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“Criminalizing” Depositions in Arbitration

Mitch Zamoff

Article

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Civil litigation–style deposition practice is preventing commercial arbitration from reaching its full potential as an economical, efficient alternative to a civil lawsuit. Although there is consensus among alternative dispute resolution experts that meaningful limits must be imposed on arbitration discovery to unlock the efficiency benefits of arbitration, depositions continue to feature prominently in commercial arbitrations for at least three reasons. First, civil litigators are addicted to depositions. They reflexively propose overdone deposition practice in arbitrations that replicates their litigation experience. Second, arbitrators may hesitate to disallow deposition discovery out of fear that their awards will be vacated for failure to hear material and pertinent evidence. Third, arbitrators are justifiably concerned that they will be punished in the arbitral marketplace if they deny the deposition requests of the parties and lawyers that select them. These dynamics dictate that consequential change will remain elusive in this area unless the rules regarding deposition practice in commercial arbitrations are amended. While these rules currently are more restrictive in some ways than the rules of civil procedure, they are toothless. They often allow some discovery depositions as a matter of right and grant the arbitrator discretion to permit an unlimited number of discovery depositions upon a modest showing of "cause" or "need." This Article is the first to

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propose that the rules of federal criminal procedure—which flatly outlaw discovery depositions—be used as a model for modifying arbitration rules concerning the availability of discovery depositions. Doing so will make arbitration more efficient without meaningfully compromising the ability of arbitration parties to pursue and defend their claims. The fact that prosecutors and defense counsel routinely try high-stakes criminal cases without the benefit of discovery depositions provides strong evidence that arbitration parties can effectively represent their interests without the need for discovery depositions. Further support for this proposal can be found in the case law which holds that the cross-examination of prosecution witnesses by criminal defense counsel at trial (without the benefit of a prior deposition) satisfies a criminal defendant's Confrontation Clause rights. If criminal defendants can be deprived of their liberty without deposing the prosecution's witnesses prior to trial, it is fair to require the parties to an arbitration to examine witnesses at a hearing without the added layers of delay and cost associated with discovery depositions.

INTRODUCTION

The deposition has become "perhaps the single most important discovery device" in civil litigation.[1] The Federal Rules of Civil Procedure (FRCP) allow parties to take up to ten depositions as a matter of right in every civil lawsuit, regardless of its magnitude or complexity.[2] In high-stakes civil litigation, parties often take well in excess of ten depositions, either pursuant to agreement or court order.[3] Judges and commentators have called depositions "the central cogs in the litigation machine,"[4] "the factual battleground where the vast majority of litigation actually takes place,"[5] and "an extensively used and rampantly abused discovery tool."[6] In an effort to avoid surprises at trial (and, more cynically, perhaps in some cases because of the economic incentives to do so), civil litigators often try to depose every witness whom they think might testify at trial without regard to the materiality of their testimony.[7] This leave-no-stone-unturned approach to deposition practice increases the cost of civil litigation and elongates the lifespan of the typical civil lawsuit.[8]

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1. Robert K. Wise & Kennon L. Wooten, *The Practitioner's Guide to Properly Taking and Defending Depositions Under the Texas Discovery Rules*, 68 BAYLOR L. REV. 399, 403 (2016).

2. FED. R. CIV. P. 30(a)(2)(A)(i).

3. *See id.* (vesting the court with discretion to allow more than ten depositions); *see also, e.g.*, Order Granting in Part and Denying in Part Plaintiffs' Motion for Leave to Take Additional Depositions at 7–8, Vasquez v. Leprino Foods Co., No. 1:17-cv-00796-AWI-BAM (E.D. Cal. Sept. 25, 2019), ECF 78 (allowing plaintiffs to take a total of fifteen depositions); Order at 8, Aerojet Rocketdyne, Inc. v. Glob. Aerospace, Inc., No. 2:17-cv-01515-KJM-AC (E.D. Cal. Nov. 6, 2018), ECF 124 (allowing defendants to take a total of seventeen depositions); Order Granting in Part Plaintiffs' Motion to Compel (Docket # 344); and Granting in Part Defendants' Request for Additional Depositions (Docket # 388) at 14, Dominguez v. Schwarzenegger, No. C 09-2306 CW (JL) (N.D. Cal. Aug. 25, 2010), ECF 399 (permitting defendant to take a total of twenty depositions and request additional depositions).

4. Eliot G. Disner, *Depositions: The Early Bird Gets the Worm or Early Evidence Is Like Yeast*, 47 FED. LAW. 30, 31 (2000).

5. Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993).

6. A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 1 (1998).

7. *See infra* Part I.B.

8. *See infra* Part I.B.

Arbitration is supposed to offer a streamlined and expeditious alternative to litigation.[9] While data suggest that arbitration provides meaningful efficiency benefits over litigation,[10] the frequent inclusion of depositions in arbitration discovery bogs down the process and makes it less distinguishable from litigation than it should be, particularly in large commercial disputes.[11] Although the rules of the American Arbitration Association (AAA) and other third-party arbitration administrators (TPAs)—which are often adopted by arbitration parties,

9. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010))); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) (noting that one of the goals of the Federal Arbitration Act was to encourage "efficient and speedy dispute resolution"); West v. Heart of the Lakes Constr., Inc., No. C5-01-1823, 2002 WL 1013529, at *4 (Minn. Ct. App. May 21, 2002) (finding that an arbitrator's authority to "expedite the proceedings" by streamlining discovery is "one of the virtues of arbitration"); Ballantine Books, Inc. v. Cap. Distrib. Co., 302 F.2d 17, 21 (2d Cir. 1962) (listing speed and informality as some of the primary "virtues of arbitration"); Hiro N. Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ON ARB. & MEDIATION 2, 6 (2016) ("Merchants established arbitration associations and programs because they sought an alternative to the intolerable delay and injustice of courtroom procedure."); Stephen J. O'Neil, *Managing Depositions in Arbitration to Minimize Cost and Maximize Value*, 69 DISP. RESOL. J. 15, 15 (2014) ("Faster disposition at lower cost must continue to be the principal differentiator of arbitration as an alternative to litigation."); Mitchell Marinello & Robert Matlin, *Muscular Arbitration and Arbitrators Self-Management Can Make Arbitration Faster and More Economical*, 67 DISP. RESOL. J. 69, 69 (2012) ("The importance of making arbitration more efficient and less costly has such a high profile that the *Dispute Resolution Journal* devoted the last issue to this theme.").

10. *See, e.g.*, Tracey B. Frisch, *Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide a Cost-Effective and Expeditious Process*, 17 CARDOZO J. CONFLICT RESOL. 155, 155 n.1 (2015) ("The median time frame for a civil case to go to trial in federal court is 23.2 months, based on U.S. Federal Court statistics for civil cases for the 12-month period ending March 31, 2011; but the median timeframe for an AAA commercial arbitration to be awarded is 7.3 months, based on AAA commercial arbitrations awarded in 2011.").

11. While depositions theoretically can be overused in all arbitrations, the risk of overdone deposition practice is greater in large commercial cases where the amount in dispute is typically well in excess of the economic costs associated with robust deposition practice. *See infra* Part II.B. Thus, while the recommendations in this Article apply to all arbitration proceedings, the focus is on the commercial arbitration setting.

especially in commercial disputes—differ meaningfully from the rules of civil procedure when it comes to the availability of discovery depositions, depositions continue to feature prominently in commercial arbitration proceedings.[12] At least three interrelated factors contribute to this dynamic.

First, civil litigators, who are usually the same lawyers that handle arbitrations, are addicted to depositions.[13] The civil litigation regime in which these attorneys typically operate rarely requires them to examine a witness at trial whom they have not already deposed.[14] Many civil litigators import a fixed "no surprises" mindset into the arbitration setting and push for deposition practice there that replicates their civil litigation experience.[15] In fact, counsel representing opposing parties in commercial arbitrations often stipulate that at least some number of depositions should be permitted in those proceedings.[16] These stipulations force arbitrators inclined to minimize the role of depositions into the difficult position of having to disregard the wishes of all parties in order to do so.[17]

Second, one of the few grounds for vacating an arbitration award is the arbitrator's failure to hear material and pertinent evidence.[18] Arbitrators may hesitate to disallow deposition discovery, particularly when both sides insist that depositions are necessary to elicit important evidence, for fear that their awards will be vacated.[19]

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12. *See infra* Part II.

13. *See infra* notes 105–07 and accompanying text.

14. *See infra* notes 105–07 and accompanying text.

15. *See infra* notes 105–07 and accompanying text.

16. *See* Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think*, 63 DISP. RESOL. J. 36, 40 (2008) ("In a commercial case, counsel for the parties usually decide on the scope of discovery before the call is scheduled and advise the arbitrator of their agreement during the course of the conference call. The attorneys commonly agree to exchange relevant documents and to depose two or three of the adversary's witnesses.").

17. *See infra* notes 104–07 and accompanying text.

18. *See infra* notes 108–12 and accompanying text.

19. Arbitrators may justifiably have greater concern about the prospect of award vacatur than judges do regarding an appeal. While many judges, including federal judges, enjoy lifetime tenure, arbitrators generally must compete for business in a marketplace where the vacatur of an award could be harmful to their reputation and business prospects. *See* Eric E. Van Loon, *Ten Tips Toward Client Arbitration Satisfaction*, JAMS (Mar. 15, 2018), https://www.jamsadr.com/blog/2018/ten-tips-toward-client-arbitration-satisfaction-vanloon [https://

Third, while the rules that govern most commercial arbitrations indicate that depositions should be used less frequently in arbitration than litigation, they are toothless.[20] These rules not only permit discovery depositions, but often allow at least a few such depositions as a matter of right, and grant the arbitrator discretion to permit an unlimited number of discovery depositions upon a showing of "reasonable need," "good cause," or some similar standard.[21] These flexible rules invite litigious commercial arbitration parties to seek discovery depositions, tie arbitrators' hands in cases where parties stipulate that discovery depositions are necessary, and leave some arbitrators feeling exposed if they deny the parties' requests for depositions.[22]

Contrast the liberal approach of the FRCP to discovery depositions[23] and the less permissive—but still flexible—deposition provisions in the rules governing commercial arbitrations with

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perma.cc/EF8X-EK94] ("[W]in or lose, client satisfaction is what builds your successful practice.").

20. *See infra* Part II.A.

21. *See, e.g.*, *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS 11–12 (June 1, 2021) [hereinafter *JAMS Arbitration Rules*], https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Comprehensive_Arbitration_Rules-2021.pdf [https://perma.cc/S8FP-U6HJ] (allowing each party to take one discovery deposition as a matter of right and authorizing the arbitrator to allow additional depositions "based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request"); *AAA® Healthcare: Payor Provider Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N 35 (Nov. 1, 2014) [hereinafter *AAA Healthcare Rules*], https://www.adr.org/sites/default/files/AAA_Healthcare_Payor_Provider_Arbitration_Rules_and_Mediation_Procedures.pdf [https://perma.cc/2WAD-MF5D] (allowing parties in complex-track cases to take two discovery depositions as a matter of right and permitting additional depositions if "agreed to by the parties or ordered by the Arbitrator for good cause shown").

22. *See infra* Part II.B.

23. Most state court rules of civil procedure take a permissive approach to deposition discovery that is similar to the FRCP. *See, e.g.*, MONT. R. CIV. P. 30(a)(2)(A)(i) (adopting federal policy that a party may take a deposition without leave except when "the deposition would result in more than 10 depositions being taken under this rule"); NEB. CT. R. DISC. § 6-330(a) ("Leave of court [to take a deposition], granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service of summons . . . ."); VA. SUP. CT. R. 4:5(a) ("[A]ny party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition before the expiration of the period within which a defendant may file a responsive pleading under Rule 3:8 . . . .").

the clear directives disfavoring depositions in criminal cases. The Federal Rules of Criminal Procedure do not allow discovery depositions.[24] Parties in a federal criminal case may only take depositions if they are necessary to preserve the testimony of witnesses who will be unavailable for trial.[25] And even in those situations, where the need for deposition testimony is considerably greater than in the discovery context—because, absent the deposition, the witness likely will not testify at all—a court is authorized to allow a deposition only if it finds that it is justified by "exceptional circumstances and in the interest of justice."[26] These tight restrictions on deposition practice exist largely to ensure that an adjudicative process required to be expeditious by the Constitution and speedy trial statutes is not unduly burdened by the time, expense, and gamesmanship associated with discovery depositions.[27] As a result, depositions are almost never taken in criminal cases.[28]

Civil litigation–style deposition practice prevents commercial arbitration from reaching its full potential as an economical, efficient alternative to a civil lawsuit. Consequential change will remain elusive in this area unless the rules limiting deposition practice in commercial arbitrations are meaningfully strengthened. This Article is the first to propose that the rules of criminal procedure restricting deposition practice be used as a model for amending arbitration rules concerning the availability of discovery depositions. Doing so will make arbitration more efficient without meaningfully compromising the ability of arbitration parties to prosecute and defend their claims. The fact that prosecutors and defense counsel alike routinely try high-stakes criminal cases without the benefit of discovery depositions provides strong evidence that arbitration parties can effectively represent their interests without the need for discovery depositions.

Part I describes the prominent role of depositions in civil litigation discovery, which provides important context for deposition practice in arbitration. Part II explains how depositions

24. FED. R. CRIM. P. 15(a)(1) (allowing a party to "move that a prospective witness be deposed" only "in order to preserve testimony for trial"). State court rules of criminal procedure also generally do not contemplate the taking of discovery depositions in criminal cases. *See infra* note 115 and accompanying text.

25. FED. R. CRIM. P. 15(a)(1).

26. *Id.*

27. *See infra* Part III.C.

28. *See infra* Part III.B.

remain a fixture of the discovery process in many commercial arbitrations notwithstanding rules intended to curtail the use of depositions in those proceedings. Part III examines the rules restricting deposition practice in criminal cases and the reasons for those rules, which are intended to achieve many of the same policy objectives as arbitration. Finally, Part IV argues that "criminalizing" depositions in arbitration not only makes sense—because both adjudicative regimes place a higher premium on efficiency than civil litigation—but is necessary to eliminate the existing incentives for parties, lawyers, and arbitrators to permit depositions to remain a prominent feature of arbitration (especially commercial arbitration) discovery. Part IV further posits that importing the restrictions on discovery depositions from criminal procedure will make arbitration more efficient without meaningfully compromising the prosecution and defense of arbitration claims for at least three reasons: (1) high-stakes, complex criminal cases are tried as a matter of course without the benefit of discovery depositions; (2) prosecutors in criminal cases are asked (and frequently able) to meet a higher burden of proof than that applicable to a civil arbitration proceeding without the benefit of discovery depositions; and (3) the cross-examination of prosecution witnesses by criminal defense counsel at trial (without the benefit of a prior deposition) satisfies a criminal defendant's entitlement to due process. If criminal defendants can be deprived of their liberty without deposing the prosecution's witnesses prior to trial, it seems fair to require the parties to an arbitration to examine witnesses at an arbitration hearing without the added layers of delay and cost associated with discovery depositions.

I. THE EXPANDING ROLE OF DISCOVERY DEPOSITIONS IN CIVIL LITIGATION

Depositions are out-of-court sworn witness examinations where the witness's testimony is memorialized "for later use in court or for discovery purposes."[29] While the "primary purpose" of depositions in modern civil cases is "to assist the parties in the discovery process,"[30] this was not always the case. As discussed

29. *Deposition*, BLACK'S LAW DICTIONARY (11th ed. 2019).

30. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1206 (2005).

below, prior to the enactment of the FRCP in 1938, depositions in federal civil cases were infrequent and generally limited to preserving the testimony of witnesses who would be unavailable at trial.[31] But following the lead of English and American equity courts, as well as various U.S. state courts which permitted more expansive deposition practice, the framers of the FRCP made discovery depositions readily available in the interest of avoiding surprises at trial.[32] The use of discovery depositions in civil litigation has since steadily increased to the point where extensive deposition practice is the norm in civil lawsuits.[33]

A. THE HISTORICAL EVOLUTION OF THE RULES GOVERNING DISCOVERY DEPOSITIONS

The modern American deposition finds its roots in English equity courts, which permitted "depositions" consisting of party-written interrogatories that were orally administered by officers of the court as early as the 1600s.[34] In these early depositions, a court-affiliated examiner asked questions prepared by the party seeking evidence and summarized the testimony in a report submitted to the court.[35]

Courts of equity in the United States adopted this method of taking deposition testimony following the American Revolution.[36] The practice evolved by the mid-1800s, when Federal Rule of Equity 67 (Rule 67) allowed parties, instead of court-appointed officers, to conduct the questioning during a deposition.[37] The promulgation of Rule 67 in 1842 thus provides the starting point from which "we can begin to trace the evolution of the modern deposition" in America.[38] In 1861, the Supreme Court amended

31. *See infra* text accompanying note 41.

32. *See infra* notes 45–47 and accompanying text.

33. *See infra* Part I.B.

34. Ezra Siller, *The Origins of the Oral Deposition in the* Federal Rules*: Who's in Charge?*, 10 SETON HALL CIR. REV. 43, 53–54 (2013); *see also* MICHAEL R.T. MACNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 173 (1999) (stating that equity courts followed the "principle that the examination of witnesses was to be by officers of the court and not by the parties or their agents").

35. Siller, *supra* note 34, at 54–55.

36. *Id.* at 55.

37. FED. R. EQ. 67 (1842), *reprinted in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 56 (8th ed. 1933) ("If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.").

38. Kessler, *supra* note 30, at 1231.

Rule 67 to allow a party to conduct its own deposition examination over the objection of its opponent.[39] This further increased the number of party-conducted deposition examinations in federal equity cases.[40] However, while federal equity courts allowed depositions for discovery or investigatory purposes, federal courts in law at that time permitted depositions only to preserve testimony for trial in limited circumstances.[41]

By the early 1900s, many state courts permitted more expansive deposition practice than the federal courts. Most state courts allowed party-conducted depositions of adverse parties that were not limited to pre-written questions.[42] However, state rules varied regarding, among other things, (1) whether depositions could be taken for discovery purposes, regardless of the witness's availability for trial; (2) whether witnesses other than adverse parties could be deposed; (3) whether parties were required to obtain court approval prior to conducting a deposition; (4) what modes of questioning were permissible at a deposition; and (5) how depositions were to be conducted (including what objections were permissible and how and when objections were ruled upon by a court officer).[43]

This set the stage in the 1930s for the drafting of the first standardized set of rules regarding deposition practice in the federal courts. In June 1935, the Supreme Court appointed an Advisory Committee to draft and submit to the Court for approval a "unified system of rules" for the federal courts that would become the FRCP.[44] Edson Sunderland, a professor at University of Michigan Law School, was the main architect of the discovery

39. FED. R. EQ. 67 (1861), *amended by* 66 U.S. (1 Black) 6 (1861) (eliminating the requirement that both parties agree to a party-conducted deposition examination).

40. *Cf.* Siller, *supra* note 34, at 57 ("In 1861 the Supreme Court made it easier for a party to conduct an oral examination. The 1842 version of Federal Equity Rule 67 had required that both parties agree to an examination upon oral interrogatories. The Court amended that rule to provide that only one party had to request an oral examination in order to obtain it." (footnotes omitted)).

41. *Id.* at 58.

42. *Id.* at 68–70.

43. *Id.* at 68–72; *see also* GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 62–91 (1932) (discussing procedure in different jurisdictions for "oral examination" of witnesses).

44. Siller, *supra* note 34, at 61 (quoting Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1934)).

rules.[45] Sunderland was "a strong proponent of expansive discovery as a means to eliminate surprise at trial."[46] Sunderland and others on the Advisory Committee believed that broad discovery would help eliminate "that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist on every objection, which not only prolongs and complicates the trial but makes the outcome turn more upon the skill of counsel than upon the merits of the case."[47]

Drawing heavily from various state court deposition procedures, the Advisory Committee crafted an initial set of rules regarding deposition practice.[48] The rules freely permitted oral discovery depositions "by uniting both the preservation of potential testimony function and the investigation of potential evidence function into a single examination procedure."[49] Rule 30, as initially enacted, allowed a party to take a deposition of "any person upon oral examination" by serving a notice identifying the witness and specifying the time and place of the deposition.[50] The original rule imposed no cap on the number of depositions and placed the burden on the party opposing a deposition to seek relief from the court.[51]

B. THE IMPACT OF THE FRCP ON DEPOSITION PRACTICE

By 1948, according to one study, the deposition had become the discovery tool used most often in federal civil cases.[52] It was also "the most expensive and burdensome discovery device."[53] Almost thirty years later, a report commissioned by the Federal

45. *Id.*

46. *Id.* at 64; *see also* Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 74 (1933) ("[A] trial which follows an effective preliminary discovery gains much in efficiency.").

47. Sunderland, *supra* note 46, at 75; *see also* Siller, *supra* note 34, at 65 (noting that Charles Clark, Reporter to the Advisory Committee and Dean of Yale Law School, also supported liberal discovery rules).

48. Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1071–73 (1955).

49. Siller, *supra* note 34, at 66.

50. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, H.R. DOC. NO. 460, at 38 (1938).

51. *Id.* at 39–40 (allowing the court to prohibit, limit, or terminate a deposition after a party moves for such relief).

52. William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1136, 1137 t.2 (1951).

53. *Id.* at 1138.

Judicial Center (FJC) found an average of more than three notices of deposition in all federal civil cases that progressed to a pretrial conference.[54]

By the early 1990s, the proliferation of discovery depositions in civil litigation prompted amendments to the FRCP. There was grave concern among judges and civil litigators that depositions were overused, expensive, and prone to abuse.[55] These concerns resulted in significant changes to Rule 30 in 1993, including, among other things, the imposition of a presumptive ten-deposition cap per party (although parties could obtain leave of court to take additional depositions), and a prohibition on deposing a witness more than once (unless allowed by the court).[56]

Notwithstanding the 1993 amendments to Rule 30, deposition practice in civil litigation remains robust. In 1997, the FJC conducted a study of deposition practices after the 1993 amendments took effect by surveying counsel in 1,000 closed civil cases.[57] The study found that depositions were used in two-thirds of federal cases involving discovery or disclosure and that an average of six witnesses were deposed in each case.[58] The study observed a strong correlation between the total number of hours spent in depositions and the total cost of a lawsuit:

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54. PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 32 t.12 (1978) (studying more than 3,000 federal cases that terminated in 1975).

55. Comm. on Second Cir. Cts., Fed. Bar Council, *A Report on the Conduct of Depositions*, 131 F.R.D. 613, 613 (1990) (describing backlash against "unethical" deposition conduct, which included the overuse of depositions); *see also* James F. Herbison, Note, *Corporate Reps in Deps: To Exclude or Not to Exclude*, 78 WASH. U. L.Q. 1521, 1525 (2000) (noting that prior to the 1993 amendments, "[f]ederal courts varied in the application of [FRCP 26 and 30], thereby producing divergent outcomes"); James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. MIA. L. REV. 1101, 1184 (1988) (arguing for liberal access to the reports of testifying experts to "forego the use of expensive depositions, thus making discovery more cost effective").

56. FED. R. CIV. P. 30 advisory committee's note to 1993 amendment.

57. THOMAS E. WILLGING ET AL., FED. JUD. CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 1 (1997).

58. Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 570–71 (1998). The data set presumably includes cases that were settled or decided by motion prior to the commencement of meaningful discovery. *Id.* Moreover, the estimates of "deposition time" do not include the significant number of hours spent preparing for depositions. *Id.*

> In our multivariate analysis, we found that the total number of hours spent in depositions was associated with increased overall litigation costs, that is, as the number of hours spent in depositions rises, the overall cost of litigation also rises. This relationship manifests itself even when one holds constant the effects of other variables, such as case complexity or the size of stakes. While this finding may appear to be obvious, its opposite may not have been implausible in the absence of our data. For example, our findings also indicate that the amount of time spent in depositions does not reduce total litigation costs by expediting settlement or by obviating the need for other forms of discovery.[59]

And finally, the 1997 FJC Study concluded that "[a]s the number of hours spent in depositions increased," so too did the length of the lawsuit.[60]

More recently, the FJC conducted a survey regarding discovery practice in federal civil cases, which included questions about the frequency and length of discovery depositions in cases that closed shortly before May 2009 (including lawsuits that settled or were dismissed or otherwise disposed of prior to the onset of deposition discovery).[61] A majority of survey respondents, which included both plaintiffs' and defense lawyers, reported that depositions were part of the discovery process in their cases.[62] An average of more than six depositions were taken in each case.[63] As discussed above, this finding is consistent with, although slightly higher than, the average number of depositions

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59. Memorandum from Tom Willging on Data on Durational Limits on Depositions to Discovery Subcomm., Fed. Jud. Ctr. Rsch. Div. 3 (Dec. 22, 1997) [hereinafter Willging Memo] (footnotes omitted), https://www.fjc.gov/sites/default/files/2015/0031.pdf [https://perma.cc/6FAB-RWRR]. The 1997 FJC Study was used in part to inform the 2000 amendment to FRCP 30, which imposed a presumptive one-day, seven-hour limit per civil deposition while still permitting the court to extend the length of a deposition if extra time is "needed to fairly examine the deponent." FED. R. CIV. P. 30(d)(1); *see also* FED. R. CIV. P. 30(d)(1) advisory committee's note to 2000 amendment (describing the purpose of the amendment).

60. Willging Memo, *supra* note 59, at 1.

61. Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to Judicial Conference Advisory Committee on Civil Rules*, FED. JUD. CTR. 7–26 (Oct. 2009) [hereinafter 2009 FJC Study], https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf [https://perma.cc/P8UU-A7GA].

62. *Id.* at 10 (finding non-expert depositions for closed cases with plaintiffs' attorneys at 54.8 percent and defense attorneys at 54.3 percent).

63. *Id.* (reporting that the mean number of non-expert depositions taken by plaintiffs in each case was 3.8 and the mean number of non-expert depositions taken by defendants was 2.8—for a total of 6.6).

per civil lawsuit estimated in the 1997 FJC Study.[64] And, like the 1997 FJC Study, a more recent multivariate analysis of civil litigation costs conducted for the FJC confirms that each deposition in a civil case translates into increased costs for the parties.[65]

Thus, despite its humble beginnings in the American legal system, the deposition has now become a mainstay of modern civil litigation. The "no surprises" mentality that motivated adoption of the original Rule 30 almost eighty-five years ago has become deeply ingrained in the DNA of civil litigators today. As Judge Robert S. Gawthrop, III colorfully explained:

> It may safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial—assuming there is a trial, which there usually is not. The pretrial tail now wags the trial dog.[66]

Civil litigators rely heavily on depositions not just to inform cross-examination at trial, but to evaluate the strengths and weaknesses of a case.[67] Depositions have assumed such a critical role in civil litigation—especially when cases are large, complex, and high-stakes—that "most lawyers" in civil practice "would agree that the deposition is the most important discovery tool."[68] Thus, when civil litigators represent clients in arbitration

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64. *See supra* note 58 and accompanying text.

65. Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis*, FED. JUD. CTR. 5–7 (Mar. 2010), https://www.uscourts.gov/file/3403/download [https://perma.cc/8XHC-8PKT] (finding that each expert deposition is associated with an eleven percent increase in a plaintiff's litigation costs, and each non-expert deposition results in a five percent increase in both a plaintiff's and a defendant's litigation costs).

66. Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (footnote omitted).

67. *See, e.g.*, Dickerson, *supra* note 6, at 3–4 (noting that "deposition transcripts . . . serv[e] as fodder for cross-examination and impeachment" at trial and that "litigators often accord great weight to witnesses' and attorneys' performances during depositions" in evaluating the strength of their case).

68. John R. Byrne, *Demystifying the Civil Deposition*, FED. LAW., Jan./Feb. 2021, at 55, 55; *see also* David A. Binder et al., *A Depositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer*, 13 CLINICAL L. REV. 871, 872 (2007) (discussing the results of a survey of civil litigators reflecting that ninety-two percent of respondents believed that depositions were either "very important" or "extremely important"); A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 277 (1998) ("A deposition can be the most powerful and productive device available during discovery.").

proceedings, they bring with them a "penchant for deposing every witness" that is warmly embraced by the FRCP's liberal deposition practice rules.[69]

II. THE USE OF DEPOSITIONS IN COMMERCIAL ARBITRATIONS

While the parties to an arbitration are theoretically free to develop their own rules to govern the proceeding, many arbitrations are conducted pursuant to the rules of a TPA—either because the arbitration clause in the parties' contract adopts those rules or because the parties decide to use them after their dispute arises.[70] Even where the parties do not agree on a particular set of rules to govern their proceeding, arbitrators may look to familiar TPA rules to help inform their decisions on procedural matters. Three of the more prominent TPAs in the United States are the AAA (the TPA that administers the most arbitrations in the United States[71]), Judicial Arbitration and Mediation Services, Inc. (JAMS), and International Institute for Conflict Prevention and Resolution (CPR).[72] While the rules of these and other TPAs are intended to reduce the use of discovery depositions, they do not bar parties and their counsel from seeking them nor do they preclude arbitrators from exercising broad discretion to allow them. This Part explains how the rules of these leading TPAs treat discovery depositions. It then reviews the evidence suggesting that notwithstanding these and other similar TPA rules, as well as arbitrators' general reluctance to allow litigation-style discovery in arbitrations, discovery depositions remain prevalent in commercial arbitrations. Finally, it explores some of the reasons for the staying power of depositions in

69. Moxley, *supra* note 16, at 39.

70. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 236 (3d ed. 1999); *see also* CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 308 (2019) ("In most cases . . . efficiency and commonsense urge parties to adopt a set of already-existing rules, either in whole or in part. Perhaps the most common source of default sets of rules comes from one of the prominent organizations providing arbitration administration.").

71. *About Us*, AM. ARB. ASS'N, https://www.adr.org/about-us [https://perma.cc/T7J9-S3N3].

72. For a more fulsome discussion of the role of TPAs in the management of arbitration proceedings, see generally Mitch Zamoff & Leslie Bellwood, *Proposed Guidelines for Arbitral Disclosure of Social Media Activity*, 23 CARDOZO J. CONFLICT RESOL. 1, 13–14 (2022).

arbitration which, I argue in Part IV, could be meaningfully reduced by the adoption of TPA rule modifications that track the rules of criminal procedure.

A. THE RULES GOVERNING DEPOSITIONS IN ARBITRATIONS

TPA rules concerning arbitral depositions disfavor expansive deposition practice but do not preclude it. In fact, the rules provide sufficient leeway for arbitrators to replicate litigation-style deposition practice, especially if the parties jointly press for such an approach.

1. AAA

The AAA's rules applicable to commercial arbitrations are silent on the topic of discovery depositions. Rule 23, which governs pre-hearing discovery, simply provides the arbitrator with authority to "manage any necessary exchange of information among the parties."[73] The rule goes on to identify the interests that the arbitrator should balance in managing pre-hearing discovery: efficiency and cost, on the one hand, and "promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses," on the other.[74] Rule 23 does not discuss whether and to what extent the information exchange contemplated by the AAA rules should include the deposition testimony of witnesses.[75]

The only mention of depositions in the AAA's commercial rules is in a special rule pertaining to the management of what the AAA terms Large, Complex Commercial Disputes (LCCDs).[76] Rule L-3 states that the arbitrator has discretion in "exceptional" LCCDs to allow the taking of depositions "upon good cause shown and consistent with the expedited nature of arbitration."[77] While it may be reasonable to infer that the AAA's

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73. *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N 22 (Sept. 1, 2022), https://adr.org/sites/default/files/Commercial-Rules_Web.pdf [https://perma.cc/6Z4U-K62T].

74. *Id.*

75. *Id.*

76. *Id.* at 9 ("Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $1,000,000 exclusive of claimed interest, arbitration fees and costs.").

77. *Id.* at 43 (quoting from Rule L-3(f) Management of Proceedings).

commercial rules discuss depositions only in the special rules governing LCCDs because the AAA intended to make depositions available only in LCCDs, that is not what the rules say. Consistent with Rule 22, an arbitrator can permit any number of discovery depositions in any arbitration administered under the commercial rules as long as they find the exchange of deposition testimony consistent with the balancing test set forth in the rule.[78] Moreover, specialized AAA rules suggest that depositions are contemplated in many types of AAA-administered proceedings. For example, the AAA rules governing disputes between healthcare payors and providers expressly allow each party to take, as a matter of right, one deposition in cases on the Regular track and two depositions in cases assigned to the Complex track.[79] These rules allow for additional depositions if the arbitrator orders them based upon a showing of good cause or if the parties agree to them.[80] The payor-provider rules do not appear to vest the arbitrator with discretion to disallow depositions that the parties stipulate should be taken.

2. JAMS

JAMS's comprehensive set of rules allows each party to take one deposition as a matter of right in every JAMS-administered arbitration.[81] In addition, the JAMS rules grant the arbitrator broad discretion to allow additional depositions "based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness."[82] JAMS provides further guidance on the role of depositions in JAMS-administered arbitrations in a separate set of recommended discovery protocols for domestic commercial cases. The protocols recognize that deposition discovery in arbitration, "if not carefully regulated, . . . can become extremely expensive, wasteful and time-

78. *Id.* at 22 (featuring Rule 22(b), which allows the parties and arbitrator to "establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute").

79. *AAA Healthcare Rules*, *supra* note 21, at 19, 35 (deriving from Rule 22 and Rule C-4).

80. *Id.*

81. *JAMS Arbitration Rules*, *supra* note 21, at 12 (featuring Rule 17(c)).

82. *Id.*

consuming."[83] That said, the protocols support the expanded use of deposition discovery beyond (and possibly well beyond) the depositions guaranteed by Rule 17 in two ways. First, the protocols expressly recognize that the "size and complexity of commercial arbitrations have now grown to a point where more than a single deposition can serve a useful purpose in certain instances."[84] Second, they make clear that arbitrators are not allowed to impose restrictions on deposition practice that conflict with the wishes of the parties to the dispute even when those wishes are contrary to best arbitration practices:

> Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision, since arbitration is governed by the agreement of the parties.[85]

Exhibit A of the JAMS Discovery Protocols sets forth a list of the factors that JAMS arbitrators are to consider in determining the appropriate scope of discovery, including the amount in controversy, the complexity of the factual issues, and the relevance of the requested discovery to the material issues in dispute.[86]

3. CPR

The rules applicable to CPR-administered arbitrations do not specifically address the topic of deposition discovery.[87] They merely grant the arbitral tribunal (whether consisting of one or three arbitrators) the authority to allow whatever discovery it

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83. *JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases*, JAMS 6 (Jan. 6, 2010) [hereinafter *JAMS Discovery Protocols*], https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf [https://perma.cc/C5ZW-46H8].

84. *Id.*

85. *Id.* at 4–5.

86. *Id.* at 9–11.

87. *See Administered Arbitration Rules*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. 24–25 (Mar. 1, 2019) [hereinafter *CPR Rules*], https://static.cpradr.org/docs/2019%20Administered%20Arbitration%20Rules_Domestic_07.25.19_.pdf [https://perma.cc/5VWP-PYXB] (discussing the parameters of discovery without mentioning depositions).

decides is "appropriate in the circumstances."[88] The only indication in the CPR rules that the scope of discovery should be more limited in arbitration than litigation is CPR Rule 11's direction to arbitrators to take into account "the desirability of making discovery expeditious and cost-effective" when deciding what discovery to permit in each case.[89]

B. DEPOSITIONS FEATURE PROMINENTLY IN COMMERCIAL ARBITRATION

There is strong evidence that depositions play a larger role in commercial arbitrations than contemplated by the TPA rules that are intended to restrict their use. In fact, a recent AAA study found that nearly two-thirds of large commercial arbitrations resulting in an award between 2015 and 2018 involved deposition practice.[90] According to the 2021 AAA Study, party-affiliated witnesses were deposed in about two-thirds of these cases, while non-party and expert witnesses were deposed approximately forty percent of the time.[91] It is not possible to tell from the study how many party-affiliated witnesses were deposed on

88. *Id.* at 24. Arbitrations are typically decided either by a sole arbitrator or a panel of three arbitrators chosen by the parties to the arbitration. *See* Irene Warshauer, *The Benefits of Mediation and Arbitration for Dispute Resolution in Securities Law*, N.Y. STATE BAR ASS'N 4 (Jan. 2011), https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Dispute%20Resolution%20PDFs/Securities mediationfinal.pdf [https://perma.cc/P5SY-CG54] ("Arbitration is the process in which parties engage a neutral arbitrator or panel of three arbitrators . . . ."); David J. McLean & Sean-Patrick Wilson, *Is Three a Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L.J. 1, 1 (2008) ("Tripartite panels are most commonly found in commercial and international arbitrations and labor disputes. Unless otherwise provided for by rule or agreement, typically each party to the arbitration agrees to appoint one arbitrator, the 'party-appointed arbitrator,' and the two party-appointed arbitrators then select a third arbitrator, most often referred to as the 'umpire,' or sometimes the 'chair' or the 'neutral.'" (footnotes omitted)).

89. *CPR Rules*, *supra* note 87, at 24–25.

90. *How Parties and Counsel Increase Their Costs and Lower Efficiency of Their Cases*, AM. ARB. ASS'N & INT'L CTR. FOR DISP. RESOL. 7 (2021) [hereinafter 2021 AAA Study], https://go.adr.org/rs/294-SFS-516/images/AAA251_Arbitrator_Case_Evaluation_Survey_Findings.pdf [https://perma.cc/2H4L-BAYU]. The study was based on survey responses from arbitrators who presided over more than 400 "commercial cases with a claim or counterclaim of at least $1 million dollars." *Id.* at 1. The report focused only on cases in which the arbitrator entered an award and did not cover cases that settled, which constitute a significant majority of arbitrations administered by AAA. *Id.*

91. *Id.* at 7.

average in these matters because the disputants in large commercial cases are often entities with many agent or employee witnesses who would fall into the party-affiliated-witness category.

Even though the arbitration agreements governing these commercial cases rarely provided for litigation-style discovery, the parties and their lawyers still engaged in more deposition and other discovery than the surveyed arbitrators thought was necessary or desirable. The surveyed arbitrators identified overdone discovery as the number one factor that drove up the cost of these arbitrations and the time required to bring them to resolution.[92] It is no surprise, then, that the arbitrators' most common "best practice" recommendation to make arbitration more time- and cost-efficient was to "limit discovery."[93]

Alternative dispute resolution experts generally agree with these arbitrators that the importation of litigation-style discovery into arbitration proceedings prevents arbitration from realizing its full potential as a more cost-effective and efficient dispute resolution mechanism than litigation.[94] The use of depositions in arbitration is particularly problematic because "[i]f depositions are available, . . . there is an inclination to leave no stone unturned," which cultivates an environment that "often lead[s] to inefficiency."[95] As one article urging arbitrators to make arbitration faster and more economical put it: "The challenge of protecting the time and cost advantages of arbitration will continue until parties and arbitration counsel learn to think of arbitration as a process that is distinct from litigation and arbitrators learn to be more 'muscular' and disciplined managers of the process and themselves."[96] In this vein, numerous commentators have suggested ways that arbitrators might limit the overuse of depositions, including "remind[ing] the parties of the cost in taking so many depositions,"[97] explaining to parties and counsel that "cross-examination can be more effective when the

92. *Id.* at 2.

93. *Id.* at 12.

94. *See, e.g.*, O'Neil, *supra* note 9, at 15 (noting that "the importation of a litigation mindset has resulted in a slow but steady encroachment of litigation procedures into the arbitration process," which has "increased the cost and duration of arbitration cases").

95. *Id.* at 16–17.

96. Marinello & Matlin, *supra* note 9, at 69.

97. *Id.* at 74.

witness is not deposed (and lines of cross-examination revealed) ahead of time,"[98] limiting the number of depositions that each side may take,[99] and urging the parties to adopt rules that eliminate deposition practice altogether.[100]

Why is it so hard for disputants and their attorneys to wean themselves off depositions when they arbitrate instead of litigate? While an in-depth consideration of the dynamics contributing to this phenomenon is beyond the scope of this Article, I highlight three potential reasons for the stickiness of deposition practice in arbitration to illustrate the pressing need to change the rules if the practice itself is to be reformed.

First, there are powerful incentives that make litigation counsel and the parties they represent in commercial arbitrations—whom are often also represented by sophisticated in-house lawyers—reluctant to deviate from the deposition practice to which they are accustomed in civil lawsuits. Examining witnesses for the first time at an arbitration hearing, rather than a deposition, requires a level of risk tolerance that is uncomfortable for many litigators who are used to deposing witnesses for seven hours or more before trial.[101] A prohibition on discovery depositions in arbitration would, at least in the case of hostile witnesses, increase the amount of unexpected testimony at the evidentiary hearing. This would increase the pressure on lawyers cross-examining adverse witnesses to effectively deal with those surprises in real time without the benefit of a deposition transcript.[102] This, in turn, would increase the risk that cross-

98. *Id.*

99. *Id.* ("If the parties are forced to be more strategic in the depositions they chose to take, they may eventually come around to the idea that they do not need so many of them."); *see also* Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators*, 25 AM. REV. INT'L ARB. 395, 450 (2014) (noting that some arbitrators curtail deposition practice and require counsel to defend the number of depositions they request).

100. Stipanowich & Ulrich, *supra* note 99, at 476 n.198 (quoting one arbitrator as stating that they "try to persuade parties to adopt the IBA Rules for the Taking of Evidence in International Commercial Arbitrations, which eliminate depositions and limit the production of document[s], and encourage the use of witness statements" (alteration in original)).

101. *See* 2009 FJC Study, *supra* note 61, at 117–18 (assessing risk within the discovery process).

102. In most cases, one would expect a ban on discovery depositions to impact only preparation for the examination of adverse witnesses. Most parties do

examinations would be less effective which, in turn, would increase the risk that the lawyers would look bad (or at least not as good as they would if they had a deposition transcript to police the witness) during the key performance moments of the hearing. Thus, the lawyers involved in arbitrations, both in-house and outside counsel, are personally incentivized to pursue the type of extensive deposition practice that will maximize their individual performance in the proceeding.[103] In addition, more depositions result in more fees for lawyers who bill their clients by the hour. While this is hopefully not a major driver of litigation-style deposition practice in arbitration, it is a fact of life that bears mention.

Second, there are powerful marketplace incentives that make it difficult for arbitrators to reject the requests of arbitration parties and their counsel to take depositions, especially when both sides agree that depositions are necessary to effectively arbitrate a dispute. It is often said that an arbitration

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not depose their own witnesses and the unavailability of discovery depositions should not affect the ability of parties and their counsel to prepare their own witnesses (or even cooperative non-party witnesses) for an arbitration hearing.

103. Two other potential incentives for lawyers to engage in overdone arbitration deposition practice also deserve mention. First, attorneys may be incentivized to vigorously pursue deposition discovery—to the extent it is available—to insulate themselves against malpractice claims. *See, e.g.*, Dang v. Floyd, 518 P.3d 671 (Wash. Ct. App. 2022) (involving a legal malpractice claim based, in part, on the lawyer's failure to take certain depositions); Sheridan v. Rintala, No. B199979, 2009 Cal. App. Unpub. LEXIS 92 (Cal. App. Jan. 6, 2009) (same); Gonzalez v. Ellenberg, 799 N.Y.S.2d 160 (N.Y. App. Div. 2004) (same). As discussed in Part IV, the amendment of TPA rules to outlaw (or severely restrict) discovery deposition practice would remove this incentive from the equation. Second, trial lawyers accustomed to litigating in court may be conditioned to using depositions to develop the evidentiary record for making or opposing summary judgment motions. *See* FED. R. CIV. P. 56(c)(1) (stating that parties "asserting that a fact cannot be or is genuinely disputed" in the context of a summary judgment motion may cite to "particular parts of materials in the record, including depositions," in support of their assertions). But this rationale for deposition practice does not apply in the arbitration setting, where dispositive motion practice is strongly disfavored. *See, e.g.*, Jennifer L. Gehrig, *Arbitration: A Franchisee's Perspective*, 22 FRANCHISE L.J. 121, 123 (2002) ("Allowing dispositive motions is not in line with the principles underlying arbitration."); Matthew DeLuca, *Clarifying the Role of Dispositive Motions in Arbitration*, 73 DISP. RESOL. J. 109, 114 (2018) ("[D]ispositive motions in arbitration . . . threaten to undercut the very rationale for disputants to resolve their disagreements in arbitration as opposed to in a court.").

proceeding belongs to the parties.[104] Parties are generally free to design and customize their arbitration clauses and processes in whatever way suits them, including with respect to discovery.[105] Arbitrators are conditioned to respect the wishes of the parties in arbitration because, at a fundamental level, there would be no arbitration unless the parties agreed to be there. Thus, even though most of the arbitration rules vest them with discretion to do so in cases where the arbitration agreement is silent, arbitrators are not accustomed to overruling the parties with respect to the process they wish to follow in their case.[106] Moreover, there may be adverse commercial ramifications for arbitrators who deny depositions to parties and lawyers who want them. Those arbitrators may not be selected for future matters involving the same parties or counsel or other disputants or lawyers who might have received negative intelligence about the arbitrator from the disputants who were denied the depositions they wanted. Thus, it is naïve for commentators to urge arbitrators to

104. *See, e.g.*, United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring) (holding that it is improper for courts to evaluate the merits of a claim when the parties previously agreed to arbitrate); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 92 (2014) (opining that "party autonomy" is "arbitration's essential virtue"); Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1192–93 (2003) (describing "freedom of contract . . . [as being] at the very core of how the law regulates arbitration"); *JAMS Discovery Protocols*, *supra* note 83, at 5 (directing arbitrators to allow "unlimited discovery" where the parties "truly desire" it because "arbitration is governed by the agreement of the parties").

105. MENKEL-MEADOW ET AL., *supra* note 70, at 308 ("To a large extent, disputants can design the parameters of the process they want under the rubric of arbitration."); Thomas J. Stipanowich, *Arbitration: The "New Litigation*,*"* 2010 ILL. L. REV. 1, 51 ("[T]he central and primary value of arbitration is . . . the ability of users to make key process choices to suit their particular needs.").

106. *See, e.g.*, Gilda R. Turitz, *Managing Discovery in Arbitration*, 18 WOMAN ADVOC. 17, 18 (2013) (noting that the expense of depositions makes arbitrators reluctant to allow them "over the objection of the opposing party"). If disputants truly want litigation-style discovery in their arbitration proceedings, they can enter into pre- or post-dispute arbitration agreements that expressly permit such expansive discovery. Arbitrators are bound to honor the parties' contractual agreement regarding how the proceedings are to be conducted. *See* 2021 AAA Study, *supra* note 90, at 6 (noting that seven percent of arbitration agreements expressly provided for the same discovery that would be available in court). This Article focuses on the much more common scenario where the parties' agreement does not endorse any particular approach to discovery but rather adopts rules that vest discretion in the arbitrator to determine the appropriate scope of deposition and other discovery.

reject requests for depositions in arbitration, especially stipulated requests, without any consideration of the potential commercial consequences of doing so.[107] Simply put, arbitrators' ability to get work is dependent on the willingness of disputants and their lawyers to select them. It stands to reason that arbitrators who are viewed in the marketplace as hostile to discovery will be less likely to be selected by lawyers seeking litigation-style discovery, as well as other attorneys and parties who consult those lawyers when making their arbitrator-selection decisions. This calculus likely causes some arbitrators in some cases to hold their noses and permit depositions even when they would prefer not to do so.

Third, many arbitrators may be concerned that denying requests for deposition discovery will expose their decisions to vacatur.[108] One of the few grounds for vacating an arbitral award under the Federal Arbitration Act (FAA) is the refusal of the arbitrator to "hear evidence pertinent and material to the controversy."[109] The FAA characterizes such a refusal as a form of arbitral misconduct.[110] Losing arbitration parties have filed motions to vacate arbitral awards under this provision of the FAA based on an arbitrator's refusal to allow certain types of discovery on the theory that the denial of discovery deprived the arbitrator of evidence pertinent and material to the controversy.[111] While courts generally have denied these motions on

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107. *See, e.g.*, 2021 AAA Study, *supra* note 90, at 12 (stating that arbitrators "should feel empowered" to restrict discovery "as they see fit to expedite the discovery phase of arbitration" in the absence of an arbitration agreement providing for "litigation-style discovery"); Frisch, *supra* note 10, at 178 ("For those who have been hesitant, fearing that asserting control will create grounds for vacatur, fear not. Inform yourself of the judicially recognized boundaries outlined in this article and step into your rightful role as time and cost controller.").

108. Arbitrators may justifiably be more concerned about the prospect of having an award vacated than judges are about having a decision overturned on appeal. While many judges, including federal judges, enjoy lifetime tenure, arbitrators generally must compete for business in a marketplace where the vacatur of an award could be harmful to their reputation.

109. 9 U.S.C. § 10(a)(3).

110. *Id.*

111. *See, e.g.*, Doral Fin. Corp. v. Garcia-Velez, 725 F.3d 27, 31 (1st Cir. 2013) (addressing a motion to vacate based on arbitrator's denial of motions to compel discovery); Prestige Ford v. Ford Dealer Comput. Servs., Inc., 324 F.3d 391, 393 (5th Cir. 2003) (addressing a motion to vacate based on arbitration panel's

the ground that the denial of discovery did not deprive the parties of a fundamentally fair hearing, courts analyze vacatur motions under § 10(a)(3) on a case-by-case basis, which creates at least some risk that an arbitrator's refusal to permit deposition discovery could jeopardize an arbitral award.[112] This is a risk, no matter how small, that many arbitrators may view as not worth assuming, particularly in view of the adverse business consequences that might flow from having an award vacated for being "guilty of misconduct" under the FAA.

As discussed in Part IV below, these dynamics are unlikely to change absent more rigorous TPA rules curbing the use of depositions in arbitration.

III. DEPOSITIONS IN CRIMINAL CASES

The approach to depositions in criminal litigation is diametrically opposed to the permissive stance taken by the FRCP. Discovery depositions are not allowed in federal criminal cases.[113]

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refusal to issue discovery subpoenas to third parties); Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 624–25 (6th Cir. 2002) (addressing a motion to vacate based on the arbitration panel's failure to allow movant to conduct discovery related to the amount the panel ordered movant to pay as costs); Troegel v. Performance Energy Servs., LLC, No. 18-1051-JWD-EWD, 2020 U.S. Dist. LEXIS 135317, at *21–22 (M.D. La. July 30, 2020) (addressing a motion to vacate based partially on the arbitrator's refusal to permit discovery); Rogers v. Ausdal Fin. Partners, Inc., 168 F. Supp. 3d 378, 382 (D. Mass. 2016) (addressing a motion to vacate challenging arbitration panel's refusal to issue subpoenas to third-party witnesses); Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12-CV-283(GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4, 2013) (addressing a vacatur motion based on arbitral panel's denial of movant's request for document discovery); AT&T Corp. v. Tyco Telecomms. (U.S.) Inc., 255 F. Supp. 2d 294, 304 (S.D.N.Y. 2003) (addressing a motion to vacate alleging that failure to permit adequate discovery constituted grounds for vacatur).

112. Frisch, *supra* note 10, at 156. For example, even though the decision ultimately was reversed on appeal, a Utah state court vacated an arbitral award based on the movant's contention that the arbitrator improperly rejected some of its deposition requests and denied it the opportunity to cross-examine a witness. Hicks III v. UBS Fin. Servs., Inc., 226 P.3d 762, 770 (Utah Ct. App. 2010).

113. FED. R. CRIM. P. 15(a). This Article does not wrestle with the normative question of whether it would be a good idea to permit discovery depositions in criminal cases in certain circumstances, as some commentators have advocated. *See, e.g.*, Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 612–13 (advocating for discovery depositions to be allowed in criminal cases); John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2191 (2000) (contending that a rule authorizing discovery depositions in criminal cases "would

Even depositions to preserve the testimony of witnesses who will be unavailable for trial are infrequent due to the heavy burden imposed on parties seeking such depositions to demonstrate the need for them. These tight restrictions on depositions are intended to ensure that criminal proceedings proceed to trial expeditiously, to prevent the imposition of undue economic burdens on the parties, and to thwart the parties from engaging in gamesmanship through the misuse of depositions.[114] All of these rationales resonate in the arbitration context.

A. THE APPROACH OF THE RULES OF CRIMINAL PROCEDURE

The most important distinction between deposition practice in civil disputes (whether litigated or arbitrated) and criminal cases is that discovery depositions are not allowed under federal and most state rules of criminal procedure.[115] The Federal Rules of Criminal Procedure (FRCrP), whose provisions limiting deposition practice are similar to those found in most state rules, do not allow either the prosecution or defense to take discovery

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assist both prosecution and defense counsel in evaluating the case"); Bryan Altman, *Can't We Just Talk About This First?: Making the Case for the Use of Discovery Depositions in Arkansas Criminal Cases*, 75 ARK. L. REV. 7, 8 (2022) (arguing that the Arkansas rules of criminal procedure should be amended to permit defendants to take discovery depositions); James J. Graney, *A Proposal for Discovery Depositions for Criminal Cases in Illinois*, 16 J. MARSHALL L. REV. 547, 559 (1983) (contending that Illinois should permit discovery depositions in criminal cases). Instead, this Article operates from the realistic premise that discovery depositions, which have been barred in federal criminal cases since adoption of the Federal Rules of Criminal Procedure, are not likely to become a part of criminal litigation in the foreseeable future, if ever. No proposal to introduce discovery depositions into federal criminal litigation has gained any meaningful traction.

114. *See infra* Part III.C.

115. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1129 (14th ed. 2015) ("All jurisdictions authorize use of depositions in the criminal justice process, but the vast majority sharply restrict their use to purposes other than discovery. Many make the deposition available in criminal cases only to preserve the testimony of a favorable witness who is likely to be unavailable at trial."). As of 2022, thirty-seven states followed the federal model and barred discovery depositions in criminal cases. Altman, *supra* note 113, at 38–39 (noting that only Arizona, Florida, Indiana, Iowa, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Texas, Vermont, and Washington permit the taking of discovery depositions in criminal cases under any circumstances).

depositions under any circumstances.[116] Rule 15 provides that the only permissible purpose for a deposition in a federal criminal case is to "preserve testimony for trial."[117] Should a party wish to take a testimonial deposition, it must request leave of court to do so, which Rule 15 states should be granted only "because of exceptional circumstances and in the interest of justice."[118] Rule 15 requires prior court approval of a deposition in a criminal case even where the parties agree that a witness needs to be deposed to preserve their testimony.[119] And Rule 15 makes clear that a criminal defendant must provide their consent in order to be deposed, an obvious requirement in view of a criminal defendant's Fifth Amendment privilege against self-incrimination.[120]

B. THE RIGOROUS ENFORCEMENT OF RESTRICTIONS ON DEPOSITIONS IN CRIMINAL CASES

A survey of the cases decided under Rule 15 reflects that courts take seriously the tight limitations the rule imposes on deposition practice in criminal cases. There do not appear to be any cases permitting either the prosecution or defense to take a discovery deposition of a witness who was expected to be available for trial. And even where the proposed deponent was likely

116. FED. R. CRIM. P. 15(a); *see also In re* United States, 878 F.2d 153, 156 (5th Cir. 1989) (finding that discovery depositions are clearly "not authorized" in federal criminal cases); United States v. Fischel, 686 F.2d 1082, 1091 (5th Cir. 1982) ("Depositions are not discovery tools in criminal cases."); *In re* Application of Eisenberg, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981) ("In criminal cases, depositions are not intended as discovery devices.").

117. FED. R. CRIM. P. 15(a).

118. *Id.* The original Advisory Committee Notes to Rule 15 drew an express distinction between "the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court" and "this rule" which permits testimonial (not discovery) depositions "to be taken only by order of the court" and "only in exceptional situations, as has been the practice heretofore." FED. R. CRIM. P. 15(a) advisory committee's note to 1944 amendment.

119. FED. R. CRIM. P. 15(h). Such agreements are rare in criminal cases presumably because neither side typically would be inclined to agree to depose a witness whose testimony is likely to be unfavorable. The Author's search for cases involving requests to approve agreed-upon depositions under FRCrP 15(h) yielded only a handful of results.

120. FED. R. CRIM. P. 15(e); *see also* U.S. CONST. amend. V (stating that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself").

to be unavailable to testify at trial, courts have consistently forced parties in criminal cases to meet a high bar to obtain approval of depositions to preserve their testimony.

While requests for testimonial depositions are rare in criminal cases, they are made from time to time. Even where it is undisputed that a witness will be unavailable for trial, courts are loath to allow depositions to preserve their testimony, enforcing the "exceptional circumstances" standard with rigor. For example, in *United States v. Sencan*, the court denied the prosecution's request to depose an alleged victim of the defendant's crime who could not attend trial due to health concerns.[121] The court was concerned about the late timing of the government's motion and the prejudice the defendant would suffer from having to prepare for a deposition in the days leading up to trial.[122] In denying the government's request to depose the witness, the court noted that there were other victims of the alleged crime who were available to testify at trial.[123] Thus, the court held, the government did not satisfy Rule 15's requirements that the deposition be justified by exceptional circumstances and be in the interest of justice.[124] The handful of decisions granting the prosecution permission under Rule 15 to use depositions to preserve trial testimony involve material witnesses whose unavailability for trial was clearly established.[125]

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121. No. 13-0117-CG, 2013 U.S. Dist. LEXIS 170127, at *2 (S.D. Ala. Dec. 3, 2013) (denying the prosecution's motion to reconsider a refusal to grant a Rule 15 deposition).

122. *Id.* at *6.

123. *Id.*

124. *Id.* Courts also occasionally deny prosecution requests for testimonial depositions under Rule 15 because of concerns that the proposed deposition format might not be adequate to vindicate the defendant's Sixth Amendment right to confront witnesses against him. *See, e.g.*, United States v. Gear, No. 17-00742 SOM-1, 2019 U.S. Dist. LEXIS 4011, at *5–6 (D. Haw. Jan. 9, 2019) (noting concerns about whether taking a deposition by two-way videoconferencing violates a defendant's rights under the Confrontation Clause in denying the government's motion for a Rule 15 deposition); U.S. CONST. amend. VI (guaranteeing the defendant "[i]n all criminal prosecutions" the right "to be confronted with the witnesses against him"). Although this constitutional concern is not germane to the arbitration context, it further illustrates the emphasis courts place on in-person witness examination at trial in the criminal context.

125. *See, e.g.*, United States v. Drogoul, 1 F.3d 1546, 1555 (11th Cir. 1993) (overturning district court order refusing to allow the government to depose witnesses located beyond the subpoena power of the court in Italy); United States v. Cooper, 947 F. Supp. 2d 108, 118 (D.D.C. 2013) (denying defendant's motion

In the infrequent instances where defendants bring Rule 15(a) motions, the results are mixed. In *United States v. Harder*, for example, the court denied the defense's motions to take twelve out-of-country depositions in four countries because it thought the defendant was trying to delay trial.[126] Most other defense-initiated Rule 15(a) motions have been denied due to the movant's failure to demonstrate the requisite exceptional circumstances.[127] However, in *United States v. Feng Tao*, the court conditionally granted defendant's motion to take a deposition (conditioned on China's agreement to facilitate the proceeding) based on the materiality of the testimony, the witness's unavailability for trial, and the court's view that allowing the deposition was consistent with the interest of justice.[128]

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to reconsider the district court's order granting the government's motion to depose two Indonesian witnesses under Rule 15); United States v. Jewell, No. 4:07-cr-00103 JLH, 2008 U.S. Dist. LEXIS 115414, at *8 (E.D. Ark. Aug. 14, 2008) (granting government's motion to take a Rule 15 deposition of a witness who was scheduled for brain surgery in another state one week prior to the start of trial); United States v. Vilar, 568 F. Supp. 2d 429, 445 (S.D.N.Y. 2008) (granting the government's motion to take deposition testimony from four witnesses located in the United Kingdom).

126. No. 15-1, 2016 U.S. Dist. LEXIS 181913, at *5–6 (E.D. Pa. Mar. 21, 2016).

127. *See, e.g.*, United States v. Aggarwal, 17 F.3d 737, 742 (5th Cir. 1994) (affirming the denial of defendant's Rule 15(a) motion based on the court's findings that the motion was untimely and that the requested deposition testimony was not essential to the defense of the case); United States v. Bello, 532 F.2d 422, 423 (5th Cir. 1976) (affirming the denial of defendant's Rule 15(a) motion on the grounds that there were no exceptional circumstances to justify the taking of the depositions and that the requested deposition testimony, even if allowed, would not have made a significant impact on the verdict); United States v. Bell, No. 17-cr-20183, 2019 U.S. Dist. LEXIS 136839, at *5 (E.D. Mich. Aug. 14, 2019) (denying defendant's Rule 15(a) motion for failing to meet "his burden of showing exceptional circumstances to warrant pretrial depositions of defense witnesses"); United States v. Ionia Mgmt. S.A., No. 03:07CR134 (JBA), 2007 U.S. Dist. LEXIS 58016, at *9 (D. Conn. Aug. 8, 2007) (denying defendant's motion to take Rule 15 depositions of foreign nationals on the ground that the witnesses would be available for trial).

128. No. 19-20052-JAR, 2021 U.S. Dist. LEXIS 216257 (D. Kan. Nov. 9, 2021); *see also* United States v. Jefferson, 594 F. Supp. 2d 655, 672 (E.D. Va. 2009) (finding that the defense established the unavailability of proposed deposition witnesses and the materiality of their testimony, but postponing a ruling on defendant's Rule 15(a) motion to consider whether witnesses would likely invoke their Fifth Amendment rights, as "Rule 15 depositions should not be authorized where the effort is likely to be futile").

The miserly approach of the courts to allowing testimonial depositions in criminal cases reinforces the widely accepted belief that criminal defendants can be effectively prosecuted and defended without the need for depositions of any kind.

C. THE KEY RATIONALES FOR DISALLOWING DISCOVERY DEPOSITIONS IN CRIMINAL CASES

Discovery depositions are prohibited in criminal cases principally to reduce cost and delay in a justice system that, like arbitration, places a premium on cost savings and efficiency. There are at least two dimensions to cost conservation in criminal adjudication. First, the criminal justice system is appropriately sensitive to imposing costs on criminal defendants—often individuals—who fund their own defense. The civil court system is generally more tolerant of resource inequality than the criminal justice system, where defendants have more at stake personally and are entitled to enhanced constitutional protections.[129] Second, criminal cases impose considerably more costs on the public than civil lawsuits, which typically are funded by private parties. Not only must the government pay the costs of investigating and prosecuting criminal cases, but the constitutional right to counsel in criminal cases (which does not exist in civil cases) dictates that the government also must shoulder the burden of funding the defenses of indigent criminal defendants.[130] Thus, in many

129. For example, a criminal defendant's constitutional right to confront witnesses against them, *see* U.S. CONST. amend. VI, would require a defendant and/or their counsel to be present at every deposition of every prosecution witness. This would increase the costs of defense in every case in which prosecutors took discovery depositions. Moreover, in cases where defendants are in custody prior to trial, the costs of compliance with the Confrontation Clause would increase even further to permit defendants to attend depositions in person (which would require a secure environment) or by remote means (which would require additional technology and related costs). *See* KAMISAR ET AL., *supra* note 115, at 1130 (noting the cost and administrative burdens inherent in temporarily releasing criminal defendants from custody to attend depositions); Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 720–21 (2017) (discussing how the Confrontation Clause impacts deposition practice in criminal cases).

130. *See* Weaver v. Massachusetts, 582 U.S. 286, 296 (2017) ("[I]f an indigent defendant is denied an attorney . . . the resulting trial is always a fundamentally unfair one."); Luis v. United States, 578 U.S. 5, 11 (2016) (noting that the right to counsel guaranteed to criminal defendants in the Constitution requires covering the costs of representation); Gideon v. Wainwright, 372 U.S. 335, 344

criminal cases, the government pays both the costs of the prosecution and the defense (and, not uncommonly, the costs of several defenses in cases involving multiple defendants).[131] And with respect to timing, criminal cases, on average, move to trial more expeditiously than their civil counterparts. This is due, in part, to speedy trial statutes at the federal and state level that require criminal cases to be tried within a certain number of days absent extenuating circumstances.[132] Thus, as discussed in

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(1963) ("[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

131. This is a considerable financial burden. A nationwide study conducted by the U.S. Department of Justice found that "state governments spent $2.3 billion nationally on indigent defense" in 2012. Erinn Herberman & Tracey Kyckelhahn, *State Government Indigent Defense Expenditures, FY 2008–2012 – Updated*, U.S. DEP'T OF JUST. 1 (Apr. 21, 2015), https://bjs.ojp.gov/content/pub/pdf/sgide0812.pdf [https://perma.cc/5VCZ-875S]. This expense has only grown over the last decade, with individual state budgets easily surpassing $100 million. *See, e.g.*, Archive of Agency Appropriations by Off. of Indigent Legal Servs., N.Y. STATE DIV. OF THE BUDGET (Jan. 15, 2019), https://www.budget.ny.gov/pubs/archive/fy20/exec/agencies/appropData/IndigentLegalServicesOfficeof.html [https://perma.cc/P9DF-S7AF] (recommending a public defense budget of $210,900,000 for fiscal year 2020); *2022–23 Governor's Biennial Budget Recommendation*, STATE OF MINN. BD. OF PUB. DEF. 3 (Jan. 2021), https://www.house.leg.state.mn.us/comm/docs/aM5O6SFOlEmD2wyorz1Tzw.pdf [https://perma.cc/NPY2-TEM3] (recommending public defense budgets of $110,511,000 and $113,396,000 for 2022 and 2023, respectively).

132. *See, e.g.*, 18 U.S.C. § 3161(c)(1) ("In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs."); N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2023) (requiring trial within "(a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony; (b) ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony; (c) sixty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months; or (d) thirty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a violation and none of which is a crime"); FLA. R. CRIM. P. 3.191(a) ("[E]very person charged with a crime shall be brought to trial within 90 days of arrest if the crime charged is a

greater depth below, importing criminal-style deposition limits into arbitration is supported by the fact that both dispute resolution processes place a premium on the conservation of cost and time.[133]

1. Cost

The primary reason discovery depositions are forbidden in all federal and most state criminal prosecutions is that their costs outweigh their potential benefits. As one of the leading criminal procedure treatises observes: "[D]epositions are very costly, and with the state footing the bill for indigent defendants, there is no financial sacrifice that would provide a restraint against appointed counsel conducting unnecessary depositions."[134] In fact, over fifty years ago, the American Bar Association (ABA) argued that criminal discovery depositions should be disallowed because their limited value was outweighed by the prohibitive expense associated with discovery deposition practice.[135] The ABA noted that the criminal system provides "no inherent limitation of cost . . . because in many cases the cost of

misdemeanor, or within 175 days of arrest if the crime charged is a felony."); 725 ILL. COMP. STAT. 5/103-5(a) (2022) ("Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant.").

133. While the constitutional privilege against self-incrimination is another significant barrier to discovery depositions of criminal defendants in criminal cases, it does not impact the availability of depositions of prosecution witnesses or other defense witnesses. *See* U.S. CONST. amend. V (establishing a privilege against self-incrimination that would allow criminal defendants to decline to be deposed prior to trial).

134. KAMISAR ET AL., *supra* note 115, at 1130; *see also, e.g.*, John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 677–78 (1988) (detailing the historic debate over criminal discovery depositions); Marian F. Ratnoff, Comment, *The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?*, 19 CASE W. RSRV. L. REV. 279, 289 (1968) (noting that "[d]epositions are often costly proceedings," and arguing that "[h]aving to pay for depositions which an indigent defendant may desire could cast an unbearable financial burden upon the State").

135. AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIM. JUST., STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.5, at 87–88 (1970) [hereinafter 1970 ABA PAPER]; *see also* H. Morley Swingle, *Depositions in Criminal Cases in Missouri*, 60 J. MO. BAR 128, 134 (2004) (discussing the ABA's recommendation against depositions in criminal cases).

defense must be borne by the state."[136] Professor John Douglass's observation that the very nature of a discovery deposition lends itself to cost proliferation is representative of the commentary in this area:

> Questioning in depositions tends to be longer, more detailed, and covers a broader subject matter than questioning at trial. Discovery depositions are not confined to matters admissible at trial, but may encompass any subject reasonably calculated to lead to admissible evidence. With no judge controlling the proceedings, and no jury to bore with detail, parties typically feel few time constraints in a deposition.[137]

Thus, it is unsurprising that concerns about the costs of discovery depositions typically prevail whenever proposals are advanced to permit more expansive deposition practice in criminal cases.[138]

An oft-cited study conducted by the State of Florida in the late 1980s attempted to quantify the costs of criminal discovery depositions. Florida is one of the states that allows discovery depositions in criminal cases, albeit with limitations.[139] The study concluded that, "by conservative estimates," criminal discovery depositions in a single year in Florida consumed more than 750,000 law enforcement hours and cost more than $35.6 million in public funds.[140] To put this figure into perspective, the

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136. 1970 ABA PAPER, *supra* note 135, § 2.5, at 87; *see also, e.g.*, Douglass, *supra* note 113, at 2190 (summarizing many of the arguments against criminal discovery depositions, including the fact that "when the state is paying the tab the defendant has no cost-driven incentive to set any limits"); Yetter, *supra* note 134, at 678 (quoting the 1970 ABA PAPER).

137. Douglass, *supra* note 113, at 2144 n.204.

138. *See, e.g.*, Swingle, *supra* note 135, at 134 ("The argument whether depositions are worth the expense in criminal cases is not new."); H.R. Con. Res. 1679, 1988 Leg., Reg. Sess., 1988 Fla. Laws 2442 (requesting that the Commission on Criminal Discovery consider using "technological advances to reduce costs and scheduling problems" associated with discovery depositions); Peter Forbes Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A. J. 732, 734 (1967) (noting that opponents of criminal discovery cite "increased costs of the administration of criminal law" under the "parade of 'horribles'" such discovery would create).

139. *See* Altman, *supra* note 113, at 38–39 (identifying Florida as one of the states that permits criminal discovery depositions as of 2022); Howard Dimmig, *Deposition Reform: Is the Cure Worse Than the Problem?*, 71 FLA. BAR J. 52, 52–55 (1997) (providing an overview of the evolution of the rule permitting discovery depositions in Florida criminal cases in certain situations).

140. *See* Yetter, *supra* note 134, at 684 (citing FLA. DEP'T OF L. ENF'T, DISCOVERING THE INJUSTICE: CRIMINAL DEPOSITIONS IN FLORIDA 5 (1987))

Florida agency that conducted the study noted that the time spent by Florida law enforcement officers in one year on discovery depositions—which includes preparing for and providing witness testimony and facilitating the attendance of defendants in custody—would be sufficient to staff an entire police force the size of the Orlando Police Department.[141] Extrapolating this annual cost (in both hours and dollars) across all fifty states and the federal criminal justice system would have a staggering impact on the public treasury.

The Florida study highlights the difficulty in quantifying the expenses associated with discovery depositions in criminal cases. Aside from the more measurable public costs of taking and defending depositions, discovery depositions in criminal cases would impose still additional costs on the government whenever law enforcement witnesses—who presumably constitute the vast majority of prosecution witnesses—were deposed. Federal and state funds would be used not only to pay these government employees to prepare for and provide deposition testimony, but to pay other law enforcers to fill in for officers who are taken away from actual law enforcement activities by the deposition process. Some commentators point to the "burden on prosecution witnesses," which, when law enforcement officers are involved, imposes additional economic burdens on federal and state budgets, as a reason to be skeptical about criminal discovery depositions.[142]

2. Speed

There is a federal constitutional right to a trial "without unnecessary delay" in criminal cases that does not exist on the civil

(discussing why the Florida Department of Law Enforcement favored eliminating discovery depositions in criminal cases).

141. *See id.*; Swingle, *supra* note 135, at 134.

142. *See* KAMISAR ET AL., *supra* note 115, at 1130 (discussing concerns about the burdens imposed by discovery depositions on prosecution witnesses). The concerns about the effects of discovery depositions on prosecution witnesses also focuses on victims of crime, who could be unfairly burdened (and perhaps retraumatized) by a discovery deposition after having already reported the crime to the police and, in some cases, having testified at a preliminary hearing. *Id.*; *see also* 1970 ABA PAPER, *supra* note 135, § 2.5 at 87 (noting that the imposition of discovery depositions on civilian prosecution witnesses "may discourage their coming forward in criminal cases").

side.[143] This right applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment.[144] As noted above, this constitutional right has spawned speedy trial statutes at the federal and state levels which require the expeditious trial of criminal cases.[145] Speedy criminal trials "prevent undue and oppressive incarceration prior to trial, . . . minimize anxiety and concern accompanying public accusation and . . . limit the possibilities that long delay will impair the ability of an accused to defend himself."[146] Moreover, with so much at stake and evidence that is often forensic in nature (and more susceptible to spoilage than documents, for example), there is an evidentiary urgency to the swift trial of criminal cases.[147] The risk that either side's case could be impaired by delay is generally greater in the criminal than the civil system.[148]

As a result of the constitutional, statutory, and prudential considerations discussed above, criminal cases proceed to trial faster (much faster in some jurisdictions) than their civil

143. FED. R. CRIM. P. 5(a)(1)(A). *Compare* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial . . . ." (emphasis added)), *with* U.S. CONST. amend. VII (lacking a speedy trial requirement in civil cases).

144. Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

145. *See supra* note 132 and accompanying text. Among other things, the Speedy Trial Act of 1974 requires that: federal criminal trials be scheduled "at the earliest practicable time . . . so as to assure a speedy trial," 18 U.S.C. § 3161(a); defendants be formally charged with federal crimes within thirty days of their arrest or service of a summons upon them, *id.* § 3161(b); and defendants should be tried within seventy days of the filing of the information or indictment in which they are charged or the date they last appeared before a judicial officer of the court in which charges against them are pending, whichever is later, *id.* § 3161(c)(1). While the deadlines in the Speedy Trial Act are often extended for reasons specifically articulated in the statute, *id.* § 3161(h), the presence of speedy trial deadlines meaningfully expedites the adjudication of criminal cases.

146. United States v. Ewell, 383 U.S. 116, 120 (1966).

147. *Cf. id.* (noting the right to a speedy trial is in place "to limit the possibilities that long delay will impair the ability of the accused to defend himself").

148. *See, e.g.*, Ratnoff, *supra* note 134, at 288 (highlighting concerns about the "threat of delay which is omnipresent" in discovery deposition practice and "the possibility that either side may use the process to indulge in malicious or overextended questioning"); Barker v. Wingo, 407 U.S. 514, 519 (1972) (discussing the social objectives of the Sixth Amendment); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 25.01, at 645 (4th ed. 2000) (summarizing the rationales for the right to a speedy trial).

counterparts. For example, in 2021, civil cases filed in U.S. federal district courts took a median of approximately thirty-five months to proceed from filing to trial, compared to a median of approximately fourteen months for criminal felony cases to go from filing to disposition.[149]

IV. ADOPTING CRIMINAL DEPOSITION RULES IN ARBITRATION

In view of the strong incentives for arbitration counsel to demand and arbitrators to tolerate discovery depositions in arbitration, the TPA rules governing arbitration depositions must change in order to unlock the full efficiency potential of arbitration. To move further away from civil litigation–style deposition practice and toward the more efficient approach of the FRCrP, TPAs should strongly consider some modest reforms, including (1) repealing rules that grant arbitration parties a certain number of depositions as a matter of right, (2) imposing a hard cap on depositions that cannot be exceeded under any circumstances,[150] and (3) meaningfully strengthening the showing required to obtain any depositions (perhaps using the FRCrP 15 standard for testimonial depositions as a model). Ultimately, TPAs should consider amending their rules to mirror the approach of FRCrP 15 by divesting arbitrators of the discretion to allow discovery depositions.[151]

This proposal is consistent with modern-day arbitration practice in other fora; for example, depositions rarely occur in

149. *Fed. Ct. Mgmt. Stat.—Comparison Within Circuits*, U.S. CTS. (Dec. 31, 2021), https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2021 [https://perma.cc/JJB8-QXH5] (allowing for the download of data regarding Federal Court Management Statistics—Comparison Within Circuit).

150. Any such cap should be set well below the ten depositions permitted as a matter of right by FRCP 30(a)(2)(A)(i).

151. Presumably, TPAs would want to take an incremental approach to such reform. For example, TPAs might decide to eliminate discovery depositions on a pilot or phased basis starting with less complex matters with lower stakes and working up to the largest commercial arbitrations on the docket. This would provide TPAs an opportunity to study the impact of eliminating discovery depositions prior to implementing this approach across the board. TPAs are better positioned than the Author to devise the optimal method of implementing these proposed rule amendments.

international arbitrations.[152] The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, the most commonly-used procedural framework for the prehearing disclosure of information in international arbitrations, do not provide for depositions.[153] And there are typically no discovery depositions allowed in arbitrations concerning securities and business disputes between investors, brokerage firms, and individual brokers before the Financial Industry Regulatory Authority (FINRA).[154]

The elimination of discovery depositions would be welcome news to most arbitrators. The survey results discussed in Part II[155] and the commentaries of respected neutrals reflect the belief of many arbitrators that discovery depositions are overused and overrated:

> Arbitrators have a strong belief that witnesses should testify only once, and that is at the hearing. So there is no need to incur the expense of earlier (and generally protracted) depositions.
>
> . . . .
>
> Despite their penchant for deposing every witness, litigators who arbitrate have learned that they have the skills to capably cross-examine the other side's witnesses without depositions. . . . The huge

152. *See Depositions in International Arbitration*, ACERIS L. LLC (Aug. 10, 2020), https://www.acerislaw.com/depositions-in-international-arbitration [https://perma.cc/J37K-KP6N] (noting that some jurisdictions, such as Brazil, Russia, and Austria, do not permit depositions on principle); *see also IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N (May 9, 2020) [hereinafter *IBA Rules*], https://www.ibanet.org/MediaHandler?id=68336C49-4106-46BF-A1C6-A8F0880444DC [https://perma.cc/6UW2-2Y7K] (promoting witness statements over depositions to enhance efficiency in international arbitration).

153. *Depositions in International Arbitration*, *supra* note 152 (citing *IBA Rules*, *supra* note 152).

154. Robert D. Mitchell, *FINRA's New Discovery Guide*, ROBERT D. MITCHELL, P.A., https://www.robertdmitchell.com/finra-discovery-guide [https://perma.cc/DX5F-PAB9]; Steven D. Hurd & Andrew M. Sherwood, *FINRA Arbitration for Employment Lawyers*, LEXISNEXIS 4–5 (June 8, 2023) (noting that "FINRA arbitration includes a presumption that depositions are not available to the parties, which reduces the employer's expenses" and that "[a] hearing in a FINRA arbitration is typically conducted without the benefit of deposing the claimant"); Jason W. Burge & Lara K. Richards, *Defining "Customer": A Survey of Who Can Demand FINRA Arbitration*, 74 LA. L. REV. 173, 186 (2013) ("FINRA Rules greatly restrict discovery compared to litigation, as interrogatories and depositions are typically not allowed . . . .").

155. *See supra* notes 90–91 and accompanying text.

> number of depositions typically taken in litigation is not as important as litigators have come to believe.[156]

But left to their own devices, for the reasons discussed in Part II,[157] lawyers will continue to request and arbitrators will continue to permit discovery depositions.

Thus, TPAs should strongly consider "criminalizing" depositions in arbitration by adopting the restrictive approach to deposition practice codified in the FRCrP.[158] This would eliminate discovery depositions altogether and limit deposition practice in arbitration to testimonial depositions necessary to preserve testimony from witnesses who will be unavailable to attend the hearing.[159] Criminal procedure's ban on discovery depositions teaches us that the eradication of discovery depositions in arbitration—which would result in significant cost and efficiency benefits—would not deprive arbitration parties of the ability to fairly try their cases. Criminal cases of all sizes, shapes, and complexities are tried every day in the absence of discovery depositions. Almost no one suggests this is unfair, even though the liberty and reputation of criminal defendants are typically at higher risk than they are for parties in civil proceedings, especially in private arbitrations.[160] Both prosecutors and defense counsel in criminal cases routinely and effectively litigate high-stakes disputes—some of which are as large and complicated as commercial arbitrations—subject to a heightened burden of persuasion without discovery depositions.

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156. Moxley, *supra* note 16, at 39.

157. *See supra* Part II.B (discussing the prevalence of depositions in arbitration).

158. This Part focuses on the sound reasons for eliminating discovery depositions in arbitration altogether since that is the most significant reform proposed herein, and the one most likely to meaningfully impact deposition practice in the arbitration arena. These arguments also support the more modest and incremental reforms suggested above, which TPAs might be more likely to implement as a starting point.

159. Of course, pre- or post-dispute arbitration agreements that expressly provide for deposition discovery would supersede TPA rules barring discovery depositions. Thus, this proposal would still allow disputants who expressly contract for discovery depositions to have them.

160. *See* Mitch Zamoff, *Safeguarding Confidential Arbitration Awards in Uncontested Confirmation Actions*, 59 AM. BUS. L.J. 505, 514–17 (2022) (providing an overview of privacy in arbitration proceedings); Laura A. Kaster, *Confidentiality in U.S. Arbitration*, N.Y. DISP. RESOL. LAW., Spring 2012, at 23, 23 (noting that privacy is a "dominant feature" of arbitration that "distinguishes it from open court proceedings").

This is true even though criminal defendants generally are entitled to more robust due process than civil disputants.[161] Courts consistently have held that the cross-examination of prosecution witnesses *at trial* is sufficient to satisfy a criminal defendant's constitutional right to confront witnesses against them.[162] It should follow that the opportunity for arbitration participants (to whom the Sixth Amendment right to confront witnesses does not apply) to cross-examine witnesses at an arbitration hearing—the equivalent of a trial in civil and criminal litigation—is also sufficient to protect their interests.[163] And although it is more difficult to prove a case beyond a reasonable doubt than by a preponderance of the evidence, prosecutors are able to meet this burden in the overwhelming majority of criminal cases without the benefit of discovery depositions.[164] This suggests that arbitration claimants do not need discovery depositions to meet a lower standard of proof. Therefore, it seems fundamentally fair to ask arbitration parties to cross-examine adverse witnesses at a hearing without the crutch of a discovery deposition. The "no surprises" justification for exhaustive (and exhausting) deposition practice in civil cases is flawed in multiple respects and is not persuasive in the arbitration arena.

A. CRIMINAL DEFENDANTS' CONFRONTATION CLAUSE RIGHTS ARE SATISFIED WITHOUT DISCOVERY DEPOSITIONS

Unlike civil litigants, criminal defendants risk the loss of life and liberty in the event of a guilty verdict.[165] This risk gives rise to a "uniquely compelling" due process interest in criminal cases that requires greater safeguards and protections for criminal defendants than civil litigants.[166] The most relevant of these

161. *Cf. infra* notes 172–79 and accompanying text (noting the higher burden in criminal cases which is connected to greater due process protections for criminal defendants).

162. *See infra* note 169 and accompanying text.

163. *See infra* note 167 and accompanying text (noting the Sixth Amendment applies only to criminal defendants).

164. *See infra* notes 172–80 and accompanying text.

165. *Cf.* Ake v. Oklahoma, 470 U.S. 68, 79 (1985) ("The State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.").

166. *Id.* at 78; *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981) ("[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption

safeguards to this analysis is the constitutional right of a criminal defendant "to be confronted with the witnesses against him" contained in the Confrontation Clause of the Sixth Amendment of the U.S. Constitution.[167] The confrontation right has been consistently construed to mean the right to cross-examine witnesses who testify against the defendant.[168]

Importantly, however, courts have made clear that the Confrontation Clause does not guarantee criminal defendants the right to cross-examine prosecution witnesses prior to trial. In fact, the Supreme Court has held that the Confrontation Clause is satisfied so long as the defendant is subject to full and effective cross-examination "at the time of trial."[169] As the Court's opinion

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that all the other elements in the due process decision must be measured."); Ed Kineade, *Appellate Juvenile Justice in Texas—It's a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 18 (1999) (noting that the quasi-criminal nature of Texas juvenile justice proceedings requires enhanced criminal due process protections); Note, *Expanding the Due Process Rights of Indigent Litigants: Will* Texaco *Trickle Down?*, 61 N.Y.U. L. Rev. 463, 496 (1986) ("It is important to note that . . . the protections afforded criminal litigants and civil litigants are not coterminous. The reason is that the interest in one's life or liberty is greater than the interest in one's property.").

167. U.S. CONST. amend. VI. The fundamental purposes of the Confrontation Clause are: (1) to ensure that witnesses testify under oath and grasp the seriousness of the trial process; (2) to allow the accused in a criminal case to cross-examine all witnesses who testify for the prosecution; and (3) to ensure that jurors can make credibility determinations based on observations of witness demeanor. *See* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (discussing the objectives of the Confrontation Clause).

168. *See, e.g.*, California v. Green, 399 U.S. 149, 157 (1970) (stating that the "primary object" of the Confrontation Clause is to prevent depositions and other out-of-court statements from "being used against the prisoner *in lieu of a personal examination and cross-examination of the witness*" (emphasis added) (quoting *Mattox*, 156 U.S. at 242)); United States v. Yates, 438 F.3d 1307, 1330 (11th Cir. 2006) (Marcus, J., dissenting) ("Cross-examination independently satisfies the confrontation requirement . . . ."); Howard v. Walker, 406 F.3d 114, 129 (2d Cir. 2005) ("[T]he right of cross-examination . . . is implicit in the constitutional right of confrontation, and helps assure 'the accuracy of the truth-determining process.'" (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

169. *Green*, 399 U.S. at 157; *see also* Crawford v. Washington, 541 U.S. 36, 50–51 (2004) (holding that the Confrontation Clause entitles a criminal defendant to cross-examine witnesses who testify at trial and allows the admission of out-of-court testimonial hearsay statements only if the defendant has the opportunity to cross-examine the declarant at trial); Maryland v. Craig, 497 U.S. 836, 866 (1990) (Scalia, J., dissenting) (discussing ways to allow vulnerable victims to be cross-examined at trial, consistent with the Confrontation Clause,

in *California v. Green* succinctly put it: "[I]t is this literal right to 'confront' the witness *at the time of trial* that forms the core of the values furthered by the Confrontation Clause."[170] Thus, there is no constitutional right to examine (or cross-examine) a witness prior to trial as long as the defense has the opportunity to do so at trial.[171]

In view of the fact that the FRCrP have denied criminal defendants the opportunity to take discovery depositions since their inception, it is not surprising that there is little case law analyzing the role of depositions in the confrontation of witnesses under the Sixth Amendment.[172] However, in considering whether to "criminalize" depositions in arbitration, it is notable that no court has ever held that the bar on discovery depositions in federal criminal cases interferes with a defendant's Confrontation Clause rights.[173] Even where a constitutional right to confront a witness exists—which it does not in civil lawsuits or arbitrations—that right is indisputably satisfied by a single opportunity to examine the witness at trial.[174] Against this backdrop, it seems even less credible for arbitration participants to assert that discovery depositions are necessary to effectively prosecute or defend their civil claims. Thus, TPAs should not be overly concerned that they are divesting arbitration participants

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when the judge determines that face-to-face cross-examination would cause the witness serious emotional distress).

170. *Green*, 399 U.S. at 157 (emphasis added).

171. *See id.* at 159 (holding that a defendant's inability to cross-examine a witness at the time the witness made a prior statement is not of constitutional significance under the Confrontation Clause "as long as the defendant is assured of full and effective cross-examination at the time of trial").

172. The few cases that touch on the issue indicate that the ability of a criminal defendant to question a witness at trial obviates the need to take that witness's deposition prior to trial. *See* Jordan v. Mays, No. 17-1159-STA-jay, 2021 U.S. Dist. LEXIS 171106, at *54 (W.D. Tenn. Sept. 9, 2021) ("Counsel's ability to question a witness at the original trial generally mitigates the need for a discovery deposition."); Payne v. Bell, 89 F. Supp. 2d 967, 974 (W.D. Tenn. 2000) ("The fact that counsel has already had the opportunity to cross-examine Shanks on this issue mitigates the need for a discovery deposition.").

173. *See* Church v. State, 189 N.E.3d 580, 592 (Ind. 2022) ("[T]he right of confrontation applies at trial, not in discovery, and no court has found the unavailability of depositions in criminal cases to be unconstitutional, whether in the federal system, or in the forty-four states where the ability is prohibited or limited.").

174. *See supra* note 168 and accompanying text.

of a meaningful right should they amend their rules to abolish deposition practice.

B. PROSECUTORS MEET A HIGHER BURDEN OF PERSUASION WITHOUT THE BENEFIT OF DISCOVERY DEPOSITIONS

Criminal prosecutors are required to prove a defendant's guilt beyond a reasonable doubt.[175] This is the most rigorous burden of persuasion that exists in the law.[176] In general terms, it requires the jury to find with near-virtual certainty that the defendant is guilty of the offense charged.[177] As the Supreme Court explained well over a century ago:

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175. *See In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

176. The two burdens of persuasion typically applicable to a civil action are: (1) the "preponderance of the evidence" standard and (2) the "clear and convincing evidence" standard. *See* Addington v. Texas, 441 U.S. 418, 423–24 (1979) (noting the standards of proof applicable to different types of civil cases). The former—which is the typical burden of persuasion applicable to civil disputes—requires the plaintiff to convince the jury that the plaintiff's version of the facts is more likely than not to be true. Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 329 (2007). In other words, if the jury believes the plaintiff should prevail with a degree of certainty exceeding fifty percent, it should find for the plaintiff under this standard. *See* MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 1.6 (NINTH CIR. JURY INSTRUCTIONS COMM. 2022) ("When a party has the burden of proving any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true."). The "clear and convincing" evidence standard, which is sometimes implicated by civil claims that sound in fraud, is more rigorous than preponderance of the evidence, but still falls below the showing required by the "beyond a reasonable doubt" standard. *Cf.* Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (noting the higher showing required by the "clear and convincing evidence" standard).

177. *See, e.g.*, 1 MAINE JURY INSTRUCTION MANUAL § 6-7 (2024) ("A reasonable doubt is just what the words imply, a doubt based on reason and common sense. It is not a doubt based upon mere guess, surmise, or bare possibility. It is doubt which a reasonable person without bias, prejudice, or interest, and after conscientiously weighing all of the evidence, would entertain as to the guilt of the accused. To convict a defendant of a criminal offense, the evidence must be sufficient to give you a conscientious belief that the charge is almost certainly true."); 2A INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 24-404 (2024) ("[I]f the jury are satisfied from the evidence that the accused be guilty of the offense charged in the indictment beyond reasonable doubt, and that no reasonable hypothesis is or explanation can be found or given upon the whole evidence in the case consistent with the innocence of the accused, and at the same time

> Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.[178]

The "beyond a reasonable doubt" standard is more difficult to meet than any standard of proof that might apply in an arbitration.[179]

Notwithstanding this rigorous standard, federal prosecutors obtain convictions in over ninety-nine percent of criminal cases (that survive dismissal) without the benefit of a single discovery deposition.[180] While the vast majority of convictions arise out of

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consistent with the facts proved, they ought to find him guilty."); WISCONSIN CRIMINAL JURY INSTRUCTIONS § 140 (2023) ("The term 'reasonable doubt' means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life. A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision. While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth." (citations omitted)). *See generally* Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 VILL. L. REV. 1, 3 (2019) (explaining that each jurisdiction adopts its own jury instruction to explain the concept of "beyond a reasonable doubt").

178. Miles v. United States, 103 U.S. 304, 309 (1880).

179. *See, e.g.*, *In re Winship*, 397 U.S. at 361 ("The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times . . . .'" (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321 (1954))).

180. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty [https://perma.cc/BG92-MVK9] (noting that in 2018, ninety percent of federal criminal defendants pleaded guilty, eight percent were dismissed, and of the approximately two percent of defendants that did proceed to trial, eighty-three percent were convicted); *see also United States Attorneys' Annual Statistical Report*, U.S. DEP'T OF JUST. 2–10 (2015), https://www.justice.gov/usao/file/831856/download [https://perma.cc/YLY9-YLRU] (providing conviction rates for each federal district).

guilty pleas, the fact that defendants—with the advice of counsel—plead guilty with such frequency reflects their assessment that the government is likely to prove the charges against them beyond a reasonable doubt without having taken any discovery depositions.[181] Even where criminal defendants go to trial in high-profile fraud cases, which are presumably more difficult for prosecutors to win than more straightforward, less complex cases, prosecutors often prevail.[182] Thus, the unavailability of

181. Gramlich, *supra* note 180 (finding that defendants plead guilty in approximately ninety percent of federal criminal cases). The fact that such a high percentage of criminal defendants (and their counsel) are able to make the determination that it is in their interests to resolve the charges against them prior to trial undercuts the notion that depositions are somehow necessary to evaluate and position civil cases for settlement. *See* Kleppinger v. Tex. Dep't of Transp., 283 F.R.D. 330, 335 (S.D. Tex. 2012) ("[W]hile one purpose of a deposition is for basic discovery, it is also utilized for the preservation of information, for the establishment of facts crucial to settlement or rulings on pretrial motions, and for potential impeachment purposes if a witness's testimony deviates at trial."); Dickerson, *supra* note 6, at 3–4 ("When evaluating the strength of their client's case, litigators often accord great weight to witnesses' and attorneys' performances during depositions. . . . Depositions are a dress rehearsal — and due to high settlement rates are often a substitute — for trial." (footnotes omitted)).

182. *See, e.g.*, Erin Griffith & Erin Woo, *Elizabeth Holmes Trial: Elizabeth Holmes Found Guilty of Four Charges of Fraud*, N.Y. TIMES (July 8, 2022), https://www.nytimes.com/live/2022/01/03/technology/elizabeth-holmes-trial-verdict [https://perma.cc/Y6XX-F5GM] (discussing the conviction of Elizabeth Holmes on one count of conspiracy and three counts of wire fraud in connection with a multi-million dollar scheme to defraud investors in Theranos); *Key Witnesses in the Enron Trial*, N.Y. TIMES (May 25, 2006), https://www.nytimes.com/2006/05/25/business/worldbusiness/25iht-web.0525witnesses.html [https://perma.cc/H3JB-GYT7] (discussing the trial that resulted in convictions of Enron executives for fraud, money laundering, insider trading, and conspiracy, among other crimes, in what is sometimes referred to as the largest accounting scandal in American history); Mark Tran, *Ebbers Found Guilty in WorldCom Trial*, GUARDIAN (Mar. 15, 2005), https://www.theguardian.com/business/2005/mar/15/corporatefraud.worldcom [https://perma.cc/7287-DA53] (reporting the guilty verdict entered against Bernard Ebbers, WorldCom founder and Chief Executive Officer, for fraud, conspiracy, and filing false documents with regulators as part of a scheme to hide over $3.8 billion in fraudulent profits); Constance L. Hays & Leslie Eaton, *The Martha Stewart Verdict: The Overview; Stewart Found Guilty of Lying in Sale of Stock*, N.Y. TIMES (Mar. 6, 2004), https://www.nytimes.com/2004/03/06/business/martha-stewart-verdict-overview-stewart-found-guilty-lying-sale-stock.html [https://perma.cc/TC5J-WM6K] (reporting that Martha Stewart, who sold approximately $230,000 of ImClone's stock one day before an experimental cancer drug failed to gain FDA approval, was found guilty of obstruction of justice, conspiracy, and lying about

discovery depositions plainly does not impede prosecutors from securing unanimous verdicts beyond a reasonable doubt, even in complex cases that may be more analogous to large commercial arbitrations, with many witnesses, complicated legal issues, and experienced defense counsel.[183]

Of course, any credible analysis of the government's ability to operate successfully within the criminal justice system without the benefit of discovery depositions must acknowledge that the availability of investigative tools such as grand jury subpoenas, search warrants, and wiretaps might mitigate the lack of deposition discovery for the prosecution in some criminal cases. However, as discussed below, none of these tools are comparable to a discovery deposition.

Testimonial grand jury subpoenas are utilized by the government in only a small subset of criminal prosecutions.[184] In the federal criminal system, which is the focus of this Article, grand

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a stock sale); P.J. Huffstutter, *Peregrine Boss Wasendorf Gets 50 Years Jail for Fraud*, REUTERS (Jan. 31, 2013), https://www.reuters.com/article/us-peregrince-financial-wasendorf/peregrine-boss-wasendorf-gets-50-years-jail-for-fraud-idUSBRE90U14820130131 [https://perma.cc/2HZL-882C] (discussing the guilty verdict entered against Russell Wasendorf, former Chairman and Chief Executive Officer of Peregrine Financial Group, on charges of mail fraud, embezzling more than $215 million in customer funds, and making false statements to the Commodity Futures Trading Commission); Louis Lanzano, *Adelphia Founder Gets 15-Year Term; Son Gets 20*, NBC NEWS (June 20, 2005), https://www.nbcnews.com/id/wbna8291040 [https://perma.cc/KW6T-K3EW] (discussing guilty verdicts for John Rigas, the founder of Adelphia Communications Corporation, and Timothy Rigas, his son who ran the company, for embezzling money from corporate investors); David Goll, *Former Fry's Executive Gets Six Years in Jail, Huge Fine*, SILICON VALLEY BUS. J. (Dec. 9, 2011), https://www.bizjournals.com/sanjose/news/2011/12/08/former-frys-executive-gets-six-years.html [https://perma.cc/3ZNG-CTZ6] (discussing Omino Siddiqui's conviction in 2008 for embezzling at least $65 million from Fry's Electronics).

183. A comprehensive examination of the reasons for high rates of conviction in the criminal justice system is well beyond the scope of this article. *See, e.g.*, Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1502 n.185 (2011) ("[G]iven the powerful pro-prosecution tilt of the criminal justice system in practice, actually enforcing the ideals of the presumption of innocence can be seen as revolutionary."); Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 535 (1998) ("[A] bias in favor of law enforcement can induce lab personnel to color the results in favor of the prosecution.").

184. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:1 (2d ed. 2011) ("[M]ost criminal investigations are conducted without any resort to subpoenaed witnesses or evidence.").

jury subpoenas play no role at all in cases that are charged by information rather than indictment.[185] When indictments are presented to the grand jury, the overwhelming majority of witnesses are government employees who appear voluntarily rather than pursuant to a subpoena.[186] Indeed, grand jury indictments often are based solely on the testimony of a single government witness, usually a law enforcement agent, summarizing the evidence against the defendant.[187]

And even when testimonial grand jury subpoenas are issued to non-government witnesses for purposes of exploring or locking in their testimony, these subpoenas rarely yield testimony

185. *See* Donald T. Kramer, Annotation, *Double Jeopardy Considerations in Federal Criminal Cases—Supreme Court Cases*, 162 A.L.R. Fed. 415 (2000) (noting that federal criminal defendants may be charged either by information or grand jury indictment); Post v. United States, 161 U.S. 583, 587 (1896) ("Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court . . . ."). Outside the federal context, grand jury practices vary drastically from state to state, with some states foregoing their use altogether. *See* Brian R. Gallini, *Bringing Down a Legend: How an "Independent" Grand Jury Ended Joe Paterno's Career*, 80 TENN. L. REV. 705, 746 (2013) ("The absence of clear guidance from the Supreme Court on how best to regulate the grand jury has created a mess of divergent state grand jury practices."); Benjamin E. Rosenberg, *Indictments, Grand Juries, and Criminal Justice Reform*, 48 AM. J. CRIM. L. 81, 87 (2020) (noting the absence of grand juries in some states). *See generally* BEALE ET AL., *supra* note 184, § 2:2 (discussing varying grand jury procedures among the states).

186. See Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision: What Is a Grand Jury and What Does It Usually Do?*, COLUM. L. SCH. (Dec. 5, 2014), https://www.law.columbia.edu/news/archive/professors-fagan-and-harcourt-provide-facts-grand-jury-practice-light-ferguson-decision [https://perma.cc/6F4W-NRQW] ("In a typical state grand jury proceeding, the prosecutor calls only one or two witnesses, usually the reporting officer and the victim (if there is one) . . . ."); Irving R. Kaufman, *The Grand Jury: Sword and Shield*, ATLANTIC 54, 56 (Apr. 1962), https://cdn.theatlantic.com/media/archives/1962/04/209-4/132643764.pdf [https://perma.cc/E5QG-YLPH] (noting that the witness is "usually a federal investigative agent").

187. Fagan & Harcourt, *supra* note 186; *see also How Grand Juries Operate*, H. MICHAEL STEINBERG, https://www.hmichaelsteinberg.com/how-grand-juries-operate.html [https://perma.cc/56LE-UTVU] (explaining that grand juries typically hear "brief testimony, usually hearsay from the arresting officer if the jurisdiction permits grand juries to rely on hearsay, as most do[, and] rubberstamps the prosecutor's charging decision").

analogous to that elicited in civil discovery depositions.[188] One critical distinction between deposition and grand jury testimony is that witnesses can avoid testifying before the grand jury by invoking their Fifth Amendment privilege against self-incrimination.[189] For this reason, the target of a grand jury investigation—unlike a defendant in a civil lawsuit or arbitration proceeding—is typically never subject to grand jury interrogation. This significantly weakens the utility of a grand jury subpoena from a discovery perspective. As a practical matter, it precludes the government from obtaining grand jury testimony from any witness who perceives that they might have criminal exposure.[190] Moreover, grand juries typically do not have the bandwidth to hear the type of extensive deposition testimony that is normally taken in a civil case. Recall that the parties to a civil case are entitled to take seventy hours of deposition testimony under the FRCP (ten depositions of seven hours each) as a matter of right without seeking leave of court or the consent of their adversaries.[191] By contrast, grand jury witnesses typically testify for less than an hour.[192] Thus, it would be grossly inaccurate to equate the right to subpoena witnesses and examine them in the grand jury with the right to take discovery depositions.

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188. *How Grand Juries Operate*, *supra* note 187 ("Unless the prosecutor views your client as a hostile witness or unless the prosecutor is setting a 'perjury trap,' however, [testimonial grand jury] questioning will not be as searching and lengthy as trial or deposition testimony.").

189. *See* U.S. CONST. amend. V (providing that no person "shall be compelled in any criminal case to be a witness against himself"); United States v. Mandujano, 425 U.S. 564, 574 (1976) (noting that the constitutional privilege against self-incrimination applies in grand jury proceedings).

190. While the government can grant such witnesses immunity from prosecution in exchange for their testimony, it is typically loath to do so. *See* Timothy R. Tarvin, *The Privilege Against Self-Incrimination in Bankruptcy and the Plight of the Debtor*, 44 SETON HALL L. REV. 47, 61 (2014) ("[T]ransactional immunity is a grant of immunity that shields the witness from any exposure to criminal liability related to a particular transaction. In other words, the witness, having been given transactional immunity and compelled to testify, cannot thereafter be charged, prosecuted, convicted, or punished for any related matters despite the fact that the witness's guilt could be established without use of the witness's testimony or the fruits of that testimony." (footnote omitted)).

191. FED. R. CIV. P. 30.

192. Kaufman, *supra* note 186, at 56 ("Generally the grand jury hearings progress rapidly, with the average case consuming less than thirty minutes.").

While search warrants can sometimes yield important evidence in criminal investigations, they too are not comparable to discovery depositions. As an initial matter, they are not testimonial. Moreover, they are a blunt instrument, typically aimed at collecting physical evidence before charges even have been filed against a defendant.[193] This is a far cry from the tactical, far-reaching questioning, typically informed by prior document discovery, that is characteristic of a civil discovery deposition. Further, the issuance of search warrants in criminal investigations is atypical. A search warrant is a proactive investigative tool that does not have relevance in the reactive criminal context. It is also not easy to develop evidence sufficient to make the requisite showing that there is probable cause to believe that evidence of a crime is at a particular location at a particular time.[194] Search warrants also require considerable resources to execute in a safe and appropriate manner.[195] Most law enforcement agencies only have the staffing and funding to seek and execute search warrants in select investigations.[196] Wiretaps are also extremely infrequent. In 2021, federal and state judges combined authorized just over 2,000 wiretaps, a tiny fraction of the criminal cases brought against defendants in the United States every

193. *Cf.* Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases:" The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1055 (1991) (discussing the probable cause requirement for search warrants, which are directed at seizing physical evidence in the early stages of investigation before charges have been filed).

194. *How Often Do the FBI and the Department of Justice Seek Search Warrants and Subpoenas?*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Aug. 22, 2022), https://trac.syr.edu/reports/693 [https://perma.cc/7XLX-VUUA] (reporting that only 883 search warrant applications were made to federal judges nationwide from January to June 2022).

195. *See* Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html [https://perma.cc/E4UJ-TK5A] (finding that "at least 81 civilians and 13 law enforcement officers" died while executing warrants from 2010 to 2016).

196. *Compare* Uchida & Bynum, *supra* note 193, at 1034 (noting that even major urban police departments that were increasing their use of search warrants only executed a couple hundred per year), *with Crime Data Explorer*, FED. BUREAU OF INVESTIGATION, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/arrest [https://perma.cc/X958-44JK] (reporting 1,762,945 arrests in the United States in 2021 for non-traffic offenses).

year.[197] Therefore, the availability of search warrants and wiretaps in a limited number of criminal investigations does not impact this analysis in a meaningful way.

In sum, while prosecutors do have discovery tools at their disposal that arbitration claimants do not, those tools are different in kind than discovery depositions and deployed in only a fraction of criminal cases. Thus, their potential availability does not undermine the argument that if prosecutors can enjoy an exceptional success rate without discovery depositions in an adjudicative regime that requires proof beyond a reasonable doubt, it should not unfairly disadvantage arbitration claimants to have to prove their claims by a preponderance of the evidence without such depositions.[198]

C. THERE IS NO ENTITLEMENT TO (OR REALISTIC EXPECTATION OF) A LACK OF SURPRISES IN DISPUTE RESOLUTION

The criminal justice system provides compelling proof that important disputes can be fairly and efficiently resolved without discovery depositions. In fact, many criminal litigators and judges with criminal dockets struggle to understand the fixation of civil litigators on deposing every witness to avoid being surprised at trial:

> Some judges at the Duke Conference expressed the view that civil litigators over-use depositions, apparently holding the view that every witness who testifies at trial must be deposed beforehand. These judges noted that they regularly see lawyers effectively cross-examine witnesses in criminal trials without the benefit of depositions, a practice widely viewed as sufficient to satisfy the demands of due process. The

197. *Wiretap Report 2021*, U.S. CTS. (Dec. 31, 2021), https://www.uscourts.gov/statistics-reports/wiretap-report-2021 [https://perma.cc/25CZ-ENXY] ("A total of 2,245 wiretaps were reported as authorized in 2021, with 1,102 authorized by federal judges and 1,143 authorized by state judges."). This report was compiled pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which requires an annual report to Congress concerning intercepted wire, oral, or electronic communications. 18 U.S.C. § 2519.

198. Criminal defendants are also entitled to receive certain information in advance of trial, but not live sworn witness testimony akin to deposition testimony. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); 18 U.S.C. § 3500(a)–(b) (requiring federal prosecutors to produce a verbatim statement or report made by a government witness or prospective government witness other than the defendant, but only after the witness has testified).

> judges also observed that they rarely, if ever, see witnesses effectively impeached with deposition transcripts.[199]

While it is true that there is an "increased potential for surprise" that comes with examining witnesses at trials and arbitration hearings without previously deposing them, this is simply a "natural outcome" of limiting deposition discovery in arbitration, which "is designed to be more expeditious and less costly than trials."[200]

Most of us who now serve as arbitrators after having tried both deposition-heavy civil cases and criminal cases without depositions eschew the "no surprises" approach to dispute resolution. Not only is the concept of "no surprises" an illusory one, but it is not at all clear that rehearsing the examination of a hostile witness at a discovery deposition is the most effective way to elicit helpful testimony from that witness at a trial or hearing. The following experiences and observations suggest that arbitration rules which permit discovery depositions in the interest of eliminating surprises are misguided.[201]

The universe of arbitration witnesses whose testimony is likely to be surprising is narrow. Even without discovery depositions, arbitration parties and counsel are entitled to thoroughly prepare their own witnesses to testify at the hearing, just as they do in litigation.[202] While friendly witnesses may not always

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199. *Advisory Committee on Rules of Civil Procedure*, U.S. CTS. 85 (Apr. 11–12, 2013), https://www.uscourts.gov/sites/default/files/fr_import/CV2013-04.pdf [https://perma.cc/YR2C-3EWF].

200. Troegel v. Performance Energy Servs., LLC, No. 18-1051-JWD-EWD, 2020 U.S. Dist. LEXIS 135317, at *9 (M.D. La. July 30, 2020) (quoting arbitrator in decision below).

201. The observations and opinions set forth in this Part of the Article are informed by approximately twenty years of experience representing clients in civil litigation and ADR proceedings, almost five years as an Assistant United States Attorney in the federal criminal justice system, and over a decade as an arbitrator of commercial disputes.

202. *See, e.g.*, Tyler Scarbrough & Chris Henry, *Preparing Witnesses for International Arbitration: Ethical Considerations and Dilemmas*, AM. BAR ASS'N: UNDER CONSTR. (Mar. 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/preparing-witness-for-international-arbitration [https://perma.cc/TF5S-73Q4] ("In the United States, there is an expectation that lawyers will assist in preparing witnesses for trials and arbitrations."); IBA Rules *supra* note 152, art. 4.3, at 10 ("It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them."); RESTATEMENT

testify in precise conformity with their preparation, they are unlikely to surprise the party that calls them in a materially unhelpful way.[203] Moreover, non-party witnesses or witnesses associated with an adversary whose testimony will establish discrete facts that are not hotly disputed are also not likely to create difficult surprises at a hearing. Thus, any concern about "surprising" hearing testimony does not extend beyond a narrow universe of hostile witnesses who are testifying about disputed issues that are material to the arbitration.

Surprises are infrequent during discovery depositions in civil disputes. Most discovery depositions in civil lawsuits, especially complex commercial cases, are preceded by robust document discovery that minimizes testimonial surprises.[204] In arbitration, the pre-hearing exchange of documents, which is and should remain a core component of discovery, significantly reduces the surprises that will arise out of the initial testimony of a hostile witness, whether that testimony takes place in a discovery deposition or for the first time at the arbitration hearing.[205] Well-

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(THIRD) OF THE L. GOVERNING LAWS. § 116(1) (2000) ("A lawyer may interview a witness for the purpose of preparing the witness to testify.").

203. *See, e.g.*, Ted Hirt, *Effective Witness Preparation*, AM. BAR ASS'N: THE PUB. LAW. (Jan. 12, 2022), https://www.americanbar.org/groups/government_public/publications/public-lawyer/2022-winter/effective-witness-preparation [https://perma.cc/W95S-MXRY] (explaining how witness preparation minimizes surprises at trial); Daniel Ambrose, *Witness Preparation: Reduce Surprises and Tell a Better Story…*, LINKEDIN (Sept. 30, 2019), https://www.linkedin.com/pulse/witness-preparation-reduce-surprises-tell-better-story-daniel-ambrose [https://perma.cc/JS9Q-RUR4] (same); Dawn R. Solowey & Lynn A. Kappelman, *How to Prepare Witnesses to Make (Not Break) Your Case*, LAW360 (Oct. 21, 2013), https://www.seyfarth.com/a/web/6767/3G9Btx/how-to-prepare-witnesses.pdf [https://perma.cc/C46M-6TYV] (same).

204. *See, e.g.*, *Understanding the Discovery Process in a Lawsuit*, LAW OFFS. OF BRYAN MUSGRAVE (Oct. 27, 2020), https://www.bryanmusgrave.com/understanding-the-discovery-process-in-a-lawsuit [https://perma.cc/NZ4M-GLFK] (explaining that depositions typically occur after robust document discovery, including the exchange of document requests, interrogatories, and requests for admission).

205. Hirt, *supra* note 203; John C. Shea, *Effective and Ethical Witness Preparation for Depositions*, MARKS & HARRISON (May 2020), https://www.marksandharrison.com/wp-content/uploads/2020/05/Effective-and-Ethical-Witness-Preparation-for-Depositions.pdf [https://perma.cc/Y5MA-PNSA] (explaining how to prepare witnesses for depositions); Niki B. Okcu, *How to Effectively Prepare Your Client for Deposition*, PLAINTIFF (Mar. 2010), https://plaintiffmagazine.com/recent-issues/item/how-to-effectively-prepare-your-client-for-deposition [https://perma.cc/C9AZ-CT3V] (same).

prepared examiners who confront witnesses for the first time already have a good sense of how they will testify based on the statements they previously made in e-mails, text messages, memoranda, and posts on social media and messaging platforms. Even when a hostile witness has not expressly taken a position on a topic of interest in a document discovered prior to an arbitration hearing, counsel typically will have a good sense of how the witness will testify based on information provided by their client, the positions taken by the other side on the key issues in dispute, and the other discovery in the case. In civil litigation, where the initial confrontation with a hostile witness almost always happens at a discovery deposition, it is unusual for examiners to be surprised by witness testimony. Of course, it is not possible to anticipate every answer, but well-prepared examiners typically have a strong directional sense of how an adverse witness will testify on disputed issues the first time they encounter the witness on the stand. It should make no material difference from a surprise avoidance standpoint whether this initial encounter takes place at a discovery deposition or an arbitration hearing.

Even civil litigators tolerated surprises prior to the enactment of the Federal Rules of Civil Procedure. As Part I reveals, the current obsession with "no surprises" in civil litigation is still a relatively new phenomenon.[206] Civil litigators tolerated surprises prior to the explosion of discovery depositions. And it is difficult to divorce the modern approach to deposition practice from the economic incentives lawyers have to perpetuate it.[207]

206. *See supra* Part I.B.

207. *See* Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2103 (2017) ("[T]he incentives from both an attorney-fee and settlement leverage standpoint encourage lawyers to serve onerous discovery requests on adversaries while holding back substantive responses to the extent possible and litigating their positions if challenged. Depositions . . . actually foment the problem because they are easy to initiate and burdensome to oppose."); Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1656 (2016) ("Financially, discovery is unmatched among the major sources of litigation costs; it generates more legal fees and expenses than any other round of court proceedings."); Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 246 (1996) ("Attorneys who work on an hourly fee basis have an incentive to defer settlement and to continue working on the case as long as their return per hour of work on the case exceeds their opportunity cost of time.").

While the pendulum definitely has swung toward fulsome deposition practice in civil litigation, it is worth noting that there is no historical right to take discovery depositions in civil litigation.[208]

Impeachment with prior testimony is not the only effective method of cross-examination. The elimination of discovery depositions would simply remove one of the many tools in a cross-examiner's toolbox. It would deprive the cross-examiner (or examiner of a hostile witness) of the ability to use a deposition transcript to control the witness and impeach them if they deviate from their prior testimony.[209] This is hardly catastrophic to a cross-examination. As an initial matter, consistent with the observations above, deposition witnesses do not often contradict their own deposition testimony. They are typically prepared to testify consistently with their deposition transcript to avoid being impeached.[210] Second, even without depositions, counsel still has the ability to control and impeach hostile witnesses with their statements contained in the documents obtained by counsel prior to or during discovery. These statements, which were made closer in time to the underlying events at issue in the case than testimony provided during a discovery deposition, are typically more impactful from an impeachment perspective than deposition testimony. And third, the absence of discovery depositions would not deprive cross-examiners of all the other impeachment techniques available to attack a witness's credibility, which are not dependent on the existence of a deposition transcript.[211]

Discovery depositions are tactically inadvisable in many situations. Moreover, it is not at all clear that it is tactically

208. *See supra* Part I.A.

209. The rules of evidence generally allow examiners who call hostile witnesses as part of their case to treat the direct examination of those witnesses as the functional equivalent of a cross-examination. *See* FED. R. EVID. 611(c)(2) (allowing the use of leading questions during the direct examination of "a hostile witness, an adverse party, or a witness identified with an adverse party").

210. While there are cases where a witness testifies inconsistently with their deposition in an effort to correct a prior misstatement or the poor wording of a prior answer, this is atypical in the Author's experience, particularly in large commercial cases where witnesses are thoroughly and effectively prepared for their discovery depositions.

211. *See, e.g.*, DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 213–19 (5th ed. 2022) (summarizing the methods of witness impeachment).

advantageous to depose a witness for discovery purposes prior to a hearing. Discovery depositions provide hostile witnesses and their counsel with a detailed roadmap of the examination opposing counsel will conduct at the hearing.[212] In a deposition examination that could last seven hours or more, the questioner is likely not only to preview the actual questions they will ask at the hearing, but the exhibits they will use to interrogate the witness and possibly even the themes they intend to try to use the witness to develop.[213] Armed with all of this information months before the hearing, the witness and counsel are often better positioned to frustrate the objectives of the questioning attorney at the hearing than they would be in the absence of a deposition.[214] For this reason, it is possible that witnesses are actually harder to interrogate effectively after a discovery deposition. Counsel who reflexively advocate for a "no surprises" regime often overlook the fact that discovery depositions significantly impair the ability of counsel to surprise witnesses in ways that might produce helpful testimony and hearing atmospherics. Thus, it is

212. *See, e.g.*, Dennis R. Suplee & Nicole Reimann, *Depositions: Disadvantages, Advantages, and Alternatives*, *in* THE DEPOSITION HANDBOOK 1, 6–7 (5th ed. 2015), http://cdn.trialguides.com/uploads/2016/12/22125444/ChapterSample_TheDepositionHandbook.pdf [https://perma.cc/VMC4-MD5E] (explaining how depositions can "tip[] off" the other side to the questioner's trial strategy, provide a window into what the questioner views as the most important facts, and provide the witness and opposing counsel with a "dress rehearsal" for trial); *Deposition Fundamentals (WA)*, LEXISNEXIS (Sept. 15, 2023), https://plus.lexis.com/api/permalink/8af18ccb-0524-401d-b3f0-fae34243120f/?context=1530671 [https://perma.cc/V8R6-XWFU] ("Depositions may also have the disadvantages of providing opposing counsel with insights concerning your strategy, exposing weaknesses in your client's case, and giving adverse witnesses a 'dress rehearsal' for trial.").

213. *See, e.g.*, *Employment, Overview - Advantages and Disadvantages of Depositions*, BLOOMBERG L., https://www.bloomberglaw.com/external/document/XEJ3KFTG000000/employment-overview-advantages-disadvantages-of-depositions [https://perma.cc/YV5S-BEDK] ("[T]he topics of your questions, the logic of your questioning, and manner in which you ask questions at a deposition all reveal your trial strategies. The opposing attorney will certainly be taking mental notes of what you think are the strengths and weaknesses of your case. They are revealed by the types of questions you ask and the manner in which you ask them.").

214. *See, e.g.*, *id.* ("[B]y taking the deposition, you prompt opposing counsel to get more prepared for trial than they otherwise might. That is, when opposing counsel is preparing the witness for the deposition, he is learning the details of the case, facts he probably would not take the time to learn if he did not need to prepare for a deposition.").

possible that the elimination of discovery depositions in arbitration would actually save overly risk-averse counsel (and their clients) from themselves and result in witness examinations that are just as, if not more, effective than those conducted after a discovery deposition.

Even with discovery depositions, there is no way to guarantee that a hearing or trial will be devoid of surprises. And finally, it seems naïve even to strive for a dispute resolution system that is devoid of surprises.[215] There is an unpredictability to human behavior, particularly in stressful situations (like arbitrations and lawsuits), that makes it impossible to script out every line before a hearing.[216] In fact, the authenticity of an unrehearsed hearing may help an arbitrator assess witness credibility and make findings on the merits. Thus, not only is the goal of eliminating surprises in dispute resolution unattainable, but it is not clear that it is desirable.[217] Reducing surprises in arbitration may make lawyers look better (and increase their fees), but it does not necessarily improve the process for parties or arbitrators.

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215. Ronald J. Levine, *Managing Client Expectations in Litigation*, LEXISNEXIS (May 17, 2023), https://plus.lexis.com/document?crid=e716e8bb-0445-4d1c-8041-796215aeb617&pddocfullpath [https://perma.cc/DX3D-3DEB] ("Uncertainty is a constant factor in life and especially in litigation."); *see also* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1319 (2006) ("[U]ncertainty is and will continue to be hardwired into the litigation process . . . .").

216. *See* Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, 89 JUDICATURE 16, 18 (2005) ("[L]ive testimony is inherently unpredictable."); Vanesa Hidalgo et al., *Acute Psychosocial Stress Effects on Memory Performance: Relevance of Age and Sex*, 157 NEUROBIOLOGY LEARNING & MEMORY 48, 55 (2019) (noting that stress-induced cortisol increases impair working memory and memory retrieval functions in healthy young men and women). *See generally* Conny W.E.M. Quaedflieg & Lars Schwabe, *Memory Dynamics Under Stress*, 26 MEMORY 364, 364 (2018) (finding that stress limits the incorporation of contextual details into the memory trace, impedes the implementation of new information into existing knowledge structures, and impairs flexible generalization across past experiences).

217. *See* JOHN H. BEISNER, U.S. CHAMBER INST. FOR LEGAL REFORM, THE CENTRE CANNOT HOLD: THE NEED FOR EFFECTIVE REFORM OF THE U.S. CIVIL DISCOVERY PROCESS 7 (2010) (describing the "be prepared for anything" approach to trial preparation as "expensive and wasteful").

CONCLUSION

The time has come for TPAs administering commercial arbitrations in the United States to follow the lead of their international counterparts and move toward the elimination of discovery depositions. The status quo, which relies principally on the willingness of (1) disputants and their attorneys to reject deposition practice, and (2) arbitrators to exercise their discretion to disallow (or severely limit) depositions, is not working. Discovery depositions continue—and will continue—to make commercial arbitration look more like civil litigation than it should. Under the current regime, lawyers are motivated to maximize their discovery opportunities and arbitrators are either required by current rules or incentivized to allow robust deposition practice whenever the parties ask for it. TPA rules (which parties that truly desire litigation-style deposition practice are free to contract around) should be changed to eliminate these incentives, which continue to stymie the efficiency and cost-saving potential of arbitration. While several reforms—such as the elimination of deposition entitlements, the imposition of hard caps on discovery depositions, and the strengthening of the requisite showing to obtain depositions in arbitration—all would move the ball forward, this Article urges TPAs to ban discovery depositions altogether. This proposal is not radical. It not only is consistent with the general approach to deposition practice in international and FINRA arbitrations, but mirrors the rules of criminal procedure, including FRCrP 15, which outlaw discovery deposition practice based on the same cost and efficiency concerns that should inform arbitration procedure. The fact that a criminal defendant's constitutional right to confront witnesses is satisfied in the absence of discovery depositions should assuage any concerns TPAs may have about eliminating (or at least severely restricting) discovery depositions. So, too, should the fact that criminal prosecutors operate effectively within a criminal justice system that requires them to meet a higher burden of persuasion without the benefit of discovery depositions. In the end, a significant departure from civil litigation–style deposition practice will remain elusive in American commercial arbitration until TPAs take meaningful steps toward "criminalizing" depositions.