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## Ethical Considerations in Drafting and Enforcing Consumer Arbitration Clauses

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# ETHICAL CONSIDERATIONS IN DRAFTING AND ENFORCING CONSUMER ARBITRATION CLAUSES

AMY J. SCHMITZ\*

I. ATTORNEYS' ETHICAL OBLIGATIONS AS ADVOCATES AND ADVISORS .....	847
A. <i>Attorneys' Advocacy Obligations</i> .....	848
B. <i>Attorneys' Advisory Role</i> .....	851
1. <i>Impact on Clients' Interests</i> .....	851
2. <i>Affect on Third Parties</i> .....	852
3. <i>Stewards of the Justice System</i> .....	854
II. LAW AND POLICY OF CONSUMER ARBITRATION .....	856
A. <i>Pro-Arbitration Legal Forces</i> .....	856
1. <i>Arbitrability of Statutory Rights</i> .....	857
2. <i>Common Law Contract Defenses</i> .....	859
a. <i>Lack of Assent</i> .....	859
b. <i>Unconscionability</i> .....	861
c. <i>Lack of Consideration, Fraud, and</i> <i>Misrepresentation</i> .....	863
B. <i>Growing Policy Concerns in Consumer Arbitration</i> .....	864
III. ATTORNEYS' ADVOCACY AND ADVISORY OBLIGATIONS IN CONSUMER ARBITRATION .....	867
A. <i>Advocacy Duties in Drafting and Enforcing Consumer</i> <i>Arbitration Clauses</i> .....	867
B. <i>Attorneys' Textured Advisory Obligations Regarding</i> <i>Arbitration</i> .....	872
IV. CONCLUSION .....	877

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“With fingernails that shine like justice  
And a voice that is dark like tinted glass  
She is fast, thorough, and sharp as a tack . . . .”

This could describe some clients’ description of an ideal attorney.<sup>1</sup> Some clients adamantly demand an attorney be “a tiger out there fighting.”<sup>2</sup> Attorneys are to be “zealous advocates” for their clients, not only in court but also in negotiating contracts on their clients’ behalf.<sup>3</sup> Furthermore, they generally must heed clients’ wishes in court and contracting within the limits of the law, which do not impose an obligation to bargain in good faith with other contractors in the absence of a fiduciary relationship or other special circumstances.<sup>4</sup> Moreover, courts refrain from imposing moral or ethical bargaining norms,<sup>5</sup> and reserve Rule 11 sanctions for particularly abusive attorney submissions.<sup>6</sup>

Policymakers and public advocates have become concerned regarding companies’ use of un-negotiated form arbitration provisions in consumer and employment contracts to chill claims, evade liability, and essentially privatize justice to their advantage.<sup>7</sup> This led the American Arbitration Association (AAA) National Consumer Disputes Advisory Committee to adopt the Consumer Due Process Protocol (Protocol) in 1998.<sup>8</sup> The Protocol urges companies to offer consumers arbitration provisions that give clear notice of arbitration clauses, explain how to obtain information regarding the arbitration

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1. CAKE, *Short Skirt, Long Jacket*, on COMFORT EAGLE (Sony 2001). These lyrics continue with: “She’s touring the facility and picking up slack / I want a girl with a short skirt, / And a long, long jacket . . . .” *Id.*

2. I will never forget this phrase, which a former client used in expressing concern about my young age and small stature.

3. See MODEL RULES OF PROF’L CONDUCT pmb1., para. 2 (2007).

4. Barnes & Robinson Co. v. OneSource Facility Servs., Inc., 195 S.W.3d 637, 643–45 (Tenn. Ct. App. 2006) (refusing to find a duty to negotiate in good faith absent an express duty, and narrowly applying promissory estoppel to require clear economic loss due to reasonable detrimental reliance).

5. Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 678–80 (1969) (highlighting how common contract law does not necessarily conform to parties’ “private moral code”).

6. Christian v. Mattel, Inc., 286 F.3d 1118, 1130–31 (9th Cir. 2002) (emphasizing that Rule 11 sanctions “are limited to ‘paper[s]’ signed in violation of the rule”).

7. See generally EDWARD BRUNET, ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006) (collecting leading arbitration scholars’ critiques and suggested reforms of the Federal Arbitration Act). These same issues loom in many uneven bargaining contexts, but this article will focus on consumer arbitration.

8. See generally NAT’L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS’N, *CONSUMER DUE PROCESS PROTOCOL* (1998) [hereinafter PROTOCOL], available at <http://www.adr.org/sp.asp?id=22019>.

process, preserve consumers' access to small claims court, and ensure "reasonable cost to consumers" and "reasonably convenient" hearing locations.<sup>9</sup> Attorneys nonetheless draft, and companies continue to impose, arbitration clauses that defy these standards in form provisions consumers may not see, understand, or have power to change.<sup>10</sup>

Courts then apply formalistic, efficiency-focused contract law in enforcing form arbitration provisions under the Federal Arbitration Act (FAA)<sup>11</sup> and states' adoptions of the Uniform Arbitration Act (UAA). At the same time, proposals for federal legislative reforms receive scholarly support,<sup>12</sup> but lack political punch.<sup>13</sup> On July 12, 2007, legislators again proposed bills in both the U.S. House and Senate to prohibit enforcement of all pre-dispute arbitration agreements in consumer, employment, and franchise contracts, or with respect to any statutory claim protecting civil rights or regulating unequal bargaining relationships.<sup>14</sup> Both bills have been referred to their respective judiciary committees,<sup>15</sup> where similar bills have evaporated

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9. *Id.* at prins. 2, 5–7.

10. Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, in 12TH ANNUAL CONSUMER FINANCIAL SERVICES INSTITUTE 35, 49 (PLI Corp. Law & Practice Course, Handbook Series No. 11165, 2007), WL 1591 PLI/Corp 35 (including Citibank, Chase, AMEX, Discover Card, Bank of America, Capital One, Washington Mutual, MBNA, and GE Capital in its list of arbitration users); *see also* Amy J. Schmitz, *Collected Cell Phone and Credit Card Arbitration Provisions* (May 15, 2007) (unpublished manuscript, on file with South Texas Law Review) [hereinafter *Collected Arbitration Provisions*] (finding arbitration clauses prevalent in cell phone service contracts, and noting how nearly all the arbitration clauses bar consumers' access to class relief).

11. *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–92 (2000) (emphasizing the "liberal federal policy favoring arbitration agreements" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111–19 (2001) (enforcing arbitration agreements in employment contracts).

12. *See* Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1086–94 (1998) (proposing statutory reform aimed at ensuring consumers' consent to arbitration of statutory claims and access to fair proceedings); Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 228–32 (1998) (suggesting legislative regulation of consumer, employment, and franchise arbitration).

13. *See, e.g.*, H.R. 1994, 109th Cong. (2005) (addressing predatory mortgage lending practices and barring enforcement of pre-dispute arbitration agreements in consumer transactions); H.R. 2969, 109th Cong. (2005) (precluding enforcement of pre-dispute arbitration agreements in employment contracts); H.R. 3651, 109th Cong. (2005) (amending the FAA to preclude arbitration of employment disputes unless the employee and employer agree, in writing, to arbitrate after the dispute arises). All three bills died in committee.

14. Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th Cong. (2007).

15. 153 CONG. REC. H7774, S9135 (daily ed. July 12, 2007).

each year.<sup>16</sup> Instead of adopting such broad regulations, Congress only has enacted a few targeted provisions barring enforcement of arbitration requirements in consumer credit contracts for active-duty military personnel and in motor vehicle franchise contracts.<sup>17</sup>

To be fair, many attorneys counsel corporate clients to temper abusive arbitration clauses, and companies often heed such advice.<sup>18</sup> In addition, fairly administered arbitration is not necessarily bad for consumers and may provide them with higher recovery rates and more efficient resolution of their claims than they would obtain in court.<sup>19</sup> Reasonably balanced arbitration procedures may provide consumers with greater justice and opportunity to vent their stories than they would experience through litigation.<sup>20</sup>

Serious concerns nonetheless pervade the use of one-sided arbitration clauses in adhesive consumer contracts that often include provisions that bar class relief, preclude small claims court access, curb remedies, and impose high fees and costs.<sup>21</sup> Furthermore, clauses that do not include all these provisions and appear balanced on their faces may still burden consumers as applied due to lack of knowing consent, limits on discovery, and repeat-player advantages in arbitration.<sup>22</sup> Indeed, how “fair” can pre-dispute arbitration clauses be

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16. See *supra* note 13 (indicating how bills have lingered endlessly in committees each year).

17. 10 U.S.C.A. § 987 (West Supp. 2007) (making arbitration clauses unlawful in consumer credit contracts with military); Motor Vehicle Franchise Contract Dispute Resolution Process, 15 U.S.C. § 1226 (Supp. II 2002) (limiting agreements to arbitrate motor vehicle franchise disputes to post-dispute, written contracts, and additionally, requiring written explanations for any arbitration awards).

18. See generally Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55 (2004) (reporting findings from a study of arbitration clauses and concluding that many arbitration clauses appear balanced and would avoid any unconscionability ruling).

19. See generally W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69 (2007) (explaining how arbitration can benefit consumers); Kirk D. Jensen, *Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L.Q. REP. 631, 631–32 (2006) (gathering studies and surveys performed by various academics, companies, and institutions, and concluding that the study did not support claims that consumers are disadvantaged by arbitration).

20. See generally Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627 (2008).

21. See Demaine & Hensler, *supra* note 18, at 71–73.

22. See *id.* at 72–74 (explaining how limits on discovery, class action preclusions, and lack of knowing consent to these provisions harm consumers); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60–61 (1997) (discussing corporate defendants’ repeat-player advantages in arbitration).

for consumers in light of Congress's decision to bar imposition of these clauses on members of the military?

This leads to unanswered questions regarding an attorney's ethical obligations in representing and counseling corporate clients considering adoption of arbitration clauses in their consumer contracts.<sup>23</sup> Professional conduct rules only send mixed messages about attorneys' advocacy and advisory roles.<sup>24</sup> At the outset, the Model Rules of Professional Conduct suggest a client-centered approach to attorneys' ethical obligations, directing attorneys to "zealously assert[ ] the client's position under the rules of the adversary system" and to seek "a result advantageous to the client . . . ."<sup>25</sup> Furthermore, they emphasize that attorneys are not moral advisors.<sup>26</sup>

The Model Rules nonetheless require that attorneys' actions be "consistent with requirements of honest dealings with others."<sup>27</sup> They also direct attorneys to consider public interests as officers of the court and refrain from "conduct that is prejudicial to the administration of justice."<sup>28</sup> Moreover, ethics rules are inherently limited in their province and power, merely setting a floor for ethical conduct.<sup>29</sup> Authentic professionalism, central to career satisfaction, calls attorneys to remain true to their own intrinsic values.<sup>30</sup>

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23. I am not the first person to raise these issues. See, e.g., Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 953-55 (2002) (discussing attorneys' ethical obligations and responsibilities in drafting and enforcing arbitration agreements).

24. See *id.* at 980-82 (noting contrasting developments with respect to arbitration ethics and raising questions about what problems ethics rules can resolve).

25. MODEL RULES OF PROF'L CONDUCT pmbl., para. 2 (2007).

26. See Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1330-31 (2006) (explaining the Model Rules' approach that allows attorneys to raise ethical values with clients, but "refrain from introducing their own values").

27. MODEL RULES OF PROF'L CONDUCT pmbl., para. 2.

28. *Id.* R. 8.4(d) (stating that it is professional misconduct for attorneys to "engage in conduct that is prejudicial to the administration of justice").

29. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 908-10 (1999) (emphasizing that professional discipline rules are merely the low bar for ethical conduct); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1441-43 (1997) (discussing personality characteristics of lawyers and law students and questioning the ability of the Model Rules to instill values).

30. See Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 429-37 (2005) (discussing the connections between happiness and an adherence to intrinsic values, and emphasizing data supporting the correlation between authentic professionalism and "well being and life satisfaction").

This leaves attorneys without clear direction in drafting and enforcing consumer arbitration provisions. The Model Rules' advocacy focus seems to tell corporate attorneys to draft and enforce pro-company arbitration clauses based on consumers' general acceptance of form terms and the courts' usual enforcement of these terms under the FAA. Advisor obligations nonetheless suggest that attorneys should counsel clients on consent and fairness concerns regarding one-sided arbitration clauses. Furthermore, broader ethical obligations may warrant an attorney's refusal to draft or enforce unconscionable or unfair arbitration provisions.

For example, a credit card company's attorneys may assume they should suggest and draft an arbitration clause for the company's consumer contracts that cuts consumers' access to class relief and small claims courts as a means of curbing claims and lowering dispute resolution costs.<sup>31</sup> However, the conscientious attorney should also explain to the company how a court may refuse to enforce this scheme because it may unjustly deny consumers' access to remedies on their small claims. Furthermore, an attorney's commitment to justice should drive the attorney to urge the company to follow the Protocol and to refuse to draft an arbitration provision that conflicts with such fairness standards. Some may, nonetheless, argue that this insistence on following fairness "shoulds" would breach an attorney's duty to heed a client's wishes to take full advantage of consumer arbitration provisions under pro-enforcement law.

This Article explores and invites further debate regarding such ethical obligations with respect to companies' use of consumer arbitration. Part I discusses attorneys' ethical obligations, as advocates and advisors, in drafting and enforcing contracts. Part II summarizes the legal and policy atmosphere in which attorneys draft and enforce arbitration agreements on clients' behalf. Part III applies attorneys' ethical obligations as advocates and advisors in this atmosphere and considers attorneys' mixed and murky duties in representing companies regarding their consumer arbitration programs. Part IV provides suggestions for attorneys seeking to navigate these duties

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31. See, e.g., Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–59 (2006) [hereinafter Ware, *Adhesive Arbitration Agreements*] (proposing overall cost savings of pre-dispute arbitration clauses for companies and consumers); see Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 210–15 (1998) [hereinafter Ware, *Reply to Carrington & Haagen*] (arguing that arbitration clauses benefit consumers and the purchasing public, even when they are not idyllic for individual claimants).

and proposes that attorneys should urge or insist on corporate compliance with the Protocol and fairness standards. The article concludes by inviting further exploration of these ethical questions—especially among educators and policymakers with means to foster attorneys' attention to consumer concerns.

## I. ATTORNEYS' ETHICAL OBLIGATIONS AS ADVOCATES AND ADVISORS

Most states have adopted the American Bar Association's Model Rules of Professional Conduct for attorneys with few or no changes.<sup>32</sup> These Rules assume the primacy of the adversarial system for reaching the truth and rendering justice<sup>33</sup> and merely set an essentially amoral floor for attorney professionalism.<sup>34</sup> Moreover, what an attorney *may* ethically do in representing clients may not satisfy the attorney's own intrinsic values.<sup>35</sup> Therefore, it is important to emphasize at the outset that regardless of the Model Rules, attorneys should check their conduct with their own ethical compasses in order to attain true professionalism and life satisfaction.<sup>36</sup> That said, the Model Rules and other ethics standards provide only mixed and murky messages regarding attorneys' advocacy and advisory duties with respect to drafting and enforcing contracts.<sup>37</sup>

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32. Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1175 (1988).

33. See generally MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) (noting the adversarial system's protection of personal autonomy); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160–61 (1958) (discussing the adversarial process in American law).

34. Schiltz, *supra* note 29, at 908–09 (suggesting attorneys must strive to be ethical beyond merely complying with rules); Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 801–03 (2003) (discussing the attorney's role in the adversarial system, which many use to justify attorney behavior others may deem immoral).

35. Rhode, *supra* note 26, at 1329–31 (discussing limits of the “client-centered” approach used to justify attorney conduct that breaches the attorney's own moral code).

36. See generally Heinrich Racker, *Ethics and Psycho-Analysis and the Psycho-Analysis of Ethics*, 47 INT'L J. PSYCHO-ANALYSIS 63 (1966) (emphasizing individuals' connection to the greater world and importance of moral feelings to health and happiness); Schiltz, *supra* note 29 (explaining professional discipline rules as only a starting point and highlighting truly ethical and balanced living as essential to being a happy and healthy attorney).

37. MODEL RULES OF PROF'L CONDUCT pmbl., para. 2 (2007); see Matthew J. Clark, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 828 (1999) (discussing the disagreement among courts and commentators regarding the ethical obligations of attorneys with respect to arbitrating fee disputes with clients).



### A. Attorneys' Advocacy Obligations

The Model Rules begin with the premise and directive that attorneys should zealously advocate and serve their clients' interests.<sup>38</sup> They further prescribe that attorneys should strive to prove facts and present legal bases to support their clients' claims and interests.<sup>39</sup> They also require that attorneys abide by their clients' decisions regarding objectives of representation and consult with their clients on the means pursued to reach those objectives.<sup>40</sup> The Model Rules therefore espouse an advocacy ethic built on an adversary system that assumes truth and justice will be revealed through a battle among attorneys who are all seeking to maximize the likelihood that their clients will prevail.<sup>41</sup>

Only "the limits imposed by law and the lawyer's professional obligations" curtail this duty of allegiance to the clients' objectives.<sup>42</sup> Attorneys must therefore refrain from assisting or counseling clients "in conduct that the lawyer knows is criminal or fraudulent."<sup>43</sup> They also must "not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."<sup>44</sup>

The Model Rules also set barriers on attorneys' interactions with non-clients involved in a legal matter.<sup>45</sup> They preclude attorneys from communicating with parties known to be represented by another lawyer in the matter,<sup>46</sup> and direct attorneys to make "reasonable efforts" to correct an unrepresented person's misunderstanding of the attorney's role in the case.<sup>47</sup> In addition, attorneys must "not use means that have no substantial purpose other than to embarrass,

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38. MODEL RULES OF PROF'L CONDUCT pmbl., para. 2. See generally Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (defending attorneys' undiluted allegiance to their clients' goals as essential to ensure that clients achieve full access to legal benefits).

39. MODEL RULES OF PROF'L CONDUCT R. 3.1 & cmt. 1 (emphasizing attorneys' advocacy duties in proving their clients' claims).

40. *Id.* R. 1.2(a).

41. Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 546-52 (1983) (explaining the common understanding of a lawyer's advocacy responsibility and accountability).

42. MODEL RULES OF PROF'L CONDUCT R. 1.2 & cmt. 1, R. 1.4.

43. *Id.* R. 1.2(d).

44. *Id.* R. 4.1.

45. *Id.* R. 4.2, R. 4.3, R. 4.4.

46. *Id.* R. 4.2.

47. *Id.* R. 4.3.

delay, or burden a third person.”<sup>48</sup>

The overall approach of the Model Rules has been described as “client-centered” in that it myopically focuses on clients’ needs and wishes.<sup>49</sup> Furthermore, the Model Rules narrowly restrict only particularly bad attorney conduct, such as purposely or knowingly pursuing illegal, fraudulent, or substantially burdensome means or ends on behalf of their clients.<sup>50</sup> The Model Rules do not require attorneys to investigate the legality of their clients’ actions or to refrain from assisting clients in achieving lawful objectives the attorneys may deem immoral in other settings.

This has bred a sense of “moral nonaccountability” among many attorneys, who use the client-centered approach to justify actions on their clients’ behalf that may be ethically questionable but technically legal.<sup>51</sup> For example, the Model Rules would direct attorneys representing a lender in a payment collection action to strive to prove facts and present legal bases to support the client’s right to payment, regardless of the debtor’s financial and personal hardships.<sup>52</sup> The Model Rules nonetheless preclude the attorneys from submitting evidence or affidavits they know are false because that would amount to fraud on the court.<sup>53</sup> The Model Rules do not preclude the attorneys from submitting affidavits they merely suspect, but do not know, to be false.<sup>54</sup> Moreover, they do not obligate the attorneys to investigate or consider the debtors’ life circumstances or the likely impact on the debtors of collection actions.<sup>55</sup>

In the transactional context, the Model Rules similarly suggest that attorneys must zealously advocate their clients’ positions and seek to achieve the clients’ objectives, within legal limits.<sup>56</sup> Furthermore, the Model Rules again prescribe very limited restraints with respect to attorneys’ conduct with non-clients.<sup>57</sup> At the same

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48. *Id.* R. 4.4.

49. See Rhode, *supra* note 26, at 1329–31 (discussing the “client-centered” approach).

50. See MODEL RULES OF PROF’L CONDUCT R. 1.2(d), R. 1.5(a).

51. See Schwartz, *supra* note 41, at 543–45 (explaining the “Principle of Nonaccountability” that flows from the advocacy ethic).

52. See MODEL RULES OF PROF’L CONDUCT R. 3.1.

53. *Id.* (precluding attorneys from pursuing a proceeding or asserting issues therein “unless there is a basis in law and fact for doing so”).

54. *Id.* R. 1.2(d) (only clearly barring conduct the lawyer “knows is criminal or fraudulent” and leaving an attorney’s duty to investigate unclear).

55. See *id.* pmbl., para. 2 (stating that an attorney is to “zealously” assert his client’s position and making no mention of a duty to investigate the effect of their advocacy on opposing parties).

56. See *id.*

57. *Id.* R. 4.2, R. 4.3.

time, contract law does not impose a duty to negotiate in good faith with third parties in the absence of a fiduciary or other special relationship with those parties.<sup>58</sup> Again, the Model Rules merely preclude what most would consider egregious conduct, such as lying or seeking to harass third parties.<sup>59</sup>

Still, some have argued that attorneys should be more accountable for the fairness of means and objectives in drafting and negotiating contracts because there is no neutral third party refereeing the process as there is in court.<sup>60</sup> Furthermore, attorneys generally may decline to represent clients in transactions without denying them necessary legal assistance because there is no overriding social need for such assistance in civil transactions as there is in criminal matters.<sup>61</sup> This suggests that attorneys should refuse to assist clients in means or ends that may be technically lawful but nonetheless “unfair, unconscionable, or unjust.”<sup>62</sup>

These arguments apply with special force to form contracts in uneven bargaining contexts. “As Brandeis insisted, the model of the lawyer as fearless combatant simply has no bearing on the circumstances in which lawyers employ their talents to the detriment of *unrepresented* interests.”<sup>63</sup> Attorneys therefore may have a professional duty to restrain their zeal and refrain from drafting unconscionable form contracts.<sup>64</sup> Zeal is misplaced in drafting form contracts because no real adversary exists to resist imposition of onerous provisions that “disgrace” the legal profession.<sup>65</sup> Furthermore, zeal is especially improper with respect to consumer arbitration clauses that effectually insulate companies from regulation or liability by stripping individuals’ access to reasonable procedures needed to

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58. *Barnes & Robinson Co. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 644 (Tenn. Ct. App. 2006) (finding no duty to negotiate in good faith absent an express duty).

59. MODEL RULES OF PROF'L CONDUCT R. 4.4.

60. See Schwartz, *supra* note 41, at 546–63 (arguing for limits on moral accountability in transactions due to the absence of third party neutrals and the ability to decline engagement); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 670–72 (1978) (proposing that attorneys may not hide behind advocacy obligations to justify immoral conduct on a client's behalf); Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002) (proposing limits on form contracting).

61. Schwartz, *supra* note 41, at 557.

62. See generally Schwartz, *supra* note 60, at 679–94 (explaining this proposal and justifications for advising against and refusing to represent clients in lawful but unconscionable means or objectives, unless the attorney owes a special duty to provide legal assistance in the matter).

63. Carrington, *supra* note 60, at 383.

64. *Id.* at 361–73 (explaining need for ethical limits on form contracting).

65. *Id.* at 361, 370–71.

vindicate their substantive rights.<sup>66</sup>

Of course, reasonable minds can disagree on what is “unfair, unconscionable, or unjust.”<sup>67</sup> Courts already struggle and disagree on what contract provisions are unconscionable.<sup>68</sup> Attorneys and their clients likewise struggle to determine what contract provisions are legally unconscionable, or simply unfair. Attorneys are therefore left in a sometimes uncomfortable balancing act among advocacy obligations and personal values in drafting and negotiating clients’ contracts.

### *B. Attorneys’ Advisory Role*

Ethics rules charge attorneys not only to serve as advocates for their clients in and out of court, but also to advise their clients with respect to these various actions.<sup>69</sup> The thrust of this advisory role requires attorneys to inform clients about all factors affecting a client’s interests. The substance and parameters of what falls under this umbrella of “interests” remains unclear beyond those factors that directly impact clients’ financial and legal interests. The ethics rules therefore leave attorneys with limited guidance regarding their duties in advising clients regarding factors that may not directly impact clients’ needs, but do have significant effects on third parties or the justice system.

#### *1. Impact on Clients’ Interests*

An attorney’s advisory obligations to clients give further richness to the attorney-client relationship, and the honesty and loyalty it entails. The Model Rules require that attorneys “exercise independent professional judgment and render candid advice” to their clients.<sup>70</sup> The Model Rules further provide that this advice “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>71</sup>

The attorney-client relationship is a true human relationship, not

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66. *Id.* at 361–62.

67. Schwartz, *supra* note 60, at 679.

68. See discussion *infra* Part II.A.2.b (discussing courts’ disagreement on an unconscionability argument’s application to arbitration clauses).

69. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2007); see also MODEL CODE OF PROF’L RESPONSIBILITY EC 7–3, 7–5, 7–8 (1983) (discussing attorneys’ role as counselor in the Code of Professional Responsibility Ethical Considerations, which the ABA replaced with the Model Rules of Professional Conduct).

70. MODEL RULES OF PROF’L CONDUCT R. 2.1.

71. *Id.*

simply a sanitized legal construct. This requires attorneys to communicate openly with clients about the legal and practical effects of clients' options, objectives, and the means clients may choose for achieving their goals.<sup>72</sup> Attorneys should explain to clients the legal and financial ramifications of their clients' situations, and of any actions that the attorneys may pursue on their clients' behalf.<sup>73</sup> Attorneys also owe their clients full information about their options and how various actions may impact the clients' time, reputations, relationships, and emotional health.<sup>74</sup>

For example, an attorney representing a lender should inform the lender that an unsecured debtor is on the verge of filing for bankruptcy and explain the client's various options for collecting on the debt. Furthermore, the attorney would be obligated to inform the client about the fees and costs the client would likely bear in having the attorney pursue various judicial and non-judicial actions to collect payment on the debt. The attorney should also explain to the client the time commitment required by the individuals involved and how pursuing different actions may impact the client's reputation. Questions would nonetheless remain regarding what other factors "may be relevant to the client's situation" with respect to third parties and the justice system.<sup>75</sup>

## 2. *Affect on Third Parties*

Attorneys' advisory obligations are especially unclear regarding the extent and substance of any ethical obligations to look out for third parties' interests. The Model Rules say very little about attorneys' responsibility for third parties' concerns, let alone the extent to which an attorney should raise these concerns with clients or refuse to represent a client who insists on actions detrimental to public interests.<sup>76</sup> Instead, the Model Rules merely allude to vague ethical considerations. At the same time, the Rules' comments send a somewhat conflicting message that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be

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72. *Id.* pmb1.

73. *Id.* R. 1.4(b), R. 2.1 & cmt. 1.

74. *Id.* R. 2.1 & cmt.

75. *Id.* R. 2.1.

76. *Id.* R. 2.1 cmt. 2 ("Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant.").

applied.”<sup>77</sup>

This begs questions regarding what third party concerns are relevant to “legal questions”<sup>78</sup> or may “decisively influence”<sup>79</sup> application of the law. For example, the lender’s attorney should inform the lender of factors that may influence whether the debtor is likely to work out a payment plan or file for bankruptcy. The attorney should also explain any equitable factors that may affect a bankruptcy court’s decisions, and perhaps investigate why the debtor has missed payments in order to gather this information.

It is unclear, however, how far the attorney should go in investigating and advising the lender regarding the debtor’s situation. Should the attorney consider information regarding the debtor’s bad health and personal hardships that likely led to the missed payments? Would it be improper for the attorney to advise the client to forego filing a collection action due to compassion for the debtor’s situation? An attorney’s broader advisory and professional obligations may drive an attorney to raise such considerations, but the Model Rules’ advocacy focus seems to require the attorney to pursue collection actions where failure to do so could preclude the client’s collection on the debt or open the door to waiver defenses to timely payments.

At the same time, attorneys essentially have no advisory obligations to third parties to whom they owe no fiduciary duties.<sup>80</sup> Instead, Model Rule 4.3 precludes an attorney from offering advice to unrepresented parties other than advising that they secure their own counsel.<sup>81</sup> Many courts find that attorneys do not even owe duties to potential clients in negotiating arbitration clauses in initial fee agreements.<sup>82</sup> In *McGuire, Cornwell & Blakey v. Grider*, for example, the court rejected a client’s fraud, breach of fiduciary duty, and violation of professional conduct claims against his former attorney based on an arbitration clause in the attorney’s fee agreement.<sup>83</sup> The

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77. *Id.*

78. *Id.*

79. *Id.*

80. See generally MODEL RULES OF PROF’L CONDUCT (stating the attorney’s duties to his or her “client”); Clark, *supra* note 37 (highlighting the limited ethical obligations of attorneys in transactions with potential clients).

81. MODEL RULES OF PROF’L CONDUCT R. 4.3 (“The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”).

82. See Clark, *supra* note 37, at 851–64 (examining enforcement of arbitration clauses in attorneys’ engagement contracts).

83. *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1050–52 (D. Colo. 1991).

court emphasized that the client could have no claims with respect to an arbitration clause in an initial fee agreement because no fiduciary obligations arose until after the client signed the retainer agreement.<sup>84</sup>

### 3. *Stewards of the Justice System*

News of corporate scandals and attorney misconduct has fueled public cries for more stringent ethical protection of the justice system.<sup>85</sup> The Model Rules nonetheless provide unclear direction regarding an attorney's obligations as an "officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>86</sup> The Model Rules preclude attorneys from submitting false evidence or engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation," but fail to further define this conduct.<sup>87</sup> In addition, they vaguely bar attorneys from engaging in "conduct that is prejudicial to the administration of justice."<sup>88</sup>

The rhetoric of these Model Rules is difficult to apply. The Model Rules prohibit lies and false evidence in court, but stakeholders in the system disagree on what otherwise lawful conduct is sufficiently dishonest or prejudicial to the justice system to warrant discipline. Moreover, it is left to individual attorneys to determine the extent to which they should advise clients on how their contemplated objectives comport with "the purpose and spirit, as well as letter, of the law."<sup>89</sup>

Still, attorneys do have special obligations to the justice system. As Professor Rhode has argued: "As gatekeepers in imperfect legal processes, lawyers have obligations that transcend those owed to any particular client. Honesty, trust, and fairness are collective goods; neither legal nor market systems can function effectively if lawyers assume no social responsibility for the consequences of their counseling role."<sup>90</sup> Attorneys cannot impose their visions of public policy on clients, but they can offer advice as stewards of the legal system. This also requires attorneys to use their training and experience to facilitate processes and solve problems that advance,

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84. *Id.* at 1051 (finding no attorney-client relationship exists before a prospective client signs an engagement agreement).

85. See Rhode, *supra* note 26, at 1317–18 (emphasizing call for ethics).

86. MODEL RULES OF PROF'L CONDUCT pmbl., para. 1; Rhode, *supra* note 26, at 1337 (quoting the preamble to the Model Rules of Professional Conduct and arguing that attorneys should take this responsibility more seriously).

87. MODEL RULES OF PROF'L CONDUCT R. 3.4, R. 8.4.

88. *Id.* R. 8.4.

89. Rhode, *supra* note 26, at 1331.

90. *Id.* at 1330.

not hinder, public interests.<sup>91</sup>

Furthermore, legal educators should raise and generate discussion with students regarding the ethical values underlying the justice system.<sup>92</sup> Teachers should also spark textured discussion of attorneys' obligations as officers of the legal system and aid students in developing strategies for considering these obligations in carrying out their advocacy and advisory duties.<sup>93</sup> Law schools should send aspiring attorneys into the profession with an overriding obligation to do no harm.<sup>94</sup> Educators have heightened opportunities to foster deeper commitments to ethics and authentic professionalism, and consequently, to produce more effective and happy attorneys.<sup>95</sup>

Responsibilities for the justice system therefore deepen attorneys' obligations in advising clients regarding their objectives and actions. Furthermore, the Model Rules' emphasis on zealous advocacy assumes relatively equal advocacy on behalf of all parties involved, as well as a neutral judge or jury to referee the process, determine the truth, and render justice.<sup>96</sup> However, as Professor Murray Schwartz has explained, with respect to counseling clients, "[t]here is no third-party tribunal, no adverse party, and no rules of procedure; the lawyer and the client are on their own."<sup>97</sup> Instead, the attorney-client relationship involves human interactions and collaborative efforts that may have broad implications.<sup>98</sup>

This is especially true when attorneys draft contracts and advise clients on matters that affect unrepresented parties. Professionalism therefore calls attorneys to refrain from assisting corporate clients in taking advantage of their form contract control to consumers'

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91. Fuller & Randall, *supra* note 33, at 1162 (emphasizing attorneys' duties "in the art of devising arrangements that will put in workable order the entangled affairs and interests of human beings," and promoting "the larger processes in which [they] participate[]").

92. Rhode, *supra* note 26, at 1336-37 (emphasizing educators' roles in teaching strategies for navigating the moral foundations and limitations of the justice system).

93. *Id.*

94. See Heinrich Von Staden, "In a Pure and Holy Way": *Personal and Professional Conduct in the Hippocratic Oath?*, 51 J. HIST. MED. & ALLIED SCI. 404, 405-08 (1996) (offering a translation of physicians' Hippocratic oath).

95. See Krieger, *supra* note 30, at 425-28, 437-38 (finding that law school currently "appears to push students toward values and motives likely to produce both unhappiness and unprofessional behavior in the future").

96. Schwartz, *supra* note 60, at 669-78 (distinguishing an attorney's ethical accountability in advocating a client's case in court versus representing a client in transactions).

97. *Id.* at 677.

98. See Fuller & Randall, *supra* note 33, at 1161-62 (discussing the limits of advocacy in counseling contexts).



disadvantage.<sup>99</sup> Attorneys obstruct, not protect, justice when they seek “petty advantages to the detriment” of the public good.<sup>100</sup>

## II. LAW AND POLICY OF CONSUMER ARBITRATION

Law and policy are sometimes at odds with respect to consumer arbitration. Consumer advocates and commentators lament consumers’ loss of rights and remedies through companies’ onerous arbitration programs.<sup>101</sup> The law, however, generally condones enforcement of arbitration clauses in form consumer contracts despite questionable consent.<sup>102</sup> In addition, the law interacts with form contracting norms to allow for what I have called the “dominos of deference”: (a) companies promulgate form arbitration clauses that curtail consumer remedies; (b) arbitration administering institutions and arbitrators may favor these companies as repeat clientele; (c) consumers rarely read or attempt to negotiate these clauses due to lack of awareness, resources, and bargaining power; and (d) courts enforce these clauses with the preemptive force of the FAA and formalistic application of contract defenses.<sup>103</sup> This raises ethical questions for attorneys who draft and enforce these clauses, torn by tensions between taking advantage of the domino effect versus promoting fair and balanced use of arbitration.

### A. *Pro-Arbitration Legal Forces*

United States courts generally must enforce arbitration agreements in accordance with the Supreme Court’s pro-enforcement reading of the FAA.<sup>104</sup> They also follow the Court’s holding that the FAA preempts state law hindering or discriminating against arbitration, which limits courts’ scrutiny of arbitration agreements to nearly extinct statutory arguments and general contract defenses such as lack of assent, unconscionability, or fraud.<sup>105</sup> Many courts then

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99. *Id.* at 1162.

100. *Id.*

101. See generally Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37 (2007).

102. See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91–92 (2000).

103. Schmitz, *supra* note 101, at 38, 45–50.

104. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); see also Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 602–10 (1997) (critiquing courts’ agreement that private arbitration does not constitute state action subject to constitutional requirements).

105. See, e.g., *Casarotto*, 517 U.S. at 687 (discussing how the FAA preempts state laws regarding arbitration agreements).

apply these general defenses in narrow and formalistic fashions.<sup>106</sup> In addition, courts heed *Buckeye Check Cashing, Inc. v. Cardegna's* charge that they narrowly limit their scrutiny of arbitration clauses to only the enforceability of arbitration agreements themselves, and order arbitration of challenges that implicate the contracts as a whole.<sup>107</sup>

### 1. Arbitrability of Statutory Rights

The Supreme Court has held that statutory claims may be arbitrated unless the statute expressly precludes arbitration or there is very strong evidence that arbitration would severely hinder the statute's purpose.<sup>108</sup> Therefore, the Court has condoned arbitration of a broad range of statutory claims covering everything from discrimination to consumer lending and securities fraud.<sup>109</sup> Furthermore, courts have agreed that arbitration of statutory claims does not constitute state action subject to constitutional due process requirements.<sup>110</sup> They also have interpreted arbitration clauses broadly to cover contract, tort, and statutory claims regardless of whether the clauses make express reference to or provide notice of statutory coverage.<sup>111</sup>

Accordingly, most courts have held that consumer warranty

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106. See Speidel, *supra* note 12, at 1079–80 (emphasizing how FAA preemption and courts' narrow application of general contract defenses make it "difficult if not impossible" to avoid arbitration agreements); Irma S. Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOY. L.A. L. REV. 137, 140–43 (2006) (explaining how courts condone dominant drafters' control of form contracting).

107. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (holding the illegality defense at issue was for the arbitrator and not the court because the defense did not target the arbitration clause, but the contract itself); see also Richard L. Barnes, *Buckeye, Bull's-Eye, or Moving Target: The FAA, Compulsory Arbitration, and Common-Law Contract*, 31 VT. L. REV. 141, 174–75, 184 (2006) (discussing the narrowing impact of *Buckeye*).

108. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

109. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–92 (2000) (finding Truth in Lending Act (TILA) claims under a consumer financing agreement may be subject to binding arbitration under the FAA); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989) (overruling prior opinion to hold securities claims arbitrable).

110. See Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1748, 1757–58, 1763–66 (2006) (noting American courts' conclusion that private arbitration does not involve state action but critiquing this conclusion with respect to arbitral class actions).

111. See *Gilmer*, 500 U.S. at 29 (finding statutory age discrimination statute could be subject to arbitration, explaining that arbitration clauses are little more than specialized forum selection clauses).

claims under the Magnusson Moss Warranty Act (MMWA) may be subject to arbitration.<sup>112</sup> This is true even where a form arbitration provision requires consumers to arbitrate in far locations and imposes high fees on small dollar claims.<sup>113</sup> In addition, courts usually deny consumers' claims that high arbitration initiation costs have an undue "chilling effect" on their statutory rights.<sup>114</sup> This is because consumers generally cannot satisfy the burden of proving the prohibitive costs of arbitration set by the Supreme Court in *Green Tree Financial Corp. v. Randolph*.<sup>115</sup> In that case, the Court set a high burden on proving prohibitive costs in concluding that the Randolphs failed to prove that their inability to pay extreme costs would preclude vindication of their Truth in Lending Act (TILA) claims.<sup>116</sup> The Court also paved the way for other courts to rely on expectations that companies would offer to pay truly onerous costs or that arbitrators would waive or reallocate these fees.<sup>117</sup>

At the same time, consumers rarely avoid arbitration based on claims that an arbitration agreement's preclusions of class relief, recovery of punitive damages, or attorneys' fees awards prevents them from asserting their statutory rights.<sup>118</sup> In addition, consumers who

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112. The MMWA provides consumers with special warranty protections and allows them to collect attorneys' fees in seeking to enforce those protections. *See* Schmitz, *supra* note 20, at 26–30 (discussing courts' general allowance for arbitration of MMWA rights).

113. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148–50 (7th Cir. 1997) (rejecting the consumer's claim that they should not be compelled to arbitrate their MMWA claims regarding a \$4,000 computer because the International Chamber of Commerce (ICC) rules incorporated in the form arbitration clause required the consumers to pay upwards of \$2,000 in arbitration costs). *But see* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1339–40 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of the same clause).

114. *See, e.g.,* James v. McDonald's Corp., 417 F.3d 672, 678–80 (7th Cir. 2005) (rejecting cost-based challenge of arbitration agreement).

115. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90–92 (2000) (explaining that although Randolph had provided information regarding high AAA arbitration fees and costs, it was not clear that she would bear these costs and that she could not pay them).

116. *Id.* at 91–92.

117. *See id.* *See also* James, 417 F.3d at 675–80 (emphasizing that consumers would have to show that arbitration was truly more expensive than litigation in terms of overall costs); Bailey v. Ameriquist Mortgage Co., 346 F.3d 821, 823–24 (8th Cir. 2003) (finding cost challenge of arbitrability was for the arbitrator to decide under the parties' agreement); Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) (finding individual could not be compelled to arbitrate if required to bear the prohibitive arbitration costs but stating that it would reconsider its ruling if the defendants agreed to pay these costs). *But see* Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 238–240 (N.D.N.Y. 2001) (finding employee could not be compelled to arbitrate her statutory claims because she had satisfied the burden of proving prohibitive arbitration costs).

118. *See* Tillman v. Commercial Credit Loans, Inc., 629 S.E.2d 865, 870–75 (N.C. Ct. App. 2006) (denying consumer's challenge of an arbitration clause based on high costs, class action waiver, and award limitations despite evidence that the consumer lived on very

prevail on challenges against arbitration of their statutory claims may face costs and burdens of asserting statutory claims in court while arbitrating the tort and contract claims stemming from the same facts.<sup>119</sup> They also may have to arbitrate statutory claims against some, but not all, of the parties who may bear responsibility for the claims.<sup>120</sup>

## 2. Common Law Contract Defenses

The most feasible challenges of arbitration provisions are based on general contract defenses such as lack of assent, unconscionability, no consideration, or fraud.<sup>121</sup> These challenges are narrow and limited. They must be aimed at an arbitration clause itself, as opposed to the contract as a whole.<sup>122</sup> In addition, courts have applied them in formalistic fashions based on classical contract norms and efficiency arguments.<sup>123</sup>

### a. Lack of Assent

Courts generally deny consumers' lack of assent challenges to form arbitration clauses. They reason that consumers remain free to walk away from the contract or seek goods or services elsewhere.<sup>124</sup>

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limited means); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1027–32 (11th Cir. 2003) (leaving to the arbitrator the mortgagors' argument that an arbitration provision precluding punitive and treble damages violated the TILA).

119. *Browne v. Kline Tysons Imps., Inc.*, 190 F. Supp. 2d 827, 833 (E.D. Va. 2002) (allowing litigation of MMWA claims, but ordering arbitration of TILA and state statutory and common law claims arising out of car sale); *Ball*, 165 F. Supp. 2d at 238–40 (requiring arbitration of the employee's non-statutory claims although she had prevailed on her cost-based challenge on the statutory claims).

120. *See Ex parte Jones, Inc.*, 686 So. 2d 1166, 1168 (Ala. 1996) (finding there was no agreement to arbitrate between consumers and the non-signatory to the arbitration agreement); *Ex parte Martin*, 703 So. 2d 883, 886–87 (Ala. 1996) (holding arbitration clause in loan agreement between buyers and sellers did not apply to manufacturer). *But see Ex parte Gates*, 675 So. 2d 371, 374–75 (Ala. 1996) (enforcing arbitration against a consumer on behalf of non-signatory manufacturer based on broad arbitration clause).

121. *See Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 478 (5th Cir. 2002) (emphasizing that “courts can consider individual claims of fraud or unconscionability in arbitration agreements as they would in any other contract”).

122. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (solidifying the “severability” concept limiting courts’ consideration of arbitration clauses to attacks on an arbitration clause itself); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–45 (2006) (emphasizing that the “severability” rule is a matter of federal law that precludes the court from deciding defenses going to a contract as a whole, including claims that the contract was illegal).

123. *See Amy J. Schmitz, Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 90–102 (2006) (discussing formalistic application of contract defenses).

124. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (enforcing form computer purchase contract requiring arbitration under ICC rules). *But see Brower v.*

They also rest their conclusions on classical contract principles embracing objective enforcement,<sup>125</sup> and economic notions that strict enforcement of form terms fosters efficiencies companies may pass on to consumers through lower prices and better quality.<sup>126</sup>

They therefore have enforced so-called “boilerplate” form terms in papers sent with bills, product packaging, and “clickwrap” e-provisions accessible through links in contracts formed over the Internet.<sup>127</sup> The court in *Hill v. Gateway 2000, Inc.*, for example, enforced an arbitration clause in purchase terms buried among the papers that came with a computer the Hills bought over the phone.<sup>128</sup> The court emphasized that it is the consumer’s duty to read form terms and that strict enforcement of form terms fosters efficient contracting.<sup>129</sup> Furthermore, the court condoned the arbitration clause although it curtailed the Hills’ right to recover attorneys’ fees under the MMWA.<sup>130</sup>

Courts have applied this same reasoning to find assent to arbitration clauses in cellular phone service contracts where consumers must accept the clauses or cancel the service.<sup>131</sup> Courts also have enforced arbitration clauses contained in the packaging of products consumers did not purchase but received as gifts.<sup>132</sup>

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Gateway 2000, Inc., 676 N.Y.S.2d 569, 572–76 (App. Div. 1998) (enforcing the identical Gateway arbitration clause, but vacating the portion of the clause requiring arbitration before the ICC due to the “excessive cost factor that is necessarily entailed in arbitrating before the ICC”). See also Jean R. Sternlight, *Recent Decision Opens Wider Gateway to Unfair Binding Arbitration*, 8 WORLD ARB. & MEDIATION REP. 129, 130–32 (1997) (discussing the *Hill* case).

125. See Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1515–20 (2007) (discussing objective and subjective enforcement theories); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 160–88 (1977) (discussing the will theory of contract).

126. See generally Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187 (2006) (questioning claims that form arbitration provisions in consumer contracts are unfair); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002) (explaining why electronic contracts promote efficiency and are not adhesion contracts).

127. See Alces, *supra* note 125, at 1521–23 (discussing the expanding world of contracting practices).

128. *Hill*, 105 F.3d at 1148, 1150–51.

129. *Id.* at 1149 (stating that “approve-or-return” provisions such as that in *Hill* make consumers better off “as a group”).

130. *Id.* at 1151.

131. *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 704–06 (S.D. Ill. 2005).

132. *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369, at \*1 (Del. Ch. Mar. 16, 2000) (mem.) (not designated for publication) (enforcing arbitration clause in the box with a computer consumer received as a gift).

Furthermore, courts have rejected employees' challenges of arbitration agreements employers provided after the employees have been hired, especially where employees have an opportunity to reject the agreements or accept them through their silence.<sup>133</sup>

#### b. Unconscionability

Consumers often pair lack of assent arguments with unconscionability challenges of arbitration clauses.<sup>134</sup> This requires consumers to prove the clauses are both substantively and procedurally unconscionable.<sup>135</sup> Procedural unconscionability asks whether the bargaining process was unduly one-sided, whereas substantive unconscionability requires that the terms of the provision be extremely oppressive or otherwise unfair.<sup>136</sup> Although some courts apply a sliding scale, most courts strictly require strong showings of both prongs.<sup>137</sup> This leaves consumers with limited and uncertain results on their unconscionability claims.

As an initial matter, consumers must show that a seller provides the challenged arbitration provision without negotiation.<sup>138</sup> They also must show that the provision contains oppressive terms such as "carve-outs" for the sellers' option to litigate, cost and fee allocations that overly burden consumers, inconvenient arbitration hearing locations, and preclusions of statutory remedies.<sup>139</sup> A court may then find the whole arbitration clause, or only certain procedural provisions, unconscionable.<sup>140</sup> If the court finds all or part of the clause

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133. *Circuit City Stores, Inc. v. Nadj*, 294 F.3d 1104, 1108–09 (9th Cir. 2002).

134. *Id.* at 1108.

135. *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265–66, 270 (3d Cir. 2003).

136. *See id.* at 265, 270 (finding "take-it-or-leave-it" contract prepared by the employer without negotiation by the employees was procedurally unconscionable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170–73 (9th Cir. 2003) (finding one-year limitation on claims under the arbitration clause in an employment contract was substantively unconscionable because it deprived employees of the benefit of the continuing violations doctrine available under a state employment discrimination statute).

137. Schmitz, *supra* note 123, at 73–90 (exploring development, evolution, and functions of unconscionability, and critiquing courts' formulaic application of unconscionability); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 812–13 (2004) (emphasizing slow and restrained application of unconscionability in the wake of formalist intellectual and social developments).

138. *See Alexander*, 341 F.3d at 265 (describing adhesion contracts).

139. *See* CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 113–14 (2002) (listing suspect terms and citing cases supporting and denying these claims).

140. *See Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779,

unconscionable, the court thereafter may refuse to order arbitration or order arbitration without the offending procedures.<sup>141</sup>

For example, the court in *Bragg v. Linden Research, Inc.* recently denied an internet-based virtual world developer's motion to arbitrate a consumer's claims against the developer based on its finding that the arbitration clause in the developer's "click-wrap" e-contract was unconscionable.<sup>142</sup> In order to participate in Second Life, the developer's virtual world, the consumer clicked a button indicating his acceptance of the developer's terms of service, which included the arbitration clause in the thirteenth paragraph under "General Conditions."<sup>143</sup> The court found the clause procedurally unconscionable because it was "buried" among nonnegotiable terms and the consumer had no real alternative for accessing virtual world services like Second Life.<sup>144</sup> The court also found that the clause was substantively unconscionable because it allowed the developer to unilaterally modify the terms and required confidential ICC arbitration in California, which would impose high costs on the consumer and hinder future claimants' access to needed evidence.<sup>145</sup> The court then refused to order arbitration, rejecting the developer's offer to arbitrate without the offending provisions.<sup>146</sup>

Success on unconscionability claims is nonetheless uncommon.<sup>147</sup> In *Tillman v. Commercial Credit Loans, Inc.*, for example, the court denied the consumers' challenge of an arbitration provision in their loan agreements although the provision subjected the consumers to onerous arbitration and appeal costs, precluded class relief, and

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785 (Ala. 2002) (finding that an arbitration provision was fundamentally unfair because it gave consumer no voice in arbitrator selection).

141. *Id.*

142. *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 606–11 (E.D. Pa. 2007) (mem.).

143. *See id.* at 595, 603–04 (explaining that Second Life is an Internet-based virtual environment in which users can become virtual characters, interact with other characters, and buy and sell virtual property).

144. *Id.* at 606–07.

145. *Id.* at 607–10.

146. *Id.* at 612–13.

147. *See, e.g., Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002) (denying unconscionability challenge to an arbitration agreement); *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 963–65 (Ala. 2001) (enforcing a consumer's duty to arbitrate breach of warranty, fraud, and other claims); *Green Tree Fin. Corp. v. Lewis*, 813 So. 2d 820, 825 (Ala. 2001) (denying unconscionability challenge to arbitration clause by illiterate consumer); *Garcia v. Wayne Homes, LLC*, No. 2001 CA 53, 2002 WL 628619, at \*13 (Ohio App. 2d Apr. 19, 2002) (not designated for publication) (denying unconscionability challenge based on risk of prohibitive arbitration costs).

lacked mutuality.<sup>148</sup> The court therefore rejected the trial court's findings that the arbitration provision was unduly one-sided and effectively precluded the low-income consumers' access to remedies by requiring them to assert their claims individually before arbitrators with average daily rates of \$1,225.<sup>149</sup> The court concluded that litigation would likely cost more than arbitration, class action waivers are generally enforceable, and North Carolina does not impose a "mutuality of obligations" requirement.<sup>150</sup>

### c. Lack of Consideration, Fraud, and Misrepresentation

Consumers assert with very little success lack of consideration, fraud, and misrepresentation challenges to arbitration clauses. Lack of consideration claims usually fail because it is sufficient if an arbitration provision is mutual or is one of many promises in a contract.<sup>151</sup> Consumers therefore have the highest chance of success on such claims where the provision only binds the consumer or is heavily one-sided.<sup>152</sup> Even these challenges often fail, however, because many courts will strive to find other contract provisions or circumstances that constitute sufficient consideration to uphold these arbitration clauses.<sup>153</sup>

Fraud and misrepresentation claims also meet very limited success.<sup>154</sup> These claims must be narrowly directed to the arbitration provision, and not the contract as a whole.<sup>155</sup> Furthermore, fraud claimants bear a heavy burden in proving that the contract drafter

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148. *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865, 875 (N.C. Ct. App. 2006).

149. *Id.* at 879–80 (dissenting opinion) (emphasizing the trial court's findings, which the dissent argues the majority largely ignored).

150. *Id.* at 875 (majority opinion).

151. *See Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 808 (7th Cir. 2003) (emphasizing that consideration need not lie in the arbitration provision itself where the contract in which it is included is supported by consideration).

152. *See Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 861–62 (W. Va. 1998) (holding arbitration provision in consumer loan contract unconscionable where form provision allowed lender to seek foreclosure and collection actions in court).

153. *See Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342–45 (Ky. Ct. App. 2001) (denying consumers' challenge to an arbitration provision in a financing contract that allowed the lender to litigate collection and foreclosure suits, and emphasizing that courts almost uniformly reject such challenges).

154. *See, e.g., In re FirstMerit Bank*, 52 S.W.3d 749, 756–58 (Tex. 2001) (denying challenges to an arbitration clause based on fraud, unconscionability, duress, and revocation).

155. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (holding that fraud in the inducement is an arbitrability question for the court unless it goes directly to the arbitration clause).



intentionally or recklessly made material misrepresentations about the arbitration that the claimants relied on in accepting the arbitration provision.<sup>156</sup>

For example, consumers in *FirstMerit Bank* lost on their fraud challenge to an arbitration addendum to a mobile home sales agreement.<sup>157</sup> The consumers claimed that the seller's failure to disclose or explain the addendum amounted to fraud due to the negative impact of the arbitration requirement on the consumers' rights.<sup>158</sup> The court quickly rejected the consumers' nondisclosure argument, echoing the majority of courts that decline to find any duty to inform consumers about arbitration provisions.<sup>159</sup>

### *B. Growing Policy Concerns in Consumer Arbitration*

Fairness concerns regarding arbitration clauses in uneven bargaining contexts have already led Congress to bar enforcement of arbitration requirements in active duty military members' consumer credit contracts and in motor vehicle franchise contracts.<sup>160</sup> At the same time, some commentators and public advocates have urged Congress to ban pre-dispute arbitration agreements more broadly in consumer and employment contexts.<sup>161</sup> Consumer advocates argue that companies use pre-dispute arbitration clauses to curtail consumers' rights and remedies with respect to any future claims by blocking court access.<sup>162</sup> Furthermore, these clauses often preclude class actions, deny small claims relief, bar recovery of statutory damages or attorneys' fees, and require consumers to bear potentially high arbitration filing fees and costs.<sup>163</sup> Moreover, these arbitration clauses usually catch consumers by surprise because they rarely read

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156. *In re FirstMerit Bank*, 52 S.W.3d at 756.

157. *Id.* at 752–53, 758.

158. *Id.* at 758.

159. *Id.*; see also *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 869–70 (D. Or. 2002) (finding no duty to explain written agreements). *But see* *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304–05 (9th Cir. 1994) (breaking from the majority to require express agreement to arbitrate statutory claims).

160. See sources cited *supra* note 17.

161. See Marcia Coyle, *Bills Would Curtail Arbitration*, NAT'L L.J., July 30, 2007, at 4, 4 (discussing proposal of the 2007 Arbitration Fairness Act, which precluded pre-dispute arbitration agreements in consumer and employment contracts, and noting bill support by policymakers and groups such as Public Citizen, American Association for Justice, and the National Association of Consumer Advocates). I have diverged from such proposals to suggest procedural reforms that allow for beneficial and fair consumer arbitration programs. Schmitz, *supra* note 101, at 50–57.

162. See Coyle, *supra* note 161, at 4.

163. See Schmitz, *supra* note 101, at 40–41, 55–56.

or understand the impact of the clauses.<sup>164</sup>

Consumers who seek to resist such arbitration provisions generally lose the fight due to lack of bargaining power and contract choices.<sup>165</sup> As mentioned above, my own examination of nine of the biggest cell phone service providers' consumer contracts exemplifies this lack of power and choice to the extent that all the companies included arbitration clauses and barred class actions in their form contracts. Only two stated arbitration as an "option."<sup>166</sup> Despite these contracting realities, however, courts generally enforce form arbitration terms per the FAA and contractual liberty directives.<sup>167</sup>

These adhesive realities of consumer arbitration led to the creation of the Protocol and other standards encouraging protection of procedurally fair consumer arbitration.<sup>168</sup> Drafters expected that companies and providers would voluntarily follow the standards' "shoulds," which include clear notice of arbitration clauses, provision of information regarding the arbitration process, preservation of consumers' access to small claims court, and measures ensuring reasonable costs and hearing locations for consumers.<sup>169</sup> Accordingly, many arbitration providers have promulgated procedural fairness standards or special rules for consumer arbitration that comply with these "shoulds."<sup>170</sup> Furthermore, some attorneys have encouraged companies to comply with such standards in adopting arbitration provisions in their consumer contracts.<sup>171</sup>

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164. See *supra* Part II (discussing "dominos of deference" to form provisions); James C. Freund, *Calling All Deal Lawyers—Try Your Hand at Resolving Disputes*, 62 BUS. LAW. 37, 42–44 (2006) (explaining "deal lawyers" use of boilerplate provisions without considering conflict avoidance).

165. See Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 101–04, 110–18 (2006) (recognizing the dominance of drafters and form documents in consumer contracts).

166. Collected Arbitration Provisions, *supra* note 10.

167. See *supra* note 11 and accompanying text (discussing enforcement of arbitration clauses).

168. PROTOCOL, *supra* note 8.

169. JAMS, JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2007) [hereinafter JAMS CONSUMER POLICY], available at [http://www.jamsadr.com/arbitration/consumer\\_min\\_std.asp](http://www.jamsadr.com/arbitration/consumer_min_std.asp).

170. See *id.*; Am. Arbitration Ass'n, Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization (2007), <http://www.adr.org/sp.asp?id=22036> [hereinafter AAA, Statement of Ethical Principles]; see also Weidemaier, *supra* note 19, at 87–88 (discussing these different standards).

171. Kaplinsky, *supra* note 10, at 51 ("My message to clients: Draft a fair clause!"); R. Christian Bruce, *Neutrality of Arbitrators Needs Scrutiny, Attorney Says, Calling for More Discovery*, 68 U.S. L. WK. 2095, 2095 (1999) (noting Kaplinsky's advice that clients adopt balanced arbitration provisions and allow consumers to choose the administrator in order

Some attorneys have nonetheless suggested or drafted onerous arbitration clauses for their corporate clients' consumer contracts. Harsh arbitration clauses therefore appear in common consumer contracts, creating debated perils this article will not fully recount.<sup>172</sup> Suffice it to say that harsh arbitration clauses may hinder consumers' access to judicial remedies for vindicating statutory and contract rights, allow companies to avoid regulation and accountability, and deny the public access to information affecting health, safety, and other important policies.<sup>173</sup>

Furthermore, expansion of arbitration does not necessarily ease judicial caseloads, as consumers continually challenge arbitration clauses and awards due to dissatisfaction with companies' use of arbitration clauses.<sup>174</sup> In addition, consumers' negative attitudes toward arbitration and companies' contracting practices may negatively impact the overall market.<sup>175</sup> Consumer-oriented blogs and other Internet postings alone reveal consumers' distrust of companies' contracts and recount consumers' stories of how companies make it difficult or impossible for consumers to obtain copies of contracts or to reach representatives with authority to change form terms.<sup>176</sup>

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to ward off repeat-player bias claims).

172. See generally Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (critiquing companies' use of arbitration clauses in contracts with consumers and employees); Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (critiquing arbitration of consumer and employment claims). See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1410-14 (1996) (critiquing the use of arbitration provisions in the securities industry); Teri J. Dobbins, *The Hidden Costs of Contracting: Barriers to Justice in the Law of Contracts*, 7 J.L. SOC'Y 116, 116-17 (2005) (discussing lower-income individuals' disadvantages in bargaining for and enforcing contract remedies).

173. See Bruce, *supra*, note 171, at 2095 (gathering articles discussing these and other perils of consumer arbitration).

174. See discussion *supra* Part II.A.2.

175. Surveys suggest that consumers generally distrust and feel helpless against companies' form contracts and arbitration clauses. See Amy J. Schmitz, Consumer Focus Group Notes, Denver, Colo., Nov. 18, 2006 (on file with the South Texas Law Review) [hereinafter Consumer Focus Group]. But see generally Drahozal, *supra* note 126 (highlighting conflicting evidence regarding arbitration's "lawlessness").

176. See Consumer Focus Group, *supra* note 175 (recounting instances when salespersons lacked the power to change arbitration provisions in their company's form contract); Posting of Victoria Pynchon to Settle It Now Negotiation Blog, The Fine Print: Sprint's Arbitration Clause, <http://www.negotiationlawblog.com/articles/arbitration/consumer-contracts> (July 7, 2007) (reporting company's representative's "Huhhhhhhhhhhh?????????" response to a request to see the contract terms); Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELECTRONIC FRONTIER FOUND., Feb. 2005, <http://www.eff.org/wp/dangerous-terms-users-guide-eulas> (discussing arbitration

Of course, one may question the legitimacy of consumers' negative attitudes toward arbitration in light of the lack of empirical evidence regarding consumer arbitration.<sup>177</sup> Furthermore, there is some mixed evidence that suggests consumers may fare better in arbitration than in litigation.<sup>178</sup> This provides attorneys with some fuel for advocating adoption of arbitration clauses in companies' consumer contracts and assisting them in enforcing these clauses.

Still, something is driving consumers' negativity toward arbitration. Furthermore, Congress already has banned use of arbitration clauses in consumer contracts offered to military members, and congressional concerns about consumer arbitration prompted recent hearings questioning the fairness of consumer arbitration.<sup>179</sup> This leaves attorneys confused regarding their proper role in drafting and enforcing consumer arbitration clauses.

### III. ATTORNEYS' ADVOCACY AND ADVISORY OBLIGATIONS IN CONSUMER ARBITRATION

#### A. *Advocacy Duties in Drafting and Enforcing Consumer Arbitration Clauses*

Legal and economic arguments tempt corporate attorneys to take advantage of consumer arbitration clauses. The law generally supports enforcement of un-negotiated consumer arbitration clauses, while arbitration providers and practitioners promote arbitration clauses for their potential to curb companies' dispute resolution costs and contain consumers' mass class action claims. Attorneys then view these arguments through the Model Rules' advocacy lens directing them to

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terms in consumer "click-through" contracts, which consumers often cannot see before completing the purchase).

177. Drahozal, *supra* note 126, at 204–15; Weidemaier, *supra* note 19, at 84–89.

178. See HARRIS INTERACTIVE, ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION 26 (2005), available at <http://www.arb-forum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf> (indicating that among those who lost, 40% still said they were moderately to highly satisfied with the fairness of the process).

179. See, e.g., *Mandatory Binding Arbitration Agreements: Are They Fair to Consumers?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of F. Paul Bland, Jr., Staff Attorney). See also Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCI. MONITOR, July 16, 2007, at 13, 13–14 (discussing lack of consent and onerous terms in consumer arbitration clauses and Congressional hearings regarding the fairness of arbitration).

abide by clients' objectives within the limits of the law.<sup>180</sup> This has fostered some corporate attorneys' reliance on their advocacy obligations to draft onerous consumer arbitration provisions for their clients "as close to the line separating enforceable from unenforceable agreements as is in their clients' interests."<sup>181</sup>

Advocacy obligations therefore prompt attorneys to suggest and draft consumer arbitration clauses as means not only for generating time and economic efficiencies, but also for curbing consumer claims.<sup>182</sup> They also may equip these clauses with procedural provisions that benefit the clients' economic and reputational interests, but effectively deny consumers' reasonable access to evidence and remedies.<sup>183</sup> Resulting arbitration clauses may then include some or all of the following: curtailed discovery, preclusion of class relief, denial of small claims court access, designation of hearing locations in the corporations' hometowns, limits on consumers' recovery of attorneys' fees, and caps on statutory damages.<sup>184</sup>

At first glance, these clauses may appear reasonable in light of pro-enforcement law and efficiency assumptions. Furthermore, attorneys may justify these clauses based on claims that even if one-sided arbitration clauses disadvantage some consumer claimants, they promote the greater consuming public because they provide companies with cost-savings they may pass on through lower prices and interest rates and higher quality goods and services.<sup>185</sup> In addition, some have proposed that private dispute resolution of small consumer matters clears court dockets to make way for cases some see as more worthy of public trials.<sup>186</sup>

At the same time, corporate clients armed with these pro-arbitration assumptions may expressly request attorneys to draft consumer arbitration clauses equipped with the pro-company

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180. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) (discussing an attorney's role as an advocate).

181. See Malin, *supra* note 34, at 801 (discussing how some may view advocacy in drafting arbitration clauses).

182. See Carrington, *supra* note 60, at 370 (discussing how the ethics rules' adversary focus may give attorneys the impulse to draft consumer arbitration clauses for corporate clients that take advantage of consumers).

183. *Id.* at 361–63, 370.

184. *Id.* at 362.

185. See Ware, *Adhesive Arbitration Agreements*, *supra* note 31, at 254–55, 258–59 (discussing arguments in favor of arbitration).

186. See Arthur B. Pearlstein, *The Justice Bazaar: Dispute Resolution Through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy*, 22 OHIO ST. J. ON DISP. RESOL. 739, 739–40 (2007) (arguing that private systems allow for flexible and equitable remedies, and individualized justice based on customary law).

provisions discussed above. Companies also may seek to adopt such provisions in light of trade publications, norms in their industries, or arbitration providers' marketing materials.<sup>187</sup> This may then heighten attorneys' temptation to take advantage of consumer arbitration based on the Model Rules' advocacy directive to heed clients' wishes.<sup>188</sup>

Furthermore, an attorney's advocacy obligations may have special force when representing a client in enforcing or defending an arbitration provision the attorney drafted. It would be in the client's and the attorney's financial, legal, and reputational interests to resist any consumer challenges to an arbitration provision the attorney drafted and the company incorporated in its widely-used consumer form contracts. The company would want to establish precedent endorsing the provision. The drafting attorney would fear loss of a client, or even allegations of malpractice.

Advocacy obligations also would likely prompt an attorney to assist a company in enforcing or defending a consumer arbitration provision the company had adopted on its own or pursuant to another attorney's advice. In this case, the attorney would not be defending her own work, but may nonetheless want to assist the company in its enforcement or defense objectives. Furthermore, understandable business incentives would fuel the attorney's desire to gain or retain the client, especially a well-paying corporate client.

At the same time, it would be difficult to argue that the Model Rules preclude an attorney from representing a client in enforcing or defending a seemingly enforceable consumer arbitration clause. The Model Rules do not authorize discipline for doing so. This only would be true if the attorney knowingly submitted false or fraudulent evidence, documents, or testimony in court in pursuing an enforcement or defense action.<sup>189</sup> Discipline may also be warranted if an attorney seeks to enforce or defend an obviously unenforceable arbitration clause or a clause adopted for the clear purpose of denying consumers' access to remedies on their legitimate claims.<sup>190</sup>

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187. See Brief of the Nat'l Ass'n of Consumer Advocates as Amicus Curiae in Support of Respondents app. 5, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (No. 02-215) (presenting an arbitration provider's marketing letters to lenders that promoted its rules and procedures to "minimize lawsuits, and the threat of lender liability jury verdicts").

188. See MODEL RULES OF PROF'L CONDUCT pmbl., para. 2 (2007) (stating that as an advocate, a lawyer has to zealously assert a client's position).

189. *Id.* R. 3.3(a).

190. See Carrington, *supra* note 60, at 361-63, 380-84 (explaining how the Model Rules leave room for attorneys to be disciplined for drafting contract provisions aimed to

Broader ethical considerations nonetheless may justify requiring an attorney to temper advocacy of onerous consumer arbitration provisions. Instead, attorneys should stop to consider an arbitration clause's impact on consumer rights and remedies. An attorney should decline to represent a client in defending or enforcing an arbitration clause that appears, upon reflection, to be unconscionable or overly burdensome on consumers' procedural and substantive rights. In such cases, the client generally does not need the attorney's technical assistance in the same way a criminal defendant would need the attorney's assistance.<sup>191</sup> Moreover, there generally is no overriding social need for the promotion of unconscionable or unjust arbitration. The tough questions, however, remain in determining what is sufficiently "unfair or unjust" in arbitration to limit attorneys' conduct in this way.

These same questions pervade attorneys' advocacy obligations in drafting and negotiating arbitration provisions. The Model Rules place only narrow limits on attorneys' contracting conduct and do not expressly bar attorneys from drafting unconscionable contracts.<sup>192</sup> Again, they only bar attorneys from making material misrepresentations or knowingly pursuing illegal objectives in drafting and negotiating contracts.<sup>193</sup> They therefore preclude only intentional or knowing conduct that is clearly calculated to achieve illegal or fraudulent objectives.<sup>194</sup>

The spirit of ethics obligations nonetheless suggest further limits on attorneys' zeal in drafting consumer arbitration clauses. In these contexts, there is no real adversary to resist onerous provisions and no neutral third party to ensure fair process.<sup>195</sup> Consumers rarely read, let alone have the power or resources to fully comprehend or negotiate form arbitration clauses.<sup>196</sup> Instead, they are at the mercy of companies

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strip individuals' necessary procedural rights).

191. See Schwartz, *supra* note 41, at 548–50 (explaining how criminal trials are governed by substantially different rules than civil ones and clients rely on attorney in criminal contexts much more than in civil ones).

192. See Carrington, *supra* note 60, at 361–63, 380–84 (noting how the Model Rules do not expressly authorize discipline).

193. MODEL RULES OF PROF'L CONDUCT R. 8.4(c), R. 1.2(d).

194. *Id.* R. 1.2(d).

195. See Carrington, *supra* note 60, at 361–62, 370–73 (noting limits of attorneys' advocacy impulses in consumer contracting and arguing that professional responsibility rules bar attorneys from drafting arbitration clauses that strip individuals' procedural rights, which they need to vindicate substantive rights). See also Schwartz, *supra* note 60 (proposing restraints on attorney conduct in contracting).

196. See Carrington, *supra* note 60, at 364–66 (explaining realities of consumer form contracting dynamics).

and their attorneys to refrain from imposing onerous arbitration provisions in their consumer contracts.<sup>197</sup>

This means that attorneys should be attentive to consumers' lack of bargaining power, understanding of arbitration, and legal resources when drafting and enforcing form contracts. It also suggests that ethics rules should bar them from taking advantage of these imbalances in drafting form arbitration provisions that overly burden consumers' access to remedies.<sup>198</sup> Attorneys must remain committed to protecting justice, regardless of whether the Model Rules explicitly authorize discipline for unfair contracting. This is especially applicable to arbitration clauses that allow clients to escape liability and regulation through inconvenient venue designations, preclusions of class relief, and limitations on recovery of damages and attorneys' fees.<sup>199</sup> Furthermore, justice responsibilities urge attorneys to temper "repeat-player" advantages in arbitration by resisting temptation to draft clauses that curtail consumers' equal voice in selecting arbitrators and arbitration administrators.<sup>200</sup>

Of course, this again raises the question regarding when arbitration provisions impose sufficiently onerous procedures to warrant attorney discipline. Reasonable minds may disagree regarding such fairness lines, and procedures that overly burden one consumer's rights may be perfectly reasonable as applied to another consumer. Consumers and contexts differ. Furthermore, attorneys' ethical obligations may differ with respect to advocating or drafting arbitration provisions versus advising clients regarding their use and enforcement of consumer arbitration.<sup>201</sup>

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197. See Consumer Focus Group, *supra* note 175 (noting consumers' feelings of powerlessness indicated in consumer focus group responses).

198. See *supra* note 60 and accompanying text (discussing proposals of Professor Murray Schwartz regarding increased accountability in transactions due to absence of third party neutral and ability to decline engagement).

199. See generally Carrington, *supra* note 60 (emphasizing that attorneys should refuse to draft onerous arbitration clauses, even if they may advise clients that a clause may be enforceable).

200. See Schwartz, *supra* note 22, at 60–61 (noting repeat-player advantages of corporations in arbitration due to arbitrators' economic incentive to build "track records" that "corporate repeat-users will view approvingly," thereby sparking referrals and future arbitration business). See also Bruce, *supra* note 171, at 2095 (noting arguments for drafting arbitration provisions that allow consumers to choose arbitration administrators).

201. See Carrington, *supra* note 60, at 388–89 (distinguishing attorneys' obligations in these contexts and arguing that drafting onerous provisions "is the step beyond advice that would expose the lawyer to possible liability").



### B. Attorneys' Textured Advisory Obligations Regarding Arbitration

Attorneys' counseling and advisory obligations add texture to their duties with respect to drafting and enforcing arbitration clauses. As an initial matter, attorneys have fuel for advising clients to include arbitration clauses in their consumer contracts. Comment 5 to Model Rule 2.1 encourages attorneys to inform clients about "forms of dispute resolution that might constitute reasonable alternatives to litigation."<sup>202</sup> The Colorado Rules of Professional Conduct include this directive to advise clients about alternative dispute resolution in the text of the rule.<sup>203</sup> The Colorado Rules' comments also go further to encourage attorneys to counsel clients about alternative dispute resolution's impacts on relationships, scope of relief, confidentiality, and privacy.<sup>204</sup>

This highlights assumptions courts, commentators, and policymakers make about what constitutes "alternative dispute resolution" (ADR) and its impact. Ethics rules do not distinguish arbitration from other forms of ADR. For example, the comments to Colorado's Rule 2.1 expressly include arbitration as a form of ADR and suggest that all forms of ADR have positive impacts on relationships, secrecy, and scope of relief.<sup>205</sup> Similarly, articles in journals aimed at businesses and legal practitioners often laud arbitration based on old blanket assumptions that all arbitration is more expedient, flexible, and cost-effective than litigation.<sup>206</sup>

Many courts also act on these positive assumptions about arbitration.<sup>207</sup> In the *McGuire, Cornwell & Blakey* case discussed above, for example, the court rejected breach of fiduciary and professional duties challenges of arbitration provisions in both the initial attorney retainer agreement and the modified fee contract the parties signed after establishing an attorney-client relationship.<sup>208</sup> The

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202. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2007).

203. COLO. RULES OF PROF'L CONDUCT R. 2.1 (1993).

204. *Id.* R. 2.1 cmt.

205. *Id.* (clarifying that arbitration is among the alternatives to litigation that attorneys should discuss with clients and tending to encourage such alternatives due to their impacts on privacy, confidentiality, and scope of relief).

206. See, e.g., William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Shifting Attorney's Fees in Litigation Attacking Commercial Arbitration Awards: A Disincentive for Meritless Motions for Correction, Modification, or Vacatur*, 35 AM. BUS. L.J. 515, 516, 519-21 (1998) (boasting arbitration's "obvious" desirability).

207. *Angell Enters., Inc. v. Abram & Hawkins Excavating Co.*, 643 N.E.2d 362, 366 (Ind. Ct. App. 1994) (touting arbitration as "an easier, more expeditious manner" for resolving disputes).

208. *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1051 (D. Colo. 1991).

court concluded that the modified provision did not improperly advantage the attorney or overly limit the attorney's liability for malpractice in breach of applicable ethics rules, although the provision carved out the attorney's collection actions against the client and prescribed binding resolution by a committee of the Colorado Bar Association.<sup>209</sup>

Such positive assumptions about arbitration have become almost cliché. They foster attorneys' and corporations' failures to adequately consider the real business and reputation risks of crafting onerous arbitration provisions and drafting to the edge of enforceability. Such provisions often invite expensive and time-consuming litigation regarding their enforceability.<sup>210</sup> Furthermore, consumers already skeptical of arbitration and the market may shun companies that impose harsh arbitration provisions.<sup>211</sup> In addition, courts and arbitrators may interpret or strike onerous provisions in arbitration clauses to allow for class arbitration, recovery of attorneys' fees, and possibly punitive damages awards.<sup>212</sup> This may dismay companies that rely on preclusions of such processes and remedies as paramount to their arbitration programs' cost-effectiveness.<sup>213</sup>

"If we are to be good counselors, we must seek more solid bases for making important process choices."<sup>214</sup> Attorneys should therefore

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209. *Id.* at 1049–51 (concluding that arbitration clauses merely shift determination of a client's claims to a non-judicial forum).

210. See discussion *supra* Part II.A.2 (noting some courts' application of contract defenses to police the fairness of arbitration). See also Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 NEV. L.J. 487, 490–94 (2007) (explaining how individuals focus on process and procedures in evaluating satisfaction with dispute resolution mechanisms).

211. See *supra* notes 175–76 and accompanying text (describing consumer negativity toward arbitration).

212. See *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (acknowledging, but not exercising, its discretion to sever offending provisions in an arbitration clause); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867–68 (Ct. App. 2002) (severing prohibition of class proceedings in an arbitration clause to allow for class arbitration).

213. See Kathleen M. Scanlon, *Class Arbitration Waivers: The "Severability" Doctrine and Its Consequences*, DISP. RESOL. J., Feb.–Apr. 2007, at 40, 44 (advising corporate counsel that "[a] practical approach is to include in . . . arbitration clauses that contain a class arbitration waiver an explicit provision making the entire arbitration clause unenforceable in the event a court strikes the waiver provision" in order to save their clients from being stuck in class arbitration that may "eliminat[e] the cost-effectiveness associated with two-party arbitration"); see also *Szetela*, 118 Cal. Rptr. 2d at 868 (finding Discover used the ban on class arbitration to effectively "prohibit[ ] any effective means of litigating Discover's business practices").

214. Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, DISP. RESOL. MAG., Fall 2007, at 10, 10.

explain to clients all factors relevant to consumer arbitration. What appears best for the client on the surface may not be best in light of this full panoply of concerns. For example, it may appear clear that a credit card company client would save money and time by promulgating an arbitration clause that precludes consumers' class actions, small claims court access, and recovery of attorneys' fees or statutory damages. This is risky, however, in that a court may find all or part of the clause unconscionable and strike the clause, or enforce arbitration without offending clauses.<sup>215</sup> A court may even require the company to submit to class arbitration, which companies strongly resist because it subjects them to possibly high class awards subject to very limited judicial review.<sup>216</sup>

Furthermore, a company cannot necessarily ensure enforcement of arbitration clauses by preserving access to small claims court or agreeing to pay consumers' arbitration fees and costs.<sup>217</sup> Some courts void arbitration clauses based on class action waivers alone.<sup>218</sup> Moreover, a court that holds provisions in an arbitration clause unconscionable may decline to accept a company's offer to waive the suspect provisions in order to preserve the duty to arbitrate.<sup>219</sup> For example, in the *Bragg* case discussed above, the court refused such an offer because it would not "rewrite the agreement" to save a clause

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215. *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1281–86, 1290–91 (D. Ariz. 2007) (explaining the judicial disagreement regarding the enforceability of class-action prohibitions in arbitration clauses and the various remedies a court may order after finding such a class action waiver unconscionable).

216. *Id.* at 1290–91 (severing the class relief prohibition from the arbitration clause, after finding it unconscionable, and allowing an arbitrator to determine whether the case should proceed to class arbitration); Scanlon, *supra* note 213, at 44 (advising companies on how to avoid class arbitration); Collected Arbitration Provisions, *supra* note 10 (noting all nine cell phone service providers' arbitrations clauses expressly preclude class relief, five of which also expressly barred class arbitration procedures and three of which voided the arbitration provision if the preclusion was deemed unenforceable). See also Am. Arbitration Ass'n, *AAA Policy on Class Arbitrations*, July 14, 2005, <http://www.adr.org/sp.asp?id=25967>; AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), <http://www.adr.org/sp.asp?ID=21936> (listing the American Arbitration Association's new class arbitration rules); Weidemaier, *supra* note 19, at 70–71, 111–12 (emphasizing how arbitration can benefit consumers, and highlighting the potential for consumers to aggregate their claims through class arbitration proceedings).

217. See *Cooper*, 503 F. Supp. 2d at 1288–90 (finding such company concessions did not alleviate the unconscionability of the class waiver as applied to consumers' claims).

218. *Id.* at 1290.

219. See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 612 (E.D. Pa. 2007) (refusing to compel arbitration despite the company's offer to waive the unconscionable procedures in its arbitration clause).

that the company itself drafted.<sup>220</sup>

In addition, companies' imposition of onerous arbitration terms may negatively impact their reputations and heighten consumers' skepticism regarding arbitration.<sup>221</sup> Companies may also be dismayed when information regarding arbitration proceedings becomes public despite arbitration's touted "privacy." It is true that arbitration is generally private in terms of who may attend hearings and view awards, but arbitration is not necessarily confidential with respect to information revealed in the course of proceedings.<sup>222</sup> Furthermore, even if companies include confidentiality protections in their arbitration clauses, this will not prevent information from becoming public in any subsequent court proceeding regarding the arbitration. Such confidentiality agreements also fail to bind non-signatories, and some courts hold these agreements unconscionable in uneven bargaining contexts.<sup>223</sup>

These textured considerations have led some commentators and attorneys to urge companies to promulgate fair and balanced arbitration provisions in order to maximize the benefits of their arbitration programs.<sup>224</sup> They have warned contract drafters that they should avoid suspect arbitration provisions such as those allowing for pro-company carve-outs, inconvenient location designations, high arbitration initiation fees, and shortened limitations periods.<sup>225</sup> Many companies therefore voluntarily comply with the Protocol and other due process standards,<sup>226</sup> which may foster fair and efficient arbitration

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220. *Id.*

221. Consumer Focus Group, *supra* note 175 (noting participants' negative perceptions of companies' arbitration clauses).

222. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (explaining that arbitration proceedings are usually private in that only the parties, the arbitrator, and invited persons may attend, but that communications are generally not confidential unless the parties agree to such confidentiality).

223. *Id.*; Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT'L ARB. 479, 494-98, 500-05 (2005) (noting United States cases holding confidentiality provisions unconscionable and explaining how these clauses can harm businesses and the public).

224. Kaplinsky, *supra* note 10, at 51-52 (suggesting that attorneys and companies should adopt fair arbitration clauses).

225. *See id.*; David M. Klein, *Ways to Avoid Electronic Contract Killers in Second Life*, LEGAL TECH., Oct. 16, 2007, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1192439008771> (noting how drafters of arbitration provisions in e-contracts can avoid a finding of unconscionability like that found in *Bragg v. Linden Research, Inc.*); *see also* Leslie A. Bailey, *Preserving Employment Class Actions*, TRIAL, Aug. 2007, at 26, 27-29 (noting when courts are likely to strike onerous arbitration provisions in advising employees' attorneys in challenging arbitration provisions).

226. *See* Collected Arbitration Provisions, *supra* note 10 (showing, out of the credit

proceedings to the benefit of companies and consumers.<sup>227</sup>

At the same time, attorneys' counseling obligations include advising clients on how their contemplated actions and objectives impact third parties and the justice system. Again, there is no neutral third party to temper or balance attorney-client discussions, and attorneys remain obligated to promote justice as officers of the court. They therefore should advise clients not to adopt arbitration clauses that appear unconscionable or unjust and refrain from drafting such clauses at the clients' behest.<sup>228</sup> Unconscionable clauses are not only legally unenforceable but also obfuscations of voluntary self-government vital to contractual freedom and due process.<sup>229</sup>

Furthermore, attorneys should advise clients to refrain from drafting to the edge of enforceability. Arbitration provisions should not be fair game simply because they are "in fashion" and may pass judicial scrutiny.<sup>230</sup> Pushing legal limits may subject clients to inefficient and expensive litigation that discounts any victories in obtaining judicial enforcement of arbitration. Moreover, attorneys' ethical obligations to public policy and justice require attorneys to advise clients against arbitration provisions that may be enforceable but nonetheless overburden consumers' access to remedies on their claims. Indeed, attorneys have heightened duties to draft balanced arbitration clauses because of their potential to effectually deregulate company conduct and deny consumers access to procedural rights and substantive remedies.<sup>231</sup>

What should an attorney do, however, if a client ignores such advice and insists that the attorney draft an onerous consumer arbitration provision. For example, the hypothetical credit card

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card contracts gathered, some did not include arbitration clauses while a couple allowed the consumer to opt out of arbitration).

227. The key should be to embrace procedural rules that balance fairness and efficiency, without "judicializing" the arbitration process with court-like procedures. See WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 44-64 (2006) (discussing fairness versus efficiency of precise procedural rules).

228. See *supra* Part I.A (discussing proposals of Professors Carrington and Schwartz for increased attorney accountability in advising clients).

229. See Fuller & Randall, *supra* note 33, at 1162 (highlighting how attorneys serving as negotiators and draftsman should foster public interest in facilitating "voluntary self-government").

230. See Carrington, *supra* note 60, at 361-70 (noting how some of the arbitration clauses "in fashion" can be so onerous that they "disgrace" the legal profession).

231. See *supra* Part III.A (discussing Professor Carrington's arguments for attorney discipline for allowing clients to use arbitration clauses to escape regulation); Fuller & Randall, *supra* note 33, at 1162 (emphasizing how attorneys' "partisan advocacy" must cease "when it misleads, distorts and obfuscates" the justice process).

company client may request creation of an onerous consumer arbitration clause despite its attorney's contrary advice. It would then seem that the attorney's advocacy obligations would compel her to draft the clause with the requested preclusions of class relief, small claims court access, and recovery of attorneys' fees or statutory damages. The attorney's duties to the public and the justice system, however, may suggest that the attorney should refuse to draft the onerous arbitration clause and discontinue representation of a client that persists in promulgating the clause.<sup>232</sup>

#### IV. CONCLUSION

Attorneys face mixed and murky messages regarding consumer arbitration: mixed professional responsibility rules; mixed legal enforcement; mixed messages from commentators and policymakers; mixed evidence regarding efficiency, cost-savings, and fairness. It is therefore doubtful that attorneys would face discipline for drafting or enforcing onerous consumer arbitration provisions they believe in good faith to be lawful. Professional discipline rules, however, merely set the floor for ethical conduct and can only go so far in dictating morals or teaching values.<sup>233</sup> Indeed, an attorney's commitment to ethics and public service "must begin at home."<sup>234</sup> Moreover, the bottom line is: "If you have the wrong values and motives, your life will not feel good regardless of how good it looks."<sup>235</sup>

Attorneys representing companies in drafting or enforcing consumer arbitration clauses should therefore remain committed to justice and ethical considerations that transcend stark professional conduct rules. This means that they should go beyond rote assumptions of arbitration's benefits to consider the real risks and impacts of onerous arbitration provisions. It also means that they should refuse to draft provisions that, upon reflection, appear likely to conceal companies' illegal conduct or squelch consumers' procedural and substantive rights.

Instead, attorneys should heighten clients' awareness and consideration of the real legal, business, reputation, and fairness impacts of onerous arbitration clauses in consumer contracts. At the least, attorneys should counsel clients to follow the Protocol and offer

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232. Fuller & Randall, *supra* note 33, at 1162.

233. See Schiltz, *supra* note 29, at 908-10 (explaining why the Model Rules are only the "lowest common denominator" for ethical conduct).

234. Fuller & Randall, *supra* note 33, at 1162.

235. Krieger, *supra* note 30, at 438.

additional suggestions for balancing efficiency and fairness through use of arbitration. Companies and consumers may benefit from arbitration clauses that provide fair and balanced procedures. Moreover, fair use of consumer arbitration promotes the substance and spirit of attorneys' ethical obligations.<sup>236</sup>

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236. It may also foster authentic and happy attorneys who conform their conduct to their intrinsic values and norms. *See id.* at 425-30 (emphasizing the importance of intrinsic values and motivations to producing professional conduct and how such ethical conduct leads to more life satisfaction); ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* 51-57, 167-69 (2d ed. 1970) (explaining how those pursuing higher needs and values become more actualized, and thus satisfied).