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THE CURRENT STATE OF ARBITRATOR ETHICS AND PARTY RECOURSE AGAINST
GRIEVANCES

By
Shari Maynard*

I. INTRODUCTION

Arbitrators are typically entrusted with complete decisional authority when conducting arbitrations.¹ This authority is accompanied by a certain level of trust and responsibility. The stakes are often high for the parties, who depend on a well-reasoned decision by the arbitrator on the merits. Also, as the Supreme Court has noted, “we should . . . be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.”² Moreover, the conduct of arbitrators plays an integral role in public perception of the arbitral process.³ These aspects of the arbitrator’s function, as well as the current prevalence of arbitration as a method for adjudicating disputes,⁴ illustrate the importance of ensuring that arbitrators act in accordance with established ethical standards.

Accordingly, with such considerable impact and importance, one might expect that a comprehensive body of ethical standards governing the conduct of all arbitrators is currently in effect and strictly enforced. However, much to the surprise and disdain of many, there are no such standards in existence.⁵ Considering that professionals performing similar roles, such as judges, are bound by stringent codes of ethics,⁶ this is an alarming fact.

The current lack of universal arbitrator ethics standards can be attributed to,

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¹ See Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1345 (2002) (arbitrators have “complete autonomy over the dispute resolution process.”).

² *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968).

³ Robert A. Holtzman, *The Role of Arbitrator Ethics*, 7 DEPAUL BUS. & COMM. L.J. 481, 483 (2009) (noting that an arbitrator’s conduct is “crucial to public confidence” in the arbitral process).

⁴ Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 950 (2002) (discussing the growth and prevalence of arbitration).

⁵ See, e.g., Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 468 (2004) (stating that notwithstanding “[v]oluntary and aspirational” codes of conduct, “arbitrators and provider institutions are not subject to specific regulatory standards or public oversight.”).

⁶ See, e.g., MODEL CODE OF JUDICIAL CONDUCT (2011) (requiring that judges act in compliance with certain ethical standards while executing their functions).

among other things, the private nature and autonomous status of arbitration. Despite the benefits of ethical standards, there are significant limitations that are presently insurmountable absent radical and unlikely change. Scholars, state legislatures, and professional organizations have made various proposals and initiatives aimed at addressing this issue, such as establishment of a state arbitrator licensing board responsible for implementing a code of ethics, and enhancement of judicial review of awards where parties allege arbitrator impropriety.⁷ Though such suggestions have merit, they have yet to be universally adopted and as such, have little effect on the arbitrators' practice. However, there is recourse, albeit limited, currently available to parties to redress past or prevent future arbitrator misconduct.

Accordingly, Part II of this article will describe some of the fundamental ethical standards generally regarded as essential to the arbitrator's practice, Part III will explore the reasons for the current lack of universal arbitrator ethics rules, Part IV explains the benefits and limitations of uniform standards, Part V briefly discusses previous efforts and recommendations for addressing the lack of arbitrator ethics standards, and Part VI suggests currently available methods for addressing and remediating the effects of unethical arbitrator conduct.

II. GENERALLY ACCEPTED STANDARDS OF ETHICS FOR ARBITRATORS

Although there is no universal code of ethics, there are certain ethical standards that provider institutions, courts and commentators have agreed are essential to the arbitrator's practice. This section will not present an exhaustive list. Rather, the intention is to give the reader an idea of the general expectations of the ethical arbitrator and to highlight the significance of the fact that arbitrators are not legally required to fulfill these expectations.

Disclosure of conflicts of interest, such as a professional relationship with one of the parties or a significant financial interest in the outcome of the arbitral proceeding, is one major ethical standard with which arbitrators are expected to comply.⁸ This issue is addressed by the Federal Arbitration Act ("FAA"),⁹ which has been interpreted to mandate that arbitrators make certain disclosures to avoid violating the "evident partiality" prohibition in the statute.¹⁰

Additionally, arbitrators are expected to exercise impartiality and independent judgment in rendering decisions.¹¹ This generally requires the arbitrator to refrain from favoritism or allowing their decisions to be influenced by participants in the arbitration

⁷ See, e.g., Sabin, *supra* note 1, at 1337 (advocating for state arbitrator licensing boards).

⁸ See, e.g., Menkel-Meadow, *supra* note 4, at 956 (identifying arbitrators' disclosures of conflicts of interest as a major ethical issue in arbitration).

⁹ 9 U.S.C. § 10.

¹⁰ See Holtzman, *supra* note 3, at 488.

¹¹ See, e.g., Menkel-Meadow, *supra* note 4, at 959; see also Weston, *supra* note 5, at 484.

and outside parties.¹²

Avoidance of impropriety in communicating with the parties is also integral.¹³ Similar to the requirement that judges avoid ex parte communications with litigants,¹⁴ it is desirable that arbitrators refrain from such communications with the parties to the arbitration to avoid prejudice.¹⁵

Ensuring that details of the proceeding remain confidential is also significant.¹⁶ However, this requirement is regarded as an important benefit conferred by selecting arbitration rather than traditional litigation and is therefore often imposed by contract or some other authority.¹⁷

Other ethical standards often referenced include competence and diligence.¹⁸ These generally refer to the expectation that the arbitrator discharge his administrative duties, such as rendering an award, appropriately.¹⁹

III. FACTORS CONTRIBUTING TO THE CURRENT LACK OF UNIFORM ARBITRATOR ETHICS STANDARDS

Perhaps most importantly, arbitration is largely a private industry.²⁰ There is no central regulating body responsible for policing the practices of those involved in the field.²¹ Furthermore, court involvement in the process has been limited severely by Supreme Court jurisprudence and the FAA.²² Although arbitration is governed to an

¹² See, e.g., AMERICAN ARBITRATION ASSOCIATION, *The Code of Ethics for Arbitrators in Commercial Disputes*, 5 para. C (2004), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867 (explaining arbitrator impartiality).

¹³ *Id.*

¹⁴ See MODEL CODE OF JUDICIAL CONDUCT r. 2.9 (2011) (prohibiting judges from engaging in ex parte communications).

¹⁵ See, e.g., *Code of Ethics for Arbitrators*, *supra* note 12 (explaining the precautions arbitrators ought to take when communicating with parties to the arbitration).

¹⁶ See, e.g., Menkel-Meadow, *supra* note 4, at 962 (identifying confidentiality as a significant ethical issue relating to the arbitrator's obligations).

¹⁷ See *id.*

¹⁸ See *id.* at 963-64 (discussing arbitrators' expectations relating to competency).

¹⁹ *Id.*

²⁰ See Menkel-Meadow, *supra* note 4, at 949-50 (noting that arbitration is a mostly private process, though some jurisdictions permit court-ordered arbitration).

²¹ See Sabin, *supra* note 1, at 1344-45 (discussing the lack of oversight and regulation of arbitrators and the arbitral process).

²² See Menkel-Meadow, *supra* note 4, at 962 (stating that arbitrator misconduct is mostly addressed through challenges brought under § 10 of the FAA, 9 U.S.C. § 10 (2010); see also Weston, *supra* note 5, at 455,

extent by the FAA, this statute does not require uniform ethical standards for arbitrators.²³ Rather, the FAA addresses ethical issues respecting arbitrators only in a limited capacity by prescribing vacatur of awards where there was “evident partiality or corruption in the arbitrators.”²⁴ These elements of the arbitral process render self-regulation the only valuable means of imposing standards of conduct on arbitrators.²⁵

Arbitrators may operate in conjunction with a private provider institution, such as the American Arbitration Association (“AAA”), agreeing to arbitrate cases under the umbrella of that institution.²⁶ Arbitrators may also operate on an ad hoc basis, which means that the arbitrator works independently to administer the case.²⁷ Consistent with the self-regulation scheme, most provider institutions have promulgated ethics codes applicable to the arbitrators associated with their organizations.²⁸ However, not every party engaged in the process receives the benefits of these rules because parties may forgo including institutional arbitration or incorporation of institutional rules in their arbitration agreements.²⁹ Additionally, some commentators have claimed that, though bound by these ethical codes, provider institutions often fall short with respect to enforcement.³⁰ This is because such institutions fear that, by strictly enforcing their ethical codes, they will publicly denigrate arbitration and decrease their available roster of arbitrators.³¹ What is more, these rules “do not have the force of law” and therefore cannot serve as a source of liability in a court action in which a party challenges the arbitrator’s conduct.³²

Secondly, as noted previously, the Supreme Court has afforded substantial autonomy to arbitration.³³ This point is worth underscoring separately because, through

458 (discussing the Supreme Court’s significant deference to arbitration and the FAA’s “limited vacatur remedy” for unethical arbitrator conduct).

²³ See 9 U.S.C. § 10.

²⁴ *Id.*

²⁵ See Kristen M. Blankley, *Lying, Stealing, And Cheating: The Role Of Arbitrators As Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 463 (2014) (“[T]he law and courts have been relatively ‘hands off’ regarding arbitration issues . . . [w]ith no one assuming the role of overseeing arbitration.”); see also Holtzman, *supra*, note 3, at 481 (explaining that the field of arbitration employs self-regulation as the primary means of addressing the ethical conduct of arbitrators).

²⁶ See Blankley, *supra* note 25, at 471 (distinguishing between institutional and ad hoc arbitration).

²⁷ See *id.*

²⁸ See Menkel-Meadow, *supra* note 4, at 978.

²⁹ See *id.*; see also Blankley, *supra* note 25, at 473.

³⁰ See Weston, *supra* note 5, at 469.

³¹ See *id.*

³² Delta Mine Holding Co. v. AFC Coal Props., 280 F.3d 815, 820 (8th Cir. 2001) *discussed in* Holtzman, *supra* note 3, at 481.

³³ See Weston, *supra* note 5, at 455; see also Sabin, *supra* note 1, at 1347.

doctrines such as federal preemption and through many individual decisions, the Court has progressively and consistently afforded almost complete deference to arbitrator decisions. In so doing, the Court has solidified arbitration's independence.³⁴ This level of support from the Supreme Court renders even the best efforts at establishing uniform ethics standards futile.

Additionally, the fundamental tenets of arbitration are efficiency, economy, and expertise, not the arbitrator's penchant for ethical conduct.³⁵ High standards of conduct are not as strongly emphasized for arbitrators as they are for judges, whose functions are similar to those of the arbitrator.³⁶ This de-prioritization of arbitrator ethics contributes to the lack of universal standards. If such standards were regarded as essential in the arbitral process, provider institutions and parties with significant leverage, such as large corporations who repeatedly arbitrate disputes, would demand that a universal code of arbitrator ethics be adopted.

Moreover, often arbitrators are hired by repeat players: parties who consistently resolve disputes through arbitration.³⁷ In some instances, the arbitrator a party selects is one with whom that party has a relationship outside of the arbitral process.³⁸ Over time, a trusting relationship may develop between these individuals.³⁹ As a result, the repeat player, despite having at least some leverage to influence the process, may be less inclined to demand universal standards of arbitrator ethics.

The issue is compounded by the doctrine of arbitral or quasi-judicial immunity.⁴⁰ This doctrine, which will be explored further in Part IV, shields arbitrators from personal liability for actions taken for the purpose of fulfilling their functions, even if such acts are unethical and improper.⁴¹

Finally, arbitrators are typically highly skilled professionals, such as lawyers or experienced players in the commercial industry.⁴² As an incident of their membership in their respective professions, these arbitrators are often bound by a formal code of ethics

³⁴ See Sabin, *supra* note 1, at 1350.

³⁵ See *id.* at 1360 (discussing the primary goals of arbitration).

³⁶ See *id.* at 1345 (noting that judges arbitrators have "little accountability" in comparison to arbitrators).

³⁷ See Menkel-Meadow, *supra* note 4, at 956 (describing the "repeat player effect"); see also Nancy A. Welsh, *What is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 399-400 (2010) (explaining the repeat player issue as well as its implications for parties who are inexperienced with arbitration).

³⁸ See Welsh, *supra* note 37 at 398-99 (explaining the practice of appointing arbitrators with whom one has a pre-existing "special relationship").

³⁹ See *id.*

⁴⁰ See Weston, *supra* note 5, at 493.

⁴¹ See Weston, *supra* note 5, at 493.

⁴² See Holtzman, *supra* note 3, at 482.

imposed by their field.⁴³ The need for a separate code of arbitrator ethics may therefore seem redundant.

Whatever the reasons for the lack of uniform standards of arbitrator ethics, the consequences of not having such standards can produce dire results. *Haworth v. Superior Court* is illustrative.⁴⁴ In that case, the parties to a dispute involving cosmetic surgery sought nullification of an award rendered by an arbitrator who, as a judge, had been disciplined for belittling colleagues based on their physical appearances.⁴⁵ The arbitrator failed to disclose this information prior to the arbitration proceedings.⁴⁶ Understandably, the complaining parties were concerned that the arbitrator's ability to fairly administer the proceeding was hampered by his apparent repulsions.⁴⁷ Despite these concerns and the arbitrator's failure to disclose, the court did not vacate the arbitrator's award and classified the challenge as an "after-the-fact attack[] by losing parties."⁴⁸ *La Serena Properties, LLC v. Weisbach* is also demonstrative.⁴⁹ In that case, the arbitration agreement provided for a sole arbitrator to be jointly appointed by both parties.⁵⁰ One of the parties, a construction firm, conspired with an arbitrator to induce its adversary to accept the arbitrator's appointment.⁵¹ The arbitrator and the firm concealed the fact that the arbitrator was in a romantic relationship with the sister of a partner in the firm and, as a result, had a close relationship with the partner and his family.⁵² Though bound by the ethics rules of the provider institution, the institution did not discipline the arbitrator, nor was the arbitrator otherwise held accountable for his conduct, as he was protected by arbitral immunity.⁵³

⁴³ See Weston, *supra* note 5, at 466-67 (explaining that the conduct of most professionals, who may serve as arbitrators, is subject to regulation).

⁴⁴ *Haworth v. Superior Court*, 112 Cal. Rptr. 3d 853 (2010).

⁴⁵ *Id.* at 858.

⁴⁶ *Id.*

⁴⁷ *Id.* at 857.

⁴⁸ *Id.* at 871, 875 (the court in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) set outer disclosure limits and required that parties to arbitration disclose "any dealings which might create an impression of possible bias." However, here, a California statute imposed more specific disclosure requirements on arbitrators. The court noted that, because arbitrator's conduct did not directly violate these express restrictions, a ruling in the defendant's favor was inappropriate.).

⁴⁹ *La Serena Properties, LLC v. Weisbach*, 112 Cal. Rptr. 3d 597 (2010).

⁵⁰ *Id.* at 598-99.

⁵¹ *Id.*

⁵² *La Serena Properties*, 112 Cal. Rptr. 3d at 598-99.

⁵³ *Id.* at 600, 606-07.

IV. BENEFITS AND LIMITATIONS OF ESTABLISHING A UNIFORM CODE OF ETHICS FOR ARBITRATORS

A. Benefits

Universal ethics standards will place essential constraints on arbitrator conduct. The extensive authority of arbitrators renders any code of ethics particularly valuable, as individuals with such considerable power ought to be constrained by regulations on their conduct. In this respect, a code of ethics will underscore that arbitrators are not invincible and hold them accountable for their actions.⁵⁴

A uniform code of ethics also contributes to the integrity of the field and enables arbitration “to maintain . . . legal legitimacy and justice.”⁵⁵ A field is more likely to garner respect and public confidence if its key players are subject to high standards of ethical conduct.⁵⁶

Enforceable ethical standards will also bolster the attractiveness of arbitration as a method of resolving disputes. Individuals and entities will be more willing to commit to arbitration with the assurance that reliable recourse is available against wrongdoing.⁵⁷

Additionally, an established code of arbitrator ethics will lessen the dilatory tactics of displeased parties whose motive in seeking nullification of an award is simply to prolong the “day of reckoning.”⁵⁸ As previously noted, parties have limited ability to challenge arbitrator decisions.⁵⁹ One of the only options is to bring an action in court seeking vacatur of the award.⁶⁰ Litigants may be inclined to erroneously challenge the award by alleging arbitrator impropriety. With no established ethics code, the complainant has no standard with which to conform his allegations outside of case law related to vacatur under the FAA. An established ethics code presents a greater impediment for such parties who erroneously allege arbitrator misconduct as a guise for seeking judicial review or nullification of their award.

Moreover, a system of uniform standards of ethics for arbitrators facilitates a more sustainable system of adjudication. This is accomplished with decreased challenges to arbitral awards and a corresponding increase in the public’s confidence in the arbitral

⁵⁴ See Sabin, *supra* note 1, at 1345 (discussing arbitrators’ lack of accountability and emphasizing the importance of ethical standards to impose such accountability); see also Weston, *supra* note 5, at 475.

⁵⁵ See Menkel-Meadow, *supra* note 4, at 958.

⁵⁶ See Sabin, *supra* note 1, at 1382.

⁵⁷ See *id.*

⁵⁸ See *id.* at 980 (stating that ethics standards will prevent arbitration from being subject to “unnecessary challenges and increased litigation about vacation or enforcement of arbitral awards.”).

⁵⁹ See *supra* note 22.

⁶⁰ See *supra* note 24 and accompanying text.

process.⁶¹ If arbitrators are held to stringent and enforced standards of conduct and comply with these standards, it is likely that those prone to impropriety will naturally be expelled from the profession or receive fewer appointments.⁶² This will leave a repertoire of arbitrators who conduct themselves and their proceedings with integrity, eliminate the need for some parties to challenge arbitral decisions, and achieve public trust in the quality of arbitrator decision-making.

Finally, uniform ethical rules offer protection for participating parties, especially parties to adhesive arbitration agreements and those who are at an economic disadvantage relative to their opponents. As some commentators opine, the vulnerability of such parties increases the need to protect them against arbitrator misconduct.⁶³ Accordingly, the constraints of compliance with ethical rules help ensure that the arbitrator treats such individuals fairly.⁶⁴

B. Limitations

Though the benefits of a universal code of ethics for arbitrators would be plentiful, there are restraints on the imposition of such standards that render their adoption unlikely, at least in the near future.

Enforcement of a code of ethics for arbitrators will be exceedingly difficult given the current status of arbitration. As one commentator has opined, “[d]ue to the unregulated nature of the arbitration practice . . . enforcement of [uniform ethics] rules is difficult, if not impossible.”⁶⁵ The current barriers to establishing a uniform code of arbitrator ethics are insurmountable because there is no single entity with the authority to impose such a code on all arbitrators and sanction violators for noncompliance.⁶⁶

The costs associated with establishing a uniform code of ethics present another limitation to its adoption.⁶⁷ Arbitration has long been touted as a less expensive alternative to traditional litigation.⁶⁸ The imposition of a code of ethics will have

⁶¹ See Sabin, *supra* note 1, at 1344-45 (stating that arbitrator impropriety and unqualified autonomy partly contribute to the propensity of many parties to challenge awards and suggesting that oversight and accountability will remedy this issue).

⁶² See Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns Of Elite Investment Arbitrators*, 96 *Cornell L. Rev.* 47, 62 (2010) (stating that arbitrators accused of certain improprieties are less likely to be re-selected for future cases).

⁶³ See Menkel-Meadow, *supra* note 4, at 960 (suggesting that, for the protection of parties to adhesive arbitration, heightened ethical standards should apply to arbitrators).

⁶⁴ See *id.*

⁶⁵ Weston, *supra* note 5, at 456.

⁶⁶ See Weston, *supra* note 5, at 468-69.

⁶⁷ See Sabin, *supra* note 1, at 1380 (acknowledging that implementing uniform ethics standards, at least through a licensing program, has attendant costs).

⁶⁸ See *id.*

attendant expenses for all participants in arbitration that will likely be poorly received. For example, if the code is imposed by an entity created solely for enforcement purposes, such an organization will require funding that will likely be solicited from taxes, dues paid by arbitrators and provider institutions, or increased fees for parties engaging in arbitration.⁶⁹ Whether one or a combination of these funding sources is employed, the end result will be to increase the costs of arbitration, diminish the relative economy of the process and, accordingly, garner little support.

Additionally, fear of unwarranted sanctions or accusations of unethical conduct may discourage highly skilled and qualified arbitrators from continuing to offer their services. An elaborate code of ethics will provide many opportunities for parties to accuse arbitrators, sometimes erroneously, of impropriety.⁷⁰ Though ideally the enforcer of the code will be equipped to discredit and eliminate wrongful accusations, fear of sullyng one's reputation, being wrongly disciplined, or not being rehired and losing a dependable source of income may deter qualified arbitrators from becoming or remaining members of the field.⁷¹ The fear of being accused of violating the code may also impair the arbitrator's decision-making abilities. In this respect, some arbitrators may be inclined to issue judgments aimed at pleasing all parties, rather than judgments based on the merits of the case.⁷²

Finally, arbitral immunity restricts the remedies parties can seek for arbitrator misconduct. Arbitrators are afforded immunity for acts within the scope of their duties.⁷³ This immunity, akin to judicial immunity, applies even when the arbitrator flagrantly abuses his position and engages in deplorable conduct.⁷⁴ As some courts and commentators have explained, arbitrators are afforded this protection to, among other things, eliminate impediments to their decisional authority and entice qualified arbitrators to enter the field with the benefit of being shielded from personal liability.⁷⁵ Accordingly, any code of ethics that is binding on all arbitrators and imposes punishments for violations must account for arbitral immunity and be appropriately tailored to exclude acts within the scope of the doctrine. This will exclude many of the behaviors that one would expect a code of ethics to address, such as rendering an award in which the arbitrator has a financial interest.

Additionally, arbitral immunity restricts the ability of parties to sue the arbitrator personally for misconduct respecting activities covered by the doctrine.⁷⁶ As a result, a

⁶⁹ *See id.* at 1380-81.

⁷⁰ *See id.* at 1365 (discussing the likely effects of holding arbitrators personally liable for conduct).

⁷¹ *See, e.g.,* Menkel-Meadow, *supra* note 4, at 956 (discussing some of the consequences arbitrators will likely consider when deciding whether to comply with ethical standards).

⁷² *See id.* at 956 (stating that "compromise" awards can result where arbitrators attempt to please all parties for fear that they won't be rehired).

⁷³ *See* Holtzman, *supra* note 3, at 482.

⁷⁴ *See* Weston, *supra* note 5, at 458.

⁷⁵ *See* Weston, *supra* note 5, at 484.

⁷⁶ *See id.*; *see also* Menkel-Meadow, *supra* note 4, at 962.

code of ethics cannot provide parties with the option of seeking recourse from the individual arbitrator. This is a stark contrast to other professions that permit personal liability for certain conduct that harms the aggrieved party.⁷⁷

V. PAST EFFORTS AND PROPOSALS FOR ESTABLISHING UNIVERSAL ARBITRATOR ETHICS STANDARDS

One approach that has been proposed is “expanded judicial review of arbitration awards” to more effectively protect against arbitrator impropriety.⁷⁸ The rationale is that, by expanding the scope of judicial scrutiny, arbitrators will become more accountable and will be less likely to behave improperly, as they would be on notice of the possibility that a court will closely examine the process by which they arrived at their decision.⁷⁹ This method faces several challenges. The Supreme Court’s emphatic policy disfavoring extended judicial interference in the arbitral process renders it likely that the Court will disallow this approach.⁸⁰ Further, arbitrators are not required to provide written opinions, a fact which substantially impedes any judicial review.⁸¹ Finally, expanded judicial review will often extend proceedings and impose greater costs on the parties involved.⁸²

At least one commentator has advocated for the establishment of state arbitrator licensing boards responsible for enacting ethics codes.⁸³ This entity would control both the credentials and other requirements necessary for becoming an arbitrator and the standards of conduct by which all arbitrators are bound.⁸⁴ The board would also sanction arbitrators for violations of the code and render violations a crime, so as to evade the hurdle of arbitral immunity.⁸⁵

This plan is impressive and would be an excellent method of imposing a code of ethics on all arbitrators wishing to practice in the field. However, the recommendation is too ambitious given the current arbitral climate. The mostly private nature of arbitration and states’ limited ability to regulate the process present significant impediments. Also, the cost of this scheme would be substantial and would likely be shouldered by reluctant, if not unwilling, tax payers and players in the arbitral process.

Another proposed solution is amendment of the FAA permitting vacatur where a party proves that an arbitrator engaged in certain unethical conduct, such as concealment

⁷⁷ See Weston, *supra* note 5, at 466-67.

⁷⁸ Sabin, *supra* note 1, at 1362.

⁷⁹ *Id.* at 1363.

⁸⁰ See *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008).

⁸¹ Sabin, *supra* note 1, at 1363.

⁸² *Id.* at 1363-64.

⁸³ *Id.* at 1369.

⁸⁴ Sabin, *supra* note 1, at 1369.

⁸⁵ *Id.*

of a conflict of interest in an effort to secure appointment.⁸⁶ As previously stated, the FAA already permits vacatur for some unethical conduct, such as partiality and corruption.⁸⁷ This addition would enable parties to invalidate the proceeding where the arbitrator has engaged in other forms of unsavory conduct. Though attractive, this method is not particularly feasible. First, any such amendments “may have to be preceded by a shift in the federal attitude favoring arbitration’s status quo.”⁸⁸ Additionally, the arbitrator would not be held accountable for his conduct until after the fact.⁸⁹ Even then, true accountability will not result because the only consequences of the arbitrator’s behavior would be nullification of the award and potential forfeiture of repeat employment by the involved parties.⁹⁰ As one commentator has noted, “the problem is that if an award is not confirmed or is vacated, the punishment did not fit the crime . . . [t]here is no economic impact on the arbitrator, who is immune from civil liability.”⁹¹ Moreover, this remedy will harm the complaining party, who will then be saddled with the financial burden of completing another arbitration or initiating a lawsuit to resolve the dispute.⁹²

Noting that there is limited judicial inquiry into the arbitrator’s conduct, due in part to arbitral immunity, one commentator has suggested that the doctrine be modified to afford only qualified immunity.⁹³ According to this proponent, qualified rather than absolute immunity is appropriate because unlike judges, arbitrators are not accountable to the public and are subject to “minimal appellate review.”⁹⁴ Additionally, injunctive relief is ordinarily not available to delay the judgment of an arbitrator suspected of wrongdoing and there is no mandate that an arbitrator provide a written public record of their decisions, which shields them from public scrutiny.⁹⁵ Thus, under a qualified immunity doctrine, arbitrators would be responsible for misconduct respecting the arbitration proceedings and abuses of their position would no longer go unpunished.⁹⁶ The proponent of this method underscored the final and binding nature of the process as an additional justification for prohibiting absolute protection of an arbitrator’s unethical

⁸⁶ *Id.* at 1366.

⁸⁷ *See supra* note 24 and accompanying text.

⁸⁸ Sabin, *supra* note 1, at 1367.

⁸⁹ *See* Menkel-Meadow, *supra* note 4, at 961 (stating that ethical challenges, such as conflicts of interest are “raised after the fact when the losing party challenges the arbitral award”).

⁹⁰ *See id.*

⁹¹ Holtzman, *supra* note 3, at 495.

⁹² *Id.*

⁹³ *See* Weston, *supra* note 5, at 498-99.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

conduct.⁹⁷ One limitation of this approach, however, is that it does not provide pre-proceeding protection from arbitrator impropriety.

Some commentators, professional organizations, and states have proposed and adopted ethical rules for arbitrators.⁹⁸ None of these standards are universally applicable to all arbitrators,⁹⁹ but they nevertheless provide useful guidance as to what a universal code of ethics ought to include and may, in the future, be used as guides to formulate such a code.

One such code is The Code of Ethics for Arbitrators in Commercial Disputes.¹⁰⁰ A product of the joint effort of American Bar Association and American Arbitration Association members, this code “sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes.”¹⁰¹ In the preamble, the authors emphasize the importance of arbitrator accountability, the resultant need to ensure that arbitrators comply with “high standards” of ethical conduct and the importance of maintaining public confidence in arbitration.¹⁰² The code includes ten canons and sets standards for, among other things, disclosure, avoidance of impropriety or the appearance of impropriety, and rendering fair and independent judgments.¹⁰³

California, in addition to other states, has also established standards of conduct for arbitrators.¹⁰⁴ California’s Ethics Standards for Neutral Arbitrators in Contractual Arbitration is a comprehensive compilation of ethical standards of conduct.¹⁰⁵ The code applies to “all persons serving as a neutral arbitrator pursuant to an arbitration agreement” that is governed by the California Code of Civil Procedure and designates California as the forum for the arbitration.¹⁰⁶ The stated purposes mirror some of the major justifications for universal standards of ethical conduct: providing arbitrators

⁹⁷ *Id.* at 491.

⁹⁸ *See, e.g.,* Sabin *supra* note 1, at 1369.

⁹⁹ *See* Holtzman, *supra* note 3, at 483 (describing proposed ethics codes and standards as “wholly aspirational”).

¹⁰⁰ *See Code of Ethics for Arbitrators, supra* note 12.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See Code of Ethics for Arbitrators, supra* note 12.

¹⁰⁴ *See Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, JUDICIAL COUNCIL OF CALIFORNIA 1 (2003), http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf; *see, e.g., Florida Rules for Court-Appointed Arbitrators*, FLORIDA SUPREME COURT STANDING COMMITTEE ON MEDIATION AND ARBITRATION 1 (2010) <http://www.flcourts.org/core/fileparse.php/262/urlt/2010ResourceHandbookTab4ArbitratorRules.pdf>; *see also New York County Ethical Standards for Arbitrators and Neutral Evaluators*, NY SUPREME COURT COMMERCIAL DIVISION (2000), https://www.nycourts.gov/courts/comdiv/ny/ADR_ethicsforarbitrators.shtml.

¹⁰⁵ *See Ethics Standards for Neutral Arbitrators, supra* note 104.

¹⁰⁶ *Id.*

guidance in performing their duties, protecting parties to arbitration, encouraging public confidence in the arbitral process, ensuring arbitrator accountability, and maintaining the “integrity and fairness” of the arbitral process.¹⁰⁷ The standards disclaim that grounds for vacatur are derived from the FAA and that the intention is not to create new civil causes of action or affect any existing civil cause of action, but caution that violation of the standards may fall within the scope of vacatur under the FAA.¹⁰⁸ The standards regulate, among other things, disclosures of conflicts of interest, disqualification, duties and limitations respecting future professional relationships, confidentiality and ex parte communications.¹⁰⁹

Finally, some commentators have suggested that a code of ethics adopted from the ABA Model Code of Judicial Conduct may be appropriate for arbitrators due to the similarities in the functions of arbitrators and judges.¹¹⁰ Standards addressed by the Code of Judicial Conduct include impartiality, the effect of personal interests on decision-making, ex parte communications, and promotion of confidence in the judiciary.¹¹¹ Although other proposed codes of arbitrator ethics mirror some of the standards included in the Code of Judicial Conduct, critics disfavor this approach.¹¹² This is in part because of the differences in the public nature of the judiciary and the private nature of arbitration as well as the “transdisciplinary” aspect of arbitration.¹¹³

VI. PARTY RECOURSE FOR ADDRESSING AND REMEDIATING THE EFFECTS OF UNETHICAL ARBITRATOR CONDUCT

Despite the current lack of universal ethics standards, there are some preventative and remedial steps available to parties to address arbitrator impropriety. Recourse is admittedly limited. However, acting in accordance with one or more of these recommendations may nevertheless be helpful.

First, careful selection of arbitrators is crucial. Parties should approach the arbitrator selection process as one of the most important tasks relative to the proceeding. Selecting an arbitrator with impeccable repute in her professional community as well as a longstanding record of impartiality and integrity will decrease the likelihood that one will be forced to accuse the arbitrator of unethical conduct after the proceedings have begun.¹¹⁴ This can be accomplished by, for example, selecting arbitrators who are past

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Sabin, *supra* note 1, at 1378.

¹¹¹ MODEL CODE OF JUDICIAL CONDUCT (2011).

¹¹² Sabin, *supra* note 1, at 1380.

¹¹³ *Id.*

¹¹⁴ See Kapeliuk, *supra* note 62, at 64-65 (discussing the relationship between an arbitrator’s reputation and the arbitrator selection process).

judges or who are widely known and respected in their field, and by conducting investigations to determine whether the arbitrator has been accused or sanctioned for unethical conduct in his principal profession. Additionally, parties can appoint institutional arbitrators whose names are available through the associated institution's directory.¹¹⁵ This would simplify the research process.

Including certain provisions in the arbitration agreement will also be helpful. Where practicable, parties should consider arbitrating their disputes through a provider institution, such as JAMS or the AAA, by stipulating as such in the arbitral agreement. The agreement should also expressly incorporate the ethics rules of the chosen provider institution.¹¹⁶ This mandates that the arbitrator's actions comport with the established ethical standards of the provider institution and provides a mechanism for the imposition of sanctions if the arbitrator violates the rules.¹¹⁷ Such sanctions may not be as severe as those prescribed for violation of other uniform professional codes of ethics, but will still afford the benefit of oversight and accountability.¹¹⁸

Another useful contractual provision is one that entitles the parties to dismiss the arbitrator during the proceeding and retain some or all of the fees paid in the event of dismissal if the arbitrator behaves improperly. This empowers parties to avoid the final and binding judgment of a corrupt or unethical arbitrator. This will likely cost parties time and money, despite the return of fees.¹¹⁹ However, the imposition of these costs will be outweighed by the parties' relief from the binding judgment of an arbitrator who is without scruples.

With evidence that their arbitrator has engaged in unethical conduct, parties may also report the arbitrator to the ethics board of her principal profession, if applicable. For example, if the arbitrator is a lawyer by profession, parties may notify the bar association of the state in which the arbitrator is admitted to practice. In some instances, the conduct may violate the rules of the organization and may therefore be cause for professional discipline.

Finally, though an extremely limited remedy, parties can seek to have the award of an unethical arbitrator vacated by filing suit.¹²⁰ Courts rarely afford relief to parties in

¹¹⁵ See Weston, *supra* note 5, at 503 (noting that provider institutions administratively support the arbitrator selection process by offering a list of potential candidates).

¹¹⁶ See Weston, *supra* note 5, at 503 (explaining that, because of the established rules and procedures of provider institutions, such institutions "play a significant role in the conduct and outcome of the arbitration process").

¹¹⁷ See Blankley, *supra* note 25, at 472; see also Menkel-Meadow, *supra* note 4, at 977 (stating that to effectuate provider institution ethics rules, the rules "must be placed in arbitral contracts that adopt them or their sponsoring organizations rules of procedure or conduct").

¹¹⁸ See Weston, *supra* note 5, at 468-69 (noting that violation of professional codes of ethics applicable to other industries can in some instances support malpractice liability, whereas provider institutions are less stringent in enforcing their ethics rules).

¹¹⁹ See *id.* at 466 (explaining the costliness of disputing the propriety of an arbitrator's conduct).

¹²⁰ See Holtzman, *supra* note 3, at 495 (discussing the limited nature of the vacatur remedy).

this manner, as the FAA’s grounds for vacatur are “extraordinarily difficult to meet.”¹²¹ Moreover, parties who elect this approach would be responsible for the costs of bringing suit.¹²² However, if it is financially feasible, otherwise prudent and there is no other option to remedy the harm caused, this course of action is worth a try.

VII. CONCLUSION

Given the nature of the arbitrator’s role and the limited availability of judicial review, all arbitrators ought to be subject to uniform standards of ethical conduct subjecting wrongdoers to sanctions for violation. The benefits of these standards, such as ensuring arbitrator accountability and protecting the integrity of the arbitral process, render their adoption attractive.

However, the current autonomous status of arbitration is not amenable to such a scheme. The Supreme Court, in rendering decisions and interpreting the FAA, has afforded near unwavering deference to the decisional authority of arbitrators.¹²³ Thus, despite the commendable efforts that some states and entities have made to adopt uniform standards, it is improbable that national standards regulating the conduct of arbitrators will be established in the near future.

As a result, parties must take steps to protect themselves in the event that their arbitrator engages in unsavory conduct. Parties must also be aware of their limited post-proceeding recourse for challenging arbitral awards and bringing civil suits against arbitrators on the basis of impropriety. To that end, prudent selection of arbitrators, careful contract drafting, and selection of institutional arbitration or ethical rules are advisable. Whatever method is chosen, it is imperative that parties are proactive, as this approach helps ensure that parties evade the burdens of a non-existent uniform code of arbitrator ethics.

¹²¹ See Blankley, *supra* note 25, at 453.

¹²² See Holtzman, *supra* note 3, at 495.

¹²³ See *supra* note 34 and accompanying text.