’ functions, much more is unknown—e.g., how many dispositions actually result from magistrate judges’

aggregated information regarding their use of mediation and other ADR procedures.<sup>67</sup> Other district courts have developed their own jurisdiction-specific settlement databases. Federal magistrate judges facilitating settlement conferences then use these databases with parties to allow comparisons with settlements reached in similar matters.<sup>68</sup> These databases are not made available to the public generally.

State courts also publish aggregate information regarding their operations. For civil caseloads, state courts tend to report the number of filings and dispositions, often indicating whether the dispositions were the result of defaults, jury trials, or bench trials.<sup>69</sup> However, only a few state

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settlement sessions, how many cases go to mediation, how often magistrate judges serve as mediators, how many dispositions result from mediation and other settlement procedures, and the terms of these dispositions.”).

67. See, e.g., REBECCA PRICE, U.S. DIST. COURT S. DIST. OF N.Y., MEDIATION PROGRAM: ANNUAL REPORT JANUARY 1, 2016 – DECEMBER 31, 2016 (Dec. 5, 2017); U.S. DIST. COURT OF THE N. DIST. OF CAL., ADR PROGRAM REPORT, FISCAL YEAR 2017 (OCTOBER 1, 2016 THROUGH SEPTEMBER 30, 2017); U.S. DIST. COURT OF THE CENT. DIST. OF CAL., ADR PROGRAM REPORT – CALENDAR YEAR 2016; see also Wayne Brazil, *Informalism and Formalism in the History of ADR in the United States and An Exploration of the Sources, Character, and Implications of Formalism in a Court-sponsored ADR Programme*, in *FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION* 250, 303-04, 317, 330-332 (Joachim Zekoll et al. eds., 2014) (using data gathered by District Court staff to discuss party perceptions of mediator interventions and fairness, as well as parties’ or their attorneys’ preference for mediation).

68. See Morton Denlow, *Magistrate Judges’ Important Role in Settling Cases*, 61 FED. LAW. 103, 103 (2014); John Lande, *How Much Justice Can We Afford?: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 235–36 (citing Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES’ J., Winter 2004, at 19, 19-21 (writing about settlement databases)).

69. See, e.g., MD. CTS., MARYLAND JUDICIARY STATISTICAL ABSTRACT 2017 (2018), <https://www.courts.state.md.us/sites/default/files/import/publications/annualreport/reports/2017/fy2017statisticalabstract.pdf> (providing number of civil cases filed and terminated; no detail regarding the manner of disposition); *Summary Reporting System*, FLA. CTS., <http://trialstats.flcourts.org/TrialCourtStats/ReportTrialCourtStats> (last visited Oct. 25, 2018) (showing that Circuit Civil cases’ disposition types include: dismissed before hearing; dismissed after hearing; disposed by default; disposed by judge; disposed by non-jury trial; disposed by jury trial; and other); OFFICE OF COURT ADMIN., TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2017, at 22, 23, 46 (2018), <http://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf> (providing information regarding filings and dispositions for civil cases as a result of: dismissal by plaintiff, default judgment, agreed judgment, bench trial, dismissal for want of prosecution, all other dispositions, summary judgment, jury/directed verdict); JUDICIAL COUNCIL OF CAL., CAL.

courts provide more detailed aggregate numbers regarding the dispositions resulting from the use of dispute resolution processes, such as court-connected mediation, arbitration, early neutral evaluation, or judicial settlement conferences.<sup>70</sup>

Significantly, federal and state courts are not alone in providing access to filings and aggregate information. Increasingly, quasi-public and “private” dispute resolution procedures are also subject to some degree of transparency.

### *III. The Experience of Quasi-Public and Private Organizations, States, and Users with the Collection and Publication of Information Regarding Dispute Resolution*

The experience of quasi-public arbitration programs, private dispute resolution organizations, states and users with the collection and publication of data regarding arbitration proceedings (and to a much lesser degree, mediation sessions) is also instructive. The transparency and accountability offered by such reporting and publication have helped to promote the integrity of the dispute resolution processes.

A few examples follow regarding quasi-public and private arbitration programs’ provision for the transparency and accountability of their processes and outcomes by making their awards available and searchable online, much as proposed by the CFPB and supported by the Section. These are followed by examples of states’ disclosure requirements, users’ “self-help” initiatives, and calls for ODR to provide for transparency.

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COURTS, 2017 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 2006–2007 THROUGH 2015–2016, at 95-98 (2017), <http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf> (listing dispositions for delay of prosecution, through other means, after a jury trial or after a bench trial).

70. See, e.g., *Uniform Data Reporting, Alternative Dispute Resolution Programs: Cases Ordered July through September 2017*, FLA. CTS. (Oct. 27, 2017), <http://www.flcourts.org/core/fileparse.php/541/urlt/Alternative-Dispute-Resolution-Program-Jul-Sep17.pdf> (“This data is reported by court administration through the Uniform Data Reporting system web application and is not audited. In addition, data may be amended at a later date.”). But see Resnik, *The Contingency of Openness*, *supra* note 2, at 1667-68 (reporting that in Illinois, court-connected arbitration includes a public dimension and that outcomes are in a court database).

*A. FINRA: Required Publication of Awards and Other Aggregate Data*<sup>71</sup>

The rules of the Financial Industry Regulatory Authority (“FINRA”), a not-for-profit organization authorized by Congress, require its awards to be made publicly available.<sup>72</sup> The awards are online and searchable through the FINRA Arbitration Awards Online database,<sup>73</sup> as well as commercial databases, such as Westlaw. The FINRA database is available without charge, and users can access FINRA arbitration awards from January 1989 through the present. In addition, users can access the awards of all arbitration programs absorbed over the years by FINRA (which include the American Stock Exchange, Chicago Board Options Exchange, International Stock Exchange, Philadelphia Stock Exchange, and Municipal Securities Rulemaking Board) and the New York Stock Exchange (“NYSE”) (which includes Pacific Exchange/NYSE ARCA).

The database provides users with instantaneous access to awards and the ability to search for awards by using multiple criteria, such as by case number, keywords within awards, arbitrator names, party names, date ranges set by the user, and any combination of these features. FINRA also now includes information about the panel selection method and panel composition.

In addition, FINRA publishes various statistics online:

- The number of cases filed and closed thus far during the current year
- Historical statistics for cases filed and closed
- The top fifteen controversy types in customer arbitrations
- The top fifteen security types in customer arbitrations
- The top fifteen controversy types in intra-industry arbitrations

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71. See Fin. Indus. Regulatory Auth., The Financial Industry Regulatory Authority’s Dispute Resolution Activities 21 (rev. Apr. 16, 2018) (part of 2018 FINRA Annual Conference materials).

72. See FIN. INDUS. REGULATORY AUTH., FINRA MANUAL r. 12904(h) (2018), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4192](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192) [hereinafter FINRA MANUAL] (“All awards shall be made publicly available.”); *Arbitration Process: Decision and Award*, FINRA, <https://www.finra.org/arbitration-and-mediation/decision-award> (last visited Dec. 7, 2018) (“FINRA makes all arbitration awards publicly available for free by posting them on Arbitration Awards Online.”).

73. See *FINRA Arbitration Awards Online*, FINRA, <http://www.finra.org/arbitration-and-mediation/arbitration-awards> (last visited Dec. 7, 2018).



- How arbitration cases close (e.g., after arbitration hearing, after arbitrators' review of documents, direct settlement by parties, settled via mediation,<sup>74</sup> withdrawn, all others)
- Results of customer claimant arbitration award cases (e.g., percentage of all customer claimant cases closed that were decided by arbitrators, percentage (and number) of cases where customer awarded damages)
- Results of all-public panels and majority-public panels in customer cases
- Arbitrators by type and location
- Mediation statistics thus far during the current year.<sup>75</sup>

The resulting disclosures have helped to protect the integrity of the arbitration process by providing parties with information they need to prepare for arbitrations and, more broadly, enabling important empirical research and systemic analysis that otherwise would not be possible.<sup>76</sup> These disclosures also have permitted regulators and observers to become aware of potentially worrisome trends in the financial services industry.

FINRA has continued to examine its procedures to enhance their transparency and legitimacy. Since 2009, for example, FINRA has required its arbitrators to issue an explained award—defined as “a fact-based award stating the general reason(s) for the arbitrators’ decision”—if all parties to the dispute jointly request one.<sup>77</sup> Few parties have jointly requested an explained award since the rule’s enactment. In response, the FINRA Dispute Resolution Task Force recommended that FINRA change its rule to require an explained decision unless any party notifies the panel before the initial pre-hearing conference that it is opting out of such requirement.<sup>78</sup>

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74. FINRA also offers mediation. *See Mediation Overview*, FINRA, <https://www.finra.org/arbitration-and-mediation/mediation-overview> (last visited Dec. 7, 2018).

75. *See Dispute Resolution Statistics*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics> (last visited Dec. 7, 2018).

76. *See, e.g.*, Stephen J. Choi & Theodore Eisenberg, *Punitive Damages in Securities Arbitration: An Empirical Study*, 39 J. LEGAL STUD. 497 (2010).

77. *See* FINRA MANUAL, *supra* note 72, at r. 12904(g)(2), [http://finra.complinet.com/en/display/display.html?rbid=2403&element\\_id=4192](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4192).

78. *See* FINRA DISPUTE RESOLUTION TASK FORCE, FINAL REPORT AND RECOMMENDATIONS 20-23 (2015), <https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf>.

The Task Force noted that it believed “increased confidence in the fairness of the system would likely flow from th[e] increased transparency.”<sup>79</sup>

*B. ICANN: Required Publication of Awards*

The Internet Corporation for Assigned Names and Numbers (“ICANN”), a not-for-profit public benefit corporation, similarly requires its approved dispute resolution service providers to make Uniform Domain-Name Dispute-Resolution Policy (“UDRP”) decisions publicly available online,<sup>80</sup> thus providing the public, parties, and arbitrators with easy access to arbitrators’ decisions and their reasoning.<sup>81</sup> Publication of neutrals’ decisions is understood as necessary to enhance the legitimacy and predictability<sup>82</sup> of the system. One of the dominant providers, the World Intellectual Property Organization (WIPO), has also established a system for querying its database regarding particular issues or categories of cases.<sup>83</sup> As a result of the required publication of decisions, the ICANN system has permitted patterns of decision-making and institutions’ repeat appointments of arbitrators to be highlighted. Such transparency has assisted the integrity of the dispute resolution system.<sup>84</sup>

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79. *Id.* at 21.

80. *See Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”),* ICANN r. 16(b)), <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> (last visited on Dec. 11, 2018) (“Except if the Panel determines otherwise [per Paragraph 4(j) of the Policy, ‘when an Administrative Panel determines in an exceptional case to redact portions of its decision’], the Provider shall publish the full decision and the date of its implementation on a publicly accessible web site. In any event, the portion of any decision determining a complaint to have been brought in bad faith (see Paragraph 15(e) of these Rules) shall be published.”).

81. *See List of Approved Dispute Resolution Service Providers,* ICANN, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> (last visited Nov. 28, 2018) (listing approved dispute resolution service providers, including links to their databases of proceedings and decisions).

82. *See* World Intellectual Prop. Org., FINAL REPORT OF THE WIPO INTERNET DOMAIN NAME PROCESS ¶ 219 (1999).

83. *See* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 336-37 (2016) (noting that the other major provider, National Arbitration Forum, enables only a full-text search of its decisions, and it is necessary to access a third party in order to conduct a full-text search of the decisions of both WIPO and NAM).

84. *See* Benjamin G. Davis, *The New New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 3 J. World Intell. Prop. 525, 532 (2000) (updated version); Benjamin G. Davis, *The New New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned*

*C. International Arbitration: Required and Increased Voluntary Publication of Awards*

International dispute resolution providers regularly make information public regarding their proceedings and awards. The World Trade Organization (“WTO”), for example, provides a searchable, online database of trade disputes brought to the WTO for resolution pursuant to the Dispute Settlement Understanding.<sup>85</sup> The awards are public, while pleadings are public only at the election of nations.<sup>86</sup> In the investor-state arbitration

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*Names and Numbers*, 17 J. INT’L ARB., no. 3, 2000, at 115, 115-17, 122; *Uniform Domain Name Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited Nov. 28, 2018); Benjamin G. Davis, *Une Magouille Planetaire: The UDRP Is an International Scam: An Independent Assessment of the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 72 MISS. L.J. 815 (2002); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 298 (2016) (reporting that “[a]nalysis of arbitrator selection showed that among dominant providers [NAF and WIPO], arbitrators who decided most often in favor of the complainant received more cases, while persons with reputations for decisions protective of domain name owners were seldom if ever selected as sole arbitrators” and were instead “placed on [relatively rarely used] three-person panels”; also observing, based on subsequent research, that “the system improved over time”) (citing Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT’L L. 903, 928-30 (2002); *2012 Domain Dispute Study*, DNATTORNEY.COM (Aug. 28, 2012), <https://dnattorney.com/resources/case-studies/>); *Domain Name Dispute Resolution Policies*, ICANN, <https://www.icann.org/resources/pages/dndr-2012-02-25-en> (last visited Nov. 28, 2018) (providing other domain name dispute resolution policies). Recently, Amy Schmitz and Colin Rule have pointed out the importance of ICANN’s transparency:

Transparency helps to ensure that an ODR system is operating the way that it should. ICANN’s Uniform Domain Name Dispute Resolution Protocol (UDRP) is an excellent example of a transparent online dispute resolution process (even though it may have challenges in some of the other ethical standards). Under the UDRP, every case filing and decision is publicly accessible. This has led to quite a bit of external scrutiny for the UDRP process. As one may expect, it is not necessarily comfortable for the participants and the dispute resolution service providers to have full public scrutiny for all cases coming through the system. However, transparency can be a very important way for ODR systems to retain public trust, and for problems to be detected quickly and resolved. Much like how sunlight laws in the public sector promote honesty, process transparency in ODR is key to combating systemic bias.

AMY SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* 76 (2017).

85. See *Dispute Settlement Archive*, World Trade Org., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm#disputes](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes) (last visited Nov. 28, 2018).

86. For example, the United States makes its pleadings available. *Id.*

context, the International Center for Settlement of Investment Disputes (“ICSID”) currently offers an online, searchable list of cases and arbitral awards.<sup>87</sup> ICSID only publishes awards with the consent of the parties. However, even without the parties’ consent, ICSID publishes excerpts of arbitral panels’ legal reasoning.<sup>88</sup> This information has been useful for the parties directly involved in investor-state disputes and for those conducting systemic, empirical analysis.<sup>89</sup>

Indeed, in the investor-state context, substantial attention has been paid to the need for transparency. For example, the United Nations Rules on Transparency in Treaty-Based Investor-State Arbitration, which became effective on April 1, 2014, provide for the publication of documents, open hearings, and the opportunity for interested third parties to file and make submissions.<sup>90</sup> For disputes arising out of treaties concluded before April 1, 2014, these rules regarding transparency apply only at the election of the parties to the arbitration or the parties to the relevant treaty.<sup>91</sup>

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87. See *ICSID Award Database*, World Bank, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>. (last visited Nov. 28, 2018).

88. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES Arbitration Rule 48(4), at 122 (Apr. 2006), <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf> (“The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.”).

89. See, e.g., Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 GEO. J. INT’L L. 363 (2015); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007); Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459 (2015).

90. UNITED NATIONS COMM’N ON INT’L TRADE L., UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION art. 3, 4 (2014), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html); see also Deborah R. Hensler, *The Private in Public, the Public in Private: The Blurring Boundary Between Public and Private Dispute Resolution*, in FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION, *supra* note 67, at 45, 63-65 (discussing the controversy over transparency).

91. See generally U.N. COMM’N ON INT’L TRADE L., UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION [THE “MAURITIUS CONVENTION ON TRANSPARENCY”] (2014), <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>. See also James Hope, *Transparency in International Arbitration*, CDR: COM. DISP. RESOL. (May 11, 2016), <https://www.cdr-news.com/categories/expert-views/6376-transparency-in-international-arbitration> (describing the application of the United Nations Commission on International

Even though international commercial arbitration awards are not required to be published, there are indications that such awards and aggregated information are being published voluntarily with greater frequency. In the past, only a selective group of lawyers and law firms was likely to know about and use international commercial arbitrators' decisions. Now, however, international commercial arbitral institutions are advocating increased publication, "with some institutions even shifting to a presumption in favor of redacted awards in the absence of party objection."<sup>92</sup> Legal journals, such as the Collection of ICC Arbitral Awards, publish arbitral awards with the redaction of names and other identifying information.<sup>93</sup> As a result of shifting presumptions regarding the publication of awards, some commentators perceive an increasingly transparent body of non-binding but persuasive precedent being produced by international commercial arbitration.<sup>94</sup> Other commentators acknowledge a trend toward transparency (especially in the investor-state arbitration context as described above), but they also note that "most if not all" international commercial arbitral institutions continue to publish only selected awards and then only in redacted form, and that such awards "are not always easy to search or find."<sup>95</sup> Indeed, access to such awards is generally available only by subscription.

Meanwhile, online subscription services now exist that use aggregated data regarding international commercial mediation and arbitration contributed by dispute resolution organizations from around the world (and involving data from 185 nations) to generate up-to-date geographic and case-type reports on "average claim amounts by case type, average claim amount versus amount awarded, arbitration and/or settlement outcomes by

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Trade Law (UNCITRAL) Rules on Transparency, Mauritius Convention on Transparency, and the UNCITRAL Transparency Registry).

92. Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 Univ. Kan. L. Rev. 1301, 1319-20 (2006); see also *Cases*, PERMANENT CT. OF ARB., <https://pca-cpa.org/en/cases/> (last visited Nov. 28, 2018) (providing public information regarding cases at parties' election).

93. See Christian Duve & Jill I. Gross, *Commercial Arbitration: Germany and the United States*, DISP. RESOL. MAG., Fall 2017, at 15, 18 (citing *Berger*, SchiedsVZ 2009, 289, 296).

94. See Rogers, *supra* note 92, at 1319-20.

95. Ank Santens & Romain Zamour, *Dreaded Dearth of Precedent in the Wake of International Arbitration: Could the Cause Also Bring the Cure?*, 7 Y.B. ON ARB. & MEDIATION 73, 78 (2015) (citing S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. OF ARB. 119 (2009)).

case type, whether parties frequently file counterclaims and their success rates, and the average length of case.”<sup>96</sup> Subscribers also can learn about “the frequency of the use of discovery tools, including e-discovery, and the success rate of counterclaims by case type.”<sup>97</sup> Access to these aggregated data regarding international commercial arbitration and mediation requires payment of a fee.

#### *D. Labor Arbitration: Required and Voluntary Publication of Awards*

Labor arbitration provides another model for the publication of information regarding arbitrations and their results.<sup>98</sup> Many state providers of labor arbitration make their awards available online.<sup>99</sup> Some states also make public the results of grievance arbitrations with public sector unions.<sup>100</sup>

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96. *Q&A with Bill Slate, Chairman, CEO and Co-founder of Dispute Resolution Data*, NORTON ROSE FULBRIGHT (Oct. 2017), <http://www.nortonrosefulbright.com/knowledge/publications/157150/data-insights>; see also *International Commercial Arbitration and Mediation: What Does the Data Show?*, DISP. RESOL. DATA, [http://www.disputeresolutiondata.com/international\\_commercial\\_arbitration](http://www.disputeresolutiondata.com/international_commercial_arbitration) (last visited Dec. 11, 2018) [hereinafter *What Does the Data Show?*] (“[D]ispute Resolution Data (DRD) is receiving data from 17 international entities and then aggregating the data by case type (28 different) and seven geographic regions. In this process, each closed international commercial arbitration provides information for up to 100 data fields and each closed international mediation up to 45 data fields. Presently, over 1,000 cases have provided information, in excess of, 40,000 data fields.”).

97. *What Does the Data Show?*, *supra* note 96.

98. In contrast, this sort of information is not generally available for employment arbitration. See David B. Lipsky, J. Ryan Lamare & Michael D. Maffie, *Mandatory Employment Arbitration: Dispelling the Myths*, 32 ALTERNATIVES TO HIGH COST LITIG. 133, 142 (2014) (critiquing claims regarding expansive use of mandatory pre-dispute employment arbitration clauses but also acknowledging “that no institution or individual has ever been able to collect a comprehensive set of data on the total number of employment arbitration claims”). But see text at *infra* notes 103-04 (regarding AAA disclosures, including disclosures regarding employment arbitration conducted pursuant to mandatory pre-dispute arbitration clauses).

99. See, e.g., *Arbitration Awards*, St. of Minn. Bureau of Mediation Serv., <http://mn.gov/admin/bms/arbitration/awards/>; (last visited Nov. 28, 2018); *Interest Arbitration Awards*, WASH. ST. PUB. EMP. RELATIONS COMM’N, [https://decisions.perc.wa.gov/waperc/interest-arbitrations/en/nav\\_date.do](https://decisions.perc.wa.gov/waperc/interest-arbitrations/en/nav_date.do) (last visited Nov. 28, 2018).

100. See, e.g., *Grievance Arbitration Decisions*, WASH. OFF. OF FIN. MGMT., <http://www.ofm.wa.gov/labor/arbitration/grievance/decisions.asp> (last visited Nov. 28, 2018).

In other settings, labor arbitration awards are not required to be published. However, those that are published are generally accompanied by reasoned opinions that provide parties with valuable information.<sup>101</sup> Parties can access searchable online databases of these labor arbitration awards through various private providers (e.g., Bloomberg BNA, CCH, and Thomson West's LAIS). Bloomberg BNA's Arbitration Award Navigator, for example, allows users to access a collection of at least 20,000 arbitration awards to assess trends, evaluate arbitrators, and pinpoint awards. Users can search awards by case name, arbitrator, topic, union, employer, industry, classification outline number, and several other criteria. These sources are non-public and require payment.

*E. Consumer Arbitration in California, District of Columbia, Maine, and Maryland: Required Disclosures*

There is also substantial state (and District of Columbia) experience with the required submission and publication of data, specifically regarding consumer arbitration. Again, such disclosures have enabled vital empirical research and systemic analysis.<sup>102</sup>

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101. The benefits of arbitrator opinion writing are many and varied. See Sarah R. Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 280. First, opinion writing improves the quality of arbitral decision-making. The process of writing an opinion encourages the arbitrator to carefully consider her decision. In addition, opinion writing assists parties in selecting an arbitrator because it provides them with better information about a particular arbitrator's decision-making process and potential biases. The opinion-writing requirement also improves the hearing process (because the arbitrator will need to make sure he or she understands all of the issues presented) and provides a greater sense of resolution to the parties, who will now have a deeper understanding of the reasons they won or lost. Moreover, this relatively inexpensive process change would have a significant impact on parties' and the public's perception of arbitration as a fair and legitimate forum for the resolution of disputes. See generally Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Functions*, 96 GEO. L.J. 1283 (2008).

102. See, e.g., Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 407 (2007). The AAA has been most conscientious in complying with California's disclosure requirements. Access to the AAA data first indicated both the presence of a "repeat player" effect in employment arbitration and the improvement in employees' success rates after the AAA began enforcing the Employment Due Process Protocol. See Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 303, 303 (Samuel Estreicher & David Sherwyn eds., 2004).

Unlike the quasi-public and private organizations described *supra*, the states have not provided for the disclosure and publication of awards. Instead, they have required dispute resolution providers to collect and disclose specific pieces of information. In some respects, the resulting data provides less information than would be available from a review of arbitration filings and awards; in other respects, the resulting data exceeds what would be available from such a review.

California is the leader in requiring disclosures regarding consumer arbitration. Effective January 1, 2003, California Civil Procedure Code section 1281.96 began requiring dispute resolution providers to collect, publish at least quarterly,<sup>103</sup> and make available to the public on the provider's website (and on paper upon request) a report containing information about the provider's consumer arbitrations within the preceding five years.<sup>104</sup> The statute also requires the report's format to be searchable and sortable by members of the public using "readily available software" and "to be directly accessible from a conspicuously displayed link" that is identified as "consumer case information."<sup>105</sup>

The statute, which was amended in 2014, currently requires publication of the following pieces of information:

- (1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.
- (2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

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103. CAL. CIV. PROC. CODE § 1281.96(a) (West 2016). Certain providers that handle fewer than 50 consumer arbitrations are required to report only semiannually. *Id.* § 1281.96(c)(2).

104. *Id.* § 1281.96(a). See generally Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. DISP. RESOL. 343, 347 (2003); Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 122 (2003); Richard Chernick, *Imposed-Arbitration Reforms Threaten to Stifle Strengths of Commercial Arbitration*, DISP. RESOL. MAG., Fall 2002, at 16; Jay Folberg, *Arbitration Ethics: Winds of Reform Blowing from the West?*, DISP. RESOL. MAG., Fall 2002, at 5 (describing reasons underlying establishment of new disclosure requirements for arbitrators in California); Gail Hillebrand, *Should California's Ethics Rules Be Adopted Nationwide?*, DISP. RESOL. MAG., Fall 2002, at 10.

105. CAL. CIV. PROC. CODE § 1281.96(b) (West 2016).



(3) The nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment<sup>106</sup>; or other. . . .

(4) Whether the consumer or nonconsumer party was the prevailing party. As used in this section, “prevailing party” includes the party with a net monetary recovery or an award of injunctive relief.

(5) The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.

(7) Whether the consumer party was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any.

(8) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing. If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any.

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106. California is unique in including the arbitration of employment matters within a statute structured to focus on consumer arbitration. The Section was careful to take no position on this inclusion.

(11) The name of the arbitrator, his or her total fee for the case, the percentage of the arbitrator's fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.<sup>107</sup>

It is particularly notable that California's statute requires disclosure of a non-consumer's prior mediation experience with a dispute resolution provider, as well as prior arbitration experience.<sup>108</sup> Meanwhile, the statute does not require disclosure of the name of the consumer, the specific legal claims involved, the basis for an arbitral award, or the terms of any settlement. The statute also does not provide for any mechanism to enforce its requirements.<sup>109</sup>

Some commentators and scholars report that despite the value of the information disclosed pursuant to California's requirements, many dispute resolution providers are not in compliance.<sup>110</sup> The AAA has been particularly conscientious in complying with the state's requirements. The AAA displays the relevant data quite prominently on its website, discloses information about the statutes that require provision of the data, provides guidance on how to search the database,<sup>111</sup> and, as noted *supra*, cooperated with the CFPB in furnishing data for the study required by the Dodd-Frank Act. Recently, however, Professor Judith Resnik reported deficiencies in even the AAA's disclosures<sup>112</sup> and concluded that the available information

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107. CAL. CIV. PROC. CODE § 1281.96(a) (West 2016).

108. *Id.*

109. *Id.*

110. See Resnik, *A2J*, *supra* note 2, at 648 (observing that a 2017 study reported that of the 32 entities offering consumer arbitration, only about one third (eleven) posted the data and one tenth (three) met all the California requirements); Resnik, *Diffusing Disputes*, *supra* note 6, at 2898 (citing DAVID J. JUNG, JAMIE HOROWITZ, JOSE HERRERA & LEE ROSENBERG, PUB. LAW RESEARCH INST., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96, at 9, 51 (2013)).

111. See *Practice Areas: AAA Consumer and Employment Arbitration Statistics*, AM. ARB. ASS'N, <https://www.adr.org/Consumer> (last visited Nov. 28, 2018).

112. Resnik, *Diffusing Disputes*, *supra* note 6, at 2900. A research team analyzed the AAA's disclosures regarding claims that had been filed and closed between July 2009 and June 2014 (and thus were governed by the 2003 version of California's disclosure requirements). They found disclosures regarding 7,303 consumer claims, excluding real estate and construction, and the disclosures generally revealed

the names of the business entity and of the arbitrators and lawyers (if appearing), as well as whether the claim closed by settlement or award, the amounts sought, the fees, and fee allocations between the disputants. Of the

was “spotty.”<sup>113</sup> It does not appear that any dispute resolution provider has suffered any negative consequence as a result of the failure to make the disclosures required by California.<sup>114</sup>

Three other jurisdictions have also enacted arbitration disclosure requirements: Maine,<sup>115</sup> Maryland,<sup>116</sup> and the District of Columbia.<sup>117</sup> All are patterned after California’s 2003 statute, although they include variations.

The District of Columbia’s reporting requirements, which became effective in 2008, look much like those in California.<sup>118</sup> However, the

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5,224 claims “terminated by an award,” about half included a dollar figure. *Id.* at 2899-900. Resnik also observes, “The information on prevailing parties comes with the caveat that arbitrators are the source; the AAA has not ‘reviewed, investigated, or evaluated the accuracy or completeness’ of such information.” *Id.* at 2900; *see also* Resnik, *A2J*, *supra* note 2, at 649 (observing that arbitration files are not accessible and often are held by individual arbitrators, not the reporting dispute resolution providers, and that the providers do not independently verify the individual arbitrators’ reports; also noting that “coding errors can occur at both individual and aggregate levels” and providing an example of sixty-two cases in which the consumers were coded erroneously as seeking exactly the same amount and receiving exactly the same award).

113. Resnik, *Diffusing Disputes*, *supra* note 6, at 2898; *see also* Amsler, *supra* note 6, at 42 (noting that California data was incomplete, thus precluding systematic analysis of outcomes (citing Lisa Blomgren Bingham, Jean R. Sternlight & John C. Healey, *Arbitration Data Disclosure in California: What We Have and What We Need* (Apr. 15, 2005) (unpublished paper presented at the American Bar Association Section of Dispute Resolution Conference in Los Angeles))).

114. CAL. CIV. PROC. CODE § 1281.96(f) provides: “It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section.” However, there is no express provision for enforcement of such obligation. *See, e.g.*, Appellants’ Opening Brief at 10, *Cross Country Bank v. California*, No. A108572 (Cal. Ct. App. Jan. 2005), 2005 WL 677738 (observing that in dicta, the trial court in the case had noted that an arbitration agreement naming NAF as the provider “might be unenforceable” due to NAF’s failure to comply with the California disclosure requirements, but also noting the lack of any express provision for such disqualification). *But see* *Honeycutt v. JPMorgan Chase Bank, N.A.*, 236 Cal. Rptr. 3d 255, 270-71 (Cal. Ct. App. 2018) (entering a judgment of vacatur of arbitral award in employment matter due to arbitrator’s failure to make disclosures as required by California statute and ethics provisions).

115. ME. REV. STAT. ANN. tit. 10, § 1394 (2010).

116. MD. CODE ANN., COM. LAW § 14-3903 (West 2011).

117. D.C. CODE ANN. § 16-4430 (West 2008).

118. Interestingly, the District of Columbia’s reporting requirements also provide for the waiver of arbitration fees and costs “for any person having a gross monthly income that is less than 300% of the federal poverty guidelines issued annually by the United States Department of Health and Human Services.” *Id.* § 16-4430(d)(1). The District of Columbia’s

District of Columbia specifically provides for enforcement by permitting any person or entity affected by a violation of the provisions to seek an injunction against, and appropriate restitution from, the allegedly violating arbitration organization. If the person or entity bringing the action prevails, or if the arbitration organization voluntarily complies after the commencement of the action, then the arbitration organization can be held liable for the person or entity's attorney's fees and costs.<sup>119</sup>

In addition, the District of Columbia requires each dispute resolution provider to disclose any financial interests that the provider has in a party or the legal representation of a party, as well as any financial interests that a party has in the provider.<sup>120</sup> This additional requirement is consistent with the recommendations of scholars and the CPR-Georgetown Commission on Ethics and Standards in the Practice of ADR<sup>121</sup> and addresses important

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provision also requires dispute resolution organizations to provide notice to consumers regarding the potential for waiver of fees. *Id.* § 16-4430(f). The District of Columbia also does not permit arbitrators or arbitration organizations to administer consumer arbitrations pursuant to an agreement or rule that requires the non-prevailing consumer to pay the fees and costs of the opposing party. *Id.* § 16-4430(g). See Brief of Appellant, *Keeton v. Wells Fargo Corp.*, 987 A.2d 1118 (D.C. 2009) (No. 08-CV-990), in which a consumer argued that an arbitration provision should not be enforced because the arbitration provider refused to provide for a waiver of fees, despite the requirements of the District of Columbia's provision. The District of Columbia Court of Appeals ultimately required the trial court to permit discovery and hold an evidentiary hearing to determine the unconscionability of the arbitration agreement. *Keeton*, 987 A.2d at 1118.

119. D.C. CODE ANN. § 16-4430(i).

120. *Id.* § 16-4430(h). Maine also requires disclosures regarding financial interest. See ME. REV. STAT. ANN. tit. 10, § 1394(1)(K) (2010).

121. In 2002, the CPR-Georgetown Commission on Ethics and Standards in the Practice of ADR published the CPR-Georgetown Principles for ADR Provider Organizations. These principles include the following regarding disclosures:

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

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

concerns regarding the potential for conflicts of interest. Such concerns were heightened after the Minnesota Attorney General brought a highly publicized suit against the National Arbitration Forum (“NAF”), a dispute resolution provider that conducted consumer arbitrations pursuant to mandatory pre-dispute arbitration clauses.<sup>122</sup> The Attorney General alleged that NAF and its operations had become financially entangled with lawyers

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e. The method by which neutrals are selected for service.

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

CPR-GEORGETOWN COMM’N ON ETHICS & STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS 9-10 (May 1, 2002), [https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/principles-for-adr-provider-organizations/\\_res/id=Attachments/index=0/Principles-for-ADR-Provider-Organizations.pdf](https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/principles-for-adr-provider-organizations/_res/id=Attachments/index=0/Principles-for-ADR-Provider-Organizations.pdf) [hereinafter PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS]; see also Welsh, *Mandatory Pre-dispute Consumer Arbitration*, *supra* note 6, at 225-26 (suggesting disclosures of the following in order to understand the operation of any negotiated or facilitated processes that precede arbitration—e.g., “written policies (or performance evaluation factors) to guide employees’ decisions regarding the amount of their *first* [and subsequent] settlement offers to consumers”; the number of times that a consumer must refuse “settlement offers in order to be offered the full amount of [their] claim”; the length of time that employees wait before the consumer’s selection of an arbitrator to offer the full amount requested by a consumer; also suggesting disclosure of the following regarding arbitration—e.g., how the “available pool of arbitrators [was] selected for these types of cases;” how arbitrators are selected for particular cases; the “contractual and financial relationship” between companies and their arbitral provider(s); the company’s “share of each arbitral provider’s gross and net revenues”; the “potential for the arbitral provider, or individual arbitrators, to receive bonuses for their work” for a company and the basis for such bonuses; the information that the company receives about “the claims made by consumers, the results of these claims and the arbitrators responsible for deciding the claims”; how the company has used this information; and whether the company has ever used this information to “improve its products or services” and, if yes, in what way).

122. See generally Welsh, *What Is “(Im)partial Enough,” supra* note 6, at 427-30.

and other actors involved in debt collection matters subject to arbitration.<sup>123</sup> NAF subsequently entered into a settlement with the Attorney General and discontinued its provision of consumer arbitrations pursuant to mandatory pre-dispute arbitration clauses.

Maine also requires a disclosure regarding financial interests that could represent a conflict of interest. In addition, the consumer protection division of Maine's Office of the Attorney General is directly involved in publicizing dispute resolution providers' disclosures to consumers. Specifically, each dispute resolution provider must notify the Attorney General of the website where its disclosures are posted (and must provide notification of the discontinuation of the use of such website), and the Attorney General is required to include links on its own publicly accessible website.<sup>124</sup>

Maryland varies from both California and Maine in additionally requiring disclosure of the address where a consumer arbitration was conducted.<sup>125</sup>

#### *F. Disclosures by Users of Dispute Resolution Services*

Some proponents of international commercial and investor-state arbitration have pioneered online initiatives that empower users of dispute resolution services to publicize information regarding their experience with international arbitrators and arbitration.<sup>126</sup> For example, the non-profit organization Arbitrator Intelligence solicits arbitral awards from users and posts them online. In addition, Arbitrator Intelligence uses a two-phase Arbitrator Intelligence Questionnaire ("AIQ") to collect both objective

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123. *Id.*; Consent Decree, *Minnesota v. Nat'l Arbitration Forum*, No. 27-CV-07-18550 (Minn. Dist. Ct. July 17, 2009), <http://pubcit.typepad.com/files/nafconsentdecree.pdf>; Deepak Gupta, *Consent Decree in Minnesota v. NAF*, Pub. Citizen (July 20, 2009, 11:38 AM), <http://pubcit.typepad.com/clpblog/2009/07/consent-decree-in-minnesota-v-naf.html> (press release regarding the consent decree).

124. ME. REV. STAT. ANN. tit. 10, § 1394(2) (West 2010).

125. MD. CODE ANN., COM. LAW § 14-3903(a)(11) (West 2011). Maryland also varies from both California and Maine in not requiring disclosures regarding the arbitration of employment-related disputes or the number of times that a non-consumer has been a party in a mediation conducted by the disclosing dispute resolution organization. *Id.* § 14-3903(a)(2), (5).

126. *See, e.g., Contribute an Award*, ARB. INTELLIGENCE, <https://web.archive.org/web/20180630230841/http://www.arbitratorintelligence.org/contribute-award/> (last visited Jan. 13, 2019). The same trend is occurring for international commercial mediation. *See e.g., Find IMI-Certified Professionals*, INT'L MEDIATION INST., <https://imimmediation.org/certified-mediator-search> (last visited Jan. 13, 2019).

information and subjective assessments from users and counsel regarding individual arbitrators' case management (e.g., ordering of interim measures and document production), decision-making (e.g., interpretive methodologies), and timeliness in the issuance of awards.<sup>127</sup> When enough anonymized data has been collected as a result of users' completion of questionnaires, Arbitrator Intelligence intends to publish "AI Reports" regarding individual arbitrators.<sup>128</sup> These reports will be available, for a fee, to users, counsel, institutions, and arbitrators, provided that the profiled arbitrator consents to such publication.<sup>129</sup> The underlying data that Arbitrator Intelligence gathered also will be made available to cooperating arbitral institutions.<sup>130</sup>

Consumer advocates and academics have urged similar initiatives for domestic consumer arbitration. Professor Lisa Amsler, for example, has proposed that one-shot players might increase transparency and improve their experience in consumer arbitration if they are trained to identify key procedural elements and then upload their assessments and other information to an online platform that would be widely accessible—and potentially quite influential in the aggregate (e.g., TripAdvisor).<sup>131</sup> Based in part on suggestions made during a National Roundtable on Consumer

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127. See *FAQs About the AIQ*, ARB. INTELLIGENCE, <https://www.arbitratorintelligence.org/faq/> (last visited Jan. 13, 2019).

128. See *id.* (answering the question "How will information from the AIQs be made available?").

129. See *id.* (answering the question "How does the AIQ ensure that feedback is fair to arbitrators?").

130. See *id.*; see also *About Us*, ARB. INTELLIGENCE, <https://www.arbitratorintelligence.org/about-us> (last visited Jan. 13, 2019); Linda Gharib, *Wolters Kluwer Announces Collaboration with Arbitrator Intelligence*, WOLTERS KLUWER (June 26, 2017), <https://wolterskluwer.com/company/newsroom/news/2017/06/wolters-kluwer-announces-collaboration-with-arbitrator-intelligence.html>.

131. See Amsler, *supra* note 6; see also Alyson Carrel & Alan Boudreau, *Crowdsourcing and Mediation: A New Approach to Social Justice Critiques*, Presentation at ABA Dispute Resolution Section Annual Conference (Apr. 17, 2015) and Association of Conflict Resolution (Mar. 25, 2015), <http://tinyurl.com/crowdsourcing-mediation>; Alyson Carrel & Alan Boudreau, *Crowdsourcing: Can Today's Technology Answer Yesterday's Social Justice Critique of Mediation?* (n.d.) (unpublished manuscript, on file with author) (proposing use of crowdsourcing to bring transparency to mediated settlements, referencing glassdoor.com and others for potential templates, and noting that questions regarding confidentiality and logistics must be resolved); see also Carrie Menkel-Meadow & Robert Dingwall, *Negotiating with Scripts and Playbooks: What to Do When Big Bad Companies Won't Negotiate*, in *THE NEGOTIATOR'S DESK REFERENCE* 717-18 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017).

Arbitration,<sup>132</sup> Professor Tom Stipanowich developed a “Fairness Index” that users similarly could access in order to provide feedback on arbitration services.<sup>133</sup>

There are some particularly notable examples of institutional repeat players’ willingness to cooperate with the publication of information regarding their internal dispute resolution programs. Professor Alan Morrison, for example, has used the annual reports published by the Office of the Independent Administrator—which administers arbitrations between Kaiser Foundation Health Plan, Inc. and its health plan members in California—to assess the fairness of Kaiser Permanente’s mandatory medical malpractice arbitration program.<sup>134</sup> Professor Morrison has called for others to engage in greater in-depth analysis of this program, with access to data beyond what was contained in the annual reports.<sup>135</sup>

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132. See STIPANOWICH ET AL., *supra* note 6; see also Nancy A. Welsh & Lipsky, “Moving the Ball Forward,” *supra* note 7.

133. See Stipanowich, *The Arbitration Fairness Index*, *supra* note 6, at 991-92. See generally Thomas J. Stipanowich, *An “Arbitration Fairness Index”: A Rating System for Consumer and Employment Arbitration Programs*, DISP. RESOL. MAG., Spring 2013, at 30.

134. See Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims Be Fair? The Kaiser Permanente System*, 70 DISP. RESOL. J. 35, 35-36 (2015) (using available data to determine whether this type of mandatory arbitration can be “operated in a manner in which those who must use it to resolve their claims receive a fair hearing and a reasonable opportunity to recover their damages”). These reports include information on the process used to close cases, time to closure, claimants’ win rates, and parties’ and counsel’s assessments of the arbitrators and process. Morrison supplemented his review of the annual reports with interviews with the independent Administrator and Kaiser-Permanente officials. *Id.* Also, it should be noted that Kaiser Permanente developed its current arbitration program following the California Supreme Court’s severe criticism of the prior program in *Engalla v. Permanente Medical Group*, 938 P.2d 903 (Cal. 1997). Morrison, *supra*, at 36; see also Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 134-44 (2009) (describing the design process that led to Kaiser Permanente’s current arbitration program).

135. See Morrison, *supra* note 134, at 59 n.71. Notably, Professor Morrison concluded that Kaiser Permanente’s arbitration system was less expensive for claimants and thus made it more possible to bring small- and medium-size claims, was faster than litigation, permitted claimants to present their cases fully, and produced “reasonably just” outcomes. *Id.* at 59. He added that “[t]he loss of a public trial before a jury is a negative, but whether it outweighs the positives is a question that will not be answered in the same way by everyone.” *Id.*



*G. Proposed Transparency Requirements for ODR*

A last recent development involves online dispute resolution (“ODR”). Increasingly, courts, agencies, and repeat litigants (e.g., insurers, manufacturers, employers) are expressing interest in using ODR to resolve relatively routine, low-dollar disputes. ODR creates the opportunity for collecting and analyzing substantial amounts of data, which can then be used to detect problematic patterns.<sup>136</sup> At the same time, the public is increasingly aware of the dangers presented by involvement with the online world, including the potential for security breaches,<sup>137</sup> victimization as a result of inaccurate information,<sup>138</sup> and unfairness as a result of biased

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136. See Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165, 192 (2017). Rabinovich-Einy and Katsh described data collected and used by British Columbia’s Civil Resolution Tribunal (CRT):

The CRT team constantly seeks feedback from both satisfied and unsatisfied users to improve the process, identify problems, and replicate successful elements. They collect data in a myriad of ways available only because of the CRT’s online nature: active user input given through rating and ranking, open text boxes, ex-post feedback, and analysis of dispute resolution data. Indeed, CRT developers have devoted significant efforts and resources to the development and refinement of categorizations of claims and defenses in order to allow for meaningful use of the data. Such data helps to improve the CRT and the diagnosis phase, and, perhaps more importantly, helps prevent future claims.

As the CRT team has recognized, learning from data and prevention of problems need not be limited to the improvement of the system itself, but could be viewed as a broader goal of the legal system. As use of online systems expands and data is stored and studied more extensively by courts, they will be able to detect, through such indicators as spikes in particular claims, that there is a regulatory gap or a need for better enforcement of existing laws in certain areas. In this way, dispute resolution data collected in courts can be used to prevent future disputes from occurring.

*Id.*

137. See, e.g., Nick Clements, *Equifax’s Enormous Data Breach Just Got Even Bigger*, FORBES (Mar. 5, 2018), <https://www.forbes.com/sites/nickclements/2018/03/05/equifaxs-enormous-data-breach-just-got-even-bigger/#479b18dc53bc>; Reuters, *Target Settles 2013 Hacked Customer Data Breach for \$18.5 Million*, NBC NEWS (May 24, 2017), <https://www.nbcnews.com/business/business-news/target-settles-2013-hacked-customer-data-breach-18-5-million-n764031>.

138. See, e.g., Aaron Klein, *The Real Problem with Credit Reports Is the Astounding Number of Errors*, CNBC (Sept. 27, 2017), <https://www.cnbc.com/2017/09/27/the-real-problem-with-credit-reports-is-the-astounding-number-of-errors-equifax-commentary.html>.

algorithms.<sup>139</sup> Consequently, many ODR advocates are calling for ODR procedures to be made transparent and accountable, with required reporting regarding the number of people using them, their substantive results, users' perceptions of the ODR process's fairness, demographic patterns, and the results of algorithmic audits.<sup>140</sup>

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139. See Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1257 (2008) (discussing the Terrorist Surveillance Program and warning that “unsophisticated algorithms and faulty data” can “generate high rates of false positives” that then “serve as a basis for baseless, stigmatizing criminal investigations”); Anjanette H. Raymond, Emma Arrington Stone Young & Scott J. Shackelford, *Building a Better HAL 9000: Algorithms, the Market, and the Need to Prevent the Engraining of Bias*, 15 NW. J. TECH. & INTELL. PROP. 215, 222-40 (2018) [hereinafter Raymond, *Engraining of Bias*] (including discussion of predictive policing); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485 (2014) [hereinafter Raymond & Shackelford, *Access to Justice*].

140. See, e.g., JOINT TECH. COMM'N, JTC RESOURCE BULLETIN: ODR FOR COURTS 15-16 (version 2.0, Nov. 29, 2017) (“Processes and algorithms that impact decisions should be available for scrutiny.”); Dafna Lavi, *Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes*, 37 U. PA. J. INTL. L. 871, 932-33, 936 (2016) (citing Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 198 (2010)) (discussing trustmarks, with reporting to regulatory agencies for failure to comply with requirements of trustmarks, and online posting of consumers' opinions regarding ODR services); Rabinovich-Einy & Katsh, *supra* note 136, at 211 (calling for transparency in a court-based public online dispute resolution system regarding any use of Big Data for dispute prevention activities and observing that such transparency could serve as a model for private ODR systems); Anjanette H. Raymond, *A Meeting of the Minds: Online Dispute Resolution Regulations Should Be Opportunity Focused*, 16 U.C. DAVIS BUS. L.J. 189, 211, 214 (2016) (calling for a “transparent system” that provides “information to consumers, allowing aggregation of data to reveal contractual discrimination, and lessening information imbalances that erode trust and hinder an open system of justice” as well as a platform that is “monitored with an eye toward eliminating all types of bias and/or undue or improper influence”); Anjanette Raymond & Scott J. Shackelford, *Jury Glasses: Wearable Technology and Its Role in Crowdsourcing Justice*, 17 CARDOZO J. CONFLICT RESOL. 115, 148 (2015) (arguing for the creation of a platform auditor that tracks and analyzes outcomes and checks coding and presentation for intentional and unintentional influences contained within the system); Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WIS. L. REV. 615, 634; Nancy A. Welsh, ODR: A Time for Celebration and the Embrace of Procedural Safeguards, Address Before the 15th ODR Conference (May 23, 2016), <http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr> (calling for algorithmic audits and alternative forums for those who do not have access to, or facility with, online options); see also Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 128–29 (2015); Noam Ebner & John Zeleznikow,

The example of federal and state courts, as well as the developments involving quasi-public and private organizations and self-help initiatives as described *supra*, strongly suggest a trend toward some degree of transparency—what this Article will term “measured transparency”—in order to assure the integrity and trustworthiness of “private” dispute resolution processes. It is at this point, then, that this Article turns to dispute resolution neutrals’ ethical obligations and their relationship with transparency.

*IV. Dispute Resolution Ethics and Transparency: Focus on the Model Standards of Conduct for Mediators*

In light of the Article’s primary focus to this point on the value of transparency in connection with the use and outcomes of mandatory pre-dispute consumer and employment arbitration, it would be reasonable to turn now to the Code of Ethics for Arbitrators in Commercial Disputes. After examining the ethical obligations of arbitrators, the Article might then begin to consider other dispute resolution neutrals’ ethics—e.g., mediators,<sup>141</sup> dispute resolution organizations,<sup>142</sup> ODR providers,<sup>143</sup> ombudspersons,<sup>144</sup> and even state<sup>145</sup> and federal judges.<sup>146</sup>

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*Fairness, Trust and Security in Online Dispute Resolution*, 36 *HAMLIN J. PUB. L. & POL’Y* 143 (2015); Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for Online Dispute Resolution*, 32 *NEGOT. J.* 297 (2016); Menkel-Meadow & Dingwall, *supra* note 131; Orna Rabinovich-Einy & Ethan Katsh, *Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment*, 1 *INT’L J. ONLINE DISP. RESOL.* 5, 28 (2014); Raymond & Shackelford, *Access to Justice*, *supra* note 139; SCHMITZ & RULE, *supra* note 84; Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating “Haves” from “Have-Nots,”* 2014 *MICH. ST. L. REV.* 1411; Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 *INTL. J. ON ONLINE DISP. RESOL.* 12, 25 (2016) (calling for the accountability as one of a proposed set of ethical principles for online dispute resolution). These calls for transparency join those made by information privacy scholars who point to technology’s challenge to the efficacy of current procedural due process jurisprudence. See Danielle Keats Citron, *Technological Due Process*, 85 *WASH. U. L. REV.* 1249 (2008).

141. See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS PMBL. (AM. ARBITRATION ASS’N, AM. BAR ASS’N, AND ASS’N FOR CONFLICT RESOLUTION 2005) [hereinafter MODEL STANDARDS OF CONDUCT].

142. See generally PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, *supra* note 121.

143. See generally *Ethical Principles for Online Dispute Resolution*, ODR.INFO, <http://odr.info/ethics-and-odr/> (last visited Nov. 30, 2018).

144. See generally *IOA Code of Ethics*, INT’L OMBUDSMAN ASS’N (rev. Jan. 2007), [http://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/Code\\_Ethics\\_1-07.pdf](http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Code_Ethics_1-07.pdf).

Because there are now discussions regarding potential revisions to the Model Standards of Conduct for Mediators, however, the Article will turn at this point to the ethical obligations of mediators. As noted previously, the use of mediation is mimicking arbitration in key respects. Mandatory mediation is most frequently associated with courts, but private contracts of adhesion increasingly contain mandatory pre-dispute mediation clauses. Thus, like consumer and employment arbitration, mediation is imposed upon parties, and many commentators have raised concerns over the years about the fairness of the process for those who are less powerful.<sup>147</sup> Most

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145. See generally MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2018).

146. See generally CODE OF CONDUCT FOR UNITED STATES JUDGES (U.S. COURTS 2018). It is worth noting that judges and lawyers might also reasonably be expected to support transparency as a means to protect the integrity of the *judicial* system. However, this is not the case. Indeed, it is striking how many lawyers opt out of the judicial system and into arbitration for disputes with their clients over fees or malpractice. Neither the ABA Model Rules of Professional Conduct nor ABA ethics opinions require any data or general transparency regarding the extent of this practice. Rather, the ABA requires only that lawyers make disclosures to their clients regarding the arbitration provisions contained in retainer agreements, gain the clients' informed consent, and provide for the availability of common law or statutory remedies. See *Feldman v. Davis*, 53 So.3d 1132, 1136-37 (Fla. Dist. Ct. App. 2011); Brian Cressman, Comment, *Bezio v. Draeger: A Missed Opportunity for a Doctrinal Solution to the Jurisdictional Split as to the Arbitrability of Legal Malpractice Claims*, 6 Y.B. ON ARB. & MEDIATION 359 (2014); Terese Schireson, Comment, *The Ethical Lawyer-Client Arbitration Clause*, 87 TEMP. L. REV. 547 (2015); Chrissy L. Schwensen, Case Note, *Arbitration Clauses in Fee Retainer Agreements*, 3 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 330 (2013) (surveying state and ABA ethics opinions, provisions); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02-425 (2002) (finding arbitration clause permissible if client is fully apprised of advantages and disadvantages to permit informed decision and clause does not insulate lawyer from liability or limit liability to which she would otherwise be exposed under common or statutory law); Prof'l Ethics, Comm. for the State Bar of Tex., Op. No. 586 (2008) (requiring informed consent, requiring clause to be fair and reasonable to client; referencing Rule 1.08, Comment 2); see also Susan Sabb Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033 (2017).

147. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010); Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theory*, 54 J. LEGAL EDUC. 49 (2004); Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996). In 2017, *SMU Law Review* published a two-part symposium issue reconsidering these critiques of ADR. The issue included articles by Professors Delgado, Michael Green, Carol Izumi, Andrea

recently, legislative mandates to participate in foreclosure mediation have triggered particular attention to these concerns.<sup>148</sup>

Even though there is currently no federal statute<sup>149</sup> providing for narrow and deferential judicial review or expedited judicial enforcement of mediated settlement agreements, traditional legal research<sup>150</sup> and available metrics<sup>151</sup> suggest that federal and state courts tend to treat mediated settlement agreements as “super-contracts”<sup>152</sup> with nearly automatic entitlement to judicial support and enforcement. An international

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Schneider, Nancy Welsh, Eric Yamamoto, Deborah Hensler, Pat Chew, Sarah Cole, Charles Craver and Lisa Blomgren Amsler, among others. Gilat Bachar and Professor Deborah Hensler undertook to identify all of the empirical efforts to test Professor Delgado’s hypothesis that mediation (and arbitration) create systematic differences in dispute resolution outcomes by gender, race, ethnicity, or socio-economic status. Ultimately, they found the results to be contrary and inconclusive, and they called for such research to be undertaken. Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don’t Know*, 70 SMU L. REV. 817, 829-30 (2017).

148. See Lydia Nussbaum, *ADR’s Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1946 n.242 (2013) [hereinafter Nussbaum, *ADR’s Place*] (citing Admin. Office of the Courts, Supreme Court of Nev., Foreclosure Mediation Program Beneficiary Compliance Outcomes (2012), <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/8318> [hereinafter Foreclosure Mediation Program] (detailing the extent to which the six primary loan servicers in Nevada (Bank of America, Wells Fargo, JP Morgan Chase, Ally/GMAC, US Bank, CitiGroup) and others complied with statutory requirements of the state foreclosure mediation program, such as attendance at mediation, production of required documents, authority to negotiate, and good faith participation)); Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, 2016 UTAH L. REV. 361, 412 [hereinafter Nussbaum, *Mediation as Regulation*] (pointing out that the foreclosure crisis ultimately required the creation of the Consumer Financial Protection Bureau and legal action by the U.S. Department of Justice and the state attorneys general from forty-nine states and the District of Columbia, and observing that “policymakers need to be aware that, while it may appear more politically expedient to require parties to mediate and then shape their behavior within the context of mediation, direct government intervention may be required to achieve the intended policy outcome”).

149. In contrast, the Federal Arbitration Act provides very limited grounds for vacating an arbitral award, and the courts have developed a deferential standard of review. See Welsh, *Mandatory Predispute Consumer Arbitration*, *supra* note 6, at 206.

150. See Welsh, *Thinning Vision*, *supra* note 4, at 59-78.

151. See Coben & Thompson, *supra* note 4, at 74.

152. See LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 483 (5th ed. 2014); see also Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247, 269 (2017) (describing, in the medical malpractice context, how some states have “deputiz[ed] screening panels to formalize settlement agreements and render them binding so parties can skip going to court for a final judgment and order”).

convention to formalize expedited enforcement of mediated settlement agreements, meanwhile, has recently been adopted by the United Nations General Assembly.<sup>153</sup>

All of these developments indicate that establishing an appropriate degree of transparency is relevant for mediation.<sup>154</sup>

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153. The United Nations Convention on International Settlement Agreements Resulting from Mediation will be known as the "Singapore Convention on Mediation." See Press Release, U.N. Info. Serv., General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation (Dec. 21, 2018), <http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html>. The Singapore Convention is modeled upon the New York Convention, which requires signatory nations' courts to recognize and enforce international commercial arbitration awards with only narrow grounds for the denial of such enforcement. Article 1 of the Singapore Convention specifically excludes employment, family, and consumer matters. See Comm'n on Int'l Trade Law, Rep. on the Work of Its Fifty-First Session, U.N. Doc. A/73/496, at 11, <https://undocs.org/en/A/73/496>. The UNCITRAL Working Group's documents regarding the Singapore Convention are available at *Working Group II: 2000 to Present: Arbitration and Conciliation / Dispute Settlement*, UNCITRAL, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Oct. 31, 2018). See also Hal Abramson, *New Singapore Convention on Cross-Border Mediated Settlements: Key Choices*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* (Catharine Titi & Katia FachGomez eds., Oxford University Press, forthcoming 2019); S. I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973 (2016); Ellen E. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, DISP. RESOL. MAG., Fall 2015, at 32; Luke Nottage, *In/formalization and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia*, in *FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION*, *supra* note 67, at 211 (pointing to lack of expedited enforceability as one reason for mediation's lack of success in moving into the international commercial arbitration or investor state arbitration context; also as a reason that elite law firms continue to dominate the international dispute resolution world).

154. In some respects, mediation presents a more difficult case than arbitration because the process promises confidentiality in order to encourage the candor and free flow of information needed to arrive at settlements. Indeed, Professor Lydia Nussbaum has pointed out the conflict that can exist between mediation's promise of confidentiality and state legislatures' policy goals in mandating mediation, particularly in the foreclosure context:

[M]aking decisions about policy reform requires access to information, but the mediation process can obscure information with its confidentiality protections and individualized approach to dispute resolution. Therefore, legislatures should spend time considering whether "nudging" more disputes to resolve out of the public eye, erodes transparency and undermines the state's interest in protecting consumers. Will families be able to assess the safety practices of an adult care home if previous complaints were resolved in confidential mediation

Therefore, this Article now turns to the Model Standards of Conduct for Mediators (“Model Standards”) originally adopted by the American Bar Association’s Section of Dispute Resolution, American Arbitration Association, and Society of Professionals in Dispute Resolution (“SPIDR”) in 1994, and then revised and adopted as revised by the American Bar Association, AAA, and ACR (the successor to SPIDR) in 2005. The Model Standards have been very influential. Most courts, bar associations, and other organizations in the United States have looked to the Model Standards as templates for ethical requirements for their mediators.<sup>155</sup>

The Model Standards certainly invoke the importance of gaining and retaining the public’s trust and protecting the integrity of the mediation process. The Preamble, for example, quickly establishes that one of the Standards’ primary goals is “to promote public confidence in mediation as a process for resolving disputes.”<sup>156</sup> Neither here nor elsewhere, however, do the Model Standards provide for any duty actually owed by mediators to

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sessions? How can consumer advocates identify patterns of misconduct by loan servicers or telecommunications carriers if individual claims are resolved quietly, one at a time? Whether the state should relinquish its power over dispute resolution outcomes, and whether parties, often unequally matched, can actually regulate each other in settlement negotiations, are questions hotly debated by scholars. Policymakers should be thoughtful about what kinds of disputes may have significance to the public. Some existing proposals for preserving public information while encouraging settlement include requiring parties to report the outcome of settlements negotiated in mediation in a national database or for the parties themselves to make mediated settlement terms publically [sic] available.

Nussbaum, *Mediation as Regulation*, *supra* note 148, at 412-13. Others have pointed to the confidentiality offered by mediation as a means to avoid the increasing transparency of arbitration. *See, e.g.*, Shahla F. Ali & Odysseas G. Repousis, *Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?*, 45 *DENV. J. INT’L L. & POL’Y* 225, 228-29 (2017) (“If this treaty [for the enforcement of mediated settlement agreements] were to be concluded, would it mean that investor-state mediation would not only be a convenient method to avoid the high levels of transparency now paradigmatic to investor-state arbitration, but would also enjoy high levels of international enforceability?”).

155. *See* RISKIN ET AL., *supra* note 152, at 401. There are exceptions, of course. In Florida, for example, the ethics provisions regulating court-certified mediators (as well as mediators handling court-connected cases) preceded the 1994 Model Standards.

156. MODEL STANDARDS OF CONDUCT, *supra* note 141, at pmbll..

demonstrate to the public on a systemic basis that the mediation process is deserving of trust and confidence.<sup>157</sup>

Meanwhile, the Model Standards frequently reference mediators' duty to protect the integrity of the mediation process in individual cases. For example, Standard III, "Conflicts of Interest," provides that while a mediator is required to disclose conflicts of interest, she is also required to withdraw from or decline to proceed with a mediation when the conflict "might reasonably be viewed as undermining the integrity of mediation."<sup>158</sup> Also pursuant to Standard III, a mediator is required to avoid establishing a relationship with a mediation participant if "that would raise questions about the integrity of the mediation."<sup>159</sup> Standard VII, "Advertising and Solicitation," provides that a mediator's solicitations for business must be constrained in order to avoid "giv[ing] the appearance of partiality for or against a party or otherwise undermin[ing] the integrity of the process."<sup>160</sup> In addition to focusing on individual cases rather than systemic needs, these standards consistently establish what a mediator must *not* do. A mediator must *not* proceed to serve as a mediator if a conflict of interest exists. A mediator must *not* establish a relationship with a mediation participant. A mediator must *not* engage in troublesome business solicitations. All of these prohibitions exist to protect the integrity of the mediation process. No standard referencing integrity establishes an *affirmative* requirement, however, such as taking action to support reasonable—or "measured"<sup>161</sup>—transparency regarding the use or outcomes of the mediation process.<sup>162</sup>

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157. See Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 MARQ. L. REV. 81, 95-104 (2016) (urging that the Model Standards should be revised to make it clear that mediators owe a duty to the public, not just the parties); see also Alyson Carrel & Lin Adrian, *Regulating Mediator Practice*, DISP. RESOL. MAG., Fall 2017, at 21, 23 (distinguishing the Model Standards from the mediation statutes and rules developed in Florida; noting that the Florida rules "don't just discuss promoting public confidence as an aspirational goal but explicitly state that these rules are meant to 'ensure protection of the participants in mediation and the public.'").

158. MODEL STANDARDS OF CONDUCT, *supra* note 141, at Standard III.E. Christopher Honeyman has chronicled situational and structural biases in mediation that actually are endemic to the process—e.g., a situational bias toward the interests of the party that provided or hired the mediator, a structural bias toward moderates as compared to radicals—that may be best resolved by disclosure. See Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 MO. J. DISP. RESOL. 141, 142-43, 146.

159. MODEL STANDARDS OF CONDUCT, *supra* note 141, at Standard III.F.

160. *Id.* at Standard VII.B.

161. The term "measured transparency" comes from Dispute Resolution Data. See *What Does the Data Show?*, *supra* note 96 ("The use of data in international commercial



Standards IV, “Competence,” and VI, “Quality of the Process,” provide for some affirmative ethical obligations regarding the assurance of quality, but their scope is limited to the parties participating in a mediation. For example, Standard IV notes that “[a] person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively” and urges that a mediator should both attend relevant educational programs and make available to the parties information that is “relevant to the mediator’s training, education, experience and approach in conducting a mediation.”<sup>163</sup> Standard VI provides that a mediator must conduct a mediation “in a manner that promotes . . . party participation [and] procedural fairness.”<sup>164</sup> If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, then the mediator should explore the circumstances and potential accommodations, modifications, or adjustments that would make possible the party’s capacity to comprehend, participate, and exercise self-determination. These actions certainly are consistent with a mediator’s obligation to protect the integrity of the mediation process, but it is noteworthy that their reach is entirely limited to the mediator’s interaction with the parties participating in mediation.

Standard IX, “Advancement of Mediation Practice,” is the only standard that begins to hint at the value of monitoring mediation and providing information about the process to the larger public. This standard provides that a mediator *should* “act in a manner that advances the practice of

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arbitrations and mediations, measured transparency, and the opportunity for new scholarly research has arrived!”).

162. Interestingly, even though Standard IV, Competence, does not specifically reference the need to consider the public and protect the integrity of the mediation process, the Reporter’s Notes observe:

The Model Standards (September 2005) retains the commitment expressed in the 1994 Version that the Standards not create artificial or arbitrary barriers to serve the public as a mediator. But to promote public confidence in the integrity and usefulness of the process and to protect the members of the public, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possesses the basic competency to assist.

Joseph B. Stulberg, *Reporter’s Notes*, JOINT COMM. FOR MODEL STANDARDS OF CONDUCT FOR MEDIATORS 14 (Sept. 9, 2005), [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/mscm\\_reporternotes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/mscm_reporternotes.authcheckdam.pdf) [hereinafter *Reporter’s Notes*].

163. MODEL STANDARDS OF CONDUCT, *supra* note 141, at Standard IV.A.

164. *Id.* at Standard VI.A.

mediation” and *may* promote the standard by “[p]articipating in research when given the opportunity, including obtaining participant feedback when appropriate.”<sup>165</sup> Standard V, “Confidentiality,” however, cautions that “[i]f a mediator participates in . . . research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.”<sup>166</sup>

Interestingly, in 2001, the American Bar Association’s House of Delegates adopted standards for the mediation of family and divorce matters that included an appendix with special policy considerations for the state regulation of family mediators and court-affiliated programs. Two of these special considerations make clear that confidentiality could and should co-exist with sufficient transparency to ensure consumer protection. Specifically, the Appendix provides:

. . . Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators. In developing these standards and qualifications, regulators should consult with appropriate professional groups, including professional associations of family mediators.

. . . .

. . . Confidentiality should not be construed to limit or prohibit the effective monitoring, research or evaluation of mediation programs by responsible individuals or academic institutions provided that no identifying information about any person involved in the mediation is disclosed without their prior written consent. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the participants, to individual case files, observations of live mediations, and interviews with participants.<sup>167</sup>

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165. *Id.* at Standard IX.

166. *Id.* at Standard V.A.

167. See Ass’n of Family & Conciliation Courts, *Model Standards of Practice for Family and Divorce Mediation*, MEDiate, Standard XIII, <https://www.mediate.com/articles/afccstds.cfm> (last visited Dec. 11, 2018) (adopted by the American Bar Association, Association of Family and Conciliation Courts, Association for Conflict Resolution and Mediate.com) [hereinafter Ass’n of Family & Conciliation Courts, *Model Standards of*

The failure of the subsequently adopted 2005 Model Standards to include this sort of clear endorsement of measured transparency for court-connected mediation is both noteworthy and confusing. The International Mediation Institute (IMI) Code of Conduct provides another model for encouraging accountability. Standard 1.3.2 makes mediators' solicitation of parties' feedback mandatory.<sup>168</sup>

There have been efforts to encourage reporting and greater transparency regarding mediation. Not long after the adoption of the 2005 Standards, for example, the ABA Section of Dispute Resolution's Research and Statistics Task Force, chaired by Professor Lisa Bingham (now Amsler), developed a list of key data elements that every court should collect on mediation programs.<sup>169</sup> Resolution Systems Institute (RSI), in collaboration with the ABA Section of Dispute Resolution, undertook a multi-year initiative to develop model post-mediation questionnaires<sup>170</sup> in order to increase public knowledge regarding the incidence and effects of court-connected mediation. In 2012, the ABA Section of Dispute Resolution's Task Force on Mediator Credentialing recommended that mediator-credentialing organizations provide accessible, transparent systems to register

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*Practice*]; *Model Standards of Practice for Family and Divorce Mediation*, AM. BAR ASS'N (Nov. 16, 2017), [https://www.americanbar.org/groups/child\\_law/resources/attorneys/model\\_standards\\_ofpracticeforfamiliesindivorcemediation.html](https://www.americanbar.org/groups/child_law/resources/attorneys/model_standards_ofpracticeforfamiliesindivorcemediation.html) (approving these Model Standards); see also Margaret Shaw et al., *National Standards for Court-Connected Mediation Programs*, 31 FAMILY & CONCILIATION CTS. REV. 156 (1993) (proposing evaluation and grievance procedures for court mediation programs).

168. Standard 1.3.2, Appointment, provides that "Mediators shall advise parties that they will be invited to offer the Mediator feedback on the process at any stage, including offering written feedback at the conclusion of the mediation," and Standard 4.4, Feedback, provides:

Unless inappropriate in the circumstances, Mediators will, at the conclusion of a mediation, invite the parties and advisers and any co-mediators or assistant mediators, to complete an IMI Feedback Request Form and return it to the Mediator or to the Reviewer indicated by the Mediator in his/her IMI Profile to assist in the preparation of the Mediator's Feedback Digest.

*Code of Professional Conduct*, INT'L MEDIATION INST., §§ 1.3.2, 4.4, <https://www.imimediation.org/practitioners/code-professional-conduct/> (last visited Dec. 11, 2018).

169. See Memorandum from Section of Dispute Resolution Task Force on Research and Statistics, Am. Bar Ass'n, to Court Adm'rs & ADR Program Adm'rs, Top Ten Pieces of Information Courts Should Collect on ADR (June 9, 2006), [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/cle\\_and\\_mtg\\_planning\\_board/teleconferences/2012-2013/May\\_2013/topten.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/cle_and_mtg_planning_board/teleconferences/2012-2013/May_2013/topten.authcheckdam.pdf).

170. See *Model Surveys*, RESOL. SYS. INST., <https://www.aboutrsi.org/model-surveys> (last visited Dec. 11, 2018).

complaints, and a majority of the task force also recommended a process to monitor the performance of credentialed mediators.<sup>171</sup> Over the years, additional efforts have been undertaken by the ABA Section of Dispute Resolution's Court ADR Committee, the Section's Mediation Committee, various law schools, and university-related centers to encourage the collection of feedback and standardized data.

Notably, some individual court-connected and non-profit community mediation programs have collected data and undertaken evaluation to improve their services, sometimes on their own initiative, and other times as a result of funders' requirements.<sup>172</sup> However, it is primarily the Model Standards' muted endorsement of transparency and accountability as expressed in the combination of Standards XI and IX that has played out in practice. Most mediators and commercial dispute resolution organizations have expressed relatively little interest in participating in evaluation and research.<sup>173</sup> In general, therefore, the efforts to encourage data collection, evaluation, and transparency have had little effect.

This paucity of data has mattered. In 2012, the California Legislature tasked the California Law Revision Commission with determining whether a potential revision to the Evidence Code, creating an exception to

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171. See ABA SECTION OF DISP. RESOL. TASK FORCE ON MEDIATOR CREDENTIALING, FINAL REPORT (Aug. 2012); see also PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, *supra* note 121, at 7 (Principle 1, Quality and Competence of Services) ("The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary. . . . The ADR Provider Organization's responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals."). Principle VI also provides for complaint and grievance systems.

172. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 927 (2008) (lauding those court-connected mediation programs that collect and use evaluation data); see also ADMIN. OFFICE OF THE CTS., NEB. OFFICE OF DISPUTE RESOLUTION, 2016/2017 ANNUAL CASELOAD REPORT (n.d.), <https://supremecourt.nebraska.gov/sites/default/files/2016-2017-ODR-Annual-Report.pdf> (reporting on case volume, referral sources and case dispositions of mediations handled by Office of Dispute Resolution-approved mediation centers).

173. See Christopher Honeyman, Barbara McAdoo & Nancy A. Welsh, *Here There Be Monsters: At the Edge of the Map of Conflict Resolution*, in THE CONFLICT RESOLUTION PRACTITIONER: MONSTERS IN THE WATERS: FEAR AND SUSPICION DIVIDE THE FIELD OF CONFLICT RESOLUTION 1 (Office of Dispute Resolution, Ga. Supreme Court, 2001) (monograph) (describing challenges in collaborations between researchers and dispute resolution providers to conduct evaluations and empirical research).

mediation confidentiality, might negatively affect court-connected mediation. The Commission conducted a multi-jurisdictional, comprehensive review of court-connected mediation and reported: “It is clear that mediation is well-established in California. There are many mediators, lots of mediation programs, and numerous mediations. *Nonetheless, precise statistical information appears to be scarce.*”<sup>174</sup> In considering the lack of data on court-connected mediation in California, the Commission observed:

[E]mpirical research on mediation issues involves significant challenges. The effectiveness of mediation could be measured in a variety of ways; there is no standardized, broadly accepted, and readily administered measuring technique. Collecting data on mediation programs and analyzing such data is . . . expensive, slow, time-consuming, and hard to finance when state budgets are tight and data collection would divert funds and resources away from direct provision of services to the public. In addition, “sound empirical data is necessarily hard to obtain given the confidential nature of most mediation.” In fact, it is even hard to learn how many mediations occur.<sup>175</sup>

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174. CAL. LAW REVISION COMM'N, RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT (PRE-PRINT RECOMMENDATION) 105 (Dec. 2017) (emphasis added) (citing the online information provided by California counties regarding their court-connected ADR programs). Elsewhere, the Commission notes that “it is even hard to learn how many mediations occur.” *Id.* at 92.

175. *Id.* at 91-92 (citing Gregory Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN. ST. L. REV. 277, 302-04 (2003) (“I have found little in the way of measurement of dispute resolution processes, with the notable exception of the ex post participant satisfaction surveys that have become so common. . . . Efforts at standardization and consistency in the collection and reporting of longitudinal data are desperately needed.”); Bobbi McAdoo, *All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 430 (2007) (“In this era of severe budget constraint encompassing the fiscal environment in state and federal government, great creativity will be needed to generate effective systems to monitor and evaluate ADR programs.”); Ignazio J. Ruvolo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 41 SAN DIEGO L. REV. 177, 188 n.23 (2005) (“[S]ome programs have been required to limit the resources devoted to the collection of data, thereby making the process of drawing conclusions about the reasons for programmatic success somewhat more conjectural than might be desirable.”); Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise, and Fear*, 17 HARV. NEGOT. L. REV. 97, 102-03 (2012) (California judicial officers were

Rather than transparency, procedural fairness, or self-determination, confidentiality arguably has emerged as the defining feature of mediation.<sup>176</sup> At times, mediators' commitment to confidentiality—exacerbated by legislatures' and courts' interpretation and application of the mediation privilege—has even demonstrated the potential to enable bad behavior by parties and lawyers in mediation.<sup>177</sup>

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surveyed on settlement practices in 2000-2004, but results were published in 2012); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 250; see also Coben & Thompson, *supra* note 4, at 52 n.18 (“Since many mediations are private matters, it is difficult to determine the number of mediations conducted in any jurisdiction.”); Jones, *supra*, at 283 (“Given the importance of process integrity and confidentiality, how can we measure the performance of alternative dispute resolution programs, particularly those that are connected to our formal systems of justice?”); *id.* at 303 (“We do not even have a good idea about how many mediations are conducted each year.”); Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 KAN. J.L. & PUB. POL’Y 351, 354 (2003) (“[M]uch of the ADR that takes place is never reported.”).

The Commission also noted that:

In 2003, an ABA task force developed a list of data fields the courts could use to determine what ADR data to capture. “The hope [was] that with more similar data collection across court systems, there [would] be more ability to discern the impact of ADR on the justice system as a whole.”

CAL. LAW REVISION COMM’N, *supra* note 174, at 92 n.510 (quoting McAdoo, *supra*, at 428 n.270). The Commission also cited Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 592 n.158 (2008), and observed that “[i]t is not clear to the Commission whether the ABA effort has had much impact; as best we can tell from extensive reading in the area, the measurement problem persists.” CAL. LAW REVISION COMM’N, *supra* note 174, at 92 n.510. The Commission further observed that “[i]n California, the Judicial Council similarly prepared a model survey for trial courts to use in collecting ADR data. The Commission does not have information on how extensively the trial courts have used the model survey.” *Id.*

The Commission also noted: “Long-term follow-up (such as checking whether a settlement proves durable) is particularly prohibitive.” *Id.* at 92 n.511 (citing Lynn Kerbeshian, *ADR: To Be Or . . . ?*, 70 N.D. L. REV. 381, 400 (1994) (“[L]ong-term follow-up is nonexistent.”)).

176. See Resnik, *The Contingency of Openness*, *supra* note 2, at 1683-85 (reporting that research regarding courts’ rules revealed that, “to the extent rules address the public or third parties, the purpose is generally to ensure confidentiality. As currently practiced, ADR makes most of its processes and outcomes inaccessible. Even as ADR takes place *inside* courthouses, it is generally *outside* the public purview and it displaces public adjudication.”).

177. See Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 14-18 (2011).

However, there *are* examples of courts and legislatures requiring confidentiality to co-exist with measured transparency in order to promote accountability and public trust in the integrity and quality of mediation. Perhaps the most notable example involves foreclosure mediation, marked by significant power disparities between repeat-player mortgage holders (i.e., banks, loan servicers) on one hand and unsophisticated homeowners on the other hand.<sup>178</sup> In this context, many states have chosen to require mediator reports regarding the achievement of settlement, the terms of such agreements, and parties' compliance with the program's requirements (e.g., authority to settle, document provision, timeliness, etc.).<sup>179</sup> Some states have then made certain information public, while protecting confidentiality in individual cases.<sup>180</sup> The Nevada Supreme Court, for example, decided to "issue[] a report detailing lender compliance with the program's statutory requirements," including attendance at mediation, production of required documents, authority to negotiate, and good-faith participation.<sup>181</sup> Other states have published aggregate information regarding foreclosure mediation settlement rates and the types of outcomes achieved.<sup>182</sup> There have been calls for foreclosure mediation programs around the country to collect consistent metrics in order to permit cross-jurisdictional evaluation

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178. See Nussbaum, *ADR's Place*, *supra* note 148, at 1889, 1893 (pointing out how the entrance of new players in the mortgage market, with different incentives, undermined the effectiveness of the procedural safeguards that had existed in the foreclosure process); Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 52 (2017) (discussing the stress likely experienced by borrowers in foreclosure mediation).

179. See Alan M. White, *Foreclosure Diversion and Mediation in the States*, 33 GA. ST. U. L. REV. 411, 443-50 (2017) (discussing various states' reporting requirements for foreclosure mediation, as well as the reporting provided for in "foreclosure resolutions" pursuant to the provisions of the Uniform Home Foreclosure Procedures Act, and their interaction with the confidentiality protections of the Uniform Mediation Act).

180. See Nussbaum, *ADR's Place*, *supra* note 148, at 1936-37, 1950-51.

181. *Id.* at 1946 (citing Foreclosure Mediation Program, *supra* note 148 (detailing the extent to which the six primary loan servicers in Nevada (Bank of America, Wells Fargo, JP Morgan Chase, Ally/GMAC, US Bank, CitiGroup) and others complied with statutory requirements of the state foreclosure mediation program)).

182. See *id.* at 1951; see, e.g., Mónica Tabales Maldonado & Alberto Tabales Maldonado, *Compulsory Mediation in Cases of Mortgage Execution: Origin, Effect and Interrelation with the Loss Mitigation Process*, 9 UNIV. P.R. BUS. L.J. 36, 46 (2018), 9 No. 1 UPRBLJ 36 (Westlaw) (English translation of Spanish-language title).

and the development of best practices.<sup>183</sup> There have not been calls for an end to the current level of transparency.

It is therefore time for the Model Standards to acknowledge that in certain contexts—i.e., when mediation is imposed by a court, legislature, or contract of adhesion, and mediation’s outcomes are granted expedited enforcement, with scant judicial review—there is an ethical obligation to support measured transparency.

#### *V. Options for the Recognition of an Ethical Obligation to Support Measured Transparency*

At this point, it appears that there are at least three different options for acknowledging a duty to the public and the value of transparency.

##### *A. Revision of the Current Model Standards*

The first, most obvious option is to revise the current Model Standards. Many years have passed since the last revision, and mediation practice has inevitably evolved. As noted *supra*, revision of the Model Standards has already been proposed and is being considered. This revision could be made as part of a larger package.

Standard IX, “Advancement of Mediation Practice,” already acknowledges and provides some support for mediators’ role in developing knowledge regarding the practice of mediation in order to advance its quality. This standard could be revised—to recognize a duty to the public and to affirm the value of measured transparency—as follows:

A mediator ~~should~~ *shall* act in a manner that advances the practice of mediation *and public confidence in it*. A mediator promotes this Standard by engaging in some or all of the following:

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183. See Nussbaum, *ADR’s Place*, *supra* note 148, at 1950-51 (citing MELANCA CLARK & DANIEL OLMOS, U.S. DEP’T OF JUSTICE, FORECLOSURE MEDIATION: EMERGING RESEARCH AND EVALUATION PRACTICES (2011), <http://www.justice.gov/atj/foreclosure-mediation.pdf>) (noting recommendations of a working group convened by the U.S. Department of Justice to permit evaluation); see also Jennifer Shack & Hanna Kaufman, *Promoting Access to Justice: Applying Lessons Learned from Foreclosure Mediation*, DISP. RESOL. MAG., Spring 2016, at 16 (observing the importance of collecting information in order to monitor the effectiveness of the foreclosure mediation program); Adam Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275, 2281-88 (2017) (describing how anonymous information from bellwether mediations were used to achieve a global settlement).



1. Fostering diversity within the field of mediation.
2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. *Supporting and complying with reporting requirements that assist the public in developing an improved understanding of, and appreciation for, mediation and its outcomes while also protecting the anonymity of the parties and abiding by their reasonable expectations regarding confidentiality.*
6. Assisting newer mediators through training, mentoring and networking.

Revision of the Model Standards will require cooperation from the three organizations that adopted the 2005 version—the ABA, AAA, and ACR. That alone suggests one of the most significant challenges posed by this option. Many within these organizations see no need for revisions to the Model Standards. In addition, in the thirteen years since the adoption of the 2005 Model Standards, the number of mediators and mediation organizations has mushroomed. At least some of these individuals and organizations will want to be consulted as part of any initiative to revise the Model Standards. These additional voices and viewpoints will make the revision process even more complex.

Further, as noted *supra*, many courts, agencies, and organizations have relied upon the 1994 and 2005 Model Standards as the templates for their own ethical requirements, and they may resist revisiting them. In addition, many mediators are unlikely to perceive a sufficient need for such wholesale revisions. Indeed, some commentators have already expressed such views.<sup>184</sup>

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184. See Ty Holt, Judith Meyer, Susan Podziba & Sharon Press, *On Professional Practice*, DISP. RESOL. MAG., Fall 2017, at 35.

Revision of the current Model Standards may represent the best option in an ideal world, but it would present very real logistical and political challenges.

*B. The Addition of Commentary to the Current Model Standards*

Another option is to supplement the current Model Standards with Explanatory Comments, as is done in other contexts.<sup>185</sup> Such Explanatory Comments could consider the application of various standards to mediation, particularly when the process is imposed upon people by the courts or pursuant to mandatory pre-dispute mediation clauses in contracts of adhesion. As this Article has suggested, the imposition of mediation, accompanied by de facto limits on judicial review and expedited judicial enforcement, could trigger a second and more demanding interpretation of the Preamble's reference to "public confidence in mediation," various standards' declaration of the importance of protecting the integrity and quality of the process, and the provisions of Standard IX, "Advancement of Mediation Practice."

The key question with this option is whether an Explanatory Comment will have any meaningful effect. The ABA Section of Dispute Resolution's Committee on Mediator Ethical Guidance produces advisory opinions on the application of the Model Standards, with a similar goal of influencing practice while avoiding the logistical and political challenges of revising the black letter. The Committee on Mediator Ethical Guidance issued its first advisory opinion on August 6, 2007, and has continued to issue advisory opinions.<sup>186</sup> Although there are occasional references to these opinions,<sup>187</sup> it is not clear that they have had a significant effect on mediation practice.

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185. See Memorandum from Samuel Jackson to ABA Section of Dispute Resolution Council (on file with author).

186. See *Committee on Mediator Ethical Guidance*, AM. BAR ASS'N, <https://web.archive.org/web/20160701050402/http://apps.americanbar.org/dch/committee.cfm?com=DR018600&edit=1> (last visited Jan 13, 2019).

187. See, e.g., Robert Kirkman Collins, *The Scrivener's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, 17 CARDOZO J. CONFLICT RESOL. 691, 701 (2016) (regarding mediators' drafting of settlement agreements); Sharon Press & Paul M. Lurie, *Protecting Self-Determination in Mediation*, GPSOLO MAG., July/Aug. 2014, 74, 75 (recommending that mediators turn to the Committee for advice on the effect of evaluation on self-determination).

*C. The Creation of Customized Standards for “Imposed Mediation”*

Although the Model Standards purport to apply to all forms of mediation, there are also customized ethical standards that have been developed for particular areas of mediation practice. According to the Reporter’s Notes, the joint committee that developed the 2005 Model Standards anticipated such developments.<sup>188</sup>

One example of customized standards is the Model Standards of Practice for Family and Divorce Mediation (“Family Model Standards”), referenced *supra*. Unlike the Model Standards, the Family Model Standards require family mediators to engage in various affirmative actions: “assist[ing] participants in determining how to promote the best interests of children,”<sup>189</sup> “recogniz[ing]” family situations involving child abuse or neglect and domestic abuse, “and tak[ing] appropriate steps to shape the mediation process accordingly.”<sup>190</sup> The Family Model Standards also require mediators to suspend or terminate mediations when the “mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.”<sup>191</sup> Two possible reasons are when “the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable”<sup>192</sup> or when “a participant is using the mediation process to gain an unfair advantage.”<sup>193</sup> These provisions go

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188. The Reporter’s Notes, under Guiding Principles, provide:

The members of the Joint Committee adopted the following principles to govern their work: . . . B. The Standards should retain their original function of serving as fundamental, basic ethical guidelines for persons mediating in all practice contexts while simultaneously recognizing that mediation practice in selected contexts may require additional standards in order to insure process integrity.

*Reporter’s Notes, supra* note 162, at 2.

189. Ass’n of Family & Conciliation Courts, *Model Standards of Practice, supra* note 167, at Standard VIII.

190. *Id.* at Standards IX and X.

191. *Id.* at Standard XI.

192. *Id.* at Standard XI.A.4.

193. *Id.* at Standard XI.A.6; *see also Code of Professional Conduct, supra* note 168, at Standard 4.3.2, Termination of the Process.

Mediators shall withdraw from a mediation if a negotiation among the parties appears to be moving toward an unconscionable or illegal outcome. An unconscionable outcome is one which is the product of undue pressure, exploitation or duress. An unconscionable outcome reflects one party’s exploitation of an existing power imbalance to the degree that the resulting agreement “shocks the conscience” and violates accepted legal and cultural

well beyond those contained in the Model Standards applicable to all mediators. As discussed *supra*, the Family Model Standards also reference principles for the regulation of mediators and court-connected family mediation programs. Particularly relevant are the standards that continue to protect confidentiality in individual cases but provide for monitoring, aggregate reporting, and measured transparency in order to ensure mediation quality and consumer protection.<sup>194</sup>

As discussed *supra*, the specialized area of foreclosure mediation has also developed a rebalancing of transparency and confidentiality. Although there are not customized ethical standards for foreclosure mediators, state statutes and court rules have created a sort of workaround to the confidentiality restrictions that might otherwise apply.

The option of creating customized ethics standards for “imposed mediation” is very appealing. It would acknowledge that mediation occurring pursuant to mandates by courts, legislatures, or contracts of adhesion is different, and that its circumstances require a heightened level of public accountability. Thus, there is a need for a targeted, tailored rebalancing in this context between transparency and confidentiality. The Family Model Standards could serve as both precedent and template.

This option likely would encounter its own logistical and political challenges, but they should be much fewer than those that would occur with an attempt to engage in a wholesale revision of the Model Standards. Thus, from a cost-benefit perspective, this is the strongest option. It responds to the particular circumstances that require increased transparency, avoids encroaching on other areas of mediation practice, and is the most likely to be adopted and implemented.

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norms of fairness.

*Id.*

194. Ass’n of Family & Conciliation Courts, *Model Standards of Practice*, *supra* note 167, ¶ C (at end); *see also* Lydia Nussbaum, *Mediator Burnout*, 34 OHIO ST. J. ON DISP. RESOL. (forthcoming, on file with author) (manuscript at 46) (also concerned about mediation quality) (“[C]ourt administrators who oversee mediation staff or a roster of contract mediators could adopt a policy to define efficiency not by settlement rates but by other metrics, such as party perceptions of fairness and satisfaction with the process, which would require a commitment to use appropriate survey instruments to gather parties’ feedback. Or, judges could adopt new court rules that would require all judges to include, in a prove-up of any mediated agreement, questions to assess whether the parties felt pressured to settle by the mediator and rejecting agreements where parties say ‘yes.’”).

### Conclusion

In reviewing and deciding to support the CFPB's Arbitration Reporting Proposal, the ABA Section of Dispute Resolution found the benefits of the Proposal to be three-fold. First, the availability of redacted filings and other information was intended to equalize to some degree the knowledge of "one shot" users of consumer arbitration in comparison to "repeat players." The Section concluded that such knowledge was likely to assist these "one shot" users as they considered whether to pursue arbitration, which arbitrators to select, and how to prepare for their arbitration proceedings.<sup>195</sup> Second, the Section found that the availability of this information would permit public

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195. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97-100 (1974) (noting the significant advantages that repeat players enjoy in comparison to one-time players—e.g., experience leading to changes in how the repeat player structures the next similar transaction; expertise, economies of scale, and access to specialist advocates; informal continuing relationships with institutional incumbents; bargaining reputation and credibility; long-term strategies facilitating risk-taking in appropriate cases; influencing rules through lobbying and other use of resources; playing for precedent and favorable future rules; distinguishing between symbolic and actual defeats; and investing resources in getting rules favorable to them implemented—and contrasting these to disadvantages borne by one-time players—e.g., more at stake in given case; more risk averse; more interested in immediate over long-term gain; less interested in precedent and favorable rules; not able to form continuing relationships with courts or institutional representatives; not able to use experience to structure future similar transactions; limited access to specialist advocates); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 195 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225-27 (1998) (observing that repeat-player employers fare better in arbitration than one-shot employees, that when repeat-player employers lose, damages are lower than for one-time employers, and generally that enforcement of pre-dispute arbitration agreements allows employers to structure the arbitration process to their advantage); Menkel-Meadow, *supra* note 42. Empirical research consistently indicates that repeat players in consumer arbitration are more likely to "win"—but it must be noted that this is also true in litigation. See Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses*, *supra* note 6, at 419-20 (summarizing empirical research examining the occurrence and potential reasons for repeat-player bias in consumer arbitration). Recent empirical work indicates that this pattern may have more to do with companies' representation by lawyers who have become extreme repeat players, since individual consumers are very unlikely to be represented by lawyers who are extreme repeat players. See Horton & Chandrasekher, *supra* note 6. There are now suggestions that one-shot players might increase transparency and improve their experience in consumer arbitration if they are trained to identify key procedural elements and then upload these and other information to an online platform that would be widely accessible. See Amsler, *supra* note 6.

oversight and enable an overall, systemic picture of the consumer arbitration process's operation and effects. For example, to the extent that some type of systematic frequency or lack of frequency of appointment of certain arbitrators and the outcomes of those cases could be evaluated, required reporting and publication would provide a means for the CFPB and other public entities to engage in oversight and assessment. Third, the fact of disclosure would make it less likely that dispute resolution providers would engage in behaviors or relationships that raised doubts regarding their impartiality or legitimacy, and transparency would assure parties and the public of such impartiality and legitimacy. Ultimately, the Section found that:

[T]he reporting and publication proposed by the CFPB—and the consequent availability of the information for those participating in consumer arbitration, those researching consumer arbitration, and those overseeing consumer arbitration—will help to protect the integrity of arbitration and, by extension, the integrity of the strong federal policy in favor of arbitration that has been expressed by the Supreme Court.<sup>196</sup>

The Section also concluded that transparency was particularly important when one of the parties to a dispute was imposing a dispute resolution process upon the other party, and the courts might be asked to enforce, and thus lend their coercive power and legitimacy to, the award produced by the process. These characteristics of mandatory pre-dispute consumer arbitration in the context of financial services and products were particularly important to the Section as it assessed the likelihood that the CFPB's proposal would assist with achieving fairness, efficiency, accountability, and good governance.<sup>197</sup>

The Section also observed that dispute resolution organizations, arbitrators, and parties should *welcome* reporting requirements and potential public scrutiny. Transparency would enable analysis, improvement, and

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196. Letter from Nancy A. Welsh, Chair-Elect, ABA Section of Dispute Resolution, to Monica Jackson, Office of the Executive Sec'y, Consumer Fin. Prot. Bureau (July 29, 2016).

197. See G.A. RES. 69/116, 1 (Dec. 10, 2014) (United Nations Convention on Transparency in Treaty-based Investor-State Arbitration) (referencing a belief “that the Rules on Transparency contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance”).

comprehension<sup>198</sup> of a consumer arbitration system that had been largely opaque.

All of this reasoning applies just as strongly to mediation as it does to arbitration, particularly as mediation is being imposed by courts, legislatures, or contracts of adhesion, and the courts are exercising both deferential review and expedited enforcement of the resulting settlement agreements. In this context, mediators should also welcome a targeted rebalancing of transparency and confidentiality—“measured transparency”—to support the integrity of, and public confidence in, the mediation process. Meanwhile, the current interest in revising the Model Standards of Conduct for Mediators creates the opportunity to achieve such rebalancing through the development of a set of ethics standards customized for imposed mediation.

It is time to establish dispute resolution neutrals’ ethical obligation to support transparency. And mediators can lead the way.

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198. Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT’L ECON. L. 587, 613-16 (1998).