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Employment Arbitration Agreements: The Case for Ethical Standards for Dispute Resolution System Designers

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Dispute resolution design is an emerging field, both academically and professionally. Attorneys, mediators, and arbitrators, the other roles in the alternative dispute resolution process, have codes of ethics which guide their conduct.[1] Dispute resolution designers, however, have no such guidelines.[2] This article uses the example of mandatory arbitration agreements in the employment context to

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[1] For attorneys, see American Bar Association, Model Rules of Professional Conduct-Table of Contents, ABA (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

For mediators see American Bar Association, Policy and Standards, ABA (2020), https://www.americanbar.org/groups/dispute_resolution/policy_standards/

For arbitrators, see American Arbitration Association, Revised Home Construction Arbitration Rules and Mediation Procedures, AAA (August 1, 2018), https://go.adr.org/homeconstruction.html.

[2] Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009).

illustrate why this lack of ethical guidelines for dispute resolutions designers is problematic.

In recent years, mandatory arbitration agreements significantly impacted employment law and litigation.[3] Employers increasingly turn to mandatory arbitration as a way to resolve disputes more efficiently and cost effectively.[4] While these are worthy goals, the results have often chilled employees' substantive rights.[5]

Employees often sign mandatory arbitration agreements without understanding their significance.[6] These agreements are frequently part of a large number of "onboarding" forms that must be signed.[7] Indeed, employees often do not realize they have signed arbitration agreements until they file a lawsuit to claim an illegal employment practice.[8] In these cases, employees are surprised to learn that they unknowingly waived important legal rights and, in some cases, effectively foreclosed their opportunity to seek legal relief.[9]

The two most problematic provisions that often appear in mandatory arbitration agreements in the workplace

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[3] Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration*, 16 GA. ST. L. REV. 293, 296–97 (1999).
[4] Alexander J.S. Colvin, *The growing use of mandatory arbitration*, ECON. POLICY INST. (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/. *See generally* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 122 DICK. L. REV. 349, 349 (2017).
[5] Edwards, *supra* note 4, at 293.
[6] Katherine Van Wezen Stone, *Mandatory Arbitration: The Yellow Dog Contract of the '90s*, 73 DENV. UNIV. L. REV. 1017.
[7] Stone, *supra* note 7; Colvin, *supra* note 5.
[8] Stone, *supra* note 7; *see also* Kilgore & Kilgore, *Mandatory Arbitration Agreements Unfairly Deny Employee Rights*, HG.ORG, https://www.hg.org/legal-articles/mandatory-arbitration-agreements-unfairly-deny-employee-rights-6859 [last visited Nov. 11, 2020].
[9] Stone, *supra* note 7; s*ee* R. Wilson Freyermuth, *Foreclosure by Arbitration?*, 37 PEPP. L. REV. 459 (2010).

context are cost sharing provisions and class action (or multi-party) waivers.[10]

Mandatory arbitration agreements—which require an employee to pay a significant cost of the arbitration—tend to chill the rights of employees, as many employees do not have the means to financially pursue their claims if they have to pay a significant deposit to an arbitrator or arbitration service.[11] Fortunately, both the courts and arbitration organizations, such as the American Arbitration Association and JAMS, have recognized that cost splitting provisions may chill the rights of employees and have mitigated this risk.[12]

Class action waivers in mandatory arbitration agreements, however, remain a problematic issue which prevents large numbers of employees from vindicating their rights.[13] Courts have been hostile to efforts to minimalize the impact of class action waivers in arbitration agreements, and arbitration services have been powerless to ease their impact in light of the developing jurisprudence.[14]

This paper will examine this issue and explore how the enforceability of mandatory arbitration in employment cases has evolved through the courts. The paper will also discuss a possible path to overcoming the negative impact of

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[10] In this paper, the term "class action waiver" is used broadly. Often these waivers prohibit any multi-party action, regardless of whether it is brought as a "class action," as that phrase is usually thought of in the context of FED. R. CIV. P. 23. Unless specifically stated to the contrary, this paper will use the phrases "class action waiver" and "class waiver" loosely to mean any provision in an arbitration agreement that prohibits multi-party actions. *See generally Shankle v. B-G Maintenance Management of Colorado, Inc.,* 163 F.3d 1230, 1234 (10th Cir. 1999).

[11] Edwards, *supra* note 4, at 293.

[12] Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999); *see* JAMS Emp. Arb. Rules & Procs., Rule 31.

[13] Hensler, *supra* note 5, at 370.

[14] *E.g.,* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

these agreements and propose a modification in the approach of dispute resolution designers that would provide a possible remedy.

Dispute Systems Design

As a threshold matter, it is important to understand what we mean by "dispute systems design." Professor Stephanie Smith and Professor Janet Martinez, who teach Alternative Dispute Resolution ("ADR") at Stanford, define "dispute systems design" as "one or more internal processes that have been adopted to prevent, manage or resolve a stream of disputes connected to an organization or institution."[15]

This is a useful definition and broad enough to address the issues treated in this article. To be sure, a mandatory mediation program instituted by a federal or state court would be a dispute system design.[16] Likewise, a detailed contract between two sophisticated corporations which requires mediation and then arbitration in lieu of litigation would be a dispute system design.[17] Neither of these examples raise the concerns addressed in this article. In the former example, a court ordered mediation program would likely be designed by neutral actors interested in the fair administration of justice.[18] In the latter example, two well-resourced companies would likely be represented by competent counsel able to protect the interests of their respective clients.[19]

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[15] Smith & Martinez, *supra* note 2, at 126.

[16] *See generally How Do Courts Use ADR?,* RESOL. SYS. INST. https://www.aboutrsi.org/resource-center/how-do-courts-use-adr.

[17] *See generally* Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMPORARY PROBLEMS 221 (2004), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1322&context=lcp.

[18] RESOL. SYS. INST., *supra* note 17.

[19] Leslie Ann Berkoff, Andrew Barton, Serena K. Lee, Peter R. Day, & Susan Tomaine, *Drafting ADR Clauses for Financial, M&A, and Joint Venture Disputes*, AM. BAR ASS'N. (July 11, 2019),

Concerns arise, however, where a sophisticated actor hires an attorney to draft a dispute system design that will bind her client and a less sophisticated third party who is neither represented by counsel nor stands in an equal bargaining position.[20] Examples would include mandatory arbitration agreements in consumer contracts or executed by new employees at the beginning of their employment.[21] This article uses the latter example to discuss the need for ethical guidance for dispute resolution designers, though much of the discussion would be just as applicable for other mandatory arbitration agreements, including consumer contracts.

The Problem of Arbitration Agreements Drafted to Benefit Employers

Mandatory arbitration agreements began emerging in the non-union employment context during the 1990s.[22] These arbitration agreements were written by employers and drafted to their benefit.[23] Judge Harry T. Edwards of the United States Court of Appeals for the D.C. Circuit observed the potential problems of mandatory employment arbitration in an insightful article two decades ago.[24] He wrote:

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https://www.americanbar.org/groups/business_law/publications/blt/2019/07/adr-clauses/.

[20] *See Mandatory Arbitration Clauses Are Discriminatory and Unfair*, PUBLIC CITIZEN, https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/.

[21] PUBLIC CITIZEN, supra note 21.

[22] Katherine Van Wezen Stone, *Mandatory Arbitration: The Yellow Dog Contract of the '90s*, 73 DENV. UNIV. L. REV. 1017 (1996); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration*, 16 GA. STATE L. REV. 293 (2000).

[23] Edwards, *supra* note 4, at 297-98; Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKLEY J. EMP. & LAB. L. 71 (2014).

[24] Edwards, *supra* note 4, at 293. Judge Edwards' background makes him an especially appropriate author to comment on this topic. He wrote:

> The subject of mandatory arbitration of statutory claims in employment has been a matter of great interest to the courts in recent years. My thinking on this subject is influenced by my current position as a federal judge. It

> Mandatory arbitration agreements in individual employees' contracts often are presented on a take-it-or-leave-it basis; there is no union to negotiate the terms of the arbitration arrangement. Therefore, employers are free to structure arbitration in ways that may systematically disadvantage employees; for example, employers may limit the tools available to employees for gathering evidence or by prohibiting certain forms of relief. Or, in order to discourage or prevent employees from bringing a claim, a company might try to impose a requirement that the employee pay fees for an arbitrator, court reporter, transcript, and hearing room-fees that easily run hundreds of dollars per day.[25]

Professor Katherine Van Wezen of the Cornell Law School and Cornell School of Industrial and Labor Relations argues that "[m]any pre-hire arbitral agreements are blatant contracts of adhesion."[26]

Some of these agreements required employers and employees to split the cost of the arbitration.[27] Courts have

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> is also informed, however, by my former work as a labor law practitioner in Chicago, my time as a labor law teacher and scholar at the University of Michigan and Harvard Law School, my extensive practice as a neutral labor arbitrator for more than ten years, and my significant involvements with the National Academy of Arbitrators, the American Arbitration Association (AAA), and the Federal Mediation and Conciliation Service during the time when I was an arbitrator. In other words, because of my career path, I have more than a fleeting interest in the subject.

[25] Edwards, *supra* note 4, at 297-98.
[26] Stone, *supra* note 7, at 1036.
[27] Edwards, *supra* note 4, at 302.

responded to these provisions with hostility.[28] Judges have largely understood that requiring employees with limited means to share in the fees of a private arbitrator would likely foreclose many claimants from having an opportunity to have their disputes heard.[29]

In a 2000 opinion, the U.S. Supreme Court observed, "It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her statutory rights."[30] In the employment context, some courts have held that a provision in the arbitration agreement which makes the employee responsible for his or her share of the arbitrator's fee renders the agreement unenforceable.[31]

Even if a cost-splitting provision in an arbitration agreement does not render it per se void, courts are still hesitant to enforce them where there is a risk they could effectively preclude a claimant from vindicating their rights.[32] The Sixth Circuit, for example, held that "potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum."[33] If claimants are able to make this showing, then they cannot be forced into arbitration.[34]

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[28] *See* Brady v. Williams Capital Grp., No. 114198/06 (N.Y. Sup. Ct. App. Div. Apr. 30, 2009) (finding a fee-splitting provision in the arbitration clause unenforceable on public policy grounds).
[29] Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 411–412 (2014).
[30] Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).
[31] *See, e.g.,* Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234–35 (10th Cir. 1999) (finding requirement that employee pay half of the arbitration costs inconsistent with the remedial nature of anti-discrimination laws).
[32] Chukwumerije, *supra* note 30.
[33] Morrison v. Circuit City Stores, 317 F.3d 646, 663 (6th Cir. 2003).
[34] *See* Morrison, 317 F.3d at 663.

The hesitancy of courts to force employees to share equally in the arbitrator's fees is shared by dispute resolution organizations.[35] For example, other than a modest filing fee in the event the claimant(s) initiate the arbitration, the American Arbitration Association and JAMS also generally require the employer to pay the arbitrator's fee and other costs associated with the arbitration.[36]

Regretfully, employees have not been as fortunate when opposing arbitration agreements that prohibit class or multi-party actions.[37] Much of the early case law surrounding class action arises in the consumer context. In 2011, the U.S. Supreme Court handed down the case that opened the door to our discussion, *AT&T Mobility v. Concepcion*.[38] In *Concepcion*, the Court held that agreements that require individual arbitrations are enforceable.[39]

Another hammer on the nail of class arbitrations came in 2010.[40] In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the U.S. Supreme Court addressed arbitration agreements that were silent on whether class actions were permitted in a particular dispute.[41] The Court held that an arbitration agreement that is silent as to whether class

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[35] AMERICAN ARBITRATION ASSOCIATION, *Employment Workplace Fee Schedule* (Nov. 1, 2019), https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19.pdf (last visited March 22, 2020); JAMS, *Arbitration Schedule of Fees and Costs*, https://www.jamsadr.com/arbitration-fees (last visited March 22, 2020).
[36] *See* sources cited *supra* note 36.
[37] *See* Kacey L. Weddle, *Supreme Court Rules That Employee Class Action Waivers Are Valid*, AM. BAR ASSOC. (June 21, 2018), https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2018/supreme-court-rules-that-employee-class-action-waivers-are-valid/. *See generally infra* notes 39-53.
[38] 563 U.S. 333 (2011).
[39] *See Concepcion*, 563 U.S. at 341.
[40] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).
[41] 559 U.S. at 666.

arbitrations are permitted must go forward on solely an individual basis.[42]

Taking the next step toward relegating class arbitrations to the ash heap of history, the Court handed down *American Express v. Italian Colors* in 2013.[43] In *Italian Colors*, the Court held that a provision in an arbitration agreement that prevented class actions was enforceable—even if it rendered it economically infeasible for claimants to pursue individual claims.[44]

The final nail in the coffin for class arbitrations likely came with the Supreme Court's 2019 decision in *Lamps Plus, Inc. v. Varela*.[45] In *Lamps Plus*, the lower court distinguished *Stolt-Neilsen* and held that class-wide arbitration was permitted because the agreement at issue was "ambiguous on the issue of class arbitration."[46] Writing for the majority, Chief Justice Roberts rejected this reasoning and concluded that class arbitrations were prohibited, even where agreements were ambiguous as to whether they were allowed.[47]

For a brief time—during the Supreme Court's march from *Concepcion* to *Lamps Plus*—employee rights advocates saw reason for hope in turning back the momentum in favor of class action waivers.[48] In 2012, the National Labor Relations Board handed down the *D.R. Horton* decision.[49] This ruling found that class action waivers in the employment context violated Section 7 of the

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[42] *See Stolt-Nielsen*, 559 U.S. at 684–87.
[43] American Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).
[44] *Italian Colors*, 570 U.S. 228 (2013).
[45] 139 S. Ct. 1407 (2019).
[46] *Lamps Plus*, 139 S. Ct. at 1413. *Cf. Stolt-Nielsen,* 559 U.S. at 684–87.
[47] *Lamps Plus*, 139 S. Ct. at 1416–17.
[48] Krista M. Cabrera & Christopher Ward, *Whatever the Court Decides It Won't End the Debate Over Class Action vs. Individual Arbitration*. TALENT MANAGEMENT & HR (Nov. 21, 2018), https://www.tlnt.com/whatever-the-court-decides-it-wont-end-the-debate-over-class-action-vs-individual-arbitration/.
[49] D.R. Horton, Inc. 357 N.L.R.B. 2277 (2012).

National Labor Relations Act ("NLRA"), which rendered contracts void if they prohibited concerted activity.[50]

When employee rights advocates attempted to use the *D.R. Horton* decision in federal courts to invalidate class waivers, they were met with mixed results. The Second, Fifth, and Eighth Circuits rejected the NLRB's reasoning in *D.R. Horton*.[51] By contrast, the Sixth, Seventh, and Ninth Circuits agreed with the reasoning in *D.R. Horton*, holding that the arbitration agreements that prohibited class actions were invalid under the National Labor Relations Act.[52]

The timing of this circuit split led some employee rights advocates to believe that the stars were aligning.[53] In *Epic Systems v. Lewis*—which would resolve the circuit split—the petition for writ of certiorari was filed with the U.S. Supreme Court on September 2, 2016—approximately two months before the presidential election.[54]

Judge Merrick Garland had been nominated by President Obama to fill the vacancy on the Court left by the untimely death of the late Justice Antonin Scalia.[55] Judge Garland's nomination had been stalled by Senate Majority Leader Mitch McConnell, who would not bring his

[50] D.R. Horton, Inc. 357 N.L.R.B. 2277 (2012).
[51] Patterson v. Raymours Furniture Co., 659 Fed. Appx. 40 (2d Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015); D.R. Horton, Inc. v. NLRB 713 F.3d 444 (5th Cir. 2013); Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016); Owen v. Bristol Care, Inc. 702 F.3d 1050 (8th Cir. 2013). *Cf.* D.R. Horton, Inc. 357 N.L.R.B. 2277 (2012).
[52] NLRB v. Alt. Ent., Inc., 858 F.3d 393, 405 (6th Cir. 2017); Morris v. Ernst & Young, 834 F.3d 975, 985–86 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1160 (7th Cir. 2016).
[53] Cabrera & Ward, *supra* note 49.
[54] Epic Sys. Corp. v. Lewis, 823 F.3d 1147 (7th Cir. 2016). For this case's procedural history, *see* https://www.supremecourt.gov/docket/docketfiles/html/public/16-285.html [last visited March 24, 2020].
[55] Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NPR (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

nomination before the Senate until after the presidential election.[56]

This led progressives to believe that, at worst, they would have the slightly left-of-center Garland. At best, they hoped for a more progressive nominee than Garland, who would assure them a liberal majority on the Court.[57] This hinged, of course, on the view that former Secretary of State Hillary Clinton was likely to win the general election in November of 2016.[58]

Of course, to the surprise of many, President Donald Trump won the election and subsequently nominated Neil Gorsuch to the vacancy left by Justice Scalia.[59] Judge Garland never received a hearing, and Justice Gorsuch's confirmation solidified the conservative majority on the Court.[60]

When *Epic Systems* was ultimately decided on May 21, 2018, it was Justice Neil Gorsuch who wrote the majority opinion.[61] The Court's opinion rejected the reasoning of the NLRB in *D.R. Horton* and held that class waivers in arbitration agreements do not violate the National Labor Relations Act's prohibition against contracts that ban concerted activity.[62] The *D.R. Horton* decision, which held much promise for employee rights advocates, was overturned, and the validity of class action waivers is now well-settled.[63] The Court's subsequent decision in *Lamps*

[56] Elving, *supra* note 56.
[57] Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court* Fight, THE NEW YORK TIMES (Sept. 19th, 2020), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html.
[58] Liptak & Stolberg, *supra* note 58.
[59] Julie Hirshfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, THE NEW YORK TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html.
[60] Davis & Landler, *supra* note 60.
[61] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018).
[62] *Epic Sys. Corp.*, 138 S. Ct. at 1632.
[63] *See Epic Sys. Corp.*, 138 S. Ct. at 1620–21, 1630.

Plus (discussed above) was simply the period on the end of a sentence which had already been written.[64]

The Attorney's Fiduciary Duty to the Client

In the employment context of course, arbitration agreements with class action waivers are almost universally drafted by attorneys who represent employers.[65] Under the American Bar Association ("ABA") Rules of Professional Conduct, an attorney must negotiate several roles.[66] He or she "is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[67] The Rules also provide that, "[i]n addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter."[68]

While the attorney must balance these roles, the lawyer nevertheless ultimately owes a fiduciary duty to the client.[69] Indeed the attorney owes a duty of undivided loyalty to the client, which is breached when the attorney acts on behalf of parties with conflicting interests.[70] As a consequence, lawyers who represent clients seeking to avoid employment class actions at all costs will be duty-bound to draft arbitration agreements containing class waivers. The problem, of course, is that these agreements are one-sided and serve as a barrier for claimants with small claims from

[64] *See* Lamps Plus, Inc. v. Varela, 139 S. Ct 1407, 1412 (2019).
[65] Edwards, *supra* note 4, at 297.
[66] *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[67] MODEL RULES OF PRO. CONDUCT pmbl. § 1 (AM. BAR ASS'N 1983).
[68] MODEL RULES OF PRO. CONDUCT pmbl. § 3 (AM. BAR ASS'N 1983). While Rules 1.12 and 2.4 of the ABA Model Rules of Professional Conduct give some minimum guidance to the conduct of attorneys acting as neutrals, the primary guidance for mediator conduct is from other sources, which shall be discussed *infra.*
[69] MODEL RULES OF PRO. CONDUCT r. 1.6 § 11 (AM. BAR ASS'N 1983).
[70] RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE 633 (3d ed. 1989).

aggregating them, which would attract the most competent counsel possible.[71]

The Neutral's Duty of Impartiality

In contrast to the attorney who represents a specific party, a neutral must be impartial.[72] Because the concept of an attorney as a neutral is more recent than the ancient practice of the lawyer representing the interests of their client, a well-developed and ingrained set of ethical rules for mediators does not exist. However, the significant efforts over approximately the last twenty-five years to produce standard for neutrals have uniformly affirmed the impartial nature of a neutral's role.[73]

For example, Rules 1.12 and 2.4 of the ABA Rules of Professional Conduct briefly address issues mediators may face, and the requirements stated in those rules clearly affirm the importance of impartiality.[74] Rule 1.12 addresses the attorney–client relationship.[75] Generally speaking, absent consent of the parties, it prohibits a lawyer from representing a party in a matter in which the lawyer previously served as a neutral.[76] It also generally prohibits a lawyer from negotiating potential employment with someone who is involved in a case where the lawyer is serving as a neutral.[77] Rule 2.4 primarily emphasizes that a lawyer serving as a neutral must make sure that the parties in the matter understand that the lawyer/neutral does not represent them.[78]

In addition to the broad guidance of the ABA Model Rules of Professional Conduct, there are other resources that

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[71] *See* Colvin, *supra* note 24, at 85.
[72] *See* MODEL RULES OF PRO. CONDUCT r. 2.4 (AM. BAR ASS'N 1983).
[73] *See generally* MODEL STANDARDS OF CONDUCT FOR MEDIATORS. (AM. BAR ASS'N 2005).
[74] MODEL RULES OF PRO. CONDUCT r. 1.12, 2.4 (AM. BAR ASS'N 1983).
[75] MODEL RULES OF PRO. CONDUCT r. 1.12 (AM. BAR ASS'N 1983).
[76] MODEL RULES OF PRO. CONDUCT r. 1.12(a) (AM. BAR ASS'N 1983).
[77] MODEL CODE OF PRO. CONDUCT r. 1.12(b) (AM. BAR ASS'N 1983).
[78] MODEL CODE OF PRO. CONDUCT. r. 2.4 (AM. BAR ASS'N 1983).

provide ethical guidance for those who specifically serve as mediators.[79] For example, the Model Standards for Mediator Conduct were first drafted in 1994 and revised in 2005.[80] They originated as a joint effort between the American Arbitration Association, the American Bar Association Dispute Resolution Section, and the Association for Conflict Resolution.[81] Under Standard II, "[a] mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice."[82]

Similar guidance exists when the neutral is serving as an arbitrator.[83] For example, Cannon I of the Code of Ethics for Arbitrators in Commercial Disputes provides that a potential neutral "should accept appointment as an arbitrator only if fully satisfied . . . that he or she can serve impartially [and] that he or she can serve independently from the parties, potential witnesses, and the other arbitrators . . ."[84] There are also prohibitions on future professional opportunities for arbitrators in order to maintain their neutrality.[85]

Similarly, JAMS has promulgated guidelines which provide:

> An Arbitrator should remain impartial throughout the course of the Arbitration. Impartiality means freedom from

[79] MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. BAR ASS'N 2005).
[80] MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. BAR ASS'N 2005).
[81] *Model Standards of Conduct for Mediators*, https://www.mediate.com/articles/modelSTDSd.cfm, MEDIATE.COM (Feb. 2005).
[82] MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 74, at Standard II.
[83] *See, e.g.,* AM. ARB. ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (AM. ARB. ASS'N 2004).
[84] *See* AM. ARB. ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 84, at B(1)-(2).
[85] *See* AM. ARB. ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 84, at C.

> favoritism either by word or action. The Arbitrator should be aware of and avoid the potential for bias based on the Parties' backgrounds, personal attributes or conduct during the Arbitration, or based on the Arbitrator's pre-existing knowledge of or opinion about the merits of the dispute being arbitrated. An Arbitrator should not permit any social or professional relationship with a Party, insurer or counsel to a Party to an Arbitration to affect his or her decision-making. If an Arbitrator becomes incapable of maintaining impartiality, the Arbitrator should withdraw.[86]

Therefore, the critical importance of neutrals being impartial is well-settled. As discussed above, however, arbitration agreements which prohibit class actions are common.[87] These leave employees with relatively small claims no vehicle to hold employers accountable.[88]

The conundrum thus presents itself. The arbitrator should be impartial, and the arbitration should be fair. However, the attorney who drafts the arbitration agreement, because of his or her ethical rules, must not be impartial.[89] The Supreme Court, which should be the arbiter of due process, has unequivocally rejected virtually all challenges to draconian class action waivers.

The Importance of Stakeholder Involvement

One gravamen of the problem with one-sided dispute design systems is the lack of stakeholder

[86] JAMS ARBITRATOR ETHICS GUIDELINES VI(A).
[87] D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012).
[88] D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012).
[89] Edwards, *supra* note 4, at 302; MODEL RULES OF PRO. CONDUCT r. 1.6 § 11 (AM. BAR ASS'N 1983).

consideration.[90] In mandatory arbitration agreements, employees frequently do not realize they have signed one.[91] They certainly did not participate in the design of the dispute system. Yet scholars have consistently observed that stakeholder involvement is critical to dispute design process.[92] Professors Smith and Martinez have written that "[s]ystem dysfunction can often be attributed to failure to adequately involve and acknowledge the interests of key stakeholder groups."[93]

It is important to observe *where* controversy exists in the arbitration field. Complex commercial agreements often contain arbitration agreements.[94] Sophisticated parties to these agreements engage in arm's length negotiations and make the reasoned decision that private arbitration is preferable to the more expensive and drawn out litigation process. The same is true, for example, in the construction context.[95] Builders, architects, and other stakeholders in construction projects routinely choose arbitration over litigation for similar reasons.[96]

In the employment and consumer context, however, controversy abounds. This is primarily because employees and consumers have no input in the language and structure of these arbitration agreements.[97] There is no stakeholder "buy in."

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[90] NANCY H. ROGERS ET AL, DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES, 70-73 (2d ed. 2018).
[91] *See generally* supra notes 39-53; *Signing an Arbitration Agreement with Your Employer*, NOLO, https://www.nolo.com/legal-encyclopedia/signing-arbitration-agreement-with-employer-30005.html [last visited Nov. 11, 2020].
[92] *See* Smith & Martinez, *supra* note 2.
[93] Smith & Martinez, *supra* note 2, at 131.
[94] Smith & Martinez, *supra* note 2, at 138.
[95] Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 154 (2007).
[96] Schmitz, *supra* note 96, at 154.
[97] Smith & Martinez, *supra* note 2, at 144; ROGERS ET AL, supra note 91, at 73.

A Suggested Path Forward

Because the courts have largely closed the door to challenges to unfair class waivers, it is the obligation of the profession to address the issue.[98] The difficulty is that, while ethical obligations for arbitrators and mediators have continued to develop, ethical considerations for dispute systems designers have not.[99] Indeed, there is an ethical vacuum in the area of dispute resolution design.

Two significant steps should be taken toward remedying this problem. First, the ABA Model Rules of Professional Conduct should be amended.[100] Second, because the Model Rules apply only to attorneys and the universe of dispute resolution designers is broader than lawyers, comprehensive standards of conduct for dispute resolution designers should be developed.[101]

Regarding the ABA Model Rules of Professional Conduct, paragraph 3 of the Preamble should be amended.[102] As previously noted, the Preamble currently states that "[i]n addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter."[103] This provision should be revised to add a specific statement affirming that if an attorney is acting as a "dispute resolution designer" where a party to an arbitration agreement is likely to be unrepresented at the

[98] As noted earlier, an attorney is more than just a technician for the wishes of his or her client. Rather a lawyer is "an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 1983); *see* D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012)

[99] Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute Systems Design? And What We Should [Not] Do About It: Lessons From International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195 (2009).

[100] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).

[101] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 1983).

[102] MODEL RULES OF PRO. CONDUCT pmbl. ¶ 3 (AM. BAR ASS'N 1983).

[103] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 1983).

time of execution, then the attorney is "acting as a neutral."[104]

This simple statement would provide significant protection to unrepresented parties. It would bring those drafting arbitration agreements within the ethical boundaries of 2.4 of the Rules of Professional Conduct.[105] Rule 2.4 says, "A lawyer serves as a third-party neutral when the lawyer assists two or more persons *who are not clients of the lawyer* to reach a resolution of a dispute or other matter that has risen between them." (emphasis added).[106]

The plain language of Rule 2.4 means that a neutral cannot simultaneously serve as a lawyer for one of the parties.[107] This means that a company desiring an ADR program with an arbitration agreement would have to retain the services of someone other than its own lawyer. Such a result would provide the bar with an opportunity to develop a robust practice for "neutral dispute resolution designers." These professionals, acting as neutrals, would then not be encumbered with the fiduciary duty to one party that currently restrains many drafters of ADR programs.[108]

Rather, neutral dispute resolution designers would be able to freely consider the interests of all the various stakeholders to an ADR program. Because they should be impartial, these professionals would be much more able to determine whether it was proper to include a class action waiver in an arbitration agreement.[109] While it might be proper for these professionals to consider the economic impact a class action lawsuit would have on an employer,

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[104] *See* MODEL RULES OF PRO. CONDUCT pmbl (AM. BAR ASS'N 1983).
[105] MODEL RULES OF PRO. CONDUCT r. 2.4 (AM. BAR ASS'N 1983).
[106] MODEL RULES OF PRO. CONDUCT r. 2.4(a) (AM. BAR ASS'N 1983).
[107] MODEL RULES OF PRO. CONDUCT r. 2.4(a) (AM. BAR ASS'N 1983).
[108] MALLEN & SMITH, *supra* note 71, at 633.
[109] *See* CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES 1(C)(3) (prohibiting arbitrators from engaging in conduct that would compromise or appear to compromise the arbitrators' impartiality).

they would also be obligated to consider the impact a class waiver would have on employees.[110] If a designer believed that a class waiver would chill the ability for employees to pursue their substantive rights, then they would be able to disregard the employer's desire for a class waiver without breaching any fiduciary duty owed to one party over the other.

Second, a comprehensive set of ethical rules for dispute resolution designers should be adopted. Such a move is not without precedent.[111] As noted previously, various stakeholders came together in 1994 to develop the Model Standards for Mediator Conduct.[112] A similar effort should be made to develop guidance for those professionals who serve as dispute resolution designers.

To be sure, these proposals are not magic bullets. Those who retain dispute resolution designers will likely attempt to exert influence over them.[113] It is the power of the purse. Nevertheless, these steps would have both positive direct and indirect impacts.

First, in the case of attorneys, these proposals carry an extra measure of accountability. Failing to draft dispute designs which are fair and even-handed toward all stakeholders would leave attorneys exposed to disciplinary actions which would be costly to both their reputation and finances.[114]

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[110] *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The arbitration epidemic*, ECON. POLICY INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.
[111] *See* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[112] *See* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[113] *See* MODEL RULES OF PRO. CONDUCT r. 5.4(c) (AM. BAR ASS'N 1983) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).
[114] *See* MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 1983) (categorizing it is a professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another).

For all designers, regardless of whether they are attorneys, a set of ethical standards would begin the path toward establishing dispute design as a profession that exercises a measure of independence. Peers would be expected to hold each other accountable for developing systems that reflect the interests of those who are impacted.[115] There may also be an indirect impact on courts. If professional standards are drafted, which create ethical norms, courts may be more willing to scrutinize one-sided arbitration agreements with class waivers.

Finally, and most importantly, neutral designers would be free to bring all stakeholders to the table. In the employment context, this means that employees could be consulted. Surveys could be taken. Input could be received. The final arbitration agreement would reflect the interests of both employers and employees. Yes, this likely means that class action waivers would be relegated to the ash heap of history. Still, employment arbitration would be left to look more like it should: an efficient, fair, and cost-effective process designed to bring disputes to a conclusion sooner, cheaper, and more justly than protracted litigation.[116]

Conclusion

Greater ethical guidance for dispute resolution designers is sorely needed. Mandatory arbitration of employment claims is an especially useful illustration of why this is so. With the Supreme Court's most recent decisions in *Epic Systems* and *Lamps Plus*, mandatory arbitration agreements are likely to be an even more sought-after method for employers to eliminate the risk of

[115] *See* MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 1983) (requiring attorneys to report instances of observed violation of the Model Rules).

[116] Barbara Kate Repa, *Pros and Cons of Arbitration*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html [last visited Nov. 11, 2020].

meritorious class action lawsuits.[117] The unavailability of a class action may well eliminate the ability of employees with small individual claims, but significant aggregate claims, to vindicate their rights.

Currently, attorneys who are retained by employers are ethically required to give their allegiance to their clients, even when the resulting agreement is procedurally and substantively unfair to the unrepresented worker who signed it.[118] The federal courts have been unwilling to even the proverbial playing field.[119] Instead, the United States Supreme Court has handed down a line of cases, uniformly upholding arbitration agreements containing class action waivers.[120] It is therefore incumbent on the legal profession, as professionals who are to advocate for a system that fairly administers justice,[121] to intercede.

A prudent path forward is through the ABA Rules of Professional Conduct, which govern attorney conduct.[122] The Rules should be amended to specify that attorneys who are retained to draft ADR programs impacting unrepresented employees are "third-party neutrals." As neutrals, they are to act impartially and consider the interests of all stakeholders. Such a revision in the Rules, which are heavily relied on by states, would be an important step toward restoring the rights of workers whose valid claims are often chilled by arbitration agreements containing class action waivers. In addition, comprehensive standards of conduct

[117] Epic Sys. v. Lewis, 138 S. Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).
[118] MODEL CODE OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 1983).
[119] Am. Express v. Italian Colors, 570 U.S. 228 (2013); Epic Sys. v. Lewis, 138 S. Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).
[120] *See* cases cited *supra* note 120.
[121] *E.g.,* MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 1983) (commenting, "This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.").
[122] MODEL CODE OF PRO. CONDUCT (AM. BAR ASS'N 1983).

for dispute resolution designers should be drafted, which would further an expectation that designers act independently with the interests of all stakeholders in mind.