

## PUBLIC COURTS VERSUS PRIVATE JUSTICE: IT'S TIME TO LET SOME SUN SHINE IN ON ALTERNATIVE DISPUTE RESOLUTION

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“People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property.”<sup>1</sup>

### INTRODUCTION

Since the early to mid-1990s, the issue of secrecy in litigation has attracted nationwide attention and has generated a literal mountain of commentary (including some of my articles).<sup>2</sup> Judges, think-tanks, and bar

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1. *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

2. See Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791 (2004) [hereinafter Doré, *Settlement*]; Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) [hereinafter Doré, *Secrecy by Consent*]; see also Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004); Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771 (1990); David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217 (2003); Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991); Emily Fiftal, *Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 CASE W. RES. L. REV. 503 (2003); John P. Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. L. REV. 829 (2004); Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67 (2000); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998); Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291 (2005); Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1 (2002); FRANCIS H. HARE, JR. ET AL., *FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES* (1994); Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783 (2002); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999); David Luban, *Limiting Secret Settlements by Law*, 2 J.

associations have convened task forces devoted to confidentiality in the courts,<sup>3</sup> and several academic symposia like this one have been dedicated to the subject.<sup>4</sup>

As the name of this Symposium suggests, much of the commentary, and virtually all of the reforms concerning this topic, center upon *litigation* confidentiality—protective orders governing discovery, the sealing of judicial records and files, confidentiality orders and secret settlements. The part such confidentiality orders and agreements have played in lawsuits involving defective products, toxic torts, clergy sexual abuse, and financial fraud

INST. FOR STUDY LEGAL ETHICS 125 (1999) [hereinafter Luban, *Limiting Secret Settlements*]; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) [hereinafter Luban, *Settlements and Erosion*]; Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995); Suzanna M. Meyers, *Doing Their Jobs: An Argument for Greater Media Access to Settlement Agreements*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 603 (2004); Abner J. Mikva, *The Role of Judges in Secret Judgments*, 55 S.C. L. REV. 773 (2004); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); Jack E. Pace III, *Testing the Security Blanket: An Analysis of Recent Challenges to Stipulated Blanket Protective Orders*, ANTITRUST, Summer 2005, at 46; Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994) [hereinafter Resnik, *Whose Judgment?*]; James E. Rooks Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859 (2004); David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807 (2003); Elizabeth E. Spainhour, *Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards*, 82 N.C. L. REV. 2155 (2004); Jean Hoefler Toal & Bratton Riley, *The New Role of Secret Settlements in the South Carolina Justice System*, 55 S.C. L. REV. 761 (2004); Heather Waldbeser & Heather DeGrave, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815 (2003); Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1 (2001) [hereinafter Weinstein & Wimberly, *Secrecy in Law and Science*]; Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL'Y 53 (2000) [hereinafter Weinstein, *Secrecy in Civil Trials*]; Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565 (2004) [hereinafter Zitrin, *Judicial Function*]; Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883 (2004) [hereinafter Zitrin, *Laudable South Carolina Rules*]; Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, 12 PROF. LAW. 1 (2001) [hereinafter Zitrin, *Why Lawyers Keep Secrets*]; Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115 (1999) [hereinafter Zitrin, *Case Against Secret Settlements*]; Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663 (2001); Jillian Smith, Comment, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237 (2004).

3. See The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 6 SEDONA CONF. J. 183 (2005) [hereinafter *Sedona Guidelines*], available at <http://www.abanet.org/litigation/abaannual/papers/06b.pdf> (April 2005 Revised Public Comment Draft Version); CONN. BAR ASS'N, REPORT OF THE TASK FORCE ON CONFIDENTIALITY AND THE COURTS (2004) [hereinafter CBA REPORT]; Laurie Kratky Doré, Address at the Federal Judicial Center, Workshop for U.S. Magistrate Judges (Feb. 21, 2003); Laurie Kratky Doré, Address at the Roscoe Pound Institute Regional Forum for State Court Judges (Jan. 31, 2003).

4. See Symposium, *Court-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004); Symposium, *Behind Closed Doors: Secret Justice in America*, 9 J.L. & POL'Y 1 (2000).

continues to fuel the controversy over *court* secrecy.<sup>5</sup> That debate questions whether judges routinely rubber-stamp confidentiality requests in their zeal to promote the strong public policy favoring settlement.<sup>6</sup> The recurring scandals and the ensuing calls for “sunshine in litigation” have led a number of courts and legislatures to restrict the discretion of judges to issue protective, confidentiality, and sealing orders in cases that could compromise public health and safety.<sup>7</sup>

At bottom, these sunshine efforts reflect the long-established commitment to open courts and the traditionally strong presumption of public access to judicial records and proceedings.<sup>8</sup> A judge represents a broader public interest, even when adjudicating a seemingly private dispute, and must carefully balance any legitimate need for secrecy against any countervailing public interest in disclosure. In a publicly-created, staffed, and heavily subsidized court system, secrecy should be the exception, rather than the rule because the courts are more than merely “a public service for private dispute resolution.”<sup>9</sup>

Ironically, this increased transparency in civil litigation may have wrought an unintended and unwelcome consequence—the diversion of more civil disputes into alternative dispute resolution proceedings like arbitration, where the public is “shut out of information almost completely”

5. In the Firestone litigation, for example, the recall of over fourteen million Wilderness AT tires, and the subsequent Congressional investigation into Firestone and Ford’s alleged culpability, came eight years after the first of numerous product liability lawsuits concerning a tire that has now been linked to approximately 271 deaths (and many more injuries) in the United States alone. Many of those Firestone cases were confidentially settled, with discovery and court files concealed by agreed protective and sealing orders. See Roselyn Bonanti et al., *The Message of the Firestone/Ford Tragedy*, TRIAL, Apr. 2001, at 52. Similarly, in the beginning of 2002, the Boston Globe stunned the nation when it revealed that in the previous decade, the Archdiocese of Boston had quietly settled child molestation claims against at least seventy priests. See Stephanie S. Abrutyn, Commentary, *Courts Just as Guilty in Church Coverup*, HARTFORD COURANT, May 26, 2002, at C1. Prior to these more recent scandals, similar lawsuits involving products like GM’s side-mounted gas tanks, the Dalkon shield, the Shiley heart valve, BIC lighters, toxic torts involving Xerox and the town of Woburn, and prescription drugs like Zomax, Halcion, and the DTP vaccine, flew below public radar cloaked by confidentiality orders and agreements. See Doré, *Secrecy by Consent*, *supra* note 2, at 300–01.

6. See Doré, *Secrecy by Consent*, *supra* note 2, at 301, 303–09 (describing the competing arguments in the confidentiality debate).

7. See *infra* Part I (discussing litigation confidentiality and reform efforts in numerous jurisdictions).

8. See *infra* Part I.A (exploring the right of public access to judicial records and proceedings in civil litigation).

9. Doré, *Secrecy by Consent*, *supra* note 2, at 287. See also Luban, *Limiting Secret Settlements*, *supra* note 2, at 127 (contending that courts are more than a “system of private justice for dispute resolution” and serve interests beyond “the private convenience of the litigants”); Weinstein & Wimberly, *Secrecy in Law and Science*, *supra* note 2, at 25 (challenging view of judges as merely neutral arbiters resolving private disputes).

and the public interest is “more readily ignored.”<sup>10</sup> Judges admonish litigants who “want secrecy [to] opt for arbitration,”<sup>11</sup> and parties thus increasingly turn to “private” dispute resolution precisely because of its privacy.<sup>12</sup> Arbitration is frequently conducted pursuant to confidentiality rules and agreements that can conceal the existence and substance of a dispute, the identities of the parties, and the resolution of the controversy. Mediation proceedings, frequently cloaked with an evidentiary privilege, are accorded even more privacy. Public policy strongly encourages alternative dispute resolution,<sup>13</sup> and courts and legislatures unquestioningly assume that confidentiality is essential to its efficient and effective functioning.<sup>14</sup> In contrast to litigation, then, ADR largely operates in an “environment of secrecy” whose “closed doors can mask a world of mischief.”<sup>15</sup>

In this Article, I explore this current dichotomy between open court proceedings and private ADR and examine whether the confidentiality traditionally accorded ADR is always justified. Courts today find themselves entangled in a multitude of dispute resolution processes that take

10. Weinstein & Wimberly, *Secrecy in Law and Science*, *supra* note 2, at 20, 25 n.102. *See also* Stephanie Brenowitz, Note, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679, 693 (2004) (attributing increase in ADR as ironic consequence of attempts to ban confidential settlements).

11. *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). *See also* *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002) (noting that closed arbitration presents “a sure path to dispute resolution with complete confidentiality”).

12. Brenowitz, *supra* note 10, at 693 (positing that “parties that are concerned about publicity may be more inclined to proceed to arbitration and mediation, which limit the access of the press and public even more [than litigation]”); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1086 (2000) [hereinafter Reuben, *Constitutional Gravity*] (acknowledging that “[p]rivacy can be an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum”); Weinstein & Wimberly, *Secrecy in Law and Science*, *supra* note 2, at 20 (citing confidentiality as one of reasons for arbitration’s popularity).

13. Congress explicitly recognized this strong federal policy favoring ADR when it enacted the Alternative Dispute Resolution Act of 1998. *See* 28 U.S.C. §§ 651–658 (2000). *See also infra* Part II.B.1 for a discussion of the ADR Act and the push to promote ADR.

14. *See* Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 563–65 (2005) [hereinafter Deason, *Complementary Systems*] (discussing the need for confidentiality in mediation); Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1578 (1994) [hereinafter Sherman, *A Process Model*] (characterizing need for confidentiality as a “canon of faith” for mediators); David B. Young, *Alternative Dispute Resolution in Bankruptcy*, in 25TH ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY AND ORGANIZATION 2004, at 863, 900 (PLI Commercial Law and Practice, Course Handbook Series No. A-861, 2004) (stating that “[f]ew would question . . . that most ADR proceedings . . . must be kept confidential”).

15. Reuben, *Constitutional Gravity*, *supra* note 12, at 964. *See also* *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1181 (Ohio Ct. App. 2004) (criticizing private arbitration proceedings because they “prevent the public from discovering . . . acts and practices” violative of consumer protection statutes); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002) (asking whether arbitration proceedings “shrouded in secrecy . . . conceal illegal, oppressive or wrongful business practices”).

them far afield of traditional adjudication.<sup>16</sup> Judicial involvement in these alternative processes blurs the line between public and private dispute resolution and arguably triggers the presumption of public access to judicial proceedings. Moreover, an increasing number of disputes that would otherwise be litigated before a judge in an open court are being diverted into arbitration through binding predispute adhesion contracts. Employees harmed by discrimination and sexual harassment, investors defrauded by securities and financial schemes, consumers bilked by deceptive or unfair trade practices, even victims of serious personal injury, are more likely than ever to find themselves before an arbitrator in a closed arbitral forum.<sup>17</sup> These disputes, which radiate beyond the immediate parties, implicate a broader public interest that, if litigated, might very well cause a judge to deny a protective order or unseal court files. Does the mere fact that these cases are now siphoned from the court system and routed to private arbitrators mandate a different result? Should a generalized need for confidentiality to promote alternative dispute resolution override the interest that regulatory agencies, other claimants, potential victims, the media, and the general public may possess in information generated in those proceedings? Can the remedial and deterrent functions of the statutory claims at issue be effectuated in a secret tribunal? This Article examines these and other issues raised by ADR confidentiality.

Part I reviews the current approach to litigation confidentiality, which generally requires “good cause” for any type of court-enforced secrecy. Sunshine reforms in a number of jurisdictions have increased (at least theoretically) public access to virtually all phases of civil lawsuits, including discovery, court dockets and files, even confidential settlements. In the world of litigation, a public interest in disclosure may well override the litigants’ mutual desire for secrecy and the public policy favoring settlement.<sup>18</sup>

16. See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005) [hereinafter Resnik, *Procedure as Contract*] (noting that arbitration and mediation “have been brought inside the courts, thereby changing that which is ‘judicial’”); Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 690 (2005) [hereinafter Sternlight, *Separate and Not Equal*] (commenting upon the “real-world blending” of litigation and other dispute resolution approaches).

17. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999) (discussing arbitration of employment discrimination claims); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004) (exploring mandatory arbitration of consumer claims); Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253 (2004) (examining arbitration of personal injury claims arising out of contractual relationships).

18. See *infra* Part I (discussing litigation confidentiality).

A similar tilt toward transparency has not occurred in ADR. Part II addresses the secret environment of ADR, describing the scope and source of confidentiality accorded both arbitration and mediation. In arbitration, principles of self-determination and party choice enable participants to keep their dispute and its resolution confidential.<sup>19</sup> The public policy favoring settlement assumes primacy, and the public is told that it has no interest in the resolution of these private disputes. Unlike litigation, no neutral and publicly accountable gatekeeper considers, let alone protects, the public interest in disclosure. And other attributes of arbitration, such as waiver of class actions, limited judicial review, closed and unrecorded hearings, and the lack of written, reasoned decisions, further hide the dispute from public view.<sup>20</sup> In mediation, evidentiary privileges can conceal information relevant to other disputes and of general public interest.<sup>21</sup>

Part III describes and evaluates the recent efforts of some courts to regulate ADR secrecy in disputes that implicate broader public policy interests. A number of courts have utilized contract doctrines such as unconscionability and public policy to render confidentiality clauses in arbitration agreements unenforceable.<sup>22</sup> Other courts unseal or refuse to seal arbitration decisions and awards filed for confirmation, modification, or vacatur.<sup>23</sup> Still others balance the need for ADR privacy against the disclosure interests of other litigants and the general public.<sup>24</sup>

These efforts suggest that the current dichotomy between litigation and ADR confidentiality may not be completely justified. Part IV thus advances a more unified approach to confidentiality in dispute resolution that calls for greater scrutiny of ADR secrecy. The Article concludes by suggesting the need for both judicial and legislative regulation aimed at increasing the transparency of ADR, particularly for claims that are grounded in public policy or are otherwise of legitimate public interest.

19. In mediation, even party choice may not trump the privileged nature of mediation communications. *See infra* Part II.B.2 (discussing mediation privilege).

20. *See infra* Part II.A (contrasting the openness of litigation with the closed doors of ADR).

21. *See infra* Part II.B (examining confidentiality in mediation and court-connected ADR).

22. *See, e.g.,* *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (finding confidentiality clause unconscionable); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1180–81 (Ohio Ct. App. 2004) (holding secrecy provision of consumer arbitration clause violative of Ohio public policy). For a discussion of these contract defenses to arbitration clauses, see *infra* Part III.A.1.

23. *See, e.g.,* *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497 (E.D. Pa. 2004) (unsealing arbitration award).

24. *See infra* Part III.A.3 (examining discovery of confidential arbitrations), and Part III.B (discussing how mediation privilege can impede the discovery of otherwise relevant information).

## I. PUBLIC COURTS AND THE TILT TOWARD TRANSPARENCY

### A. *The Right to Open Courts*

Open courts serve several important purposes. Access to civil cases facilitates public monitoring and oversight of the taxpayer-subsidized judicial system, which is “an essential feature of democratic control.”<sup>25</sup> Transparency checks judicial incompetence or misconduct<sup>26</sup> and helps ensure fair and accurate fact finding and decision making.<sup>27</sup> Public access educates the public about the judicial system in general and its workings in a particular case.<sup>28</sup> Ultimately, access enhances public confidence in and respect for the civil justice system, thus encouraging its continued use and support.<sup>29</sup>

These rationales all buttress a qualified right of public access to civil judicial proceedings and records.<sup>30</sup> Although courts differ as to its source, scope, and strength,<sup>31</sup> this presumption prohibits a court from sealing judicial records unless a sufficient countervailing need for confidentiality ex-

25. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

26. *See* *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12–13 (1986) (holding that access to criminal cases checks overzealous or corrupt prosecutors and biased or incompetent judges); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (stating that access to civil cases “diminishes the possibilities for injustice, incompetence, perjury, and fraud”).

27. *See* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (indicating that access “safeguards the integrity of the fact-finding process”); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) (“Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information regardless of the type of proceeding.”).

28. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (declaring that access provides “opportunity both for understanding the system in general and its workings in a particular case”); *Leucadia, Inc.*, 998 F.2d at 161 (indicating that access provides the “public with a more complete understanding of the judicial system”).

29. *See* *Press-Enterprise Co.*, 478 U.S. at 13 (suggesting that mere opportunity to observe judicial proceedings fosters appearance of fairness essential to public confidence in courts). In addition to these systemic objectives, public access may also serve remedial and deterrent substantive goals not provided by closed ADR proceedings. *See infra* Part II.A.3.f–g.

30. *See generally* Doré, *Secrecy by Consent*, *supra* note 2, at 317–24 (examining the right of public access to civil judicial proceedings and records).

31. The U.S. Supreme Court has yet to extend either a First Amendment or a common law right of access beyond the criminal arena. *See id.* at 319–20. The Circuits, however, have all generally recognized at least a common law right to attend civil judicial proceedings and to inspect judicial records. Many apply a more stringent First Amendment standard to at least civil trials and some judicial records. Under such a constitutional standard, a court must find that an overriding or compelling interest justifies confidentiality and then “narrowly tailor” any confidentiality order to serve that interest. *See In re Boston Herald, Inc.*, 321 F.3d 174, 181–82 (1st Cir. 2003); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Even the broader common law right, however, triggers a rebuttable presumption in favor of public access. *See* Doré, *Secrecy by Consent*, *supra* note 2, at 320 (indicating that choice of First Amendment over common law “apparently influences only the strength of any presumption of public access and the showing of confidentiality necessary to rebut that presumption”). Courts also differ as to which “judicial records” will trigger the presumption, *see id.* at 374–78 (discussing differing definitions of judicial records), and as to the appropriate weight to accord the presumption if applicable, *see id.* at 378–80 (discussing weight of presumption).

ists.<sup>32</sup> Even without this presumption, only “good cause” can justify a protective or confidentiality order concerning nonjudicial records and information produced in the course of civil litigation.<sup>33</sup> As discussed below, this commitment to open courts and sensitivity to the right of public access pervades all aspects of a civil lawsuit.

## B. *Sealed Dockets and Pseudonyms*

### 1. Dockets

A recent secrecy scandal involving the state courts in Connecticut illustrates the exceptionally strong right of public access to information concerning the very existence of a lawsuit and the official index of its proceedings. In late 2002, two Connecticut newspapers revealed that in the previous thirty-eight years, state courts had sealed entire files of what appeared to be thousands of civil cases.<sup>34</sup> In some of these cases, court personnel were permitted to reveal only the existence and the caption of the case. In others, files designated as “super-secret” were completely unavailable, and court personnel were prohibited from even acknowledging the existence of the cases. The newspapers suggested that these and possibly many other cases had been sealed “at the behest of prominent individuals who were parties.”<sup>35</sup> The reports astonished many, including members of the Connecticut judiciary, and led to the eventual promulgation of more stringent state court rules regulating the sealing of judicial records.<sup>36</sup>

On appeal of the newspapers’ suit to access the super-secret cases, the Second Circuit Court of Appeals recognized a First Amendment right of public access to “docket sheets, which provide an index to the records of judicial proceedings.”<sup>37</sup> A tradition of accessibility surrounds this information because court clerks are generally required to maintain public records

32. See *infra* Part I.D for a discussion of the sealing of judicial records.

33. See FED. R. CIV. P. 26(c); see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (requiring that courts find good cause to support all confidentiality orders).

34. See *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86–89 (2d Cir. 2004) (discussing background of the controversy); CBA REPORT, *supra* note 3, at 12–15 (outlining history of the issue in Connecticut).

35. *Hartford Courant Co.*, 380 F.3d at 86.

36. See CONN. R. SUPER. CT. § 11-20(c)–(e), 11-20A (mandating that court notify public of motions to seal or close courtroom and articulate the specific overriding interests that justify sealing order).

37. *Hartford Courant Co.*, 380 F.3d at 91. The newspapers sought to unseal the docket sheets of the cases whose very existence had been super-sealed.



of court proceedings.<sup>38</sup> Further, access to docket sheets facilitates judicial review of the trial court's underlying sealing decision.<sup>39</sup> And, public disclosure ensures that the First Amendment right to attend judicial proceedings or inspect judicial records is more than "merely theoretical."<sup>40</sup> As recognized by the Second Circuit, disclosure of docket sheets furthers many of the rationales for open courts:

Precisely because docket sheets provide a map of the proceedings in the underlying cases, their availability greatly enhances the appearance of fairness. They have also been used to reveal potential judicial biases or conflicts of interest. In addition, docket sheets furnish an "opportunity both for understanding the system in general and its workings in a particular case." By inspecting materials like docket sheets, the public can discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed. Thus docket sheets do not constitute the kinds of government records that function properly only if kept secret, like grand jury proceedings.<sup>41</sup>

Accordingly, the existence of a dispute and its docket index are "public" components of a civil lawsuit to which a presumption of access attaches.

## 2. Pseudonyms

The actual identity of the parties to a civil lawsuit also falls within the public's right of access to judicial records and proceedings.<sup>42</sup> In requiring that a complaint "include the names of all the parties,"<sup>43</sup> and that every action "be prosecuted in the name of the real party in interest,"<sup>44</sup> the Federal Rules of Civil Procedure "provide no exception that allows parties to proceed anonymously or under fictitious names such as initials."<sup>45</sup> Never-

38. *Id.* at 94. In finding a qualified First Amendment right of access, the Second Circuit relied upon U.S. Supreme Court precedent evaluating claims of access to criminal proceedings. Under that precedent, the First Amendment right turns upon two complementary considerations: tradition of accessibility and functional utility. *See Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 8-9 (1986).

39. *Hartford Courant Co.*, 380 F.3d at 94.

40. *Id.* at 93. *See also* *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029 (11th Cir. 2005) (reminding courts that "public docket sheets are essential to provide 'meaningful access' to criminal proceedings").

41. *Hartford Courant Co.*, 380 F.3d at 95-96 (citations omitted). The Second Circuit ultimately remanded the case for a determination of whether the defendant court administrators were authorized to provide the required access. *Id.* at 86.

42. *Doe v. Provident Life & Acc. Ins. Co.*, 176 F.R.D. 464, 467 (E.D. Pa. 1997).

43. FED. R. CIV. P. 10(a).

44. FED. R. CIV. P. 17(a).

45. *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001).

theless, federal courts have implicitly authorized pseudonymous litigation in limited circumstances.<sup>46</sup>

Judge Richard Posner of the Seventh Circuit Court of Appeals recently criticized the overuse of pseudonyms in litigation, stating that “[j]udicial proceedings are supposed to be open . . . in order to enable the proceedings to be monitored by the public. The concealment of a party’s name impedes public access to the facts of the case, which include the parties’ identity.”<sup>47</sup> Additionally, the “public has a right to know who is utilizing the federal courts that its tax dollars support.”<sup>48</sup> While no national standard governs the practice, the parties’ identities are presumptively public information, and pseudonymous litigation is strongly disfavored.<sup>49</sup> Accordingly, a judge should not automatically grant the “privilege of suing or defending under a fictitious name . . . even if the opposing party does not object.”<sup>50</sup> Instead, a judge must independently determine whether exceptional circumstances or compelling privacy or security interests justify pseudonymity.<sup>51</sup> Generally, courts reserve such special circumstances to cases involving “children, rape victims and other particularly vulnerable parties,”<sup>52</sup> or matters of “utmost intimacy.”<sup>53</sup> Significantly, courts should not permit parties to conceal their identities simply to avoid economic injury or “to protect [their] professional or economic life.”<sup>54</sup>

### C. Discovery

Public access to documents and information generated in the discovery phase of a civil lawsuit still presents one of the most difficult and hotly

46. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

47. *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004).

48. *Coe v. County of Cook*, 162 F.3d 491, 498 (7th Cir. 1998). See also *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (“Identifying the parties . . . is an important dimension of publicness. The people have a right to know who is using their courts.”); *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573 (S.D.N.Y. 2004) (criticizing pseudonyms as contrary to the “public’s legitimate interest in knowing the facts at issue in court proceedings”).

49. *Doe v. City of Chicago*, 360 F.3d at 669.

50. *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d at 872.

51. See *Doe v. City of Chicago*, 360 F.3d at 669–70 (chastising trial court for failing to independently determine whether to permit plaintiff to conceal her name); *Doe v. Evans*, 202 F.R.D. 173, 175 (E.D. Pa. 2001) (indicating that the public’s interest in knowing parties’ identities should prevail unless the “party requesting pseudonymity demonstrates that her interests in privacy or security justify pseudonymity”); *Guerrilla Girls, Inc.*, 224 F.R.D. at 573 (recognizing court’s discretion to permit parties to proceed anonymously in “exceptional cases” or “special circumstances”).

52. *Roe v. City of Milwaukee*, 37 F. Supp. 2d 1127, 1129 (E.D. Wis. 1999) (permitting HIV-positive plaintiff to proceed under pseudonym).

53. *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (refusing to allow sexual assault victim to proceed under fictitious name).

54. *Guerrilla Girls, Inc.*, 224 F.R.D. at 573.

contested issues facing the courts today.<sup>55</sup> The public possesses no First Amendment right of access to the discovery process, which is not a “public component[] of a civil trial.”<sup>56</sup> Access to raw discovery does not assist the public in monitoring or understanding the judicial process or a court’s principal adjudicative function because raw discovery is never filed with, reviewed by, or relied upon by a court in its decision making. As such, many jurisdictions regard discovery as a private activity that carries no presumptive right of public access.<sup>57</sup>

A growing number of courts, however, regard “the fruits of pretrial discovery . . . in the absence of a court order to the contrary, presumptively public” unless the party opposing disclosure demonstrates good cause.<sup>58</sup> Under this view, the party seeking protection must articulate the specific prejudice or harm from disclosure. Even if the court finds a particularized need for confidentiality, it must balance the competing public and private interests before issuing a protective order.<sup>59</sup> The mutual agreement of the litigants cannot dispense with the court’s duty to make an independent and meaningful determination of good cause. Thus, while a stipulated protective order may suspend the need for the producing party to demonstrate good cause,<sup>60</sup> that party bears the ultimate burden of justifying continued confidentiality should it be subject to later challenge.<sup>61</sup>

55. The earliest debates concerning court secrecy focused primarily upon discovery confidentiality and agreed protective orders. See Marcus, *supra* note 2; Miller, *supra* note 2. See also Doré, *Secrecy by Consent*, *supra* note 2, at 324 n.168 (identifying other early commentary concerning discovery confidentiality).

56. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984).

57. See Estate of Frankl v. Goodyear Tire & Rubber Co., 853 A.2d 880, 886 (N.J. 2004) (“The universal understanding in the legal community is that unfiled documents in discovery are not subject to public access.”). Although the public may possess no presumptive right of access, the litigants may voluntarily disclose discovery documents to whomever they please unless barred from doing so by a protective order. *Id.* at 886 n.5 (citations omitted).

58. Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1210 (9th Cir. 2002) (“Generally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows ‘good cause’ why a protective order is necessary.”).

59. *Id.* at 1211. Even jurisdictions that find no presumption of access to unfiled discovery are revisiting that view. See Estate of Frankl, 853 A.2d at 887 (referring to bar committee question of whether New Jersey Supreme Court should “maintain the position that unfiled discovery is insulated from forced public access”).

60. Much of the debate surrounding discovery confidentiality concerns stipulated protective orders issued at the inception of litigation. The parties agree to these orders in order to minimize discovery disputes and eliminate the need to litigate confidentiality on a document-by-document basis. Such orders permit the litigants to self-designate documents as “confidential” prior to producing them in discovery. Unless challenged by the requesting party, this designation controls the subsequent use and disclosure of the confidential information. An agreed protective order will typically prevent public disclosure of the confidential information, restrict its use to the preparation, trial, or settlement of the case at hand, and require its return or destruction upon resolution of the controversy. If the parties must subsequently file any designated information with the court, they must do so under seal. Further, the agreed restrictions on disclosure continue after resolution of the dispute and frequently become part of any confidential settlement between the parties. By facilitating the cooperative exchange of discovery,

Agreed protective orders frequently provide for the sealing of any confidential discovery that is subsequently filed in connection with a motion or other application to the court.<sup>62</sup> Most courts distinguish between unfiled and filed discovery in evaluating the public's right of access.<sup>63</sup> As discussed in the following section, when discovery subject to a protective order is filed under seal, that information may qualify as a judicial record subject to a strong presumption of public access.

#### D. Sealed Records and Files

As illustrated by the recent secrecy scandal in Connecticut, most sunshine in litigation reforms center upon the sealing of judicial records.<sup>64</sup> Under these statutes and rules, neither the mere agreement of the parties nor a generalized interest in settlement will justify the sealing of court documents and files.<sup>65</sup> Instead, judicial records and proceedings trigger a

these umbrella protective orders can be an extremely valuable tool in complex cases involving significant quantities of documents. The confidentiality debate questions whether this interest in facilitating the expeditious discovery and ultimate settlement of a case constitutes good cause, in itself, to issue a protective order. *See generally* Doré, *Secrecy by Consent*, *supra* note 2, at 332–44 (examining controversy surrounding stipulated discovery protective orders).

61. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) (requiring the producing party “to make an actual showing of good cause for . . . continuing protection” of unfiled documents produced under a stipulated protective order).

62. *See* Doré, *Secrecy by Consent*, *supra* note 2, at 335 & n.213 (describing standard features of a stipulated protective order).

63. *Foltz*, 331 F.3d at 1134–35; *Phillips*, 307 F.3d at 1212.

64. *See, e.g.*, CAL. APP. R. 12.5; CAL. TRIAL & PRETRIAL R. 243.1–243.4 (prescribing procedures for sealing of court records in trial and appellate courts); CONN. R. SUPER. CT. § 11-20A (prohibiting sealing of materials on file or lodged with the court in connection with a court proceeding absent notice to interested parties and affirmative trial court findings); DEL. SUPER. CT. R. CIV. P. 5(g); DEL. R. CHANCERY CT. 5(g); DEL. SUP. CT. R. 9(bb) (requiring judicial determination that good cause exists for continued sealing of court records); GA. UNIFORM R. SUPER. CT. 21 (establishing procedural and substantive requirements for sealing of judicial records); IDAHO CT. ADMIN. R. 32(f) (requiring that court make factual finding “as to whether the interest in privacy or public disclosure predominates” before sealing judicial records in least restrictive fashion); IND. CODE ANN. § 5-14-3-5.5 (West 2002) (requiring specific balancing of interests, findings of fact, and conclusions of law before sealing “judicial public record”); LA. CODE CIV. PROC. ANN. art. 1426 (C)–(E) (2005) (prohibiting sealing of records if information relates to a public hazard); MASS. UNIF. R. IMPOUNDMENT P. 1, 7 (directing that the court consider enumerated “relevant factors” in deciding to impound papers, documents, and exhibits); MICH. CT. R. 8.119(F)(4) (limiting the court’s discretion to seal “documents and records of any nature that are filed with the clerk”); UNIF. R. N.Y. STATE TRIAL CTS. § 216.01 (requiring written finding of good cause and consideration of public interest before sealing court records); S.C. R. CIV. P. 41.1 (establishing balancing factors to guide courts in deciding whether to seal documents); TEX. R. CIV. P. 76a (creating presumption of public access to “court records”). For an example of recent local federal rules imposing similar restrictions on the sealing of judicial records, *see, e.g.*, D.N.J. LOCAL CIV. R. 5.3 (adopted 2005; governing motions to seal or otherwise restrict public access); D.S.C. LOCAL CIV. R. 5.03(A) (adopted 2001; providing mandatory procedures for filing of documents under seal).

65. *See, e.g.*, CONN. R. SUPER. CT. § 11-20A(c) (stating that “agreement of the parties to seal . . . shall not constitute a sufficient basis for the issuance of such an order”); MASS. UNIF. R. IMPOUNDMENT

presumption of public access that can be rebutted only by a legitimate privacy or proprietary interest and a demonstrated need for confidentiality.<sup>66</sup> Accordingly, a number of jurisdictions currently prohibit the sealing of documents filed with the court unless procedural and substantive requirements are first satisfied.<sup>67</sup>

Although they differ in their specifics, most of these provisions mandate some form of public notice of any motion to seal and provide an opportunity for interested persons to intervene or otherwise be heard. Motions to seal generally must itemize the particular document(s) for which sealing is sought, identify a legitimate interest in confidentiality and the clearly defined and serious injury that would occur from disclosure, and explain why less restrictive alternatives than sealing do not exist.<sup>68</sup> A sealing order can be no broader than necessary to protect the identified interest and must be supported by specific findings of fact.<sup>69</sup> In some cases, rules direct courts to consider explicit public interests, such as public health and safety, the administration of public office, the operation of government, or the public significance of the lawsuit.<sup>70</sup>

The public cannot monitor or understand its judges or the judicial system without access to documents, testimony, exhibits, or other information relevant to the judicial function. The presumption of access is thus at its strongest with respect to documents central to the court's adjudication of a dispute.<sup>71</sup> Thus, even discovery subject to a stipulated protective order will

P. 7 (noting that party agreements are insufficient in themselves to constitute good cause necessary to impound papers, documents, or exhibits).

66. See Doré, *Secrecy by Consent*, *supra* note 2, at 378–82 (discussing the presumption of public access to judicial records). Most jurisdictions do not vary the strength of the presumption with the type of judicial record at issue or its role in the court's adjudication of the case. The Second Circuit has refined the analysis to calibrate the strength of the presumption to the role the records or testimony play in the courts' determination of the litigants' substantive rights. Under that view, the need for public monitoring is at its strongest when the court performs its core dispute-resolving function. If a particular record would only minimally aid in public oversight of the judicial function, the presumption is weak or merely predictive. See *United States v. Amodeo*, 71 F.3d 1044, 1049–50 (2d Cir. 1995). I have previously suggested that this approach may assist courts in determining confidentiality of other information produced during the course of a civil lawsuit. See generally Doré, *Secrecy by Consent*, *supra* note 2.

67. See *supra* note 64.

68. See, e.g., D.N.J. LOCAL CIV. R. 5.3(c)(2) (describing requirements of motions to seal); D.S.C. LOCAL CIV. R. 5.03(A) (stating mandatory procedures for filing of documents under seal).

69. See CONN. R. SUPER. CT. § 11-20A(d).

70. See, e.g., FLA. STAT. ANN. § 69.081 (West 2004) (prohibiting concealment of public hazards); LA. CODE CIV. PROC. ANN. art. 1426 (C)–(E) (2005) (prohibiting sealing of records relevant to public hazard); S.C. R. CIV. P. 41.1 (directing court to balance many factors including “the public or professional significance of the lawsuit” and “the public interest, including . . . public health and safety”); TEX. R. CIV. P. 76a (creating presumption of public access to “court records” that “have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government”).

71. See *supra* note 66.

trigger an exceptionally strong presumption of access when attached to a dispositive motion that “adjudicates substantive rights and serves as a substitute for trial.”<sup>72</sup>

Moreover, because a court must opt for the least restrictive alternative to sealing<sup>73</sup> and the litigants must demonstrate a particularized need for confidentiality, courts are especially hesitant to seal the entire record in a case. Without particularized review of the contents of a court file, a judge cannot assess the role any particular record plays in its decision making or the corresponding need for public access. Accordingly, the entire file in a case can be sealed only in exceptional or “extreme cases” that implicate a “compelling interest in secrecy.”<sup>74</sup> Absent such a compelling interest, neither party agreement, nor an interest in promoting settlement, should warrant “hid[ing] a whole case from view.”<sup>75</sup>

#### *E. Judicial Opinions, Decisions, Orders, and Judgments*

Public monitoring and understanding of the judicial process require disclosure of documents relevant and useful to a court’s determination of the litigants’ substantive rights. A court’s orders, judgments, and opinions that resolve the factual and legal merits of a civil dispute are the “quintessential” product of this adjudicative function.<sup>76</sup> As recently reiterated by the Third Circuit, “[j]udicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at

72. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). *See also id.* at 1136 (holding that stipulated protective order did not rebut presumption when protected discovery was filed under seal as attachment to dispositive motion). In contrast, if discovery subject to a protective order is filed in connection with a non-dispositive motion such as a motion to compel or for sanctions, the trial court’s prior determination of good cause may rebut any presumption of access and shift the burden to the party seeking disclosure. *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). That is, both unfiled discovery and discovery filed for non-adjudicative purposes are governed by same “good cause” standard of Rule 26(c).

73. Options narrower than wholesale closure, such as redaction of private, proprietary, or privileged information, frequently exist. *See Foltz*, 331 F.3d at 1137 (holding sealing order overbroad because private information could easily be redacted).

74. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002). *See also Doré, Secrecy by Consent*, *supra* note 2, at 391–92 (discussing the sealing of the entire record in a civil case); *Doré, Settlement*, *supra* note 2, at 819–20 (discussing requests to seal record pursuant to confidential settlement).

75. *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (noting that “the parties’ confidentiality agreement can not require a court to hide a whole case from view”). *See also Hagestad v. Tragesser*, 49 F.3d 1430, 1434–35 (9th Cir. 1995) (holding that trial court failed to articulate supporting reasons to seal entire record pursuant to parties’ compromise); *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) (finding it “immaterial” that sealing of entire record was “an integral part” of court-facilitated settlement).

76. *EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996).

a specific decision.”<sup>77</sup> In addition to explicating the court’s decisions, access to court orders, opinions, and judgments contributes to the development of the common law and the principle of stare decisis. Judicial precedents are “valuable to the legal community as a whole,” and are thus “not merely the property of private litigants.”<sup>78</sup>

Such core judicial work product deserves an exceptionally strong presumption of public access. Absent exceptional circumstances, a court should refuse to seal its opinions or orders<sup>79</sup> and deny requests to vacate its judgments, even if the parties have conditioned settlement on confidentiality.<sup>80</sup>

### F. Civil Trial

A trial is a presumptively public phase of a civil lawsuit to which even a First Amendment right of access likely attaches.<sup>81</sup> In addition to the right to attend and observe trial proceedings, the public has a qualified right to inspect evidence introduced at a civil trial.<sup>82</sup> Unlike unfiled discovery, such evidence has been screened for admissibility and relevance and is central to the court’s adjudication of the merits. Thus, notwithstanding party consent, “only the most compelling showing” of a need for confidentiality can justify sealing testimony or exhibits introduced at trial.<sup>83</sup>

77. *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d Cir. 2004).

78. *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994). The public value of judicial decisions helps explain the continuing controversy relating to unpublished opinions. See generally Martha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995).

79. See *Nat’l Children’s Ctr.*, 98 F.3d at 1410 (holding that trial court erroneously sealed its own consent decree).

80. *U.S. Bancorp Mortgage Co.*, 513 U.S. at 29 (holding that only “exceptional circumstances” can justify vacatur of civil judgments and that “exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur”). For a discussion of settlement and vacatur, see generally Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Resnik, *Whose Judgment?*, *supra* note 2.

81. See *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (holding that First Amendment right of public access extends to civil trials); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (indicating that the press and public possess the First Amendment right to attend civil proceedings).

82. *In re NBC*, 635 F.2d 945, 952 (2d Cir. 1980).

83. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993). See generally, Doré, *Secrecy by Consent*, *supra* note 2, at 371–72. Of course, once trial exhibits have been returned to the parties following the trial and appeal of a case, they are no longer judicial records subject to compelled disclosure. See *Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3d Cir. 1988).

### G. Settlement

Trial as a method of civil dispute resolution is quickly “vanishing” and civil lawsuits are increasingly resolved through pretrial adjudication or private settlement.<sup>84</sup> Although empirical studies and academic symposia continue to ponder the reasons for this decline in trial rates, many partially attribute it to the judicial promotion of settlement and the increasing diversion of disputes into alternative dispute resolution.<sup>85</sup> Settlement straddles the divide between civil litigation and ADR. The approach toward settlement confidentiality thus helps to illuminate the current dichotomy between secrecy in litigation and secrecy in ADR.

Unless judicial approval of settlement is required by statute or court rule,<sup>86</sup> the parties to a civil lawsuit possess wide latitude to confidentially settle their dispute through stipulated dismissal. In such cases, confidentiality is treated solely as a matter of private contract. Litigants can promise not to disclose the existence, terms, or amount of their compromise or to refrain from discussing the facts underlying their dispute.<sup>87</sup> Because the settlement is never filed, the court lacks discretion to police its terms or mandate its public disclosure.<sup>88</sup>

Frequently, however, litigants additionally request judicial assistance to ensure settlement confidentiality.<sup>89</sup> Settling parties may file their compromise with the court, seeking court approval, the retention of post-dismissal enforcement jurisdiction, or the entry of a consent decree. Settlement may also be conditioned upon the court’s sealing of judicial records and files or the continued maintenance of a stipulated protective order that governed discovery produced in the settled suit. Or, litigants may ask that

84. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (reporting that percentage of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002); Patricia Lee Refo, *The Vanishing Trial*, LITIGATION, Winter 2004, at 1, 2 (reporting that rate of case termination by summary judgment rose from 2.8% in 1960 to 7.7% in 2000).

85. See Refo, *supra* note 84, at 58 (suggesting that alternative dispute resolution contributes to the declining trial rates).

86. In order to bind absent class members, a court must approve the settlement of any certified class action as “fair, reasonable, and adequate.” FED. R. CIV. P. 23(e)(1)(A), (C). See also FED. R. CIV. P. 23.1 (requiring court approval of settlement of shareholder derivative suits).

87. See generally Doré, *Settlement*, *supra* note 2, at 798–800 (examining confidentiality through private contract).

88. See *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139 (2d Cir. 2004) (acknowledging that filing of stipulation of dismissal generally divests court of all jurisdiction over a case).

89. See generally Doré, *Settlement*, *supra* note 2, at 798–804 (discussing reasons why litigants may wish to involve the court in their settlements).



the court issue a confidentiality order that enhances compliance with non-disclosure agreements and deters third-party discovery requests.<sup>90</sup>

Whether directed by statute or court rule, or motivated by the broader public interest, courts appear increasingly reluctant to blindly endorse these stipulated requests for settlement confidentiality. As passionately voiced by Chief Judge Joseph Anderson of the South Carolina federal district court,

Court-ordered secrecy is an issue that we in the third branch of government cannot overlook. True, court-ordered secrecy occurs in a small (though underreported) number of cases. But is it usually the very cases that are undeserving, primarily cases involving conduct with the potential for future harm, in which government-enforced secrecy is sought.

. . . [J]udicial officers at all levels must be ever-conscious of the sometimes harmful consequences—to future litigants and to our system of justice—of acquiescing in court-ordered secrecy for the sake of a settlement. A judge's signature represents a public act of a public official. Litigants should not be allowed to appropriate that signature by merely handing up a consent order, especially one that restricts access to information about the operation of the third branch of government.<sup>91</sup>

Court rules in many jurisdictions thus prohibit or restrict the sealing of settlement agreements.<sup>92</sup> Confidentiality clauses do not bind the court, and settling parties “cannot expunge the public interest [in judicial records and files] by the simple expedient of filing a stipulation of dismissal with the court.”<sup>93</sup> Instead, courts retain continuing supervisory power over their own records “[s]o long as they remain under the aegis of the court,” and, as the “primary representative of the public interest, . . . [the court] is duty-

90. A confidentiality order enforceable by contempt arguably deters unauthorized disclosures better than a private suit for breach of a confidentiality agreement. Likewise, while a private confidentiality agreement will not bind third parties, a confidentiality order may be recognized by other courts and prevent other litigants from discovering the protected information. See Doré, *Settlement*, *supra* note 2, at 802–03.

91. Anderson, *supra* note 2, at 750. Chief Judge Anderson was the architect of the first-in-the-nation local federal rule that prohibited the sealing of settlements filed with the court. See D.S.C. LOCAL CIV. R. 5.03.

92. See, e.g., D.S.C. LOCAL CIV. R. 5.03 (prohibiting sealing of settlement agreements filed with the court); ARK. CODE ANN. § 16-55-122 (2004) (voiding settlement agreement or provision concealing environmental hazard); ARK. CODE ANN. § 25-18-401 (2004) (prohibiting governmental agency from agreeing to confidential settlement or seeking secrecy order concerning settlement terms); CAL. CIV. PROC. CODE § 128 (West Supp. 2006) (disfavoring stipulated reversal or vacatur of judgments); N.C. GEN. STAT. ANN. § 132-1.3 (West 2000) (restricting agencies of government or its subdivisions from entering into confidential settlements without “overriding interest”); OR. REV. STAT. ANN. § 17.095 (West 2005) (prohibiting public body from entering into confidential settlement); S.C. R. CIV. P. 41.1 (establishing factors that courts should balance in deciding whether to seal settlement agreements); TEX. R. CIV. P. 76a (creating presumption of public access to “court records” that include unfiled settlement agreements and unfiled pretrial discovery that “have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government”).

93. *Gambale*, 377 F.3d at 140, 142 n.6.

bound . . . to review any request to seal,” even after the parties have settled.<sup>94</sup>

Thus, only “good cause” will justify the entry or continued maintenance of any confidentiality order. A general interest in promoting settlement will not alone constitute good cause. A court must additionally weigh any particularized need for confidentiality (in achieving settlement or protecting legitimate personal or proprietary interests) against any countervailing public interest in disclosure.<sup>95</sup>

Although legitimate public interests may be difficult to identify, several categories commonly surface. For example, disputes involving a public official, government entity, or the administration of public office implicate a strong public interest in disclosure.<sup>96</sup> Access to these cases facilitates public monitoring and accountability of the judiciary, as well as the government itself—a prime objective of federal and state freedom of information, open meeting, and “right to know” laws.<sup>97</sup>

Sunshine statutes and rules also frequently target settlements relevant to public health, welfare, and safety.<sup>98</sup> Although admittedly ill-defined and difficult to determine without prejudging the merits of a controversy, this factor reflects a concern with the repeat player whose employment practices, defective products, deceptive trade violations, or other alleged misconduct affects persons other than the immediate parties, including other

94. *Id.* at 141 (quoting *Citizens First Nat’l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)).

95. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786–88 (3d Cir. 1994).

96. A number of the sunshine statutes focus exclusively on settlements by public or government entities. *See* ARK. CODE ANN. § 25-18-401 (prohibiting governmental agency from agreeing to confidential settlement or seeking secrecy order concerning settlement terms); N.C. GEN. STAT. ANN. § 132-1.3 (restricting government agencies from entering confidential settlements without “overriding interest”); OR. REV. STAT. ANN. § 17.095 (precluding public entity from entering confidential settlement); S.C. R. CIV. P. 41.1(c) (prohibiting court from sealing settlement of public body or institution).

97. A court may also determine whether the information for which court protection is sought is otherwise accessible under the federal Freedom of Information Act or its state equivalent. Like the presence of a government party, this related factor argues against granting any confidentiality order absent compelling privacy interests. *See* Janice Toran, *Secrecy Orders and Government Litigants: “A Northwest Passage Around the Freedom of Information Act”?*, 27 GA. L. REV. 121, 177, 180–81 (1992) (cautioning courts to consider impact of confidentiality order on Freedom of Information requests); Doré, *Settlement*, *supra* note 2, at 809–10 (examining these related public interest factors).

98. *See, e.g.*, FLA. STAT. ANN. § 69.081 (West 2004) (prohibiting concealment of public hazards); LA. CODE CIV. PROC. ANN. art. 1426 (C)–(E) (2005) (prohibiting protective order regarding discovery or sealing of records if information relates to public hazard); TEX. R. CIV. P. 76a (creating presumption of public access to “court records” that include unfiled settlement agreements and unfiled pretrial discovery that “have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government”); WASH. REV. CODE ANN. § 4.24.611 (West 2005) (restricting confidentiality provisions in court order or private agreement that involve product liability or hazardous substance claims).

employees, consumers, communities, or markets.<sup>99</sup> A confidentiality order in such cases may “deny similarly situated plaintiffs, potential victims, regulatory authorities, or the media timely access to information regarding a continuing hazard.”<sup>100</sup>

Finally, courts are especially reluctant to endorse any confidentiality pact that suppresses evidence potentially relevant to other disputes. While settling parties undoubtedly wish to shield themselves from future lawsuits or additional liability, confidentiality clauses in a settlement cannot bind persons not party to that compromise.<sup>101</sup> Thus, one of the most compelling reasons to modify or vacate a stipulated protective order is to permit the sharing of relevant information and discovery with other litigants.<sup>102</sup> While perhaps impeding the settlement of the case-at-hand, discovery sharing fosters long-run efficiency and fairness by avoiding the needless duplication of discovery and its attendant unnecessary expense.<sup>103</sup> In a similar vein, courts often hesitate to endorse or enforce confidentiality clauses that “gag” settling parties from providing testimony or otherwise accessible relevant evidence to other litigants or regulatory authorities.<sup>104</sup>

## II. THE SECRET ENVIRONMENT OF ADR

Under traditional “bipolar” thinking, disputants choose between public and private dispute resolution, with litigation and ADR presenting alternative fora for resolving controversies or vindicating rights.<sup>105</sup> The ability to

99. See *Kalinauskas v. Wong*, 151 F.R.D. 363, 366 (D. Nev. 1993) (noting that public interest grows more pressing as additional individuals are harmed by identical or similar action).

100. Doré, *Settlement*, *supra* note 2, at 811.

101. See *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003) (suggesting that parties have no entitlement to judicial protection from future litigation); *Kalinauskas*, 151 F.R.D. at 367 (stating that confidentiality agreements “cannot bind parties who do not sign them”).

102. See *Foltz*, 331 F.3d at 1131 (“This court strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation.”). See also VA. CODE ANN. § 8.01-420.01 (2001) (providing that protective orders issued in personal injury or wrongful death cases shall not prohibit sharing of discovery in similar or related matters).

103. *Foltz*, 331 F.3d at 1131 (contending that discovery sharing “advances the interests of judicial economy by avoiding the wasteful duplication of discovery”).

104. See *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1133–34 (N.D. Cal. 2002) (holding that confidentiality agreement signed by former employees did not preclude them from disclosing non-privileged information regarding defendant’s wrongdoing); *Kalinauskas*, 151 F.R.D. at 365 (refusing to “condone the practice of ‘buy[ing] the silence of a witness with a settlement agreement’”); *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 241 (S.D.N.Y. 1997) (hesitating to “seal existing evidence that would ordinarily be accessible to other litigants”); see also *infra* Parts III.A.3 and B (examining discovery of confidential arbitrations and mediations).

105. Reuben, *Constitutional Gravity*, *supra* note 12, at 956 (rejecting such a bipolar view and advocating a “unitary” theory of “binding public civil dispute resolution”). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), the United States Supreme Court held that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” See also Reuben,

resolve a dispute in private with minimal public exposure motivates parties to select ADR over litigation<sup>106</sup> and has undoubtedly fueled its growing popularity.<sup>107</sup> The opaque environment of ADR, as described below, however, raises concerns similar to those posed by court secrecy<sup>108</sup> and thus jeopardizes legitimate public interests in disclosure.

### A. Arbitration Confidentiality

#### 1. Sources of Arbitration Confidentiality

As with virtually all aspects of ADR, the confidentiality of arbitration rests upon principles of self-determination and party autonomy.<sup>109</sup> When

*Constitutional Gravity*, *supra* note 12, at 986 (stating that “ADR does not provide a day in court, but rather an alternative to a day in court”); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 209 (2004) (stating that “[a]rbitration is simply an alternative method for resolving disputes and vindicating rights”).

106. See Llewellyn Joseph Gibbons, *Private Law, Public “Justice”: Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 771 (2000) (indicating that “individuals choose arbitration solely in the hope of keeping some facts private”); Resnik, *Procedure as Contract*, *supra* note 16, at 624 (suggesting that ADR “is often chosen because it has the advantage of private decision making, made in the ‘shadow’ rather than in the light”); Reuben, *Constitutional Gravity*, *supra* note 12, at 1086 (indicating that privacy is “an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum”); Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 561 (1997) [hereinafter Sherman, *Confidentiality in ADR*] (stating that ADR is “often touted as a means of resolving disputes in private to avoid public exposure”).

107. See Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1409, 1412 (2002) (describing “increasing diversion” and “flight” to private dispute resolution); Sherman, *Confidentiality in ADR*, *supra* note 106, at 542 (linking “spectacular rise” in ADR with confidentiality of process); Weinstein & Wimberly, *Secrecy in Law and Science*, *supra* note 2, at 20 (suggesting that privacy may explain growing use and popularity of ADR).

108. See Gibbons, *supra* note 106, at 771 (noting that privacy of arbitral process and award is “one of the elements of alternative dispute resolution that separates it from the public courts”); Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933, 936 (2005) (characterizing arbitration as “significantly more private and focused” than public courtrooms); Reuben, *Constitutional Gravity*, *supra* note 12, at 957 (distinguishing ADR procedures that “operate outside of public view” from constitutional procedures designed to “assure public witness”).

109. ADR participants possess wide reign to design their dispute resolution process as they see fit. See James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 173 (2001) (listing “party self-determination” and “voluntariness” as two core principles of mediation); Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. KAN. L. REV. 583, 619 (2004) (criticizing laissez-faire approach that permits parties to stipulate to whatever arbitration procedure they wish); Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199, 1200 (2000) [hereinafter Cole, *Managerial Litigants*] (identifying party consent as the “nearly exclusive guiding principle for process design”); Moohr, *supra* note 17, at 443 (arguing that all ADR models are “grounded on the proposition that individual litigants should control and manage their suits”); Resnik, *Procedure as Contract*, *supra* note 16, at 624 (noting that public benefits of ADR “are presumed to flow from the reduction of conflict . . . predicated on the parties’ preferences”). See also *infra* Part IV.B (questioning whether party autonomy justifies arbitration confidentiality).

parties waive litigation in favor of the arbitral forum, they also commonly waive the openness of the courts for the secrecy of arbitration. Predispute arbitration agreements frequently contain express confidentiality provisions<sup>110</sup> or incorporate confidentiality by reference to specific arbitral rules.<sup>111</sup> Most major dispute resolution organizations mandate the confidentiality of arbitration proceedings<sup>112</sup> and tout privacy as a selling point for their services.<sup>113</sup> An arbitrator can bind the participants with a confiden-

110. In their study of pre-dispute arbitration clauses in consumer contracts, Professors Demaine and Hensler found that 13.5% of the arbitration clauses examined required that some aspect of the arbitration be confidential. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 69 (2004). See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) (confidentiality provision required that "[a]ny arbitration . . . remain confidential"); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 875 (D. Or. 2002) ("Borrower and Lender agree that the arbitration proceedings are confidential. The information disclosed in such proceedings cannot be used for any purpose in any other proceeding."); *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1171 (N.D. Cal. 2002) (arbitration agreement required that "award shall be kept confidential"); *Zuver v. Airtouch Commc'ns., Inc.*, 103 P.3d 753, 764 n.9 (Wash. 2004) (en banc) (arbitration agreement requiring that "[a]ll arbitration proceedings, including settlements and awards, under the Agreement will be confidential").

111. See, e.g., *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 272 (3d Cir. 2004) (examining arbitration clause in employment contract that incorporated confidentiality provision by reference to rules of American Arbitration Association). See also *Gibbons*, *supra* note 106, at 777 (describing possible legal sources of arbitration privacy).

112. A survey of the rules of major ADR providers confirms the importance of confidentiality to arbitration participants.

Rule 18 of the American Arbitration Association's ("AAA") National Rules for the Resolution of Employment Disputes, for example, provides, "The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." American Arbitration Association, National Rules for the Resolution of Employment Disputes, <http://www.adr.org/sp.asp?id=22075> (last visited Feb. 15, 2006) [hereinafter AAA, Employment Rules].

Rule 26(a) of JAMS Comprehensive Arbitration Rules & Procedures provides, "JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision." JUDICIAL ARBITRATION & MEDIATION SERVS., COMPREHENSIVE ARBITRATION RULES & PROCEDURES 10 (2005), [http://www.jamsadr.com/images/PDF/comprehensive\\_arbitration\\_rules.pdf](http://www.jamsadr.com/images/PDF/comprehensive_arbitration_rules.pdf) [hereinafter JAMS, ARBITRATION RULES].

Rule 4 of the National Arbitration Forum ("NAF"), Code of Procedure, states,

Arbitration proceedings are confidential as permitted by law, unless all Parties agree otherwise. Arbitration Orders and Awards are not confidential and may be disclosed by the Parties.

The Arbitrator and Forum may disclose case filings, case dispositions, and other case information filed with the Forum as required by a Court Order.

NAT'L ARBITRATION FORUM, CODE OF PROCEDURE 5 (2005), [http://arbitrationforum.com/programs/code\\_new/2005\\_code.pdf](http://arbitrationforum.com/programs/code_new/2005_code.pdf).

See also American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule 23, <http://www.adr.org/sp.asp?id=22440> (last visited Feb. 15, 2006) [hereinafter AAA, Commercial Rules] ("The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary."); ARBITRATION FORUMS, INC., SPECIAL ARBITRATION FORUM: REFERENCE GUIDE 18 (2004), [http://www.arbfile.org/afstatic/res/Downloads/SpecialWorkbook/Revised\\_Special\\_Workbook\\_2004.pdf](http://www.arbfile.org/afstatic/res/Downloads/SpecialWorkbook/Revised_Special_Workbook_2004.pdf) ("All matters concerning an arbitration proceeding shall be held in strict confidence" by AF, the arbitrator, and all participants.).

113. The confidentiality policy of Global Arbitration and Mediation Service, for instance, states,

tiality order and sanction them for disclosures in violation of such order.<sup>114</sup> Thus, arbitration confidentiality is a creature of consent, particular institutional rule, or specific arbitral order.

## 2. Scope of Arbitration Confidentiality

Given its contractualist nature, the scope of arbitration privacy varies with the specific agreement, ADR service provider, and arbitrator. Generally, however, the arbitration process and its outcomes remain private.

Unlike the public courthouse, no set location for an arbitral proceeding exists.<sup>115</sup> No open docket notifies the public or the media of the filing of an arbitration claim or the existence of the dispute.<sup>116</sup> Discovery, if permitted, is generally limited in scope and restricted to use only in the arbitration proceedings.<sup>117</sup> Parties cannot share, and the public cannot access, evidence, testimony, briefs, motions, and other information disclosed.<sup>118</sup>

We at GAMS appreciate that confidentiality is one of the key reasons businesses select arbitration or mediation to resolve disputes. Your privacy is important to us. The proprietary information of your business is important to us as well. We will do everything possible to keep your business matters as confidential as possible. . . . We provide the most confidentiality as possible, so you can resolve your dispute without regard to such considerations.

Global Arbitration and Mediation Service, Confidentiality Policy, [http://www.globalarbitrationmediation.com/GAMS\\_confidentiality\\_policy.shtml](http://www.globalarbitrationmediation.com/GAMS_confidentiality_policy.shtml) (last visited Jan. 26, 2006) The policy also states, "Our rules and agreements prohibit the parties from discussing or releasing any information regarding the conduct, content or the outcome of the mediation process or arbitration procedure." *Id.*

114. See JAMS, ARBITRATION RULES, *supra* note 112, at 10 (stating in Rule 26(b), "The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information"); NAT'L ARBITRATION FORUM, CODE OF PROCEDURE, RULE 4 (1996) ("A Party who improperly discloses confidential information shall be subject to sanctions."). Breach of a confidentiality obligation "may be relitigated before the same arbitrator[,] . . . the source of future arbitrations, or . . . a dependent or independent basis on which to commence proceedings in a state court." Gibbons, *supra* note 106, at 777.

115. See AAA, Commercial Arbitration Rules, *supra* note 112, at Rule 22 (providing that "[t]he arbitrator shall set the date, time, and place for each hearing").

116. See Brenowitz, *supra* note 10, at 682 (complaining that lack of arbitral docket prevents disputes from coming to attention of "public's watchdogs").

117. An arbitration clause may prohibit discovery altogether and provide only for the exchange of evidentiary materials prior to the hearing. See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 164 & n.5 (5th Cir. 2004). If permitted, discovery in arbitration is much more restricted than in litigation and occurs at the agreement of the parties or the discretion of the arbitrator. See AAA, Employment Rules, *supra* note 112, at Rule 7 (conferring authority on arbitrator to order discovery).

118. See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1151 n.16 (agreement prohibited disclosure of the contents of arbitration); *Torrance Aames Funding Corp.*, 242 F. Supp. 2d 862, 875 (2002) (borrower agreed that information disclosed in arbitration with lender "cannot be used for any purpose in any other proceeding"); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1182 (Ohio Ct. App. 2004) (agreement prohibited consumer from sharing information with anyone regarding subject matter of arbitration).

Without permission, the public cannot attend arbitral hearings, which are generally open only to participants and their representatives.<sup>119</sup>

Absent party agreement, the forum makes no transcript of the proceedings.<sup>120</sup> Unless the rules of the arbitral forum so provide, the arbitrator is not required to provide any written findings of fact, conclusions of law, or explanation of the grounds for the award.<sup>121</sup> The award itself, which may consist solely of a concise, unsupported disposition, is generally not publicly filed,<sup>122</sup> and the parties may agree upon anonymity as well as confi-

119. See AAA, Employment Rules, *supra* note 112, at Rule 17 (“The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any other witness. The arbitrator also shall have the authority to decide whether any person who is not a witness may attend the hearing.”); AAA, Commercial Arbitration Rules, *supra* note 112, at Rule 23 (“The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.”); JAMS, ARBITRATION RULES, *supra* note 112, at 10 (stating in Rule 26(a), “JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding, . . . including the Hearing”); *id.* (stating in Rule 26(c), “The Arbitrator may exclude any non-Party from any part of a Hearing”).

120. See AAA, Commercial Arbitration Rules, *supra* note 112, at Rule 26 (requiring that parties procure stenographic record if desired); AAA, Employment Rules, *supra* note 112, at Rule 15 (requiring that parties procure stenographic record if desired); JAMS, ARBITRATION RULES, *supra* note 112, at 9 (in Rule 22(k)(i) permitting any party to arrange and pay for stenographic record); NAT’L ARBITRATION FORUM, *supra* note 112, at 32 (stating in Rule 35(F) that “[n]o record of a Hearing shall be kept unless agreed by all Parties or Ordered by the Arbitrator”).

121. See Moohr, *supra* note 17, at 402 (stating that awards are not generally filed and “are simple statements of the disposition of the claims that do not provide the reason for the award or an explanation of the grounds supporting it”). *But see* AAA, Employment Rules, *supra* note 112, at Rule 34(c) (requiring written reasons for award in employment dispute unless the parties agree otherwise).

122. Some arbitral rules do not regard arbitral awards themselves as confidential. See AAA, Employment Rules, *supra* note 112, at Rule 34(b) (making awards publicly available on a cost basis); NAT’L ARBITRATION FORUM, *supra* note 112, at 5 (providing in Rule 4 that “Awards are not confidential and may be disclosed by the Parties”). In other cases, however, either arbitral rule or party agreement will preclude public disclosure of the result of an arbitration, including the award. See, e.g., JAMS, ARBITRATION RULES, *supra* note 112, at 10 (in Rule 26(a) providing for confidentiality of arbitration award); Demaine & Hensler, *supra* note 110, at 69 (describing several confidentiality clauses in consumer arbitration agreements). See also *Ting*, 319 F.3d at 1151 n.16 (prohibiting disclosure of the result of arbitration or award); *Luna v. Household Fin. Corp.*, III, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002) (mandating that award be kept confidential); *Acorn v. Household Int’l, Inc.*, 211 F. Supp. 2d 1160, 1171 (N.D. Cal. 2002) (requiring that award be kept confidential); *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 764 n.9 (Wash. 2004) (en banc) (quoting arbitration clause that prevented disclosure of “[a]ll arbitration proceedings, including settlements and awards”).

dentiality.<sup>123</sup> Unless challenged on limited available grounds, the arbitral award becomes final and not subject to any public review whatsoever.<sup>124</sup>

### 3. Arbitration Secrecy and the Public Interest

Under the currently entrenched view of the United States Supreme Court, virtually all disputes, including those asserting statutory or public rights, are subject to binding arbitration.<sup>125</sup> The Federal Arbitration Act creates a strong public policy in favor of arbitration over litigation regardless of the claim or cause of action.<sup>126</sup> Thus, disputes involving employment discrimination, consumer protection, product liability, professional malpractice, personal injury, securities fraud, and antitrust claims have all been rerouted from litigation to the secret environment of arbitration. The privacy of the arbitral forum exacerbates many of the frequently decried problems associated with compelled arbitration of these claims.

#### a. *Public Interest in Underlying Dispute*

As previously discussed, in deciding whether to issue a protective, confidentiality, or sealing order, courts in litigation balance the need for privacy against any legitimate public interest in disclosure.<sup>127</sup> Disputes that affect public health, welfare, and safety, including “flagrant product defects, professional malpractice, or environmental pollution,” would seem to implicate a legitimate public interest whether resolved in a judicial or arbi-

123. For example, while the AAA National Rules for the Resolution of Employment Disputes make arbitral awards publicly available, the names of the parties and witnesses are not publicly available “unless a party expressly agrees to have its name made public in the award.” AAA, Employment Rules, *supra* note 112, at Rule 34(b). See also *Plaskett v. Bechtel Int’l, Inc.*, 243 F. Supp. 2d 334, 342–43 (D.V.I. 2003) (examining arbitration clause that prevented the inclusion of party name in arbitration award if requested by the party).

124. See *Moohr*, *supra* note 17, at 402–03 (explaining how an arbitration award is “virtually final,” given the nominal review permitted by federal arbitration statute). See also *infra* note 154 (examining limited judicial review of arbitration proceedings and awards).

125. The United States Supreme Court has expressly held that a number of statutory claims vindicating public rights are subject to arbitration, including employment discrimination, consumer, antitrust, and securities claims. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (Truth In Lending Act/Equal Credit Opportunity Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (RICO and Securities Exchange Act of 1934, § 10(b)); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (Sherman Act).

126. See *Gilmer*, 500 U.S. at 25 (holding that FAA manifests “liberal federal policy favoring arbitration agreements”).

127. See *supra* Part I.



tral courtroom.<sup>128</sup> Workplace discrimination threatens a national public policy broader than individual redress, and a dispute between employer and employee may “belong[] to the public as well as to the parties.”<sup>129</sup> Likewise, a standard consumer contract that is mass-marketed to “hundreds of thousands or even millions of individuals” implicates “an inherent public interest” in the interpretation and enforcement of its terms.<sup>130</sup> In permitting the parties to shroud these matters, arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs.<sup>131</sup>

### b. *Isolation of Claimants*

Relatedly, many have noted that the closed arbitral forum tends to favor the institutional “repeat player” over the “one-shot” participant.<sup>132</sup> Large employers, credit card companies, health providers, securities brokers, banks, mortgage companies, and financial institutions all contract with large numbers of similarly situated individuals who may all be affected by the same practice, scheme, or course of conduct. An arbitration clause isolates these individuals and forces them to resolve their dispute in private. The confidentiality of the arbitral forum prevents other similarly situated claimants from learning of the existence or substance of a dispute.<sup>133</sup> Arbitral privacy can thus deprive existing and potential claimants in litigation or arbitration of information and documents relevant to their

128. Sherman, *A Process Model*, *supra* note 14, at 1578–82 (suggesting need for states to consider competing policies underlying confidentiality in ADR). *See also* Thornburg, *supra* note 17, at 276 (identifying personal injury claims as a type of dispute that belongs in a public forum).

129. Moohr, *supra* note 17, at 460.

130. Gibbons, *supra* note 106, at 784 (recommending reexamination of privacy in e-arbitration of disputes arising out of mass-market contracts).

131. *See id.* at 788 (arguing that the private arbitral process shortcuts the “barometer of public need”); Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 755 (2005) (fearing secret settlements may permit public ignorance of “trends that affect public health”); Sternlight & Jensen, *supra* note 17, at 91 (commenting that press “cannot usually read and report on arbitration claims as they do complaints filed in court”); Thornburg, *supra* note 17, at 272 (contending that privatization of personal injury claims “can result in the public lacking information about important issues of health and safety and product reliability”).

132. *See, e.g.*, Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 97–104 (1974) (discussing repeat player advantages); Randall, *supra* note 105, at 219 n.130 (suggesting that repeat arbitral players possess better ability to identify and settle meritorious cases and to track and select arbitrators); Resnik, *Procedure as Contract*, *supra* note 16, at 668 (discussing “the power of repeat players . . . to set the parameters of law’s bargaining”); Reuben, *Constitutional Gravity*, *supra* note 12, at 1064–67 (discussing advantages that repeat players may obtain concerning arbitrator selection).

133. *See* Moffitt, *supra* note 131, at 756 (asserting that confidentiality may prevent a product liability plaintiff “from finding out if he or she is the only person ever to have a problem with [a] device”).

claims,<sup>134</sup> and it can impede them from proving a pattern or practice or intentional misconduct.<sup>135</sup> This again contrasts with litigation, where the sharing of information with similarly situated litigants frequently provides compelling justification to modify or vacate a confidentiality order.<sup>136</sup>

*c. Arbitration Privacy and Collective Action*

Arbitration confidentiality can work in tandem with another common feature of arbitration agreements—the waiver of class actions—to further impede cooperative resolution of similar claims against a common adversary.<sup>137</sup> Arbitration agreements frequently prohibit class or collective actions in either litigation or arbitration.<sup>138</sup> Arbitration privacy precludes information sharing among commonly aggrieved parties and the use of knowledge gained in individual arbitration for the mutual aid of others.<sup>139</sup> The prohibition on class and multiparty actions requires that claimants arbitrate their grievances separately without the informational, financial, or other incentives available in a collective action. This inability to share information and bring class actions can “greatly decrease the likelihood that any claims will be filed.”<sup>140</sup>

134. See Alfani & McCabe, *supra* note 109, at 197 (contending that the public is “entitled to every person’s evidence”); Resnik, *Procedure as Contract*, *supra* note 16, at 658–59 (discussing how ADR can limit access to information and shelter documents from subsequent disclosure in litigation). *But see* Eric J. Conn, *Hanging in the Balance: Confidentiality Clauses and Postjudgment Settlements of Employment Discrimination Disputes*, 86 VA. L. REV. 1537, 1562 (2000) (arguing that parties to settlement of employment discrimination disputes should not be held “hostage to some interest that is no concern of [theirs]”).

135. Randall, *supra* note 105, at 220 (contending that arbitration enables institutions to “minimize information available to potential claimants” and impede them from building a case).

136. See *supra* notes 101–04 and accompanying text.

137. See generally Sternlight & Jensen, *supra* note 17, at 88–90 (marshalling arguments against the waiver of class actions in arbitration agreements); John B. O’Keefe, Note, *Preserving Collective-Action Rights in Employment Arbitration*, 91 VA. L. REV. 823, 826–28, 840 (2005) (proposing “open arbitration” to facilitate “concerted activity for mutual aid” in absence of class arbitrations); see also *Luna v. Household Fin. Corp.*, III, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) (holding that confidentiality clause magnified the unfairness of the class action prohibition).

138. See Demaine & Hensler, *supra* note 110, at 65 (finding 30.8% of consumer arbitration clauses studied explicitly prohibited class actions and none of clauses examined explicitly permitted class actions); Sternlight & Jensen, *supra* note 17, at 75 (noting increasing number of arbitration clauses that “prevent consumers from bringing class actions against [companies] in either litigation or arbitration”). When an arbitration agreement is silent as to class actions, the arbitrator will determine whether it permits class arbitration. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

139. See O’Keefe, *supra* note 137, at 827–28 (contending that prohibition on employment class actions could constitute illegal interference with concerted activity unless open arbitration is required).

140. Sternlight & Jensen, *supra* note 17, at 90. Professors Sternlight and Jensen level numerous additional criticisms of arbitration clauses that waive consumer class actions, which the authors describe as “do-it-yourself tort reform.” See *id.* at 85–91, 103. States differ as to the enforceability of class action waivers in arbitration agreements. See *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456, 459 n.3 (Ct. App. 2005) (collecting conflicting authorities).

Even if individual claims are confidentially arbitrated, the prohibition on class actions effectively conceals entire disputes that would almost certainly be public if litigated in a judicial forum.<sup>141</sup> Class actions and other representative suits “are of particular public interest because they affect persons absent from the bargaining table, as well as the public-at-large.”<sup>142</sup> Accordingly, a “heavy burden” falls on those who would limit access to class action litigation,<sup>143</sup> which carries a robust presumption of public access.<sup>144</sup>

*d. No Publicly Accountable Guardian*

In a class or collective action, the judge guards the best interests of the absent class members and the general public.<sup>145</sup> No such guardian of the class or public interest exists in the secret arbitration of individual claims.<sup>146</sup> Indeed, an arbitrator charged with resolving a dispute arguably owes duties only to the participants that retain and pay her.<sup>147</sup>

141. See Sternlight & Jensen, *supra* note 17, at 90–91 (comparing widespread publicity accorded even small claims in litigation with typically private arbitration).

142. Doré, *Settlement*, *supra* note 2, at 807.

143. Friedenthal, *supra* note 2, at 75–76 (contending that absent class members cannot make “seasoned decision” if key information is kept secret).

144. See *In re Cendant Corp.*, 260 F.3d 183, 194, 196 (3d Cir. 2001) (applying heightened scrutiny to request to seal bids for class counsel); *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (discussing court’s “larger role” . . . in the resolution through settlement of suits “affecting the public interest”); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408–09 (1st Cir. 1987) (holding that judicial approval of consent decree creates strong presumption of public access).

145. See Doré, *Settlement*, *supra* note 2, at 807–08 (contending that the judge in a class action “plays a role beyond resolution of the case at hand and serves as guardian of a broader public interest”); Natalie C. Scott, Note, *Don’t Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 578 (2002) (describing judges as guardians of the class and as responsible to the public).

146. See Brenowitz, *supra* note 10, at 700 (contrasting class actions with arbitration where no neutral gatekeeper weighs the public interest).

Several ADR providers now offer class arbitrations. See, e.g., JUDICIAL ARBITRATION & MEDIATION SERVS., CLASS ACTION PROCEDURES (2005), [http://www.jams-endispute.com/images/PDF/JAMS\\_Class\\_Action\\_Procedures.doc](http://www.jams-endispute.com/images/PDF/JAMS_Class_Action_Procedures.doc). At least one of these providers recognizes the need for open arbitration of class claims. For example, Rule 9(a) of the AAA, Supplementary Rules for Class Arbitrations, provides,

The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

American Arbitration Association, Supplementary Rules for Class Arbitrations, <http://www.adr.org/sp.asp?id=21936> (last visited Feb. 15, 2006).

147. See *In re* [Sealed], 64 F. Supp. 2d 183, 184 (E.D.N.Y. 1999) (noting that “[c]ourts have obligations to the public that private arbitrators do not”); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1181 (Ohio Ct. App. 2004) (recognizing that “generally arbitration forums should be treated differently from courts”). *But see* American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, Preamble, <http://www.adr.org/sp.asp?id=21958> (last visited Feb. 15, 2006) (“Persons who act

Like courts, an arbitrator possesses substantial and “broad judicial powers” to conduct proceedings and enforce arbitral orders.<sup>148</sup> Like courts, arbitrators increasingly interpret, apply, and enforce antidiscrimination, consumer protection, and other statutory rights that vindicate important public values and goals.<sup>149</sup> In litigation, the presumption of access operates to ensure the public accountability of judges.<sup>150</sup> In contrast, the confidentiality of arbitration insulates the arbitral decision maker, who already possesses largely unchecked discretion, from similar public scrutiny and oversight.<sup>151</sup>

*e. Inaccessible Results and Reasoning*

As previously discussed, arbitral proceedings are not publicly docketed and are generally closed to non-participants. Unless requested by the parties, arbitrators are not required to issue written, reasoned opinions or to publish their awards or decisions.<sup>152</sup> Confidentiality thus conceals an arbitrator’s track record and prejudices other potential parties, as well as the public in general.

“One-shot” participants cannot easily or inexpensively access information concerning arbitrator bias, misconduct, or conflicts of interest nec-

as commercial arbitrators therefore undertake serious responsibilities to the public, as well as to the parties.”).

148. According to Professor Reuben, “Arbitrators are often statutorily vested with broad judicial powers to administer depositions and discovery, including subpoena and sanction powers. In addition, arbitrators often receive the same ‘judicial’ immunity from civil liability that is reserved exclusively for the states’ own constitutionally authorized judiciary.” Reuben, *Constitutional Gravity*, *supra* note 12, at 1005–06.

149. See *infra* Part II.A.3.f for a discussion of how confidentiality impedes the deterrent, declarative, and normative functions of employment and consumer laws.

150. Public oversight of judges and judicial work product serves as a principal rationale for open courts. See *supra* Part I.A.

151. As observed by Professor Reuben, “Transparency is closely aligned with accountability as a democratic value because it is transparency that makes accountability possible by permitting witness to government actions.” Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 *LAW & CONTEMP. PROBS.* 279, 289 (2004) [hereinafter Reuben, *Democracy*]. For a discussion of the limited judicial review applicable to arbitration, see *infra* note 154.

152. Without a reasoned opinion explaining the bases of an arbitral award, even the parties themselves will be left in the dark concerning the decision’s rationale. For that reason, some arbitral rules either require or permit written and reasoned awards in certain cases. See AAA, Employment Rules, *supra* note 112, at Rule 34(c) (requiring arbitrator to “provide written reasons for the award unless the parties agree otherwise”); AAA, Commercial Arbitration Rules, *supra* note 112, at Rule 42(b) (stating that “arbitrator need not render a reasoned award unless the parties request such an award . . . or unless the arbitrator determines that a reasoned award is appropriate”); NAT’L ARBITRATION FORUM, *supra* note 14, at Rule 37(G) (“An award shall not include any reasons, findings of fact or conclusions of law unless required by prior written agreement of the parties.”); JAMS, ARBITRATION RULES, *supra* note 112, at 9 (stating in Rule 24(g) that “[u]nless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award”).

essary for an informed selection of arbitrators.<sup>153</sup> Moreover, the public cannot assure itself that the increasing number of employment and consumer cases being diverted into arbitration are being resolved fairly and in the public interest. Although participants can sue to enforce or vacate an arbitral award, judicial review is limited to arbitrator misconduct and does not encompass misunderstanding or misapplication of the law or facts.<sup>154</sup> And, even this limited oversight will not occur if the participants never challenge the award in court.<sup>155</sup> Secrecy thus hampers accountability and jeopardizes public confidence in the arbitral process itself.<sup>156</sup>

*f. Confidentiality and Broader Policy Objectives*

Finally, the secrecy of arbitration contributes to a broader concern that arbitration itself cannot vindicate important deterrent, declarative, and normative policies underlying various public rights. Professor Moohr has articulated this concern with respect to the arbitration of employment claims:

Litigation of employment discrimination claims generates several enforcement mechanisms that are integral to securing the end of workplace discrimination. First, judicial decisions, which speak with the authority of the state, provide general deterrence of future violators. Second, the courts develop and refine the law of employment discrimination, establish precedents, and define a uniform standard. Finally, the judicial process educates the community and forms public values, a crucial

153. See Brenowitz, *supra* note 10, at 696–97 (arguing that inability to scrutinize work of mediators and arbitrators conceals conflicts of interest and improper behavior); Gibbons, *supra* note 106, at 787 (contending that the publication of awards checks arbitral abuse); Moohr, *supra* note 17, at 453 (proposing that public scrutiny permits employees to access information concerning arbitration and arbitrators). Indeed, this information asymmetry has led some courts to invalidate as unconscionable arbitration confidentiality provisions. See *infra* Part III.A.1.a.

154. The grounds set forth in the Federal Arbitration Act (“FAA”) or state laws patterned on the Uniform Arbitration Act are limited to situations involving arbitrator fraud, misconduct, evident partiality, or ultra vires acts. See FAA, 9 U.S.C. § 10 (2000); UNIF. ARBITRATION ACT § 23 (2000). Case law suggests that a court can also vacate an award that is in “manifest disregard of the law.” See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (stating that “parties [are] bound by [an] arbitrator’s decision not in ‘manifest disregard’ of the law”); see also Cole, *Managerial Litigants*, *supra* note 109, at 1233–35 (discussing judicial review of arbitration); LaRocca, *supra* note 108, at 940 (stating that standards for review “ensure a high degree of judicial deference to arbitrators”); Moohr, *supra* note 17, at 450 (noting that arbitration awards are “virtually final” given “quite narrow” grounds for judicial review); Reuben, *Democracy*, *supra* note 12, at 300 (describing limited substantive review of arbitral decisions); Thornburg, *supra* note 17, at 266 (noting that only “‘manifest disregard’ of the law” will justify vacating an arbitral award).

155. See *infra* Part III.A for a discussion of the limited opportunities courts possess to police arbitration confidentiality.

156. See Gibbons, *supra* note 106, at 787 (arguing that publication of arbitral awards will promote the appearance of fairness and develop public confidence in arbitral system); Thornburg, *supra* note 17, at 263 n.51 (suggesting that lack of transparency in arbitration impedes fairness and impartiality of process).

undertaking when a law seeks to change public sentiment. Arbitration, because it is a nongovernmental, confidential, and final forum, does not generate these enforcement mechanisms; thus, it is less effective in achieving the public policy objective [of ending employment discrimination].<sup>157</sup>

Others level much the same criticism concerning the arbitration of consumer and personal injury claims.<sup>158</sup>

*g. Need for Scrutiny*

Whether arbitration can effectuate broader social policies lies beyond the scope of this Article. Arguably, the United States Supreme Court foreclosed these wholesale criticisms when it held that arbitration can serve remedial and deterrent functions.<sup>159</sup> Without public knowledge of a dispute or its resolution, however, prospective violators cannot fully appreciate the costs of engaging in prohibited conduct.<sup>160</sup> A private arbitral decision affects only the conduct of the participants and cannot guide the primary behavior of others. Unlike publicly available court decisions, unpublished arbitral awards do not communicate public values or educate the community about the underlying law. Perhaps enough of these cases will continue to be litigated so as to fulfill these normative and declarative functions. Because the privacy of arbitration does impede these public purposes, however, the narrower issue of confidentiality deserves separate and closer scrutiny.

157. Moohr, *supra* note 17, at 400.

158. See Gibbons, *supra* note 106, at 793 (contending that transparency in consumer arbitrations will serve important public purposes); Reuben, *Constitutional Gravity*, *supra* note 12, at 1014 (recognizing that arbitration negates “any possibility that the dispute’s resolution will have any public educational or deterrent value”); Thornburg, *supra* note 17, at 255, 270–73 (contending that mandatory pre-dispute arbitration of personal injury claims “threatens the retributive, economic, and communitarian goals of tort law” and “[a]t the extreme, . . . could make all tort policy considerations disappear altogether”). *But see* Conn, *supra* note 134, at 1568–72 (questioning assumption that ADR thwarts public policy goals of Title VII).

159. In affirming the arbitrability of age discrimination claims, the Court in *Gilmer v. Interstate/Johnson Lane Corp.* held that “[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” 500 U.S. 20, 28 (1990) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). Professor Moohr criticizes the Court’s assumption, arguing that it subsumes the broader goal of ending workplace discrimination “into the more limited goal of ensuring that individuals obtain a remedy for a discrimination injury, thus crediting only one public policy.” Moohr, *supra* note 17, at 418.

160. See Moohr, *supra* note 17, at 431 (asserting that public knowledge enables the public to “calculate the costs and benefits of engaging in the prohibited conduct”); Thornburg, *supra* note 17, at 270 (commenting that arbitration decreases the deterrent value of tort law).

### B. Confidentiality in Mediation and Court-Connected ADR

Confidentiality in arbitration is frequently justified by analogy to its use in private negotiation, mediation, and other court-based bargaining.<sup>161</sup> The nature and rationale for privacy in these non-binding, non-adjudicatory forms of ADR thus helps to elucidate its propriety in arbitration, as well as ADR in general.<sup>162</sup> Moreover, although confidentiality in settlement-focused ADR like mediation may be appropriate,<sup>163</sup> absolute or overly broad confidentiality, even in mediation, “may result in an untenable ‘loss of information to the public and the justice system.’”<sup>164</sup>

#### 1. Confidentiality of Mediation and Court-Sponsored ADR

The Alternative Dispute Resolution Act of 1998 (the “ADR Act”) requires federal district courts to authorize the use of alternative dispute resolution in all civil cases and to implement their own alternative dispute resolution programs.<sup>165</sup> Courts today actively promote the private settlement of disputes, which has become an increasingly important judicial function.<sup>166</sup> Courts thus routinely encourage and frequently mandate that litigants participate in ADR processes designed to avoid adjudication through consensual resolution of disputes.<sup>167</sup> Court-connected ADR takes

161. See *infra* notes 280–81 and accompanying text. See also *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (comparing private settlement agreements to “most arbitration awards”).

162. Because arbitration is the form of ADR that most resembles litigation, see *infra* Part IV.C.1, this article focuses primarily upon the confidentiality of arbitration and its contrast with litigation.

163. See *infra* Part IV.C.2.

164. *In re Anonymous*, 283 F.3d 627, 637 (4th Cir. 2002) (citations omitted).

165. The ADR Act, 28 U.S.C. §§ 651–58 (2000), reflects the strong federal policy favoring alternative dispute resolution. That Act requires every federal judicial district to “devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution . . .” *Id.* § 651(b). Each ADR program must include “at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and [voluntary] arbitration.” *Id.* § 652(a). See also FED. R. CIV. P. 16(a)(5), (c)(9) (making facilitation of settlement a proper purpose and subject of pretrial conference).

166. As recognized by the Second Circuit,

There is no question that fostering settlement is an important Article III function of the federal district courts. Every case must be dropped, settled or tried, and a principal function of a trial judge is to foster an atmosphere of open discussion among the parties’ attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial.

*United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998). For an examination of judicial involvement in settlement, see generally Doré, *Secrecy by Consent*, *supra* note 2, at 288–95 (exploring the shift in judicial activity from adjudication to settlement); Doré, *Settlement*, *supra* note 2, at 823–26 (examining whether increased judicial participation in settlement implicates the right of public access to judicial proceedings).

167. See Alfini & McCabe, *supra* note 109, at 172–73 (examining increase in court-sponsored or officially-mandated mediation programs); Cole, *Managerial Litigants*, *supra* note 109, at 1199–1203 (describing adoption of mediation and arbitration within confines of traditional litigation system);

many forms, including settlement conferences, summary jury trials, early neutral evaluation, non-binding arbitration, and mediation.<sup>168</sup>

Courts, commentators, and legislators collectively assume that a closed and confidential bargaining forum is essential to the smooth and effective functioning of those processes.<sup>169</sup> Without some assurance of confidentiality, litigants might be reluctant to fully and candidly state their positions, evaluate the strengths and weaknesses of their cases, or make the admissions or concessions necessary to a desired compromise.<sup>170</sup>

Notwithstanding the presumption of public access to judicial proceedings and records, then, the confidentiality of even court-sponsored ADR is widely recognized and protected. The ADR Act directs that district courts enact local rules that “provide for the confidentiality of . . . alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.”<sup>171</sup> Courts thus generally deny the press and public access to court-supervised ADR proceedings like settlement confer-

Moffitt, *supra* note 131, at 728 (asserting that “courts regularly encourage parties to resolve disputes extra-judicially”).

168. See generally Reuben, *Constitutional Gravity*, *supra* note 12 (discussing potential state action in various court-sponsored adjudicative, consensual, and advisory ADR processes); Sternlight, *Separate and Not Equal*, *supra* note 16, at 692–94 (contending that “court-connected ADR . . . dominate[s] the work of some courts”).

169. See, e.g., Alfani & McCabe, *supra* note 109, at 194 (contending that “confidentiality is an essential element of mediation”); Deason, *Complementary Systems*, *supra* note 14, at 563–65 (examining need for confidentiality in mediation); Reuben, *Constitutional Gravity*, *supra* note 12, at 1099 (characterizing confidentiality as one of the “cornerstones” of the process); Sherman, *A Process Model*, *supra* note 14, at 1578 (describing confidentiality as a “canon of faith” for mediators). But see Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 1, 39 (2002) (questioning whether confidentiality is indispensable to mediation process).

170. In recognizing a federal common law settlement privilege, the Sixth Circuit Court of Appeals reiterated the importance of “secrecy of matters discussed . . . during settlement negotiations”:

In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of “impeachment evidence,” by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts.

Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003). See also Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) (cautioning that without confidentiality, counsel will “conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of civil dispute”).

171. 28 U.S.C.A. § 652(d) (West Supp. 2005). See also Administrative Dispute Resolution Act, 5 U.S.C.A. § 574(a) (West Supp. 2005) (protecting neutrals from the voluntary or compelled disclosure or discovery of “any dispute resolution communication or any communication provided in confidence to the neutral”).



ences and summary jury trials, even in cases involving government action or issues of public significance.<sup>172</sup>

## 2. The Mediation Privilege

Confidentiality does not necessarily create an evidentiary privilege, however.<sup>173</sup> Although compromise discussions may be inadmissible, they are still theoretically discoverable, at least upon a showing of sufficient relevance and need.<sup>174</sup> The potential discoverability of ADR-related information has prompted many jurisdictions to confer additional confidential protection on at least one type of ADR proceeding through the creation of a mediation privilege.<sup>175</sup>

The rationale for such a privilege stems from the fact that successful mediation requires a consensual outcome. Unlike arbitrators or judges, the neutral mediator does not adjudicate; he does not impose a decision on the parties or dictate an outcome.<sup>176</sup> Mediation is a consensual process and the mediator merely assists the parties to resolve their dispute. Although they may be compelled to mediate, the parties themselves choose whether to settle or to continue to litigate.<sup>177</sup> Because of its emphasis on conciliation

172. See, e.g., *In re Cincinnati Enquirer*, 94 F.3d 198 (6th Cir. 1996) (denying newspaper access to summary jury trial in class action arising from prison riots); *B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995) (upholding court's decision to hold closed in-chambers conferences to discuss implementation of consent decree in suit brought by Illinois Department of Children and Family Services); *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 903 (6th Cir. 1988) (denying press access to summary jury trial in case involving nuclear power and utility rate issues); *United States v. Town of Moreau*, 979 F. Supp. 129 (N.D.N.Y. 1997) (denying media access to settlement conferences and position papers in CERCLA lawsuit involving town water supply).

173. The ADR Act does not create any evidentiary privilege. See *FDIC v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999); *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1123 (N.D. Cal. 1999). See also *Pearson v. Miller*, 211 F.3d 57, 68 (3d Cir. 2000) (noting that "[s]tatutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on the courts").

174. Although Federal Rule of Evidence 408 makes "[e]vidence of conduct or statements made in compromise negotiations" inadmissible, it does not create an evidentiary privilege or restrict the discoverability of settlement information. FED. R. EVID. 408. See *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F. Supp. 2d 201, 211 (D.D.C. 2005); *In re RDM Sports Group, Inc.*, 277 B.R. 415, 433 (Bankr. N.D. Ga. 2002). Jurisdictions differ as to whether they require a showing of exceptional circumstances to justify discovery of settlement information. See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 9:7 (2d ed. 2005) (stating that some courts "require more of the party seeking to discover compromise discussions than they require of others").

175. See COLE ET AL., *supra* note 174, § 9:2 (describing assumption underlying privilege as belief that "there is something special about mediation that warrants a broader exclusion than is provided for compromise discussions without a mediator").

176. See Reuben, *Constitutional Gravity*, *supra* note 12, at 1049 (describing court-related mediation as "different in kind from arbitration and trial" because it is "consensual in nature" and because the mediator lacks "coercive authority to decide cases").

177. For an examination of mediation law and practice, see generally COLE ET AL., *supra* note 174.

and consensus, effective mediation (like settlement) depends upon confidentiality.<sup>178</sup>

In recognition of this need, nearly all states have adopted a mediation privilege of one type or another.<sup>179</sup> Several federal courts similarly recognize a federal common law privilege against discovery of information disclosed in conjunction with mediation proceedings.<sup>180</sup> And in an effort to promote consistency, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) recently approved the Uniform Mediation Act (the “UMA”), which creates a privilege for mediation communications and prevents their discovery or admission into evidence.<sup>181</sup>

Although jurisdictions widely differ concerning its scope, conditions, and exceptions, the mediation privilege permits participants to refuse to disclose or prevent others from disclosing matters provided in connection with a mediation proceeding.<sup>182</sup> The privilege is intended to encourage mediation by fostering frank and honest discussions among mediation participants without fear that adverse information presented during a media-

178. See *State v. Williams*, 877 A.2d 1258, 1266 (N.J. 2005) (noting that “[s]uccessful mediation, with its emphasis on conciliation, depends on confidentiality perhaps more than any other form of ADR”); *Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1126 (Cal. 2001) (holding that “confidentiality is essential to effective mediation”).

179. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238(B)–(E) (2003); ARK. CODE ANN. § 16-7-206 (2004); CAL. EVID. CODE § 1115–1128, available at <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid&codebody=&hits=20>; FLA. STAT. ANN. § 44.102(3) (West 2003); LA. REV. STAT. ANN. § 9:4112 (2006); MASS. GEN. LAWS ANN. ch. 233, § 23C (West 2000); MINN. STAT. § 595.02 (2000); OKLA. STAT. tit. 12, § 1805 (1993); OR. REV. STAT. ANN. § 107.785 (West 2003); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (2004); TENN. CODE ANN. § 36-4-130 (2002); TEX. CIV. PRAC. & REM. CODE § 154.052(c), available at <http://www.capitol.state.tx.us/statutes/cp.toc.htm>; VA. CODE ANN. § 8.01-576.10 (2001); WASH. REV. CODE § 5.60.070 (1995); WYO. STAT. ANN. § 1-43-103 (2005). See also UNIF. MEDIATION ACT Prefatory Note (2001) (indicating that “state legislatures have enacted more than 250 mediation privilege statutes”).

180. See *In re RDM Sports Group, Inc.*, 277 B.R. 415, 430 (Bankr. N.D. Ga. 2002); *Sheldone v. Pa. Turnpike Comm’n*, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1176 (C.D. Cal. 1998), *aff’d*, 216 F.3d 1082 (9th Cir. 2000).

181. NCCUSL approved the UMA in 2001. To date, however, only six states and the District of Columbia have adopted the UMA. See Council B16-0145, 2005 Council Period 16 (2005) (enacted as Act A16-0273; transmitted to Congress for approval, Feb. 6, 2006); 710 ILL. COMP. STAT. 35/1 to 35/99 (2005); IOWA CODE § 679 C (2005); NEB. REV. STAT. §§ 25-2930 to 2942 (2004); N.J. STAT. ANN. §§ 2A:23C-1 to -13 (West Supp. 2005); OHIO REV. CODE ANN. §§ 2710.01 to 2710.10 (West 2005); WASH. REV. CODE §§ 7.07.010 to 7.07.080 (2005). *But see* NCCUSL Act Search Results, <http://www.nccusl.org/Update/ActSearchResults.aspx> (last visited Jan. 30, 2006) (noting that in 2005–06, the UMA has been introduced in the legislatures of District of Columbia, Massachusetts, New York, Utah, and Vermont).

182. The UMA, for example, provides that “[a] [mediation] party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.” UNIF. MEDIATION ACT § 5 (2001). See also COLE ET AL., *supra* note 174, § 9:10 (discussing wide variance among jurisdictions concerning the privilege and the uncertainty as to what proceedings qualify as a “mediation”).

tion could be used against participants in subsequent litigation.<sup>183</sup> It thus aims at preventing compelled disclosure of mediation-related matters in judicial proceedings. To that extent, the privilege encourages mediation, while potentially sacrificing information relevant to other controversies or of significant public interest.

### 3. Overbroad and Unqualified Protection?

Privileges differ as to whether they afford absolute or qualified ADR confidentiality. Absolute privileges “apply regardless of the need for the evidence in a particular case,” while qualified privileges permit “a case by case balancing of the individual case need [for evidence] against the public policies favoring nondisclosure.”<sup>184</sup> A recent decision from California illustrates the overly broad protection afforded by an absolute mediation privilege.

In *Rojas v. Superior Court*, several hundred tenants living in mold-infested apartments sued their landlord for fraudulent concealment.<sup>185</sup> Several years before, the landlord had sued the building’s contractors concerning the very same condition and, after court-ordered mediation, confidentially settled that prior suit. By the time the tenants discovered that they had been exposed to toxic mold and had sued the landlord, the mold and water leakage had been remediated and the buildings repaired. The tenants thus sought to discover information concerning the prior condition of the building and the existence and amount of any mold, including photographs, videotapes, witness statements, and raw data from destructive testing of physical samples collected by the landlord at the complex.<sup>186</sup> The landlord argued that the California mediation privilege prohibited disclosure of this information because it had been “prepared for the purpose of, in

183. See *In re RDM Sports Group, Inc.*, 277 B.R. at 430 (noting belief that mediation privilege encourages settlements and that mediation has “flourished” because of confidentiality); *Sheldone*, 104 F. Supp. 2d at 514 (predicting that participants “would be reluctant to lay their cards on the table” without mediation privilege); *Folb*, 16 F. Supp. 2d at 1172 (reasoning that lack of privilege gives participants “incentive . . . to withhold sensitive information in mediation or refuse to participate at all”). See generally COLE ET AL., *supra* note 174, § 9:2 (discussing policy rationales for mediation privilege).

184. COLE ET AL., *supra* note 174, § 9:10, at 9:25. See also Maureen A. Weston, *Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 49 (2003) (contrasting “blanket confidentiality” with “qualified confidentiality” that recognizes “judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders”).

185. 93 P.3d 260, 262 (Cal. 2004).

186. *Id.* at 270.

the course of, or pursuant to” the court-ordered mediation of his prior suit against the contractors.<sup>187</sup>

The tenants could not duplicate much of the requested information and thus arguably possessed substantial need for the evidence. Nevertheless, the California Supreme Court rejected any “good cause” exception to the privilege, which “unqualifiedly bars disclosure” of mediation-related communications “absent an *express statutory* exception.”<sup>188</sup> Thus, no showing of substantial need or undue hardship justifies discovery of information so long as it is prepared for the purpose or in the course of mediation.<sup>189</sup> The privilege absolutely protects factual materials like photographs, videotapes, and raw data even if they do not reflect attorney strategy or mental impressions.<sup>190</sup>

Like most similar privileges, the California mediation privilege does not immunize “otherwise discoverable” material from disclosure merely because it is introduced or used in mediation proceedings.<sup>191</sup> Theoretically, then, the privilege covers only material that would not exist but for the mediation and will not prevent discovery of preexisting facts or documents.<sup>192</sup> *Rojas* illustrates, however, the difficulty in determining whether information is prepared for mediation or litigation, especially when litigation and mediation proceed simultaneously. Indeed, in *Rojas*, the landlord’s lawsuit against the contractors had been pending for almost two years before the parties were ordered to mediate. The landlord likely prepared at

187. The California mediation privilege prevents discovery or admission of communications or writings that are “prepared for the purpose of, in the course of, or pursuant to, a mediation.” CAL. EVID. CODE § 1119, available at <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid&codebody=&hits=20>.

188. *Rojas*, 93 P.3d at 270–71 (emphasis in original).

189. *Id.* at 271 (remanding to determine whether any of the requested materials had been “prepared for the purpose of, in the course of, or pursuant to” the mediation).

190. The *Rojas* court refused to distinguish between derivative or non-derivative information or equate the mediation privilege to the more qualified protection afforded work product. *Id.* at 270. Cf. FED. R. CIV. P. 26(b)(3) (providing that party may obtain discovery of work product upon showing of “substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means”). The mediation privilege further differs from work product in that it protects documents produced to one’s adversary. See *In re RDM Sports Group, Inc.*, 277 B.R. 415, 432 (Bankr. N.D. Ga. 2002).

191. CAL. EVID. CODE § 1120(a), available at <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid&codebody=&hits=20> (providing that “[e]vidence otherwise admissible or subject to discovery outside of a mediation . . . shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation”).

192. The *Rojas* court recognized that the mediation privilege thus did not protect the facts set forth in witness statements or any physical samples that still existed. 93 P.3d at 270 n.8. See also *In re RDM Sports Group, Inc.*, 277 B.R. at 430 (stating that mediation privilege does not protect information that would not have come into being absent mediation); *Sheldone v. Pa. Turnpike Comm’n*, 104 F. Supp. 2d 511, 515 (W.D. Pa. 2000) (noting that privilege does not justify concealing facts or documents that existed independent of mediation).

least some of the requested tests, photos, and reports in anticipation of the pending litigation or for joint use in both proceedings. An absolute privilege provides even more protection than work product and gives participants incentive to use mediation as a shield for unfavorable evidence.

*Rojas* also raises concerns similar to those levied against litigation confidentiality. Does the rationale underlying a broad, unqualified privilege—the desire to encourage mediation and settlement—justify the concealment of information potentially relevant to mediation participants, other litigants, and the general public?<sup>193</sup> In litigation, party autonomy and the policy favoring settlement often yield to the public interest in disclosure. The desire for settlement alone will not support a protective or sealing order if confidentiality jeopardizes the discovery rights of third parties or conceals information relevant to public health and safety.<sup>194</sup> *Rojas* implicates both these counterweights. Yet confidentiality will prevail, without any balancing of competing interests, simply because the information is produced for purposes of mediation.

As discussed below, no clear dividing line separates litigation from mediation, particularly when courts sponsor, encourage, and even require mediation of litigated disputes.<sup>195</sup> And, although *Rojas* concerned a privilege particular to mediation,<sup>196</sup> at least one other court has extended privilege protection to less structured settlement activities, whether “done under the auspices of the court or informally between the parties.”<sup>197</sup> Privileges

193. A recent California appellate court decision illustrates how an unqualified mediation privilege can result in the non-disclosure of information of general public interest. In *Doe 1 v. Superior Court*, the court cited *Rojas* to prevent public disclosure of written summaries of the personnel files of numerous priests accused of sexually molesting minors. 34 Cal. Rptr. 3d 248, 249, 251 (Ct. App. 2005). Because the summaries were prepared by the Los Angeles Diocese in connection with the mediation of civil litigation against the church, even the Diocese itself could not disclose them over the objection of the priests who participated in the mediation. *Id.* at 249.

194. See *supra* notes 96–104 and accompanying text.

195. See, e.g., *Doe 1*, 34 Cal. Rptr. 3d at 252 (recognizing “the conceptual difficulties in distinguishing between a mediation and a settlement conference when a bench officer is presiding at those talks”). See also Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. MEM. L. REV. 255, 310–12 (2005) (predicting that settlement privilege will apply to other forms of ADR and protect “anything that reasonably can be construed” as settlement negotiations).

196. Some courts have narrowly construed the mediation privilege and confined it to formal mediation proceedings before a neutral. See, e.g., *In re RDM Sports Group, Inc.*, 277 B.R. at 431 (noting that privilege does not shelter documents prepared prior to mediation); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180 (C.D. Cal. 1998) (holding that mediation privilege does not cover post-mediation communications); *Saeta v. Superior Court*, 11 Cal. Rptr. 3d 610, 617 (Ct. App. 2004) (refusing to extend privilege to termination review panel in wrongful discharge case).

197. See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979–80 (6th Cir. 2003) (recognizing a broader federal common law privilege for settlement communications); see also *Allen County v. Reilly Indus., Inc.*, 197 F.R.D. 352, 353 (N.D. Ohio 2000) (denying access to privileged settlement negotiations with county regarding environmental clean-up); *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 554 (E.D. Cal. 1990) (recognizing a “well established privilege

“are in derogation of the search for truth”<sup>198</sup> because they prevent the disclosure of relevant evidence and impede accurate resolution of controversies. Because a significant number of litigated disputes do eventually settle, an unqualified privilege like that in *Rojas* could operate too broadly in some cases and undercut judicial regulation of even litigation confidentiality.

### III. ATTEMPTS TO REGULATE ADR SECRECY

A number of concerns surround the confidentiality of ADR in disputes that implicate interests broader than, and in addition to, the resolution of the dispute at hand. For the most part, however, little legislative or judicial attention has been paid to these concerns. Instead, the desire to facilitate the private settlement of disputes,<sup>199</sup> the push to promote non-judicial, alternative dispute resolution,<sup>200</sup> and the correspondingly weighty federal policy favoring arbitration,<sup>201</sup> have caused many courts to enforce (perhaps routinely) the confidentiality of both arbitration and mediation.<sup>202</sup> Party autonomy, rather than public interest in disclosure, controls the existence and scope of arbitration privacy. And the parties’ purported need for confidentiality in negotiating and achieving settlement justifies extensive protection of all information communicated during mediation. Recently, however, a

relating to settlement discussions”). *But see In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 n.20 (7th Cir. 1979) (finding “no convincing basis” for settlement negotiations privilege); *In re Subpoena Issued to Commodity Futures Trading Comm’n.*, 370 F. Supp. 2d 201, 210 (D.D.C. 2005) (finding no “consensus of support for a settlement privilege in federal court”). For an examination of the settlement privilege, see generally Lauderdale, *supra* note 195, at 290–96 (discussing and agreeing with *Goodyear*); Michael D. Moberly, *The Discoverability of Severance Agreements in Wrongful Discharge Litigation*, 20 HOFSTRA LAB. & EMP. L.J. 1, 14–24 (2002) (supporting at least a qualified privilege against discovery of settlement evidence).

198. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

199. For a discussion of the strong public policy favoring the private settlement of disputes, see generally Doré, *Secrecy by Consent*, *supra* note 2, at 290–92 (discussing how procedural rules “promote private settlement from the outset of a civil lawsuit through its appeal”).

200. *See supra* notes 165–68 and accompanying text (discussing ADR Act’s promotion of court-sponsored ADR).

201. In *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24–25 (1983), the U.S. Supreme Court held that the Federal Arbitration Act, 9 U.S.C. §§ 1–13, “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”

202. A New York district court recently expressed this sentiment: “[P]rotecting confidentiality agreements . . . promotes federal policy and encourages ADR by ensuring that parties in an arbitration proceeding get the protections for which they contracted.” *Fireman’s Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, Nos. 03CV0531, 03CV1625 (DL)(MLO), 2005 WL 1522783, at \*3 (E.D.N.Y. June 28, 2005). *See also Parilla v. IPA Worldwide Servs. VI, Inc.*, 368 F.3d 269 (3d Cir. 2004) (upholding confidentiality clause of consumer arbitration agreement); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (same); *Rojas v. Superior Court*, 93 P.3d 260, 270–71 (Cal. 2004) (rejecting “good cause” exception to mediation privilege).

few courts have attempted to regulate ADR confidentiality using the limited opportunities and means available to them.

### A. Arbitration

Generally, a court will possess at least three distinct opportunities to weigh in on the confidentiality of an arbitration proceeding.<sup>203</sup> First, one of the parties to an arbitration agreement may seek to compel arbitration and to stay or dismiss any pending lawsuit concerning an arguably arbitrable dispute.<sup>204</sup> Second, one or both of the parties may sue after an arbitration either to confirm and enter judgment on an award or to modify or vacate it.<sup>205</sup> Finally, a party to a prior confidential arbitration may seek to block discovery concerning the arbitral award or proceeding.<sup>206</sup> Although relatively little judicial precedent exists, courts are beginning to address the confidentiality of arbitration at these junctures.

#### 1. Generally Applicable Contract Defenses: Unconscionability and Public Policy

In determining whether to permit litigation to proceed or, instead, to compel the parties to arbitrate, a court must determine whether an enforceable arbitration agreement exists. The Federal Arbitration Act (the “FAA”) makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>207</sup> The FAA “preclude[s] States from singling out arbitration provisions for suspect status, requiring instead that such provisions be

203. See Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 39 (2005) [hereinafter Cole, *State Action*] (noting that “[c]ourt involvement occurs, if at all, prior to start of arbitration and after the completion of arbitration”); Reuben, *Constitutional Gravity*, *supra* note 12, at 1004–05 (describing judicial involvement in arbitration).

204. See 9 U.S.C.A. § 4 (West Supp. 2005) (concerning “Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination”).

205. *Id.* § 9 (“Award of arbitrators; confirmation; jurisdiction; procedure”); *id.* § 10 (“Same; vacation; grounds; rehearing”); *id.* § 11 (“Same; modification or correction; grounds, order”). The parties may also seek judicial assistance during an arbitration. See *Id.* § 5 (authorizing court to resolve disputes concerning the appointment of an arbitrator or the filling of an arbitrator vacancy); *id.* § 7 (authorizing parties to request judicial assistance to compel the attendance of witnesses or issue contempt). See *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 269–70 (3d Cir. 2004) (describing court’s role even in cases ordered to arbitration).

206. See *infra* Part III.A.3 and note 248 (examining discovery of arbitration-related information).

207. 9 U.S.C.A. § 2. The desire to eliminate the historic judicial hostility to arbitration agreements largely motivated enactment of the FAA in 1928. “Section 2 of the FAA puts arbitration agreements on the same footing as other types of contracts.” *Iberia Credit Bureau, Inc.*, 379 F.3d at 166.

placed ‘upon the same footing as other contracts.’”<sup>208</sup> Accordingly, while courts and legislatures may not single out confidentiality clauses in arbitration agreements for special treatment, generally applicable contract defenses may invalidate those provisions.<sup>209</sup> Courts have utilized the doctrines of both unconscionability and public policy to invalidate arbitration confidentiality.

*a. Unconscionability*

The generally applicable defense of unconscionability “seeks to prevent substantial unfairness between contracting parties having grossly unequal bargaining power.”<sup>210</sup> Substantive unconscionability reflects a concern with one-sided or overly harsh agreements and will invalidate arbitration provisions that are too heavily weighted in one party’s favor.<sup>211</sup>

Several courts, including the Ninth Circuit Court of Appeals and the Washington Supreme Court, have found confidentiality provisions in consumer and employee arbitration agreements substantively unconscionable.<sup>212</sup> According to these courts, facially neutral confidentiality provisions disproportionately favor repeat participants who have firsthand knowledge of how prior arbitrations against them have fared. In contrast, one-shot participants like employees and consumers, cannot access or util-

208. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

209. *See id.* (holding that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]”). *But see infra* note 220 (discussing risk that FAA may preempt arbitration-specific use of unconscionability doctrine).

210. *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 279 (3d Cir. 2004). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (permitting court to refuse to enforce unconscionable contract or contract term). *See generally* Randall, *supra* note 105, for a discussion of the doctrine of unconscionability and its application to arbitration agreements.

211. *See LaRocca, supra* note 108, at 950–52 (discussing attacks on the enforceability of arbitration agreements). Procedural unconscionability, in contrast, focuses on contract formation and will generally exist if a contract is one of adhesion. *See Parilla*, 368 F.3d at 276. Although many jurisdictions require both procedural and substantive unconscionability, courts generally discuss arbitration confidentiality in terms of substantive unconscionability.

212. *See Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (declaring confidentiality provision in contract between AT&T and potentially seven million California consumers unconscionable under California law); *Luna v. Household Fin. Corp.*, 236 F. Supp. 2d 1166, 1180–81 (W.D. Wash. 2002) (invalidating confidentiality provision in loan contract with borrowers who consolidated debt); *Acorn v. Household Int’l Inc.*, 211 F. Supp. 2d 1160, 1171–72 (N.D. Cal. 2002) (finding confidentiality clause of mortgage financing arbitration agreement substantively unconscionable); *Torrance v. Ames Funding Corp.*, 242 F. Supp. 2d 862, 875 (D. Or. 2002) (invalidating confidentiality provision in arbitration agreement appended to mortgage contract); *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 764–65 (Wash. 2004) (en banc) (invalidating confidentiality clause in employment contract with employee alleging disability discrimination).



ize such arbitral precedent.<sup>213</sup> Confidentiality of arbitral awards conceals these advantages to repeat players and precludes the “scrutiny critical to mitigating those advantages.”<sup>214</sup> This informational asymmetry additionally hampers the ability of one-shot participants and other potential claimants to build a case of intentional or unlawful misconduct against a repeat player.<sup>215</sup> Finally, the secrecy of arbitration can undermine “an employee’s confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim.”<sup>216</sup> These courts thus view arbitration confidentiality as unfairly one-sided and disproportionately favorable to repeat players like lenders, employers, and service providers, who already possess superior bargaining power. Unconscionability will invalidate the confidentiality provision itself, and, if combined with other unconscionable provisions, might nullify the arbitration agreement in its entirety.<sup>217</sup>

Unconscionability challenges have not fared as well in all jurisdictions, however. Both the Third and Fifth Circuit Courts of Appeals recently refused to find confidentiality provisions in employment and consumer

213. In *Ting*, the Ninth Circuit concluded that “if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player.” 319 F.3d at 1152. The specific advantages enjoyed by repeat players include “unequal information in arbitrator selection, unequal representation at the hearing, a repeat participant’s ability to screen out and settle meritorious cases, and the arbitrator’s incentive to satisfy repeat customers.” *Acorn*, 211 F. Supp. 2d at 1172 (internal quotations omitted). See also *Torrance*, 242 F. Supp. 2d at 875 (noting that confidentiality gave mortgagor a “vastly superior legal posture”); *Zuver*, 103 P.3d at 765 (noting that while public interest in open arbitration may not render confidentiality provision unconscionable, in employment contract, it benefited only the employer).

214. *Acorn*, 211 F. Supp. 2d at 1172.

215. As noted by the Ninth Circuit, “the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T.” *Ting*, 319 F.3d at 1152. See also *Zuver*, 103 P.3d at 765 (holding that clause “hampers an employee’s ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations”).

216. *Zuver*, 103 P.3d at 765.

217. Ordinarily, an arbitration agreement will contain a severability clause that would dictate only severance of the specific invalid clause. A court will sever the unlawful clause unless doing so will defeat a primary purpose or essential part of the agreement. See RESTATEMENT (FIRST) OF CONTRACTS § 603 (1932) (focusing on whether severance of illegal term will defeat the primary purpose of the bargain); RESTATEMENT (SECOND) OF CONTRACTS, § 184 (1981) (directing severance of clause that violates public policy unless it constitutes “an essential part of the agreed exchange”). Frequently, however, a court that has invalidated a confidentiality clause in an arbitration agreement will also find other provisions, such as class action waivers and fee-splitting provisions, similarly unconscionable. In such cases, the court might find that each of the interrelated unlawful provisions “magnify the one-sidedness of the others,” thus tainting the entire agreement and rendering severance inappropriate. *Luna*, 236 F. Supp. 2d at 1183. Compare *Torrance*, 242 F. Supp. 2d at 876 (holding that arbitration agreement was “so permeated by unconscionability so as to render it invalid”), with *Zuver*, 103 P.3d at 769 (severing confidentiality and remedies provisions from arbitration agreement).

arbitration agreements so one-sided as to render them unconscionable.<sup>218</sup> As explained by the Third Circuit,

Each side has the same rights and restraints under those provisions and there is nothing inherent in confidentiality itself that favors or burdens one party *vis-a-vis* the other in the dispute resolution process. Importantly, the confidentiality of the proceedings will not impede or burden in any way [the employee's] ability to obtain any relief to which she may be entitled.<sup>219</sup>

Thus, not all courts have embraced the unconscionability doctrine as a method of policing arbitration secrecy. Moreover, if courts are applying the unconscionability defense more frequently or more rigorously to arbitration agreements than to other contracts, they risk violating the FAA's prohibition against singling out arbitration for special scrutiny.<sup>220</sup> Finally, the unconscionability doctrine focuses solely on the power imbalance between the contracting parties and the "harshness of a particular bargain."<sup>221</sup> Many of the concerns with arbitration secrecy, however, go beyond the immediate parties and focus on potential plaintiffs and the public at large.<sup>222</sup> Unconscionability thus may be too narrow a tool to effectively regulate the confidentiality of ADR.<sup>223</sup>

218. *Lloyd v. Hovensa, LLC*, 369 F.3d 263 (enforcing confidentiality provisions in employee arbitration agreement that incorporated AAA rules); *Parilla v. IAP Worldwide Servs., IV, Inc.*, 368 F.3d 269 (3d Cir. 2004) (refusing to invalidate confidentiality provision incorporated into employment agreement, notwithstanding other unconscionable provisions in agreement); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (rejecting *Ting* and enforcing confidentiality provision of cellular telephone agreement).

219. *Parilla*, 368 F.3d at 280. *See also Iberia Credit Bureau, Inc.*, 379 F.3d at 175 (acknowledging that while the confidentiality provision "is probably more favorable to the cellular provider," it is not "so offensive as to be invalid" given that confidentiality can benefit the customer in some circumstances).

220. *See Iberia Credit Bureau, Inc.*, 379 F.3d at 167 (cautioning that states may not use doctrines of general applicability "in ways that subject arbitration clauses to special scrutiny"); *see also* Kelly Thompson Cochran & Eric J. Mogilnicki, *Current Issues in Consumer Arbitration*, 60 *BUS. LAW.* 785, 788 (2005) (arguing that "treating confidentiality clauses in arbitration agreements differently from other contracts would appear to raise serious federal preemption concerns"); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 1 *J. DISPUTE RESOL.* 61 (2005) (arguing that FAA should preempt use of unconscionability doctrine as backdoor bias against arbitration); Randall, *supra* note 105, at 194 (contending that courts are circumventing the FAA "through expansive, arbitration-specific uses of unconscionability" and suggesting restrained use of doctrine to avoid preemption).

221. *Iberia Credit Bureau, Inc.*, 379 F.3d at 175 n.20.

222. *See supra* Part III.A (examining arbitration secrecy).

223. *See Iberia Credit Bureau, Inc.*, 379 F.3d at 175 n.20 (recognizing that "[t]he vice (if any) of the confidentiality clause lies mostly in its systematic effect, not in its oppressiveness as regards the particular plaintiffs before us"); *Parilla*, 368 F.3d at 280 (noting that concern with confidentiality "was not about any potential unfairness between two contracting parties *vis-a-vis* each other," but with broader substantive policies). *See also* Garfield, *supra* note 2, at 285-86 (suggesting that unconscionability may be inadequate to deal with "contracts of silence" because they are contrary to the public, but

*b. Public Policy*

A public policy defense might provide a broader, arguably more fitting contract doctrine to address the systemic threat posed by arbitration secrecy. Under this common law defense, a court can refuse to enforce all or part of a contract on public policy grounds, if “the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>224</sup> Absent legislation expressly prohibiting a confidentiality clause, a court must “derive” public policy from other laws and “its own sense of public welfare.”<sup>225</sup> The substantive policies underlying consumer protection, employment discrimination, and other statutory rights supply one such benchmark for public policy.

A recent decision from the Ohio Court of Appeals, *Eagle v. Fred Martin Motor Co.*,<sup>226</sup> is illustrative. In that case, the purchaser of an automobile sued a dealership for unfair and deceptive practices under Ohio consumer law. The Ohio Court of Appeals rejected the dealership’s effort to compel arbitration after finding several provisions of the arbitration agreement, including a confidentiality clause, unenforceable as against public policy.<sup>227</sup> In so holding, the court distinguished the defenses of unconscionability and public policy. Unlike unconscionability, which focuses “on the relationship between the parties and the effect of the agreement upon them,” public policy required “the court to consider the impact of such arrangements upon society as a whole.”<sup>228</sup> The court similarly contrasted the openness of the courts with the privacy of arbitration, noting that while “public access to court proceedings helps society become aware of unfair business acts and practices, educating consumers and thereby discouraging such activities,” private arbitration proceedings “prevent the public from discovering such violative acts and practices.”<sup>229</sup> While recognizing that judicial and arbitral proceedings may merit different treatment, the court declared that “limitations on a consumer’s right of redress and the public’s

not necessarily oppressive to the parties); Sternlight & Jensen, *supra* note 17, at 103 (contending that unconscionability defense is “too expensive and unwieldy” to regulate class-action arbitration waivers).

224. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981). A court can also refuse to enforce any statutorily prohibited contract provision. *See id.* § 178 cmt. a. *See also* Garfield, *supra* note 2, at 294–343 (suggesting that courts use a case-by-case balancing approach to invalidate some contracts of silence as against public policy).

225. Garfield, *supra* note 2, at 300.

226. 809 N.E.2d 1161 (Ohio Ct. App. 2004).

227. *Id.* at 1182–83. The Ohio court used public policy grounds to additionally invalidate an arbitration provision that negated the consumer’s right to proceed through a class action or as a private attorney general. *Id.* at 1183.

228. *Id.* at 1180.

229. *Id.* at 1181.

access to vital consumer information should not be allowed,” even in arbitration.<sup>230</sup>

The arbitration clause in *Eagle* prohibited the consumer from sharing information regarding the subject matter of the arbitration with anyone. And, unless the consumer was willing to pay for a reasoned arbitration award, the arbitrator could not disclose information about the specific acts and practices found to violate the consumer protection laws.<sup>231</sup> By impeding public access to information concerning these deceptive acts and practices, then, the confidentiality clause frustrated government enforcement and contravened the policies and purposes of the underlying consumer laws.<sup>232</sup>

As with unconscionability, however, courts may face difficulty using the contract defense of public policy to regulate ADR secrecy. The confidentiality of arbitration did not appear to bother the United States Supreme Court when it held that private arbitration can effectively vindicate the statutory rights of employees and consumers.<sup>233</sup> Courts will be unable to use public policy to disguise a general attack on arbitration itself. Moreover, whether they are litigating or arbitrating, parties can confidentially settle those statutory claims and similarly frustrate their underlying policy goals.<sup>234</sup> Confidential settlements can deprive existing and potential claimants of information necessary to build their case or prevent disclosure of information relevant to public welfare, health, and safety.<sup>235</sup> While confidential settlements may themselves call for greater regulation, courts rarely refuse to enforce those contracts as against public policy.<sup>236</sup>

230. *Id.*

231. *Id.* at 1183 (declaring provision requiring consumer to pay for findings of fact and conclusions of law “ultimately prohibitive, not only in terms of public access restrictions, but also in regards to cost”). *But see* Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886, 897 (Ill. App. Ct. 2003) (holding that because arbitration awards are not confidential, other potential plaintiffs “would not be operating ‘in the dark’”).

232. *Eagle*, 809 N.E.2d at 1182–83. Although the *Eagle* court relied primarily upon public policy, it further held that the “characteristics of secrecy and limitation of consumer rights . . . contribute[d] to the substantive unconscionability of the arbitration clause.” *Id.* at 1183.

233. *See* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (upholding arbitration of ADEA claim notwithstanding argument that lack of written opinion resulted in “lack of public knowledge of employers’ discriminatory policies”); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 280 (3d Cir. 2004) (expecting that Supreme Court would not find confidentiality of Title VII arbitrations unenforceable as against public policy). *See also supra* note 159 and accompanying text.

234. *Gilmer*, 500 U.S. at 32 (indicating that concerns with privacy of arbitration “apply equally to settlements of ADEA claims, which . . . are clearly allowed”); *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 176 (5th Cir. 2004) (noting that state law did not prohibit repeat players from using confidential settlements to prevent adverse findings).

235. *See supra* Part I.G.

236. Although settling parties possess relative freedom to privately contract for confidentiality, a court can still refuse to issue a protective or sealing order on public policy grounds. *See Doré, Settlement, supra* note 2, at 798–800 (discussing settling parties’ “wide latitude to craft provisions that will

## 2. Motions to Confirm or Vacate

Voluntary compliance with an arbitral award may obviate the need for judicial review or involvement.<sup>237</sup> Under the FAA and state laws patterned upon it, however, a prevailing party to an arbitration can petition a court to confirm the award and enter judgment thereon.<sup>238</sup> Alternatively, a dissatisfied participant can request that a court vacate or modify an arbitral award under narrow grounds for judicial review.<sup>239</sup> By involving the court in the proceeding, the parties to an otherwise confidential arbitration risk sacrificing the secrecy of the arbitral forum for the presumptive openness of the courtroom. Once arbitration documents are filed with the court with a request for judicial action, they become judicial records subject to the right of public access. As with other judicial records, the court must assess whether the need for privacy outweighs any applicable public interest in disclosure. And neither the arbitrator's order nor the parties' confidentiality agreement will necessarily bind the court.<sup>240</sup>

cloak their settlements with seemingly impenetrable layers of confidentiality"). In some cases, a court might further refuse to enforce the private agreement itself as against public policy. *See Cariveau v. Halferty*, 99 Cal. Rptr. 2d 417, 418 (Ct. App. 2000) (voiding as against public policy a confidential settlement that prohibited customer from disclosing broker's misconduct to broker's employer or regulatory authorities). See generally Garfield, *supra* note 2, for an argument that courts should invalidate some contracts of silence as against public policy. Finally, some sunshine in litigation statutes invalidate confidentiality agreements that conceal public hazards. *See, e.g.*, FLA. STAT. ANN. § 69.081 (West 2004) (rendering unenforceable any agreement or contract that has the "purpose or effect of concealing a public hazard"); L.A. CODE CIV. PROC. ANN. art. 1426 (2005) (voiding contractual provisions that have "purpose or effect of concealing a public hazard"); WASH. REV. CODE § 4.24.611 (2005) (permitting court to void confidential settlement agreements that limit disclosure in product liability/hazardous substance claims).

237. *See* JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION 181 (2001) (stating that "[v]oluntary compliance with arbitral awards is usually high"). Even if a losing party complies with an award, however, the successful party may still petition a court to enter judgment on the award. *See infra* note 245.

238. FAA, 9 U.S.C. § 9 (2000) (permitting any party to the arbitration to apply to a court for an order confirming arbitration award); UNIF. ARBITRATION ACT § 11 (1956) (confirmation of award); REV. UNIF. ARBITRATION ACT § 22 (2000) (confirmation of award). *See also supra* note 154 (discussing limited judicial review of arbitration awards).

239. FAA, 9 U.S.C. § 10 (vacation of award); *id.* § 11 (modification or correction of award); UNIF. ARBITRATION ACT § 12 (vacation of award), *id.* § 13 (modification or correction of award); REV. UNIF. ARBITRATION ACT § 23 (vacation of award), *id.* § 24 (modification or correction of award).

240. As one judge admonished,

I write this brief memorandum to put counsel for these parties on notice, as well as other parties that seek similar relief, that I will not necessarily agree in advance to the sealing of an arbitration award to facilitate a settlement. Court records are presumptively open for public inspection and parties should not assume that their agreement to secrecy in the arbitration proceeding would automatically carry over to a sealing of an arbitration award where the assistance of the court is sought to enforce the award. Courts have obligations to the public that private arbitrators do not.

*In re* [Sealed], 64 F. Supp. 2d 183, 184 (E.D.N.Y. 1999).

Courts have recognized their independent duty to examine the confidentiality of arbitration when the parties seek their assistance to confirm or vacate arbitration awards. In *Zurich American Insurance Co. v. Rite Aid Corp.*,<sup>241</sup> for example, an employment dispute and a resulting coverage controversy arising out of a high-profile financial scandal concerning Rite Aid Corporation were submitted to confidential arbitration. Rite Aid's liability insurer sued to vacate the confidential arbitration award that required it to indemnify Rite Aid for a separate multimillion dollar arbitral award won by a former Rite Aid employee. Both the docket and record in the court proceedings were sealed by stipulation of the parties, who were negotiating a settlement of the underlying arbitration awards. In analyzing "whether it [was] appropriate for [the] case to remain shrouded under seal,"<sup>242</sup> the district court *sua sponte* engaged in the balancing of interests applicable to the sealing of judicial records and proceedings.

According to the *Rite Aid* court, neither the confidentiality of the arbitral forum nor the federal policy of encouraging arbitration, "trump[ed] the clear law and policy standards . . . for maintaining open and accessible records of legal matters for public scrutiny."<sup>243</sup> Instead, the significant public interest in the case required that the record be unsealed:

[I]n light of the recent, well-publicized corporate scandals and fraud perpetrated on both the public and financial community, and pursuant to the common law public policy of open disclosure standards . . . for legal proceedings, allowing transparency into the unprecedented Rite Aid corporate scandal weighs heavily in favor of unsealing the record.<sup>244</sup>

Similar reasoning can apply to more common arbitrations involving claims of discrimination or that implicate other public interests in disclosure.<sup>245</sup> The filing of the arbitration award with the court triggers the scrutiny traditionally accorded judicial proceedings in litigation. Accordingly, confidentiality agreements in arbitration will not warrant sealing the entire judicial record of a proceeding to vacate or confirm an arbitral award and,

241. 345 F. Supp. 2d 497 (E.D. Pa. 2004).

242. *Id.* at 499.

243. *Id.* at 507 n.3.

244. *Id.* at 505 (citation omitted).

245. In *Malek v. 24 Hour Fitness*, No. NO3-1473 (Super. Ct. Cal., Contra Costa County, June 4, 2004) (unpublished), for example, an arbitrator awarded a victim of sexual harassment and retaliation substantial compensatory and punitive damages against her health club employer. Unlike *Rite Aid*, the underlying arbitration in *Malek* was not covered by a confidentiality agreement or rule. Although the health club sought to prevent disclosure by satisfying the award, the successful plaintiff sued to reduce it to judgment. Both the arbitrator and the court refused the health club's requests for confidentiality. *Id.* See also *Malek v. 24 Hour Fitness*, Arb. No. 199017 (Apr. 23, 2003) (Chvany, Arb.) (finding that privacy of arbitration did not "mean that there are legal grounds to seal the record in its entirety thereby preventing a party from disseminating information concerning the proceeding").

absent compelling circumstances, should not justify sealing the court docket or the court's own decisions or orders.<sup>246</sup>

### 3. Discovery of Confidential Arbitrations

As discussed, confidentiality clauses in arbitration agreements can impede potential plaintiffs from obtaining information necessary to build their cases and may even restrict regulatory agencies from investigating and enforcing statutory rights.<sup>247</sup> Courts may thus confront ADR confidentiality when these potential litigants seek to discover arbitral decisions and awards or information produced during an arbitration proceeding.<sup>248</sup> In these cases, important public and private values again collide.

On one hand, protecting the confidentiality of arbitration furthers the strong public policy favoring ADR by protecting party expectations and “ensuring that parties in an arbitration proceeding get the protections for which they contracted.”<sup>249</sup> At the same time, however, courts must similarly protect the “countervailing public and private interest in affording a litigant the opportunity to broadly discover information in support of its case.”<sup>250</sup> As recently recognized by one court, “[a]n overzealous quest for ADR can distort the proper role of the court’ by suppressing admissible evidence in the name of confidentiality.”<sup>251</sup>

The discovery of confidential arbitrations thus implicates issues very similar to those raised when collateral litigants seek information covered by a stipulated protective order or a confidential settlement agreement. In litigation, the sharing of information with similarly situated litigants prevents wasteful duplication of effort, furthers the truth-seeking function of discov-

246. See *Commercial Union Ins. Co. v. Lines*, 239 F. Supp. 2d 351 (S.D.N.Y. 2002), *vacated and remanded on other grounds*, 378 F.3d 204 (2d Cir. 2004) (refusing to seal court's decisions and orders or to excise text of arbitration award, notwithstanding sealing order of arbitral panel). Cf. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818 (2d Cir. 1997) (holding that court did not abuse discretion in sealing file of arbitration proceeding when court's opinion discussing the underlying facts and discrimination findings permitted public scrutiny of the defendant's discriminatory acts).

247. See *supra* Part III.A.1 (discussing unconscionability and public policy).

248. See, e.g., *Fireman's Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, Nos. 03CV0531, 03CV1625 (DLI)(MLO), 2005 WL 1522783 (E.D.N.Y. June 28, 2005) (considering discovery of arbitration award); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. Civ. A. 04-N-1228, 2004 WL 1821968, at \*2 (D. Colo. Aug. 13, 2004) (discussing how “confidentiality agreement between parties to an arbitration might circumscribe discovery in a collateral lawsuit”); *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, No. 00 Civ. 0194, 2003 WL 1948807 (S.D.N.Y. Apr. 23, 2003) (permitting discovery of materials produced in arbitration of boat accident).

249. *Fireman's Fund Ins. Co.*, 2005 WL 1522783, at \*3. See also *Lawrence E. Jaffe Pension Plan*, 2004 WL 1821968, at \*2 (stating that “a court should not cavalierly disregard the expectations of the parties to an arbitration as memorialized in their confidentiality agreement”).

250. *Fireman's Fund Ins. Co.*, 2005 WL 1522783, at \*3.

251. *Id.*

ery, and it provides compelling reason to modify a court's confidentiality order. Although parties possess wide latitude to privately contract for confidentiality vis-à-vis each other, their confidentiality agreement, whether in litigation or in arbitration, should not bind the court or third parties.<sup>252</sup>

As with private settlements, then, the confidentiality of arbitration should not conceal evidence or unduly impair the discovery rights of third parties. Employers should not be permitted to use the confidentiality of an arbitration to silence employees or to conceal otherwise discoverable information if the facts of one employment dispute are relevant to another.<sup>253</sup> Nor should ADR confidentiality preclude victims of discrimination or other misconduct from sharing information with regulatory agencies charged with "righting the wrongs inflicted upon them."<sup>254</sup> "Adjudicative facts" that relate to the underlying merits of a controversy and that exist independent of a settlement are not immune from discovery simply because they are subject to a confidentiality agreement or produced in the course of compromise discussions.<sup>255</sup> The same should hold true for otherwise discoverable information produced in connection with an arbitration.

252. See *Lawrence E. Jaffe Pension Plan*, 2004 WL 1821968, at \*2-\*3 (relying on court's authority to modify protective orders to permit disclosure of documents produced in arbitration); *Contship Containerlines, Ltd.*, 2003 WL 1948807, at \*2 (holding that any implied obligation of confidentiality arising from foreign arbitration did not preclude district court from requiring disclosure of relevant requested materials).

253. See *Wendt v. Walden Univ., Inc.*, No. Civ. 4-95-467, 1996 WL 84668 (D. Minn. Jan. 16, 1996) (permitting co-workers to depose employee who had confidentially settled with employer); *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993) (permitting plaintiff in a sex discrimination suit to depose former employee who had confidentially settled with employer and to seek information concerning employment with defendant, knowledge of sexual harassment, and other "factual information" surrounding settled case); *Llerna v. J.B. Hanauer & Co.*, 845 A.2d 732, 739 (N.J. Sup. Ct. 2002) (balancing parties' interest in confidential settlement against public's interest in eradicating workplace discrimination to permit discovery of sexual harassment of other women); *Farmers Group, Inc. v. Lee*, 28 P.3d 413 (Kan. Ct. App. 2001) (refusing to enjoin employee party to confidential settlement from testifying in another employee's suit against employer). See generally *Moberly*, *supra* note 197, at 41-49 (examining discovery and confidentiality agreements in wrongful discharge litigation).

254. *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 745 (1st Cir. 1996) (enjoining employer from enforcing confidentiality provisions that prevented former settling employees from filing charges with the EEOC or assisting others to do so). See also *In re Disciplinary Proceeding Against Kronenberg*, 117 P.3d 1134 (Wash. 2005) (disbarring attorney for facilitating settlement that prevented rape victim from testifying against his client); *Cariveau v. Halferty*, 99 Cal. Rptr. 2d 417, 418 (Ct. App. 2000) (voiding as against public policy confidential settlement that prohibited customer from disclosing broker's misconduct to broker's employer or regulatory authorities).

255. Federal Rule of Evidence 408 "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." FED. R. EVID. 408. That is, parties cannot use the settlement process as a "screen for curtailing [an] adversary's right of discovery." *In re Subpoena Issued to Commodity Futures Trading Comm'n.*, 370 F. Supp. 2d 201, 211 (D.D.C. 2005). See generally *Doré, Settlement*, *supra* note 2, at 813-16 (distinguishing between settlement facts and adjudicative facts concerning the discovery of private settlements).



### B. Mediation

Of course, information that is subject to an evidentiary privilege, such as a mediation or settlement privilege, is not otherwise discoverable.<sup>256</sup> As previously discussed, an overly broad, absolute mediation or settlement privilege that is not subject to exception for good cause can likewise conceal relevant information and impede the discovery rights of third parties. To curb this danger, courts can narrowly construe the privilege and refuse to extend it beyond the formal ADR proceedings for which it was designed.<sup>257</sup> Similarly, courts can carefully scrutinize whether material was actually and solely prepared “for the purpose of, in the course of, or pursuant to, a mediation.”<sup>258</sup> This scrutiny is particularly important in court-connected mediation where materials may have been gathered for purposes of already-pending litigation. Courts must ensure that facts, documents, and communications that would have existed notwithstanding the ADR process are not improperly concealed.

In some cases like *Rojas*, however, justice may even require disclosure of documents prepared in anticipation or for purposes of mediation. Under an absolute privilege, a court cannot balance the need for confidentiality against the need for disclosure or weigh the competing harms. A qualified privilege that permits at least some balancing of interests would provide a necessary safety valve and permit discovery of mediation-related information when justified by sufficiently compelling cause.<sup>259</sup>

As with work product, the threshold for disclosure of mediation-related information may be high. Undoubtedly, much of what occurs in preparation for or during the course of a mediation or settlement conference deserves to be confidential.<sup>260</sup> Settlement, the ultimate objective of this type of ADR, serves important public policies by promoting “a more efficient, more cost-effective, and significantly less burdened judicial sys-

256. See FED. R. CIV. P. 26(b)(1) (restricting scope of discovery to “any matter, not privileged”); see also *supra* Part II.B.2 (examining mediation privilege).

257. See *supra* note 196.

258. *Rojas v. Superior Court*, 93 P.3d 260, 270–71 (Cal. 2004) (remanding to determine whether photos, videotapes, and raw test data were prepared by landlord in preparation for mediation or for litigation).

259. The Administrative Dispute Resolution Act applicable to ADR proceedings involving administrative agencies, for example, authorizes disclosure of dispute resolution communications when necessary to prevent “manifest injustice.” 5 U.S.C. § 574(a)(4)(A) (2000). See also *In re Anonymous*, 283 F.3d 627, 637 (4th Cir. 2002) (prohibiting disclosure of communications made during appellate mediation program “unless the party seeking such disclosure can demonstrate that ‘manifest injustice’ will result from non-disclosure”).

260. See generally Doré, *Settlement*, *supra* note 2, at 823–26 (discussing the confidentiality of court-sponsored settlement negotiations); Doré, *Secrecy by Consent*, *supra* note 2, at 392–94 (discussing the sealing of court-annexed ADR).

tem.”<sup>261</sup> Although one can question the necessity of an evidentiary privilege, the success of mediation or any negotiation process does depend upon a closed and confidential bargaining forum. Moreover, settlement discussions can be punctuated by puffing and posturing, and they can be motivated as much by a desire for peace as by a concession of the merits.<sup>262</sup> Given their questionable relevance and accuracy and their potential to mislead, mediation-related communications may merit confidentiality.<sup>263</sup> That privacy, however, should not be used to shelter evidence relevant to other litigation or to public health, welfare, or safety.<sup>264</sup> In appropriate cases, in other words, the privilege should be permitted to yield.<sup>265</sup>

#### IV. A UNIFIED APPROACH

Litigants forfeit a large measure of privacy when they employ the court system to resolve their dispute. At the same time, alternatives to litigation such as arbitration and mediation enable and encourage parties to keep their dispute confidential.<sup>266</sup> These divergent approaches, however, rest upon an artificial dichotomy and questionable assumptions concerning party autonomy and the policy favoring settlement. A unified view that regards litigation and ADR as points on a continuum of dispute resolution processes calls instead for a similarly unified approach to confidentiality and correspondingly greater scrutiny of ADR secrecy.

261. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003). See also *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1177 (C.D. Cal. 1998) (noting that mediation privilege fosters “conciliatory relationships among parties to a dispute,” reduces “litigation costs,” and decreases “the size of state and federal court dockets, thereby increasing the quality of justice in those cases that do not settle voluntarily”).

262. See *Goodyear Tire & Rubber Co.*, 332 F.3d at 981 (commenting on “inherent questionability of the truthfulness of any statements made [in settlement negotiations]”); *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 554 (E.D. Cal. 1990) (denying discovery of settlement negotiations).

263. In *Goodyear Tire & Rubber Co.*, the Sixth Circuit discounted any evidentiary loss caused by a settlement privilege given the “inherent questionability of the truthfulness” of settlement communications and their lack of relevance. *Goodyear Tire & Rubber Co.*, 332 F.3d at 981, 983. See also *Cook*, 132 F.R.D. at 554 (suggesting that discovery of settlement communications would be “highly misleading if allowed . . . for purposes other than settlement”).

264. See Resnik, *Procedure as Contract*, *supra* note 16, at 658–59 (recognizing that ADR confidentiality permits parties to shelter documents from subsequent disclosure in litigation).

265. See *In re Anonymous*, 283 F.3d 627, 637 (4th Cir. 2002) (balancing “the public interest in protecting the confidentiality of the settlement process and countervailing interests, such as the right to every person’s evidence”).

266. See Rabinovich-Einy, *supra* note 169, at 24–25 (questioning intuitive assumption that permits ADR parties to keep disputes secret).

### A. *The Multidoor Courthouse*

The current dichotomy between confidentiality in litigation and confidentiality in ADR reflects a bipolar civil justice system that separates in-court dispute resolution from alternatives to litigation.<sup>267</sup> Litigation and ADR, however, are not wholly separate and independent processes. As noted by Professor Reuben and others, the embrace of ADR has created a “multidoor courthouse” that provides “a unified system of public civil justice in which trial, arbitration, mediation, evaluative techniques, and other forms of ADR all operate toward the single end of binding public civil dispute resolution.”<sup>268</sup> Judges increasingly sponsor, encourage, and even mandate ADR procedures in cases that are initially commenced in litigation.<sup>269</sup> Likewise, many disputes begun in arbitration eventually wind up before a court in litigation.<sup>270</sup> This “real intertwining and intermingling of dispute resolution techniques”<sup>271</sup> undermines the distinction between litigation and ADR and the contradictory attitudes toward confidentiality.

### B. *Party Autonomy*

ADR is built on the premise that parties design, manage, and control the resolution of their disputes.<sup>272</sup> This deference to party autonomy and self-determination increases ADR’s attraction, while validating its out-

267. See *supra* note 105.

268. Reuben, *Constitutional Gravity*, *supra* note 12, at 956 (contending that “trial is but one end of a spectrum of public civil dispute resolution, rather than the exclusive method”). See also Cole, *State Action*, *supra* note 203, at 48–51 (maintaining that dispute resolution is not an exclusive state function); Sternlight, *Separate and Not Equal*, *supra* note 16, at 716 (criticizing artificial walls that divide various dispute resolution procedures).

269. See Resnik, *Procedure as Contract*, *supra* note 16, at 597 (observing that arbitration and mediation are no longer “extrajudicial” because they have been brought inside courthouse); Sternlight, *Separate and Not Equal*, *supra* note 16, at 694–95 (noting that courts frequently require that cases proceed through ADR as prerequisite to later litigation). See also *supra* notes 165–66 and accompanying text.

270. See Moohr, *supra* note 17, at 448 (commenting that litigation “is not entirely public, and arbitration . . . is not entirely private”); Sternlight, *Separate and Not Equal*, *supra* note 16, at 690 (noting that “disputes commenced in court increasingly are directed to ADR” and that cases commenced in ADR are often litigated).

271. Sternlight, *Separate and Not Equal*, *supra* note 16, at 697 (reflecting that ADR occurs in the shadow of litigation, while litigation occurs in the shadow of ADR).

272. See Alfani & McCabe, *supra* note 109, at 173 (listing party self-determination and voluntariness among core principles of mediation); Cole, *Managerial Litigants*, *supra* note 109 at 1200–01 (discussing party autonomy model on which ADR is built and fact that party consent provides “nearly exclusive guiding principle for [ADR’s] process design”); Moohr, *supra* note 17, at 443 (noting that ADR forums commonly assume “that individual litigants should control and manage their suits”); Resnik, *Procedure as Contract*, *supra* note 16, at 624 (observing that public benefits of ADR flow from “the reduction of conflict . . . predicated on parties’ preferences”).

comes.<sup>273</sup> Party autonomy likewise predicates ADR confidentiality, which allows participants to arbitrate, mediate, negotiate, and settle their dispute privately and confidentially, if they so desire.<sup>274</sup> This “contractualist, laissez-faire approach,”<sup>275</sup> however, does not justify across-the-board acceptance of confidentiality concerning all ADR processes. Instead, while self-determination may support the privacy of consensual, non-binding ADR like mediation, it does not necessarily sustain the blanket secrecy of pre-dispute binding arbitration.

In mediation, parties submit their dispute to a neutral mediator after the controversy develops and the parties have knowledge of their respective claims and defenses. The parties self-determine even court-mandated mediation by resolving their dispute on mutually agreed terms or returning to litigation.

In contrast, in arbitration, a consumer or employee “agrees” to arbitrate before the controversy even arises. Consumer and employment arbitrations involve lopsided contracts between parties of profoundly unequal bargaining strength.<sup>276</sup> Consent, such as it is, is likely to be woefully uninformed.<sup>277</sup> The assumption that ADR participants choose or self-determine confidentiality, then, does not necessarily hold true for many arbitrations today.

273. See Cole, *Managerial Litigants*, *supra* note 109, at 1200–01 (suggesting that ability to control process is what makes ADR attractive); Resnik, *Procedure as Contract*, *supra* note 16, at 597, 624 (stating the presumption that “parties’ agreements validate [ADR] outcomes”).

274. See generally Doré, *Secrecy by Consent*, *supra* note 2, at 297–300 (exploring party autonomy and settlement).

275. Bales, *supra* note 109, at 604 (criticizing contractualist approach to arbitration of statutory claims between parties of disparate bargaining power).

276. See Alfini & McCabe, *supra* note 109, at 192 (characterizing arbitration parties as “unwilling participants in a seemingly voluntary process”); Bales, *supra* note 109, at 604 (challenging contractualist approach to arbitration between “parties of grossly disparate bargaining power”); Demaine & Hensler, *supra* note 110, at 74 (suggesting that even informed consumers are “in a poor position to negotiate terms or seek services . . . from other businesses”); Resnik, *Procedure as Contract*, *supra* note 16, at 662 (criticizing lack of judicial oversight of “vivid” and “profound” bargaining inequality).

277. Professors Demaine and Hensler challenge the assumption that consumer arbitrations involve voluntary and informed consent. Their empirical study

provides little basis for believing that consumers are making informed decisions when they “agree” to arbitrate in pre-dispute arbitration clauses. More than a third of the clauses obtained fail to inform consumers that they are waiving their right to litigate disputes in court. A fifth of the clauses do not explicitly state that the outcome of arbitration is final and binding. More than a third do not provide consumers with any information regarding the expenses they should expect to incur in an arbitration proceeding. Many clauses are silent on key aspects of arbitration . . . [a]nd almost a third of the clauses fail to state what organization will provide the arbitration. Moreover, to be fully informed of the features of the arbitration to which they are “agreeing,” consumers would need to review the applicable provider rules, a daunting task (made impossible when the arbitration provider is not named in the clause).

Demaine & Hensler, *supra* note 110, at 73.

### C. *The Public Policy Favoring Settlement*

As forms of alternative dispute resolution, confidential settlements, arbitration, and mediation draw support from the strong public policy favoring the “negotiated, non-judicial resolution of disputes.”<sup>278</sup> As previously discussed, parties generally possess the power to privately settle their disputes without judicial involvement or regulation.<sup>279</sup> ADR confidentiality is thus frequently justified by analogy to confidential settlements. Again, however, a distinction should be drawn between arbitration and non-binding mediation.

#### 1. Arbitration

The Supreme Court itself has justified arbitration privacy by comparison to confidential settlements.<sup>280</sup> If parties can conceal their dispute through a confidential settlement, it is argued, they should similarly be permitted to accomplish the same thing through private arbitration.<sup>281</sup>

As noted above, however, the consensus in settlement occurs after the dispute has arisen, while the agreement in arbitration (to the extent that it exists), predates the parties’ dispute. Additionally, although the settlement itself may be confidential, any judicial records, proceedings, and court decisions that preceded and perhaps motivated the compromise, remain public unless good cause is shown.<sup>282</sup> In contrast, arbitration leaves no public record of the dispute or its resolution.<sup>283</sup>

278. Randall, *supra* note 105, at 220 (indicating that neither arbitration nor settlement depend upon judicial involvement). *See also* Mohr, *supra* note 17, at 440 (recognizing agreement to arbitrate as form of voluntary dispute resolution).

279. *See supra* notes 234–36 and accompanying text. As discussed, some commentators have called for greater regulation of even private “contracts of silence” that suppress evidence or conceal information relevant to public health and safety. *See, e.g.,* Garfield, *supra* note 2, at 294–318 (contending that courts should balance interest in confidentiality against public interests in disclosure and refuse to enforce parties’ agreements that sell silence); Resnik, *Procedure as Contract*, *supra* note 16, at 648–49 (suggesting that the judicial promotion of settlement may require regulation of “substantive provisions of settlements made under courts’ wings”).

280. In *Gilmer*, the U.S. Supreme Court brushed aside objections to private arbitration of employment discrimination claims because such claims can also be resolved through confidential settlement or informal conciliation. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30–32 (1991).

281. In *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 176 (5th Cir. 2004), for example, the Fifth Circuit rejected an unconscionability challenge by analogizing arbitration confidentiality to confidential settlement. The *Iberia* court found it “instructive” that “while confidential settlements are not completely analogous to confidential arbitration,” Louisiana permitted corporate repeat players to “use confidential *settlements* to prevent a court from making adverse findings.” *Id.* (italics in original).

282. *See supra* notes 95–104 and accompanying text (discussing the good cause necessary to support a confidentiality order).

283. *See* O’Keefe, *supra* note 137, at 856 (noting that settlement does not erase pleadings, judicial proceedings, trial record, or decisions from the public record).

Finally and most importantly, unlike a settlement, the agreement to arbitrate does not resolve a dispute through mutually agreed terms. Although the parties arguably consent to arbitrate their dispute, the arbitration itself is an adversarial proceeding in which a non-judicial, third-party neutral determines the outcome and imposes a decision upon the parties.<sup>284</sup> Unlike a settlement conference or mediation, arbitration does not depend upon full and frank discussion or conciliatory offers. Posturing and puffery do not necessarily mar the accuracy of arbitration evidence. Unlike statements made to provoke settlement, information presented in arbitration is presumably very relevant to the merits—because that is what the arbitrator is deciding.<sup>285</sup> Although less formal than litigation, then, arbitration resembles litigation in that it constitutes an adjudicatory proceeding that substitutes for and “orbit[s] fairly close to trial.”<sup>286</sup>

The “presumptive right to ‘public observation’ is at its apogee” with respect to matters that affect the adjudication of a dispute<sup>287</sup> and that “serve[] as a substitute for trial.”<sup>288</sup> The increasing number of civil disputes diverted into arbitration, however, is siphoning the adjudicative function out of the courts and into the hands of private arbitrators. Admittedly, the arbitrator is not a judge, and arbitration does not likely implicate any “state action.”<sup>289</sup> The arbitrator, however, does perform a quasi-public function when she adjudicates statutory claims grounded on public policy or resolves controversies having third-party effects.<sup>290</sup> Yet, the arbitrator’s ad-

284. See Moohr, *supra* note 17, at 440 (describing arbitration as “fundamentally different” than settlement, which provides an “alternative to third-party judgment” and which resolves dispute on agreed terms); O’Keefe, *supra* note 137, at 856 (finding analogy between arbitration and settlement “unsatisfactory, because arbitration results in a third-party decision after an adversarial process”).

285. See *supra* notes 169–70 and accompanying text (discussing the need for confidentiality concerning mediation and settlement negotiations).

286. Reuben, *Constitutional Gravity*, *supra* note 12, at 1048–49 (contending that arbitration substitutes for trial as a method of resolving disputes through “clash between adversaries”). See also Rabinovich-Einy, *supra* note 169, at 19 (describing arbitration as “the form of ADR closest to litigation”); Randall, *supra* note 105, at 209 (describing arbitration as “simply an alternative method for resolving disputes and vindicating rights”); Reuben, *Democracy*, *supra* note 151, at 296 (describing arbitration as an adjudicatory proceeding in which a third-party neutral decides the dispute).

287. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004).

288. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). See also *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988).

289. See *Cole, State Action*, *supra* note 203, at 3–4 (stating that courts uniformly find no “state action” in contractual arbitration even though courts enforce the arbitration agreement and arbitration awards). *But see* Reuben, *Constitutional Gravity*, *supra* note 12, at 955 (arguing that “[a] strong, but more controversial, argument can . . . be made that contractual arbitration is . . . driven by state action”).

290. See *Bales*, *supra* note 109, at 604 (rejecting laissez-faire attitude toward arbitration of statutory claims grounded in public policy); Resnik, *Procedure as Contract*, *supra* note 16, at 599 (suggesting that ordinary rules of contract do not necessarily apply to “court-based contracts” that have third-party effects); *Thornburg*, *supra* note 17, at 277 (contending that “[a]rbitrators perform public functions” in consumer cases).

judication of the merits remains secret and the public is denied access to information that would most likely be public if litigated.<sup>291</sup>

## 2. Mediation

The analogy to confidential settlements more aptly applies to mediation and other non-binding ADR procedures whose ultimate aim is settlement. Successful negotiation and mediation may well depend upon the confidentiality of those processes, and information disclosed may be of questionable accuracy and relevance.<sup>292</sup> Even then, however, the extensive involvement of the courts in mediation and court-annexed ADR arguably distinguish those processes from purely private settlements.

As discussed, the presumption of public access to judicial proceedings rests in large part on the need to monitor judges and hold them publicly accountable.<sup>293</sup> Arguably, that rationale requires such supervision and regulation when ADR is brought into the courthouse and judges increasingly resolve disputes through negotiation rather than adjudication.<sup>294</sup> After all, if the public has a right to observe their judges “in action,” shouldn’t that right include the judicial promotion of settlement—a significant portion of judicial duties today?

Strong policies support the confidentiality of settlement negotiations and proceedings, however.<sup>295</sup> Like discovery, settlement proceedings are historically closed procedures to which no tradition of accessibility at-

291. In this respect, access to an arbitral award differs from disclosure of the terms and amount of a confidential settlement. The public arguably possess no presumptive right to discover the terms and amount of a settlement between private parties. The settlement amount and its terms are the product of compromise, not adjudication, and are motivated by considerations other than the merits. *See Gambale*, 377 F.3d at 143–44 (holding that need for confidentiality of settlement agreement and award overcomes any presumption of access). *See also Doré*, *Secrecy by Consent*, *supra* note 2, at 397–99 (distinguishing between “settlement facts” and “adjudicative facts” in confidential settlements). In contrast, the arbitral award represents the arbitrator’s decision on the merits concerning liability and damages. *But see Fireman’s Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, Nos. 03CV0531, 03CV1625 (DLI)(MLO), 2005 WL 1522783, at \*1, \*5 (E.D.N.Y. June 28, 2005) (refusing to compel production of amount of arbitration award).

292. *See O’Keefe*, *supra* note 137, at 856 n.159 (analogizing mediation to pretrial settlement); Reuben, *Constitutional Gravity*, *supra* note 12, at 1049 (suggesting that less constitutional scrutiny is due mediation than arbitration); Sherman, *A Process Model*, *supra* note 14, at 1578 (comparing mediation to negotiation and other facilitative processes that may depend on confidentiality).

293. *See supra* Part I.A (discussing right of access to judicial proceedings).

294. *See Alfini & McCabe*, *supra* note 109, at 172–73 (discussing the “official character of mediation in the shadow of the courts”); Resnik, *Procedure as Contract*, *supra* note 16, at 597, 614 (noting how court-connected negotiation and ADR are changing conception of “judicial”); Sternlight, *Separate and Not Equal*, *supra* note 16, at 694–95 (stating that “court-connected ADR has now come to dominate the work of some courts”). *See also Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (suggesting that the “fact and consequences” of judicial participation in settlement “are public acts” in which public has interest).

295. *See supra* Part II.B.1 (discussing confidentiality of mediation and court-connected ADR).

taches.<sup>296</sup> Moreover, court-annexed ADR does not adjudicate the litigants' substantive rights and accordingly does not implicate any core judicial function.<sup>297</sup> As such, the presumption of public access, if any, is "markedly weak" concerning court-sponsored ADR.<sup>298</sup> Good cause may justify closing these ADR proceedings if confidentiality facilitates participation in the process and ultimate settlement of the dispute. Again, however, the confidentiality of even these non-binding ADR activities should not be absolute or operate to suppress otherwise discoverable evidence.<sup>299</sup>

### CONCLUSION

In sum, the divide between litigation and ADR may not be as gaping as many assume. The exponential growth of court-sponsored ADR and the increased diversion of controversies into arbitration blur that distinction and suggest that ADR confidentiality can no longer be justified simply because it involves alternatives to litigation. Arbitration arguably lies closer to litigation than to settlement and thus may require greater transparency and accessibility.

An increasing number of disputes that would otherwise be litigated in open court are now being adjudicated in a closed and secret arbitral forum. Many of these controversies involve employment, securities, and consumer claims that additionally seek to vindicate statutory rights and public policies.<sup>300</sup> The resolution of these disputes radiates beyond the immediate parties and is of interest to others, including similarly situated plaintiffs, potential victims, regulatory agencies, and the media. Yet, the confidential-

296. See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980–81 (6th Cir. 2003) (noting that "confidential settlement communications are a tradition in this country"); *In re Cincinnati Enquirer*, 94 F.3d 198, 199 (6th Cir. 1996) (holding that settlement proceedings like summary jury trials are "historically closed procedures"). See also *supra* Part I.C (examining right of access to unfiled discovery).

297. See *In re Cincinnati Enquirer*, 94 F.3d at 199 (holding that summary jury trial "does not present any matter for adjudication by the court"); *B.H. v. McDonald*, 49 F.3d 294, 300 (7th Cir. 1995) (ruling that court does not adjudicate anyone's rights in settlement conference).

298. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143–44 & n.3 (2d Cir. 2004) (distinguishing between adjudicative and settlement functions and finding that need for confidentiality of settlement overcame "markedly weak," possibly non-existent, presumption of access). See generally Doré, *Secrecy by Consent*, *supra* note 2, for an examination of the presumption of public access concerning settlement and settlement-related activities.

299. See *supra* notes 101–04 and accompanying text (discussing judicial reluctance to enforce or endorse confidential settlements that conceal evidence or gag witnesses), and *supra* notes 292–99 and accompanying text (examining regulation of mediation confidentiality).

300. See Bales, *supra* note 109, at 606–07 (discussing tremendous growth in arbitration of employment claims); Demaine & Hensler, *supra* note 110, at 73–74 (studying frequency with which consumer arbitration clauses are used in some industries); LaRocca, *supra* note 108, at 933–34 (noting the increasing percentage of the U.S. workforce covered by pre-dispute mandatory arbitration agreements).



ity of arbitration prevents the public from learning of even the existence, let alone the resolution, of these claims. Confidentiality of arbitrations likewise hampers the underlying policy goals of the laws at issue and may prevent disclosure of information relevant to public safety or of other public interest.

Greater transparency would alleviate at least some of these problems associated with confidential arbitration. At the very least, in cases of obvious public interest, public disclosure of the existence of the dispute and the identities of the parties would identify repeat players and alert the public to possible continuing threats to public health and safety. Publication of the arbitration awards in these cases, as well as the written findings and reasoning of the arbitrator, would perform educative and normative functions similar to those performed by disclosure of judicial opinions and decisions.<sup>301</sup>

At the same time, arbitration does differ from litigation and may not merit the same level of accessibility and openness. The arbitrator is not a public official, and the parties, not taxpayers, finance the process. Unlike judicial proceedings, arbitration is not governed by procedural or evidentiary rules that help ensure the relevance or unprivileged status of information presented. Opening informal arbitration proceedings to public scrutiny might jeopardize the benefits in speed and expense that arbitration purportedly offers.<sup>302</sup> Thus, like unfiled discovery in litigation, good cause likely supports the continued confidentiality of the arbitration proceedings themselves.

Several courts have attempted to regulate arbitration secrecy by refusing to enforce confidentiality provisions in arbitration agreements or in

301. California, for example, requires private arbitration companies to make available to the general public basic information regarding consumer arbitration cases that they administer, including the names of the non-consumer parties, the disposition of the consumer claims, and the amount of the awards. CAL. CIV. PROC. CODE § 1281.96, available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1281-1281.96>. See also CAL. CIV. PROC. CODE § 1285, available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1285-1287.6> (requiring that petition to confirm or vacate arbitration awards name all parties to the arbitration and attach arbitration award).

302. This concern motivated the Fifth Circuit in *Iberia Credit Bureau, Inc.* to uphold the confidentiality provision in a cellular telephone arbitration agreement:

If every arbitration were required to produce a publicly available, “precedential” decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding. But part of the point of arbitration is that one “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”

*Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 175–76 (5th Cir. 2004) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

arbitration awards themselves.<sup>303</sup> The FAA's restrictions on judicial review, however, significantly limit the tools and options available to a court interested in policing arbitration secrecy.<sup>304</sup> Contract defenses like unconscionability and public policy produce inconsistent results and may risk preemption. In any event, many confidential arbitrations will escape judicial review altogether if participants comply with the agreement or the award and never seek court assistance. For that reason, judicial discretion alone cannot adequately regulate arbitration confidentiality, making "sunshine in ADR" legislation additionally necessary.<sup>305</sup>

Greater justification supports mediation and settlement confidentiality. However, as the law drives more litigants to utilize these forms of court-based ADR, and as judges themselves become more "embedded" in civil settlement processes, even these non-binding, settlement-based forms of ADR may require greater judicial and legislative scrutiny.<sup>306</sup>

Increased transparency and accessibility to at least some aspects of ADR in at least some cases would disclose information important to other potential claimants, facilitate accountability and deterrence, and encourage public confidence in ADR.<sup>307</sup> In other words, as in litigation, the time has come to permit some sun to shine in on alternative dispute resolution.

303. See *supra* Part III.A.

304. See *supra* note 154. See also Weinstein & Wimberly, *Secrecy in Law and Science*, *supra* note 2, at 26 (noting that "there is little the court can do to compel disclosure" in arbitration).

305. I have previously suggested that litigation confidentiality is best dealt with through informed exercise of judicial discretion, rather than inflexible sunshine in litigation legislation. See Doré, *Secrecy by Consent*, *supra* note 2, at 402. Limitations unique to arbitration, however, may render judicial discretion inadequate to deal with arbitration secrecy. Moreover, preemption concerns may require that any legislative solution emanate from Congress. See Randall, *supra* note 105, at 188 (indicating that Supreme Court has foreclosed "direct state law solutions to the problems posed by arbitration").

306. See Resnik, *Procedure as Contract*, *supra* note 16, at 643 (advocating judicial and legislative regulation of both judges and parties involved in court-based bargaining).

307. See Brenowitz, *supra* note 10, at 705 (supporting amendment of ADR Act to exempt cases of public interest from confidentiality requirement); Rabinovich-Einy, *supra* note 169, at 38-39 (advocating publication of mediated resolutions); Thornburg, *supra* note 17, at 277 (arguing that legislative solutions should ensure an "acceptable level of procedural fairness and disclosure").