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FOREWORD: AN INTRODUCTION TO ETHICS IN A WORLD OF MANDATORY ARBITRATION

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Our topic—Ethics in a World of Mandatory Arbitration—raises an initial and fundamental question: What is "mandatory arbitration?" Let me start with the notion of arbitration. Arbitration is a form of Alternative Dispute Resolution (ADR). It includes a range of extra-judicial adjudicative dispute resolution processes where a third party decides. The arbitration I know best is a creature of contract and comes primarily in two forms. One is through a submission agreement. That is when parties agree to have an arbitrator decide an existing dispute. The other form is a pre-dispute or future dispute agreement, usually a clause in a contract where parties agree to arbitrate future disputes that may arise between them. As to that second form of arbitration agreement, in the United States there was long-standing common law hostility. Courts would not enforce those agreements for some time.

As a creature of contract, arbitration is very flexible. Parties have so much control over the process that I have seen arbitrations so informal they look like discussions around the table. I have seen arbitrations so formal that they look like any piece of formal

* Associate Professor, Georgia State University College of Law. Professor Yarn made these introductory and closing remarks while serving as Moderator of the Georgia State University Symposium, "*Ethics in a World of Mandatory Arbitration*," hosted by the *Georgia State University Law Review* on February 14, 2002.

litigation—complex litigation—in which I have been involved. Parties have a choice of decision maker because it is a creature of contract. They control the scope and effect of the award. And because of this flexibility, it has many advantages—speed and cost savings over litigation being touted as two of the primary ones.

I experienced these advantages in my first year of litigation practice. My first piece of litigation was a securities fraud case. I inherited it when it was ten years old. It had been ten years in discovery. We went to trial a few months after I got involved in it. We were five months straight at trial, and the last issue was resolved before the Supreme Court of the United States five years later. The amount of the dispute, $3,000,000, was exceeded by the cost of litigation. My first arbitration, which happened about that same time, had almost the same amount of money in dispute, and it lasted four months from when it was initiated to when the award was issued. I became very interested in arbitration at that point. But other people, I found, had been interested in it for a much longer time.

Arbitration has been used for centuries, particularly among closely-knit groups—trade associations, guilds and such. A seventeenth-century treatise on arbitration describes "arbitrament" as being called once a "love day" because of the peace and tranquility which soon followed its use. As the ADR movement has gained momentum over the last two decades and the perceived costs of litigation drove repeat players in the system to look for cheaper alternatives, arbitration has increased in popularity. Arbitration agreements proliferated and were challenged. Relying on the liberally pro-arbitration Federal Arbitration Act, courts, particularly the United States Supreme Court, reversed their historical hostility and began enforcing pre-dispute clauses in places where arbitration had not been used much before—making arbitrable many disputes that heretofore were assumed to be outside the traditional uses of arbitration.

This brings us to the "mandatory" portion of mandatory arbitration. Of particular interest is the relatively recent emergence of pre-dispute arbitration clauses in contracts between employees and employers and between consumers and providers of goods and services. Based on

the assumption that the employees and the consumers have little or no leverage to negotiate—that these are take-it-or-leave-it kinds of clauses—the somewhat derisive term "mandatory arbitration" is now being used to describe this kind of arbitration.

Battles over the enforcement of these pre-dispute clauses have been in the courts and will continue to be in the courts; however, our starting point today is that we live in a world of mandatory arbitration in which most of these arbitration agreements are enforceable. With that as our starting point, what are our responsibilities as members of this profession? What are our ethical duties, the acceptable standards of behavior for clients, counselors, arbitrators, providers of arbitration services, and the courts in such a world? As a creature of contract, arbitration has many advantages. There is nothing particularly wrong with arbitration. But it can also be abused particularly at the edges. Where are the edges? The implications go beyond simply employment and consumer arbitration. They go to arbitration generally—to ADR generally. People in the dispute resolution world some fifteen years ago were all saying "wouldn't it be great if everybody wanted to mediate and everybody wanted to arbitrate." Be careful what you wish for was some of the theme of the Symposium discussion. I once asked Bob Coulson, the former president of the American Arbitration Association, what the future held for ADR and these processes over the next twenty, thirty years. He said: "These are delicate flowers and we are bound to ruin them."

When I got involved in ADR as a young member of the bar, I was put on a committee here in Georgia called the Committee to Study the Practicality of Arbitration and Mediation. Judges in Georgia would say to me: "Arbitration's illegal, isn't it?" And indeed, in a sense, it was; we didn't have a modern arbitration act until the mid 1980s, and now—really just a few years later, in geological time, nothing later—we have this huge ADR system in this state but also nationally. It's nothing new, it's as these panelists have reminded us—ADR has been used for a long time, arbitration has been used for a long time and probably predates any formal system of court.

But out of this recent emergence of alternatives, we get this "mandatory arbitration." And in our new world of mandatory arbitration—if you see it through a bigger lens—it's a much more complicated world evidencing a massive evolution of the justice system and a segmentation of dispute resolution delivery. It's a world where courts and lawyers have embraced ADR for whatever their various reasons, yet by doing so, they've increased the formality of the process and brought it within their ambit and scrutiny. I remember in Bryant Garth's book, *Access to Justice*, the whole notion of making a distinction between informalism and ADR. In informalism, the courts create informal ways to have disputes resolved within the ambit of the courts. In contrast, true alternatives were outside of courts and judges altogether, they were really extra-judicial alternatives to litigation and ways to avoid courts. They were also alternatives in the sense of disputants having a choice. That's where the term alternative dispute resolution seemed to have come from. "Alternative" related to the parties' consent to and control over the process.

Only a few years ago in a wholesale endorsement of these processes, Attorney General Janet Reno said ADR no longer means alternative dispute resolution, it means appropriate dispute resolution. So, ADR is dead, long live ADR, and we have to figure out a way to live within this world in which consent and control is questionable—a world of mandatory arbitration.