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PROCEDURAL JUSTICE AND THE ROLE OF THE ATTORNEY IN ADR

RESOLVING DISPUTES OVER ATTORNEYS' FEES: THE ROLE OF ADR

*Alan Scott Rau**

I. FEE DISPUTES TODAY

A. THE EXTENT OF DISPUTING OVER FEES

JUST how often "disputes over fees" arise between attorneys and clients is a subject as to which we have little or no reliable information. At the very outset, of course, we encounter a problem of characterization; a neat dichotomy between, for example, "fee disputes" and disputes involving attorney "misconduct"[1] hardly accounts for the messiness of human realities. In some cases, attorney-client disputes do immediately appear to be about the size of the attorney's bill. They may, for example, involve claims that the fee was not in accord with the client's original understanding as to the basis of billing. They may involve disagreements about the reasonableness of hourly charges, or the propriety of charges for particular disbursements or services (such as work devoted to the preparation of the bill

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I am grateful to Dr. Cynthia Spanhel and Karen Bonney of the Texas State Bar Office of Research and Analysis, and to Professors Teresa Sullivan and Elizabeth Chambliss, for their advice and assistance in connection with this firm survey. I am also indebted to Professors Douglas Laycock and Charles Silver, Dr. Judy Corder, and David Cohen for their careful reading of earlier drafts of this paper and their helpful comments, criticisms, and suggestions.

1. *See* ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, Report to the ABA 13, 33 (1991) [hereinafter DISCIPLINARY ENFORCEMENT REPORT].

itself!).[2] They may involve claims of "bill padding,"[3] or of "overlawyering"[4] — or they may involve assertions that the fee was simply excessive in light of the result obtained.[5] Other disputes, in contrast, are nominally about "other things": they may involve claims of attorney delay, neglect, conflict of interest, or incompetence, or may focus on misuse of client property, or improper attempts to collect or secure payment of fees. They may also, however, involve claims that the attorney has been billing for work that has simply not been performed, or they may involve assertions that the attorney's performance was substandard — that is, that the result obtained was simply inadequate in light of the size of the fee. Payment of fees, then, is often intertwined with other subjects of contention. But even where disputes appear to be about "something else"—both where allegations of misconduct are colorable and when they are inserted for rhetorical effort or leverage—it seems plausible to suggest that such disputes may frequently be triggered by the attorney's demand for payment of his fee and fueled by the attorney's continuing attempts to collect it.

However defined, the suspicion persists that disputes over fees constitute a major and particularly intractable share of all attorney-client conflict. A 1976 study by Steele and Nimmer, based on in-depth interviews with 45 persons who had experienced "serious problems" with their attorneys, identified reports of excessive fees and of delay in performance as the two most common complaints:

> [T]here were concerns about attorney demands for, and exercise of, unilateral control of fees, with negotiation about fees and even itemization of billable services often lacking. Another area of dispute involved instances in which actual costs substantially exceeded those initially discussed and either estimated or agreed to, even though no special problems had been encountered in the case.[6]

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2. *See In re* Disciplinary Action Against Simmonds, 415 N.W.2d 673, 676 (Minn. 1987) (attorney's fee included time spent in preparing billing records, as well as time spent in answering ethics complaint); *see also* Weinberger v. Great Northern Nekoosa Corp., 801 F. Supp. 804, 828 n.70 (D. Me. 1992) (attorney sought reimbursement "for as many as four meals in one day").

What appears to be an increasingly controversial subject is the propriety of charging clients for costs that might more properly be considered the overhead of the law firm, such as the time of paralegals or time charges for computerized research. *See id.* at 827-28. A rich source of anecdotes on the subject is Susan Beck & Michael Orey, *Skaddenomics*, AM. J. LAW, Sept. 1991, at 3.

3. *See* St. Paul Fire & Marine Ins. Co. v. Dresser Indus., Inc., 972 F.2d 341 (4th Cir. 1992 (unpublished disposition)) (attorney billed "outlandish" numbers of hours in order to "charge the client what the billing partner thought the services rendered were worth"; associate billed 24 hours or more in a single day on nine occasions, on one day billing over 32 hours).

4. *See Weinberger*, 801 F. Supp. at 815 (hours charged by plaintiffs' attorneys were "excessive, duplicative, or otherwise redundant . . . . It appears they were shooting mice with a cannon.").

5. "[Even] [a] Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983).

6. Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 952. A table giving the frequency of various reported problems appears *id.* at 1018. A Canadian survey conducted in 1978 found that 53% of the respondents listed "overcharging" as their main complaint against the legal profession. Alvin Esau, *Excessive Fees & Lawyer Discipline*, 13 MANITOBA L.J. 287, 287 (1983).

On the attorney's side, our survey of the Texas bar suggests a similar pattern: 61.2% of our respondents reported that their firms had experienced fee disputes with clients over the preceding five years, and 31.1% of these reported that five or more fee disputes had occurred during that period.[7]

A number of structural factors combine to make differences over fees both widespread and hard to resolve satisfactorily. To begin with, it is notoriously difficult even for *cognoscenti* to value legal services with any objectivity and uniformity.[8] And the difficulties from the client's perspective are even greater. The services of the attorney — unlike those of the automobile mechanic, the plumber, or even the physician — are often intangible; they are commonly performed out of the client's sight; they involve the manipulation of recondite forms and practices and of official agencies to which the lawyer's training and experience give him privileged access. Even for clients who are "repeat players," there may be no suitable standard of comparison to assess the reasonableness of a fee, since all but the most routine legal problems, as well as the skills, experience, training, prestige, track record, and connections of different attorneys, are likely to be incommensurables.[9]

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7. Of firms with more than 10 attorneys, 85.6% reported that they had experienced at least some fee disputes over the past five years, and of these, 69.9% reported an incidence of five or more such disputes. The survey defined a fee dispute as "a refusal to pay a fee or at least a demand by a client that a fee be reduced or returned," cautioning that the client's "mere expression of concern over a fee or a question about how a fee was calculated" should not be considered such a dispute.

Our total sample included 3,379 Texas law firms, drawn from a database of law firms in IOLTA (Interest on Lawyer's Trust Account) records. Participation in the IOLTA program is mandatory for Texas attorneys. *See* SUPREME COURT OF TEXAS STATE BAR RULES art. XI and app. (1988) (governing the operation of the Texas Equal Access to Justice program, amendment effective July 1, 1989). All of the firms in the database with two or more attorneys were surveyed. The remainder of the sample (making up approximately 42% of the sample) consisted of solo practitioners; we surveyed approximately 15% of all solo practitioner firms in the database. 1,794 responses were received, for an overall response rate of 53% (for solo practitioners, the response rate was 40%; for firms with two or more attorneys, the response rate was 63%). The responses reported here have been weighted to correct for undersampling of solo practitioners [hereinafter Survey of the Texas Bar].

8. *See* ROBERT H. ARONSON, FED. JUD. CENTER ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW (1980). Rule 1.5(a) of the Model Rules of Professional Conduct contain a laundry list (apparently nonexclusive) of "factors to be considered in determining the reasonableness of a fee:"

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1992).

9. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1992). In billing for its merger and acquisition work the New York firm of Skadden, Arps, Slate, Meagher & Flom factors in, according to its chief administrative officer "how well we perform, what kind of pressures we have to work under, and the unique skills we bring to a case" as well as the number of billable hours. MARK STEVENS, POWER OF ATTORNEY: THE RISE OF THE GIANT

Comparison is made even more problematic by the restrictions — attributable both to professional discipline and to professional custom — that continue to limit the free flow of information about legal fees and services.[10] This low level of visibility and accountability can often make the practice of law resemble what has been called a "confidence game," in which a principal goal of the attorney is to "stage manage" the client relationship in order to create an "appearance of help and service" justifying the fee charged.[11]

A client who finds an attorney's fee excessive is likely to grumble and then to pay the bill anyway.[12] Where the client refuses to pay — or makes an unsuccessful demand for a reduction in the fee charged, or for the return of a fee already paid — then we can say that a true "dispute" has surfaced between attorney and client.[13] However, the mechanisms available to resolve this dispute are not likely to lead to solutions that commend themselves to either of the parties as particularly fair or efficient.

LAW FIRMS 107 (1987). The firm's fee-setting practice has been less charitably described as "a little art, a little science. . . . Their objective is to come in with a number that'll get paid sans any embarrassing objections from the client." *Id.*

10. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 775-90 (1986); *see also* Lauren R. Reskin, *Lawyer Advertising Levels Off: P.R. Use Growing*, 70 A.B.A. J., June 1984, at 48, 49 (58% of lawyer respondents expressed concern that advertising is "unprofessional").

11. *See* Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Coaptation of a Profession*, 1 L. & SOC'Y. REV. 15, 24-26 (1967). It also helps to make possible a variety of unseemly billing practices, from the universally condemned (fictional billing or "padding bills") to the easily rationalized (doing unnecessary work or "running the meter," sometimes excused as "leaving no stone unturned"). *See generally* Lisa Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 705-20 (1990).

12. Almost all of the respondents in the Steele & Nimmer survey simply acquiesced in the fee demanded by the attorney. *See* Steele & Nimmer, *supra* note 6, at 957-60 ("I simply paid the bill. What could I do?").

Anecdotal evidence, however, suggests an increasing willingness on the part of at least sophisticated clients to challenge fees perceived as excessive. *See* Ellen J. Pollock, *In a Bid to Trim Costs, Many Companies Are Forcing Law Firms to Reduce Fees*, WALL ST. J., Dec. 4, 1991, at B1; Sharon Walsh, *Lawyers' Clients Get a Little Cross Examining Bills*, WASH. POST, June 8, 1992, at F1; David Margolick, *At the Bar: Keeping Tabs on Legal Fees Means Going After the People Who Are Hired to Go After People*, N.Y. TIMES, March 20, 1992, at B16 ("[f]or a fee, a number of companies will now monitor legal bills" received by clients); John W. Bickel & William A. Brewer, *The Demise of the Billable Hour*, TEX. LAW., Sept. 14, 1992, at 26 ("shift in the balance of power" between clients and attorneys resulting from the "realities of the post 1980s business environment, coupled with increased competition and the oversupply of lawyers"). Increased client attention to legal costs is clearly "in the air," and this may contribute not only to a greater willingness to challenge fees, but also to a greater reliance on in-house counsel, and to a greater insistence that attorneys be familiar with and consider the use of alternatives to litigation such as mediation and arbitration.

13. This is of course the terminology of Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 527 (1981):

> If the other party accepts the claim in full and actually delivers the resource in question in a routine manner ("Yes, we'll repair your new car; just bring it in."), there is no dispute. Outright rejection of a claim ("The car was not defective; it broke down because of your misuse.") establishes an unambiguous dispute; there are now two (or more) parties with conflicting claims to the same resource. A compromise offer ("We'll supply the parts if you will pay for the labor.") is a partial rejection of the claim, which initiates negotiation, however brief, and thus constitutes a dispute. . . . *A dispute exists when a claim based on a grievance is rejected either in whole or in part.*

Id.

B. FEE DISPUTES AND THE DISCIPLINARY MECHANISM

We are all aware that a contract between individuals can never be regarded as entirely a matter of private agreement, "not restrained by law."[14] Fee arrangements between lawyers and clients, however, are to an exceptional degree subject to public regulation and supervision.[15] The attorney who has overcharged a client may in theory have committed an ethical violation: disciplinary rules commonly proscribe the charging of "excessive" or "unreasonable" fees,[16] and fee-related grievances may arise out of other ethical prohibitions as well.[17] In theory, then, the client who has been overcharged may resort to the formal grievance machinery operated by the organized bar. The overwhelming majority of attorney disciplinary proceed-

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14. A Missouri statute does curiously provide that the "compensation of an attorney . . . is governed by agreement, express or implied, which is not restrained by law." MO. ANN. STAT. § 484.130 (Vernon 1987). This of course has never been taken literally. *See In re* Kinghorn, 764 S.W.2d 939 (Mo. 1989) (client consulted attorney for help in collecting child support, and signed a retainer agreement and promissory note for $2,350, which was more than the amount then owed; held, discipline imposed; attorney "should have known that he had collected far too much money"); Lauer, *Limitations on Attorney Fees*, 21 J. MO. BAR 297 (1965).

15. *See generally* WOLFRAM, *supra* note 10, at 495-542.

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1992). The rule mandates simply that "[a] lawyer's fee shall be reasonable," although the rule includes a laundry list of "factors to be considered" in determining a fee's reasonableness. *See supra* note 8. Wolfram writes that the "austere and virtually indecipherable" standard of the Model Rules was probably intended to be "at least as strict" as that found in the 1969 Model Code of Professional Responsibility, that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." *See* WOLFRAM, *supra* note 10, at 517. For the view that this semantic difference between the Model Rules and the Model Code is of no substantive significance, *see* OREGON STATE BAR, THE ETHICAL OREGON LAWYER § 4.2 at 4-4 (1991) ("While [Oregon Disciplinary Rule 2-106(A)] proscribes a 'clearly excessive' fee rather than an 'unreasonable' fee, the terms are synonymous.").

Absent from the laundry list of the Model Rules is any mention of the sophistication of the client or the client's informed consent to any fee arrangement, although these factors have an obvious (if usually covert) impact in fee cases. *But see* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 4-200(B)(2) (1992) (forbidding "unconscionable" fees, and adding the "relative sophistication" of attorney and client to the list of factors to be considered "in determining the conscionability of a fee"); SUPREME COURT OF TEXAS, STATE BAR RULES, art. X, § 9, Rule 1.04, cmt. 8 (1991) ("[A] fee arrangement negotiated at arm's length with an experienced business client would rarely be subject to question. . . . [A]pplication of the disciplinary test may require some consideration of the personal circumstances of the individuals involved."); *cf.* Kipper v. Kipper, 542 N.Y.S. 2d 617, (N.Y. App. Div. 1989) (suit by law firm to recover fee; court "would be unable to countenance" the fee charged if not for fact that client's father "was a sophisticated businessman versed in legal matters" and "fully involved" in determining course of litigation).

17. *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1992) ("Conflict of Interest: Prohibited Transactions"); Rule 1.15 ("Safeguarding Property"); *see also* Rule 8.4(c) (the attorney shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Consider the relatively efficient attorney who is able to complete in five hours a task to which most other lawyers would need to devote ten hours — and who then proceeds to "pad" his bill so as to charge for seven hours of work. Such conduct would presumably run afoul of Rule 8.4(c), although the total dollar amount of the bill is by hypothesis "reasonable" with respect to the customary charge in the locality. *In re* Farmer, 747 P.2d 97 (Kan. 1987) (in a personal injury case, attorney withheld funds from settlement proceeds for the purpose of paying medical bills; he then negotiated reduction with doctors and hospital by representing the settlement was not adequate to pay all expenses, and retained the difference for himself; one year suspension from practice ordered); *see* Lerman, *supra* note 11, at 687-96, 709-13.

ings are in fact triggered by client complaints.[18]

Of course, bringing the disciplinary mechanism into play requires certain cognitive resources that a client may lack — including, at the very least, knowledge that such a mechanism exists.[19] But there are more fundamental problems that make the existing mechanism for the discipline of attorneys illsuited — to put it mildy — to handle the typical fee dispute.

In many, if not most, cases disagreements over fees will in fact turn on such matters as an interpretation of the parties' contractual arrangement — the client's original understanding, for example, with respect to the basis for billing, the services to be rendered, or the likely extent of necessary "lawyering."[20] By contrast, existing disciplinary mechanisms are based on a law enforcement model, principally designed to deter deviant conduct and to weed out wrongdoers from the profession.[21] The traditional focus of disciplinary agencies has thus been on the possible "misconduct, moral guilt, and

18. *See* Steele & Nimmer, *supra* note 6, at 973. The ABA's Center for Professional Responsibility conducted a survey of disciplinary agencies in 1989 inquiring: "In how many of your disciplinary cases are the complainants lawyers?" The average percentage estimate given was around 7%; only two jurisdictions estimated the percentage of lawyer complainants as high as 20%. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY STANDING COMM. ON PROFESSIONAL DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS, 1988 DATA 41-45 (1989) [hereinafter ABA SURVEY].

19. Of the 45 respondents in the Steele and Nimmer survey who had experienced "serious problems" with their attorneys, not one brought the problem to the attention of the state disciplinary system. Thirty-five did not even know of the existence of the disciplinary agency. Even those who know of the agency's existence might well suffer from misconceptions concerning, for example, the potential cost of the process to the complainant, the effect that any complaint might have on pending legal matters for which the attorney had been retained, or bias on the part of agency personnel. (They "are all in cahoots and they bury their own mistakes.") Steele & Nimmer, *supra* note 6, at 957, 962-63.

20. Attorneys in our survey who had experienced fee disputes over the previous five years were asked to indicate the grounds on which the client had refused to pay, or had asked for a reduction in, the fee. One possible ground suggested was that the client claimed that "the fee charged was not in accordance with the fee agreement or with the understanding between the client and your firm at the time your firm was retained." 31% of respondents answered that clients disputing a fee "sometimes," "almost always," or "always" made such a claim. This was by a considerable margin a higher rate than for any of the other possible grounds suggested (for example, that the fee charged was not "reasonable" according to prevailing billing standards in the community, or that the fee was excessive because of alleged deficiencies in the quality of legal services rendered). Of course, this is self-reporting, that may lend itself to possible tendentious characterizations by the attorneys involved. In addition, there were a large number of miscellaneous responses that themselves suggested the presence of inadequate communication — and perhaps inadequate self-awareness as well. For example:

"Client just didn't want to pay."

"Most of my complaints have been 'just too high' without any objective basis for the complaint."

"People only remember what they want to remember and once they have no further need for your service they come up with reasons why they should not pay an attorney. . . . They look for someone to blame for their own stupidity, and the last one in line is the attorney."

"[O]ur only two real fee disputes were with individuals who were fairly irrational and unstable and I don't know they would have accepted an arbitrator's decision — they were angry at the world and the legal system and took it out on us." Survey of the Texas Bar, *supra* note 7.

21. In the words of the Clark Committee [the Special Committee on Evaluation of Disciplinary Enforcement, whose report was formally adopted by the ABA in 1970]:

> The profession's self-policing role has several purposes, including disciplining the attorney guilty of misconduct, deterring future misconduct and protecting the public by removing from the roll of attorneys those whose conduct has

deviance" on the part of the attorney rather than on the substandard practice of law.[22] Such an emphasis naturally tends to distort the process by which the concerns of a client with respect to a fee are addressed. As with most schemes of self-regulation, a substantial impetus for the traditional disciplinary model is the desire to forestall even more extensive regulation of the profession by the state.[23] The system accordingly does not even purport to resolve particular private disputes, nor to provide redress for the client (although it is increasingly common in some jurisdictions to see the imposition of lesser sanctions, or even a failure to prosecute, made conditional on restitution by the attorney to the client of any excessive fee).[24] Assume, for

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> demonstrated that their continued practice may jeopardize the interests of clients or the public.

ABA REPORT OF THE SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT 95 ANN. REP. ABA 783, 893-94 (1970) [hereinafter Clark Committee Report]; *see also* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1 (1991).

22. *See* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 228.

23. *See* Clark Committee Report, *supra* note 21, at 805.

> Unless the profession as a whole is itself prepared to initiate radical reforms promptly, fundamental changes in the disciplinary structure, imposed by those outside the profession, can be expected. . . . "We will compound our own cure or someone will mix up a dose which will curl our hair."

Id.

24. *See, e.g.*, Toledo Bar Ass'n v. Lubitsky, 590 N.E.2d 746 (Ohio 1992) (fee claimed by attorney "was clearly excessive based upon the limited nature of the task requested and the minimal services performed"; attorney suspended from practice for six months "with reinstatement contingent upon [his] return of $8,500 to [client]"); *In re* Disciplinary Proceedings Against Guenther, 369 N.W.2d 700 (Wis. 1985) (fee agreement was on basis of 1% of sales price of client's property but attorney nevertheless billed client at an hourly rate based on inadequate time records; held, attorney suspended for one year and required to refund portion of fees collected that exceeded the agreed percentage of sales price); Florida Bar v. Hollander, 594 So.2d 307 (Fla. 1992) (attorney agreed to a contingent one-third fee in collection case, but later received $3,250 as a settlement of collection matter all of which he applied toward his fee; held, attorney given a public reprimand and ordered to pay restitution of 2/3 of money received on client's behalf); Florida Bar v. Della-Donna, 583 So.2d 307, 311 (Fla. 1989) ("Charging and collecting an excessive fee can cause harm just as converting a client's funds can. Restitution of an excessive fee, therefore, can be ordered as a condition of readmission or reinstatement . . ."). *But see In re* Brown, 511 N.E. 2d 1032 (Ind. 1987) (attorney charged $5,678 for work in connection with an "extremely simple" estate valued at $2,618; held, attorney publicly reprimanded but "a disciplinary proceeding cannot order [an attorney] to pay his client a fixed amount"; the "finding that the charge was clearly excessive, hopefully, will motivate [the attorney] to meet his obligations").

Even in jurisdictions where restitution may be made part of a disciplinary sanction, courts will be reluctant to do so where the amount of the loss suffered by the client is not "ascertained or . . . readily ascertainable." *See In re* Disciplinary Proceedings Against Harman, 403 N.W.2d 459 (Wis. 1987) (attorney filed suit against client to collect $9,000 but at trial court found that under fee agreement he was only entitled to $2,850; in a later disciplinary proceeding, the court refused to order attorney to reimburse client for legal fees incurred in defending against attorney's action; an order for restitution "would convert the disciplinary proceeding into a 'trial' on the issue of damages, something for which the disciplinary procedure is neither designed nor fitting."). The client apparently has no right to intervene in any disciplinary proceeding in order to seek restitution. *See In re* Disciplinary Proceedings Against Guenther, 369 N.W.2d at 706-07 (Abrahamson, J., concurring).

The Clark Committee Report recounts an incident in which the members of a state disciplinary agency concluded that an attorney who had charged $15,000 in a divorce case had rendered services worth at most $3,000. The agency then offered the attorney to "take no action"

example, that an attorney is hired on the basis of an hourly fee that is customary and thus assumed to be "reasonable." The client, however, asserts that the number of hours actually devoted to the project was surprising and unnecessarily high. Does this commonplace scenario even pose an ethical problem, or present a claim of a disciplinary violation? The author has heard assertions by responsible bar officials that it does not.

Many client complaints filed with disciplinary agencies do not even lead to formal proceedings; they are dismissed at an early stage and the underlying contractual issues are never addressed. Only a very small number lead to the actual imposition of sanctions. And in all probability, the rate of dismissal is even greater in cases alleging excessive fees than in cases alleging other kinds of misconduct.[25] As a practical matter, disciplinary action against an attorney who has charged an "excessive fee" is imposed in only the most blatant cases of abuse.[26]

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if he was willing to reduce his fee to $3,000, warning that in the absence of such an agreement it would file a complaint against him. *See supra* note 21, at 895-96; *see also In re* Kinghorn, 764 S.W.2d 939 (Mo. 1989) (staff counsel's offer to recommend disposition of a grievance by a mere reprimand if attorney would refund fee to client "before sundown"). In a number of jurisdictions claims of excessive fees may be the subject of informal mediation by the disciplinary agency at a preliminary screening stage, even though there appears to be no basis for a finding of an ethical violation and the agency would therefore dismiss the complaint without prosecution. In such cases agency personnel may "suggest that the attorney act to resolve the grievance or . . . make a unilateral offer or action to produce such a resolution." *See* Steele & Nimmer, *supra* note 6, at 983-90.

25. The 1989 survey of disciplinary systems conducted by the ABA's Center for Professional Responsibility indicated that on average, 58% of the complaints received by disciplinary agencies survived an initial screening process and were "investigated." ABA SURVEY, *supra* note 18, at 9. Public sanctions were ultimately imposed at an average rate of 2% of the total complaints received, and private sanctions at an average rate of 2.5%. *Id.; see also* ABA DISCIPLINARY ENFORCEMENT REPORT, *supra* note 1, at 9 ("[i]n some jurisdictions up to ninety percent of all complaints filed were summarily dismissed"). Such figures do not distinguish between complaints over excessive fees and other types of ethical violations. However, in Steele and Nimmer's study of disciplinary sanctions in 17 jurisdictions, the authors did find that a disproportionate number of the grievance cases that were not dismissed at an early stage, but that proceeded to a formal hearing, resulted from inquiries initiated by the agency itself; disproportionately few of the cases that survived early dismissal resulted from client complaints. Steele & Nimmer, *supra* note 6, at 990-91.

During 1986, 11.9% of the *complaints* received by the Washington State disciplinary agency involved an allegation of excessive fees. However, on only two occasions from 1984 through 1986 were *sanctions* imposed for violation of Rule 1.5(a) of the MODEL RULES OF PROFESSIONAL CONDUCT. *See supra* note 8. This represented only 1.3% of the total number of sanctions imposed during this period. Farrell, *Discipline Statistics: Consistency and a Few Surprises*, WASH. ST. B. NEWS, June 1987, at 20, 21, 25. During 1992, 10.3% of disciplinary complaints in Washington concerned fees, most of them alleging "excessive" fees; while the state no longer categorizes sanctions according to the particular disciplinary rule involved, state disciplinary counsel is aware of no case during the past five years in which sanctions were imposed for "excessive" fees. WASH. ST. B. NEWS, Aug. 1993 at 35; Personal communication, Leland G. Ripley, Chief of Disciplinary Counsel, Aug. 4, 1993. The pattern nationwide appears to be similar. According to the ABA, during 1990, violations with respect to fees constituted 5.2% of the offenses that were reported to the National Discipline Data Bank as giving rise to the imposition of public disciplinary sanctions against attorneys. ABA, CENTER FOR PROFESSIONAL RESPONSIBILITY, NATURE OF OFFENSES REPORTED TO NATIONAL DISCIPLINE DATA BANK IN 1990 (1991). And of these, almost all involved an offense categorized as "failure to return fee"; the category of "overreaching, excessive fee" accounted for fewer than 1% of the sanctions. *Id.*

26. When discipline *is* imposed for an excessive fee, the penalty is rarely severe. The

It is not hard to find explanations for the extraordinary infrequency of disciplinary sanctions for excessive fees. We have already noted the extent to which the bar's disciplinary process is typically an inquiry into attorney "misconduct." And we have noted how difficult it is to be confident about the proper valuation of legal services. In addition, it may well be true that the organized bar may find it hard "in close cases to judge [a claimed fee] as a disciplinary violation" since most lawyers would themselves "like to receive handsome fees," and may find the imposition of discipline for having received too much as something like "a contradiction in terms."[27] In such circumstances, a disciplinary body may understandably be reluctant to make a finding of an ethical violation on the ground that an attorney's fee is "excessive" or "unreasonable." Such reluctance would be reinforced by an awareness that any public and official finding of wrongdoing puts in jeopardy a most valuable asset — the attorney's good reputation among colleagues and potential users of legal services — and leaves the wrongdoer "stamped with dishonor and disgrace."[28] In some jurisdictions, indeed, this common reluctance to impose sanctions in fee cases may find support in the phrasing of court rules that prohibit a finding of misconduct unless the amount of the attorney's fee is actually "extortionate or fraudulent."[29]

ABA's disciplinary standards call for suspension "when the lawyer did not mislead a client but engages in a pattern of charging excessive or improper fees"; a single instance of charging an excessive or improper fee typically leads to no more than a reprimand. *See* ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 21, at 46; *cf. id.* at 35 (lawyer who "intentionally overstated the number of hours he worked on a client's estate to make it appear that he was entitled to $9,500" disbarred). *See also In re* Ferrucci, 580 N.Y.S.2d 806, 807-08 (N.Y. App. Div.), *appeal dismissed*, 79 N.Y.2d 941 (1992) (lawyer's charging excessive fees was "not simply an isolated incident of misconduct but more likely a pattern of behavior"; suspension for six months ordered).

27. WOLFRAM, *supra* note 10, § 9.3 at 516.

28. Cohen v. Hurley, 366 U.S. 117, 147 (1961) (Black, J., dissenting).

29. *See* OKLA. STAT. ANN. tit. 5, Ch.1 app. 1-4, 1.4(a) (West 1984) (Rules Governing Disciplinary Proceedings). We can never know whether such an apparently rigorous formulation leads the Oklahoma courts and disciplinary authorities to shrink in practice from imposing sanctions in fee cases to any greater degree than in other jurisdictions. It seems doubtful that it does. *See, e.g.*, State *ex rel.* Oklahoma Bar Ass'n v. Moss, 577 P.2d 1317, 1320 (Okla. 1978) (attorney charged 50% of the assets of an estate for services in connection with probate of will and administration of estate; held, attorney suspended for 30 days; court relied on dictionary that defined "extortionate" to mean "exorbitant" and that in turn defined "exorbitant" to mean "excessive"!).

In addition, California's Rules of Professional Conduct are phrased so as to prohibit only the charging of "an illegal or unconscionable fee" by the attorney. CALIFORNIA RULES OF PROFESSIONAL RESPONSIBILITY Rule 4-200(a) (1992); Aronin v. State Bar, 801 P.2d 403 (Cal. 1991) ("A fee that 'seems high' or even one that is in fact high is not the same as an unconscionable fee."); *see also supra* note 16. Play in the joints is reduced even further by the requirement that an attorney found to have committed a "wilful violation" of this rule shall be suspended from the practice of law for at least six months, "irrespective of mitigating circumstances." Wests Ann. Cal. 23, Pt. 2 (1973) (Transitional Rule of Procedure of the State Bar of California Div. 5, Std. 2.7).

The verbal formulation for discipline used in states like Oklahoma and California appears to be a remnant of the standard applied in many other jurisdictions in fee cases prior to the adoption of the Model Code of Professional Responsibility in 1969. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 27 (1930) (committee must decline to pass on any question regarding proper fees "except in those flagrant cases where an attorney, under the guise of charging a fee, has retained so much of the funds coming into his hands as . . .

Of course, that the state disciplinary system is "avowedly coercive and public-oriented,"[30] and that the imposition of sanctions stigmatizes the attorney found guilty of misconduct, may have a double-edged effect on the resolution of fee disputes. All this may make the actual imposition of public sanctions unlikely. But at the same time no attorney threatened with a fee-based complaint can completely ignore the existence of the bar's grievance machinery or the possibility of formal hearings and an adverse finding: As the ABA's Special Committee on the Resolution of Fee Disputes noted, "Reputable attorneys have occasionally given in to preposterous demands by clients simply to avoid involvement with the disciplinary machinery, while less scrupulous lawyers soon learn that only fees so outrageous as to constitute overreaching will be considered . . . to warrant the institution of formal disciplinary proceedings."[31]

C. LITIGATION OVER FEES

Fee disputes may also become the subject of litigation. Unlike the grievance mechanism for the discipline of attorneys, adjudication is overtly oriented toward the resolution of private disputes. Lawyers sue clients to recover fees,[32] and in adjudicating fee suits brought by lawyers, courts em-

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amounts to misappropriation of funds"); *see also In re* Quinn, 135 A.2d 869, 872 (N.J. 1957) (finding it "unthinkable to condemn a demand or charge as unethical merely because it exceeds another's judgment of what is fair. The touchstone is moral turpitude"); *In re* Greer, 380 P.2d 482, 487 (Wash. 1963) (where "ethical considerations take us from one end of the spectrum marked 'reasonable' through categories designated successively as unreasonable, excessive, immoderate, inordinate, exorbitant, and unconscionable, we move in a direct line from the civil arena into a disciplinary forum").

Texas has also recently adopted a restrictive and nonstandard formula for fee cases, although one that is often derided as obscure and unworkable. TEX. DISCIPLINARY R. PROF. CONDUCT Rule 1.04(a) (1989), Volume 3 of the Texas Government Code in title 2, subtitle G app. (Vernon Supp. 1992). Because a standard of "reasonableness" is "too vague and uncertain to be an appropriate standard in a disciplinary action," the rule prohibits only illegal or "unconscionable" fees. *Id.* at cmt. 1. The rule then goes on to define a fee as "unconscionable" if "a competent lawyer could not form a reasonable belief that the fee is reasonable." *Id.* at 1.04(a).

30. WOLFRAM, *supra* note 10, § 3.5 at 138 n.77.

31. ABA SPECIAL COMM. ON RESOLUTION OF FEE DISPUTES OF THE ABA SECTION OF BAR ACTIVITIES, THE RESOLUTION OF FEE DISPUTES: A REPORT AND MODEL BY LAWS 4 (1974).

32. The Model Code of Professional Responsibility suggested in EC 2-23 that

> A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-23 (1980). Nothing similar even to this hortatory "ethical consideration" can be found in either the 1983 Model Rules or the Comments to those rules. *See* WOLFRAM, *supra* note 10, § 9.61 at 553 n.99; Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. BAR FOUND. RES. J. 939, 944. As might be expected, it takes a fairly outrageous case before discipline against a lawyer for instituting a collection lawsuit will even be contemplated. Such a case is *In re* Wetzel, 574 P.2d 826 (Ariz. 1978), where an attorney filed "numerous lawsuits" against clients to collect fees and "failed to exercise even minimal efforts to avoid these controversies." *Id.* at 828. In many cases he sought punitive damages to bring his claim within the jurisdiction of the superior court in order to force the client to "go in front of the jury" and "teach him a lesson," even though he knew that punitive damages are not recoverable in con-

ploy a curious and unpredictable hybrid of contract law and disciplinary code-inspired equity.[33] Clients also sue lawyers, and whether the suit is denominated as one for malpractice, fraud, or breach of contract, a substantial number of such cases turn on claims by the client that the attorney's fee is unwarranted.[34]

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tract cases. *Id.* The attorney was indefinitely suspended from practice. *Id.* at 829. *See also In re* Wetzel, 691 P.2d 1063, 1073 (Ariz. 1984), *cert. denied*, 469 U.S. 1213 (1985) (attorney disbarred).

33. *See, e.g.*, Wheeler v. Scott, 777 P.2d 394 (Okla. 1989). In this case an attorney filed suit to collect unpaid fees in excess of $140,000. The trial court reduced the fee to slightly over $125,700, but the state supreme court found this still excessive: It reversed and remanded with instructions to the trial court to reconsider and to apply the fee standards used in previous cases where attorneys' fees were awarded under "prevailing party" statutes and under the "equitable fund" doctrine. *E.g.*, State v. City of Oklahoma City, 598 P.2d 659, 660-61 (Okla. 1979) (creation of a common fund through attorney effort; factors to be considered in awarding attorneys' fees are similar to guidelines of Code of Professional Responsibility). *Wheeler*, 777 P.2d at 396-97, 399. On remand, the trial court further reduced the fee to $75,500. Wheeler v. Scott, 818 P.2d 475, 477 (Okla. 1991). A second appeal followed. The supreme court held that while the number of hours on the case billed by a first-year associate was unreasonable and should be reduced, the fee should have been calculated by using "the hourly rate to which [the client] contractually agreed." *Id.* at 480. It accordingly fixed the fee at $94,000. *Id.* at 482. In addition, the attorney received a statutory attorney's fee of approximately $14,000 as the prevailing party in an action to collect a debt — and a further attorney's fee, to be determined upon a further remand, as the prevailing party on the appeal! *Id.* at 483; *cf.* McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir. 1985) (when asked to enforce a fee contract in an adversary proceeding between attorney and former client, "the court is not deciding whether a lawyer's conduct is unethical but whether . . . it has resulted in such an enrichment at the expense of the client that it offends a court's sense of fundamental fairness and equity").

34. *See, e.g.*, Coughlin v. SeRine, 507 N.E.2d 505 (Ill. App. Ct. 1987). In an action by an attorney to recover a fee, the client counterclaimed for "professional malpractice, breach of fiduciary duty, accounting, breach of contract and fraud, in separate counts and all related to the alleged charging by [the attorney] of excessive fees." *Id.* at 508. In the malpractice count, the client alleged specifically that the attorney had "billed him for more hours than should have been required to perform the work; and he was damaged by having paid more to [the attorney] than should have been necessary." *Id.* The court held that it was error to dismiss this count: "An attorney obviously owes his client a duty not to overcharge . . . . This alleged breach, therefore, is cognizable as malpractice and actionable . . . ." *Id.* at 509; *see also* Rodriguez v. Horton, 622 P.2d 261, 265 (N.M. Ct. App. 1980) (malpractice action; award of punitive damages based in part on charging of excessive fees); *cf.* Nolan v. Foreman, 665 F.2d 738, 743 (5th Cir. 1982) (action by client seeking return of excessive fee, and alleging that attorney refused to return papers relating to criminal defense unless client agreed to release attorney from malpractice liability; held, "allegations of violations of the State Bar rules, even if cast by the plaintiff in terms of breach of contract, state a cause of action for legal malpractice in the nature of a tort action").

One survey of attorneys suggested that 2.16% of legal malpractice claims concerned disputes over fees. Werner Pfennigstorf, *Types and Causes of Lawyers' Professional Liability Claims: The Search for Facts*, 1980 AM. BAR FOUND. RES. J. 255, 272.
While this number seems small, it is identical to the percentage of malpractice claims involving a breach of fiduciary duty, and higher than that involving trial malpractice (1.71%). *Id.* Alleged conflicts of interest accounted for 2.49% of the claims; the highest percentage involved failure to meet procedural deadlines (11.23%). *Id.*

An additional cause of action of considerable power and increasing plausibility is the client's suit under a state consumer protection or deceptive practices statute. Such statutes commonly provide for recovery of treble damages and attorney's fees by the aggrieved "consumer." *See, e.g.*, Short v. Demopolis, 691 P.2d 163, 168, 170 (Wash. 1984) (client's counterclaim to attorney's suit to recover fees; held, state Consumer Protection Act applies to "entrepreneurial" aspects of legal practice including disputes over amount of fees, but not to claims of negligence); Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 942 (Conn.

The charge that litigation is in many cases unsuitable as a dispute resolution mechanism is well-rehearsed in the literature, which points to the cost, delay, frustration and escalation of hostility that frequently attend the process, to the limited range of remedies available to courts, the "binary" (either/or) nature of court adjudication, and to its abstraction and isolation from the interests and personal characteristics of individual disputants.[35] Certainly the costs of litigation are likely to substantially deplete any recovery for either the attorney or the client[36] (at least in the absence of a statute that permits such costs to be shifted to the adversary),[37] and they may indeed equal or exceed the amount of the disputed fees.[38] In addition, features

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1983) (Unfair Trade Practices Act applies to practices such as deceptive advertising and misrepresentations as to fees by attorneys; investigative demand by Commissioner upheld). *But cf.* Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc., 461 A.2d 1369, 1370, 1373, 1375 (Conn. 1983) (client's counterclaim alleged that attorney was suing to collect fees which attorney "knew was not due and owing"; held, statute did not apply since dispute was a "purely private one" lacking the necessary "nexus with the public interest").

The proper amount of an attorney's fee may of course be determined by a court not only in a suit between the attorney and an aggrieved client, but in some cases as part of the court's responsibilities in adjudicating an underlying lawsuit. The most common examples are the awards of attorneys' fees in probate cases, in class actions and other common fund cases, and in cases arising under one of the many statutes specifically providing for the awards of fees to prevailing parties. In some cases, a court may reduce an attorney's fee it considers excessive even where the client himself has not challenged the fee. *See, e.g.*, Snow v. Mikenas, 370 N.E.2d 1001, 1001 (Mass. 1977) (even though clients made no objection to fee, probate court judge could inquire on his own motion into reasonableness of contingent fee arrangement and could enjoin attorneys from receiving any fees or expenses out of distributed funds); Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 n.7 (7th Cir. 1982) (personal injury suit brought by father and minor children; held, the court's power to reduce attorney's fee on father's share of judgment was "ancillary to the court's control over the children's share" and justified by the court's inherent right to supervise members of its bar). *But see* United States v. Vague, 697 F.2d 805, 805, 808 (7th Cir. 1983) (criminal defense; court had no authority sua sponte to adjourn the sentencing hearing after plea bargain and then order reduction in an "exorbitant" fee).

35. *See, e.g.*, JOHN S. MURRAY, ALAN S. RAU, EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 17-38, 49-52 (1989); THE BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 3 (1989); *cf.* Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1820-31 (1986) (discussing the current "failure of adjudication" stemming from the "quantitative inadequacy of adjudicative services," "procedural complexity," "substantive uncertainty," and the "strategic infliction of waste" — but urging reform in the shape of a "two-tier" trial system aimed at making adjudication more workable and available).

36. *See* Jeffrey M. Smith, *The Pitfalls of Suing Clients for Fees*, 69 A.B.A. J. 776, 777 (1983). Smith poses the case of a law firm's suit to recover a $15,000 fee from a client; he posits that the fee is a reasonable one justifying a favorable judgment. *Id.* He then illustrates how the net recovery is likely to be eroded by such factors as the cost of an independent attorney to handle the suit (since "[a]ttorneys are well advised not to represent themselves in suits against clients"), the time lost by lawyers in the firm who must work with that attorney on the case, the additional costs of any expert witnesses, the impact of taxation on any recovery, and the impact of a malpractice counterclaim on the firm's insurance deductible and on its future insurance premiums. *Id.* at 777-80.

37. *See Wheeler*, 777 P.2d at 660-61.

38. A California statute makes fee arbitration "mandatory for an attorney if commenced by a client," CAL. BUS. & PROF. CODE § 6200(c) (West Supp. 1991); *see infra* note 64. Of the 785 cases opened by the Los Angeles County arbitration program in 1990-91, the average disputed fee (i.e., that portion of the fee claimed by the client to be excessive) was $23,938. DISPUTE RESOLUTION SERVICES, INC., FEE ARBITRATION COMMITTEE ANNUAL REPORT

that are peculiar to fee litigation make such suits especially problematical. The lawyer contemplating an action to recover an unpaid fee must realize that such a suit virtually guarantees a counterclaim for malpractice — which might take any form from the relatively commonplace allegation that the underlying services were negligently performed, to more dramatic accusations of misbehavior. "Fee suits can be ugly affairs."[39] In addition, in many jurisdictions an attorney who is found by the court to have committed a serious ethical violation in the course of the representation may find that his right to any fee whatever, whether "on the contract" or in quantum meruit, has been forfeited. When the case is tried, then, the attorney often finds that "the issue [is] no longer what is a fair and reasonable fee for services rendered, but . . . whether [the attorney] is barred from any recovery."[40] And

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(1991). However, 57.3% of the cases involved disputed fees of $5,000 or less. *Id.* at tbl. B. While some of these cases might have been brought in small claims court (13.9% involved disputed fees of $1000 or less), most of them obviously represent disputes which could not economically be litigated. *Id.*

The same pattern can be found in other arbitration programs. In the D.C. Bar's fee arbitration program during 1991-92, the average amount requested in client-initiated fee arbitrations was $17,181; in attorney-initiated fee arbitrations, $4,387. DISTRICT OF COLUMBIA BAR ATTORNEY-CLIENT ARBITRATION BOARD 1991-92 ANNUAL REPORT 8 (1992). Median amounts requested, however, were considerably lower—$2,500 in client-initiated cases and $2,035 in attorney-initiated cases. *Id.* In the Tarrant County (Fort Worth) Bar Association fee arbitration program, 115 arbitration awards were issued between 1986 and 1991; of these, the average amount in dispute was $2,795 (personal communication, David Evans, Chairman of Fee Arbitration Committee of the Tarrant County Bar Association). Similar conclusions may be drawn from a nationwide survey of fee arbitration programs conducted in 1987 by HALT (An Organization of Americans for Legal Reform). HALT, ARBITRATING LAWYER-CLIENT FEE DISPUTES: A NATIONAL SURVEY 1 (1988) [hereinafter HALT SURVEY]. The survey found that in more than half of the states offering statewide arbitration programs, the average disputed fee in the arbitrations was below $2,500. *Id.* at 4.

39. WOLFRAM, *supra* note 10, § 9.61 at 554. *See* McDaniel v, Gile, 281 Cal. Rptr. 242, 244 (Cal. Ct. App. 1991) (attorney's suit to recover fee in divorce action; client's counterclaim alleged sexual harassment and that attorney withheld legal services to gain sexual favors; held, cause of action stated for malpractice and for intentional infliction of emotional distress); Barbara A. v. John G., 193 Cal. Rptr. 422, 433 (1983) (attorney's suit to recover fee in post-divorce support case; client counterclaimed for damages sustained in pregnancy after intercourse with attorney, who had misrepresented his infertility; held, cause of action stated for deceit and for battery); *see also* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.1 (3d ed. 1989):

> Some insurers have recently reported that malpractice claims filed in response to fee actions comprise approximately twenty percent of all claims against attorneys. Yet possibly as much as forty percent of all claims have some relationship to how the lawyer handled the fee arrangement.
>
> Unquestionably, a claim for legal malpractice is a deterrent to pursuing an action for legal fees.

Id. at 6-7.

40. *See* Condren v. Grace, 783 F. Supp. 178, 185-86 (S.D.N.Y. 1992) (attorney "failed to satisfy his ethical obligations" by defending client in lawsuit while neglecting to advise him of a potential conflict of interest due to a "festering monetary claim" arising out of their prior business dealings; held, attorney "must forfeit his fee"). *See also* Financial Gen. Bankshares, Inc. v. Metzger, 523 F. Supp. 744 (D.D.C. 1981), *vacated on other grounds*, 680 F.2d 768 (D.C. Cir. 1982) (attorney breached fiduciary duty to corporation by secretly supporting a group of dissident shareholders and by secretly representing a group of Middle Eastern investors trying to gain control of corporation; held, client corporation is relieved of duty to pay outstanding attorney fees and entitled to refund of any fees paid, as well as punitive damages); Jackson v. Griffith, 421 So. 2d 677, 677-78 (Fla. Dist. Ct. App. 1982) (attorney sued client to recover fee; trial court found that fee agreement had been induced by "coercion, duress and threats"; held,

finally, even under the best of scenarios the public relations value of a suit by an attorney against one of his clients is likely to be a very negative quantity.

For the client, the prospect of litigation over fees may be quite as unattractive as it is for the attorney. Even finding a local lawyer willing to handle a suit, or to testify as an expert witness, against another attorney in a fee case is likely to be difficult[41] — and, unless the expense can be shifted, is certain to be costly. In addition, in any litigation between attorney and client the client may find, to his dismay, that confidential information previously revealed to the attorney has become part of the public record; under modern codes of conduct, the attorney's ethical duty to "hold inviolate" these confidences may take second place to his right to establish the amount of his fee.[42]

Given the drawbacks of these processes, it appears certain that both the number of litigated cases appearing in the reports and the number of complaints made to the bar's disciplinary agencies give a very inadequate picture of the prevalence of fee disputes between attorney and client. When a differ-

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no recovery on contract or in quantum meruit; "an attorney displaying conduct sufficient to void an agreement in law should not be allowed to profit from his blatantly unprofessional conduct in equity"); *cf.* Mahoning County Bar Ass'n v. Gilmartin, 577 N.E.2d 350 (Ohio 1991). *Gilmartin* was a disciplinary proceeding rather than a private suit between an attorney and client. The attorney, hired to assist the client in preparing a proof of loss for insurance purposes, submitted a bill of $22,710. The court ordered a public reprimand for charging a "clearly excessive fee" and ordered the attorney to make full restitution to the client of funds held in a trust account, "without deduction for any attorney fees." *Id.* at 351. The case seems unusual in suggesting that asking for too high a fee is itself an ethical violation that may be sufficient to warrant the forfeiture of the attorney's entire claim to any fee, rather than of just the "excessive" portion.

41. A formal ABA Ethics Opinion was actually required in 1935 to address the question whether it is proper "for a lawyer to accept employment to collect a claim from, or to bring suit against, another lawyer." The committee concluded that

> [I]t is not professionally improper for a lawyer to accept employment to compel another lawyer to honor the just claim of a layman. On the contrary, it is highly proper that he do so. . . . The honor of the profession, whose members proudly style themselves officers of the court, must surely be sullied if its members bind themselves by custom to refrain from enforcing just claims of laymen against lawyers.

ABA Comm. on Professional Ethics and Grievances, Formal Op. 144 (1935).

See also Arthur W. Francis, Jr., *How to Handle a Legal Malpractice Suit*, L.A. LAW., June 1989, at 19, 20 ("[I]t should be kept in mind that the client is a person who is willing to sue a prior attorney and would likely have no qualms about suing a second attorney."); Sterling Hutcheson & C. M. Monroe, *Actions Against Attorneys for Professional Negligence*, *in* 14 AM. JURY TRIALS 265, 273 (1968) ("Many mature lawyers refuse to appear, under any circumstances, as plaintiff's counsel in an action against another lawyer for damages for professional negligence. They knew that such suits may disturb the amicable relations they enjoy with other members of the bar and thus impede the disposition of other claims in which they are involved.").

42. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992). The text of Rule 1.6 provides that the lawyer may reveal confidential information "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client." *Id.* The comment suggests that in doing so, the attorney is nevertheless required to "make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure." *Id.* cmt. 18.

ence of opinion arises concerning an attorney's fee, all the incentives are either for a quick settlement or, at the end of the day, for one or the other of the parties simply to "lump it."[43] Our survey seems to confirm this impression. Of those firms that had experienced fee disputes over the previous five years, 73.6 percent reported that in "all" or "most" cases they had "reach[ed] a final agreement on the disputed fees after discussion and negotiation with the client"; where a client refused to pay a fee, and negotiation failed to resolve the dispute, 69.3 percent of respondents reported that in "all" or "most" cases they "simply let the whole matter drop and fail[ed] to take any further action to collect the fee."[44]

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43. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124-25 (1974).

A dramatic picture of the winnowing out of private grievances before they reach the stage of the filing of a lawsuit is provided by Miller & Sarat, *supra* note 13. The authors' survey of randomly-selected households found that for every 1,000 "grievances" perceived by those studied, "claims" were made against the adverse party in 718 cases, lawyers were consulted in only 103, and lawsuits were filed in only 50. *Id.* at 544 (fig. 1A). This attrition rate is likely to be greater still in cases where "routinized, well-known, and widely available procedures" for dealing with the particular problem do not exist, and where "popular expectations" and the "principles governing redress" appear unsettled. *Id.* at 563. For example, where the grievance involved personal injury, claims were asserted at a rate of 857 per 1000 grievances; while most claims were routinely settled by insurance adjusters, lawyers were consulted in 116 cases and lawsuits were filed in 38. *Id.* at 544 (fig. 1B). By contrast, where the perceived grievance involved discrimination, claims were asserted at a rate of only 294 per 1000 grievances, lawyers were consulted in 29 cases, and lawsuits filed in only eight. *Id.*

The pattern of client claims against attorneys based on "excessive" fees is almost certainly closer to the pattern found in discrimination cases than to that in personal injury cases; *see also* Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y REV. 655, 657, 659, 672 (1980-81) (identifying individual's comparison of self with others ("relative deprivation") and sense of having control over outcome ("perceived control") as elements influencing his decision to seek recompense for perceived injuries). In addition, there are still other factors likely to dispose the client to "lump" any fee dispute. Even the client who has not yet paid the demanded fee may be at a tactical disadvantage because of the attorney's leverage in the form of the attorney's lien: The attorney may have a "retaining lien" on the client's property (typically documents and files) that have come into the lawyer's possession in the course of the representation, and may hold this property hostage until the claimed fee is paid. *See* Tri-Ex Enter., Inc. v. Morgan Guar. Trust Co., 583 F. Supp. 1116 (S.D.N.Y. 1984) (denying client right to copy documents but granting motion to compel production by client's adversary in litigation; "the right to retain the papers is valuable to the attorney in proportion as denial of access to them causes inconvenience to the client"; "[w]here the adversary has access to documents to which the client does not, the inconvenience to the client is increased, thereby enhancing the value of the lien"); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 55 (retaining liens invalid) (Tent. Draft No. 4, 1991). The attorney may also have a "charging" or "judgment" lien that typically attaches to property acquired in litigation, and that the attorney can enforce in an effort to recover his fees in connection with the same litigation. *See generally* WOLFRAM, *supra* note 10, at 558-62. Finally, consensual liens obtained by attorneys to secure payment of their fees are of course extremely common. *See* Ellen J. Pollock, *Divorce Lawyers Often Shortchange, Overcharge Women Clients, Study Finds*, WALL ST. J., Mar. 13, 1992, at B5; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 55 cmt. i ("Other security for attorney fees and disbursements").

There is, however, no reason to believe that the pattern of fee claims brought by attorneys against clients is dramatically different. We have already canvassed the costs, tangible and intangible, and the risks and uncertainty, of litigation that are likely to work to discourage claiming on the part of the attorney as well as of the client. *See infra* note 44 and accompanying text.

44. Survey of the Texas Bar, *supra* note 7. 67.7% of all firms that had experienced fee

D. TOWARDS THE USE OF ALTERNATIVE PROCESSES

The unsatisfactory nature of existing processes has led in recent years to a number of reform proposals aimed at providing alternative forums to resolve fee disputes. As early as 1928 the Los Angeles County Bar Association had created a Committee on Arbitration to adjudicate fee disputes between attorneys and clients. The avowed "primary motive" for this and other early reform efforts, however, was a desire to protect the bar's image — "the avoidance of the public airing of fee disputes" that had "resulted in much unfavorable publicity to the profession."[45] Similar public relations concerns have continued to play a part in many reform proposals coming from the organized bar; the sense that disputes over fees are a major and continuing source of unresolved attorney-client friction has led to calls for the creation of private, preferably inconspicuous processes that would serve primarily to "cool down" client discontent. In 1970, the report of the ABA's prestigious Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) recommended that procedures be established for arbitrating fee disputes; the report suggested in particular that this arbitration be conducted "outside the organized bar" by such organizations as the American Arbitration Association. The major premise underlying this recommendation was that, judging from local experience with fee arbitration, attorneys' fees were "with rare exceptions" reasonable.[46] It followed therefore, that arbitration under the aegis of bar associations was "not likely to be an effective vehicle for improving the relationship between the public and the bar"; in such cases the client — the implication was that he would almost inevitably be unsuccessful — would conclude that he had not been given a fair and open-minded hearing, since "a group of attorneys [was] protecting one of its

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disputes reported that they had "never" become involved in litigation at any stage with a client concerning such a dispute.

While settlement remains the norm in all categories, the degree to which fee disputes are finally resolved through negotiation still seems considerably higher in the case of larger firms than where solo practitioners are concerned. Of firms with more than 10 attorneys, *94.4%* of those that had experienced fee disputes reported that in "all" or "most" cases they had reached a final resolution with the client through discussion and negotiation; for solo practitioners, however, the corresponding figure was only 70.4% (sig.=0.00). *Id.* This pattern might be explained by the greater control and monitoring capabilities available to corporate clients, and above all by the potential for continuing relationships, which may give corporate lawyers a "powerful incentive to go the extra mile that is not present in many individual contexts." David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 826 n.109 (1992). Some significant differences were also observed as a function of the type of practice in which the firm was engaged. The extent to which any fee disputes were finally resolved "after discussion and negotiation with the client" was significantly greater for firms that did a majority of their work (accounting for half or more of their gross revenues) in either commercial law (including corporate, banking, and tax) (80.7% in "all" or "most" cases), personal injury defense work (80.9%), probate (84.8%), or real estate law (86.3%) than for firms doing most of their work in other areas like criminal law (72.3%) or family law (67.6%) (in all cases sig.= 0.05 or better). Survey of the Texas Bar, *supra* note 7.

45. George E. Bodle, *The Arbitration of Fee Disputes Between Attorneys and Clients*, 38 L.A. B. BULL. 265, 265 (1963). The author was then Chairman of the County's Committee on Arbitration.

46. Clark Committee Report, *supra* note 21, at 984-85.

own."[47]

Another ABA committee report, issued in 1974, was entirely devoted to the resolution of fee disputes.[48] This report also proposed that such disputes be handled through binding arbitration, conducted by a "Committee on Resolution of Fee Disputes" that would be a committee of the local bar association, but separate from the normal disciplinary mechanism. The 1974 report addressed, as the Clark Committee had not, the critical issue of attorney unwillingness to enter into fee arbitration initiated by the client. The report noted that state and local bar associations that had been conducting arbitration were "experiencing more and more refusals by attorneys to submit to arbitration of fee disputes."[49] In such circumstances, arbitration proceedings could be "stopped in their tracks" simply by the attorney's refusal to consent to arbitration, rendering the entire system "impotent."[50] And the system would be thwarted in precisely those situations in which it was most needed: Fee disputes are most likely to arise, the report suggested, where the client is a one-shot player with no continuing need for legal services and little familiarity with legal work, and where the attorney has little incentive to "keep the client satisfied to preserve the basis for a future relationship."[51] These were precisely the circumstances where an attorney — particularly one "who look[s] upon the practice of law as merely a trade"[52] — would be most likely to refuse to participate in arbitration. This shortcoming in the system "does the profession immeasurable harm in its relationship with the public."[53]

Despite these problems arising from attorney unwillingness to consent to fee arbitration, the 1974 committee report shrank from recommending that attorneys actually be required to participate. The report expressed some uncertainty as to "whether such a requirement could lawfully be imposed,"[54] although there hardly seems to have been any elaborate investigation into the legal position.[55] More telling, perhaps, was the committee's conclusion that "there was little likelihood" that mandatory arbitration could gain the necessary support, and the suggestion that lawyers should not be "treated as second-class citizens, barred from all recourse to the courts."[56] Instead, the report proposed an ingenious if somewhat cumbersome compromise by which the fee dispute committee could proceed ex parte in the event the attorney refused to consent to binding arbitration.[57] If after an ex parte hearing the committee found in favor of the client, then one of the commit-

47. *Id.* at 985.
48. Special Committee on Resolution of Fee Disputes, *The Resolution of Fee Disputes: A Report and Model By-Laws*, 1974 A.B.A. SEC. B. ACTIVITIES REP. [hereinafter Special Committee Report].
49. *Id.* at 4.
50. *Id.* at 3.
51. *Id.* at 1.
52. *Id.* at 1-2.
53. Special Committee Report, *supra* note 48, at 1-3.
54. *Id.* at 4.
55. *Id.*
56. *Id.*
57. *Id.* at 4-6.

tee members would bring suit against the attorney for the refund of any excessive fees, or would defend the client against any suit brought by the attorney, all at no charge to the client. The committee member would also bring suit to vacate any lien asserted by the attorney on the basis of the excessive fee.[58]

In the years following these ABA reports, a large number of state and local bar associations have set up arbitration programs to handle fee disputes.[59] The rules of these programs typically provide that if both attorney and client consent to arbitration, the decision of the arbitrators on the appropriate fee is final and binding, subject to challenge only on the same grounds as other arbitration awards.[60] Almost all of the programs, however, are voluntary. As a rule it is the client who makes the request for arbitration of a fee dispute.[61] Once he does so, a considerable amount of "jawboning" undoubtedly takes place on the part of the bar aimed at persuading the attorney to consent to the process rather than to "stop it in its tracks."[62] But a

58. *Id.* The 1974 report contained a set of "model bylaws" for use by state and local bar associations in setting up a Committee on the Resolution of Fee Disputes. *See id.* at 7-14. The report does not indicate whether the committee envisaged that an ex parte arbitration award could be used as evidence of a "reasonable" fee in the event of later litigation. The Model Bylaws provide for the confidentiality of the arbitration records and proceedings—"[w]ith the exception of the award itself" — but only in cases in which both client and attorney had consented in advance to be bound by the result. *Id.* at 14; *see also infra* note 64 and accompanying text (describing rules of Georgia program).

59. *See*, HALT SURVEY, *supra* note 38. The 1987 HALT survey found that the bars of 30 states offer fee arbitration statewide (as does the bar of the District of Columbia); in 14 additional states, fee arbitration is offered at the local level by at least some local bar associations. According to HALT, fee arbitration was not offered at all in six states (Alabama, Arkansas, Louisiana, Nebraska, South Dakota and West Virginia). *Id.* Since the date of the HALT survey, the Louisiana State Bar has instituted a voluntary "Legal Fee Dispute Arbitration" program; fee arbitration is now also conducted on a local level by some bar associations in Alabama. *See* La. State Bar Ass'n, Guidelines for LSBA-Sponsored Legal Fee Dispute Arbitration; Gail D. Cox, *Arbitrating What Lawyers Bill: Clients Find They Sometimes Can Win Cuts in This Increasingly Popular Forum*, NAT. L.J., Apr. 8, 1991, at 1.

Earlier surveys of fee arbitration programs can be found in Paul G. George, Note, *Arbitration of Attorney Fee Disputes: New Direction for Professional Responsibility*, 5 UCLA-ALASKA L. REV. 309, 315-21 (1976); James R. Devine, *Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come*, 14 TOLEDO L. REV. 1205 (1983).

60. "The [petitioner] agrees to be legally bound by the Award of Arbitrators . . . . A court of competent jurisdiction has the power to enter a Judgment on this award." Petition for Arbitration of a Fee Dispute, Legal Fee Arbitration Board, Massachusetts Bar Assoc. *See also In re* Pearson, 352 N.W.2d 415, 418 (Minn. 1984) (failure to abide by final and binding fee arbitration award "constitutes professional misconduct warranting discipline").

61. For example, of the 239 cases filed in 1990 with the Oregon State Bar arbitration program, 61% were initiated by clients and 39% by attorneys (private communication, Liz Denecke, Administrator, Ore. State Bar Attorneys' Fee Arbitration Program). Of the 31 arbitration programs surveyed in HALT's 1987 study, 29 responded that "most complaints" were filed by the client; the other two responded that "most complaints" were filed by "both client and lawyer" [sic]. HALT, SURVEY, *supra* note 38, at 4.

62. Under the Tarrant County (Fort Worth) Bar Association Fee Arbitration Rules, if an attorney refuses to participate in arbitration, the committee chairman "shall notify the President of the [Bar] Association and promptly refer the matter to the Office of the General Counsel of the State Bar of Texas for investigation as a potential grievance." TARRANT COUNTY BAR ASSOCIATION FEE ARBITRATION RULES Rule 1.03. The present chairman of the committee refers to the Tarrant County scheme as "not mandatory but coercive." Of the 355 arbitration files opened in the past five years that the committee has analyzed, in only two did the attorney both fail to settle the dispute and fail to participate in arbitration (private commu-

continuing refusal by the attorney to participate in arbitration will in most cases bring the arbitration process to an end.[63]

While there is considerable variation in the regulatory pattern, it appears that only five states now require attorneys to submit fee disputes to binding arbitration at the client's request.[64] Nevertheless the climate has clearly

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nication, David Evans, Chairman, Fee Arbitration Committee). *See also* Sheldon C. Toplitt, *Arbitration: Settling Fee Disputes Out of Court*, DOCKET CALL, Spring 1983, at 14, 15 (Delaware; where attorney fails to consent to arbitration, the chairman of the arbitration committee "shall attempt to persuade the attorney to agree to submit in the best interests of the profession"); John Woytash, *New Muscle for Fee Arbitration*, BAR LEADER Mar. 1976, at 14, 16 (Orange County, California; "[i]n an effort to coax [attorney] cooperation, up to four follow-up letters may be sent once a complaint is filed"); *see also infra* note 63 (rules of District of Columbia program).

The Model Rules of Professional Conduct exhort the attorney to "conscientiously consider submitting" to any arbitration or mediation procedure that the bar has established for the resolution of fee disputes. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 cmt. (1992).

63. *See, e.g.*, RULES OF THE LEGAL FEE ARBITRATION BOARD OF THE MASSACHUSETTS BAR ASSOCIATION, Rule 9.1 ("If the Respondent fails to return the agreement [to arbitrate] within a reasonable period of time, the petition will be dismissed.").

In the District of Columbia, the program rules provide that attorney-respondents shall be routinely warned of the "consequences under these rules of failure to consent to arbitration." DISTRICT OF COLUMBIA BAR, ATTORNEY-CLIENT ARBITRATION BOARD, RULES OF PROCEDURE FOR FEE ARBITRATION SERVICE Rule 7. These "consequences" are similar to those proposed in the 1974 report of the ABA's Special Committee on Resolution of Fee Disputes: If the Board determines after a preliminary investigation that the client's allegations concerning the fee are not "frivolous," then the Board may help procure an attorney to represent the client at no charge or a reduced charge, either to bring suit for a refund of any excessive fee paid by the client or to defend any fee suit brought by the attorney. *Id.* Rules 7, 11, 13. It appears that under these circumstances, about 65% of respondent-attorneys agree to proceed with arbitration. DISTRICT OF COLUMBIA BAR, ATTORNEY-CLIENT ARBITRATION BOARD, ANNUAL REPORT, 1990-91, at 2; *Fee, Malpractice Arbitrations Winning Greater Acceptance*, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) No. 24, Jan. 2, 1991 at 431.

The HALT survey indicates that about one-third of the states with voluntary fee arbitration programs follow a similar practice, in which the Bar will conduct an investigation and may help the client in subsequent litigation in the event that the attorney refuses to participate. HALT SURVEY, *supra* note 38, app. I.

64. Binding arbitration of fee disputes is mandatory for the attorney in Alaska, Maine, New Jersey, South Carolina, and Wyoming. *See* ALASKA BAR RULES, Rule 34; MAINE BAR RULES, Rule 9 (attorney who fails to reply to petition or to appear at hearing "shall be bound by the findings and award of the [arbitration] panel in the same manner, and with the same effect, as on a default judgment entered by the Superior Court"); N.J. GEN. APPLIC. RULES Rule 1:20-4(i), 1:20A-3(a) (fee dispute arbitrated "upon a client's written request or upon written consent to the attorney's request"; if attorney fails to comply with arbitrators' determination that he should refund fees paid by client, then attorney may be suspended from practice of law until he does so); S.C. APP. CT. RULES, Rule 407; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 cmt. (1992) ("Upon application by a client . . . an attorney shall submit to the proceedings of the Resolution of Fee Disputes Board."); S.C. RESOLUTION OF FEE DISPUTES BOARD Rule 9 (If client consents to be bound by results of arbitration proceedings, "the attorney is also bound."); WYOMING RULES FOR RESOLUTION OF FEE DISPUTES Rule 6(b) (if client contests a charged fee within 90 days of receipt of a final billing by the attorney, "the creditor-attorney shall participate in the proceedings and be subject to the final decision made"). New York has recently imposed a requirement that fee disputes be resolved by arbitration, "at the election of the client," in "domestic relations matters" only. *See In re* Amending the Disciplinary Rules of the Lawyer's Code of Professional Responsibility (Committee Approval of revisions to N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.12(e)) (N.Y. App. Div. 1993); Jan Hoffman, *New York's Chief Judge Imposes Strict Rules for Divorce Lawyers*, N.Y. TIMES, Aug. 17, 1993, at 1.

In addition, other states have instituted hybrid fee arbitration procedures that cannot easily be characterized. In California, for example, a statute makes fee arbitration "mandatory for

changed since the days when an ABA committee could conclude that "there was little likelihood" that mandatory arbitration could generally be adopted.[65] In 1991, the report of another ABA committee appointed to study the lawyer disciplinary process strongly endorsed the concept of mandatory fee arbitration, and this is certain to stimulate interest in the future in mandatory schemes.[66]

II. MANDATORY ARBITRATION OF ATTORNEY-CLIENT FEE DISPUTES

A. ARBITRATION AS A DISPUTE RESOLUTION MECHANISM

Arbitration has been used for centuries in England and in the United States as a dispute resolution device.[67] The traditional foundation of the process has been a voluntary agreement in which the parties undertake to arbitrate a present dispute or to submit to arbitration a dispute that may arise in the future.[68] In the commercial sphere, arbitration has provided

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an attorney if commenced by a client"; if the attorney refuses to participate, an award may be rendered *ex parte*. CAL. BUS. & PROF. CODE § 6200(c) (West 1991); CAL. FEE ARB. RULES Rules 2.0, 3.0, 29.0. However, unless both parties have expressly agreed in writing that the arbitration award is to be binding, then the award will not be binding; either party may reject it and request a trial de novo within 30 days. CAL. BUS. & PROF. CODE § 6204(a) (West 1991); CAL. FEE ARB. RULES, Rule 6.1. The statute nevertheless creates a disincentive to a trial de novo, by allowing the court to impose liability for the other side's attorneys' fees and costs on the party who does not do better at trial than at arbitration. In addition, attorneys who failed to appear at the arbitration hearing are in all cases barred from recovering any attorneys' fees incurred at trial. CAL. BUS. AND PROF. CODE § 6204(d) (West 1991). Of the 692 fee arbitration cases opened by the Los Angeles County program in 1989-90, 16.3% were "mandatory non-binding" cases, and 48.9% were closed "prior to determination of binding or non-binding status"; the remainder were cases where both parties had agreed to be bound by the award. DISPUTE RESOLUTION SERVICES, INC., FEE ARBITRATION COMMITTEE ANNUAL REPORT 1 (1990).

The Georgia program also skirts the edges of arbitration that is effectively "mandatory" on the attorney. The rules for the program provide that attorneys who do not agree to be bound by the arbitration award have no right to participate in the hearing; the arbitrators may nevertheless proceed *ex parte*, and if the client is successful, the State Bar is to provide the client with a lawyer at no cost to represent him in subsequent litigation over the fee; *see also supra* note 58. An additional "kicker" is that in such litigation, "the award rendered will be considered as prima facie evidence of the fairness of the award and the burden of proof shall shift to the lawyer to prove otherwise." GEORGIA BAR RULES, Rule 6-502 (1990).

65. *See supra* note 56 and accompanying text.

66. *See* DISCIPLINARY ENFORCEMENT REPORT, *supra* note 1, at 13 (Court should establish a "central intake office for the receipt of all complaints about lawyers" that would be responsible for screening complaints and directing them to appropriate mechanism, including mandatory arbitration of fee disputes and voluntary arbitration of lawyer malpractice claims and other disputes); Recommendation 10 ("Procedures in lieu of discipline for minor misconduct"; disciplinary counsel may reach agreement with attorney to submit matter to non-disciplinary proceedings, including fee arbitration).

67. *See* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984); William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193.

68. Arbitration has "flourished most in situations where parties to a contract have or aspire to have a continuing future relationship in which they will regularly deal with each other." In the administration of a collective bargaining agreement or in the relationship between a buyer and a seller of fabric in the textile industry,

> [T]here is a history and a likelihood of continued mutual dependence by which both parties may profit; there also exist non-legal sanctions allowing either party

"merchants fora where mercantile disputes will be settled by merchants";[69] in many trades or industries, it remains the predominant mechanism by which disputes are processed.[70] In the last half century, fostered by national labor legislation, arbitration has also become the principal method of resolving disputes between employers and unions that arise in the course of administering collective bargaining agreements.[71] Both commercial and collective bargaining agreements are frequently structured to allow the parties to the contract to continue performance without interruption while any dispute is being settled through arbitration.[72] Particularly where the parties are engaged in a long-term continuing relationship, arbitration has in fact been viewed as a process enabling them to "continue and refine their bargaining;"[73] the decision by arbitrators chosen by the parties to the dispute spells out the implications of their original bargain, gives "meaning and content" over time to their "system of self-government,"[74] and helps them achieve the resolution that they "would have achieved had they had the opportunity to negotiate with respect to the issues in dispute."[75]

While the traditional attitude of judges towards arbitration was one of considerable hostility, statutes enacted in most jurisdictions have completely

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> to withdraw from (or seek to adjust) the relationship, or at least to withhold vital future cooperation. All this makes it easier to settle in advance on arbitration as a less disruptive method than litigation for resolving any future disputes.

MURRAY, RAU & SHERMAN, *supra* note 35, at 394.

69. Jones, *supra* note 67, at 219.

70. *See* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 852 (1961) (survey of prevalence of arbitration indicates that "in the case of [a trade] association reporting that its members have an import relationship to foreign trade, deal in [fungible commodities], and consist of merchants, the existence of arbitration machinery rises to approximately 100 percent"); Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. LAW 164, 165 (in international commercial contracts, arbitration clauses "not only predominate but are nowadays almost universal" and are "virtually taken for granted"); Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir. 1987) (widespread use of arbitration clauses in textile industry should put contracting party "on notice that its agreement probably contains such a clause").

71. In 1981 the Department of Labor estimated that more than 96% of all collective bargaining agreements, covering a total of almost 6.5 million workers, provided for the arbitration of employee grievances arising out of interpretation of the agreement. U.S. BUREAU DEPT. OF LABOR, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS 112 (1981).

72. *See, e.g.*, AMERICAN INSTITUTE OF ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, Doc. A201, arts. 4.34, 4.53 (1987) ("Pending final resolution of a Claim including arbitration, . . . the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents."); Collective Bargaining Agreement between the Major Container Co. and the United Paperworkers Int'l Union, COX, BOK, GORMAN & FINKIN, LABOR LAW, STAT. SUPP. 110, 117 (11th ed. 1991) ("In the event differences should arise between the Company and the Union . . . as to the meaning and application of this Agreement, . . . there shall be no suspension of work by the employees on account of such differences."); *cf.* Mann, *supra* note 67, at 471 n.112 (17th century dispute between partners in shipping venture over missing barrel of tar, settled by agreement to arbitrate dispute on return of vessel; "[a]greement on how they would settle the dispute was enough to permit the voyage, which was far more important than one barrel of tar, to continue").

73. Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 947 (1979).

74. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

75. Getman, *supra* note 73, at 929.

reversed the common-law position on arbitration and have made executory agreements to arbitrate enforceable. The original purpose of such statutes was to place arbitration agreements "upon the same footing as other contracts."[76] But in the past decade a series of court decisions — relying heavily on the rhetoric of voluntary agreement, but undoubtedly inspired by an interest in reducing heavy judicial case loads[77] — has given such unwavering support to the arbitration process as to virtually assure it a privileged position in American law.[78] Disputes involving statutory claims such as antitrust and securities fraud matters, long thought to be inappropriate for arbitration because they implicate important "public" issues, must now be arbitrated if the parties have so agreed.[79] At the same time, the strictly contractual model of arbitration exemplified by the international commercial

76. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. REP. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). The Federal Arbitration Act was enacted in 1925. 9 U.S.C. § 1 (1988). Applying to maritime transactions and to transactions "involving commerce," the Act makes agreements to arbitrate "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2. When satisfied that the parties have agreed to arbitrate, federal courts are instructed to order parties to arbitration and to stay any lawsuit involving arbitrable issues. *Id.* §§ 3, 4. Arbitration awards are to be enforced by federal courts and may be overturned only on very limited grounds. *Id.* § 10. *See generally* MURRAY, RAU & SHERMAN, *supra* note 35, at 480-501. Statutes similar to the FAA are in force in most of the states; a compilation appears in MARTIN DOMKE, COMMERCIAL ARBITRATION APP. I (rev. ed. 1992).

77. See [then Chief Justice] Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) ("neither the federal nor the state court systems are capable of handling all the burdens placed upon them;" "arbitration should be an alternative that will complement the judicial systems"); Wylie Indep. School Dist. v. TMC Found., Inc., 770 S.W.2d 19 (Tex. App.—Dallas 1989, writ dism'd) (arbitration agreement not complying with state statute should nevertheless be specifically enforced; the "increasing volume of litigation has forced the judicial system to look for alternative means to dispose of mounting caseloads"). *See also* Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 446-49 (1989).

78. The Supreme Court has held that within the ambit of the FAA, "a body of federal substantive law of arbitrability" exists that overrides state law restricting arbitration. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Southland Corp. v. Keating, 465 U.S. 1 (1984) (arbitration clause in franchise agreement enforceable despite state Franchise Investment Law requiring courts to hear claims); Perry v. Thomas, 482 U.S. 483 (1987) (arbitration agreement enforceable despite provision in state Labor Code preserving judicial forum to recover unpaid wages); *see also* Securities Indus. Assoc. v. Connolly, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) (state regulations barring securities firms from requiring customers to sign arbitration agreement as a condition to opening account are "patently inhospitable" to arbitration and are thus invalid); Saturn Distribution Corp. v. Williams, 905 F.2d 719, 726 (4th Cir. 1990) (state law prohibiting nonnegotiable arbitration clauses in automobile franchise agreements is preempted by FAA; FAA "does not allow such singular hostility to the formation of arbitration agreements").

79. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (arbitration of antitrust claims arising out of international commercial transaction; "[h]aving made the bargain to arbitrate, the party should be held to it"); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (Securities Exchange Act and RICO claims); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (Securities Act); *see also* Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (1991) (claim under Age Discrimination in Employment Act); Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 757 F. Supp. 283 (S.D.N.Y. 1991) (antitrust claim in domestic transaction). The strong federal policy favoring the enforcement of arbitration agreements also allows arbitration to trump other important public interests, like "efficient dispute resolution." *See, e.g.*, Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985) (compelling arbitration of pendant state-law claims, despite the assumption that related federal law securities claims were inarbitrable and

transaction or the collective bargaining agreement has been strained by a growing tendency to import arbitration into contracts of adhesion; employment and franchise agreements, agreements between securities brokers and their customers, and agreements between patients and doctors or hospitals have also routinely come to include arbitration clauses, usually at the insistence of the party in control of the printed form.[80] In some cases, regulatory legislation has actually imposed some form of "arbitration" as a mandatory process to resolve private disputes that were not thought suitable for courts or administrative agencies to handle.[81]

Compared to formal court adjudication, arbitration may often appear to be "an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law."[82] That arbitration thus affords a sort of "rough justice" may, however, be the trade-off for what proponents of the process point to as arbitration's expeditious, "business-like," expert settlement of disputes. The principal advantages claimed for arbitration are largely advantages of efficiency. To begin with, it seems likely that a dispute processed through arbitration will be disposed of more quickly than if the parties had made their way through the court system to a final judgment.[83] Arbitration tends to be a speedier process in part because

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thus "the result would be the possibly inefficient maintenance of separate proceedings in different forums"). *Id.* at 217.

80. *See* MURRAY, RAU, SHERMAN, *supra* note 35, at 430-32, 437-447, 463-68, 517-26.

81. *See, e.g.*, 7 U.S.C.A. § 136a(c)(1)(F)(ii) (Supp. 1992) (mandatory data-licensing scheme by which pesticide manufacturer may utilize prior registrant's data to obtain federal registration, but must compensate prior registrant therefor; if the two manufacturers cannot agree on amount of compensation, either "may initiate binding arbitration proceedings," which are to be "final and conclusive"); *see* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (upholding arbitration scheme against constitutional challenge); PPG Indus., Inc. v. Stauffer Chem. Co., 637 F. Supp. 85 (D.D.C. 1986) ("Congress concluded that the EPA lacked the requisite expertise in determining compensation."). *See generally* John Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 J. DISP. RESOL. 1. A "Model Employment Termination Act" was approved by the National Conference of Commissioners on Uniform State Laws in 1991. MODEL EMPLOYMENT TERMINATION ACT, 7a U.L.A. 63 (Supp. 1992). Under this Act, an employee who has worked for the same employer for one year or more may not be fired without "good cause"; claims for wrongful termination are to be heard by an arbitrator, who may order reinstatement of the employee or may award up to three years' worth of severance pay. *Id.* § 5. *See also* APPENDIX, COMMENT (the "preferred method" for enforcing statutory protection is through the use of professional arbitrators who have the "skill, training and experience to understand the special problems of the workplace"; placing enforcement in the hands of the civil courts "would almost surely be the most complex, expensive, and time-consuming procedure"). *Cf.* Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988) (Commodity Futures Trading Commission requires members of commodity exchanges like the Chicago Board of Trade to submit disputes with members to arbitration; held, arbitration requirement upheld; "by virtue of its continued membership in the CBOT" plaintiff had "consented to arbitration"; that it "had no choice but to accept the CBOT's rules" if it were to continue in business was irrelevant).

82. Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 751 n.12 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986).

83. In commercial arbitration cases administered by the American Arbitration Association in 1992, an average of 211 days elapsed between the date a case was filed and the date of the award. The median length of a case was only 138 days. American Arbitration Association (private communication, Helmut Wolff, American Arbitration Association). In New Jersey's fee arbitration program, 67% of the 1,756 fee cases disposed of in 1991 were concluded in

it allows the parties simply to bypass any queue at the courthouse door and to schedule hearings at their own convenience; in addition, the relative informality of arbitration means that pre-trial procedures, elaborate pleading, motion practice, and discovery are substantially streamlined or in many cases completely eliminated.[84] In commercial cases, arbitrators will usually not devote time to writing reasoned opinions that explain and justify their decisions; it is well understood that the lack of a reasoned opinion will help to insulate an award from judicial scrutiny.[85] And these decisions are likely to be final: There is no process by which an aggrieved party can appeal an award to another, higher arbitrator or panel of arbitrators; judicial review is highly restricted and the possibility of a successful challenge extremely slight.[86] There is, in short, likely to be much less "lawyering" in arbitration than in litigation. Savings in time and in pre- and post- "trial" work are likely also to be reflected in lower expense, even allowing for the fact that the costs of arbitration are borne by the parties themselves and (unlike litigation) not even in part by the taxpayer.[87]

Efficiency considerations — what Marc Galanter has referred to as the

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under 180 days (although 7% took longer than a year); the average age of all cases disposed of that year was 172 days, while the median age was only 132 days. NEW JERSEY OFFICE OF ATTORNEY ETHICS, STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 115-16 (1991). In the District of Columbia the average processing time for all fee arbitration cases has been 218 days; the median time has been 197 days. D.C. BAR, ATTORNEY-CLIENT ARBITRATION BOARD, 1991-92 ANN. REP., 9; *see also* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 460 (1988) (survey of practicing attorneys indicates that arbitration was overwhelmingly considered a speedier means of dispute resolution than either jury trial or bench trial); *see also id.* at 473-77 (comparison with other studies).

84. *See* MURRAY, RAU, SHERMAN, *supra* note 35, at 555-65.

85. In fact the American Arbitration Association, which administers much commercial arbitration in this country, actively discourages arbitrators from doing so; as the AAA's Manual for Commercial Arbitrators explains, "[t]he arbitrator . . . better fulfills his obligations to the parties when his award leaves no room for attack." AAA Manual for Commercial Arbitrators (1985).

86. *See* MURRAY, RAU, SHERMAN, *supra* note 35, at 481-501. However, the finality of arbitration awards may be undercut to some extent by the practice of commercial arbitrators not to explain their decisions in written opinions. Since the actual basis of the award — a determination of just what issues were actually resolved — may be unclear, the award's collateral estoppel effect may be limited, permitting the later relitigation of issues that would probably have been barred by a judicial determination. *See, e.g.*, Tamari v. Bache & Co. (Lebanon) S.A.L., 637 F. Supp. 1333 (N.D. Ill. 1986) (customer initiated arbitration against broker seeking to hold broker accountable for acts of its subsidiary, and arbitrators dismissed claim without opinion; held, later action against the subsidiary itself was not precluded since "it is impossible to tell" the basis for the arbitrators' award); *see also* Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29 (1988); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623 (1988).

87. The parties are responsible for the administrative fees of any institution (like the AAA) that administers the arbitration, and in some cases may have to pay stenographic costs and the costs of a hearing room. They must also pay the fees of the arbitrators themselves, which in large and complex cases may be substantial. *See* Hunt v. Mobil Oil Corp., 654 F. Supp. 1487 (S.D.N.Y. 1987) (three arbitrators were each paid $1500 per day of hearings plus expenses, which included first-class air travel and "first-class" hotels; arbitration consumed 61 hearings over more than 4 years).

A survey of practicing attorneys found that 56.2% of respondents considered arbitration to be more "economical" than a jury trial and 53.1% more "economical" than a bench trial; only 13.9% and 16.9%, respectively, thought it less "economical." However, attorney responses

"cool theme" in the dispute resolution literature, emphasizing speedier and less expensive decisionmaking[88] — may predominate among the advantages claimed for arbitration by its proponents. However, interest in arbitration has also focused on other features of the process that, it is claimed, may allow it to provide a higher *quality* of justice and superior outcomes. For example, one important feature of most schemes of arbitration is that, unlike litigation, the parties here are able to choose their own "judges": They are free, therefore, to

> avail themselves of decision-makers with expert knowledge of the subject matter in dispute. The arbitrator may have a similar background to the parties, or be engaged in the same business; he is likely, then, to be familiar with the presuppositions and understandings of the trade.[89]

Use of knowledgeable arbitrators may allow the parties to avoid the daunting task of having to educate a judge or a jury as to the content of industry practice; it may also allow them to predict with greater confidence the ultimate outcome of the arbitration.[90] As a general matter, the "evidence from arbitration is that a single qualified lay judge is superior to six or twelve randomly selected laymen—on reflection, a not implausible suggestion."[91]

In addition, arbitration usually takes place in private, and the result is not a matter of public record unless it later becomes the subject of a court proceeding.[92] Privacy in the process that prevents the revelation of sensitive or

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indicated that arbitration was less likely to be perceived as cheaper if the case was a large one involving more than $250,000. *See* Stipanowich, *supra* note 77, at 461-62.

88. Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases* 69 JUDICATURE 256 (1986); *see also* David Luban, *The Quality of Justice*, 66 DEN. U. L. REV. 381 (1989); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 6-7 (1991); *cf.* Robert Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 259-70 (1989) (distinguishing different conceptions of the primary role of mediators, including "efficiency," "protection of rights," "empowerment" and self-determination, and fostering mutual recognition and understanding).

89. MURRAY, RAU, SHERMAN, *supra* note 35, at 391.

90. Arbitrators are not usually expected to "follow the law" or to treat prior arbitration awards as having any precedential value. *See id.* at 401-03. In addition, the relative absence of prehearing discovery in arbitration limits a disputant's ability to assess the quality of the opponent's case prior to the hearing. Nevertheless, lawyers experienced in arbitration tend to feel that they are often able to predict the results of arbitration with some certainty, at least in part because criteria of decision based on trade custom and past practice are likely to be available and to be consistently applied. A survey of practicing attorneys found that 53% of the respondents rated the predictability of arbitration as "good" or "excellent" in cases involving less than $250,000, with only 15.5% considering it to be "poor" or "very poor"; for larger cases involving more than $250,000, the ratings were 48.7% and 17.9% respectively. *See* Stipanowich, *supra* note 83, at 457; *cf.* Robert L. Bonn, *The Predictability of Nonlegalistic Adjudication*, 6 LAW & SOC'Y REV. 563, 571 (1972) (lawyers with extensive experience in commercial arbitration replied "without hesitation that the decision of an arbitrator was by far the 'most predictable,' that a judge's decision was 'predictable at some but not all times,' and a jury's decision was 'virtually one of pure chance' "; however, this may be the result of a careful prescreening of cases conducted by sellers before choosing to pursue arbitration).

91. William M. Landes & Richard H. Posner, *Adjudication as a Private Good*, 8 J. LEG. STUD. 235, 252 (1979).

92. The fee arbitration survey conducted by HALT in 1987 reported that the proceedings

embarrassing material about the dispute may well be attractive to both parties, minimizing unfavorable publicity for the attorney and the revelation of confidential and privileged information of the client.[93] For all of these reasons, then, attorneys have frequently found it desirable to insert pre-dispute arbitration clauses in their agreements with clients, binding both attorney and client to submit any later disputes over fees — and, sometimes over malpractice claims to as well — arbitration.[94]

On the other hand, further claims for arbitration that advance a "warm" theme — for example, claims that the privacy and "informality" of the process may help to lessen the adversarial conflict and heightened antagonism that frequently accompany litigation — seem considerably more speculative. It is certainly plausible to suggest that the absence of the jury, of courtroom ritual, and of the procedural jockeying that accompany pre-trial practice, all can "make parties more comfortable and reduce enmity and disaffection costs."[95] But in an extreme form, such claims can amount to little more than wishful thinking — as in the frequent suggestion that the "non-adversary atmosphere" of arbitration may permit the relationship between the parties to continue after the dispute is settled.[96] One factoid that is troubling

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and case documents were kept confidential in all of the states with statewide arbitration programs; the arbitration awards themselves were kept confidential in only about half of the programs. *See* HALT SURVEY, *supra* note 38. *See, e.g.*, South Carolina Resolution of Fee Disputes Board, Rule 19 ("all proceedings" confidential, except that the panel's decision "may be summarized in a complaint" filed in order to enforce the award); CAL. FEE ARB. RULES Rule 25.3 ("arbitration award is public; the arbitration case file . . . remains confidential"); KY. SUP. CT. RULES, Rule 3.810(8) ("With the exception of the award itself all records, documents, files, proceedings and hearings pertaining to arbitration of any fee dispute . . . shall not be open to the public."); *see also* Courier Journal & Louisville Times v. O'Bannon, 2 ADR Rep. BNA 323 (Ky. App. 1988) (lawyer sought declaratory judgment that arbitration award against him should not be made public; held, court had no authority to seal arbitration award).

The HALT data may now be somewhat outdated. *Cf.* FLORIDA BAR RULES Rule 14-5.1 ("All records, documents, files, proceedings and hearings . . . shall be made available, upon inquiry, to anyone."); WYOMING RULES FOR RESOLUTION OF FEE DISPUTES Rule 18 (With the exception of alleged ethical violations referred to a grievance committee, "no confidentiality exists in the resolution of fee disputes.").

93. *See supra* note 42 and accompanying text.

94. *See infra* notes 260-62 and accompanying text.

95. Robert Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 1006 n.251. *But see id.* at 992-94 (arbitration may lessen the likelihood of hostility because there are fewer opportunities for direct party confrontation; however, this reduces enmity only through the effect of party "insulation" — i.e., limiting the number and intensity of party contacts — rather than through "interparty translation" — i.e., facilitating mutual recognition, understanding, and sympathy).

96. *See* George, *supra* note 59, at 319, 338. This student comment asserts in addition that the often-noted tendency of arbitrators to "split the difference" between the claims of the disputants is a sign of "flexibility" that allows "the parties to arbitration [to] approach their attempts to persuade from a 'reasonable compromise of differences' approach rather than an 'all or nothing' (zero sum) approach." *Id.* at 338 n.183. This, however, seems naive. For one thing, if arbitrators do indeed tend to "split the baby" in their decisions, such a propensity is hardly likely to dampen adversarial advocacy; on the contrary, it is likely to drive the parties further apart, as each attempts to stake out an extreme position from which the arbitrators can move to a compromise favorable to him. *See* MURRAY, RAU, SHERMAN, *supra* note 35, at 591-92 (describing the rationale for "final-offer arbitration"). This arbitral propensity is also unlikely to contribute to the maintenance of future relations between the parties; on the contrary, in such areas as labor arbitration the tendency to give "a little bit to each side" may instead be the *effect* of a stable collective bargaining system, in which parties of "rough equal-

for such a thesis is that it appears parties rarely do continue to deal with each other following an arbitration.[97] Of course, such a failure to resume a business relationship does not necessarily mean that arbitration is as "lethal to continuing relations" as litigation,[98] and one need not conclude from it that the end of the relationship is attributable to the arbitration process. That relations are rarely resumed after arbitration could instead be the result of a process of advance screening: It would be natural to prefer the less disruptive processes of negotiation and settlement for more valued partners, and to neglect those processes when disputes arise with marginal firms or those who were not in any event serious future business prospects.[99]

Of course, attributes of arbitration that in the abstract appear to make it a superior dispute resolution mechanism may in fact turn out to be either a blessing or a curse, depending upon the tactical position of the party concerned. Rapid resolution of a dispute may well benefit everyone. Nevertheless, the party against whom a claim is being asserted will probably find that there are offsetting advantages in delaying the ultimate reckoning. In addition, the larger of the disputants may well prefer to exploit the fact that its smaller opponent does not have the financial resources for an extended struggle. A party for whom the stakes and risk of loss are high may for that reason become less interested in "informality," and more reluctant to chance a decision without having taken every possible advantage of the full panoply of legal procedures available to him — including the ability, with an appeal, to play out his hand to the bitter end.[100] Similarly, a party who is aware that his case is a weak one may not always find a knowledgeable arbiter to be desirable; he may prefer instead to take his chances with a decision maker who is somewhat less expert and considerably more malleable.[101]

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ity," locked in to a long-term relationship, resort to arbitration to help them "achieve the results of successful negotiation." See Getman, *supra* note 73, at 928-33; PHILIP SPERBER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS 349 (1985); Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 278.

97. In a survey of textile disputes arbitrated through the AAA, one author found that of 78 cases, "business relations were resumed" following the arbitration in only 14. Robert L. Bonn, *Arbitration: An Alternative System for Handling Contract Related Disputes*, 17 ADMIN. SCI. Q. 254, 262 (1972).

98. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 25 n.117 (1983).

99. *See* Bonn, *supra* note 90, at 574 (sellers in textile disputes carefully screen or preselect cases they take to arbitration, pursuing arbitration primarily against "buyers who are marginal firms or who have weak or specious claims," and settling disputes with buyers who had a strong case or who were good future business prospects).

Similar patterns may be found in fee disputes between attorneys and clients. *See infra* note 228 and accompanying text.

100. It is revealing in this respect that a recent survey of practice in patent disputes suggests that corporations "overwhelmingly favor arbitration for disputes involving smaller stakes," but that "only a very small percentage prefer arbitration where the risks exceed six figures." Wesley & Peterson, *Patent Arbitration*, 4 ADR Rep. (BNA) no. 2 at 30 (1990).

101. This has in fact been suggested by the General Counsel of Refac Technology Development Corporation, who has written this about his company's patent litigation strategy:

> [I]f patent validity or infringement is questionable, why take a chance with an arbitration expert who will know exactly how weak the patent is and how dubious infringement is? It makes sense to take one's chance with a judge inexperi-

Parties who are not themselves established members of a trade may be reluctant to confide the dispute to a process relying on decisionmakers who are "insiders," and who are therefore likely to share the preconceptions and values of their adversary.

B. MAKING THE CASE FOR MANDATORY ARBITRATION

As we have seen, the prevalence and intractability of fee disputes between attorneys and clients have led many jurisdictions to create arbitration mechanisms to hear such disputes, and led some jurisdictions to impose upon attorneys an obligation to participate in the process. We are often reminded, however, that historically the primary success of arbitration has come in resolving disputes that arise in the course of ongoing contractual relationships, between parties of roughly equal bargaining power; we are told that it would therefore be a facile error to assume that these successes can be replicated merely by importing wholesale into other contexts the surface features that appear to distinguish an "arbitration" mechanism.[102] In particular, when arbitration is imposed by law on parties in discrete transactions, it may be thought to be somehow at odds with "the concept of voluntary arbitration" for which "valid contract formation" is required.[103]

All this may be true but seems curiously beside the point. Mandatory arbitration may indeed not benefit from the dynamic of self-government that often makes labor and commercial arbitration an extension of the parties' own negotiations. It may indeed lack the legitimacy of processes founded on consent, in which an arbitrator chosen and paid by the parties is charged with interpreting substantive standards laid down by them in their agreement, in accordance with procedures to which they have also consented.

> enced in the technical and legal aspects involved. If the infringer is much bigger than the patentee or an entire industry has copied the patent, a jury trial would be much more beneficial than arbitration because of the sympathy and deep-pocket doctrine that can be played to the hilt.

Philip Sperber, *Overlooked Negotiating Tools*, 20 LES NOUVELLES 81 (June 1985).

Similar tactical considerations might counsel that a party challenging an excessive legal fee would, all else being equal, prefer to rely on a jury's "gut reaction" that the fee is probably "too high" instead of a determination by experts aware of the many considerations that enter into fixing attorneys' fees. *See* George, *supra* note 59, at 319.

102. *See supra* notes 67-75 and accompanying text; *see also* Getman, *supra* note 73. Getman suggests that the widespread success of labor arbitration is largely attributable to the existence of collective bargaining between management and unions that have a "significant, almost equivalent, voice in establishing the ground rules of industrial life." Getman, *supra* note 73, at 946. He argues that this collective bargaining process tends to ensure the selection of arbitrators whose awards will carefully respect the parties' own priorities in order to maintain the arbitrators' future acceptability; it also tends to ensure that awards are unchallenged and obeyed due to "the feeling that awards are likely to be equalized over the long run and that erroneous awards can be dealt with through negotiation." *Id.* at 922-23. The much-criticized practice in labor arbitration of compromise awards may actually be a reflection of the fact that labor awards are shaped so as to accomplish these goals of responsiveness and finality. It follows, then, according to Getman, that the labor analogy may be inapposite when brought in to urge the use of arbitration in such different contexts as prison disputes or disputes between attorneys and clients. *Id.* at 938-46. *See also* Mann, *supra* note 67, at 444 n.4 ("To impose an arbitration process without reference to an existing community ignores the relationship between arbitration and community and dooms the experiment to failure.").

103. George, Note, *supra* note 59, at 350.

Mandatory arbitration is, instead, simply a form of economic or professional regulation.

One sees this point clearly if one considers the many state statutes requiring arbitration of "interest" disputes in public employment.[104] Public employees are for obvious reasons usually forbidden to engage in strikes; the tests of economic strength used in the private sector to determine contract terms after a bargaining impasse are therefore limited in the public interest. When a police union and a municipality cannot agree on the terms of a new collective bargaining agreement, statutes may instead give either party the right to submit "any and all unresolved issues" to "arbitration."[105] The award, usually subject to limited judicial review, determines what the future terms and conditions of employment shall be. The decisionmakers are not formally state employees, but are private individuals chosen by the parties themselves; some statutes specifically envisage that if the parties themselves cannot agree, private organizations like the American Arbitration Association will select the arbitrators.[106] When the inevitable constitutional objections to such schemes are raised, for example on grounds of improper delegation of legislative or political power, they are often bypassed by the simple device of characterizing the arbitrators as "public officers" rather than as mere "private persons": The arbitration panel *must* be considered an "administrative or governmental agency" after all, since it had been granted "a portion of the sovereign and legislative power of the government."[107] Of course, such a transparent semantic ploy hardly deals with the critical problem—that private decisionmakers, insulated from the political process, are being charged with determining sensitive issues implicating the level of public services or the use of public money.[108] But in any event it is clear enough that these arbitrators are in fact exercising governmental functions in the regulation of public employment; one may be hard put to distinguish such an "arbitration" panel from a specialized tribunal or "public" agency created to administer a public regulatory scheme and funded out of

104. *See* MURRAY, RAU & SHERMAN, *supra* note 35, at 403-09, 587-90.

105. *See, e.g.*, R.I. GEN. LAWS § 28-9.2-1 (Supp. 1992) (Policemen's Arbitration Act); *see also id.* § 28-9.1-1 (firefighters); *id.* § 28-9.3-1 (public school teachers); *id.* § 28-9.4-1 (other municipal employees); N.J. STAT. ANN. § 34:13A-16 (West 1988) (police and fire departments); CONN. GEN. STAT. § 7-473c (1991) (municipal employees); *Cf.* TEX. REV. CIV. STAT. ANN. art. 5154c-1 § 10(b) (Vernon Supp. 1992) (Fire and Police Employee Relations Act; although "the policy of this Act favors and encourages the parties to elect voluntary arbitration, nothing contained herein shall be deemed a requirement for compulsory arbitration").

106. *E.g.*, WASH REV. CODE § 41.56.450 (1991) (uniformed personnel); R.I. GEN. LAWS § 28-9.3-10 (1991) (public school teachers); *cf. id.* § 28-9.2-8 (policemen; where parties cannot agree, arbitrator selected by chief justice of state supreme court).

107. City of Warwick v. Warwick Regular Firemen's Ass'n, 256 A 2d 206, 219 (R.I. 1969); *see also* WASH. REV. CODE § 41.56.452 (1991) (interest arbitration panel "exercises a state function and is, for the purposes of this chapter, a state agency").

108. *See* Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CINN. L. REV. 669 (1975); *see also* HARRY H. WELLINGTON & RALPH K. WINTER, THE UNIONS AND THE CITIES 23 (1971); Joseph R. Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CAL. L. REV. 678 (1976).

general revenue.[109]

By the same token it might be thought desirable to entrust the regulation of certain private disputes to decisionmakers called "arbitrators" rather than to small claims courts, administrative agencies, or other specialized tribunals.[110] Whether fee disputes between attorney and client should be diverted to arbitration requires an exercise of judgment with respect to familiar concerns, usually thought appropriate in discriminating among different forums — concerns with respect to expense, expeditiousness and other, intangible costs of disputing; the neutrality and competence of the decisionmakers; and the creation of "both internal incentives and outside supervision [to] conform . . . decisions to the public interest."[111] Such considerations may justify a form of "arbitration" even though the process may not benefit from the legitimacy of time-honored models.

The variety of local experiments across the country with fee arbitration has naturally led to different patterns of dispute resolution and to different rates of success. In some cases the local bar may be small and relatively collegial, and a local fee arbitration program may benefit from an energetic committee chairman who is not reluctant to pursue recalcitrant attorneys: In such circumstances one would not be surprised to find that lawyers rarely decline to participate in arbitration, and anecdotal evidence suggests in fact that this tends to be true. A high rate of attorney participation may be reinforced both with sticks (such as a threat to refer cases of non-participation to bar counsel "for investigation as a potential grievance,"[112] or a threat to provide another lawyer to represent the client at no charge in subsequent

109. *See* Getman, *supra* note 73, at 933, 938, 946 n.119; Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 600-01 (1985) (Brennan, J., concurring) (Although dispute over compensation for use of pesticide data "ultimately involves a determination of the duty owed one private party by another, at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of [the statute's] comprehensive regulatory scheme. As such it partakes of the characteristics of a standard agency adjudication.").

One might well ask in what significant way "interest" arbitration of public-sector employment disputes differs from a scheme such as Nebraska's in which responsibility for such disputes is allocated to a state Commission of Industrial Relations, consisting of five "judges" named for six-year terms by the Governor with the advice and consent of the legislature. The statute stipulates that such "judges" are to be appointed "because of their experience and knowledge in legal, financial, labor and industrial matters," *see id.* NEB. REV. STAT. §§ 48-801, 803-806, (1988), and that they are to be paid $180 for each day spent in performing their duties, plus travelling expenses. Commission orders are binding and of the same force and effect as orders issued by state courts. *Id.* at § 48-819.

110. *See, e.g.*, MODEL EMPLOYMENT TERMINATION ACT, *supra* note 81, at spp. Cmt. (arbitration is the "preferred method" for resolving wrongful discharge cases). But some of the same functions performed by arbitrators could conceivably be entrusted to specialized courts; courts might, for example, be created to handle business litigation, taking such matters as shareholder lawsuits, takeovers and trade secret cases out of the general civil courts. *See* Christi Harlan, *Massachusetts Bill Seeks Courts for Business*, WALL ST. J., Dec. 9, 1988, at B6. The chairman of the corporate law committee of the Boston Bar Association claimed that a proposal for such specialized courts "would help speed action on the business cases and place them in the hands of judges who have expertise in business law." *Id.*

111. Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 463 (1989).

112. *See supra* note 62 and accompanying text.

litigation),[113] or with carrots. The chairman of at least one local arbitration committee regularly represents to attorneys that if they agree to participate, any potential claim for malpractice would necessarily be waived by the client — although of course the written submission to arbitrate does not so provide.[114]

In other situations, however, the rate of attrition from complaint to hearing may be substantial. One can only speculate as to the many possible explanations for such attrition. Undoubtedly, the attorney and client themselves will frequently arrive at a negotiated settlement of the fee dispute, and this may occur after as well as before a demand for arbitration is filed with a bar arbitration program.[115] We know, however, that in many cases the term "settlement" can only be a euphemism, used to flatter outcomes that hardly partake of the usual justifications for private ordering: It is likely, for example, that much attrition can be accounted for by clients who, having filed an initial complaint with a bar arbitration program, ultimately become discouraged and abandon the process as futile when they find out more about it. They may assume, perhaps, that a panel dominated by attorneys will not be completely evenhanded. Or they may assume, on the other hand, that an attorney who has charged an "excessive" fee will never agree to participate in arbitration anyway if the program is a voluntary one and he is not required to do so.[116] And indeed perhaps the most common cause of attrition is that either attorney or client simply refuses to participate in arbitration when the other party has requested it.[117] Cases where attorneys reject the notion of arbitration may not, perhaps, coincide perfectly with the universe of cases in which attorneys are most conscious of having charged a fee that would be perceived as clearly excessive. However, it would not seem wildly speculative to suggest that there is considerable over-

113. *See supra* note 63 and accompanying text.

114. Such a representation is not necessarily disingenuous: To be fair, it may be a somewhat awkward — and highly inaccurate — attempt to invoke the potential collateral estoppel effects of an arbitration award favorable to the attorney. *See infra* note 159 and accompanying text.

115. *Cf. supra* note 44 and accompanying text.

116. In the Illinois arbitration program, "more than half the clients who complain about their bills give up after reading materials [the] bar provides." Cox, *supra* note 59, at 30. Clients "look at the brochure and say, 'No attorney would agree to this.' " *Id.*

117. From 1986 through 1990, 3,714 petitions for arbitration were requested from the Oregon State Bar's fee arbitration program. Petitions were actually filed with the program in 1,158 cases (that is, in only 31 percent of the cases did a request for a petition lead to the formal initiation of proceedings). And in only 400 cases did the process continue to a hearing and the rendering of an award (that is, in only 35 percent of the cases in which the arbitration mechanism had been set in motion did an arbitration actually take place). Figures are not available to explain precisely why the process aborted in all these cases. Statistics do indicate, however, that of all the cases in which arbitration was formally initiated under the Oregon program during 1991, 25 percent were aborted because the attorney-respondent either failed to respond or expressly declined to participate; 27 percent were aborted because the client either failed to respond or declined to participate. (private communication, Liz Denecke, Administrator, Ore. State Bar Attorneys' Fee Arbitration Program); *see also* DISTRICT OF COLUMBIA BAR, ATTORNEY-CLIENT ARBITRATION BOARD ANN. REP., 1990-91 at 4 n.55 ("Clients are significantly more likely to consent to arbitrate lawyer-initiated fee disputes than lawyers are likely to consent to client-initiated fee disputes.") In the District of Columbia program, about 65% of attorney-respondents agree to proceed with arbitration. *Id.* at 2.

lap between the two categories.[118]

Proposals for the mandatory arbitration of fee disputes are frequently met with objections grounded in provisions of the federal or state constitutions. Of course, no state arbitration program purports to bind a *client* unwilling to engage in the process, and in the absence of an arbitration provision in the original attorney-client agreement, there would appear to be no way to do so.[119] It is sometimes asserted, however, that obligating an *attorney* to participate in arbitration would implicate in some way the attorney's rights to due process, to equal protection, to a trial by jury, or to access to the judicial system. Constitutional challenges to mandatory arbitration programs may not be actually disingenuous. It is not too much to suggest, however, that these arguments tend to function largely as makeweights, disguising or rationalizing a simple reluctance to submit to the process. And it is not surprising that when pressed, such challenges have universally been rebuffed.

The overarching element in any constitutional analysis must be the traditional supervision of the legal profession by the state judiciary. The authority of a state's supreme court over "admission to the bar and the conduct of its members" may be written into the state constitution;[120] even in the absence of such an explicit provision, however, it is routinely asserted as part of the "inherent powers" of the judiciary, "necessary and incidental to the court for its own protection, to secure the proper administration of justice, to maintain the prestige of the profession for integrity, to conserve the public good and to protect clients from malpractice attended with fraud and corruption."[121] This judicial authority has been the basis for a pervasive regulation of the profession, even in contexts outside the conduct of litigation — as a practical matter, of course, largely "self-regulation" through extensive del-

118. *See supra* notes 48-53 (discussing the ABA's Special Committee on Resolution of Fee Disputes, 1974); *see also* Cox, *supra* note 59, at 31 (recounting experience of coordinator of Wisconsin's fee dispute committee; "[o]ne case now pending involves an attorney who won a $23,000 settlement and then charged his client $20,000 . . . and there is no chance he will participate").

119. The Wyoming Rules for Resolution of Fee Disputes do require — in a rather high-handed manner — that where an attorney files a petition seeking arbitration to collect an unpaid fee, the client must move to dismiss the petition within 15 days; the client's failure to do so "shall constitute an irrevocable election by the client to be subject to the jurisdiction of the Committee [on Resolution of Fee Disputes] and any proceeding [thereunder]." WYOMING RULES FOR RESOLUTION OF FEE DISPUTES Rule 6(e). The authority for such a rule has apparently never been tested.

120. MONT. CONST. art. VII, § 2(3); *see also* N.J. CONST. art. VI, § 2, ¶3 (jurisdiction of supreme court "over the admission to the practice of law and the discipline of persons admitted").

121. State ex rel. McCormick v. Winton, 5 P. 337, 339 (Or. 1884); *see also* Board of Overseers of the Bar v. Lee, 422 A.2d 998 (Me. 1980) (the "power to define and regulate the practice of law naturally and logically belongs to the judicial department"; the "inherent power" of the supreme court to regulate the conduct of attorneys thus derives from the "concept of separation of powers"); Anderson v. Elliott, 555 A.2d 1042 (Me. 1989) (upholding mandatory arbitration program, which "comes within the court's constitutional authority to regulate the attorney-client relationship"); *see generally* Joseph D. Robertson & John W. Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon*, 13 WILLAMETTE L. REV. 273 (1977); WOLFRAM, *supra* note 10, at § 2.2 ("Inherent Powers of Courts to Regulate Lawyers").

egation to the organized bar.[122] It is taken for granted not only with respect to such matters as admission to the profession and discipline for misconduct, but equally in contexts for which there exist close common-law analogues, such as the policing of the terms of client contracts. When a court asserts the authority (sometimes on its own initiative) to reduce the fees charged by an attorney in a case before it, it does so not only in its role as an adjudicator of litigated disputes, but in exercise of its "inherent powers" to supervise the profession.[123] Mandating an alternative forum in which disputes over fees can be heard and resolved is little more than a variant on that exercise of authority.[124]

Against that backdrop, the constitutional concerns occasionally expressed with respect to mandatory arbitration of fee disputes hardly appear to be substantial. It certainly should not be difficult to design a fee arbitration program in such a way as to satisfy minimal requirements of due process,[125] and challenges by attorneys on due process grounds are likely therefore to border on the frivolous.[126] Challenges based on other constitutional provi-

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122. Wolfram writes that the supervision by courts of the organized bar is most often exercised "in a passive and reactive capacity," in which courts "serve as the largely passive sounding boards and official approvers or disapprovers of initiatives that are taken by lawyers operating through bar associations." WOLFRAM, *supra* note 10, at 37, 33-34. One can of course find movement in a number of jurisdictions toward more direct judicial supervision, in the form of a court-appointed bureaucracy, see DISCIPLINARY ENFORCEMENT REPORT, *supra* note 1 at 19-20; "ABA Adopts Lawyer Discipline Model But Resists Call for Greater Openness," 60 U.S.L.W. 2490, 2491 (Feb. 11, 1992).

123. *See supra* note 34; *see also* First Nat'l Bank v. Brower, 368 N.E.2d 1240 (1977) (court-promulgated directive that on the entry of default judgment, attorneys' fees are to be awarded on quantum meruit basis rather than on the basis of any formula in agreement between creditor and debtor; directive upheld given the "traditional authority of the courts to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law"); Gair v. Peck, 160 N.E.2d 43 (N.Y. 1959) (court has power to adopt a rule setting forth a "schedule of reasonable fees" and method of computation of contingent fees in personal injury and wrongful death cases; the "idea is frivolous that disciplinary power over attorneys is unrelated to the exaction of excessive fees"); American Trial Lawyers Ass'n v. N.J. Supreme Court, 316 A.2d 19 (N.J. 1974) ("[T]he power so vested in the Supreme Court to regulate the practice of the law includes the power to adopt a reasonable rule establishing the outer limits of permissible contingent fees in tort litigation.").

124. *See In re* Livolsi, 428 A.2d 1268 (N.J. 1981) (upholding state mandatory fee arbitration program; if the supreme court "has the authority to control the substance of the fee relationship, then a power of a lesser magnitude determining the procedure for resolving fee disputes must also be within our province"); Anderson v. Elliott, 555 A. 2d, at 1050 (The "overriding responsibility and authority of the Supreme Judicial Court to superintend that professional relationship [between attorney and client] is a complete answer to the constitutional challenge to Maine's client-initiated fee arbitration."); *see also* W. Perry Brandt et al., Special Project, *Recent Developments in Attorneys' Fees*, 29 VAND. L. REV. 685, 710-18 (1976) (maximum contingent fees by court rule).

125. *E.g.*, ALASKA BAR RULES Rule 40(f) (at hearing, both parties have right to be represented by counsel; to present, examine, and cross-examine witnesses; to present documentary evidence and to have subpoenas issued; to challenge arbitrators for cause and to make one peremptory challenge; and to have hearing recorded). "[A]ny relevant evidence will be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." *Id.* Rule 40(n). Arbitrators are to make written findings "on all issues and questions submitted which are necessary to resolve the dispute." *Id.* Rule 40(q). Awards may be vacated on the grounds set out in the Uniform Arbitration Act. *Id.* Rule 40(u).

126. Existing mandatory arbitration programs have regularly been held to provide attor-

sions are likely to appear more trivial still. It seems difficult to argue, for example, that mandatory arbitration denies attorneys the "equal protection" of the laws: Attorneys, at least outside the realm of popular humor, hardly appear to be a "suspect class" as the term is used to draw attention to race- and gender-based classifications; a rational basis for close regulation of attorneys' contracts can readily be found once one acknowledges the court's pervasive interest in the attorney-client relationship and the absence of alternative remedies readily available to the client.[127] And the claim that

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neys with the "some form of hearing" required by due process jurisprudence. Guralnick v. Supreme Court of New Jersey, 747 F. Supp. 1109 (D.N.J. 1990), *aff'd*, 961 F.2d 209 (3d Cir. 1992). *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976). It could not seriously be argued that an attorney's due process rights incorporate the motion practice, discovery, rules of evidence and written reasoned opinions that distinguish litigation from the informality that is the hallmark of arbitration procedure. *See generally* Hardware Dealers Mut. Fire Ins. Co. v. Glidden, 284 U.S. 151 (1931) (mandatory arbitration of amount of loss in fire insurance cases; held prospect of "speedy determination" and resort to "expert knowledge" support state's choice to require "a more summary method of determining the amount of the loss than that afforded by traditional forms"; 14th Amendment is satisfied "if the substitute remedy is substantial and efficient"); Country-Wide Ins. Co. v. Harnett, 426 F. Supp. 1030 (S.D.N.Y. 1977) (mandatory arbitration under state "no fault" insurance law; "arbitration is a reasonable alternative to a judicial determination of insurance claims"; the "process afforded plaintiff clearly passes constitutional muster"). *See generally* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 ORE. L. REV. 487, 534-40 (1989).

127. *See Guralnick*, 747 F. Supp. at 1114-16. Does mandatory arbitration somehow "impair the obligation of contracts"? The *Guralnick* court noted that fee arbitration at the client's request does not change the "terms of the contract" but merely "dictates the forum in which disputes regarding the attorney's fee may be adjudicated"—This rhetorical move that has been so often repeated as to become almost unimpeachable doctrine. *Id.* at 1115. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 229-30 (1987) (arbitration agreement between broker and customer does not amount to impermissible waiver of substantive provisions of Exchange Act; by agreeing to arbitrate the client did "not forego the substantive rights afforded by the statute . . . [but merely submitted] to their resolution in an arbitral, rather than a judicial, forum"); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481-83 (1989). An increasing judicial tendency to presume arbitral competence even as to statutory or "public policy" matters has increasingly undercut the force of earlier cautionary notes to the effect that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring).

A common provision in state constitutions guarantees the "right of access" to courts. *See, e.g.*, TEX. CONST. art. 1, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."). Such provisions are apparently derived from Magna Charta. But however ancient and estimable the sentiment, they can hardly be read to require the freezing of all common-law actions in their traditional form; "reasonable substitutes" may be crafted for any common-law claim, and remedies reshaped or restricted accordingly. *See* Davidson v. Rogers, 574 P.2d 624 (Or. 1978) (statute prohibited recovery of general damages for defamation unless defamation was intentional or defendant refused to publish retraction when requested to do so; held, statute is valid because, "while restricting the remedy, . . . it does not wholly deny the injured party a remedy for the wrong suffered"); Donald B. Brenner, Note, *The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms as a Receptacle of Important Substantive and Procedural Rights?*, 13 RUTGERS L. J. 399, 413 (1982); David Richards & Chris Riley, *Developing a Coherent Due-Course-of-Law Doctrine*, 68 TEX. L. REV. 1649, 1652-53 (1990). In fact, in many jurisdictions, the "access to court" guarantee has simply been "balanced away" where a plausible "legitimate, countervailing public interest or policy" can be found justifying the modification or even the elimination of common-law forms of liability. *See* David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 49 (1986); Johnson v. Star Mach. Co., 530 P. 2d 53 (Or. 1974); *cf.* Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (a two-year medical malpractice statute of limitations

mandatory fee arbitration somehow reduces the attorney to a state of "involuntary servitude" in violation of the 13th Amendment[128] seems little more than an open invitation to the imposition of Rule 11 sanctions.

Perhaps the most serious attention has focused on provisions of state constitutions that guarantee a right of trial by jury.[129] When asserted in this context to challenge a mandatory arbitration program, however, a general right to trial by jury may well be trumped by the judiciary's interest in regulation of the legal profession.[130] The interests that underlie the courts' supervisory authority over the legal profession are perceived to be strong ones; in exercising such authority, courts claim to be concerned with nothing less than the proper functioning of the judicial system. Judicial supervision of client contracts is in the first place intended to insure the actual integrity of the attorney-client relationship, to which citizens are compelled to resort for access to "the law." And in addition — a consideration of at least equal

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held unconstitutional as applied to minors because the restriction was "unreasonable or arbitrary when balanced against the purpose and basis of the statute," which "effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative"). *See generally* Patrick E. Sullivan, Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150, 170-78 (characterizing different interpretations given to "access to courts" guarantee in different jurisdictions); Golann, *supra* note 126, at 529-31 (separation of powers), 546-49 (access to courts).

128. *See Guralnick*, 747 F. Supp. at 1116.

129. Guarantees in state constitutions of the right to trial by jury are quite common. *See, e.g.*, N.J. CONST. art. 1, ¶ 9 ("The right of trial by jury shall remain inviolate."); OR. CONST. art. I § 17 ("In all civil cases the right of Trial by Jury shall remain inviolate."), art. VII § 3 ("In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved."); TEX. CONST. art. V, § 10 ("In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury.").

In addition, if the parties are in *federal court*, the 7th Amendment to the federal constitution may guarantee a jury trial "in suits at common law" even if a jury trial would be unavailable under state law. *See* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2303 (the "language of the Rules of Decision Act cannot prevail over the clear command of the Seventh Amendment"). However, the Supreme Court has held that the 7th Amendment guarantee "applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts." Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916). It is widely assumed that this holding is still "good law." *See Hardware Dealers Mut. Fire Ins. Co.* 284 U.S. at 158 (14th Amendment "neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure"); Boyd v. Bulala, 672 F. Supp. 915, 921 (D.C. Va. 1987); Rozbicki v. Huybrechts, 576 A.2d 178 (Conn. 1990). 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 256 n.12 (1986).

130. *Cf.* Gentile v. State Bar of Nevada, 111 S.Ct. 2720 (1991). In *Gentile* Chief Justice Rehnquist, writing for a majority of the Court, concluded that a lawyer representing a party in a pending proceeding could be disciplined for public statements about the case "upon a lesser showing" than the "clear and present danger" standard generally applied under the First Amendment. *Id.* at 2743. In the course of his opinion Chief Justice Rehnquist referred to earlier attorney solicitation cases in which the Court had "engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Id.* at 2744; *see also In re* Fadeley, 802 P.2d 31 (Or. 1990) (censuring supreme court justice for violating provision of Code of Judicial Conduct that prohibited personal solicitation of campaign contributions; held, the code prohibition was justified by "offsetting societal interest" of eliminating "the appearance (at least) of impropriety . . . and preserv[ing] the judiciary's reputation for integrity"; "[t]he means chosen to carry out the state's purpose are the least intrusive possible if there is to be any chance to achieve the desired aim").

importance — it is designed to maintain a critical public confidence in the court system as a whole; widespread public dissatisfaction with attorney conduct over fees might indeed become, as one court has asserted, "the principal source of public dissatisfaction with the judicial system" itself.[131]

The assertion of judicial authority over attorney-client contracts is buttressed by the fact that in many jurisdictions the attorney's supposed right to a jury trial of a fee dispute may in any event be rather tenuous. An attorney's suit to recover a fee need not be equated with a common garden-variety claim of "contract" or "debt." The relationship of trust and confidence between attorney and client, and the latter's "presumed vulnerability,"[132] will frequently induce a court to characterize the relation as a "fiduciary" one, thereby allowing it to treat an action involving fees as one within the historical jurisdiction of "courts of equity."[133] In such a case, of course, there would simply be no common-law jury right to preserve.[134]

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131. Anderson v. Elliott, 555 A.2d 1042, 1049 (Me. 1989); *see also In re* Livolsi, 428 A.2d at 1272, 1281 ("[P]ublic confidence in the judicial system is as important as the excellence of the system itself."); McGill v. City of Ottawa, 773 F. Supp. 1473, 1474 (D. Kan. 1991) ("courts have a stake in fee contracts because the fairness of the terms reflects directly on the court and its bar"; the court "reformed" fee contract between client and attorney in the exercise of its "equitable jurisdiction").

132. WOLFRAM, *supra* note 10, at 497.

133. When an *attorney* brings suit to recover a fee, he would in most cases be required to proceed "at law." *See* Gray v. Joseph J. Brunetti Construc. Co., 266 F.2d 809, 818 (3d Cir.), *cert. denied*, 361 U.S. 826 (1959); Elting v. Frieman, 215 A.2d 367, 368-69 (N.J. Super. Ct. App. Div. 1965) (Equitable jurisdiction "is assumed to protect the client from oppression by his attorney. . . . Those reasons give no support to the proposition that the attorney should have an equal right to seek the aid of equity.") *But cf.* Rosenman & Colin v. Richard, 850 F.2d 57 (2d Cir. 1988) (client has no right to jury trial when attorney seeks to enforce a charging lien on proceeds of judgment). On the other hand, the jurisdiction of courts of equity to intervene at the *client's* request, by enjoining a legal action and determining the fee, is well established. *See, e.g.*, Lewis v. Morgan, 28 A.2d 215 (N.J. Ch. 1942) (client successfully sought to enjoin prosecution of attorney's suit to recover fee; "the existence of a confidential relationship between an attorney and client has been recognized from the earliest times . . . . The bill is manifestly fashioned to invoke this constituent of equitable jurisdiction"); Kelley v. Schwinghammer, 79 A. 260 (N.J. Ch. 1911) (enjoining attorney's suit to recover on a note executed by client).

It seems accurate to conclude, then, that "equity courts have always had broad powers to adjudicate attorney-client fee disputes on behalf of the client," *In re* Livolsi, 428 A.2d at 1274 — and thus that clients have been able to deny attorneys any right to a jury trial of a fee claim by invoking equitable jurisdiction. Such equitable intervention is not limited to those cases where the attorney-client relationship was already in existence at the time the fee agreement was made, but it is of course considerably more likely and particularly intense in such situations. *See* Spilker v. Hankin, 188 F.2d 35, 37-39 (D.C. Cir. 1951) (suit by attorney to recover on promissory notes given by client long after the attorney-client relationship had commenced; held, the attorney's success in a suit on an earlier note did not estop the client from raising defenses; clients "are wards of the court in regard to their relationship with their attorneys," and the client could therefore "make any legal or equitable defense to the remaining notes which appeals to the conscience of the court"). On this point, see generally Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 282-87 (fiduciary duties of attorneys). *Cf.* Simler v. Conner, 372 U.S. 221 (1963) (per curiam). *Simler* was a declaratory judgment suit brought by a client to determine the amount of an attorney's fee. The Court held that under the 7th Amendment, the "questions involved are traditional common-law issues which can be and should have been submitted to a jury." *Id.* at 223. The result of such a holding, however, was merely that the client was entitled to the jury trial which he had been demanding. *Id.*

134. *See supra* note 129. In most jurisdictions the test of the applicability of such constitu-

C. THE STRUCTURE OF THE ARBITRATION PROCESS

The nature of arbitration admits considerable flexibility and variation in design, allowing the process to be adapted both to local conditions and to the contours of the individual dispute. Nevertheless, in designing an arbitration program to resolve fee disputes between attorneys and clients, there are certain critical concerns that must be addressed and resolved at the outset. Some of these will be examined briefly below.

1. Dealing with Attorney Misconduct

This is perhaps the thorniest problem likely to arise in connection with fee arbitration programs. The danger has often been pointed out: When perceived inadequacies in the official, formal system of adjudication lead to increased diversion to "private" processes, then important "public" concerns may be ignored or disserved. The relief obtained by an individual claimant

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tional guarantees is an historical one, focusing on whether "the claim would have received a jury trial . . . at the time the Constitution was ratified." Golann, *supra* note 126, at 502-03; *cf.* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1257-58, 1267-71 (1985) (Seventh Amendment test); Molodyh v. Truck Ins. Exch., 744 P.2d 992, 996 (Or. 1987) (statute provided mandatory appraisal procedure to determine amount of loss in fire insurance policies; since "plaintiff had a well-established right to have a jury determine the amount of damages in an action on an insurance policy when our constitution was adopted," such arbitration would be unconstitutional if appraisal was binding; "[to] save the statute,"court construed provision as "non-binding in respect to the non-demanding party").

The strategic device of re-characterizing a suit over legal fees as one in "equity" may not succeed in the few jurisdictions where the constitution grants an absolute right to a jury trial in *all* civil actions. *See* TEX. CONST. art. V, § 10; State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 292 (Tex. 1975) (constitution extends right to jury trial to "any legal process which a party institutes to obtain his demand or by which he seeks his right"). Even in those states, however, it is conceded that in "special circumstances" there may be "some special reason" that a jury is "unsuitable." *Id.* at 293; *see* Adams v. Texas State Bd. of Chiropractic Examiners, 744 S.W.2d 648, 654 (Tex. App.—Austin 1988, no writ) (no right to jury trial in a suit to review an order of an administrative agency where "expert knowledge or experience to properly evaluate the evidence" may be required, and jury trial might therefore interfere substantially with the agency's role in statutory scheme of regulation).

To argue that a suit over an attorney's fee is not the sort of case with which the guarantee of trial by jury was historically concerned is at least to approach the doctrinal question on its own terms and to play the game with a straight face. By contrast, other arguments that purport to avoid the claimed right to jury trial are little more than hollow makeweights. For example, the suggestion that by engaging in his profession an attorney has somehow "waived" his right to a jury trial is an unconvincing fiction, especially implausible when a mandatory arbitration scheme is made applicable to attorneys already in practice. See Kelley Drye & Warren v. Murray Indust., Inc., 623 F. Supp. 522 (D.N.J. 1985), in which a federal district court in a diversity case directed a law firm to proceed with arbitration despite the "direct collision" of New Jersey's mandatory fee arbitration program with the 7th Amendment. *Id.* at 528. The court held that the firm had "voluntarily given up its right to a trial of any kind," presumably by having chosen to "exercise [the] privilege" of practicing law. *Id.* at 527. It also suggested that the state's mandatory arbitration rules "might well constitute a written agreement for arbitration" under the Federal Arbitration Act, the firm's "having become a party to the agreement by taking advantage of the opportunity to practice law in New Jersey." *Id.* at 526. *See also Adams*, 744 S.W.2d at 654 (revocation of chiropractor's license; held, chiropractor "waived" constitutional claim to a jury trial by "avail[ing] himself" of the right to practice and "enjoying the benefits" of the statutory scheme); Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310, 319 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988) (plaintiff "consented" to arbitration mandated by CFTC "by virtue of its continued membership in the [Chicago Board of Trade]").

in an alternative private process may be quite satisfactory to him — may, indeed, even approximate what he might have obtained in litigation, and at a lesser cost. Dispute processing through private mechanisms, however, may neglect those functions that can only be performed through the authoritative pronouncements of public institutions like courts — functions such as the general deterrence of wrongdoing, the channelling or shaping of private conduct, or structural change.[135]

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135. One of the leading commentaries that sounds this cautionary note about ADR is Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1085-89 (1984) (The function of adjudication, using public resources and employing public officials, "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them;" "[c]ivil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."); *see also* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676, 679 (1986). (Private disputes may "implicate important public values," and resolution in ADR processes "may treat as irrelevant the choices made by our lawmakers and may, as a result, ignore public values reflected in rules of law."); *see also* Alschuler, *supra* note 35, at 1816-17 (public adjudication "can discourage wrongful primary conduct . . . and it can discourage violent self-help"; adjudication "is a cornerstone of commerce, an essential social service, and a hallmark of civilization." *Id.* at 1817); *see also* Geoffrey C. Hazard & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 57 (1988) (noting that determinations by a private tribunal lack "governmental imprimatur," "the message that society is unified against the condemned behavior," and therefore lack "the corresponding social import").

The point that a private process, responsive only to the disputants themselves, may fail to weigh the effects of its decisions on the interests of society at large can be illustrated by the large number of labor arbitration cases in which "industrial due process" and the maintenance of good relations between employer and union have seemed to justify the reinstatement of employees discharged for endangering public safety. *See, e.g.*, Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990) (upholding reinstatement of automobile mechanic who was fired for recklessness in failing to tighten lug bolts on front wheels); *cf.* Exxon Shipping Co. v. Exxon Seamen's Union, 801 F. Supp. 1379, 1390 (D.N.J. 1992) (breathalyzer test of seaman on oil tanker showed elevated blood alcohol level; held, the "public policy underlying efforts to keep intoxicated persons from operating commercial vessels is severely undermined by the arbitration award [ordering reinstatement of employee]"). Or the many product liability cases that are settled with generous compensation to the plaintiff, but with the understanding that the settlement itself and other information about the product's dangers are to remain unavailable to the public. *See* Bob Gibbins, *Stealth Litigation: Protective Orders' Social Costs*, N.J. L.J., Dec. 9, 1991, at 16.

At the same time, of course, an important theme in much of the literature is that, given disparities between the disputants in terms of needs, resources, and access to information, the results reached in private processes are not in any event likely to be as fair or satisfactory to the disadvantaged party as results in public institutions like the courts. The most common suggestion is that such disparities are particularly likely to distort the process of bargaining and settlement. "[T]he distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant." Fiss, *supra* note 129, at 1076; *see also* Edwards, *supra* note 129, at 679 (Because of inequality in power and resources, alternative mechanisms may produce "inexpensive and ill-informed decisions [that] merely legitimate decisions made by the existing power structure within society.") Sometimes, however, the critique seems to sweep more broadly. *See* Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 31-47 (1987) ("comparing the qualitative efficiency of ADR processes with more traditional litigation procedures"); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359. ("ADR should be reserved for cases in which parties of comparable power and status confront each other."). *Id.* at 1359. *See generally infra* note 160 and accompanying text.

It is possible then that public interests implicated by many attorney-client disputes may be bypassed or undermined by strictly private processes. For example, many disputes between attorneys and clients nominally arise because a client is demanding the return of a fee paid. On this basis a grievance committee saddled with an excessive caseload may be eager to shunt the dispute to the bar's fee arbitration committee as a fee dispute — even though it may also appear that the representation of the client had been less than devoted because of a conflict of interest, that the attorney is refusing to account for trust funds that he is holding on the client's behalf, that the attorney had promised services that he did not in fact perform, or that his past conduct reveals many similar instances of client overreaching or billing abuse.[136] In a significant category of cases, then, a contractual dispute over the fee may be only the tip of the iceberg, with other issues of vital public concern lurking just beneath the surface.[137] There are a number of related points here: The resolution of "fee disputes" by arbitration may fail to address the public interest in law enforcement, by failing even to address related issues of professional misconduct. When individual disputes are resolved at different times by different panels of arbitrators, recurrent patterns of abuse may not be detected or sanctioned. And if the diversion of fee disputes to alternative processes allows attorneys to avoid costs (such as adverse publicity and the stigma of disciplinary proceedings)[138] that they

136. *See, e.g.*, ABA, DISCIPLINARY ENFORCEMENT REPORT, *supra* note 1, at 31; JETHRO K. LIEBERMAN, CRISIS AT THE BAR: LAWYERS UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 200-01 (1978).

137. A good illustration is *In re* Hansen, 586 P.2d 413 (Utah 1978). In this case the attorney defended a client in a civil suit; during the same period, he undertook to represent the *plaintiff* in the suit in a criminal matter. When the client heard about this she contacted the state bar and "expressed concern over the conflict of interest and asked about obtaining the return of the fee she had paid." *Id.* at 415. Disciplinary proceedings were brought based on this conflict of interest and also based on allegations that the fee was excessive. The court noted that "when there has been a deviation from proper professional standards there should be some appropriate penalty, not only for the effect upon the attorney, but as a salutary measure for the benefit of the Bar and the public." *Id.* at 417. The proper disposition in this case was "to call attention to such impropriety . . . and to require [the attorney] to recognize that he breached his contract." *Id.* In addition, because his conduct fell short of what was required, the attorney "should not be entitled to the fee paid him"; if he failed to refund it within 30 days, he was to be suspended until he did so. *Id.*

The intertwining of fee disputes and disciplinary matters may also be exemplified by a case like Grossman v. State Bar, 664 P.2d 542 (Cal. 1983). Here the attorney initially agreed to handle a personal injury suit for a one-third contingent fee. Despite that agreement, he later unilaterally withdrew 40% of the settlement funds from the client's trust account as his fee, and when the client complained, responded that "we feel entirely justified in taking the normal fee." *Id.* at 544. The court imposed a one-year suspension from practice, stayed for a probationary period. *Id.* at 546.

138. *See supra* notes 27-31 and accompanying text. For this reason the court's decision in a case like *In re* Hansen, 586 P.2d 413, is likely to be considerably more powerful — both in terms of general deterrence and in terms of the respondent's future behavior — than the result of a fee arbitration proceeding in which an arbitration panel resolved the dispute by merely ordering a refund of the fee paid by the client.

On the use of disciplinary sanctions as a means of giving "warning to other lawyers," see WOLFRAM, *supra* note 10, at 124-25. *See also id.* at 107-08 (trend in many jurisdictions towards lessening the secrecy of the disciplinary process and "opening" it up to the public); ABA REPORT, *supra* note 1, at xii, 23 (recommendation that disciplinary process be "fully public").

would otherwise incur in an official forum, the resulting level of deterrence of misconduct may well be inadequate.[139]

Any scheme for the mandatory arbitration of fee disputes should then at the very least be part of an overall system — a system in which the resolution of a particular attorney-client dispute is connected with the disciplinary process through which professional conduct is scrutinized for ethical violations. "Loops"[140] between the two can be designed to ensure that the law enforcement functions served by attorney discipline are not swept under the rug in the drive toward private settlement.

For example, a state may have set up a "central intake office for the receipt of all complaints about lawyers;"[141] such an office could initially screen complaints to determine, either from the face of the complaint or after a summary investigation, whether any dispute exists between attorney and client that appears to involve a colorable claim with respect to the attorney's fee. If it does, the dispute would in the first instance be referred directly to an arbitration panel — without the further burden of determining whether the dispute was "primarily," "substantially," "predominantly," "really" (or some other unadministrable formulation) about fees.[142] At the same time,

139. On this point, though, one suspects that there may be countervailing considerations. Where more accessible means of redress are provided to clients, there is likely to be an increase in the number of claims asserted against attorneys which may more than offset any decrease in deterrence attributable to the ability of attorneys to avoid the costs incurred in official forums. This at least seems intuitively plausible, although one cannot of course be certain which effect would predominate.

140. *See* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988). The authors coined this term in connection with their suggestion that formal "loop-back" procedures be built into the design of any dispute resolution system. Such procedures, they note, can increase the chances of a satisfactory settlement by encouraging disputants to move (or "loop") back from "rights" disputes (e.g., litigation) or "power" disputes (e.g., strikes) into negotiation. *Id.* at 52. For example, provision for a mini-trial or non-binding arbitration could supply parties in litigation with information about the likely court outcome and thus help them in a negotiated settlement; a required "cooling off" period could provide a window for negotiations prior to a strike. *See id.* at 53-55. The term is used here of course in a different sense. The point is simply to underscore the need for some functional connections between the various subsystems that carry out the goals of any overall system of attorney regulation (the goal of a satisfactory resolution of "private" client grievances as well as the societal interest in sanctioning attorney misconduct).

141. As recommended by the ABA REPORT, *see supra* note 1, at 13. *See also* 60 U.S.L.W. 2490, 2491 (Feb. 11, 1992).

142. A possible exception to such a policy of automatic referral to arbitration is suggested by the Wyoming Rules, which exclude from arbitration "fees for claimed legal services which constitute a violation of the rules of professional conduct." WYOMING RULES FOR RESOLUTION OF FEE DISPUTES Rule 2(b)(ii). As interpreted, this seems to envisage only a narrow exception: Arbitration is excluded only in rare cases where the face of the complaint reveals a clear and "truly outrageous" professional violation, such as a claimed contingency fee in a divorce action in violation of MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d); in such cases the dispute is referred directly to a grievance committee. (Personal communication, Cary Alburn, Chairman of Committee on Resolution of Fee Disputes). To the same effect are the New Jersey Rules, providing that where "a grievance involves aspects of both a fee dispute and a charge of unethical conduct," the case is sent first to fee arbitration; if, however, "it clearly appears . . . that there is presented an ethical question of a serious or emergent nature," the fee dispute is to be held "in abeyance" and the file is transmitted to the appropriate ethics committee. N.J.R. GEN. APPLIC. Rule 1:20A-4. This exception is intended as an "escape hatch" from an otherwise rigid policy of primary referral to fee arbitration, and is meant to be triggered primarily by those unusual cases that would justify an immediate suspension from

however, the initial screening would provide enough information to indicate whether the complaint should be forwarded to disciplinary counsel, who could retain it "in the system" for evaluation as a grievance after the arbitration is completed. Any such inquiry into professional misconduct at a later time could of course consider any number of alleged ethical violations, including the question whether the attorney has engaged in the sort of aggravated billing abuse—"overreaching," recurrent or "unconscionable" overcharging—for which disciplinary sanctions have traditionally been reserved.[143] In addition, where evidence of this or any other violation of the lawyer codes surfaces in the course of the arbitration process, it should — at least in theory — trigger an obligation on the part of lawyer-arbitrators to report such wrongdoing to disciplinary authorities.[144] While too great a reliance on reporting by attorneys of their peers' misconduct would undoubtedly be misplaced,[145] a state that chose in the first instance to divert all fee complaints to arbitration might also formalize the duty to report related misconduct, by embedding it in some institutional routine.[146]

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practice under state rules. *Cf.* N.J.R. GEN. APPLIC. Rule 1:19A-7, Rule 1:20-5 (in "an emergent situation the Supreme Court . . . may order a temporary suspension" from practice); Personal communication, David Johnson, Director, N.J. Office of Attorney Ethics, Jan. 4, 1993. Further exceptions might be envisaged—where, for example, it appears that there are other disciplinary complaints currently pending against the same attorney. In other cases, however, holding any disciplinary action in abeyance for the short period it should take to complete the arbitration proceeding seems unlikely to have serious ill effects. *Cf.* Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violation in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 992-95.

143. *See supra* notes 26-29 and accompanying text. A good candidate for such two-tier processing is Attorney Grievance Comm. v. Kerpelman, 438 A.2d 501 (Md. 1981). In this case, the attorney originally agreed to represent the client in a contested divorce and custody dispute for a fee of $70 per hour, although the client was under the impression that the retainer of $2000 he had paid "would probably just about cover the total costs." In the midst of the trial, the attorney obtained the client's signature on another fee agreement, stressing that "results will be important" and that the time spent "may be only a minor factor." After a three-day trial, the client was not required to pay any alimony and was awarded custody of his children. The attorney, having spent no more than 39 hours on the case, demanded a fee of $25,000 that the client refused to pay. A lawsuit followed in which the lawyer claimed his fee and the client counterclaimed, alleging fraud. In a later disciplinary proceeding, the court referred to the attorney's behavior as "gouging of the lowest and most under-handed order," *id.* at 510, and imposed a suspension from practice of one year. *Id.*

144. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1992) (duty to report a violation "that raises a substantial question as to [another] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"). The earlier Model Code swept more broadly to require that attorneys report "knowledge of a violation of a [Disciplinary Rule]," *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1983), but such an absolute requirement "proved to be unenforceable." MODEL RULES OF PROFESSIONAL CONDUCT Rule 83.3, cmt. (1991). *See* Wolfram, *supra* note 10, at 683-86.

Under the rules of the New Jersey program, where a case is sent to fee arbitration even though a charge has been made of unethical conduct, the arbitrators are instructed that "after hearing and determination of the fee" they are to "refer any matter that [they conclude] may involve unethical conduct (including overreaching) to the appropriate district ethics committee." N.J.R. GEN. APPLIC. Rule 1:20A-4. Such referral after arbitration takes place an estimated ten to fifteen times per year. *See supra* note 41 and accompanying text.

145. *See* Wolfram, *supra* note 10, at 683. ("Probably no other professional requirement is as widely ignored by lawyers subject to it" as the duty to report.); Wilkins, *supra* note 44, at 822-23.

146. At least in cases where the complaint appears on its face to allege a disciplinary viola-

This sequencing of processes — the dovetailing of fee arbitration for the resolution of attorney-client disputes with the bar's disciplinary mechanism — reserves a vital function for arbitration. In many cases, when allegations of attorney misconduct (perhaps inserted for rhetorical effect, or for leverage in the grievance process) are peeled away, all that will remain is a colorable claim that in light of the quality of the services rendered, the fee charged was an excessive one. In such a case, an adjustment of the fee ordered by the arbitrators is likely to defuse the client's sense of grievance and to appropriately resolve the dispute with some finality. Where more serious misconduct is present, the matter should not end there. But the more closely intertwined the questions whether the attorney has committed an ethical violation and whether his claimed fee is in fact justified, the more likely it is that an initial arbitration proceeding will generate useful information for the disciplinary process. The arbitration proceeding itself would lead to an award as to fees that between attorney and client would be binding and enforceable, finally determining their contractual rights subject to whatever limited degree of judicial review is thought necessary.[147] In any later inquiry, the issue of attorney misconduct would for purposes of disciplinary sanctions be addressed de novo. The hearing panel, however, would presumably benefit from an expert "first look" at the problem in the form of the arbitrators' conclusions and findings with respect to such matters as the factual background of the dispute, the understanding of the parties, and local billing practices. We are already quite familiar in other contexts with the notion that courts may engage in an extensive re-examination of arbitral decisions — recognizing that arbitration between parties to a contract may have third-party effects of general public importance — while at the same time taking

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tion, the arbitration panel might be charged by disciplinary counsel or by a central screening office to include along with its award a recommendation as to whether the complaint should ultimately be prosecuted as a grievance, as well as a summary of any evidence justifying prosecution. *Cf.* ALASKA STATE BAR RULES Rule 40(q)(4) (Decision of arbitrators in fee dispute "will include . . . a specific finding as to whether the matter should be referred to Bar Counsel for appropriate disciplinary proceedings."). *Id.* There is naturally some risk that this use of arbitration as a "first look" at ethical violations might lead to the arbitration process itself becoming further "legalized," adversarial and protracted, and to increased difficulty in recruiting volunteer arbitrators; it is difficult to say, however, whether these effects would be seen in a sufficiently large number of cases to have a substantial impact.

It should be clear that however desirable it might otherwise be to maintain the privacy and confidentiality of the arbitration process, confidentiality would have to yield to this duty of the lawyer-arbitrator to report misconduct. *See* NANCY ROGERS & RICHARD SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 100-03 ("Limits on Confidentiality: Duties to Disclose"); TEX. CIV. PRAC. & REM. CODE § 154.073(d) (Vernon Supp. 1993) ("confidentiality of communications in dispute resolution procedures [made subject to] other legal requirements for disclosure"); *see also* UTAH CODE ANN. § 78-31b-7(4)(a) (1992) (exception to confidentiality in "ADR procedure" where ADR provider is subject to the child abuse reporting requirements of state law); *cf.* ABA COMMITTEE AND PROFESSIONAL RESPONSIBILITY INFORMAL ETHICS 1393 (1977) (declining to resolve apparent conflict between duty to report and provision for confidentiality in by-laws of voluntary bar arbitration program); WOLFRAM, *supra* note 10, at 685 (While the attorney-client privilege must be respected despite the duty to report misconduct, "reporting the violations of nonfirm lawyers that are observed other than when representing a client will rarely involve client information and thus will rarely be excepted from the reporting requirement.").

147. *See infra* notes 203-04 and accompanying text.

advantage of arbitral expertise and the exercise of arbitral judgment.[148]

Once we recognize that it is desirable to create some mechanism for the efficient handling of client complaints concerning fees that does not depend upon the law-enforcement model of the disciplinary system, the existence of separate, sequenced processes for the resolution of fee disputes and of formal grievances seems inevitable.[149] However, where a client is not only challenging an attorney's fee but also contemplating a suit in which he would seek affirmative recovery on the basis of the attorney's malpractice, much is to be said for the resolution of all such claims in a single proceeding. On occasion, a malpractice claim may in fact turn on nothing more than alleged abuses in billing;[150] in *all* cases the question of the quality of an attorney's performance is inevitably just the other side of the same coin from the question of the appropriate fee to which the attorney is entitled.[151] A defense to a

148. A collective bargaining agreement between a union and an employer typically extends protection against the discharge of employees without "just cause." It also provides that challenges to the propriety of any discharge are to be finally resolved by arbitrators, who are likely to make use of their knowledge of the "practices, understandings and accommodations of unions and management over the years," Roger I. Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 U.C. DAVIS L. REV. 551, 572 (1981). However, where a union has unsuccessfully asserted a grievance on behalf of a particular employee, the adverse arbitral award will not bar the employee from claiming in later litigation that his discharge was in violation of federal civil rights legislation. *See, e.g.*, McDonald v. City of West Branch, 466 U.S. 284 (1984) (deprivation of civil rights under color of law in violation of 42 U.S.C. § 1983); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (racial discrimination, Title VII of the Civil Rights Act of 1964). The principal remaining rationale for this result, given an increasing tendency to presume arbitral competence even as to statutory matters, appears to be the possible disparity of interests between union and employee that may cause the union to "present the employee's grievance less vigorously, or to make different strategic choices, than would the employee." *Cf.* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1656-57, n.5 (1991) (distinguishing *McDonald* and *Alexander*). The arbitration award may nevertheless be introduced into evidence in the later litigation and, "especially . . . where the issue is solely one of fact," and depending on such factors as "the degree of procedural fairness in the arbitral forum" and "the special competence of particular arbitrators," the court may accord the award "great weight." *McDonald*, 966 U.S. at 292 n.13. *See Alexander*, 415 U.S. at 60 n.21; Becton v. Detroit Terminal of Consolidated Freightways, 687 F.2d 140 (6th Cir. 1982) (" 'just cause' or similar contract questions are an integral part of many discrimination claims" and "both involve the same operative facts"; while a court in a later judicial proceeding is not "conclusively bound" by an arbitral award even as to the "just cause" issue, it may treat the arbitration decision as "persuasive evidence"). *See also* Sheets v. Sheets, 22 A.D.2d 176 (N.Y. App. Div. 1964) (child custody and visitation; after arbitration, the court "would examine into the matter, *de novo*, and in doing so could utilize the proof adduced before the arbitration tribunal, could call for new proof, or could employ a combination of both"); Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984) (child support; "courts should conduct a *de novo* review unless it is clear on the face of the award that the award could not adversely affect the substantial best interests of the child"). *Id.* at 1263.

Still another analogy might be to the "screening panels" that are imposed by many jurisdictions as a preliminary step in any medical malpractice litigation. Physicians commonly serve on, and sometimes dominate, these panels; while the panel decisions are not binding, they are in many states admissible into evidence in a later trial of the malpractice claim. *See* LA. REV. STAT. ANN. § 40:1299.47(H) (West 1992) (report of the "expert opinion" of the panel is "admissible," but is not "conclusive"). A recent comprehensive guide is Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181 (1990).

149. *See supra* notes 14-31 and accompanying text.

150. *See supra* note 33 and accompanying text.

151. *See* Mallen & Smith, *supra* note 39, § 11.24 ("Legal Malpractice as a Defense to Com-

claimed fee in which the client asserts that legal services were substandard—that the attorney lacked adequate skills and knowledge, or exercised inadequate care and diligence—can easily become an independent action or counterclaim in malpractice, one based on precisely the same allegations. Attorneys therefore often express the concern that arbitration of fee disputes might subject them to the possibility of the "inefficient maintenance of separate proceedings in different forums";[152] the same client problem might then give rise to duplicate procedures and potentially inconsistent results.[153]

The rules of some fee arbitration programs attempt to address such concerns by providing that at least where the client has already filed suit against the attorney seeking damages for malpractice, the arbitrators are to have no jurisdiction.[154] Such provisions would not, obviously, bar the client from

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pensation"); Cherney v. Moody, 413 So.2d 866 (Fla. Dist. Ct. App. 1982) (client's counterclaim against attorney "sounding in malpractice" was barred as an independent cause of action by statute of limitations, but could still be maintained "in recoupment"); Riley v. Montgomery, 463 N.E.2d 1246 (1984); *see also* CAL. FEE ARB. RULES Rule 36.6, (governing fee arbitration proceedings and providing that the arbitration panel "may receive evidence relating to claims of malpractice and professional misconduct, but only to the extent that those claims bear upon the fees to which the attorney is entitled").

The point of course is that in most cases, an attorney's negligence will naturally "reduce the value of the services, and consequently the amount of compensation to be awarded." Mallen & Smith, *supra* note 39, at 699. A separate, but related, point is that where an attorney is found to have committed a serious violation of the rules of professional conduct, a court may apply a rule of "forfeiture," denying him the recovery of any fees whatever and not taking account of the actual value of any services rendered. *See infra* note 40 and accompanying text; *see also Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1493-96 (1981) (denial of compensation "is a penalty against the attorney that goes beyond any actual harm the client suffered").

152. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217-18 (1985) (Even though "arbitrable" claims and claims assumed to be "nonarbitrable" arose out of the same facts and were indeed "inextricably intertwined," separate proceedings and "piecemeal litigation" were necessary given the mandate of the Federal Arbitration Act that voluntary arbitration agreements be "rigorously enforced."). *Id.* at 218.

153. This appears to be one of the major objections by attorneys to mandatory fee arbitration programs. *See infra* note 254 and accompanying text.

154. *See* CAL. FEE ARB. RULES Rules 8.2 ("client's right to request or maintain arbitration is waived if . . . the client commences an action or files any pleading . . . seeking affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct"); ALASKA STATE BAR RULES Rule 39(d)(2). The "or maintain" language obviously requires that the arbitration be terminated on the attorney's motion if a malpractice action is brought *at any time* during the pendency of the arbitration proceedings. In other places, the same state rules seem to sweep more broadly and to suggest that this limit on the arbitrator's jurisdiction extends even beyond those cases where the client has actually filed a lawsuit. *See* CAL. FEE ARB. RULES Rules 5.2 (disputes are not subject to arbitration "where the client seeks affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct"); ALASKA STATE BAR RULES Rules 34(c)(2); *see also* GA. BAR RULES Rule 6-202 (fee arbitration committee may decline or terminate jurisdiction if the client, "in addition to disputing the fee, claims any other form of relief against the lawyer arising out of the same set of circumstances, including any claim of malpractice or professional misconduct"). In the unlikely event that this difference in language was intended to have substantive significance, it would merely suggest the advisability of caution on the part of clients in phrasing requests for arbitration, taking care when doing so not to invoke other potential claims.

It goes without saying that where fee arbitration is mandatory for the attorney, any separate lawsuit brought by the attorney to collect his fee will be stayed at the client's request pending arbitration. *E.g.*, WYO. RULES FOR RESOLUTION OF FEE DISPUTES Rules 6(c); CAL. FEE ARB. RULES Rules 9.0; ALASKA STATE BAR RULES Rules 39(b). Any lawsuit brought by the

asserting a malpractice claim after the arbitration is concluded.[155] At the same time, it would clearly be unrealistic to treat a client's decision to seek fee relief in arbitration as somehow amounting to a "waiver" or "abandonment" of the right to bring a malpractice action[156] — and abusive to subject even an informed client, acting in full understanding of the consequences, to an irrevocable choice between the advantages of fee arbitration and the ability to press a malpractice claim. Unless the scope of any arbitration is broadened with the consent of both client and attorney to embrace claims of malpractice as well as claims relating strictly to a fee,[157] relief from duplicative proceedings is likely to be found only in the limited application of doctrines like collateral estoppel. A prior lawsuit over an attorney's fee would indeed be likely to act as a bar to a later malpractice action;[158] however,

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client in which the client seeks a judicial resolution of the fee dispute will have to be stayed as well, *see, e.g.*, ME. BAR RULES Rule 9(e)(5)(D), or it will be treated as an election by the client not to seek arbitration. *See, e.g.*, CAL. FEE ARB. RULES Rules 8.2; ALASKA STATE BAR RULES Rules 39(d)(2).

155. Only where the statute of limitations for malpractice actions is unusually short would there be any substantial likelihood that a malpractice claim, brought by a client after the termination of arbitration proceedings, would be time-barred. *See* Mallen & Smith, *supra* note 39, at §§ 18.2-18.8 (malpractice statutes of limitations commonly range from one year to six years, although even longer periods might be available if the cause of action can be characterized as one for fraud or for breach of a written contract).

156. Even though attorney-respondents might like to believe that it would be so treated, and even though such wishful thinking is occasionally encouraged. *See supra* note 114 and accompanying text.

157. In 1989, the Attorney-Client Arbitration Board of the District of Columbia Bar extended its jurisdiction beyond the voluntary arbitration of fee disputes to include voluntary arbitration of legal malpractice claims. Attorneys have consented to arbitration in "approximately one-third" of the malpractice cases filed with the program; during 1991-92, five malpractice cases went to hearing and award, and — perhaps as a result of a process of self-selection — all of the awards were in favor of the attorney. D.C. Bar, Attorney-Client Arbitration Board, 1991-92 Annual Report, pp. 4, 7. *Cf.* 1 MALLEN & SMITH, *supra* note 39, at 208 (in the absence of a pre-dispute clause in the attorney-client contract, widespread use of ADR to handle malpractice claims by former clients is uncertain since the "relationship between the attorney and former client is likely to be strained and cooperation, at least in the initial states of the dispute, is unlikely").

158. This result may be rationalized in terms of the malpractice claim having been a compulsory counterclaim in the earlier action. *See* Law Offices of Jerris Leonard, P.C. v. Mideast Systems, Ltd., 111 F.R.D. 359, 361 (D.D.C. 1986) (the "party raising the malpractice claim is in effect asserting a defense of failure to perform to the lawyer's claim for breach of contract"); *see also* CLS Assoc., Ltd. v. A.B., 762 S.W.2d 221 (Tex. App.—Dallas 1988, no writ). Or it may be justified on the ground that the issue of the quality of the attorney's services had necessarily been litigated and decided in the earlier fee suit. *See* Chisholm-Ryder Co. v. Sommer & Sommer, 434 N.Y.S.2d 70, 73 (1980) (prior action "necessarily determined" that compensation was due to attorney; client "could have raised" the issue of malpractice as a defense and it "was required to do so or be precluded on it"); *cf.* Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381 (Tex. 1985) (trial court had granted separate trials for attorney's fee suit and for malpractice counterclaim; jury verdict in favor of attorney in former suit could therefore not preclude later malpractice action). *See also* Felger v. Nichols, 370 A.2d 141 (Md. Ct. Spec. App. 1977) (attorney's motion for summary judgment in malpractice action granted). The court in *Felger* noted that in a suit for attorney's fees, "the court must consider, among other things, the skill requisite properly to conduct the case;" therefore, "assuming that both actions involve the same legal service, the matter of the adequacy of the client's legal representation would be raised in both, either directly or by way of defense, and would be litigated and determined in both." *Id.* at 143. The client in that case, however, had actually testified in the earlier fee suit that the attorney had given him "bad advice" and had failed to "faithfully and fully discharge the business entrusted to him." *Id.* at 144; *compare* Rowland v. Harrison, 577

application of doctrines like res judicata and collateral estoppel to prior *arbitration* awards is considerably more problematical.[159]

2. *Monitoring the Process*

As we have seen, the concern is sometimes expressed that where there is an increased diversion to arbitration of what appear to be "fee disputes," important interests underlying the formal disciplinary system may come to be neglected. Connections thus need to be established between this system of private dispute resolution and the "public" system of law enforcement.[160] At the same time, it is possible for the process or the results of fee arbitration itself to be directly called into question: Are the awards of private arbitrators likely to protect, in an adequate fashion, the interests of clients against the charging of excessive fees? Are private arbitrators likely to be as zealous as the courts in using fee disputes as a vehicle to police the conduct of attorneys guilty of professional misconduct?[161]

The expression of such concerns usually begins with the familiar observation that arbitration is not supposed to be a "law-" or "rule-applying" process; when one adds the equally familiar point that courts do not generally scrutinize arbitration awards for compliance with "the law," it is clear that close congruence between awards of arbitrators in fee cases and results that would be reached by courts on similar facts can hardly be taken for granted.[162] It would be a mistake, however, to leap uncritically from such

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A.2d 51, 55 (Md. Ct. App. 1990) (veterinary malpractice; since the question of negligence "was not litigated and determined" in earlier debt action brought by doctor, later malpractice action was not barred).

159. In the absence of an express grant of jurisdiction by the parties, the arbitrators would have had no authority to grant any relief to the client on a malpractice claim. *Cf.* Shell, *supra* note 86, at 643. And it may not in any event be clear from the award just what issues the arbitrators had actually addressed or decided. *See generally supra* note 86. While arbitrators who award the entire amount of a claimed fee have presumably rejected any arguments the client may have made based on the attorney's alleged substandard performance, a reduction or denial of a fee could be motivated or justified in any number of different ways. In addition, the abbreviated and informal nature of arbitration proceedings, and the lack of evidentiary safeguards and discovery available in judicial proceedings, might also suggest a lessened collateral estoppel effect. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS, § 84 cmt. c (where arbitration procedure is "very informal," findings should not have preclusive effect in "another action where the issue would otherwise be subjected to much more intensive consideration"); Shell, *supra* note 86 at 653-54, 659-60 (arbitration, "with its compromise awards, loose evidentiary practices, and secret decisionmaking, places less of a priority than litigation on discovering and reporting historical fact"). And such concerns might be heightened where — in contrast to the labor and commercial arbitration models — arbitration does not take the form of a consensual process under a contractual agreement but rather appears as economic regulation, made mandatory on one party and designed to be particularly accessible to the other without the need for professional assistance in development of the case.

Even where a fee arbitration is not to have collateral estoppel effect, however, the award and any findings the arbitrators may have made could still be admissible and useful in a later proceeding. *See* note 53; HALT, *Fee Arbitration: Model Rules and Commentary* (1989), Rule 13(b) (award "may be considered by, but is not binding on, the decision-maker in other legal proceedings between the parties").

160. *See supra* notes 135-59.

161. *See supra* note 40 and accompanying text.

162. Indeed, the frequently "alegal" character of arbitration is often put forward as one of the potential advantages of the process relative to litigation, as it may permit greater "effi-

truisms to the assumption that arbitration awards can be expected to diverge substantially from results in litigated cases in such a way as to jeopardize important client interests. It would be a mistake, for example, to assert — particularly in the absence of any functional analysis whatever — that arbitrators in fee disputes are "likely" (or at any rate "not unlikely") to resolve disputes over fees in a way that would lead to a "forfeiture of a client's fiduciary and ethical protections" against attorney misconduct.[163] And in any event, as we have seen, the alternatives of litigation and disciplinary procedures, while theoretically available to clients, may not in fact adequately

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ciency" in terms of time and cost and greater "flexibility" in fashioning results to the equity of the case. See *supra* notes 83-87 and accompanying text; *see also* MURRAY, RAU & SHERMAN, *supra* note 35, at 390-91, 401-03, 480-98.

163. *See* Brickman, *supra* note 133, at 298 ("likely"), 299 ("not unlikely"), 301 ("potentially may"); *cf. id.* at 297 ("accentuate the likelihood").

Some sort of functional analysis to test, or at least to justify, such an assertion seems especially called for in light of an inflexible jurisprudence insisting on the institutional competence of private arbitrators to handle disputes that turn on violations of regulatory statutes. *See supra* note 79 and accompanying text. No evidence seems to exist that suggests any dramatic difference in the patterns of decisions of courts and arbitrators with respect to such disputes. The General Accounting Office recently conducted a study of the use of arbitration in disputes between individual investors and securities brokers; it found itself unable to compare the results of arbitration with the results of litigation because of a lack of cases and the inherent differences between the two processes. The few cases that could be identified in five federal district courts "were usually settled out of court or dismissed." G.A.O., Securities Arbitration: How Investors Fare 26, 48 (1992). Nevertheless, what data there was revealed no great disparities. *Cf. id.* at 35-39, 45 (in cases brought by investors, investors won in 59% of cases in industry-sponsored arbitration forums and in 60% of AAA cases; investors receiving an award got 61% of their claims in industry forums and 57% in AAA cases; punitive damages were rarely awarded) with *id.* at 49 (decision favored investor in only 9 of 23 court cases, although in 6 cases investors received 100% of compensatory damages claimed; no punitive damages awarded).

The proposition that arbitration of attorney-client disputes is likely to entail a loss of protection to clients seems even more paradoxical in light of the fact that as a practical matter, it is self-regulation by the organized bar that has traditionally given content to most ethical restrictions on attorney conduct. See *generally* WOLFRAM, *supra* note 10, at 33-38, 82-85. It may be true that in the fee arbitration programs set up under the auspices of state and local bar associations, arbitrators (unlike members of a grievance committee?) are "not generally regarded as having code enforcement obligations or powers." Brickman, *supra* note 133, at 281. But to attach great importance to that fact is to claim substantive significance for what may merely be a matter of form. Arbitration may indeed be problematical when used in certain types of adhesion contracts to shield non-compliance with rules of public law or to insulate from judicial scrutiny one-sided contractual arrangements imposed by a party with superior bargaining power. *See, e.g.*, Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981) (arbitration clause in standard musician's contract is "unconscionable and unenforceable" because it "designates an arbitrator who, by reason of its status and identity, is presumptively biased"); Brickman, *supra* note 133, at 296-97 (although "pay or play" clause in standard musician's contract may be unenforceable penalty, there "is no reported arbitration decision [sic] in which 'pay or play' clauses in employment contracts have been voided as contrary to contract law"); *cf.* Heinrich Kronstein, *Arbitration is Power*, 38 N.Y.U. L. REV. 661, 662 (1963) (development of arbitration organized and administered by private groups may lead to "the removal of duly constituted legislative and judicial control over large areas of conduct"). But this seems a particularly inapt analogy to use in criticism of mandatory fee arbitration programs in which arbitration is not in fact required of clients, not part of an adhesion contract, but instead mandated for attorneys as one further aspect of the pervasive regulation of the profession by courts and the organized bar. *See also* DISCIPLINARY ENFORCEMENT REPORT, *supra* note 1, at 19 (respective roles of bar associations and state supreme court in lawyer discipline and in fee arbitration).

address the client interest in compensation;[164] in such circumstances, using "the likely judicial outcome"[165] as a baseline from which to judge arbitration is to structure an entire argument around what is in most cases a hypothetical construct. (The worst kind of Comparative Law, as Jerome Cohen has said, is that which favorably contrasts "our" theory with "their" practice.) One might well suggest, then, that holding out the possibility of some sort of settlement and some sort of redress through arbitration would serve at least as a valuable addition to a client's arsenal of remedies.

In addition, it would be a mistake to assume that arbitration in fee cases must take on all the familiar characteristics of traditional commercial arbitration. The process can be structured in such a way as to increase the likelihood that it will be sensitive both to the client's interests and to questions of professional misconduct. To ensure the acceptability and fairness of awards in fee cases, however, a number of issues need to be addressed.

a. The Arbitrators

In all existing fee arbitration programs, attorneys are the principal decisionmakers. Where a panel of three arbitrators is used rather than a single arbitrator (typically this will occur in cases where larger sums are in dispute), it is common for laymen to sit on the panel along with attorneys.[166] However, in such cases it is almost always provided that non-attorneys are to make up only a minority of the panel.[167]

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164. *See supra* notes 14-44 and accompanying text.

165. Brickman, *supra* note 133, at 298.

166. The HALT survey indicated that of 31 states (including the District of Columbia) with statewide fee arbitration programs, 19 used lay arbitrators; a later National Law Journal survey lists 21 states that used lay arbitrators. *See generally* HALT SURVEY, *supra* note 38; Cox, *supra* note 59. Even these figures seem to understate the current trend towards use of non-attorneys on arbitration panels: For example, while the HALT survey indicates that Massachusetts does not use lay arbitrators, the Massachusetts rules currently provide for non-attorneys on arbitration panels, *see* RULES OF THE LEGAL FEE ARBITRATION BOARD OF THE MASS. BAR ASSOC., Rule V(A)(3) (1991); while the National Law Journal survey indicates that Oregon does not use lay arbitrators, the Oregon rules now also provide for non-attorney arbitrators. *See* RULES OF THE OREGON STATE BAR ON ARBITRATION OF FEE DISPUTES, Rule 2.0(1992).

In smaller cases where single arbitrators are used, it is almost always the case that an attorney will serve as the single arbitrator. *See, e.g.*, State Bar of Calif., RULES OF PROCEDURE FOR THE HEARING OF FEE ARBITRATIONS, Rule 21.1 (single attorney arbitrator for disputes involving less than $7500). Even this, however, is by no means a universal rule. *See* State Bar of Montana, RULES ON VOLUNTARY ARBITRATION OF FEE DISPUTES, Rule 5.4 (single arbitrator may be either a layperson or a lawyer). The threshold at which a case will be heard by a panel of three arbitrators varies considerably, but is usually well under five figures. Extremes are exemplified by Louisiana (one arbitrator in attorney-client disputes under $10,000, La. State Bar Assoc. Lawyer Dispute Resolution Program, Rule 15) and Wyoming (one arbitrator if amount in dispute is $1000 or less, WY. RULES FOR RESOLUTION OF FEE DISPUTES Rule 4(d)(i)); more common is Alaska's $2000. ALASKA STATE BAR RULES Rule 37(c); *cf.* N.J.R. GEN. APPLIC. RULE 1:20A-3(b)(1) (hearing may be held before single arbitrator where the "amount *of the total fee charged* is less than $3000" (emphasis added)).

167. *E.g.*, State Bar of Calif., RULES OF PROCEDURE FOR THE HEARING OF FEE ARBITRATIONS, Rule 21.1 (three arbitrators for dispute involving $7500 or more, "one of whom shall be a public (non-lawyer) member").

There are occasional exceptions. In some local programs a larger panel of seven arbitrators may be named with the understanding that not all panel members will be able to attend the

It is almost obligatory in any discussion of arbitration to call attention to what Judge Posner has called the necessary "tradeoff between impartiality and expertise" on the part of the arbitrators themselves.[168] If one of the principal attractions of the process lies in the advantages of knowledgeable and expert decisionmakers,[169] it is obvious that attorney-arbitrators are particularly likely to be familiar with the demands of legal practice and with the applicable norms imposed by both contract law and professional disciplinary rules. This is especially true where an effort is made to use attorney-arbitrators who are experienced in the area of practice giving rise to the dispute. The presence of such arbitrators may obviate the need to resort to "expert witnesses" hired to educate judges or juries about such matters. There is, however, a familiar corollary: The more experienced the arbitrator, the more familiar he is with the subject matter of the dispute, the more likely it is that he will be an "insider" sharing with one of the disputants the predispositions and preconceptions of the trade that often accompany technical expertise. Particularly where arbitration operates as a form of professional or economic regulation, this may become a serious concern. The presence of at least one non-attorney arbitrator in a fee dispute may be seen as an attempt to address this problem of neutrality; similar considerations are often thought to require the use of non-professionals on arbitration panels dealing with doctor-patient disputes over alleged malpractice,[170] or with securities disputes between brokers and investors.[171]

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hearing, and that only a quorum of three is necessary; it may turn out that a majority of those actually present will be non-attorneys. *See also supra* note 166 (State Bar of Montana, single arbitrator may be either a layperson or a lawyer).

168. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983).

169. *See supra* note 89 and accompanying text.

170. Some states have imposed preliminary hurdles on malpractice litigation by requiring that claims be submitted to a sort of non-binding arbitration, in the form of what are called "screening" or "medical review" panels. *See* Macchiaroli, *supra* note 148, at 186. Arbitration clauses are also sometimes found in "voluntary" agreements drafted by hospitals or doctors, and entered into with patients before any services are rendered and of course before any dispute has arisen; these clauses contemplate a true arbitration leading to a binding award. In the case of both processes it is not uncommon for legislation to mandate the composition of the arbitration panel, including the presence on the panel of attorneys or members of the "general public." *See generally* MURRAY, RAU & SHERMAN, *supra* note 35, at 429-32, 465-66; Macchiaroli, *supra* note 148 at 188-90.

171. Binding arbitration, conducted under the auspices of one of the securities exchanges, is regularly provided for in the contracts that brokers require of investors as a condition to opening an account. *See* G.A.O., Securities Arbitration: How Investors Fare, *supra* note 163, at 28-30 (All large firms and most smaller firms required arbitration clauses for individual investors opening margin and options accounts, although only a minority of firms required arbitration clauses for cash accounts; most of the firms that required arbitration clauses "never or almost never waived or negotiated the clauses.").

Where arbitration is required of the client at the instigation of the broker — and in the context of an adhesion contract in which the genuineness of consent is doubtful — a different balance may be called for with respect to the use of non-professional arbitrators, if the process is at all to maintain its legitimacy. The arbitration rules of the various exchanges, developed with the approval of the SEC, in fact require that a *majority* of every arbitration panel be "public arbitrators," not "from the securities industry"; in recent years the definition of "public" arbitrators has been clarified and tightened to exclude not only those associated with brokers and dealers, but also attorneys or accountants who have devoted 20% of their work to securities industry clients, and individuals who are retired from or who had spent "a substan-

However, the primary impetus for the use of lay arbitrators in fee cases may come simply from seeing the presence of non-attorneys as part of an exercise in public relations.[172] It may be difficult in any event to win public acceptability and legitimacy for a process dominated by the professional colleagues of the attorney whose fees are being called into question;[173] the use of "public" arbitrators may be intended to give the process an aura of impartiality that may encourage client usage. There appears in fact to be no evidence at all suggesting any different pattern in the decisions of non-attorney and attorney arbitrators. Anecdotal reports from the personnel of arbitration programs are usually to the effect that no such differences exist, and even discounting for the source, this should hardly be surprising. In most programs at the present time, non-attorney arbitrators are likely to be on the panel simply because their names have been informally suggested by bar committee members from among their friends in the community. Lay members, in short, are likely to be just the sort of people who "network" with attorneys and deal with them professionally and socially.[174] On the other hand, while the attitude and motivation of attorneys who serve on the bar's regulatory committees are likely to be quite complex, one can assume that at least in larger communities a certain antipathy on the part of the establishment bar to apparent "corner-cutters" or marginal practitioners will frequently play no small role in their decisions.[175]

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tial part of [their] business career" in the securities industry. *See, e.g.*, N.Y. STOCK EXCHANGE, ARBITRATION RULES, Rule 607(a) (panel of three arbitrators where amount in controversy exceeds $10,000); *see also id.* Rule 601(f) (disputes involving smaller amounts shall be heard by a "single public arbitrator knowledgeable in the securities industry selected by the Director of Arbitration"). *See generally* G.A.O., *supra* note 163, at 55-57. The HALT Model Rules for attorney-client fee arbitration also find the need for an apparently "impartial and hospitable forum" to weigh more heavily than the value of expertise, and consequently require the pool of arbitrators to contain a majority of non-lawyers. HALT, *supra* note 159, Rule 22(b).

172. There is of course a parallel here to the increasing use of non-lawyers on hearing panels in disciplinary cases. *See* ABA, STANDARDS FOR LAW DISCIPLINARY AND DISABILITY PROCEEDINGS § 3.4 (1979) ("Participation by nonlawyers increases the credibility of the discipline and disability process in the eyes of the public."); A.B.A. DISCIPLINARY ENFORCEMENT REPORT, *supra* note 1, at 45-46 ("The presence of nonlawyers serves to assure the public that the disciplinary process is not a 'whitewash.' ").

173. *See* Martha Brannigan, *Critics Argue that Legal-Fee Arbitrators Tend to Side With Their Fellow Lawyers*, WALL ST. J., Oct. 16, 1990 at B1 ("The major complaint we hear from consumers is about the makeup of arbitration panels," says the chairman of a Los Angeles legal-reform group.).

174. The HALT survey indicated that virtually all programs that use lay-arbitrators recruit them on the basis of "lawyer recommendation" or "bar recommendation." HALT SURVEY, *supra* note 38. Imputations of "cronyism" might easily be dampened if "lay" mediators were selected in other ways—for example, by resort to AAA panels, consumer groups, or the roster of volunteer mediators at local dispute resolution centers.

175. That in practice disciplinary sanctions often seem to be reserved for the less prestigious segments of the bar, particularly solo practitioners and others not in corporate practice, has often been noted. *See, e.g.*, Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 6-8 (1991); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, STAN. L. REV. 589, 641 n.168 (1985) (survey of disbarments, suspensions, and public censures in three major jurisdictions in 1982 indicated that none of the attorneys sanctioned came from a firm of more than seven attorneys). It is true that this pattern of sanctions seems overdetermined, and one need hardly rely solely on the class bias of the elite bar as an explanation. One can also point to the fact that corporate clients have no great incentive to resort to the discipli-

Existing arbitration programs are generally sponsored and administered by state or local bar associations. In some cases, they are run by fee arbitration committees appointed directly by the supreme court of the state as part of a mandatory arbitration program.[176] In any event, the suggestion of the Clark Committee that fee arbitration programs be entrusted to organizations like the American Arbitration Association which have "no connection with the organized bar" — in order to avoid giving clients the impression that "a group of attorneys is protecting one of its own"[177] — has been uniformly ignored. There is perhaps another analogy here with securities arbitrations involving brokers and investors; regulators have also regularly urged that clients of securities brokers be permitted to choose the AAA in preference to industry-sponsored forums like the stock exchanges.[178] There is, however, undoubtedly greater reason to insist that alternative forums be available in such circumstances, where arbitration is made mandatory for the client at the firm's instigation as part of a contract of adhesion.[179]

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nary system, there being alternative strategies at their disposal for controlling their attorneys. *See* Wilkins, *supra* note 44, at 828-29 and n.116.

176. *See, e.g.*, N.J. R. GEN. APPLIC. Rule 1:20A-1; OFF. ATT'Y ETHICS SUP. C. OF N.J., REP., *supra* note 83, at 110-12.

177. *See supra* notes 44-45 and accompanying text. 95 A.B.A. ANN. REP. 985 (1970).

178. The SEC has urged the securities industry to allow investors to choose between industry-sponsored arbitration forums and independent forums like the AAA in order to "enhance investor confidence in the fairness of securities dispute resolution proceedings." *See* G.A.O., *supra* note 163, at 15-16, 31-33. In response, five of the larger firms set up an experimental "pilot project" in 1991 under which they would agree to AAA arbitration on a "case by case" basis even though their standard pre-dispute arbitration clauses did not provide for AAA arbitration. Some of the firms agreed to use the AAA only under certain conditions, among them that the arbitrators used would be selected from the pool of arbitrators at industry forums. *See generally* MORRIS ET AL., SECURITIES ARBITRATION AT SELF-REGULATORY ORGANIZATIONS: NEW YORK STOCK EXCHANGE AND NATIONAL ASSOCIATION OF SECURITIES DEALERS ADMINISTRATION AND PROCEDURES, Exh. 1, 2 (PLI 1992).

Attempts by states to *impose* such a requirement on brokerage firms have been less successful. *See* Securities Ind. Ass'n v. Lewis, 751 F. Supp. 205, 206 (S.D.Fla. 1990) (Florida statute requiring brokers to allow customers the option of arbitration before the AAA "or other independent nonindustry arbitration forum" invalid under Federal Arbitration Act); *cf.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109 (2d Cir. 1990) (closing the "Amex window" for AAA arbitration); Perry E. Wallace, *Securities Arbitration After McMahon, Rodriguez, and the New Rules: Can Investors' Rights Really Be Protected?*, 43 VAND. L. REV. 1199, 1235-39 (1990).

179. *See supra* note 171. An additional consideration is that arbitrators in securities cases are compensated for their service. In industry forums, arbitrators receive an "honorarium" of $150 for a single "session" (defined as 4 hours of hearings or less); at the AAA, arbitrators traditionally are not compensated for the first day of hearings, but receive substantial per diem fees thereafter. *See* G.A.O., *supra* note 163, at 57; *see also id.* at 46 ("Over 60 percent of the cases at [industry forums] and AAA took two or fewer sessions."). There may thus be some cause for concern that arbitrators who expect to decide a large number of securities cases may, in disputes between customers and repeat players like brokers, see their decision patterns affected by the desire to obtain future assignments. *See id.* at 63-64 (at Chicago Board Options Exchange, one arbitrator "decided 47 percent of the cases . . . reviewed," and he decided 71% of these in favor of the broker-dealer). The AAA is not likely to use the same arbitrators as often as do industry forums. *Id.*; *see also* David E. Robbins, *Securities Arbitration from the Arbitrators' Perspective*, 23 REV. SEC. & COMMODITIES REG. 171, 175 (1990) ("One too often sees the same faces week after week at certain arbitration forums. With all due respect, arbitration should not be a supplement to social security. . . . [W]hen they sit on cases day after day, arbitrators build up an immunity to outrageous conduct.").

In contrast to securities cases, however, fee arbitrations between lawyers and clients will

Whether the public relations benefits from AAA administration of fee arbitration would be substantial is certainly open to question — under any auspices a majority of the arbitrators would, after all, presumably continue to be attorneys. It is questionable also whether any such putative benefits would be worth the candle, even where contracting with an established outside organization like the AAA would turn out to be less costly than direct administration. Where arbitration is made independent of the organized bar, the links between various elements of the regulatory system — between fee dispute processing and the disciplinary process — would presumably become attenuated.[180] In any event a study of arbitration of securities disputes has found that results for investors do not in fact vary appreciably between AAA arbitrations and arbitrations conducted in industry forums.[181]

There might perhaps be greater prospects for manipulating client perceptions of the fairness of the arbitration process by expanding client participation in the selection of the arbitrators themselves. One would not be surprised, after all, to find that procedures that involve the parties more directly in the choice of arbitrators are more likely to "enhance disputants' perceptions of impartiality and, in turn, their procedural justice judgments."[182] In some arbitration programs the parties are apparently given no role at all in the choice of their arbitrators.[183] However, their sense of participation in the process could be fostered by any number of alternatives, from the fairly simple (allowing each party a limited number of peremptory challenges)[184] to the somewhat more complex (permitting each party to

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generally be done by attorney-arbitrators on a pro bono basis as part of their service to the bar. *See, e.g.*, OFF. ATT'Y ETHICS SUP. C. N.J., *Information About the Supreme Court of New Jersey's Attorney Fee Arbitration System* (1991) ("All fee committee members are directly appointed by the Supreme Court of New Jersey and serve without compensation."); KY. R. SUP. CT. Rule 3.810(5)(C) ("Members of the Panel shall not be paid or compensated for their services."); LA. ST. BAR ASS'N, LAWYER DISPUTE RESOLUTION PROGRAM Rule 48 ("In lawyer-client disputes, arbitrators shall serve *pro bono*.").

180. *See supra* notes 198-204 and accompanying text.

181. G.A.O., *supra* note 163, at 38-39 (after controlling for all other factors, analysis showed no differences caused by the particular forum [i.e., industry forum or AAA] with respect to whether investors received an award or what proportion of their claim was awarded).

182. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 126 (1988).

183. *See, e.g.*, WY. RULES FOR RESOLUTION OF FEE DISPUTES, Rule 4(d) ("When a fee resolution petition is filed, the Chairman shall designate members for a hearing panel for that dispute with selection considerations to include geographical factors"); D.C. Bar, Attorney-Client Arbitration Board, Rules of Procedure for Fee Arbitration Service, R. 14, 15 ("hearing panels to consist of members 'randomly selected' from the roster of arbitrators").

184. *E.g.*, RULES OF THE OREGON STATE BAR ON ARBITRATION OF FEE DISPUTES, Rule 5.2 ("each party may challenge without cause and thereby disqualify . . . not more than two members of the panel"); *cf.* STATE BAR OF MONTANA, RULES ON VOLUNTARY ARBITRATION OF FEE DISPUTES, Rule 5.1, 5.3 (each prospective arbitrator is assigned a number; the disputants each eliminate one lawyer and one layman from the list, with the final panel consisting of those having the lowest assigned numbers); GA. R. BAR Rule 6-303 (petitioner strikes one name from list of potential attorney-arbitrators and one name from list of potential lay arbitrators; respondent is then given the remaining names and also strikes one name from each list; the remaining names constitute the panel).

strike arbitrators from a list submitted to them, and then asking them to rank all the remaining acceptable names in order of preference).[185]

b. The Arbitration Proceeding: Awards and Review

There seems to be little of any value that can be learned about the fee arbitration process by looking at the actual results of arbitrations in existing programs: Many bar programs, indeed, choose not to disseminate or even to compile information concerning the frequency or the extent of client victories in arbitration.[186] The available figures hardly demonstrate the existence of any systematic bias in favor of either clients or attorneys.[187] One quite common criticism of arbitration focuses, not on the risks of favoritism towards one party or the other, but on the supposed tendency of arbitrators to

185. This is of course the usual method of arbitrator selection used in AAA arbitrations; the arbitrators that are ultimately selected are those with the most favorable overall ranking. *See* MURRAY, ET AL., *supra* note 35, at 542; *see also* LA. STATE BAR ASS'N, LAWYER DISPUTE RESOLUTION PROGRAM, Rule 12; HALT, *supra* note 159, Rule 22(c) (same, but each party "may not cross off more than one half of the arbitrators listed").

It goes without saying that the sort of party participation in the choice of arbitrators that is exemplified by these rules requires that adequate background information be supplied to the parties to enable them to exercise a meaningful choice. It might then be required that the names of the prospective arbitrators given the parties be accompanied by a "short biography" of each. HALT, *supra* note 159, Rule 22(b); *see also* MURRAY, RAU & SHERMAN, *supra* note 35, at 542; Morris, *supra* note 178, Exh. 15, 16 (sample of arbitrator profile provided to parties in securities arbitrations).

The time-honored system of selection in "tripartite" arbitration — in which each disputant names one arbitrator, with the third, "neutral" arbitrator being named by the two party-appointed arbitrators — of course gives the disputants the maximum control over the choice of the decisionmaker. This method may, however, prove to be too cumbersome and confusing for the average client in small-stakes fee disputes.

186. *See* Cox, *supra* note 59 (some bar officials decided "it would be safer not to keep score"; the Washington State Bar deliberately does not keep such data since keeping track of who prevailed in arbitration might have a "chilling effect" on use of the program).

187. *See, e.g.*, DISTRICT OF COLUMBIA BAR, ATTORNEY-CLIENT ARBITRATION BOARD, 1991-92 ANN. REP. at 7 (Of 30 fee dispute hearings held during the year, 14 resulted in awards "in favor" of the client and 16 resulted in awards "in favor" of the attorney.); L.A. COUNTY BAR ASS'N, DISPUTE RESOLUTION SERVICES, INC., ARBITRATION COMMITTEE ANN. REP. (1990-91) (of 312 cases heard during the year, 69% resulted in awards ordering that the fee be reduced or refunded); OFFICE OF ATTORNEY ETHICS, SUP. CT. OF N.J., REPORT, STATE OF THE ATTORNEY DISCIPLINARY SYSTEM 132-34 (1990) (of 911 cases resolved through arbitration during 1990, fees were "upheld in full without any reduction" in 39.8% of the cases; in the remaining 60.2% of the cases the legal fees billed were reduced, by a total of 25.1% of the dollar amounts in dispute). In the Oregon State Bar arbitration program, 77 fee disputes went to a hearing in 1990; the client prevailed completely in 20% of these cases and the attorney's fee was reduced in another 27% of the cases (personal communication, Liz Denecke, Administrator, State Bar of Oregon Fee Arbitration Program). Only 17 fee disputes were arbitrated between 1989 and 1991 under the Montana State Bar program; the client apparently prevailed completely in three of these cases and the attorney's fee was reduced in another 6. Letter from Geraldine Little, Executive Assistant, State Bar of Montana (Oct. 9, 1992) (on file with author). In California, while local bar associations handle most fee arbitrations under their own rules, the State Bar has a statewide arbitration program that operates in the absence of a local program. Of the 139 cases closed by the State Bar between January 1 and August 31, 1992, the client was awarded a refund in 19% of the cases; in 60% the attorney was awarded a fee either in full or in a reduced amount—in this category the fees claimed by attorneys were reduced by a total of about 23%—and in 20% of the cases "no money was awarded to either party." Letter from Linda L. Harrington, Director, Mandatory Fee Arbitration (Sept. 15, 1992) (on file with author).

engage in compromise—"splitting the baby" rather than straining for a principled decision "on the merits."[188] However, the results from existing programs are necessarily inconclusive on this point: It would, for example, be a meaningless exercise to look at the amounts or the percentages by which nominally disputed fees are reduced in arbitration; officials of bar arbitration programs often note that clients will for tactical purposes typically place the attorney's entire fee in "controversy," even though some of the fee was clearly earned and only a portion could plausibly be claimed to be "excessive."[189] It can at least be pointed out that the functional elements usually thought to create incentives for compromise awards in labor and commercial arbitration—primarily the arbitrators' desire for repeat business, and the consequent desire to promote their acceptability—are likely to be absent in bar-sponsored fee arbitrations.[190]

If arbitration is to become at all a meaningful alternative for clients who are in the midst of fee disputes with attorneys, the process must be made accessible and comprehensible to them. Some resources must presumably be devoted to structuring the process with this most important goal in mind. For example, clients who will be without their own attorney at the hearing may need to be given adequate information in advance to enable them to invoke the process and to use it effectively. It might be useful, to begin with, if attorneys were required to give clients notice of the existence of the fee arbitration mechanism and to tell them how to go about initiating a proceeding.[191] Unrepresented clients may also need to be given some sense of what

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188. *See generally* MURRAY, RAU & SHERMAN, *supra* note 35, at 427-29.

In securities arbitrations investors who received an award in industry-sponsored forums got an average of 61% of the amount they were claiming; in AAA arbitrations they received an average of 57%. However, in industry-sponsored forums successful investors were awarded the total amount they were claiming, or more, 30% of the time. G.A.O., *supra* note 163, at 35-39.

189. Such an impressionistic judgment is not entirely without empirical support. It is suggestive that in 1991-92 the average amount requested in *client*-initiated arbitrations under the D.C. Bar's program was $17,181, while the average amount awarded was only $2,240; in *attorney*-initiated cases, by contrast, there was little difference between the average demand and the average award ($4,387 as opposed to $4,063). However, only 5 attorney-initiated arbitrations were heard during the year (the attorney prevailed in three). DISTRICT OF COLUMBIA BAR, *supra* note 187, at 7-8.

190. *See* MURRAY, RAU & SHERMAN, *supra* note 35, at 427-29; Shell, *supra* note 86, at 634 (arbitrators "often have an incentive to make disputants equally happy or unhappy because they are paid by the parties rather than by the state"; "arbitrators who want to encourage repeat business will seek a reputation for moderation rather than extremism in their decision-making."). *Cf. id.* at 634 n.51 (warning that the "empirical work on arbitrator decision processes to date has been limited to data derived from labor arbitrators"). *See also supra* note 102; *cf. supra* note 179.

191. *Cf.* TEX. GOV. CODE ANN. § 81.079(b) (West 1993). This recent statute requires attorneys to give notice to clients of "the existence of a grievance process," either by (1) making available brochures prepared by the state bar, (2) displaying a sign in the attorney's office, or through information contained (3) in the client contract or (4) in the attorney's bill.

Of course, information conveyed at the beginning of the relationship, as envisaged by the first three alternatives, might be inadequate where the client has not yet focused his attention on the problem and the dispute has not yet crystallized. A better psychological moment for requiring information about arbitration might be shortly after the attorney is "notified by the client of a fee dispute." *See* HALT, *supra* note 159, Rule 11(a). This alternative does, however, put the onus on the client to take the initiative of challenging a fee before being given any

the process will be like and what they should expect to happen; written materials or program staff may be called on to provide information with respect to such matters as how to prepare and to put on a case, what documents the arbitrators are likely to want to see and how to obtain them,[192] and how to go about challenging an unfavorable award.[193] And at the hearing itself some considerable care may have to be expended to insure that the client's story is adequately told and that the facts are adequately developed.[194] Ensuring that the arbitration process becomes more user-friendly

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information about the availability of arbitration, and it also obviously creates some definitional complexity. *See* HALT, *supra* note 159, Rule 11(b) (defining "notified . . . of a fee dispute" to mean a communication "that indicates the client disagrees with or is dissatisfied with" the fee).

Some of the states with mandatory programs require an attorney to give notice to the client of the right to arbitration before the attorney may file suit to collect a fee. This then permits the client to move to stay the collection suit in favor of arbitration. *See, e.g.*, N.J. R. GEN. APPLIC. RULE 1:20A-6; ALASKA STATE BAR RULES RULE 39(a). Obviously this type of notice cannot deal with the converse situation where it is the client rather than the attorney who is the claimant.

192. *See, e.g.*, FLA. BAR, CONSUMER GUIDE TO THE LEGAL FEE ARBITRATION PROGRAM (1991) ("What Information Should I Furnish to the Circuit Arbitration Committee?"); MASS. BAR ASS'N, A GUIDE TO THE LEGAL FEE ARBITRATION BOARD.

The rules of many state programs explicitly grant arbitrators the power to subpoena evidence or the appearance of witnesses at the request of either party. *See, e.g.*, ALASKA STATE BAR RULES Rule 37(i)(3); N.J. R. GEN. APPLIC. Rule 1:20A-3(b)(2); STATE BAR OF CALIF., RULES OF PROCEDURE FOR THE HEARING OF FEE ARBITRATIONS, Rule 28.0. In other cases the arbitrators may have such powers under the general arbitration statute in the jurisdiction. *See, e.g.*, MAINE BAR RULES Rule 9(g)(3). The need to exercise the subpoena power on behalf of the client, helping him to obtain necessary evidence in the attorney's possession, is somewhat mitigated where the burden of proof on the issue of the reasonableness of the disputed fee is placed on the attorney rather than on the client. *See, e.g.*, N.J. R. GEN. APPLIC. Rule 1:20A-3(b)(1) ("burden of proof shall be on the attorney to prove the reasonableness of the fee in accordance with [the Rules of Professional Conduct] by a preponderance of the evidence").

193. *See* Marino v. Tagaris, 480 N.E.2d 286 (Mass. 1985). Arbitrators here had decided a fee dispute in favor of the attorney. The award was confirmed on the attorney's motion but the court reversed, even though the statutory period for moving to vacate an unfavorable arbitration had expired. *Id.* at 286. The client claimed that she had not realized she had the right to move to vacate the award, and "she did not challenge the award only because she was unaware that it was possible to do so." *Id.* at 290. The court noted that neither the rules of the arbitration program nor the "guide" sent to clients by the bar association "explicitly refers" to the client's right to move to vacate awards, and it found as a result that the client had not been "sufficiently apprise[d]" of her right to challenge the award. *Id.* The informational deficiencies noted by the court seem to have been remedied since *Marino* was decided. *See* MASS. BAR ASS'N, A GUIDE TO THE LEGAL FEE ARBITRATION BOARD (n.d.) ("What if I disagree with the arbitrator's decision?"; brochure stresses time limits and grounds for overturning awards, and the need "in most cases" to retain an attorney before filing a formal motion to vacate).

To the same effect as *Marino*, see Pickens v. Weaver, 219 Cal. Rptr. 91, 94 (Cal. App. 1985) (both the form sent the client by the local bar association and the arbitration award "failed to provide any guidance necessary to a lay person concerning the proper court for filing a petition" for review of the award or the time limitations within which to do so).

194. In refusing to confirm the arbitration award, the court in *Marino* also found that the client, a housewife who had led "a relatively sheltered life," may never have been given an adequate explanation of "what she [could] expect to confront at the hearing." *Marino*, 480 N.E.2d at 287. The court particularly emphasized that in conversations with the program staff prior to the hearing, "it was stressed to her that she did not need an attorney to represent her, since the hearing was 'informal.' " *Id.* at 290. As a result, the court suggested (although without so holding) that her understanding of arbitration might even have been so faulty as to prevent a "meeting of the minds" necessary for a valid arbitration agreement. *Id.*

Nowhere, however, did the court explain whether or why it had in fact been necessary for the client to hire an attorney for the arbitration, even if the amount in dispute had been large

in ways like these is likely to make some call upon the resources of program administrators, although other alternatives might be canvassed.[195] If no effort at all is made in this direction, however, the vaunted "informality" of the arbitration process might become nothing more than a snare for clients who are unfamiliar even with "the factors relevant in mounting a successful challenge to the claimed fee,"[196] but who are faced nevertheless with decision-makers inclined to decide cases in accordance with "official" legal principles.[197]

Legitimacy of the fee arbitration process might also be enhanced where arbitrators are expected to give some explanation of their awards in written opinions. One major goal here is to justify the result to the parties, assuring them that the arbitrator has given some thought to the decision, that he has heard and considered their various contentions, and that the result is an arguable one supported by reason or policy or experience rather than a matter of mere fiat. Requiring a written opinion might also tend to ensure that possible issues of professional misconduct or ethical violations have been addressed for purposes of later disciplinary action.[198] All this would of course mean going well beyond the one-sentence dispositions that are typical in commercial arbitration[199] and that indeed seem to be mandated by the rules of some fee arbitration programs.[200] The writing of fully-reasoned opinions might well be too much to expect from the volunteer arbitrators who will staff most arbitration programs,[201] but at least some indication in summary

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enough to justify the expense of doing so—or why the advice of the program staff to represent herself had in fact been misleading. The primary defect in the award rather appears to lie elsewhere, in the failure of the proceeding to permit a fair presentation of the client's case. Apparently the client, relying on representations that the proceeding would be "informal," came to the hearing and spoke for two minutes. The attorney then himself made a "lengthy presentation," but the client was not permitted by the arbitrators to respond because they were "running behind schedule." *Id.* at 288; *cf.* MASS. BAR ASS'N, A GUIDE TO THE LEGAL FEE ARBITRATION BOARD (n.d.) ("You will have a chance to respond to statements made by the other person, and you will also have an opportunity at the end of the hearing to summarize your position.").

195. *See* D.C. BAR, ATTORNEY-CLIENT ARBITRATION BOARD, RULES OF PROCEDURE FOR FEE ARBITRATION SERVICE, Rule 42 (suggesting that in order to assist clients in presenting claims in arbitration, the Board might obtain "the services either of members of the Bar or of law students who are working under the supervision of a faculty member as part of a regular law school program").

196. *Marino*, 480 N.E.2d at 289-90.

197. Richard Lempert has referred to adjudication that is conducted in an informal style, but where "the decision is almost always fully determined by legal criteria," as an example of "hidden legalism."). Richard Lempert, *The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board*, 23 LAW & SOC'Y REV. 347, 390-92 (1989).

198. *See supra* note 145.

199. *See* MURRAY, RAU & SHERMAN, *supra* note 35, at 401, 495-97.

200. *See, e.g.*, WY. STATE BAR, RULES FOR RESOLUTION OF FEE DISPUTES, Rule 12(b) ("The award shall state only the amount of the award, if any, and the terms of payment if applicable."); D.C. BAR, ATTORNEY-CLIENT ARBITRATION BOARD, RULES OF PROCEDURE FOR FEE ARBITRATION SERVICE, Rule 37 ("No opinion shall be issued with the award."); *cf.* MAINE BAR RULES Rules 9(h)(2) (award "need not be in any particular form, but shall contain, as a minimum, a statement of the amount or nature of the award, if any, and the terms of payment, if applicable").

201. The SEC has recently decided not to require that awards in securities arbitrations include written opinions, on the ground that such a requirement could "slow down the arbitra-

fashion of the principal considerations that motivated the award might be a reasonable substitute.[202]

Where arbitrators write opinions to explain and justify their decisions, judicial scrutiny of an award is made that much easier;[203] court challenges by dissatisfied parties now supplied with grounds for vacating an award become that much more likely. Indeed, one rationale for a requirement of a reasoned opinion in arbitration seems precisely to be that it will make possible a broader scope of judicial review of the award.[204]

It is, however, by no means clear that fee arbitration awards should be subject to any more extensive form of judicial review than are other types of awards. It has been suggested that closer scrutiny of fee arbitration awards might be justified by a court's "inherent power to regulate the practices of members of the bar," and that such review is an exercise of the court's role in maintaining public confidence in the conduct of attorneys and the fairness of the judicial system.[205] It is also sometimes suggested that a more elaborate review of awards is required in cases where arbitration has been made mandatory, and that where arbitration is imposed on the parties the judicial deference usually accorded awards in consensual arbitration may be totally

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tion process and discourage many persons from participating as arbitrators." David A. Lipton, *Generating Precedent in Securities Industry Arbitration*, 19 SEC. REG. L.J. 26, 42 n.51 (1991); *cf.* Brickman, *supra* note 133, at 293, 307 (Arbitrators in fee disputes should be required to "demonstrate" that they have applied "relevant ethical and fiduciary doctrines" by setting out in their decisions "the specific applications of fiduciary law and ethical rules that were made in the matter before them.").

202. *See, e.g.*, N.J. R. GEN. APPLIC. Rule 1:20A-3(b)(4) (award "shall have annexed a brief statement of reasons therefor"); STATE BAR OF CALIF., RULES OF PROCEDURE FOR THE HEARING OF FEE ARBITRATIONS, Rule 36.2 ("arbitrators are encouraged, where appropriate, to file findings of fact with their awards"); ALASKA STATE BAR RULES Rule 40(q) (award "will include" findings "on all issues and questions submitted which are necessary to resolve the dispute" and "a specific finding as to whether the matter should be referred to Bar Counsel for appropriate disciplinary proceedings").

The Massachusetts arbitration rules require the award to state "the factors which may have influenced the panel's decision." MASS. BAR ASS'N, RULES OF THE LEGAL FEE ARBITRATION BOARD, Rule VI(D)(2). This requirement has been institutionalized through a form arbitration award, the reverse side of which recites that "[t]he Arbitrator(s) considered each of the following eleven factors"; there follows a list that essentially reproduces the laundry list of Rule 1.5(a) of the MODEL RULES OF PROFESSIONAL CONDUCT. *See supra* note 8. The form then asks the arbitrator to indicate whether each item on the list has been a "principal factor" in the decision, an "other significant factor," or "not applicable to this case." MASS. BAR ASS'N, RULES OF THE LEGAL FEE ARBITRATION BOARD, Rule VI(D)(2). The result is a stylized memorandum of such a high level of generality and abstraction from the facts of the particular dispute that the parties are hardly likely to obtain any great insight from it into the arbitrator's decision-making process.

203. One California judge has advised commercial arbitrators that in the event "they feel compelled by some uncontrollable urge, literary fluency, good conscience, or mere garrulousness to express themselves about a case they have tried, the opinion should be a separate document and not part of the award itself." Herbert L. Sherman, *Analysis of Pennsylvania Arbitration Act of 1980*, 43 U. PITT. L. REV. 363, 397 (1982) (quoting Loew, Inc. v. Krug, No. 609, 196 (Cal. Super. Ct., Los Angeles City, Santa Monica, Dept. A., December 2, 1953)).

204. *See, e.g.*, Brickman, *supra* note 163, at 293 ("Lacking articulation of the arbitrator's rationale, it is impossible to determine whether the arbitrator applied the wrong law. . . . Therefore, to ensure that arbitrators apply fiduciary and ethical rules, arbitrators . . . should be required to reveal the rationale for their awards.").

205. Marino v. Tagaris, 480 N.E.2d 286, 289 (Mass. 1989). *See generally supra* notes 121-25 and accompanying text.

out of place.[206] But of course, the same supervisory power over the bar that supports the imposition of mandatory arbitration in the first place[207] could also support extensive limitations on the right of attorneys to challenge awards resulting from the process imposed on them. Some mandatory arbitration programs in fact do as a practical matter cut off all review of the award.[208]

While eliminating any judicial review at all may be somewhat extreme, any review process must have as its primary focus an attempt to ensure that the *client's* consent was meaningful and that the proceeding itself was not tainted by misconduct or partiality on the part of the decision-maker.[209] Beyond that, there appear to be no reasons to assume a priori that arbitrators would not be competent or inclined to apply any relevant legal rules, whether of contract law or of professional regulation, to the resolution of a fee dispute.[210] Extending judicial scrutiny to include a "substantive review" with respect to whether these legal standards were "properly applied"[211]

206. *See* Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 386 A.2d 1290, 1294 (N.J. 1978) (compulsory arbitration for public sector labor disputes; judicial review "should extend to consideration of whether the award is supported by substantial credible evidence present in the record," the test "normally applied to the review of administrative agency decisions and . . . particularly appropriate here"); Mount St. Mary's Hosp. v. Catherwood, 260 N.E.2d 508, 576 (N.Y. 1970) (compulsory "interest" arbitration between unions and private nonprofit hospitals; process "is a substitute for a determination of the dispute by an administrative or regulatory agency," and "its objective may not be accomplished under lower constitutional standards" than would be required of such an agency); MODEL EMPLOYMENT TERMINATION ACT, *supra* note 81, § 8, cmt. (arbitration award may be vacated if arbitrator committed "prejudicial error of law"; this ground of review was added because under the statute, arbitration "has been imposed upon, not agreed to by, the parties" and because individual statutory rights are in issue).

However, a rule of stricter review where the process is mandatory is by no means universal. *See* Allison, *supra* note 81, at 70-72; *see also* CONN. GEN. STATS. § 7-473c(c)(3) (mandatory "interest" arbitration for municipal employees; award made final and binding except for grounds on which any award could be overturned under state's general arbitration law). *But cf.* Carofano v. City of Bridgeport, 495 A.2d 1011, 1018 (Conn. 1985) (scope of review under this statute is not "so essentially different in practical application from that available for reviewing determinations of administrative agencies that any constitutional deficiency is perceptible.").

207. *See supra* notes 130-34 and accompanying text.

208. Under the New Jersey program, no appeal of an arbitration award can be taken to a court; either party may appeal to the state's Disciplinary Review Board, but the grounds for such appeal are essentially limited to failure by the arbitrators "substantially to comply" with the procedural requirements of the program or "actual fraud" on the part of any member of the panel. N.J. R. GEN. APPLIC. Rule 1:20A-3(c); Office of Attorney Ethics of the Sup. Ct. of N.J., Report, *supra* note 83, at 111-12; *In re* Livolsi, 428 A.2d 1268, 1282 (N.J. 1981) ("appeals of this kind to the DRB will ordinarily not require clients to find a new lawyer or incur any of the other expenses which would have to be incurred in court").

209. These are of course the traditional, and highly restrictive, grounds for challenging awards found in most modern arbitration statutes. *See, e.g.* FEDERAL ARBITRATION ACT, 19 U.S.C. §§ 1, 10 (1988).

210. *See supra* notes 163-65, 175 and accompanying text. It must be acknowledged however that unlike most other sorts of "ethical" restrictions on the practice of law, the prohibition of "excessive" fees is particularly likely to expose the latent tension between the norms of professional regulation and the "ethic of free enterprise" to which most attorneys subscribe, *see* WOLFRAM, *supra* note 10, at 516 ("Lawyers will always be inadequate enforcers of fee limitations because their economic hearts aren't in it."); *cf. supra* notes 25-29 and accompanying text.

211. Brickman, *supra* note 133, at 306-07.

would be certain to undermine the finality of arbitration and, by promising further proceedings, would lead to substantially increased cost and delay.[212] Even if it were somehow possible to limit review of awards to appeals brought by dissatisfied clients rather than by attorneys,[213] the likely result of an extended review on the merits would be a radical transformation and formalization of the arbitration process itself. Such a trade-off seems to be of extremely doubtful utility to the client. Even in the usual case where judicial review will be possible only on the narrow "procedural" grounds provided for in general arbitration statutes,[214] considerable forbearance will have to be exercised by courts in order to ensure that their role in reviewing awards does not come to affect the efficiencies of the arbitration process.

c. Mediation Prior to Arbitration

While the rules of some state arbitration programs contemplate that the arbitrators "shall attempt to facilitate the amicable resolution of the dispute,"[215] in practice mediation between attorney and client has not played a

212. The HALT Model Rules provide that awards may be overturned only on grounds of fraud by one of the parties, partiality or misconduct on the part of the arbitrator, procedural irregularity, or newly discovered evidence; "[m]isinterpretations or misapplications of substantive law shall not be grounds" for overturning an award. HALT, Fee Arbitration: Model Rules & Commentary, *supra* note 158, Rule 37. Comments to the rules caution that "[u]nless arbitration provides a final decision for both parties, it simply adds an unnecessary layer of time and expense to the proceedings." *See also In re* Livolsi, 428 A.2d at 1281-82 (upholding mandatory fee arbitration program including the absence of any appeal from an award; "[t]he least we owe to the public is a swift, fair and inexpensive method of resolving fee disputes"; finality of awards "protects clients who can ill afford the time and expense" of defending an award on appeal).

213. *Cf.* Brickman, *supra* note 133, at 306 (construing *In re* Livolsi, 428 A.2d 1268 (N.J. 1931), as limited to cases where the petition for review was brought by the attorney rather than by the client).

214. *See supra* note 209. This is accomplished in most fee arbitration programs by incorporating into the rules of the program the standards of the state's general arbitration statute. *See, e.g.*, ME. BAR RULES Rule 9(i) (mandatory program; award "may be enforced in accordance with the Uniform Arbitration Act"); ALASKA STATE BAR RULES Rule 40(t) (mandatory program); GA. BAR RULES Rule 6-417 (voluntary program).

See also James P. Hargarten & Susan A. Ardisson, *Fine Tuning California's Mandatory Attorney Fee Arbitration Statute*, 16 U.S.F. L. REV. 411, 431-32 (1982) (limited grounds for review, but the necessity for client to defend attorney's action to vacate award can result in considerable expense and delay for him).

215. ATTORNEY-CLIENT ARBITRATION BOARD OF THE D.C. BAR, RULES OF PROCEDURE FOR FEE ARBITRATION SERVICE, Rules 9, 10, 11. The D.C. Rules only contemplate such attempts at "informal settlement" in cases where either the client or the attorney has not actually consented to the arbitration process itself. *But see* FLA. BAR RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS II.G. ("The chairperson may appoint a member of the [circuit arbitration] committee to assist the parties in seeking settlement."); S.C. Bar, Resolution of Fee Disputes Board, Rule 4 ("It shall be the duty of the Board to encourage the amicable resolution of fee disputes falling within its jurisdiction."), Rule 12 (Member of panel assigned to investigate complaint "shall encourage resolution of the complaint by compromise if he finds that compromise is consistent with these rules."); *cf.* ME. BAR RULES Rule 9(e)(2) ("After the petition [for arbitration] is filed . . . it shall be expeditiously reviewed by Bar Counsel, who may endeavor to resolve the dispute informally, and for such purposes may communicate directly with the petitioner and the attorney against whom the claim is being made."). Travis County (Texas) has a formal two-stage procedure under which, "[i]f either party requests mediation . . . mediation services will be offered to the disputants"; [i]f mediation is not requested, or if mediation does not result in an agreement, the disputants will be requested to appear for

major part in existing procedures for resolution of fee disputes. One may naturally expect, before the arbitration proceeding is formally put in motion, that a number of informal contacts, in the form of correspondence or phone conversations, will take place between either or both of the disputants and personnel of the program. These may usefully serve to clarify the nature of the dispute and to determine that the dispute is indeed one over which the arbitrators have jurisdiction; before and even during the hearing itself, it may be common to urge accommodation on the part of the attorney.[216] However, the utility of institutionalizing mediation as a preliminary stage for fee disputes, promoting or relying on the process before an arbitration award is rendered, may seriously be questioned.

At whatever stage of the dispute the parties find themselves, one might sensibly have a preference for consensual rather than imposed or adjudicated solutions to resolve it. This preference is a major theme that is sounded in a particularly rich literature on the subject.[217] Mediated settlements, it is claimed, have at least the potential to lead to outcomes that are "superior" to those resulting from adjudication—"superior" in that they are more likely to take into account the particular circumstances and needs of the parties, to be responsive to the parties' particular values and concerns, and to go beyond traditional adjudicative outcomes by displaying greater flexibility and creativity in the solutions reached and the remedies provided.[218] As a result,

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arbitration." TRAVIS COUNTY BAR ASS'N, FEE DISPUTE RESOLUTION BY-LAWS, § 1.01. The rules of the Hawaii program are similar, *see* HAWAII STATE BAR ASS'N, ATTORNEY-CLIENT RELATIONS COMM., RULES FOR THE MEDIATION/ARBITRATION OF FEE DISPUTES, Rule 4.9 (committee member assigned to the case is to contact both client and attorney to "determine whether the parties desire mediation or arbitration").

In other states, by contrast, it is specifically provided that the "arbitrators will not engage in efforts to settle the controversy." *E.g.*, LA. GUIDELINES FOR LSBA-SPONSORED LEGAL FEE DISPUTE ARBITRATION 11.

216. *See* Cox, *supra* note 59 (arbitrator with D.C. program comments that "[t]ypically, . . . [t]he attorney skids in at the last minute, and the arbitrator then takes the attorney aside and cajoles him about working something out. Which leaves the client outside of the process, seething").

217. *See, e.g.*, Baruch Bush, *supra* note 88, at 267-70 ("Mediation places the substantive outcome of the dispute within the control and determination of the parties themselves . . . [and] not only allows the parties to set their own standards for an acceptable solution, it also requires them to search for solutions that are within their own capacity to effectuate."); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 219 (1982) ("Joint gains could be realized if only the contending parties were willing to yield up enough sovereignty to allow a mediator to help them devise creative alternatives and to help them analyze their joint problem."); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 429-31 (1986); JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795-809 (1984).

218. See the catalog of various claims for the "higher quality" of settlements in Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 62-63.

The potential for greater flexibility and responsiveness in mediated settlements is easily illustrated. Such a settlement, for example, could provide the respondent with an extended period in which to discharge the debt, at the same time providing the claimant with "a security interest as a hedge against non-payment and as a means to raise the priority of the claim in the event of bankruptcy," and providing *both* parties an agreed-upon dispute resolution method to which they could resort "to iron out any future disputes without return to litigation." *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE 18

it is suggested, disputants who have been through mediation are likely to feel more "satisfaction," both with the quality of the outcome and with the experience of the process itself, than those undergoing alternative processes like adjudication.[219]

Whether this potential of mediation does in fact tend to be realized, in any substantial proportion of mediation proceedings as actually conducted, can hardly be demonstrated empirically. The case may ultimately rest on little more than anecdote, intuition, or a priori inclination.[220] But in any event, in

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(1989). Another example is suggested by the mediation of an attorney-client fee dispute observed by the author. A fee dispute can of course be "compromised" at a given dollar level either by arbitrators or by the parties themselves. However, in mediation a "compromise" can be fashioned by helping the parties to focus on particular charges that one or the other may care about very much: Charges arising out of particular phone calls, for example, that the client particularly resents ("Why should I have to pay anything at all to clarify this?") could on the basis of such strong feelings be reduced or eliminated. In other processes, by contrast, even a similar compromise in dollar terms seems more likely to come from elsewhere—either from an unexplained, unrationalized desire for a middle ground between opposing contentions, or from discrimination between claims that are stronger or weaker or more or less plausible in terms of the prevailing law. *See* Sander, *Family Mediation: Problems and Prospects*, MEDIATION Q., Dec. 1983, at 3, 6 (Mediation "involves a wide-ranging inquiry into what the interested parties want to talk about; it is not dominated by what the judge wants to hear about.").

219. *See* Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences between Mediation and Arbitration*, NEG. J., July 1990, at 249 (labor arbitration); *see also* Stephen B. Goldberg, *The Mediation of Grievances under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 283-84 (1982).

A commonly-advanced corollary to the "satisfaction" argument is that the parties are more likely to comply with settlements they have fashioned themselves rather than with imposed solutions; this may be attributed to the "guarantees of personal honor" and assumption of personal responsibility added by the fact of agreement, to the greater likelihood that consensual agreements will entail "reciprocal obligations that provide powerful incentives for performing in accordance with the agreement," or to "pressures toward cognitive consistency" leading parties to "structure later behavior in accordance with prior commitments." Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance through Consent*, 18 LAW & SOC'Y REV. 11, 40-45 (1984). *But cf.* Neil Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155 (1987) (arguing that "prehearing sense of obligation" and awareness of partial liability might better explain compliance; in general, data of McEwen & Maiman are inadequate to determine whether greater compliance in mediated cases "is a result of consensual processes arising from case characteristics or from the forum itself"). *See also* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086 n.35 (1984) (increased compliance with consent decrees as opposed to adjudicated cases "may well be due to the fact that a consent decree asks less of the defendant").

Superior outcome and participant satisfaction are not of course the only criteria by which the "quality" of dispute resolution processes may be judged. One might readily identify other possible goals of dispute processing that, it seems plausible to assume, are better advanced by mediation than by adjudication. For example, value may be attached to the capacity of mediation to encourage personal growth on the part of the participants—growth that may further their sense of competence or autonomy, or effect some personal transformation. *See, e.g.*, Robert Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 347-48 (1989) (defining "quality" partly in terms of whether processes "strengthen the capacity and increase the opportunity for disputing parties to resolve their own problems" or "encourage individual disputants to experience personal change and growth, particularly in terms of becoming less self-centered and more responsive to others"); *see also* Baruch Bush, *supra* note 88, at 270 (power of mediation to evoke "mutual recognition," in the interest of "escaping our alienated isolation and rediscovering our common humanity"); *infra* note 236 and accompanying text.

220. *See* Galanter, *supra* note 218, at 59, 65-68 ("real life does not offer nicely matched pairs of cases; there is no judicial counterpart of identical twin research"); Kenneth Kressel &

the context of disputes between attorneys and clients over legal fees, any such possible virtues seem particularly attenuated and likely to be outweighed by other considerations. The qualities that are most important to people in determining their satisfaction with a dispute-resolution process may, after all, turn out to be nothing more than these: having a chance to be heard, having some "control over the processing or handling of the case," and receiving a careful, thorough, fair, and dignified attention to one's claims.[221] Both mediated settlements and arbitration proceedings seem to some degree capable of providing these essential elements. However, for the client engaged in a dispute with an attorney over a fee, a preliminary stage of mediation—without arbitration's guarantee of a final resolution—may appear to be just one more hurdle to jump, and an invitation to further delay.

Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179, 184-85 (1985) (among the "reasons for caution about the evidence favoring mediation," there is the problem of self-selection and the "absence of controls for placebo effects"; "[p]eople often draw benefit from a novel, intriguing, and enthusiastically administered form of treatment when the treatment itself has no inherent merit"): Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 nn.8,9 (1991).

221. *See* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 61-66 (Rand 1989). By contrast, delay, litigation costs, and the parties' perceived opportunity to participate in the proceedings, all appear to play relatively insignificant roles in determining satisfaction with a dispute resolution process. "The findings do not reveal much interest on the part of litigants in very informal, high-participative, simplified procedures." *Id.* at viii-x, 55-57, 62, 75-76; *see also id.* at 21-22 (distinguishing "participation" from "control").

The force of these conclusions may be somewhat limited by the constraints of the study design. The universe in this study was limited to personal injury cases, with awards of $35,000 or less, which were resolved following one of three third-party procedures—trial, court-annexed arbitration, or judicial settlement conference. Most defendants in these cases were insured, and therefore relatively indifferent to legal costs; plaintiffs were represented on a contingent-fee basis and so their legal costs may have been hidden within a favorable outcome. *Id.* at 57, 77. In almost all cases, the individual litigants had been excluded from actual participation in the settlement conferences. *Id.* at 31-32.

But see, for very similar conclusions, LIND & TYLER, *supra* note 182. Lind & Tyler argue that "[p]rocedures are viewed as fairer when they vest process control or voice [typically in the 'mere experience of an opportunity for expression'] in those affected by a decision." *Id.* at 86, 94-127, 208, 215-17. By contrast, some recent studies indicate that the power to control *outcomes* (as occurs in mediation) does not appear to be the most powerful determinant of procedural justice as perceived by most people; where, for example, disputants were allowed to reject the decision of a third-party neutral in favor of the option of attempting to negotiate a settlement, "the capacity to veto the decision maker's verdict had no substantial effect on judgments of the fairness of the procedure, even when the judgment was quite unfavorable to the subject." *See id.*; *see also* E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. APP. SOC. PSYCH. 338 (1983) ("[t]he move to nonadversary mediation might result in a lessening of disputant acceptance of legal institutions."); Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. OF EXPERIMENTAL SOC. PSYCH. 13, 16, 26 (1978) (in cases of "extreme outcome conflict," disputants generally prefer procedures that place control over the presentation of evidence in their hands, but leave the final decision to a third party, since the sharing of decision control between the parties would result in a "lack of settlement [which] might easily be as unsatisfactory as an unfavorable solution"). *Compare* Larry Heuer & Steven Penrod, *Procedural Preference as a Function of Conflict Intensity* 51 J. PERSONALITY & SOC. PSYCH. 700, 709 (1986) (while disputants may indeed prefer arbitration in high-conflict situations, they will prefer mediation in cases where there is a greater possibility of compromise, "for its assistance with the definition of an appropriate settlement and for its assistance with concession exchange free of the appearance of weakness").

For the least hardy of claimants, discouragement and attrition would seem inevitable.[222] A balancing process may lead to the conclusion that such a preliminary stage is not in fact worth the candle in fee cases, and this seems particularly appropriate where arbitration itself to some extent may have the ability to serve some of the same functions that are claimed for mediation.

It is, of course, a truism that many fee disputes will arise out of a failure of "communication" between attorney and client over the nature and extent of lawyering called for by the client's problem.[223] Most people, as Stewart Macaulay has observed, "are not sure just what they want from a lawyer or what a lawyer has to offer."[224] Unrealistic expectations may be formed with regard to the client's objectives, and these may persist long after the initial interviews; unrealistic expectations are particularly likely with respect to the cost of achieving those objectives,[225] and attitudes of deference or dependency may tend to discourage attempts by ordinary clients to clarify the matter in advance—and are even more likely to discourage advance attempts to limit or control costs. One might well think, then, that, with respect to expectations concerning fees a process of assisted negotiation or mediation might serve to clear up any such muddles at a stage where crossed signals may have become apparent, but before they have hardened irrevocably into

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222. Where the parties have failed to settle voluntarily, it is often thought undesirable for the same neutral who had served as a mediator to go on to act as an arbitrator. It is natural to be concerned that involvement in settlement discussions might impair the arbitrator's neutrality, or appearance of neutrality, once he has to issue an award; to mediate while reserving the power to render a binding decision entails a "confusion of roles" that is often criticized and should probably be avoided. *See* MURRAY, RAU & SHERMAN, *supra* note 35, at 594-601; *see also* Goldberg, *supra* note 219, at 284. In such cases, an additional layer of mediation may appear even more cumbersome and time-consuming. *See, e.g.*, the two-stage procedure of mediation followed by arbitration provided for in Travis County, *supra* note 215.

Goldberg argues that a preliminary stage of mediation is in fact likely to reduce the overall system cost, since "the money saved in successful mediation [multiplied] by the proportion of successful mediation efforts" is likely to exceed "the money lost in unsuccessful mediation efforts multiplied by the proportion of unsuccessful mediation efforts." "Considerable empirical evidence exists that mediation resolves a sufficient proportion of grievances to achieve some savings in time and money[.]" Goldberg, *supra* note 219, at 288, 290. This certainly seems plausible in the context of grievance disputes under collective bargaining agreements, where an increasingly formalized arbitration process is itself likely to entail considerable cost; in addition, the existence of a well-understood and institutionalized grievance procedure, and external constraints on union discretion in the form of the duty of fair representation, mean that cases not resolved in mediation will be routinely carried to the next stage of arbitration. The absence of these elements in attorney-client fee disputes makes the cost calculus much less certain, and makes the likelihood of attrition through delay and cost much more likely.

It is also true that even where the rate of unsuccessful mediation is high, overall efficiencies might still result from the exchanges of information, partial resolution of issues, and sharpening of focus that the process often makes possible. *See* ROGERS & MCEWEN, *supra* note 218, at 24. Unfortunately, this theoretical possibility may go unperceived by many weary claimants.

223. *See supra* note 20 and accompanying text.

224. STEWART MACAULAY, LAWYER-CLIENT INTERACTION: WHO CARES AND HOW DO WE FIND OUT WHAT WE WANT TO KNOW? 16-17 (1984).

225. *See* William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1460-61 (1992) (clients "may expect more of the legal system than it can deliver under even the best of circumstances," and are "slow to understand the costs of achieving their objectives").

adversarial positions. The process might then make possible an ongoing representation that both attorney and client have an interest in continuing.

It does appear to be true that the post-conflict relations between disputants are more likely to survive a process of mediation than adjudication. Traditionally, therefore, disputants have most often turned to consensual settlement where they were parties to "multi-stranded social relationships,"[226] who have expectations of continued interaction in the future and who are attempting to deal with a present dispute while preserving a relationship that adjudication might jeopardize.[227] However, in most cases of attorney-client conflict, one suspects that once private discussions between the parties have failed to resolve the matter, the likelihood that any substantial incentive remains for a continued working relationship is extremely remote. A lawyer with inadequate communication skills to resolve differences about a bill directly with the client is unlikely to have any serious chance of retaining him once third parties become involved.[228] In addition, attorneys familiar with fee arbitration routinely claim that disputes between lawyers and clients are in any event more likely to arise and to prove intractable in cases that are "one-shot" transactions for the client, where in consequence

226. Sally E. Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2061 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985)).

227. This is usually attributed to the greater incentives, arising out of the relationship itself, for problem-solving behavior and integrative bargaining—and to the correlative ability of privately-crafted settlements to focus on the future, make necessary trade-offs, and take account of the complex needs of the ongoing relationship and of each party's real "interests, expectations, and emotions." It may also, however, be related to the attention paid in private processes to communication, interpersonal recognition, and learning about how to deal with future disputes, and, conversely, to the tendency of adjudication to promote escalation of conflict and "all or nothing" solutions. *See* P. H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 13-17 (1979); *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 55-64 (1991) (in the interests of "long-term reciprocity of advantage," disputes arising from trespassing animals are settled "beyond the shadow of the law"; "one might suspect that the norms of neighborliness include a norm against the invocation of formal legal rights"); Bonn, *supra* note 90, at 574-75 (in textile industry, a seller pursues arbitration "mainly against marginal firms with whom he enjoys only a marginal business relationship and with whom he entertains poor prospects of future business relationships," choosing instead to make some informal accommodations with buyers who were "customers with good future business prospects"); Merry, *supra* note 226, at 2061 ("[I]f a murder occurred between two Nuer tribesmen and their kinsmen lived nearby and expected to see one another in the future, they would mediate the dispute and pay bloodwealth in cattle. If they had few kin ties, however, and lived further apart, they would refuse to pay damages and transform their relationship into a feud."); Josephine M. Zubek et al., *Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation*, 36 J. CONFLICT RES. 546, 549, 568 (1992); *cf.* Kressel & Pruitt, *supra* note 220, at 183-84 ("the evidence in this regard appears qualified"; "more serious, ongoing disputes between parties with a continuing relationship are likely to be mediated, but they are also prone to agreement breakdowns and to further problems between the parties after the mediation hearing").

228. Indeed, Merry & Silbey's study of disputing in neighborhoods suggests that in general "by the time a conflict is serious enough to warrant an outsider's intervention," disputants simply may not want what mediation may have to offer. At the point that they are willing to turn to others for help in dealing with their problem, they are likely instead to want "vindication, protection of [their] rights . . . or a third party who will uncover the 'truth' and declare the other party wrong." Sally E. Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984). This preference, they suggest, may explain the low rate of "voluntary" usage (that is, not referred by the judicial system) of alternative processes like mediation. *Id.* at 152-54.

no ongoing attorney-client relationship was likely ever to have been contemplated by the parties in the first place.[229] The paradigm is the divorce or custody case, which in fact appears to be a fertile ground for fee disputes.[230]

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229. In the New Jersey fee arbitration program, 40.5% of the fee disputes that lead to formal arbitration proceedings arise out of Domestic Relations matters (including matrimonial, support, and custody cases). Office of Attorney Ethics of the Sup. Ct. of N.J., Rep., *supra* note 83, at 116. The state's Office of Attorney Ethics attributes this, however, to the "extremely emotional and often volatile nature of these matters." *Id.*

One can of course always imagine counter-examples which may in particular cases make mediation seem appropriate. And even where there is indeed no serious prospect of any future relationship between the disputants themselves, the attorney at least might have some interest in a consensual solution that increased the chances of favorable word-of-mouth and future referrals from the client. One also needs to take into account the effect of the dispute, and of the dispute resolution process, on similar relationships that either attorney or client might have in the future with similar parties: Will the fee dispute leave "a residue of mistrust and hostility" that may negatively affect later transactions by this client with other attorneys, or by this attorney with other clients, generating "an environment of suspicion and hostility in which both sides pay a considerable price in self-protective or aggressive efforts"? *See* Baruch Bush, *supra* note 95, at 936-37 and 968-71.

Finally, in some cases mediation techniques may have a useful role in helping not to preserve, but to bring an end to a representation, by untangling a long-standing relationship and enabling the parties to go about their lives without further exposure. *See, e.g.*, Lon C. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971) ("dramatically successful" mediation that helped parties disengage from a long-term supply contract, a process that required a period of "phasing out" and complicated financial adjustments); Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 22-23 (1982) (in domestic violence cases, examples of mediated agreements that "formally acknowledged the end of the relationship" and provided detailed rules governing outstanding matters between the couple, such as the right to visit the children of the relationship and the return of certain property); *cf.* A.B.A., DISCIPLINARY ENFORCEMENT REPORT, *supra* note 1 (mediation may be useful "where a lawyer has placed a lien on a client's file").

230. *See supra* note 229. Of our respondents whose firms did a majority of their work (i.e., accounting for half or more of their gross revenues) in family law (including divorce and custody matters), 64.7% reported having had a fee dispute over the past five years; of these, 37.3% reported having had five or more such disputes. This figure was not in fact significantly different from the results for firms doing a majority of their work in personal injury defense work (61.6% reported fee disputes) or criminal law (64%). It *was*, however, significantly higher than for firms devoting most of their practice to wills and estates (only 52% reported fee disputes), real estate (51.7%), administrative and governmental practice (53.7%), and personal injury work for plaintiffs (52.6%). (In all cases sig. = 0.00.) The relatively low figure for plaintiff-oriented personal injury firms is presumably explained at least in part by the universal practice of reducing contingent fee agreements to writing. *See* MODEL RULES PROFESSIONAL CONDUCT Rule 1.5(c) (1983). Firms that received most of their revenues from commercial practice (including corporate, banking and tax) reported a surprisingly high incidence of disputes (74.6% reported having had a fee dispute), but this seems to be largely a function of firm size. It is natural to expect that larger firms with a larger client base will be relatively more likely to experience a fee dispute. *See supra* note 7. After controlling for firm size, the higher incidence of disputes for commercial firms turned out to be not significant at all. 59.8% of our respondents specializing in family law were single practitioners, and no firm doing more than half of its work in family law had more than 10 lawyers; only 19.6% of respondents specializing in commercial law were solo practitioners. *Id.*

We also asked firms to indicate "the frequency with which fee disputes have occurred over the past five years in each" of a number of legal areas. On a scale of "1" to "5," with "1" the lowest frequency of disputing and "5" the highest, firms that engaged in some family law practice (*i.e.*, accounting for more than 1% of their gross revenues) reported a mean frequency rating of 2.54 for disputes arising out of a family law representation. This was considerably higher than for any other field of practice. For example, respondent firms engaging in some degree (more than 1%) of *commercial* practice reported a mean frequency rating of 1.90 for disputes arising out of a commercial representation (significantly different using a 95% confidence interval). In addition, of firms with some degree of family law practice, 55.3% reported

In addition, while some mediated settlements may indeed be crafted so as to take into account the particular interests and strongly-felt concerns of the parties,[231] it would seem that in these largely zero-sum disputes over money, the opportunities for true integrative solutions (as opposed to mere dollar "compromise") are not extensive—certainly far less extensive than would be the case in more complex or multi-issue disputes.[232] In many cases, too, the existence of integrative potential is in practice unlikely to be exploited by any except the most imaginative of negotiators and mediators — and those who in addition are privileged to operate in the absence of constraints imposed by time and expense.[233] (Those familiar with the quality of mass-produced mediation in local "settlement weeks" will immediately see the force of this

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that any fee disputes would "sometimes" or "almost always" arise out of a family law representation (only 19.5% reported that it "never" would). By contrast, only 22.2% of firms engaged in some commercial practice reported that any fee disputes would "sometimes" or "almost always" arise out of representation in a *commercial* matter — while *46.7% of these same firms* reported that disputes would "sometimes" or "almost always" arise out of a *family law* representation.

231. *See supra* note 217-18 and accompanying text.

232. *See* Donald G. Gifford, *A Context Based Theory of Strategy Selection in Leal Negotiation*, 46 OHIO ST. L.J. 41, 56-57 (1985) (arguing that integrative bargaining is "less useful when the parties disagree only about a single issue and the parties' interests are inherently opposed"). The *locus classicus* of the literature on integrative settlements is DEAN G. PRUITT, NEGOTIATION BEHAVIOR (1981) (integrative agreements can be achieved by "logrolling," i.e., trading off concessions on different issues of different priorities to the parties; by developing "a new option . . . that satisfies both parties' most significant needs"— e.g., "a husband and wife who both need to get to work at an early hour might have two basins installed in their bathroom"—or by cutting one party's costs or compensating one party for costs incurred). *Id.* at 137-62.

Menkel-Meadow argues that "true zero-sum games are empirically quite rare." Menkel-Meadow, *supra* note 217, at 784-88. Even where a case seems to involve nothing more than the payment of money there will be additional issues, such as timing, to which the parties attach different values and which therefore render the game less zero-sum. *Id.* at 97-103 ("converting a single-factor to a multiple-factor contract"); Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 KAN. L. REV. 69, 79, 96 (1982) (adding considerations such as timing, tax advantages, and interest rates may make "the share bargaining on the primary agenda item slightly less competitive"). It is always important to be reminded of this theoretical possibility — while at the same time bearing in mind that in the nature of many cases this potential for expanding the pie is likely to be quite marginal. *See* Neil Vidmar & Jeffrey Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U. L. REV. 89, 92-93, 93 n.19 (1991) (suggesting that enthusiasm for mediation may cause proponents to "downplay the large number of instances where a binary decision is probably appropriate," including cases where a "single issue overrides other considerations").

233. *See* Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 253 (1981) (study of mediation in small claims courts; "[c]ontrary to the expectation that flexible and creative settlements would occur, few mediation agreements . . . involved any conditions besides payment"; with few exceptions nonmonetary issues "were converted into dollars and cents for purposes of the agreement"); *cf.* SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1990) (possible risks of mandated participation; in "mediation programs particularly, narrowly focused procedures and briefer, more formulaic sessions seem likely to resolve a narrower range of issues and thus not meet the broader needs of the parties"); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 602 (1987) (study of 25 informally-settled divorce cases; "[t]here is settlement—but not agreement—when contentious parties sign unsatisfactory stipulations out of impatience, frustration, or emotional distress").

observation.) And it should not be forgotten that one occasionally sees arbitrators too who, far more often than judges in traditional litigation, are able to fashion creative and innovative remedies—remedies, for example, that may be particularly efficient in exploiting the ability of one party to provide compensation at a lesser cost than would be entailed by a mere monetary transfer.[234] Consider, for example, the arbitrator in a Montana fee dispute who awarded an attorney the amount of $356.25, "to be paid with no more than 12 hairstylings."[235]

Finally, it might well be conceded that the mediation process can often be quite effective in creating a certain "atmosphere of mutual recognition and empathy"[236] among the disputants. A process where the parties are encouraged to speak directly to each other, and to discuss their feelings about each other, the argument goes, is likely to contribute to an understanding of and a sympathy with the other's position. Closure and "a kind of psychological healing" may result;[237] at the same time, such a process of "interparty translation"[238] may lead the parties to redefine their goals, forming a different image of just what it is that they want to take away from a resolution of the dispute.[239] Here, too, however, it may not be fanciful to suggest that

234. *See, e.g.*, Menkel-Meadow, *supra* note 217, at 787-88 ("If, in a personal injury case, the plaintiff wants money to buy a new car, the defendant might be able to provide such a car directly to the plaintiff at a lower cost than the market price of a new car which defendant would have to pay in settlement."). One striking example of such a remedy fashioned in arbitration is David Co. v. Jim W. Miller Constr., Inc., 444 N.W.2d 836 (Minn. 1989). In this case a contractor had agreed to build several luxury townhouses for a developer, but extensive construction defects were discovered after completion. The unsold units became unmarketable, and in addition the owners of the sold units made claims against the developer for rescission. Although the developer had initially sought only monetary damages, the arbitrators devised what the reviewing court termed an "innovative" and "novel" remedy: Their award ordered the builder—who was himself a real estate developer—to purchase the townhouses and the land on which they were built from the plaintiff. *Id.* at 840.

235. Abstract of Fee Arbitration Decisions, State Bar of Montana, File No. 137, decided September 19, 1988. If the client was in fact a hairstylist, this is surely an efficient settlement, reducing the cost of settlement "with the same net gain to plaintiff at a lower cost to the defendant." *Cf.* Menkel-Meadow, *supra* note 217, at 788 n.125. Of course, such a conclusion assumes that the value of the services to the attorney was not diminished by the risk of something less than enthusiastic and dedicated compliance on the part of a client who had earlier found reason to complain about the lawyer's fee.

236. Baruch Bush, *supra* note 95, at 982; *see also id.* at 963, 993, 1030 n.289; Baruch Bush, *supra* note 88, at 269-70; Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss*, 4 OHIO ST. J. DISP. RESOL. 129, 135 (1989). *See also* note 219 and accompanying text.

237. LEONARD RISKIN & JAMES WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 232 (1987).

238. Baruch Bush, *supra* note 95, at 963, 993.

239. *See* Dean E. Peachey, *What People Want from Mediation*, in MEDIATION RESEARCH 300, 312-18 (1989) (victims of crime who are able to attribute offending behavior to external or temporary causes will be less likely to seek retribution in preference to "other forms of justice" like restitution or forgiveness; they will be *more* likely to favor retribution "when they cannot understand why the event happened, or if they cannot understand why the perpetrator acted as he or she did").

As with the potential for integrative settlements (*see supra* note 233 and accompanying text), it seems likely that this capability of mediation will often go unrealized in practice—particularly where the mediator adopts a style that leans heavily toward the coordination of bargaining and the orchestration of mutual concessions, at the expense of a more "therapeutic" approach in which the parties "are encouraged to engage in a full expression of their feelings

some of the same effects might to some extent be achieved in an informal arbitration proceeding. An arbitration hearing, after all, is likely to be structured so that there are few if any restraints on what each side is permitted to say, with each encouraged to voice whatever concerns he may have without the ritualization imposed by rules of evidence and procedure[240] — in general, it is designed to keep the disputants within "the world of ordinary discourse."[241] In such a setting there may be abundant opportunity for the open expression of emotions, the venting and dissipation of anger, and the insights gained through face-to-face explanations;[242] such possibilities are only enhanced where, in the interest of accommodating the unrepresented client, the already relaxed format of arbitration is made even more accessible and comprehensible. Of course, arbitrators can hardly be expected to work consciously at the human relations goal of mutual understanding.[243] How-

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and attitudes." *See* Susan S. Sibey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986). It is my impression that attorney-mediators in court-ordered or officially-sponsored mediation programs are particularly likely to adopt the former style, often in one of its more directive or heavy-handed variants. *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66-75 (1991) (court-ordered mediation, conducted by attorneys, in Florida; study notes extensive use of caucuses and, once settlement offers are on the table, "a mad dash for the middle").

240. Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 354-55 (1976) (contrasting alternatives of adjudication and arbitration in New York City Small Claims Court; in the latter, parties "are permitted, if not encouraged, to tell their stories in their own way"). As to the relative "informality" of procedure in arbitration, *see generally supra* notes 82-94 and accompanying text; MURRAY, RAU & SHERMAN, *supra* note 35, at 555-65; ALASKA STATE BAR RULES Rules 40(n) ("Any relevant evidence will be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule to the contrary."); *see also* Dallas Bar Association, *Twenty Questions and Answers About Fee Disputes* no. 13 ("[The hearing] is usually conducted at about 5:00 p.m. on a weekday evening in the office of one of the attorneys on the panel . . . It is a serious business meeting, of course, but it is not as formal as a court hearing. You may tell your story any way you wish. . . . Although it is certainly not necessary, you may have a friend, relative, or some other attorney with you to help you make your statement, or just to lend moral support.").

241. Lempert, *supra* note 197, at 353-54 (one of the "keys to informal justice" is a procedure in which the participants "are allowed to and tend to follow the rules of ordinary conversation and storytelling").

242. *Cf.* McEwen & Maiman, *supra* note 227, at 256. The authors' comparative study of mediation and adjudication in a Maine small claims court found that while half the litigants studied had reported getting angry or upset during their trial or mediation, "40.3% of the angry litigants in mediation reported feeling much *less* upset at the end of the session compared to 26.1% of litigants in adjudication". In addition, 30% of disputants in mediation reported that the process "increased their understanding of the other party's side of the dispute," compared to a rate of only 14% in adjudication. *Id.* The authors concluded that the "informality and far greater tolerance for emotional outbursts in mediation creates a greater potential for reducing anger," as well as a greater likelihood that a litigant "would come to comprehend the other party's point of view." *Id.*

243. *See* Baruch Bush, *supra* note 95, at 992-94, who distinguishes between the "informality" of arbitration procedure—which reduces hostility by reducing opportunities for "direct party confrontation" in the form of evidentiary and procedural contentions—and procedure in mediation, which instead is aimed directly at facilitating mutual recognition and sympathy. This distinction must of course be a matter of degree. Baruch Bush recognizes that the effect of "interparty translation" may indeed be achieved to some extent "merely by contact between the parties in an aggression-neutralized atmosphere," but argues that it is more likely to be achieved, and to a greater degree, "by process elements consciously adapted to this end—such as the adoption of a translating and reconciliatory function by the neutral third party." *Id.* at

ever, the informality and openness of arbitration procedure should at the very least serve an educational function: It should help to educate the client as to the norms and demands of legal practice ("cooling off" the client might be a more pointed way of expressing the same idea), and at the same time help to educate the attorney with respect to possible danger signs and areas of exposure in client relations. And it must be at least an open question whether for the parties, the promise of a final resolution of the fee dispute may not outweigh any shortcomings of arbitration relative to alternative processes in promoting such understanding.

What is perhaps the most problematical aspect of the mediation of fee disputes is the danger that the process may lead to inadequate settlements, entered into by clients without a full understanding of the structure of legal fees or the professional rules regulating attorney behavior. In addition to a natural imbalance of information, there may be imbalances of negotiation skills, rhetorical ability, stamina, or tolerance for conflict that will only be accentuated if (as is likely to be the case) the client has not hired a second attorney to represent him.[244] In these circumstances a client may be particularly vulnerable to a mediator intent on achieving a settlement and who can create pressure for agreement by stressing the need for "compromise," the desirability of an end to a protracted dispute, and the costs and pressures of continuing it.[245] "Reality testing" by mediators can, here and elsewhere, be a euphemism for this particularly directive form of "arm twisting."[246]

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993. This latter task is rarely part of the job description of arbitrators, who lack the necessary skills and who may also be concerned that it may appear to compromise their neutrality.

244. The relatively small amount in controversy in most fee disputes means that it will rarely make economic sense for a client to retain another attorney to represent him. *See supra* note 38. The director of the Oregon State Bar's fee arbitration program "encourages" clients to participate in the arbitration without retaining another attorney, because of the added expense; she estimates that attorneys represent clients in no more than one in six of the fee arbitrations conducted. Personal communication, Liz Denecke, Administrator, Ore. State Bar Attorneys' Fee Arbitration Program. The Florida Bar's "Consumer Guide" to the state's fee arbitration program notes that the purpose of arbitration is to resolve fee disputes "quickly and inexpensively without having to hire an attorney to represent you," although consumers are told they have the right to be represented by an attorney at the hearing "should you question your ability to represent yourself." FLORIDA STATE BAR ASS'N, CONSUMER GUIDE TO THE LEGAL FEE ARBITRATION PROGRAM (1992). *See also Marino*, 480 N.E.2d at 290. (Massachusetts arbitration program; in conversations with the program staff prior to the hearing, "it was stressed to [the client] that she did not need an attorney to represent her, since the hearing was 'informal.' ").

245. Such an appeal is of course especially powerful where a final stage of arbitration is not available or is not made mandatory for the attorney, so that a mediated settlement can readily be sold to the client as a means of "avoiding litigation and having to pay for another lawyer." But the appeal is still not without force in circumstances where mediation is seen as a preliminary hurdle that must first be traversed before the process of arbitration can even be set in motion.

Cf. Erlanger et al., *supra* note 233, at 591-96 (divorce settlements; "when a settlement is perceived as the only exit from the dispute process," one party may feel substantial pressure—financial or emotional pressure, or pressure from lawyers and judges—to settle informally; "severe dissatisfaction" with the imposed outcome is a frequent consequence).

246. Kressel & Pruitt, *supra* note 220, at 193. *See generally id.* at 192-94 (While "[a]ssertive tactics are usually viewed as alien to good mediation," several studies have portrayed mediators "as much more assertive actors," particularly with respect to substantive interventions aimed at bringing about a settlement; such tactics "often (but by no means al-

"When the client attends without counsel, the momentum of the mediation conference may seem hard to resist";[247] as a consequence, a client may reluctantly be led to an agreement without ever having had a neutral and objective look at the "merits" of the dispute.

III. CONCLUSION

That some satisfactory method of processing fee disputes now needs to be put in place, in the interest of both attorneys and clients, seems clear. In cases where negotiation fails, or where the process of private ordering becomes little more than a euphemism for capitulation or resigned acquiescence,[248] there may otherwise be little practical alternative to "lumping" any claim involving a fee.

Mandatory arbitration of fee disputes is of course hardly a panacea. The 1974 prediction of the ABA's Special Committee on Resolution of Fee Disputes, that there was "little likelihood" mandatory arbitration could gain the necessary support to be enacted,[249] has proven at least in some jurisdictions to be overstated. Nevertheless, the fact remains that proposals for mandatory arbitration are likely to meet with widespread and intense opposition on the part of the bar.[250] Such opposition may be grounded in a simple distrust of clients, in concerns with respect to possible client abuse of the arbitration process,[251] or in hostility to any form of expanded state regulation of the profession. It may also rest on certain *a priori* assumptions con-

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ways) have a somewhat coercive quality."). *See also* Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL. 141, 146 ("the well-known definition of a mediator as someone who listens to and reasons politely with both parties only until he is sure which is weaker, and then jumps on that one with both feet"); McEwen & Maiman, *supra* note 233, at 260 (in longer mediations, 38.6% of disputants in successful mediations and 64% in unsuccessful mediations "remembered that the mediator had pressured them to accept a settlement"; mediators "would suggest a settlement figure of their own, note the time already expended, and observe that court decisions are unpredictable"); *see also supra* note 241.

247. ROGERS & MCEWEN, *supra* note 218, at 24.

248. *See supra* notes 43-44, 115-118 and accompanying text.

249. *See supra* notes 54-56 and accompanying text.

250. When asked for their reaction to "a proposal by which all attorneys in Texas must submit to binding arbitration of any fee dispute at the initiative of the client," 33.3% of our attorney-respondents answered that they would "oppose," and another 33.5% answered that they would "strongly oppose," such a proposal. This opposition did not seem to vary significantly depending on the location or size of the firm in which the attorney practiced or the type of practice engaged in.

251. This was a common theme in the comments volunteered by our respondents:

"A mandatory system would only serve to increase disputes; clients would be able to refuse to pay fees and threaten mandatory arbitration. Most attorneys would write off or reduce just fees in order to avoid the expense (i.e., lost time)."

"Making it mandatory may lead to 'unnecessary' arbitration and require attorneys to face senseless, wasted time in the process. Clients would use it to their advantage—Legal blackmail against attorney."

"Good clients will never invoke the process. Squirrelly clients will use it to save a few bucks."

"Business persons—with few exceptions—question the fee. They believe it a prudent business activity. I could double my fee and receive about the same complaints. I could reduce them by one-half and receive the same complaints."

"In the 10+ year existence of our firm, we have experienced few fee disputes. What we have experienced, however, indicates that most fee disputes are based on a client's desire to

cerning the arbitration process, such as the supposed tendency of arbitrators to indulge in compromise awards.[252] Opposition to mandatory arbitration may rest in part on the willingness of attorneys to believe (or at least to assert) that any mandatory process is simply unnecessary, since their peers can be counted on to share what they think of as their own high standards of ethics and of reasonable behavior.[253] And it is likely also to reflect a concern that a mandatory arbitration process would be unable to protect the attorney against a second bite at the apple by clients in the form of possible subsequent suits for malpractice.[254] In any event, opposition to mandatory arbitration is likely in many jurisdictions to be an effective barrier to a reform of this nature.

Arbitration has an obvious value for clients confronted with what they believe to be an excessive legal fee: To suggest that mandatory arbitration is likely to "encourage" or lead to an increase in fee disputes[255] may be just a tendentious way of recognizing that the process might provide clients with their first realistic alternative for the assertion of any grievances over a fee. However, the process may well merit a closer look by attorneys as well. In general, every attorney may be seen as having some stake in the public perception of the profession, and thus some stake in minimizing both the extent of billing abuse and the extent of client dissatisfaction with existing means of redress. More pragmatically, where a dispute has arisen over a fee the ethical attorney who is quite convinced of the propriety of the claimed fee may wish to hold out to the client the availability of a process that provides an opportunity for a disinterested look at the controversy and a rapid and final disposition of it. Encouraging client participation in the process in this way may well increase the ultimate chances of resolution and payment; it may also reduce the likelihood of the escalation of conflict that often leads to malpractice litigation—and reduce as well the likelihood of strategic behavior by clients in the form of appeals to the grievance mechanism.[256]

The attorney may naturally wish to initiate arbitration where all of the claimed fee has not yet been paid and a balance remains due; there are, however, circumstances in which the client, also, may conceivably find it in his

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avoid paying or achieve a windfall rather than a legitimate concern over the reasonableness of the fee."

252. Of those respondents who would "oppose" or "strongly oppose" a proposal for mandatory arbitration, 34.1% agreed with the proposition that arbitrators would "tend to 'split the baby in half' without regard to the merits of the dispute." *See supra* notes 188-90 and accompanying text.

253. Of those respondents who would "oppose" or "strongly oppose" a proposal for mandatory arbitration, 53.7% agreed with the proposition that "mandatory arbitration is not necessary since most fee disputes can be amicably negotiated with the client"; 40.3% agreed with the proposition that a mandatory program is not necessary "since most lawyers would agree to voluntary arbitration or mediation."

254. Of those respondents who would "oppose" or "strongly oppose" a proposal for mandatory arbitration, 67.6% agreed with the proposition that the proposal would be "unfair as long as the client remains free to bring a separate action against the attorney for damages (e.g., malpractice claims) at a later date." This was by a considerable margin the most common reason given for opposition. *See also supra* notes 149-59 and accompanying text.

255. *See supra* note 251.

256. *See supra* notes 30-31 and accompanying text.

interest to set the process in motion even though the attorney is still claiming payment: Not only may the client see arbitration as one means of putting the dispute behind him forever, but, more importantly, the client may wish to invoke a right to arbitration in order to stay a threatened lawsuit by the attorney for collection of the fee.[257] In such a case the attorney who acquiesces (or who is obliged to acquiesce) in arbitration may obtain at the end of the process a fee award that will be binding on the client and routinely enforceable, since it will benefit from the same presumptions of validity and limited review as do other arbitration awards.[258]

It is interesting to note that opposition to mandatory arbitration, however intense, need not always translate into an unwillingness to participate in the process on a voluntary basis. Among our attorney-respondents who reported that they would "oppose" or "strongly oppose" any proposal for mandatory binding arbitration, 30% would nevertheless "always" or "almost always" favor their firm's participation in "a process for the voluntary resolution of fee disputes through binding arbitration" set up under bar auspices. An additional 56.3% "would consider participating" in voluntary arbitration, "depend[ing] on the circumstances."[259]

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257. *See supra* note 191; N.J. R. GEN. APLIC. Rule 1:20A-6 (required notice by attorney to client of the client's right to arbitration before the attorney may file suit to collect a fee). The Director of New Jersey's mandatory program estimates that 20-30% of the fee arbitration proceedings in that state have resulted from the client's motion for a stay after receiving such a pre-action notice. Personal communication, David Johnson, Director, New Jersey Office of Legal Ethics (Jan. 4, 1993).

258. *See supra* notes 205-14 and accompanying text. Even greater assurances of payment might be provided where clients seeking to initiate arbitration are required first to deposit with the program all or a substantial portion of the claimed fees that remain unpaid; any fees awarded the attorney by the arbitrators could be paid directly out of the deposit in accordance with the terms of the award.

In addition, requiring a small filing fee for clients who wish to initiate arbitration need not unduly burden client access to the process, but might provide some reassurance with respect to client "abuse" of the right to arbitration as well as defraying some of the administrative costs of the program. At the present time it seems that only a small number of existing arbitration programs require such filing fees. *See* HALT SURVEY, *supra* note 38 (as of 1987, only five statewide programs required a filing fee); *see, e.g.*, MASS. BAR ASS'N, RULES OF THE LEGAL FEE ARBITRATION BOARD Rule 111(c) ($25 filing fee for "disputes involving legal fees of $5000 or less," thereafter rising with amount of disputed fee to a maximum of $250); FLA. BAR ASS'N, CONSUMER GUIDE TO THE LEGAL FEE ARBITRATION PROGRAM (1991) (applicant and respondent will each pay a filing fee of $15). In the program administered by the Los Angeles County Bar Association, the filing fee is 5% of the amount in dispute, with a minimum of $50 and a maximum of $3500. During 1990-91, 106 claimants requested a waiver of this fee on the ground of inability to pay; the fee was reduced in 69 cases and completely waived in the remaining 37. L.A. COUNTY BAR ASS'N, DISPUTE RESOLUTION SERVICES, ARBITRATION COMMITTEE ANN. REP. (1990-91).

259. Further questions were asked of this latter group to probe for just what "circumstances" might lead these respondents to favor their firm's participation in voluntary arbitration. Not surprisingly, the most important factor appeared to be the prospect of "increas[ing] the likelihood of payment in cases where the client has not yet paid the fee"; this was considered an "important" or "very important" factor by 74.4% of those respondents who opposed mandatory arbitration, but who would nevertheless "consider" participating in voluntary arbitration. By far the *least* important factor for this group appeared to be the prospect that participating in arbitration might increase the "likelihood of maintaining a future relationship with the client." Only 38.5% of these respondents considered this an "important" or "very important" factor that might lead them to favor their firm's participation, and 22.8% re-

Finally, the attorney might also wish to give some thought to efforts aimed at insuring in advance that the client too would be obligated to participate in any arbitration proceeding. Achieving this symmetry in dispute resolution might bring with it the considerable advantages of allowing control over the format, the forum, and the identity of the decision-maker.[260] Such a result can only be accomplished, of course, through careful planning and drafting at the stage of contract formation, and even where the attorney does not actually leave himself open to imputations of overreaching, pre-dispute arbitration clauses may not be permissible where a rigid view is taken of ethical restrictions on transactions with clients.[261] Where such clauses are permit-

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sponded that it was "not important at all." *Cf. supra* notes 96-99, 228-30 and accompanying text.

260. *See* MURRAY, RAU & SHERMAN, *supra* note 35, at 392-93 (fee agreement drafted by prominent Houston attorney provided that any "malpractice or fee dispute would be arbitrated by the Dean of the University of Texas School of Law, [the attorney's] alma mater"). A pre-dispute arbitration clause was enforced in McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048 (D. Colo. 1991). The clause there was striking in that far from merely achieving symmetry, it operated unilaterally; the client, a "successful and sophisticated businessman," was required to submit to binding arbitration "any fee disputes . . . and claims by you regarding [the firm's] handling of your matter," but the clause expressly "does not bar [the firm] from collecting amounts due to it in other ways, including litigation." Grider, 765 F. Supp. at 1049.

261. *See, e.g.*, D.C. Bar Legal Ethics Comm., Op. 211 (1990) (agreements requiring arbitration of malpractice or fee disputes are not permitted "unless the client is in fact counseled by another attorney"; "it is unrealistic to expect lawyers to provide enough information about arbitration to a prospective client . . . so that the client can make an informed consent to a mandatory arbitration provision," and equally unrealistic to conclude that "limited disclosure coupled with the advice to seek independent legal counsel" will be adequate); Md. State Bar Ass'n Comm. on Ethics, Op. 90-12 (1989) (same; "an agreement to submit all disputes arising out of the attorney-client relationship to arbitration constitutes an effort prospectively to limit the lawyer's liability to a client for malpractice" under Rule 1.8(h) of the MODEL RULES OF PROFESSIONAL CONDUCT).

A tentative draft of the Restatement of the Law Governing Lawyers took a similar position. A comment suggested that pre-dispute arbitration clauses covering fee matters should be unenforceable "[e]xcept when the client is sophisticated in legal matters or is represented by independent counsel": "Were the rule otherwise, a lawyer could obtain the client's consent to a forum favorable to the lawyer when the client did not foresee possible disadvantages of trial there." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 43, § 54, cmt. b, iv. However, the ALI membership later voted to delete this comment, relying on the Supreme Court's recent approval of pre-dispute arbitration clauses in a number of other areas where adhesion contracts also implicated matters of public concern. *See* 60 U.S.L.W. 2729 (May 26, 1992); *supra* notes 77-79 and accompanying text.

At the present time the situation in many jurisdictions remains muddied. At least where malpractice claims are concerned, California apparently takes a permissive view, resorting to the familiar rhetorical device to the effect that pre-dispute arbitration clauses are not the same thing as "limiting liability," since a "standard arbitration provision . . . merely selects the forum in which liability will be determined," Calif. State Bar, Formal Op. 1989-116 (1989); *cf. supra* note 127 and accompanying text. But this opinion explicitly cautions that it does not address the propriety of provisions requiring arbitration of *fee* disputes. Calif. State Bar, Formal Op. 1989-116 (1989) at n.6. Curiously, other California opinions indicate that agreements binding the client to arbitrate fee disputes are thought to be impermissible as somehow inconsistent with the statute making fee arbitration "voluntary for a client and . . . mandatory for an attorney," since such clauses could "vitiate any probability of voluntary acquiescence." *See* Calif. State Bar, Formal Op. 1981-56 (1981) (attorney may not require as a condition of employment that a client accept binding arbitration in advance of a dispute over fees; attorney and client may voluntarily agree to arbitrate a fee dispute only after the dispute occurs). In other jurisdictions similar results may be dictated, not by rules regulating attorney-client contracts, but by local variations in the general arbitration statute. *See, e.g.*, Texas General Arbi-

ted by positive law, the attorney's contractual planning might even extend beyond claims over the amount of a fee to include claims of malpractice as well: Attorneys might find that the feared effects of making the process for asserting claims more accessible, and thus the actual assertion of claims more likely, could well be outweighed by the attractions of a non-jury forum and the powerful advantage of sweeping all potential claims into the same proceeding.[262]

tration Act, TEX. REV. CIV. STAT. ANN. art. 224 (Vernon 1991) (in a contract in which an individual acquires "services" for a consideration of $50,000 or less, pre-dispute arbitration agreement must be signed "by the parties to such agreement and their attorneys" in order to be enforceable); *cf.* Gerdes v. Tygrett, 584 S.W.2d 350 (Tex. Civ. App.—Texarkana 1979, no writ) (parties submitted existing fee dispute to bar association arbitration; award in favor of attorney was upheld despite lack of required signatures on the submission).

262. *See supra* notes 149-59 and accompanying text. Such considerations may also suggest submitting to the arbitration of malpractice claims even after a dispute arises. *See supra* note 157 and accompanying text.