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February, 2003

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ETHICAL CONCERNS IN DRAFTING EMPLOYMENT ARBITRATION AGREEMENTS AFTER *CIRCUIT CITY* AND *GREEN TREE*

Martin H. Malin*

I. INTRODUCTION

An insurance company operates in a metropolitan area that has considerable residential racial segregation. The company harbors no racial animus. Its hiring and promotions are free from racial discrimination. However, the company has concluded that it makes good business sense to assign its African American sales representatives to areas inhabited predominantly by African Americans and to assign its white sales representatives to areas inhabited predominantly by whites. It believes that, to the extent that the race of the sales representative will influence a sale, customers may be less likely to buy from a sales representative of a different race. Therefore, segregation of the sales force is likely to maximize sales and maximize profits.

The company's lawyer correctly advises the client that such action would violate Title VII of the 1964 Civil Rights Act.[1] The client considers the Title VII violation as a business risk to be weighed against the probable benefits of the proposed action. In calculating the risk, the client considers the likelihood that an employee will discover the practice and take action to challenge it, the expense and resulting adverse publicity in the event the client is sued, and the client's vulnerability to punitive damages for such a willful violation of the statute.

If the client requires all employees, as a condition of employment, to agree to arbitrate all disputes, including statutory claims, arising out of employment,

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[1] 42 U.S.C. §§ 2000e-1 to 2000e-17 (2000).

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it may reduce the business risk. Arbitration is a private forum, and channeling all disputes into arbitration may reduce the risk of adverse publicity. Arbitrators tend to be more conservative in the remedies they award; consequently, requiring arbitration may reduce the risk of outlier jury punitive damages awards. The arbitration agreement might reduce the risk further, for example by limiting the amount of punitive damages or attorney fees the arbitrator may award to a prevailing employee and reducing the limitations period for filing the claim. This Article considers the ethical issues the lawyer will face when requested by the client to draft a mandatory arbitration agreement that the client will impose en masse on its employees.

In *Gilmer v. Interstate Johnson/Lane Corp.*,[2] the United States Supreme Court, disagreeing with every federal circuit except one, held that a pre-dispute agreement to arbitrate contained in a securities exchange registration statement will be enforced with respect to claims arising under the Age Discrimination in Employment Act.[3] In so doing, the Court relied on the liberal policy favoring arbitration contained in the Federal Arbitration Act ("FAA").[4]

Gilmer appeared to signal employers to impose on employees agreements to arbitrate all statutory claims as a condition of employment. The decision, however, left open a host of questions which required answers before cautious employers would adopt the arbitration alternative.[5] Chief among these was whether *Gilmer* would apply outside the securities industry. The FAA excludes from its coverage "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[6] Read broadly, this provision would exclude almost all employment contracts from FAA coverage. The *Gilmer* majority avoided the issue because it found that Gilmer's agreement to arbitrate was contained in his securities exchange registration, rather than in his employment contract.[7] In dissent, Justice John Paul Stevens, who would have reached the issue, joined by Justice Thurgood Marshall, argued for a broad reading of the employment contract exclusion.[8]

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[2] 500 U.S. 20 (1991).

[3] 29 U.S.C. §§ 621-33 (2000).

[4] 9 U.S.C. §§ 1-16 (2000).

[5] For early cataloguing of these questions see Christine Godsil Cooper, *Where Are We Going with* Gilmer? – *Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77, 81-83 (1986).

[6] 9 U.S.C. § 1 (2000).

[7] *See Gilmer*, 500 U.S. at 25 n.2.

[8] *See id.* at 36 (Stevens, J., dissenting).

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The dominant approach in the lower courts after *Gilmer* was to construe the employment contract exclusion narrowly, applying it only to employees who actually transported goods or people in interstate commerce.[9] However, the Court of Appeals for the Ninth Circuit interpreted the exclusion broadly.[10] Because of the Ninth Circuit's position and because the only Supreme Court Justices to opine on the issue read the exclusion broadly, cautious employers resisted the urge to rush headlong into imposing an arbitration mandate on their employees.[11]

In *Circuit City Stores, Inc. v. Adams*,[12] the Supreme Court adopted the dominant lower court view and held that the FAA's employment contract exclusion applies only to employees who transport goods or people in interstate commerce. As one management lawyer characterized it, the Court's decision was "the equivalent of an amber light turning to green."[13]

Consequently, many more employers will impose agreements to arbitrate statutory employment claims on their employees as a condition of employment. In so doing, they will turn to their attorneys to draft the arbitration agreements. The attorney's intuitive response will be to treat the task the same as any other assignment to draft a form contract that the client will impose en masse on other parties. The attorney will draft the agreement to maximize the client's position to the fullest extent of the law.

In this Article, I question that intuitive response. I suggest that the task of drafting the employment arbitration agreement differs from the task of drafting the typical form contract because in the former, the lawyer is creating the system that will adjudicate employees' public law claims. In light of the evolving heavy presumption that employment disputes are arbitrable and in light of the evolving extremely narrow bases for judicial review of employment arbitration awards, the arbitration system that the employer's attorney drafts will be

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[9] *See, e.g.*, Kovelseski v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999); McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998); Miller v. Pub. Storage Mgmt., Inc., 121 F.3d 215 (5th Cir. 1997); O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995).

[10] *See* Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999).

[11] Such caution was well advised. When the Supreme Court finally resolved the issue, it did so by a five-to-four vote.

[12] 532 U.S. 105 (2001).

[13] *The Employee Dispute Resolution Solution*, CORP. LEGAL TIMES, Sept. 2001, at 68 (comments of Garry G. Mathiason of Littler Mendelson).

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the only system that will hear the employees' claims. In other words, the employer's lawyer almost completely controls the employees' access to justice.

Part II of this Article traces the legal developments from *Gilmer* to *Circuit City* and the implications of these developments for the current state of employment arbitration. Part II suggests that we stand at a crossroads where employment arbitration can develop into an efficient system for resolving workplace disputes with significant benefits for employers and employees, or it can develop into a vehicle for employer avoidance of statutory duties and thwarting of legitimate employee claims. Part III discusses the evolving case law concerning judicial policing of employer-promulgated arbitration systems. It argues that, over the long term, the Supreme Court's decision in *Green Tree Financial Corp. v. Randolph*,[14] could be even more significant than the decision in *Circuit City*. Part III suggests that the decision in *Green Tree* may mean that the employer's attorney will play the most significant role in determining the manner in which employment arbitration will develop. Part IV contends that, in light of *Green Tree*, lawyers drafting arbitration agreements will face conflicts between their duties as zealous advocates for their clients and their duties as officers of the court. It suggests ways in which lawyers may resolve these conflicts. Part V concludes.

II. FROM *GILMER* TO *CIRCUIT CITY* AND BEYOND

Prior to *Gilmer*, the Supreme Court had considered the impact of arbitration agreements on statutory employment claims only in the context of grievance procedures contained in collective bargaining agreements. The Court consistently held that employees covered by collective bargaining agreements had rights to litigate their statutory claims in court that were independent of those contracts.[15] Consequently, an employee could sue on the statutory claim without resorting to the collectively bargained grievance procedure and in spite of resorting to it with an unfavorable result in the arbitration.

Outside the employment context, however, the Court relied on the FAA to enforce pre-dispute agreements to arbitrate statutory claims.[16] In non-unionized

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[14] 531 U.S. 79 (2000).

[15] *See* McDonald v. City of W. Branch, 466 U.S. 282 (1984); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[16] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

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settings, lower courts faced actions brought by employers, primarily in the securities industry, to compel employees to arbitrate their statutory claims pursuant to individual contracts or pursuant to arbitration provisions of employees' registrations with securities exchanges. These actions forced the courts to reconcile the Supreme Court's FAA commercial contract jurisprudence with its employment jurisprudence developed in the collective bargaining context. The circuits almost uniformly concluded that the employment nature of the relationship was the salient factor, followed the Court's grievance arbitration decisions, and refused to enforce pre-dispute agreements to arbitrate statutory employment claims.[17] When the Court granted certiorari in *Gilmer*, it agreed to review the only circuit court decision holding that a pre-dispute agreement to arbitrate a statutory employment claim was enforceable.[18]

In *Gilmer,* the Court characterized its earlier decisions developed in the context of collectively bargained grievance arbitration as exhibiting "mistrust of the arbitral process . . . undermined by our recent arbitration decisions."[19] The Court relied on the strong policy favoring arbitration exhibited in the FAA and its more recent commercial arbitration decisions, reasoning generally that "by 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."[20] The Court recognized that claims under a particular statute might not be amenable to arbitration, but made it clear that, because of the strength of the federal policy favoring arbitration, a party opposing arbitration on this ground has a heavy burden to demonstrate that Congress intended to preclude arbitration.[21]

The lower courts divided over how broadly to read *Gilmer's* endorsement of the arbitration of statutory employment claims. At one extreme, the Court of Appeals for the Fourth Circuit held that *Gilmer* had impliedly overruled the Court's prior grievance arbitration precedent. The court required employees

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[17] *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990), *vacated*, 500 U.S. 930 (1991); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989); Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989); Swenson v. Mgmt. Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544 (10th Cir. 1988); Johnson v. Univ. of Wis.-Milwaukee, 783 F.2d 591 (7th Cir. 1986).

[18] *See* Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

[19] 500 U.S. at 34 n.5.

[20] *Id.* at 26 (internal citations omitted).

[21] *See id.* at 25-27.

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covered by collective bargaining agreements to submit their statutory claims to the collectively bargained grievance arbitration procedure.[22] The Fourth Circuit also held that an employee's agreement to arbitrate his statutory claims precluded the Equal Employment Opportunity Commission ("EEOC") from suing in its own name to recover individual relief for that employee.[23] The Supreme Court overruled the Fourth Circuit on both issues.[24]

At the other extreme, the Ninth Circuit alone has held that pre-dispute agreements to arbitrate claims under Title VII of the 1964 Civil Rights Act[25] are not enforceable because Congress intended to preclude arbitration of such claims.[26] The Ninth Circuit also stood alone on the scope of the FAA's employment contract exclusion, reading it broadly to exclude almost all employment contracts.[27] The Supreme Court rejected the latter holding in *Circuit City*.

At issue in *Circuit City* was Section 1 of the FAA which provides, "[N]othing herein . . . shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[28] Specifically, the Court had to interpret the words "engaged in foreign or interstate commerce." The Court held that the term encompassed only those workers who transport goods or people in interstate commerce. It reasoned that a broader interpretation, which would apply the exclusion as broadly as the Commerce Clause of the Constitution, would render the statutory enumeration of "seamen" and "railroad employees" superfluous.[29] Under the maxim *esjudem generis*, the Court reasoned, the term "engaged in

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[22] *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).

[23] *See* EEOC v. Waffle House, 193 F.3d 805 (4th Cir. 1999), *rev'd*, 534 U.S. 279 (2002). In this regard, the Fourth Circuit was not alone. The Second Circuit had held similarly. *See* EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998).

[24] *See* EEOC v. Waffle House, 534 U.S. 279 (2002) (holding that individual employee's agreement to arbitrate does not affect the relief the EEOC may seek in its lawsuit); Wright v. Universal Maritime Servs. Corp., 525 U.S. 70 (1998) (declining to decide whether a collective bargaining agreement can ever waive an employee's right to sue for a statutory violation but holding that if such a waiver is enforceable, it must be clear and unmistakeable).

[25] 42 U.S.C. §§ 2000e - 2000e-17 (2000).

[26] *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998); *but see* EEOC v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994 (9th Cir. 2002) (panel decision overruling *Duffield* in light of *Circuit City*), *vacated*, 319 F.3d 1091 (9th Cir. 2003) (vacating panel decision and granting rehearing en banc).

[27] *See* Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999).

[28] 9 U.S.C. § 1 (2000).

[29] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001).

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commerce" "should . . . be controlled and defined by reference to the enumerated categories of workers which are recited just before it . . . ."[30]

The Court further contrasted the language of Section 1 with the language of Section 2, which defines the general scope of the FAA. Section 2 specifies that the FAA applies to all contracts "involving commerce,"[31] a term that the Court previously interpreted as equivalent to "affecting commerce," and as expressing Congress's intent to exercise its authority to the broadest extent permissible under the Commerce Clause.[32] In contrast, the Court regarded "engaged in commerce" as having a much narrower reach.[33]

Circuit City clearly signals to lower courts, even more so than *Gilmer,* that they should weigh the federal policy favoring arbitration very heavily in future cases. A panel of the Ninth Circuit has opined that the court's position that employees may not be compelled to arbitrate Title VII claims is inconsistent with *Circuit City.*[34] The court has granted rehearing en banc and the impact of *Circuit City* on the full court remains to be seen.

Reactions to *Circuit City* confirm that many employers who proceeded cautiously after *Gilmer* have viewed *Circuit City* as giving them a green light to mandate that their employees arbitrate their statutory claims. American Arbitration Association Senior Vice President Robert Wade related that the number of companies with employment arbitration agreements increased seventy-five percent after *Circuit City.*[35] A senior employment counsel for TRW, Inc., indicated that the company, whose mandatory arbitration system was binding on the company but not on the employee, was considering making the system binding on its employees in light of *Circuit City.*[36] Indeed, it has been suggested that as many employees are covered by non-union arbitration systems as are covered by collective bargaining agreements.[37]

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30 *Id.*

31 9 U.S.C. § 2 (2000).

32 *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

33 *See Circuit City,* 532 U.S. at 115-16.

34 *See* EEOC v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994 (9th Cir. 2002), *vacated,* 319 F.3d 1091 (9th Cir. 2003).

35 *See* Charles Lane, *High Court Backs EEOC Suits in Bias Cases,* WASH. POST, Jan. 16, 2002, at A-1 (quoting Wade as saying that the number of companies with employment arbitration agreements had increased from 400 to 700).

36 *See The Employee Dispute Resolution Solution, supra* note 13, at 68 (comments of TRW Senior Employment Counsel Elizabeth B. Lilly).

37 *See* Robert Lewis, *More on ADR,* A.B.A. J., Dec. 2001, at 14 (quoting Cornell University Professor Katherine Stone).

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As more employers impose arbitration agreements on their employees, there is considerable concern about the road they will travel now that *Circuit City* has given them the green light. Critics envision employers depriving their employees of access to courts and juries and substituting for the public justice system a private stacked deck, characterized by defective procedures, inadequate remedies and biased arbitrators.[38]

These concerns do not lack substance. Indeed, exhibit A supporting them is the arbitration system that Hooters of America, Inc., imposed on its employees.[39] The Hooters system provided for tripartite arbitration, with the employee and the company each appointing one member of the arbitral panel. Although the two party-appointed arbitrators were to jointly select the third member of the panel, they were required to select from a list that Hooters completely controlled.[40] The Hooters system imposed extensive disclosure requirements on the employee but no such requirements on the company.[41] It provided for the company, but not the employee, to seek summary judgment, record the hearing, and sue to vacate the award if the arbitration panel exceeded its authority.[42] It also enabled Hooters to amend the arbitration rules at any time without notice and to cancel the arbitration agreement with thirty days notice. No similar right to cancel was provided to the employee.[43] Not even the Fourth Circuit could mandate arbitration under these circumstances. Indeed, the Fourth Circuit characterized the Hooters system as "a sham unworthy even of the name of arbitration."[44]

Employment arbitration need not evolve along the Hooters model, however. An alternative vision sees employment arbitration as evolving into a vehicle that provides an efficient, cost-effective method for resolving employees' statutory claims.[45] Under this vision, employers benefit from lower litigation

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[38] *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

[39] *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

[40] *See id.* at 938-39.

[41] *See id.* at 938.

[42] *See id.* at 939.

[43] *See id.*

[44] *Id.* at 940.

[45] *See, e.g.*, Robert N. Covington, *Employment Arbitration After* Gilmer*: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345 (1998); Susan A. FitzGibbon, *Reflections on* Gilmer *and* Cole, 1 EMPLOYEE RTS. & EMP. POL'Y J. 263 (1997);

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costs and avoidance of exposure to outlier jury awards. Employees also benefit from a system that, because it is less expensive than litigation, provides a more accessible forum capable of being used for claims that might otherwise not have justified the expense of litigation; a system that, because it is faster than litigation, provides more immediate and therefore more effective remedies; and a system that, due to its procedural simplicity, ensures that the employee's case will be adjudicated on the merits rather than resolved on a motion. Such a vision is probably what the Court contemplated in *Gilmer* when it opined that an agreement to arbitrate merely substitutes one forum for another and does not waive the underlying statutory rights.[46]

Arbitrators and courts will play key roles in determining along which road the development of employment arbitration will proceed. I have discussed their roles elsewhere.[47] Perhaps the most significant role, however, will be played by the attorneys who draft the arbitration agreements and arbitration systems that employers will impose on their employees. As developed below, these attorneys must contend with serious ethical and moral concerns in carrying out their roles. Before considering those issues, it is necessary to understand the evolving law of employment arbitration procedures, a matter covered in the next part.

III. FROM *COLE* TO *GREEN TREE* AND BEYOND

In the aftermath of *Gilmer*, the third party neutral community developed rules and guidelines designed to ensure fundamental fairness to employees pressing claims under arbitration systems unilaterally promulgated by their employers. Arbitrator-appointing bodies such as JAMS (formerly Judicial Arbitration & Mediation Services),[48] the American Arbitration Association ("AAA"),[49] and the Center for Public Resources ("CPR"),[50] developed rules for employment arbitration in an effort to ensure disputants basic due process. A

Martin H. Malin, *Privatizing Justice but by How Much: Questions* Gilmer *Did not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001).

[46] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[47] Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187 (1993); *see* Malin, *supra* note 45.

[48] *See* JAMS (Mediation, Arbitration and ADR Services), *Employment Arbitration Rules and Procedures*, (revised Sept. 2002) <http://www.jamsadr.com/employment_arb.asp>.

[49] *See* Am. Arbitration Ass'n, *National Rules for Resolution of Employment Disputes*, (visited Mar. 26, 2003) <http://www.adr.org/rules/employment/employment_ rules.html>.

[50] *See* CPR Institute for Dispute Resolution, *Program to Resolve Employment Disputes* (last modified Feb. 16, 2003) <http://www. cpradr.org/empdispu_arbitrat.htm>.

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task force comprised of representatives of the American Bar Association, National Employment Lawyers' Association ("NELA"), National Academy of Arbitrators, Federal Mediation and Conciliation Service, and the Society of Professional in Dispute Resolution developed a Due Process Protocol for the arbitration of statutory employment claims.[51] The National Academy of Arbitrators has issued guidelines for its members on arbitrating statutory employment claims which remind them "that the power to withdraw from a case in the face of policies, rules, or procedures that are manifestly unfair or contrary to fundamental due process carries considerable moral persuasion."[52] Thus, employers who try to stack the deck may find that most reputable arbitrators will refuse to play under their rules.

Self-policing by the third party neutral community, however, may be insufficient to protect employees against stacked decks. Employers intent on stacking the deck may turn to less reputable arbitrators. Furthermore, even where the arbitration agreement designates a reputable arbitrator who refuses the assignment because of fundamental unfairness, a court may still compel arbitration. Such was the case in *Great Western Mortgage Corp. v. Peacock*,[53] where the Third Circuit compelled arbitration even though the arbitration agreement called for JAMS to administer the case and JAMS refused to do so because the agreement also shortened the limitations period for filing a claim and restricted the remedies that the arbitrator was authorized to award.

The first comprehensive judicial consideration of the minimal due process safeguards required in an employer imposed arbitration system occurred in *Cole v. Burns International Security Services*.[54] The decision in *Cole* has received considerable attention because of its scholarly analysis, its comprehensiveness, and because its author, Chief Judge Harry Edwards, was a highly respected labor law professor and arbitrator prior to his appointment to the bench.

Judge Edwards began his analysis by cataloguing the differences between arbitration under a collective bargaining agreement and arbitration of statutory claims under an employment agreement imposed unilaterally by the employer. He observed that arbitration under a collective bargaining agreement is a

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[51] *See A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, 50 DISP. RESOL. J., Oct.-Dec. 1995, at 37.

[52] National Academy of Arbitrators, *Guidelines on Arbitration of Statutory Claims Under Employer Promulgated Systems* (visited Mar. 26, 2003) <http://www.naarb.org/guidelines.html>.

[53] 110 F.3d 222 (3d Cir. 1997).

[54] 105 F.3d 1465 (D.C. Cir. 1997).

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substitute for workplace strife rather than a substitute for litigation. Collective bargaining agreement arbitration provides a mechanism whereby the union and employer's mutually selected arbitrator interprets their private contract. Indeed, when the parties to a collective bargaining agreement agree on a grievance arbitration procedure, they agree that if they cannot agree on what their contract means in a given dispute, their contract means whatever the arbitrator says it means. Thus, collective bargaining arbitration is an integral part of a private process of workplace self-government.[55]

The court further observed that traditional grievance arbitration contains safeguards that individual employment arbitration lacks. These include the presence of two institutional repeat-players in the union and employer and the ability of the parties to revisit the result awarded by the arbitrator in the collective bargaining process.[56] Judge Edwards continued:

> The fundamental distinction between contractual rights, which are created, defined, and subject to modification by the same private parties participating in arbitration, and statutory rights, which are created, defined, and subject to modification only by Congress and the courts, suggests the need for a public, rather than private, mechanism of enforcement for statutory rights.[57]

Thus, the extreme judicial deference to the parties' agreement and the arbitrator's award afforded grievance arbitration was not applicable to the arbitration of individual statutory employment rights. Rather, according to the court, employment arbitration must be evaluated to ensure that the agreement only substitutes the arbitral forum for the judicial forum and does not alter statutory rights. The employee must be able to effectively vindicate the statutory rights at issue in the arbitral forum. Judge Edwards enumerated five characteristics of an arbitration arrangement necessary for it to be enforceable. An arbitration arrangement is enforceable if it:

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.[58]

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55 *See id.* at 1473-75.
56 *See id.* at 1476.
57 *Id.*
58 *Id.* at 1482.

Following *Cole*, courts tended to refuse to enforce arbitration agreements that reduced the limitations period below that contained in the statute at issue or limited the arbitrator's remedial authority.[59] Similarly, most courts considering the issue held that for an arbitration agreement to be enforceable, the employer must pay the entire fee of the arbitrator, and the employee may not be required to pay more than a nominal amount, approximately equal to the filing fee for federal court.[60] Then, along came *Green Tree Financial Corp. v. Randolph*.[61]

Green Tree may, in the long run, turn out to be a more significant decision than *Circuit City*, even though *Green Tree* was not an employment case. In *Green Tree*, the plaintiff financed her purchase of a mobile home through Green Tree, whose financing agreement required arbitration for all disputes related to the agreement.[62] The plaintiff sued Green Tree alleging violations of the Truth in Lending Act and the Equal Credit Opportunity Act. Green Tree moved to compel arbitration and the district court agreed. However, the Eleventh Circuit reversed, observing that the arbitration agreement failed to specify which party would be responsible for the arbitrator's fees and related costs of the proceeding. Relying on employment arbitration precedent, the court held the agreement unenforceable because it subjected the plaintiff to an unreasonable risk of steep arbitration costs that would undermine her ability to effectively vindicate her statutory rights.[63]

By a five-to-four vote, the Supreme Court reversed. The majority wrote:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory

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[59] *See, e.g.*, Brennan v. King, 139 F.3d 258 (1st Cir. 1998); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998); Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669 (Ca. 2000); *but see* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 231 (3d Cir. 1997) (compelling arbitration despite agreement's shortening of the limitations period and limitations on remedies, and opining that validity of those provisions was for the arbitrator to decide).

[60] *See, e.g.*, Shankle v. B-G Maint. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999); *Paladino*, 134 F.3d 1054; *Armendariz*, 6 P.3d 669; *see also* Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 314 (6th Cir. 2000) (expressing "serious reservations" about the enforceability of an agreement that required the employee to pay half the arbitrator's fee but denying enforcement on other grounds); *but see* Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752 (5th Cir. 1999) (holding that court should evaluate fee splitting arrangement on a case-by-case basis to determine whether it deprives employee of an effective forum in which to vidicate statutory claims); Rosenberg v. Merril Lynch, 170 F.3d 1 (1st Cir. 1999) (same).

[61] 531 U.S. 79 (2000).

[62] *See id.* at 82-83 & n.1.

[63] *See id.* at 92.

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> rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.[64]

The Court premised its analysis on the strong federal policy favoring arbitration. It analogized to the presumption that claims under a particular statute are arbitrable and to the burden that a party resisting arbitration has to show that Congress intended that claims under the statute not be arbitrated. The Court placed a similar burden on a party resisting arbitration on the ground that excessive costs will impede her ability to vindicate her claims in the arbitral forum. The Court majority wrote:

> [T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden.[65]

Since *Green Tree*, lower courts have evaluated the effects of arbitral fee splitting provisions on a case-by-case basis with the plaintiff bearing the burden of proving that she cannot afford the arbitration costs.[66] The Third Circuit has

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[64] *Id.* at 90-91 (citation and footnote omitted).

[65] *Id.* at 91-92 (citations omitted).

[66] *See, e.g.*, Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002); Blair v. Scott Specialty Gasses, 283 F.3d 595 (3d Cir. 2002); Bradford v. Blackwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001); Boyd v. Town of Hayneville, 144 F. Supp. 2d 1272 (M.D. Ala. 2001). I have criticized *Green Tree* for undermining the efficiency advantages of arbitration and for its focus on the narrow issue of whether the particular plaintiff could vindicate her statutory rights in the forum with which she was presented and ignoring the systematic effects of the agreement's silence concerning responsibility for arbitrator fees in deterring other potential plaintiffs from asserting their rights. *See* Malin, *supra* note 45, at 619-20. The trend in the post-*Green Tree* case law validates my concerns. A plaintiff who will be deterred from bringing a claim because of the barrier posed by excessive costs of the arbitral forum will be deterred even further by the costs of having to prove to a court that such costs are beyond her financial reach.

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held that the district court must make a factual inquiry into the plaintiff's ability to afford the probable arbitration fees and must allow for discovery on this issue. The court required this even though the plaintiff submitted an affidavit demonstrating that she had negative income and negative assets.[67]

Even where a plaintiff makes a sufficient showing of an inability to afford the fees required for access to the arbitral forum, a court may still compel the plaintiff to arbitrate. *Green Tree's* focus is on the effect of arbitral fees on a particular plaintiff's ability to vindicate her statutory rights, rather than on the systemic effects of fee splitting provisions in deterring potential plaintiffs from pursuing claims. Consequently, where a plaintiff establishes that her responsibility for a portion of the costs of the arbitral forum impedes her access to the forum and thus her ability to effectively vindicate her statutory rights, the employer may remove that impediment by offering to pay those fees.[68]

In the aftermath of *Green Tree*, the D.C. Circuit appears to be backing away from *Cole*. In *Brown v. Wheat First Securities, Inc.*,[69] the D.C. Circuit held that *Cole* did not apply to state common law retaliatory discharge claims. Similarly, in *LaPrade v. Kidder, Peabody & Co.*,[70] the court enforced an arbitration award which taxed a portion of the arbitral forum fees to the plaintiff. The court held that the award did not display a manifest disregard for the law.

Green Tree's impact, however, may not be limited to judicial policing of the costs of arbitration that may be imposed on employees. The Court has stated that an employee may not be compelled to arbitrate in a forum that does not allow that employee to effectively vindicate her statutory rights. The

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[67] *See Blair*, 283 F.3d at 608; *but see* Cooper v. MRM Invest. Co., 199 F. Supp. 2d 771 (M.D. Tenn. 2002) (finding that plaintiff could not afford the fees of the arbitral forum where her W-2 from the prior year showed that she had an income of only $7253.74).

[68] *See* Roberson v. Clear Channel Broad., Inc., 144 F. Supp. 2d 1371 (S.D. Fla. 2001); *but see Cooper*, 199 F. Supp. 2d 771. In *Cooper*, the court refused to compel arbitration even though the employer offered to pay all costs of the arbitration. The court reasoned that the arbitration agreement's requirement that the employee split the arbitrator's fees with the employer might deter other employees from pursuing their claims. To prevent the employer from "craft[ing] questionable arbitration agreements, requir[ing] plaintiffs to jump through hoops in order to invalidate those agreements, and ultimately . . . jettison[ing] questionable provisions from the arbitration agreements' would be inequitable." *Id.* at 782. The court's rationale is sound policy but unfortunately is probably inconsistent with the Supreme Court's case-by-case focus on the particular plaintiff in *Green Tree*.

[69] 257 F.3d 821 (D.C. Cir. 2001).

[70] 246 F.3d 702 (D.C. Cir. 2001).

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arbitration arrangement may change the forum but not the underlying statutory law. Thus, even the Fourth Circuit refused to force employees to play with a blatantly stacked deck in *Hooters*. However, when we move away from the Hooters systems, the issues become more difficult, and the judicial consensus begins to break down.

Courts must scrutinize arbitration procedures to ensure that they are fundamentally fair, *i.e.*, that they provide a forum for the effective vindication of statutory rights. How closely they scrutinize those procedures requires a delicate balance between the federal policy promoting arbitration and the rights of those who would be compelled to arbitrate. Scrutinizing too closely will invite routine procedural challenges to arbitrability which could nullify the cost and speed advantages of arbitration. Scrutinizing too loosely will allow wolves, *i.e.*, unfair procedures that impede employees' abilities to assert their statutory rights, to sneak through dressed in sheep's clothing.

In *Green Tree*, the Court clearly struck this balance in favor of the federal policy promoting arbitration. It acknowledged that excessive arbitration costs can impede an individual's ability to use the arbitral forum to vindicate statutory rights. However, it analogized to the burden that a party resisting arbitration on substantive grounds has to show that Congress intended to preclude arbitration of the particular statutory claims at issue. It held that the party seeking to resist arbitration because of allegedly excessive costs has the burden to demonstrate that the costs impede access to the arbitral forum. Furthermore, the inquiry is made with respect to the particular plaintiff on a case-by-case basis. The inquiry ignores the possibility that the arbitration agreement's allocation of costs might systemically deter individuals from bringing claims even if it did not deter the plaintiff in the particular case.

On a more general level, *Green Tree* treats issues of substantive arbitrability (*i.e.*, whether Congress intended to preclude arbitration of claims under a particular statute) the same as issues of procedural arbitrability (*i.e.*, the fairness of the procedures). With respect to both types of issues, the party resisting arbitration bears a heavy burden of persuasion and the inquiry is focused on the particular case, rather than systemically. Under such an approach, the party resisting arbitration will almost always lose.

For example, assume that an arbitration agreement requires that claims be brought within six months of the date they arise and an employee claiming unpaid overtime resists arbitration because the Fair Labor Standards Act's[71]

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[71] 29 U.S.C. §§ 201-19 (2000).

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("FLSA") limitations period is two or three years depending on whether the violation is willful.[72] The employee sues and the employer moves to compel arbitration. If the employee filed the claim within six months, then the employee will be unable to prove that the shortened limitations period impeded his ability to vindicate his FLSA rights in the arbitral forum.[73] If the employee filed the claim outside the agreement's six month limitations period but within the statutory limitations period, a court can compel arbitration conditioned on the employer waiving the timeliness defense.[74]

The impact of a focus limited to the particular plaintiff instead of a consideration of the systemic effects of provisions of an arbitration agreement is clearly illustrated by decisions of the Ninth Circuit and the California Court of Appeals dealing with the enforceability of Countrywide Credit Insurance Company's arbitration scheme.[75] Countrywide's arbitration agreement expressly limited discovery to three depositions per party and thirty overall discovery requests. It provided for unlimited depositions of expert witnesses which would not be counted against the other limitations. It also limited any deposition of a company representative to four subjects specified in advance but contained no similar limitation on depositions of the employee or the employee's witnesses. The courts noted that the discovery rules were uneven and designed to favor the employer. Nevertheless, the courts held that the unequal discovery rights, standing alone, did not render the agreement unconscionable in the absence of evidence that in practice they would prevent the plaintiffs from vindicating their statutory rights.[76] Missing from the court's

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[72] *See id.* at § 255.

[73] In *Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 171 n.4 (2d Cir. 2002), the employer made this precise argument in responding to the plaintiff's attack on the arbitration agreement's shortening of the statutory limitations period.

[74] Indeed, this is the practice of the National Labor Relations Board ("NLRB"). The NLRB often defers unfair labor practice charges to the parties' grievance and arbitration procedures. *See* Collyer Insulated Wire Co., 192 N.L.R.B. 837 (1971). However, collective bargaining agreements frequently have very short time limits for filing grievances and for demanding arbitration. Often, the unfair labor practice charge will be filed after the time for filing a grievance under the collective bargaining agreement has expired. The NLRB will only defer the charge to the grievance procedure if the party seeking deferral represents that it will waive time limit and other procedural objections to arbitration.

[75] *See* Ferguson v. Countrywide Credit Ins. Co., 298 F.3d 778 (9th Cir. 2002); Mercurio v. Superior Court, 116 Cal. Rptr. 2d 671 (Cal. Ct. App. 2002). Neither jurisdiction is known for its friendliness to employment arbitration.

[76] *Ferguson*, 298 F.3d at 787; *Mercurio*, 116 Cal. Rptr. 2d at 682-83. The courts did hold the arbitration agreements unconscionable in light of other provisions that tilted the process to favor the employer. *See Ferguson*, 298 F.3d at 787; *Mercurio*, 116 Cal. Rptr. 2d at 684.

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analysis was any consideration of the degree to which the unequal discovery rights would deter employees in general from bringing claims against Countrywide.

The impact of a focus limited to the particular plaintiff instead of a consideration of the systemic effects of provisions of an arbitration agreement is also illustrated by *Brooks v. Travelers Insurance Co.*[77] The employer imposed on its employees an agreement which limited the arbitration hearing to one day, absent unusual circumstances. It impliedly limited the hearing in unusual circumstances to two days. It limited the relief an arbitrator could award in ways that were more restrictive than some employment statutes. It provided that each party would bear its own legal fees and expenses, that the parties would split the costs of the arbitration proceeding beyond the first day of hearing, and expressly prohibited the arbitrator from changing that allocation. Finally, it provided for a one year limitations period, a period considerably shorter than that provided under several employment statutes. Nevertheless, the district court dismissed the plaintiff's complaint for age and disability discrimination and ordered her to arbitrate. During oral argument on appeal, the Second Circuit expressed concern that the arbitration agreement impeded plaintiff's ability to vindicate her statutory rights. In light of those concerns, the employer abandoned its efforts to compel the plaintiff to arbitrate. The Second Circuit vacated the district court's judgment and dismissed the appeal.

If the focus is limited to the specific plaintiff present before the court, as *Green Tree* suggests is required, the Second Circuit's decision makes perfect sense. However, the court's decision left Travelers free to continue to impose the arbitration agreement on all of its other employees and to waive it whenever an employee challenged it in court. Meanwhile, the agreement could continue to deter many employees from bringing claims in the first instance. The failure to consider the potential systemic effects of the agreement permits such strategic behavior.[78]

There are post-*Green Tree* precedents that continue to police arbitration agreements closely for procedural fairness. However, several of them have been qualified substantially, undermining their effectiveness.

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[77] 297 F.3d 167 (2d Cir. 2002).

[78] In fairness to Travelers, I do not know how the company reacted to the litigation. I do not know if it is continuing to impose the arbitration agreement or if it amended the agreement in light of the concerns expressed by the court during oral argument.

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For example, in *Perez v. Globe Airport Security Service, Inc.*,[79] the Eleventh Circuit refused to enforce an arbitration agreement which required the parties to split the fees charged by the American Arbitration Association and precluded the arbitrator from disturbing that allocation. The court held this limitation on the arbitrator's remedial authority rendered the agreement unenforceable. However, the court subsequently vacated its opinion in light of a joint motion by the parties to dismiss the appeal.[80]

Similarly, on remand from the Supreme Court in *Circuit City*, the Ninth Circuit held the Circuit City arbitration agreement unconscionable under California law.[81] The court faulted the agreement for reducing the limitations period and for limiting the remedies available in arbitration. However, the Ninth Circuit has twice enforced Circuit City arbitration agreements with the same offending provisions. The difference is that in the cases where the court enforced the agreements, the agreements were offered to existing employees who were given thirty days to opt out. In the court's view, the ability to opt out meant that the agreements were not adhesion contracts and, therefore, were not procedurally unconscionable.[82] Of course, the employees did not opt out, and therefore, the court held them to be bound.[83]

In all fairness to Circuit City and the Ninth Circuit, Circuit City did not present its arbitration agreement to incumbent employees as a piece of routine paperwork. Circuit City clearly disclosed the consequences of a failure to opt out of the new arrangement and advised employees to seek counsel if they did

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[79] 253 F.3d 1280 (11th Cir. 2001), *vacated by*, 294 F.3d 1275 (11th Cir. 2002).

[80] *See Perez*, 294 F.3d 1275.

[81] *See* Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002).

[82] *See* Circuit City Stores, Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002).

[83] The decisions remind me of my recent experience purchasing a new motor vehicle. After reaching agreement on price and related terms, the dealer turned to the paperwork. Included with the manufacturer's standard form sales agreement, the documents necessary to transfer title and register the vehicle, the report to the state on the sales tax and similar documents, was a separate document according to which the dealer and I agreed that all future disputes between us would be resolved in arbitration. Not wanting to waive my right to jury trial in the unlikely event that a dealer's mechanic's negligence caused my brakes to fail resulting in serious bodily injury, I asked the sales representative if it would be a deal breaker if I did not sign the arbitration agreement. He replied immediately, "Of course not. If you are not comfortable with the arbitration agreement we'll just tear it up." I was left wondering how many other consumers have questioned the agreement. It would not surprise me if most simply sign it as part of the routine paperwork. Should courts not review such agreements' terms closely, following the Ninth Circuit's approach to the Circuit City agreements?

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not understand the consequences. Circuit City also gave employees thirty days to reject the arrangement and made it easy for them to do so. Most importantly, Circuit City expressly assured employees that opting out of the arrangement would not affect their employment at Circuit City. In other words, Circuit City did everything right to avoid even the slightest appearance of overreaching. Nevertheless, I must question whether such an approach justifies the court's failure to scrutinize the arrangement's terms to ensure that the arbitration system would allow employees to effectively vindicate their statutory rights. If the arbitration system is fundamentally deficient, it undermines the policies of the statute the plaintiff is seeking to enforce regardless of whether the plaintiff had the opportunity to opt out of the system months, or even years, before the claim arose.

Similar qualification and undermining of the strength of precedent has occurred in the Seventh Circuit. In *McCaskill v. SCI Management Corp.*,[84] the court held an arbitration agreement unenforceable because it precluded an award of attorney fees to a prevailing plaintiff, even where the statutory basis for the plaintiff's claim provided for such an award. However, the three judge panel granted the employer's motion for reconsideration and vacated the opinion.[85]

While the reconsideration was pending, a different panel of the same court decided *Metro East Center for Conditioning and Health v. Qwest Communications International, Inc.*[86] Metro East claimed that Qwest was overcharging it for interstate phone service. Qwest's tariff on file with the Federal Communications Commission ("FCC") required arbitration of all disputes between it and its customers. Metro resisted arbitration citing the original panel decision in *McCaskill* and arguing, among other grounds, that the costs of the arbitral forum were excessive under the circumstances and that the tariff precluded an award of attorney fees to a prevailing customer in conflict with the Federal Communications Act which provided for fee shifting for prevailing plaintiffs. The *Metro East* panel rejected these arguments because of the filed-rate doctrine which provides that the FCC has the exclusive authority to set rates and other terms and conditions of service. Thus, the court lacked authority in the law suit to overturn part of the filed tariff; Metro East's remedy was to petition the FCC to do so.[87]

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[84] 285 F.3d 623 (7th Cir. 2002), *vacated by*, 294 F.3d 879 (7th Cir. 2002).
[85] *See McCaskill*, 294 F.3d 879.
[86] 294 F.3d 924 (7th Cir. 2002).
[87] *See id.* at 927-28.

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The panel, per Judge Frank Easterbrook, did not stop there. It added considerable dicta critical of the original panel decision in *McCaskill*. Judge Easterbrook equated Metro East's arguments resisting arbitration to the position of the dissent in *Green Tree*.[88] With respect to *McCaskill*, he commented:

> Metro East overstates *McCaskill's* holding, because the employer in that case conceded that the American Rule would not be used in the arbitration and forfeited additional arguments as well. The employer did not, for example, contend in *McCaskill* that it is the arbitrator, not a judge, who must determine in the first instance what rules for the allocation of legal expenses are applicable. Although some language in *McCaskill* could be read to decide issues on which the parties had not engaged, rehearing has been granted in that case to consider more fully the effects of the employer's forfeitures. Because *McCaskill* has been withdrawn, it remains open to decision in this circuit whether parties to a contract may agree to replace a fee-shifting system with the American Rule, whether the right party to make this decision is the arbitrator or the judge, and whether, if a contractual choice of the American Rule is indeed forbidden, this spoils the entire arbitration clause.[89]

Judge Easterbrook continued, suggesting that an arbitration agreement's limitation on remedies precluding an award of attorney fees should be enforceable. He observed, "As far as we know, the Supreme Court has never held that any entitlement is outside the domain of contract, unless the statute forbids waiver . . . ."[90] He catalogued areas where parties may waive fundamental rights in exchange for other benefits.[91] He cited decisions which held enforceable cognovit notes and opined, "A contract specifying use of the American Rule in arbitration is well short of a cognovit clause; and if the latter can be valid, why not the former?"[92] Judge Easterbrook's view would justify enforcing an agreement to arbitrate under the most blatantly stacked deck

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[88] *See id.* at 927.

[89] *Id.* at 928.

[90] *Id.*

[91] *See id.*

[92] *Id.* at 929. Judge Easterbrook opined that enforcement of the arbitration agreement, regardless of how fundamentally deficient the procedures are, is necessary to preserve personal liberty. He characterized arbitration as something that "comes with the territory. . . . Although these requirements may be non-negotiable . . . they remain 'agreements' because the person could have chosen to do something else. A would-be securities dealer may elect a different occupation . . . ." *Id.* at 926 (citations omitted). Even if the agreement infringed on a statutory right, such as the right to recover attorney fees if successful in litigation, he opined, "One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly." *Id.* at 929.

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system. Under this approach, even the Fourth Circuit was wrong in *Hooters* because the plaintiff had the liberty to exchange her statutory rights for something more valuable, a job.

On rehearing, the *McCaskill* panel held the arbitration agreement unenforceable based on concessions made by SCI's counsel during oral argument. The court declined to consider further the effect of the conflict between the arbitration agreement and Title VII's provision for attorney fee awards to prevailing parties.[93] In a concurring opinion, Judge Ilana Diamond Rovner defended the original panel decision against Judge Easterbrook's attack in *Metro East.*[94] However, at this point, the most that can be said about the Seventh Circuit is that at least two judges disagree over whether a limitation on remedies renders an arbitration agreement unenforceable.

Other courts, inspired by *Green Tree,* have upheld provisions in arbitration agreements that appear to have been designed to deter employees from pressing claims. For example, in *Christiansburg Garment Co. v. EEOC,*[95] the Supreme Court, interpreting Title VII's provision for awarding costs and attorney fees to the prevailing party, held that a prevailing defendant may only be awarded attorney fees where the plaintiff's law suit was frivolous. The Court reasoned that to allow the routine award of attorney fees to prevailing defendants would undermine Title VII by deterring plaintiffs from bringing claims. Nevertheless, the Eleventh Circuit and two district courts, relying on *Green Tree*, have enforced arbitration agreements that contained "loser pays" provisions.[96] Similarly, the Eighth Circuit has suggested that it may uphold limitations on remedies, such as a clause limiting punitive damages to $5,000.[97] Even before *Green Tree*, the Third Circuit had held that the validity of shortened limitations periods and limitations on remedies was for the arbitrator to decide.[98]

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[93] *See* McCaskill v. SCI Mgmt. Corp., 298 F.3d 677 (7th Cir. 2002).

[94] *See id.* at 681-86 (Rovner, J. concurring).

[95] 434 U.S. 412 (1978).

[96] *See* Musnick v. King Motor Co., 325 F.3d 1255 (11th Cir. 2003) (requiring plaintiff to arbitrate Title VII claim pursuant to agreement that provided for award to costs and attorney fees to prevailing party); Manuel v. Honda R & D Ams., Inc., 175 F. Supp. 2d 987 (S.D. Ohio 2001) (enforcing arbitration provision that imposed arbitrator's fees and other costs on the losing party); Goodman v. ESPE Am., Inc., 84 Fair Emp. Prac. Cas. (BNA) 1629 (E.D. Pa. 2001) (enforcing arbitration provision that required losing party to pay all fees and costs including opponent's attorney fees); *cf.* Thompson v. Irwin Home Equity Corp., 300 F.3d 88 (1st Cir. 2002) (enforcing consumer arbitration agreement that contained a loser pays provision).

[97] *See* Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 n.6 (8th Cir. 2001).

[98] *See* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997).

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Green Tree has also had an impact on an issue more fundamental than limitations on remedies to the fairness of arbitral proceedings: arbitral neutrality. The impact can be seen in judicial reactions to the arbitration system imposed on employees by Ryan's Family Steak House. Ryan's required all employees to sign an agreement with Employment Dispute Services, Inc., ("EDSI") to arbitrate all employment-related claims against Ryan's. EDSI's sole source of income was fees received for employment arbitration services, and it was dependent upon continued use by its employer clients for that income. The Sixth Circuit, in a pre-*Green Tree* decision, suggested that EDSI's financial interest in retaining its contracts with employers coupled with its role in selecting the panel from which the parties selected the arbitrators to hear the case rendered the procedure inherently biased against plaintiffs.[99] The Southern District of Indiana invalidated the procedure on this basis.[100] However, the Eighth Circuit has enforced the Ryan's arbitration system in light of *Green Tree*,[101] and the Seventh Circuit, while denying enforcement because it found the agreement not supported by consideration, suggested that the attack on the impartiality of the EDSI system would not meet the heavy burden that *Green Tree* imposes on a party seeking to invalidate an arbitration agreement on its face.[102]

Thus, in the long term, *Green Tree* may have far more impact than *Circuit City* in determining along which road the evolution of employment arbitration will proceed. As courts back off from *Cole* and, by placing the burden on employees to show they cannot vindicate their statutory rights under the employer's arbitration system, scrutinize employer-imposed arbitration systems more loosely, the actors who will play the most significant role in determining along which path employment arbitration evolves will be management attorneys who draft the arbitration agreements for their clients.

The lawyer's intuitive reaction to *Green Tree* and subsequent legal developments will be to use them to justify drafting the arbitration agreement to maximize the employer's advantage.[103] Draft the arbitration agreement to require employees to pay half the costs of the proceeding, limit such remedies

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99 *See* Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 314 (6th Cir. 2000).

100 *See* Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985 (S.D. Ind. 2001).

101 *See* Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001).

102 *See* Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001).

103 "There is a very blurry line as to what is and is not enforceable . . . . Management lawyers, while trying to accommodate the wishes of their clients, are trying to take it as close to the line as possible." Kelly Lucas, *Courts Thwart Heavy-Handed Arbitration*, THE IND. LAWYER, Apr. 24, 2002, at 10 (quoting attorney Kenneth E. Lauter).

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as attorney fees and punitive damages, provide discovery procedures that favor the employer and require claims to be filed within a short period of time. Avoid the blatantly gross, such as the Hooters model. The agreement may deter many claims from even being brought. Employees who arbitrate under the agreement and subsequently attack the award for imposing excessive costs on them or for adhering to allegedly unlawful restrictions on remedies likely will lose because it cannot be said that the award will display manifest disregard for the law.[104] If an employee sues and resists arbitration, argue to the court that the employee bears the burden under *Green Tree* of showing that the challenged provisions of the agreement preclude that employee from vindicating his or her statutory rights. If the argument appears to be going the employee's way, stipulate that the employer will not enforce the offensive portions of the agreement against that employee. The next part considers the moral and ethical concerns raised by this approach.

IV. ETHICAL AND MORAL ISSUES IN DRAFTING THE ARBITRATION AGREEMENT

A. Preliminary Comments and Assumptions

In representing a client, a lawyer's obligation is "zealously to protect and pursue a client's legitimate interests, within the bounds of the law."[105] As zealous advocates, lawyers drafting form agreements for their clients will draft as close to the line separating enforceable from unenforceable agreements as is in their clients' interests.[106] Thus, an attorney drafting a form lease that a landlord client will use for all its tenants or a form contract that a client will use with all of its customers will include provisions exculpating or limiting the client's liability for negligence if the law in the client's jurisdiction enforces such clauses.

There may be reasons to exclude such clauses, even if they are enforceable. For example, inclusion of an exculpatory clause may be interpreted by the tenant or customer to indicate that the client does not exercise reasonable care in the conduct of the business. This may make the tenant or customer reluctant to do business with the client. The lawyer may appropriately counsel the client on such concerns, but if they lead to the exclusion of the clause, they do so for

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104 *See* LaPrade v. Kidder, Peabody & Co., 246 F.3d 702 (D.C. Cir. 2001).

105 MODEL RULES OF PROF'L CONDUCT, pmbl. ¶ 9 (2002).

106 *See* Lucas, *supra* note 103.

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business reasons, not because of any ethical or moral obligation of the lawyer and the exclusion is entirely consistent with the lawyer's duty of zealous representation.

Professor David Luban has referred to the duty to zealously pursue the client's interests as the "principle of partisanship."[107] American lawyers have so internalized the principle of partisanship that their intuitive reaction when clients ask them to draft arbitration agreements to impose on their employees will be to draft as close to the line of enforceability as possible.[108]

In this part, I suggest that lawyers should question their intuition. Before examining the issue, a few preliminary assumptions and comments are in order. In approaching this issue, I make several assumptions that are very controversial among legal ethicists. First, I assume that our adversarial system of justice is morally justified.[109] Second, I assume that an attorney's role as

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[107] DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 11 (1988).

[108] Just as there may be business reasons to exercise restraint in drafting exculpatory clauses into a client's business forms, business concerns may counsel against sharp drafting of employment arbitration agreements. For example, most employers do not, as a matter of policy, engage in individual disparate treatment against members of statutorily protected classes. Indeed, to protect against liability for unlawful disparate treatment, they adopt nondiscrimination policies and objective human resource practices, such as requiring periodic performance appraisals, and policies requiring just cause for discipline and discharge and the use of progressive discipline. *See* Susan Bisom-Rap, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Practice*, 26 FLA. ST. U. L. REV. 959 (1999); Susan Bison-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1 (1999). Such practices also help protect the employer against the renegade supervisor or manager. The supervisor or manager who might harbor discriminatory animus to a subordinate will also be constrained to follow the rules by the fear of litigation. If the employer's arbitration system resembles that of Hooters, greatly deterring employees from bringing claims of discrimination, the fear of litigation may no longer constrain the renegade supervisor or manager.

[109] The adversary system has been justified as a superior method of ascertaining the truth. *See* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of the ABA and AALS*, 44 A.B.A. J. 1159 (1958). It also has been justified as essential to individual autonomy and the protection of individual rights and dignity. *See* MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976). As indicated in text, these justifications are controversial. *See, e.g.*, LUBAN, *supra* note 107, at 67-103; John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Carrie J. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern Multicultural World*, 38 WM. & MARY L. REV. 5 (1996). For a more recent defense of the adversary system and attorneys' roles in it see W. William Hodes, *Rethinking the Way Law is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim*

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zealous advocate for the client justifies behavior that would otherwise be immoral.[110] For example, a criminal defense attorney is morally justified in cross-examining a witness that the lawyer knows is telling the truth,[111] even though such action undertaken outside of the lawyer's role would be immoral. Third, I assume that the principle of partisanship extends to all aspects of the lawyer's representation, not just to representation in litigation.[112]

Furthermore, my call for lawyers to question their intuitive instincts when drafting employer-imposed arbitration agreements is normative rather than positive. It is not my intent to suggest that lawyers who fail to do so are vulnerable to disciplinary action. The *Model Rules of Professional Conduct*, which have been adopted in one form or another in the overwhelming majority of jurisdictions,[113] are intended to set basic rules governing conduct, rather than prescribe normative aspirations. Unlike their predecessor, the *Model Code of Professional Responsibility*, the Model Rules contain no "Ethical Considerations." As the chair of the ABA's Ethics 2000 Commission explained, "We also retained the primary disciplinary function of the Rules, resisting the temptation to preach aspirationally about 'best practices' or professionalism concepts. Valuable as the profession might find such guidance, it would not have and should not be misperceived as having a regulatory dimension."[114]

Some have criticized the Model Rules' approach, voicing the fear that the Rules' minimalist approach to regulating lawyer conduct will become accepted as the ultimate declaration of normatively desireable behavior.[115] The Model Rules themselves caution against their being considered as the final word on morally appropriate conduct. "The Rules do not, however, exhaust the moral

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Better?, 87 KY. L.J. 1019 (1999).

[110] For a discussion of the issue of role morality see DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 98-102 (3d ed. 2001); LUBAN, *supra* note 107, at 104-27.

[111] *See* Hodes, *supra* note 109, at 1033-34 & n. 38; Murray L. Schwartz, *Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1140-45 (1988). Even Professor Luban concedes that the criminal defense lawyer is a special case with a particularly forceful justification of role morality. *See* LUBAN, *supra* note 107, at 60-64.

[112] *But see* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978).

[113] The ABA reports that 42 jurisdictions have adopted the Model Rules. *See* ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), MODEL RULES OF PROF'L CONDUCT, 2002 Ed., Chair's Introduction, *available at* <http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html> [hereinafter Chair's Introduction].

[114] *Id.*

[115] *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 647-48 (1985).

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and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."[116]

The Model Rules, however, provide a useful starting point in considering questions of how a lawyer should approach a particular situation. In this regard, we should focus not only on the Model Rules' specific prescriptions, but also on the conceptualization of the lawyer's roles that underlie those prescriptions. These concepts may be supplemented by other sources, such as judicial opinions and scholarly writings on the lawyer's role within the principle of partisanship.

B. The Lawyer's Duty to the Public Justice System as a Limit on the Duty to the Client

There is a consensus that the principle of partisanship has its limits. Even the criminal defense attorney does not labor under an unrestrained duty to zealously advocate for the client. The Supreme Court made this clear in *Nix v. Whiteside*.[117]

Whiteside was convicted in Iowa state court of second degree murder for the stabbing death of Calvin Love. Whiteside admitted stabbing Love but maintained that he acted in self-defense. Whiteside told his defense counsel that he stabbed Love as Love was pulling a gun out from under a pillow. However, he admitted to his attorney that he never actually saw a gun. Despite counsel's assurance that even if the victim did not have a gun, Whiteside would have acted in self-defense if he reasonably believed that the victim was reaching for a gun, Whiteside insisted to his lawyer that he would testify to seeing something metallic. Whiteside's lawyer admonished him that if Whiteside so testified, Whiteside would be committing perjury and the lawyer would advise the court of the perjury, seek to withdraw as counsel and probably impeach that aspect of Whiteside's testimony. Consequently, Whiteside testified that he believed Love was reaching for a gun and acted in self-defense. On cross-examination, Whiteside testified that he did not actually see a gun.[118]

The jury convicted Whiteside of second degree murder. The Iowa Supreme Court affirmed Whiteside's conviction, opining that his lawyer's actions were

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[116] MODEL RULES, *supra* note 105, at pmbl. ¶ 14.
[117] 475 U.S. 157 (1986).
[118] *See id.* at 160-62.

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mandated by the Iowa Code of Professional Responsibility.[119] The United States Court of Appeals for the Eighth Circuit, however, held that Whiteside was entitled to a writ of habeas corpus. The court reasoned that by threatening to disclose Whiteside's perjury to the court, counsel had threatened to violate his duty to maintain client confidences and denied Whiteside effective assistance of counsel.[120]

The Supreme Court reversed the Eighth Circuit. The Court held that an attorney's duty to advocate the client's defense is limited by the attorney's duties "as an officer of the court and a key component of a system of justice, dedicated to a search for truth."[121] The Court opined that counsel was ethically obligated to act as he did, just as he would have been had Whiteside announced an intent to tamper with witnesses or jurors.[122] Consequently, the threat to reveal the perjury and withdraw from the case did not deprive Whiteside of effective assistance of counsel.

Thus, lawyers have dual roles. They serve as representatives of their clients, but they also serve as officers of the court.[123] The trend in the evolution of standards regulating professional conduct has been to place increasing weight on counsel's role as an officer of the court. Thus, the Model Code declared bluntly, "A [l]awyer [s]hould [r]epresent a [c]lient [z]ealously [w]ithin the [b]ounds of the [l]aw."[124] The Model Rules provide, "A lawyer shall act with reasonable diligence and promptness in representing a client."[125] Commentary to this rule recognizes that the lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf," but adds immediately thereafter that the lawyer is not required "to press for every advantage that might be realized for a client."[126] The Model Rules, originally promulgated in 1983, were revised substantially in 2002. One purpose of the 2002 revision of the Model Rules was to strengthen and clarify the lawyer's duties to the court and to the justice system.[127]

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119 *See* State v. Whiteside, 272 N.W.2d 468 (Iowa 1978).

120 *See* Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 475 U.S. 157 (1986).

121 *Whiteside,* 475 U.S. at 174.

122 *See id.* at 168-71, 174.

123 *See* MODEL RULES, *supra* note 105, at pmbl. ¶ 1.

124 MODEL CODE OF PROF'L RESPONSIBILITY, Cannon 7 (1981).

125 MODEL RULES, *supra* note 105, at R. 1.3.

126 *Id.* at R. 1.3 cmt. 1.

127 *See* Chair's Introduction, *supra* note 113.

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The lawyer's duties as an officer of the court are directly related to the lawyer's role in the justice system. They are not general moral duties to society that override the lawyer's duty to zealously advocate the client's interests. This distinction is clearly evident in the Model Rules' treatment of the lawyer's duty to maintain client confidences.

As a general matter, a lawyer may not reveal any information relating to representation of a client unless the client authorizes disclosure.[128] Only under very limited circumstances do the Rules countenance disclosure on the basis of a general concern about society. They permit, but do not require, disclosure "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."[129]

In contrast, the Rules mandate disclosure where necessary to protect the integrity of the judicial process. The Rules not only prohibit a lawyer from offering evidence that the lawyer knows to be false, they mandate that where a lawyer subsequently learns that evidence used was false, the lawyer must remediate the situation including, where necessary, disclosing the falsity to the tribunal.[130] They further mandate that a lawyer who knows that a person intends to engage in or has engaged in, or is engaging in criminal or fraudulent conduct related to an adjudicatory proceeding take remedial measures including, where necessary, disclosure to the tribunal.[131] These duties override the duty to maintain client confidences.[132] The Rules do not merely permit disclosure, they mandate it. Furthermore, the standard that justifies disclosure is materiality to the proceeding, a much broader concept than necessary to prevent reasonably certain death or serious bodily harm.

The justification of the adversary system that forms the basis for the Model Rules is the system's function in seeking truth. The system assumes that the most effective way to find the truth is to have both parties zealously represented by advocates who will uncover and present their fullest and most favorable case, and, by cross examination, rebuttal and argument, will test to the maximum the case presented by the other side. Neither counsel is seeking the truth. Each counsel is presenting the case believed to have the greatest likelihood of winning, regardless of the truth. The combined partisan efforts of

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128 *See* MODEL RULES, *supra* note 105, at R. 1.6(a).
129 *Id.* at R. 1.6(b)(1).
130 *See id.* at R. 3.3(a)(3).
131 *See id.* at R. 3.3(b).
132 *See id.* at R. 3.3(c).

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the opposing advocates are what is most likely to produce a complete and tested record that facilitates the tribunal's determination of where the truth lies.[133]

When attorneys present their clients' cases in the light most favorable to their clients, they serve the adversary system's truth seeking function. The Model Rules recognize that, generally, there is no conflict between the lawyer's duty to client and duty to the public justice system as an officer of the court. The Model Rules provide:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.[134]

False evidence, however, impedes the adversary system's truth seeking function, as does tampering with witnesses, judges, jurors and others involved in the proceeding. The lawyer's obligations as an officer of the court mandate that the lawyer take steps to preserve the integrity of the tribunal's truth seeking function.[135] The Rules recognize that the lawyer's obligation to preserve the

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[133] *See* Fuller & Randall, *supra* note 109.

[134] MODEL RULES, *supra* note 105, at pmbl. ¶ 8. The Fourth Circuit has written more generally about the lawyer's obligation to preserve the integrity of the court as a truth seeking body:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993).

[135] "[A]lthough a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." MODEL RULES, *supra* note 105, at R. 3.3 cmt. 2.

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integrity of the justice system takes priority over the lawyer's obligations to the client.

> The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.[136]

Other aspects of the Model Rules reflect circumstances where the lawyer's obligation to the system of justice takes priority over the lawyer's obligation to pursue the client's interests. For example, in an ex parte proceeding, a lawyer is obligated to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."[137] In ex parte proceedings, the lawyer's zealous advocacy through the presentation only of evidence favorable to the client's position does not serve the tribunal's truth seeking function in the manner that it does when there is an equally zealous opposing advocate testing the lawyer's evidence and presenting evidence favorable to the opposing party. Consequently, the lawyer's duty as an officer of the court mandates disclosure of all material evidence, including evidence adverse to the lawyer's client.[138]

Similarly, the Model Rules require an attorney to avoid misleading legal arguments and to disclose directly adverse authority within the jurisdiction.[139]

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[136] *Id.* at cmt. 11. The Supreme Court has observed that, as an officer of the court, a lawyer is "an instrument or agency to advance the ends of justice." Theard v. United States, 354 U.S. 278, 281 (1957). Furthermore, "cooperation with the court [is] due, whenever justice would be imperiled if cooperation was withheld." People ex rel. Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928).

[137] MODEL RULES, *supra* note 105, at R. 3.3(d).

[138] Rule 3.3(d) cmt. 14 states:

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

[139] *See id.* at R. 3.3(a)(2).

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Professor Gaetke has characterized this obligation as "the most noteworthy example of . . . the subordination of the interests of the client and lawyer in favor of those of the judicial system."[140] He has criticized the narrowness of the obligation because it does not encompass authority that is adverse by analogy or authority from another jurisdiction, even though the court may find it persuasive.[141] Although a lawyer may face disciplinary action only for the failure to disclose a very narrow range of adverse legal authority, courts have expressed a broader expectation of counsel in their roles as officers of the court.[142] Similarly, the Fourth Circuit has opined that, as an officer of the court, a lawyer owes a duty of candor that is broader than the specific duties to disclose provided for in the Model Rules.[143]

In other circumstances, courts have criticized lawyers for not living up to their obligations to the justice system, even though their actions may not have run afoul of express provisions of the disciplinary rules. For example, in *BEM I, L.L.C. v. Anthropologie, Inc.*,[144] BEM, a landlord, brought an action against Anthropologie, its tenant, in state court for $48,000 in allegedly due and owing rent. Anthropologie removed the action to federal district court on the basis of diversity of citizenship. While the case was still in state court, BEM's lawyer had filed a motion to increase the claim to $88,000, but withdrew the motion in an attempt to defeat federal jurisdiction upon learning of Anthropologie's intent to file a removal petition. Nevertheless, the lawyer did not object to removal or call to the district judge's attention that the amount in controversy may not have met the jurisdictional limit. The district court referred the matter to arbitration, pursuant to a provision in the lease, and the arbitration panel found in favor of Anthropologie, awarding it substantial damages and attorney fees.[145]

On appeal, BEM argued that the district court lacked jurisdiction because the amount in controversy was insufficient. BEM maintained, correctly, that a federal court's subject matter jurisdiction is subject to question at any time before the litigation is final. BEM's counsel's strategy apparently was to

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[140] Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 57 (1989).

[141] *See id.* at 58, 69, 88. Professor Gaetke notes that the Kutack Commission's discussion draft of the Model Rules would have required broader disclosure of adverse legal authority but the requirement was narrowed during the redrafting and approval process. *See id.* at 69-70.

[142] *See, e.g.*, Jewelpak Corp. v. United States, 297 F.3d 1326, 1333 n.6 (Fed. Cir. 2002) ("[O]fficers of our court have an unfailing duty to bring to our attention the most relevant precedent that bears on the case at hand – both good and bad – of which they are aware.").

[143] *See* United States v. Shaffer Equip. Co., 11 F.3d 450, 457-58 (4th Cir. 1993).

[144] 301 F.3d 548 (7th Cir. 2002).

[145] *See id.* at 551.

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remain silent concerning the alleged jurisdictional defect, proceed to arbitration where counsel hoped to prevail, and raise the jurisdictional issue if BEM lost in the arbitration.[146] Judge Richard A. Posner chastised BEM's counsel for adopting a strategy that was inconsistent with their duties as officers of the court:

> As officers of the court, lawyers who practice in federal court have an obligation to assist the judges to keep within the boundaries fixed by the Constitution and Congress; it is precisely to impose a duty of assistance on the bar that lawyers are called "officers of the court." Lawyers also owe it to the judge and the opposing lawyer to avoid subjecting them to the burdens of a lawsuit that they know or think may eventually be set at naught, and have to be started over again in another court, because of a jurisdictional problem of which the judge and the opposing lawyer may be unaware.[147]

Even criminal defense counsel may have duties to the court that go beyond those expressly provided for in the Model Rules. In *Commonwealth v. Pavao*,[148] the defendant executed a written waiver of jury trial form. The trial judge neglected to conduct an on the record oral colloquy with the defendant to ensure that the waiver was made voluntarily and intelligently. Under Massachusetts state law, such a colloquy was mandatory. Apparently, the prosecutor failed to notice the procedural defect. Defense counsel was aware of the failure but remained silent. A bench trial proceeded and the defendant was convicted. Defense counsel thereafter attacked the conviction solely on the ground that the trial court failed to conduct the mandatory colloquy. The Massachusetts Appellate Court chastised counsel for his ace-in-the-hole strategy as exceeding the bounds of zealous advocacy. In the court's view, counsel's obligation to the integrity of the judicial process required him to apprize the trial judge of the error.[149]

In neither *BEM* nor *Pavao* did counsel's conduct run afoul of any express provisions of the Model Rules or the Model Code.[150] Nevertheless, the

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[146] *See id.* at 552-53. The strategy failed, as the court found that the amount in controversy was sufficient to support diversity jurisdiction.

[147] *Id.* at 551.

[148] 658 N.E.2d 175 (Mass. App. Ct. 1995), *rev'd on other grounds*, 672 N.E.2d 531 (Mass. 1996).

[149] *See id.* at 181-82.

[150] Professor William H. Fortune has called for an amendment to the Model Rules that would require counsel to disclose information material to procedural aspects of the case. *See* William H. Fortune, *A Proposal to Require Lawyers to Disclose Information About Procedural*

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lawyer's duty as an officer of the court is to preserve the integrity of the adversarial system of justice. That duty trumps the duty to zealously advocate the client's cause where such zealous advocacy will undermine, rather than further, the integrity of the system.

Lawyers maintain a professional independence from their clients. The Model Rules codify that independence in terms cautioning against equating legal representation of a client with moral approval of the client's actions.[151] The concept of professional independence, however, is broader than the distinction between representation and approval of a client's cause. The lawyer's independence from the client is directly linked to the lawyer's duties to the public justice system. Lawyers' professional independence from their clients enables them to support the legal framework and rules that ensure that the adversary system will provide for just outcomes, *i.e.*, will continue to be a truth seeking system.[152]

The concept of the lawyer's professional independence from the client is particularly helpful in addressing the ethics of drafting employment arbitration agreements. Discussions in the Model Rules, the courts and elsewhere of the attorney's obligations as an officer of the court occur in the context of legal representation of a client within an existing tribunal's system. The principle of partisanship is limited by the lawyer's obligation to maintain the integrity to the tribunal as a truth seeking system. Lawyers who draft employment arbitration agreements, however, go beyond representing clients within the bounds of a given tribunal's system. Instead, they are actually creating the system itself. It is to their ethical constrains that I now turn.

C. Applying the Duty to the Public Justice System to the Drafting of Employment Arbitration Agreements

Part III demonstrated that it is becoming increasingly difficult for employees to resist arbitration in the courts. When employees file suit, courts are increasingly likely to compel arbitration. The judicial embrace of arbitration at the front end has been accompanied by a judicial reluctance to disturb arbitration awards at the back end.

Matters, 87 KY. L.J. 1099 (1999).

[151] *See* MODEL RULES, *supra* note 105, R. 1.2(b). "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." *See also id.* at R. 1.2 cmt. 5.

[152] *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 17 (1988).

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The FAA provides for a court to vacate an arbitration award only in specified instances of serious arbitral misconduct.[153] I have argued that courts abdicate their responsibility if they do not review arbitral legal interpretations (as opposed to factual findings) *de novo*.[154] Judge Edwards appeared to agree in *Cole*.[155] Unfortunately, *Cole's* dicta stands alone among judicial opinions.

Most courts have reviewed employment arbitration awards only to see if they display a manifest disregard for the law.[156] They have interpreted this standard very narrowly, holding that for there to be manifest disregard for the law, the governing legal principle must be well defined, explicit and clearly applicable to the case, and the arbitrator must have known of the principle and consciously refused to apply it.[157] The Fifth Circuit has adopted a standard that is even narrower, opining that to vacate an arbitration award, there must be a finding that the arbitrator acted contrary to the law and that enforcement of the award "would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties."[158] Even the D.C. Circuit has not heeded Judge Edwards' call for *de novo* review of arbitral legal conclusions.[159]

Thus, it appears that management lawyers, when drafting employment arbitration agreements for their clients, are creating the first and final forum in which their clients' employees will adjudicate their statutory claims. The Model Rules make clear that in carrying out this function, counsel's role is not limited to that of legal tactician.[160] Thus, in presenting the arbitration

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153 *See* 9 U.S.C. § 10(a) (2000).

154 *See* Malin & Ladenson, *supra* note 47, at 1226-38; *see also* Malin, *supra* note 45, at 624-31.

155 Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1487 (D.C. Cir. 1997).

156 The manifest disregard for the law standard has its origins in Supreme Court dicta. *See* First Options of Chicago v. Kaplan, 514 U.S. 938, 942 (1995); Wilko v. Swann, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am.Express, Inc., 490 U.S. 477 (1989).

157 *See, e.g.*, Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000); Dawahere v. Spencer, 210 F.3d 666 (6th Cir. 2000); DiRusa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997).

158 Williams v. CIGNA Fin. Advisors, Inc., 197 F.3d 752, 762 (5th Cir. 1999).

159 *See* LaPrade v. Kidder, Peabody & Co., 246 F.3d 702 (D.C. Cir. 2001).

160 *See* MODEL RULES, *supra* note 105, at R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

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alternative to a client, a lawyer may counsel a client that the arbitral forum should be established with fair procedures that will ensure that employees using it will be able to vindicate their statutory rights. I contend, however, that not only is a lawyer permitted to so counsel the client, the ethical lawyer must do so.

As discussed above, the lawyer's professional independence from the client is essential to maintenance of the existing legal framework. As Professor Gordon has observed:

> Even someone committed to the most thoroughly reductionist versions of modern liberal theory—that there is no public interest, save that in fair rules for the free competition of private interests in the market, the provision of public goods, and the correction of market failures—must still imagine some mechanism for maintaining the basic framework of legal rules that constitute and support the market. To provide such a mechanism, it turns out that it is very difficult to manage without some notion that lawyers must be committed to helping to maintain the legal framework.[161]

Our nation's employment statutes provide the legal framework regulating the relationships between employers and employees. They are designed to remedy market failures and market excesses. Each statute contains its own enforcement provisions, including the public tribunals, typically courts or administrative agencies, before whom disputes over enforcement will be resolved. When representing a client before one of those tribunals, a lawyer is obligated to maintain the integrity of the tribunal. By so doing, the lawyer maintains the integrity of the overall legal framework, including the substantive provisions of the statute that the tribunal is empowered to enforce. It follows, *a fortiori*, that in creating a substitute tribunal, a lawyer remains obligated to ensure the integrity of the overall legal framework, including the substantive provisions of the statutes that the substitute tribunal will enforce. In other words, the lawyer is obligated when drafting the tribunal's structure and procedures to be true to the Supreme Court's vision that the arbitration agreement only substitutes a forum and does not impede the effective vindication of statutory rights.

For example, assume that a client has been charged with violating the overtime provisions of the Fair Labor Standards Act ("FLSA"). The FLSA places the burden on the employer to keep accurate time records for all non-

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[161] Gordon, *supra* note 152, at 17.

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exempt employees.[162] If the employer fails to do so, doubts about hours worked are resolved against it.[163]

A lawyer is obligated by the duty to maintain the integrity of the public justice system to refrain from fabricating such time records where none exist. If the client presents the lawyer with purported time records and the lawyer knows they have been fabricated, the lawyer must refuse to use them in the case. If the lawyer unknowingly uses them and later learns of their fabrication, the lawyer must take steps to remedy the deception, including disclosure to the court where necessary. Using the fabricated records under these circumstances would undermine the legal framework by stacking the deck beyond the capacity of the adversary system to correct for it. The lawyer's obligation to the public justice system similarly precludes creating an arbitration system that allows the employer to use fabricated records in defending against FLSA claims. More generally, the arbitration system that the lawyer creates should not undermine the legal framework through such methods as unequal discovery rights or the imposition of excessive costs on the employee that stack the deck beyond the capacity of the adversary system to correct for it.

What does this mean in practice? Primarily, the lawyer's responsibility to maintain the integrity of the legal framework should inform the manner in which the lawyer presents the arbitration alternative to the client. In counseling a client, it is impossible for a lawyer to escape ethical, social and political considerations. The law's ambiguity precludes a lawyer from limiting her role to that of amoral tactician, neutrally and objectively informing the client of the probable legal consequences of a proposed course of action. The tone with which the lawyer presents the alternatives will affect the manner in which the client receives the lawyer's advice and the course of action likely to be taken.

For example, the lawyer can discuss employment statutes as infringements on employer autonomy that arm unscrupulous employees with vexatious weapons to extract unwarranted concessions from their employers. The lawyer can then portray arbitration as an opportunity to act strategically to force such vexatious claims into a forum that will be sympathetic to the employer's plight and hostile to insolent employees who dare to challenge the boss. Such a presentation will likely lead to an arbitration agreement that undermines the overall legal framework by stacking the deck in the employer's favor. I submit that such an approach falls outside the boundaries of the partisanship principle

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162 *See* 29 U.S.C. § 211(c) (2000); 29 C.F.R. pt. 516 (2002).

163 *See* Andersen v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

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and breaches the lawyer's responsibilities to maintain the integrity of the justice system.

Alternatively, the lawyer can portray arbitration as a system that substitutes a less formal, less expensive and less time consuming process for litigation while maintaining the integrity of the underlying statutory regulatory framework. The lawyer can explain that moving to an arbitration system may actually lead to an increase in claims because the system will be more accessible to employees than the courts. Such an increase in claims, however, is likely to be offset by reduced litigation expenses and by arbitration's elimination of the employer's exposure to outlier jury awards. As a private forum, arbitration may also shield the employer from adverse publicity. The lawyer can further explain that the arbitration agreement may not waive employees' statutory rights but must merely substitute the arbitral forum for the courts as the venue where employees may effectively vindicate their statutory rights. Under such an approach, the client will decide whether arbitration is in its interests. If the client opts to impose arbitration on its employees, the system the lawyer will draft will be fair and even handed, lacking sharp practices that may stack the deck against employees.

In most cases, the client will follow the lawyer's lead and the path the lawyer chooses in presenting the arbitration alternative will dictate how the agreement is drafted. But, what if the lawyer presents the arbitration alternative appropriately and the client insists that the lawyer draft the agreement strategically to eliminate, to the maximum extent possible, what the client regards as meritless vexatious claims? The lawyer should attempt to dissuade the client from such strategic behavior. If the client continues to insist, the lawyer faces what the Model Rules call a "difficult ethical problem[]."[164] The Model Rules leave it to each individual lawyer to strike the right balance in such circumstances between "responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."[165]

A lawyer who chooses to draft the arbitration agreement strategically must maintain her professional independence and should take steps to ensure that the client recognizes that independence as well. Otherwise, the client is likely to portray the arbitration system to its employees as something that has been blessed by the lawyer. If an employee questions specific details of the system, the client likely will respond that it is simply following the lawyer's orders. In

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164 MODEL RULES, *supra* note 105, at pmbl. ¶ 8.

165 *Id.*

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so doing, the client will seek to clothe the arbitration system with a false legitimacy by playing on the lawyer's role as an officer of the court.[166] To accomplish this, the lawyer should make clear to the client the ethical ramifications of drafting the arbitration agreement to stack the deck and also make clear that the moral responsibility for such action rests with the client and not the lawyer.[167]

It may be argued that lawyers have no role preaching ethics to their clients. The lawyer's personal ethical code does not necessarily coincide with the client's. The lawyer may think it immoral for a client to layoff a large number of employees around Christmas time, particularly if those employees are not likely to find comparable employment elsewhere. The client, however, may regard the lay offs as justified, perhaps for reasons unknown to or unappreciated by the lawyer. Who made the lawyer king of morality? It is better, so the argument goes, for the lawyer to restrain himself to implementing the client's decision.[168]

Regardless of the merits of the above argument, it has no application to the drafting of employment arbitration agreements. The lawyer who counsels a client that the agreement must be drafted fairly is not imposing her moral values on the client. Rather, she is upholding the legal framework as articulated by the Supreme Court. The Court has told us that employment arbitration must not affect substantive rights; it must merely substitute arbitration for litigation as the forum in which those rights may be vindicated.

D. A Special Case: Arbitration as a Vehicle to Avoid the Law

Consider the insurance company hypothesized at the beginning of this Article. Recall that the company operates in a metropolitan area with considerable residential racial segregation, but harbors no racial animus. Its hiring and promotions are free from racial discrimination. However, the client has concluded that it makes good business sense to assign its African American sales representatives to areas inhabited predominantly by African Americans and to assign its white sales representatives to areas inhabited predominantly by whites because some blacks will be less likely to buy from a white sales

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166 *See* Gaetke, *supra* note 140, at 76.

167 *See generally* Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999).

168 *See* Lee Modjeska, *On Teaching Morality to Law Students*, 41 J. LEGAL EDUC. 71, 72-73 (1991).

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representative and some whites will be less likely to buy from a black sales representative.

The lawyer correctly advises the client that such action would violate Title VII. The client considers the Title VII violation as a business risk to be weighed against the probable benefits of the proposed action. In calculating the risk, the client will consider the likelihood that an employee will discover the practice and take action to challenge it, the expense and resulting adverse publicity in the event the client is sued, and the client's vulnerability to punitive damages for such a willful violation of the statute.

Even a fair arbitration system can reduce the business risk. Because arbitration is a private proceeding, the risk of adverse publicity if a claim is brought is substantially reduced. Furthermore, the absence of a jury may substantially reduce the risk of an outlier punitive damage award. Thus, the client may conclude that adopting a mandatory arbitration system will facilitate its plan to maximize sales by segregating its sales force.

How should the lawyer react to the client's request that the lawyer draft the arbitration agreement? The literal language of the Model Code suggests that it is unethical for the lawyer to draft the arbitration agreement. It provides, "[A] lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."[169] Drafting the arbitration agreement would assist the client in violating Title VII, *i.e.*, conduct that the lawyer knows to be illegal. However, the Code was never interpreted to apply to conduct that was neither criminal nor fraudulent.[170] The Model Rules clearly do not prohibit the lawyer from drafting the arbitration agreement. The Model Rules provide, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[171]

Although the disciplinary rules do not prohibit the lawyer from drafting the arbitration agreement, they do not compel the lawyer to do so. I suggest that a lawyer facing such a dilemma discuss the matter with the client in an attempt to dissuade the client from violating Title VII.[172] The lawyer may legitimately counsel the client not to overvalue the arbitration agreement's reduction in business risk. Although the arbitration proceeding itself will be private, the agreement will not bar the employee from filing charges with the EEOC and

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169 MODEL RULES, *supra* note 105, at R. 1.2(d).

170 *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1592-93 (1995).

171 MODEL RULES, *supra* note 105, at R. 1.2(d).

172 *See* Pepper, *supra* note 170, at 1598-1607.

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relevant state and local agencies.[173] It also will not bar the employee from "going public." Thus, even under the arbitration agreement, the client faces a significant risk of adverse publicity.

Additionally, although arbitration generally avoids exposure to outlier jury awards, the client could become the exception that proves the rule. An arbitrator could be so offended by the client's deliberate and calculating violation of Title VII, that he or she will impose substantial punitive damages.

The lawyer should also counsel the client that the client will be unable to deny its intentional racial discrimination. If the client denies the discriminatory intent, the lawyer will know that the denial is false and will be precluded from allowing the client to testify to the denial. If the client testifies to the denial anyway, the lawyer will be obligated to take remedial steps including, if necessary, disclosure to the tribunal.

Finally, the lawyer should probe the client's premise that segregating the sales force will significantly increase sales. The lawyer should ask the client to review existing sales figures. Is there any evidence that sales representatives are having difficulties selling to customers of a different race? If the client cannot produce such evidence but is instead relying on business intuition, the lawyer should urge the client that the risks involved, even with an enforceable arbitration agreement, are not worth the gain which is purely speculative.

If, despite such counseling, the client insists on imposing an arbitration agreement on its employees, I believe that it is proper for the lawyer to draft it. There is nothing illegal or immoral about an employer requiring its employees, as a condition of employment, to agree to arbitrate all claims. Indeed, the client will want the arbitration agreement to be meticulously fair to ensure that it is enforced by the courts. The immorality lies with the racial segregation of the client's sales force and consequent violation of Title VII. However, in that decision, the client clearly bears the sole moral responsibility. It is impossible for the client to avoid the moral responsibility by claiming to have deferred to counsel's advice. "My lawyer made me do it," just won't fly.

V. CONCLUSION

The Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, has given a green light to employers to impose agreements to arbitrate on their employees as a condition of employment. However, the Court's decision in

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[173] *See* Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 28 (1991).

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Green Tree Financial Corp. v. Randolph, may turn out to be more significant than *Circuit City* for the future of employment arbitration. *Green Tree* arguably holds that parties resisting arbitration on the ground that the procedures are unfair has the burden to prove that the procedures of the arbitration system under attack preclude them from effectively vindicating their statutory rights. Under such a regime, arbitration agreements that tilt the playing field in the employer's favor will be enforced by the courts, provided that they are not shams. This poses a moral dilemma for an attorney called upon by a client to draft an arbitration agreement that the client will impose on its employees.

The attorney's intuitive reaction will be to draft the agreement as favorable for the client as is likely to be enforced by the courts. This reaction derives from the principle of partisanship which provides that attorneys owe their loyalty to their clients and are obligated to advocate their clients' interests zealously. Generally, when drafting form contracts that clients will use en masse, the principle of partisanship obligates the lawyer to draft in a manner as protective of the client's interests as is enforceable.

The principle of partisanship, however, is limited by the lawyer's duties as an officer of the court. Those duties derive from the lawyer's professional independence from the client which enables the lawyer to maintain the integrity of the public justice system, even where actions that would undermine that integrity would serve the client's interests. Drafting form contracts ordinarily does not implicate this duty. However, an employment arbitration agreement differs from the typical form contract because it provides for the exclusive method by which employees will resolve their statutory claims. Just as a lawyer has a duty to maintain the integrity of the legal framework when practicing before a particular tribunal, the lawyer has a duty to maintain the integrity when creating the tribunal that will adjudicate public law claims.

Consequently, lawyers should present the arbitration alternative to their clients as one that provides advantages and disadvantages flowing from its speed, privacy and cost efficiency, but as one which substitutes an arbitral forum for a judicial one but does not skew the rules to favor either side. Such a presentation usually will lead to the lawyer drafting the agreement to provide a tribunal with fundamentally fair procedures that enable employees to effectively vindicate their statutory rights. However, if the client insists that the agreement be drafted with procedures that skew the process to favor the client and the lawyer agrees to do so, the lawyer must maintain professional independence and ensure that the client takes moral responsibility for the decision to skew the procedures and preclude the client from legitimizing the procedures by attributing them to the lawyer who is an officer of the court.

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