

DISCLOSURE AND DISQUALIFICATION STANDARDS FOR *NEUTRAL* ARBITRATORS: HOW FAR TO CAST THE NET AND WHAT IS SUFFICIENT TO VACATE AWARD

MERRICK T. ROSSEIN[†] & JENNIFER HOPE^{††}

INTRODUCTION

Since the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,¹ increasingly more employers require as a term of employment that the prospective or current employee agree to arbitrate any dispute, claim, or controversy arising between the employer and employee.² Thus, claims of discrimination and retaliation under Title VII of the 1964 Civil Rights Act,³ the Age Discrimination in Employment Act,⁴ the Americans with Disabilities Act,⁵ the Family Medical Leave Act,⁶

[†] Professor of Law, City University of New York School of Law. The author serves as an arbitrator and mediator on the Employment, Commercial, and International panels of the American Arbitration Association. He is the inaugural Scholar-in-Residence of the ABA Section on Labor and Employment, ADR Committee. All rights reserved © 2006.

^{††} J.D. Candidate, May 2007, City University of New York School of Law; B.A., 1999, Rutgers University.

¹ 500 U.S. 20 (1991).

² See Walter J. Gershenfeld, *The Changing Face of Employment/Workplace Dispute Resolution*, 43 BRANDEIS L.J. 135, 143 (2004) (noting the impact of employment arbitration on unfair-dismissal legislation and calling for increased fairness in proceedings); Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 EMP. RTS. & EMP. POL'Y J. 285, 293–94 (2000) (“Employers, faced with a rising number of employment discrimination claims and a corresponding fear of having to pay large jury verdicts to former employees, have responded to the Supreme Court’s strong endorsement of arbitration by increasingly making arbitration of employment-related claims a condition of employment.”).

³ 42 U.S.C. § 2000e (2000).

⁴ 29 U.S.C. § 621 (2000).

⁵ 42 U.S.C. § 12101 (2000).

⁶ 29 U.S.C. § 2601 (2000).

and disputes concerning other federal, state, and local employment statutes and common law are increasingly decided by arbitrators. Further, written employment agreements frequently contain arbitration provisions. The selection of the arbitrator is an essential component in the process of creating a fair and impartial forum for the resolution of workplace disputes. In the selection of the arbitrator and throughout the arbitral process, neutral arbitrators are required to make disclosures of information that might raise an appearance of, or an actual conflict of, interest.⁷

Disclosures should be made before the appointment of an arbitrator, and arbitrators generally remain under a continuing obligation to make any disclosures concerning possible conflicts of interest that come to the arbitrator's attention after his or her appointment. Rules and ethics standards vary concerning the extent of such disclosures. For example, the American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes requires any person requested to serve as an arbitrator to disclose any direct or indirect financial or personal interest in the outcome of the arbitration, and existing or past financial, business, professional, or personal relationships

⁷ See, e.g., CAL. R. CT., ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION No. 7(d) [hereinafter CAL. ETHICS STDS.] (describing various situations that require disclosure by a prospective arbitrator, such as a family relationship by the prospective arbitrator with one of the parties to the dispute—note that the California ethics standards are statutory in nature); AM. BAR ASS'N, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II (2004), http://www.abanet.org/dispute/commercial_disputes.pdf [hereinafter AAA/ABA CODE OF ETHICS] (addressing the requirement that before accepting a position as an arbitrator, an individual should divulge any information that may pose a conflict of interest). The AAA International Arbitration Rules state:

Arbitrators acting under these rules shall be impartial and independent.

Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. . . . Upon receipt of such information from an arbitrator or party, the administrator shall communicate it to the other parties and to the tribunal.

AM. ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES art. 7, ¶ 1 (2006), <http://www.adr.org/sp.asp?id=28144>.

Arbitrators are required to file a "Notice of Appointment" form disclosing any past or present relationship of any kind, direct or indirect, with the parties or their counsel. The case manager, in writing, will call the facts to the attention of each party. See AM. ARBITRATION ASS'N, DISCLOSURE AND CHALLENGE OF AN ARBITRATOR, <http://www.adr.org/si.asp?id=2521> [hereinafter, AAA ARBITRATOR DISCLOSURE].

with any of the parties, prospective witnesses, lawyers, or other arbitrators; they must also disclose any such relationships involving their families or household members.⁸ The California Ethics Standards for Neutral Arbitrators in Contractual Arbitration (“California Standards”) are probably the most expansive and far reaching.⁹ If an arbitrator fails to make a required disclosure, the California Standards provide for mandatory and automatic disqualification of the arbitrator once a party serves a timely notice of disqualification.¹⁰ Disclosure requirements are expressly mandated by statute.¹¹ In contrast, other ethics rules allow for discretion in determining whether a prospective arbitrator should be removed.¹²

Despite these ethics standards, the determination of vacatur depends on whether an arbitrator’s nondisclosure or allegedly deficient disclosure satisfies the statutory scheme under which

⁸ AAA/ABA CODE OF ETHICS, *supra* note 7, Canon II. See also NATIONAL ASSOCIATION OF SECURITIES DEALERS MANUAL, CODE OF ARBITRATION PROCEDURE R. 10312(a) (2006) [hereinafter NASD MANUAL] which requires its arbitrators to disclose:

- (1) Any direct or indirect financial or personal interest in the outcome of the arbitration;
- (2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators must disclose any such relationships or circumstances that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They must also disclose any such relationship or circumstances involving members of their families or their current employers, partners, or business associates.

Id.

⁹ CAL. ETHICS STDS., *supra* note 7, No. 7(d)(1)–(14); *see also* CAL. CIV. PRO. CODE § 1281.9 (West 2006).

¹⁰ CAL. ETHICS STDS., *supra* note 7, No. 10(a)(1); *see also* CAL. CIV. PRO. CODE § 1286.2(a)(6) (West 2006) (noting that if the arbitrator fails to remove himself from the panel, the arbitration award may be vacated); *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142, 146 (Ct. App. 2004) (referring to the ability of a party to exercise their right to remove a prospective arbitrator, the court noted that “[t]here is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner”).

¹¹ CAL. CIV. PROC. CODE § 1281.9(a)(2) (West 2006).

¹² *See, e.g.*, NASD MANUAL, *supra* note 8, R. 10308(d)(1) (noting that when a party objects to an arbitrator’s appointment, the NASD Director of Arbitration “shall determine if the arbitrator should be disqualified”). Likewise, the disclosure rule in the NASD Code also specifies that “[t]he Director *may* remove an arbitrator based on information that is required to be disclosed pursuant to this Rule.” *Id.* R.10312(d)(1) (emphasis added).

an arbitration award is being challenged, which in the United States is most likely the Federal Arbitration Act ("FAA").¹³

This paper examines the disclosure rules and the interpretation of these rules by federal courts and proposes a less onerous standard. The majority of the courts and codes adopt a reasonableness standard to determine whether evident partiality exists that requires disqualification of the arbitrator. One important issue examined is whether the courts uniformly apply the reasonableness standard. Another issue of great concern to the parties engaged in arbitrations and the arbitrators is whether the code requirements are realistic or too onerous and difficult to meet, leading to increased arbitration expenses and delay.¹⁴

Part I reviews the U.S. Supreme Court's plurality opinion laying a shaky foundation for a disclosure and disqualification standard. Part II places the issue in the context of courts giving great deference to the decisions of arbitrators and the general presumption in favor of upholding arbitration awards where challenged. Part III examines the FAA and federal decisional law interpretation of the "evident partiality" standard first articulated by the Supreme Court in disclosure cases. Part IV reviews how the courts address the arbitrator's lack of knowledge of an undisclosed conflict. Part V reviews the recent changes in disclosure requirements, including the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, the California Standards, the Revised Uniform Arbitration Act's treatment of evident partiality, and the National Association of Securities Dealers ("NASD") rules. Part VI critically assesses the various standards and proposes a standard intended to ensure that the arbitral process remains expeditious and efficient in the context of employment arbitration.

I. THE SUPREME COURT'S EVIDENT PARTIALITY STANDARD:
"APPEARANCE OF BIAS" OR "REASONABLENESS"

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,¹⁵ the U.S. Supreme Court in a plurality decision held that an

¹³ 9 U.S.C. § 1 (2000).

¹⁴ The author plans to conduct an empirical study to determine whether the code's disclosure requirements lead to increase costs. Here, the question is raised without a definitive statistical answer.

¹⁵ 393 U.S. 145 (1968) (plurality opinion).

arbitrator's failure to disclose a material relationship with one of the parties constituted "evident partiality" under 9 U.S.C. § 10(a)(2), requiring vacatur of the award.¹⁶ Along with its primary concerns about the appearance of bias that might result from such nondisclosure,¹⁷ Justice White, in his concurring opinion, noted that the arbitration process would be best served by requiring early disclosure of any significant dealings between arbitrators and parties.¹⁸ Further, he stated that "[t]he judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality," and a policy of early disclosure would limit the opportunities for "a suspicious or disgruntled party [to] seize on [an undisclosed relationship] as a pretext for invalidating the award."¹⁹ Justice White also observed that some "undisclosed relationships . . . are too insubstantial to warrant vacating an award."²⁰ He explained, "an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography."²¹

Addressing section 10(a)(2) of the FAA, the *Commonwealth Coatings* plurality interpreted "evident partiality" as meaning that an arbitrator "must be unbiased [and] also must avoid even the appearance of bias."²² In *Commonwealth Coatings*, a neutral arbitrator failed to disclose that the respondent, a prime contractor, was a "regular customer[]" of the arbitrator's engineering consulting business.²³ Despite not having patronized him for a year, their relationship included projects involved in the arbitration proceeding at issue and had, over four or five years, involved fees of up to \$12,000.²⁴ Following a judgment in the prime contractor's favor, the petitioner learned of the undisclosed relationship and subsequently appealed the arbitration award on the ground that the arbitrator's failure to

¹⁶ *Id.* at 147.

¹⁷ *Id.* at 147–48.

¹⁸ *Id.* at 151 (White, J., concurring).

¹⁹ *Id.*

²⁰ *Id.* at 152.

²¹ *Id.* at 151.

²² *Id.* at 146–50 (plurality opinion).

²³ *Id.* at 146.

²⁴ *Id.*

disclose the relationship (as opposed to arbitrator bias) constituted evident partiality.²⁵

The Supreme Court reversed the lower court's denial of vacatur, finding that the undisclosed relationship created an impression of bias.²⁶ Justice Black, writing for the plurality,²⁷ analogized arbitrators to judges, stating that arbitrators must similarly avoid actions that "‘reasonably tend to awaken the suspicion that his social or business relations or friendships[] constitute an element in influencing his judicial conduct.’"²⁸ Citing to Rule 18 of the American Arbitration Association's Rules and the 33rd Canon of Judicial Ethics (noting them as guiding but not controlling), he opined that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."²⁹ While facts did not necessarily indicate improper motives, "a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge."³⁰

In his concurrence, Justice White wrote that arbitrators should not be held to the "standards of judicial decorum of Article III judges," because they are "men of affairs, not apart from but of the marketplace."³¹ While he agreed that in this instance the arbitrator showed evident partiality, he rejected any automatic

²⁵ *Id.*

²⁶ *Id.* at 149–50.

²⁷ There is some question as to whether Justice Black wrote for a majority or only a plurality. Justice White, with Justice Marshall, concurred in the opinion and noted: "While I am glad to join my Brother Black's opinion in this case, I desire to make these additional remarks." *Id.* at 150 (White, J., concurring). Some courts have argued that this "joining" makes Black's opinion a majority and therefore binding authority, while others have held that White's mention of his "additional remarks" clearly indicates a divergent opinion. Compare *Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir. 1994) (stating that *Commonwealth Coatings* is not a plurality opinion because "Justice White said he joined in the 'majority opinion' but wrote to make 'additional remarks.'") (quoting *Commonwealth Coatings*, 393 U.S. at 150, 151 n.* (White, J., concurring)), and *Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217, 221 (E.D. Pa. 2003) (arguing that the *Commonwealth Coatings* opinion was not a plurality opinion), with *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 n.19 (6th Cir. 1989) ("[I]n view of Justice White's concurrence in *Commonwealth Coatings*, the plurality's appearance of bias discussion should be considered dicta." (citing *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82–84 (2d Cir. 1984))).

²⁸ *Commonwealth Coatings*, 393 U.S. at 150 (plurality opinion).

²⁹ *Id.* at 150.

³⁰ *Id.* at 148 (quoting *Tumey v. Ohio*, 273 U.S. 510, 524 (1927)).

³¹ *Id.* at 150 (White, J., concurring).

disqualification where such information is either disclosed or “the relationship is trivial.”³² Later courts have indicated that a “material” or “substantial” relationship is necessary to constitute evident partiality requiring vacatur in nondisclosure cases.³³

Because it is generally accepted as a plurality opinion, *Commonwealth Coatings* has left courts free to reject “evident partiality” as the broad “appearance of bias” standard in favor of (what has been interpreted as) Justice White’s more narrow standard requiring disclosure of relationships such that a “reasonable person would . . . conclude that an arbitrator was partial.”³⁴

II. ARBITRATION AWARDS AND DISCLOSURE GENERALLY

Recent statutory and standard revisions have sought to clarify what arbitrators must disclose to preclude vacatur of an arbitration award under “evident partiality.” These revisions were intended to encourage neutral (and sometimes non-neutral or party-appointed) arbitrators’ impartiality,³⁵ but have diverged on how to review an arbitrator’s nondisclosure and on the appropriate remedies for such failures. Nevertheless, these efforts for clarity in disclosure have yet to evidence a drastic change in the courts’ opinions, particularly as it relates to neutral arbitrators, who were (theoretically, although not always

³² *Id.*

This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.

Id.

³³ See, e.g., *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 647 (6th Cir. 2005) (stating the rule that nondisclosure of a material relationship can constitute evident partiality); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) (reiterating the conclusion from *Commonwealth’s* concurrence that an arbitrator must disclose substantial relationships); *Skyview Owners Corp. v. Serv. Employees Int’l Union, Local 32B-J*, No. 04 Civ. 4643, 2004 U.S. Dist. LEXIS 19986, at *15 (S.D.N.Y. Oct. 5, 2004) (same).

³⁴ *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83–84 (2d Cir. 1984); see also *Montez*, 260 F.3d at 982 (noting that courts have had a difficult time defining what constitutes “evident partiality”).

³⁵ See Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L.J. 1815, 1816, 1823–27 (2003) (discussing the revision of the AAA/ABA Code of Ethics that includes increased requirements of disclosure).

in practice) being held to a higher standard of disclosure than non-neutrals prior to enactments.³⁶ California courts have been more aggressive in addressing arbitrators' failure to disclose.

Generally, courts give great deference to the decisions of arbitrators³⁷ and there is a general presumption in favor of upholding arbitration awards where challenged.³⁸ Arbitration awards receive "one of the narrowest standards of judicial review in all of American jurisprudence"³⁹ in order to effectuate the policy behind the FAA, which is to encourage arbitration as a more inexpensive alternative to litigation.⁴⁰ This deference is

³⁶ The Supreme Court in *Commonwealth Coatings* does not expressly indicate whether party-appointed arbitrators are governed by the same standards as neutral arbitrators. See *Commonwealth Coatings*, 393 U.S. at 146-47 (plurality opinion) (stating that the FAA shows Congress' desire "to provide not merely for any arbitration but for an impartial one," but failing to expressly indicate whether Congress' purported policy applies to all arbitrators or only to neutral arbitrators like the particular individual whose conduct was at issue in that case). At least one lower court has discussed the case as if it only applies to neutral arbitrators. See *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 623 (7th Cir. 2002) ("The point of *Commonwealth Coatings* is that the sort of financial entanglements that would disqualify a judge will cause problems for a *neutral* under § 10(a)(2) unless disclosure is made . . .") (emphasis added), *aff'd*, 103 F. App'x 39 (7th Cir. 2004).

³⁷ See *Salem Hosp. v. Mass. Nurses Ass'n*, 449 F.3d 234, 237 (1st Cir. 2006) (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("The hallmark of federal court review of an arbitrator's decision is extreme deference to the opinion of the arbitrator, whose interpretation of the contract has been bargained for by the parties to the arbitration agreement.")); see also MERRICK T. ROSSEIN, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION §§ 13:68-69, 13:75.20 (2006).

³⁸ See, e.g., *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005) ("The [FAA] expresses a presumption that arbitration awards will be confirmed."); *JCI Comm'ns, Inc. v. Int'l Bhd. Elec. Workers, Local 103*, 324 F.3d 42, 48 (1st Cir. 2003) (noting the "very deferential standard of review" that the court must apply to arbitration decisions); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) (same); *George Day Constr. Co., v. United Bhd. of Carpenters, Local 354*, 722 F.2d 1471, 1477 (9th Cir. 1984) (same).

³⁹ *Nationwide Mutual*, 429 F.3d at 643 (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002)).

⁴⁰ See *id.* (reiterating judicial deference to arbitration decisions); U.S. SUP. CT. DIG. tit. 26, § 2 (LexisNexis 2004) (stating that the purpose of the FAA is to "make arbitration agreements as enforceable as other contracts, but not more so, and to make arbitration procedure, when selected by parties to contract, speedy, and not subject to delay and obstruction in courts" (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967))); see also *Alston & Cole-Alston v. UBS Fin. Serv., Inc.*, No. 04-01798, 2006 U.S. Dist. LEXIS 656, at *4 n.2 (D.D.C. Jan. 2, 2006) (stating that the purpose of arbitration is to provide a less complicated alternative to litigation); *Challenger Caribbean Corp. v. Union de Gen. de Trabajadores de Puerto Rico*, 903 F.2d 857, 862 (1st Cir. 1990) (stating that the

particularly high where parties choose the arbitrators.⁴¹

The FAA establishes procedures for State and Federal arbitration and provides that any party to arbitration may apply to federal court for an order confirming an arbitration award within one year after an award is made.⁴² The court will confirm an award unless it is modified, vacated, or corrected pursuant to the limited reasons enumerated in sections 10 and 11.⁴³ In particular, section 10(a)(2) “authorize[s] vacation . . . where there was evident partiality . . . in the arbitrators.”⁴⁴ While courts have treated arbitrator disclosure issues under section 10(a)(2), there is no express provision guiding an arbitrator’s failure to disclose relationships or conflicts.⁴⁵ Disclosure issues have thus been treated as either manifesting or providing evidence of

federal government has a policy of settling labor disputes by arbitration rather than litigation); *V.I. Nursing Ass’n Bargaining Unit v. Schneider*, 668 F.2d 221, 223 (3d Cir. 1981) (same).

⁴¹ *Delta Mine Holding Co. v. AFC Coal Props., Inc.* 280 F.3d 815, 823–24 (8th Cir. 2001) (holding that where parties have agreed to party-appointed arbitrators, awards should be confirmed unless it can be proved that a party’s arbitrator’s partiality prejudicially affected award).

⁴² 9 U.S.C. § 9 (2000).

⁴³ 9 U.S.C. § 10(a) (2000) reads:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

⁴⁴ *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 147 (1968) (quoting 9 U.S.C. § 10(a)(2)).

⁴⁵ *AT&T v. United Computer Sys. Inc.*, 7 F. App’x 784, 788 (9th Cir. 2001) (“Failure to disclose information is not a ground for vacating an arbitration award under the FAA.”); Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 CASE W. RES. L. REV. 815, 821 (2003) (“The FAA does not provide any standards for arbitrators’ conduct. Thus, any requirement that an arbitrator disclose potentially disqualifying conflicts of interest or conduct an investigation to uncover such conflicts stems from case law . . .”).

“evident partiality.”⁴⁶ Case law generally provides the contours of what constitutes adequate disclosure, even where voluntary ethics codes provide for specific disclosures, to satisfy the statutory requirement of evident partiality. This is a very fact-intensive inquiry.⁴⁷

In federal courts, the circuits are split on what constitutes “evident partiality,” with some following the Supreme Court’s plurality in *Commonwealth Coatings* in adopting a standard whereby a failure to disclose may be grounds for an arbitration award vacatur where such a failure to disclose creates an appearance or impression of bias.⁴⁸ In many circuits, this standard is limited in favor of a more narrow reasonableness standard,⁴⁹ requiring “more than a mere appearance of bias”⁵⁰ such that an award will be vacated where the fact would lead a reasonable person to conclude that the arbitrator lacked

⁴⁶ ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 499 (4th Cir. 1999) (“The material and relevant facts an arbitrator fails to disclose may demonstrate his ‘evident partiality’ under [the FAA]. However, nondisclosure, even of such facts, has no independent legal significance and does not in itself constitute grounds for vacating an award.”).

⁴⁷ Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1312–13 (11th Cir. 1998); Fed. Vending, Inc. v. Steak & Ale of Fla., Inc., 71 F. Supp. 2d 1245, 1246 (S.D. Fla. 1999) (“[T]he evident partiality inquiry [of the FAA] is a case-specific and fact-intensive one.”).

⁴⁸ See, e.g., Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996) (“In nondisclosure cases, vacatur is appropriate where the arbitrator’s failure to disclose information gives the impression of bias in favor of one party.”); Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995) (noting uncertainty among courts of appeals following the *Commonwealth Coatings* decision).

⁴⁹ See, e.g., *Gianelli Money*, 146 F.3d at 1312 (explaining awards may be vacated only when an actual conflict exists or where a failure to disclose offends the reasonable person standard); Lifecare Int’l, Inc. v. CD Med., Inc., 68 F.3d 429, 433 (11th Cir. 1995) (stating that the mere appearance of bias is insufficient to vacate an arbitration award); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83–84 (2d Cir. 1984) (adopting a reasonable person standard); Int’l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551 (2d Cir. 1981) (noting that appearance of bias does not necessarily rise to evident partiality).

⁵⁰ Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992) (citing Florasynth, Inc. v. Pickholz, 750 F.2d 171, 173 (2d Cir. 1984)) (noting that arbitrators often have “interests and relationships that overlap with the matter they are considering” and “[t]he mere appearance of bias that might disqualify judge will not disqualify an arbitrator”); see also Evans Indus., Inc. v. Lexington Ins. Co., No. 01-1546, 2001 U.S. Dist. LEXIS 10419, at *10 (E.D. La. July 12, 2001) (affirming an arbitration award against a challenge of evident partiality where the arbitrator had at one time owned interest in a partnership at issue, including earning commissions (citing *Berstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987))).

partiality.⁵¹ Some courts find that there is not much distinction between the two standards.

Courts are concerned with arbitrator partiality where there may be an appearance of favoring industry, raising concerns of the credibility and integrity of the arbitration process, and thus providing the impetus for more stringent arbitrator disclosure of relationships and prior dealings between parties and arbitrators.⁵² Further, because of an increasingly international commercial market, a push toward greater arbitrator disclosure and transparency places American arbitration standards more in line with international standards.⁵³ While the codes and standards increase arbitrator responsibility through disclosure standards,⁵⁴ most of these codes and federal and state courts tend

⁵¹ See, e.g., *United States v. Int'l Bhd. of Teamsters*, No. 99-6248, 2000 U.S. App. LEXIS 19798, at *3 (2d Cir. Aug. 9, 2000); *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993).

⁵² See CAL. CIV. PROC. CODE § 1281.85(a) (West 2006); Cal. Assemb. Comm. on Judiciary, Analysis of Sen. Bill No. 475, 2001–2002 Reg. Sess. (Aug. 21, 2001) (stating that the new California Ethics Code was promulgated “to provide [a] basic measure[] of consumer protection with respect to private arbitration, such as minimal ethical standards and remedies for the arbitrator’s failure to comply with existing disclosure requirements”); see also UNIF. ARBITRATION ACT prefatory note (2000) (“The UAA did not address many issues which arise in modern arbitration cases. The statute provided no guidance as to . . . whether arbitrators are required to disclose facts reasonably likely to affect impartiality”); American Bar Association, *Dispute Resolution Policies*, <http://www.abanet.org/dispute/webpolicy.html> (last visited Feb. 7, 2007) (“Recognizing that the 1977 Code had become unresponsive to current concerns and provided inadequate guidance in numerous respects,” the committee convened to redraft that Code.); *Order Granting Approval to a Proposed Rule Change Relating to Arbitrator Classification and Disclosure in NASD Arbitrations*, 69 Fed. Reg. 21,871 (Apr. 24, 2004) (“[T]he Commission believes that the proposed rule change . . . requires that NASD’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.”).

⁵³ AAA/ABA CODE OF ETHICS, *supra* note 7, *Note on Neutrality* (stating that an expectation of neutrality “is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects”); see also Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 460 (2005) (“At the urging of the international arbitration bar—for whom American domestic practice was an embarrassing aberration—the AAA and the ABA have recently revised their ‘Code of Ethics for Arbitrators.’ ”)

⁵⁴ See AAA/ABA CODE OF ETHICS, *supra* note 7, Canon II.A (requiring disclosure of “any known direct or indirect financial or personal interest in the outcome of the arbitration” as well as of “any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties”). In addition,

to adopt objective standard for disclosure, which look at the circumstances surrounding nondisclosure, and hold that a failure to disclose does not per se demand vacatur of an arbitration award.⁵⁵ In particular, some courts seem to be highlighting the extent to which the nature of arbitration, as an industry-based practice meant as an alternative to litigation, necessitates a practical approach to disclosure.⁵⁶ Nevertheless, one recently revised code goes so far as to require disclosure of potential *future conflicts*.⁵⁷

Thus, there are conflicting trends. On the one hand is the fear of arbitrator abuse of power, as they are not held to the same standards of judges but yield similar power: arbitrators are not mandated in most cases to publish opinions, but nevertheless they decide issues of law *and fact*.⁵⁸ On the other hand, as noted

potential arbitrators are expected to “make a reasonable effort to inform” themselves of any such interests or relationships of which they may happen to be ignorant. *Id.* Canon II.B.

⁵⁵ See, e.g., UNIF. ARBITRATION ACT § 12, cmt. 3 (2000) (“The fundamental standard of Section 12(a) is an objective one: disclosure is required of facts that a reasonable person would consider likely to affect the arbitrator’s impartiality in the arbitration proceeding.”); AAA/ABA CODE OF ETHICS, *supra* note 7, Canon II (using a reasonableness standard for disclosure); NASD MANUAL, *supra* note 8, R. 10312(d)(3) (using a reasonableness standard when assessing whether to disqualify an arbitrator).

⁵⁶ *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 701 (2d Cir. 1978) (“The very intimacy of the group from which specialized arbitrators are chosen suggests that the parties can justifiably be held to know at least some kinds of basic information about an arbitrator’s personal and business contacts.”).

⁵⁷ See CAL. ETHICS STDS., *supra* note 7, No. 10(b).

⁵⁸ *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968) (“[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein . . .”).

See also *Gilmer v. Interstate/Johnson Lane Corp.*, a case in which the plaintiff argued that the procedures generally used in arbitration are suspect because “arbitrators often will not issue written opinions,” resulting in a lack of public knowledge of employers’ wrongdoings and an inability to obtain meaningful appellate review. 500 U.S. 20, 31–32 (1991). The Court did not directly address *Gilmer*’s argument because the specific rules which governed his dispute mandated that a writing be issued and made available to the public. *Id.*

One commentator suggested that the court misread the arbitration rules to require a written “opinion” (providing an explanation of the arbitrator’s reasoning for the decision) when, in fact, only a written “award” was required. See Kaczmarek, *supra* note 2, at 301–03 (arguing that public law arbitrators should be required write opinions and release them). The AAA EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES R. 39 (2006) [hereinafter EMPLOYMENT ARBITRATION RULES] provides that the award will be publicly available with the names of the parties and witnesses redacted, unless the parties agree to include the names. Some state statutes require written decisions. See, e.g., CAL. CIV. PROC. CODE § 1283.4

in *Commonwealth Coatings*, “arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases”⁵⁹ The nature of commercial arbitration requires particular knowledge and “often entails the use of arbitrators that are closely connected to the particular industry, and consequently, the parties themselves.”⁶⁰ This leads many to feel that those within a particular industry may be predisposed to industry awards.⁶¹ The AAA Employment Arbitration Rules require that the neutral arbitrators be experienced in the field of employment law,⁶² and many of the arbitrators on the Employment Panel are attorneys in law firms representing either employees or management or previously were in those firms. Since the issues in employment arbitration are frequently complex and involve numerous statutes and common law developments, it is essential that employment arbitrators are experts in this area of the law.

III. FAA AND FEDERAL INTERPRETATION OF “EVIDENT PARTIALITY” IN DISCLOSURE CASES

While an arbitrator’s failure to disclose is relevant to an inquiry into arbitrator partiality, it alone is not always sufficient to establish “evident partiality,” as set forth in 9 U.S.C. § 10(a)(2). Many courts are unwilling to apply a per se rule of vacation where an arbitrator fails to disclose information that a party subsequently objects to as evidencing partiality.⁶³ Many

(West 2006).

⁵⁹ *Commonwealth Coatings*, 393 U.S. at 148–49.

⁶⁰ Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV. 453, 454–55 (2005).

⁶¹ Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 259 (2004).

As the [AAA] indicates, one of the “primary advantages” it offers is “industry expertise,” with “expert neutrals highly-trained in specific industries.” Knowledge of the insurance industry is a reasonable requirement for an arbitrator of insurance disputes. However, experts “highly trained in specific industries” often are or have been involved with those industries rather than consumer groups and may be predisposed to favor the industry or to see disputes from its perspective.

Id. (quoting American Arbitration Association, *Focus Area*, <http://www.adr.org/FocusAreas> (last visited Feb. 8, 2007)).

⁶² EMPLOYMENT ARBITRATION RULES, *supra* note 58, R. 12(b)(i).

⁶³ *See, e.g.,* Lucent Tech., Inc. v. Tatum Co., 379 F.3d 24, 29 (2d Cir. 2004) (noting that a per se rule would “make the results of arbitration less rather than more certain and would run counter to the general policy of encouraging and

courts will look to the nature of the nondisclosure to determine evident partiality.⁶⁴

The Eleventh Circuit noted two times when an award will be vacated due to “evident partiality”: where there is actual bias or where an arbitrator fails to disclose “information which would lead a reasonable person to believe that a potential conflict exists.”⁶⁵ Under this standard, “evident partiality” is made out by objective factors requiring a fact-intensive analysis of the information that was not disclosed and its relationship to the parties and the arbitration.⁶⁶

While one court has indicated that the “reasonable appearance of bias” standard is more suited for cases involving neutrals or differing governing rules, other than the FAA,⁶⁷ this standard has been applied to cases involving *both* neutrals and non-neutrals.⁶⁸

It is apparent that, “[s]ince the *Commonwealth* case, the decisions of the circuit courts have not been a model of clarity as to what must be shown to establish evident partiality” and what arbitrators need to disclose to avoid vacatur.⁶⁹ In *Morelite*

supporting arbitration” (citing *Gilmer*, 500 U.S. at 24–25)); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 499 (4th Cir. 1999) (noting that nondisclosure “does not in itself constitute grounds for vacating an award”).

⁶⁴ See, e.g., *Consolidation Coal Co. v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1995) (“We find it appropriate to apply to this case the evident partiality standard for vacation developed by FAA case law.”); *Fed. Vending, Inc. v. Steak & Ale of Fla., Inc.*, 71 F. Supp. 2d 1245, 1249 (S.D. Fla. 1999) (“Indeed, although failure to disclose circumstances which present a ‘close-call’ may not be enough—in and of itself—to require setting aside an award, such failure at a minimum requires that the court take a hard look at the *nature* of such undisclosed circumstances.”).

⁶⁵ *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

⁶⁶ See *Int’l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1980) (“To vacate an arbitration award where nothing more than an appearance of bias is alleged would be ‘automatically to disqualify the best informed and most capable potential arbitrators.’” (quoting *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring))).

⁶⁷ *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002) (“To the extent that an agreement entitles parties to select interested (even beholden) arbitrators, § 10(a)(2) has no role to play.”).

⁶⁸ *Consolidation Coal*, 48 F.3d at 127, 129 (reversing a district court order to vacate an arbitration award where a party-appointed arbitrator failed to disclose that his brother had been employed by the defendant-union).

⁶⁹ *Evans Indus., Inc. v. Lexington Ins. Co.*, No. 01-1546, 2001 U.S. Dist. LEXIS 10419, at *9 (E.D. La. July 12, 2001); see also *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2d Cir. 1984)

Construction Corp. v. New York City District Council Carpenters Benefit Funds,⁷⁰ the Second Circuit, “[m]indful of the trade-off between expertise and impartiality, and cognizant of the voluntary nature of submitting to arbitration,” defined evident partiality “as requiring a showing of something more than the mere ‘appearance of bias’ to vacate an arbitration award,” yet not necessarily as impossible as “proof of actual bias.”⁷¹ There, the petitioner moved to vacate an arbitration award claiming the arbitrator was evidently partial when he failed to disclose the father-son relationship between himself and one of the parties; the son served as the arbitrator of a dispute involving a union where the father was president.⁷² The court held that despite a “traditional reluctance to inquire into the merits of an arbitrator’s award”⁷³ such an intimate and undisclosed relationship, where both were involved in the arbitration, would lead “a reasonable person . . . to conclude that an arbitrator was partial to one party to the arbitration.”⁷⁴ Family relationships, however, do not per se show evident partiality.⁷⁵

(“Exactly what constitutes ‘evident partiality’ by an arbitrator is a troublesome question.”). Lack of clarity on how to define evident partiality has also permeated state courts. *See, e.g., Schreifels v. Safeco Ins. Co.*, 725 P.2d 1022, 1024 (Wash. Ct. App. 1986) (“‘Evident partiality,’ like obscenity, is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms.”).

⁷⁰ 748 F.2d 79 (2d Cir. 1984).

⁷¹ *Id.* at 83–84; *see also* *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 n.7 (6th Cir. 2006) (accepting the Second Circuit’s interpretation of evident partiality “as requiring a showing of something more than the mere ‘appearance of bias’ to vacate an arbitration award, yet not as insurmountable as ‘proof of actual bias’”). *See generally* *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) (discussing the “absence of a consensus on the meaning” of “evident partiality” evidenced by different approaches adopted by the circuits).

⁷² *Morelite Construction*, 748 F.2d at 84.

⁷³ *Id.* at 81.

⁷⁴ *Id.* at 84.

⁷⁵ *Consolidation Coal Co. v. Local 1643, United Mine Workers*, 48 F.3d 125, 130 (4th Cir. 1995) (reversing and remanding an arbitration award where the record did not indicate specific facts that the nature of the relationship between an arbitrator and his brother who worked for the defendant-appellant union was sufficiently direct or had any relationship to the arbitration such that it established evident partiality, and rejecting the district court finding of per se bias on the basis that the relationship was between brothers); *see also* *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1310–14 (9th Cir. 2004) (affirming district court order confirming arbitration award and refusing to vacate due to evident partiality despite certain family and business relationships between arbitrator and party); *Barnstead v. Ridder*, 659 N.E.2d 753, 756 (Mass. App. Ct. 1996) (finding arbitrator’s failure to disclose business connections between his family and defendant’s family not grounds to vacate award).

Reasonableness requires more than the appearance of bias with facts that are not remote and which indicate partiality.⁷⁶ According to the Fourth Circuit, a court must look at the “nature of the relationship and its connection to the arbitration dispute”⁷⁷ Factors that assist in this determination include:

- (1) [A]ny personal interest, pecuniary or otherwise, the arbitrator has in the proceeding;
- (2) [T]he directness of the relationship between the arbitrator and the party he is alleged to favor;
- (3) [T]he connection of the relationship to the arbitration; and
- (4) [T]he proximity in time between the relationship and the arbitration proceeding.⁷⁸

In *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, the court did not find evident partiality where the non-prevailing party alleged that the arbitrator's brother worked for the respondent-union. Applying the above factors, the court reasoned that there was no interest on the part of the arbitrator; the brother was not an elected official with the union, had no responsibility for the union's contractual matters, and had not been involved with the union since 1982; likewise, the arbitrator had a history of ruling against the union.⁷⁹ Thus, even though the brother had, at one point, lived together and had owned a business with his brother-arbitrator, where a relationship is indirect, lacking a connection to the arbitration at issue, and the arbitrator has nothing to gain, there is no evident partiality.⁸⁰

⁷⁶ *Consolidation Coal*, 48 F.3d at 129; see also *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (“[T]he burden of a claimant for vacation of an award due to ‘evident partiality’ is heavy, and the claimant must establish specific facts that indicate improper motives on the part of the arbitrator.”); *Health Serv. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992) (finding that a prior business relationship between two people in the same business, without any facts indicating such closeness or intimacy of relationship, insufficient to warrant vacatur as establishing evident partiality); *Boll v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 04-80031, 2004 U.S. Dist. LEXIS 27948, at *14 (S.D. Fla. June 25, 2004) (“A trivial relationship is not sufficient to warrant vacatur under 9 U.S.C. § 10(2)(a), in that by definition, the circumstances surrounding a trivial relationship would be so attenuated that an impression of partiality would not be reasonable.”).

⁷⁷ *Consolidation Coal*, 48 F.3d at 129.

⁷⁸ *Id.* at 130.

⁷⁹ *Id.*

⁸⁰ *Id.*

Moreover, partiality must be “direct, definite, and capable of demonstration, rather than remote, uncertain or speculative.”⁸¹ In *Nationwide Mutual Insurance Co. v. Home Insurance Co.*,⁸² the court confirmed an arbitration award against a charge that the arbitrator was partial under the FAA alleging his failure “to disclose certain business and social relationships with [Home Insurance] and its counsel.”⁸³ Rejecting that nondisclosure per se requires vacatur as well as the “appearance of bias” standard, the court found the facts did not raise evident partiality. The parties’ agreement warranted “that the arbitrators come from within the insurance industry” and therefore the parties clearly intended that the panel be “involved in the business of insurance.”⁸⁴ Citing the Seventh Circuit’s decision in *Sphere Drake Insurance Ltd. v. All American Life Insurance Co.*,⁸⁵ the court highlighted the nature of arbitration as industry-based, increasing the likelihood that arbitrators, as members of an industry, will come to be “repeat players” and “the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile; the Arbitration Act does not fasten on every industry the model of the disinterested generalist judge.”⁸⁶ While this case dealt specifically with a party-appointed arbitrator, the same standard would apply (at least as a floor) to neutral

⁸¹ *Id.* at 129; *see also* Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1147 (10th Cir. 1982) (“For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative.”).

⁸² 429 F.3d 640 (6th Cir. 2006).

⁸³ *Id.* at 644.

⁸⁴ *Id.* at 645.

⁸⁵ 307 F.3d 617 (7th Cir. 2002).

⁸⁶ *Id.* at 620; *see also* *Nationwide Mutual*, 429 F.3d at 647 (adopting the standard in *Sphere Drake* and *Morelite*). The Court further highlighted the *Sphere Drake* court’s “cognizan[ce] of the practices and norms peculiar to industry arbitration and incorporat[ion] [of] these considerations in its analysis” such that disqualification of an arbitrator based on professional dealing would make finding a qualified arbitrator difficult. *Id.*; *see also* *Dow Corning Corp. v. Safety Nat’l Cas. Corp.*, 335 F.3d 742, 750 (8th Cir. 2003) (“When the parties agree to arbitration before disinterested persons who have experience in a specialized business or type of problem, the relatively small number of qualified arbitrators may make it common, if not inevitable, that parties will nominate the same arbitrators repeatedly.”); *Teldata Control, Inc. v. County of Cook*, No. 02-7439, 2003 U.S. Dist. LEXIS 6076, at *3 (N.D. Ill. April 14, 2003) (“[S]ection 10(a)(2) does not inexorably require a disinterested arbitrator.”).

arbitrators.⁸⁷ The court indicated that even if Jacks, the arbitrator, had been a neutral umpire, it would not have found evident partiality because Jacks disclosed that he had served as Home's arbitrator on matters over twenty years, including as an opposing arbitrator, among other things. Nationwide agreed to continue and later claimed these disclosures deficient but failed to show "how the substance of these disclosures . . . and his prior and ongoing contacts with Home and [others] . . . manifest evident partiality" under the FAA.⁸⁸

The district court in *Evans Industries, Inc. v. Lexington Insurance Co.*⁸⁹ found any relationship between the umpire and a party-appointed arbitrator too indirect to warrant vacatur under Section 10(a)(2).⁹⁰ The arbitrator was unaware of the connection between the defendant and its parent company, AIG, whom the arbitrator used to represent. Even had the arbitrator been aware, the contacts between the parent company and subsidiary were "too indirect to establish anything more than a possible appearance of bias, which the Fifth Circuit has rejected as insufficient to establish evident partiality."⁹¹ The court reiterated the factors indicated above and the general policy that the court "will not lightly overturn an arbitration award for evident partiality,"⁹² while noting nondisclosure is clearly relevant to a determination evident partiality. The Fourth Circuit found that it does not independently justify vacatur.⁹³

In *Ormsbee Development Co. v. Grace*,⁹⁴ the Tenth Circuit, under the New Mexico Arbitration Act (which mirrors the Federal Arbitration Act in the provisions for award vacation) found no partiality on the part of a neutral arbitrator where he had similar clients to one of the party's firm, because the relationship was too indirect.⁹⁵ While he disclosed that he did

⁸⁷ See *Nationwide Mutual*, 429 F.3d at 645 ("We conclude that the present circumstances do not warrant deviation from *Apperson's* case-by-case objective inquiry into evident partiality, particularly where, as here, the complaint of evident partiality concerns a party-appointed, as opposed to a neutral, arbitrator.").

⁸⁸ *Id.* at 649.

⁸⁹ No. 01-1546, 2001 U.S. Dist. LEXIS 10419 (E.D. La. July 12, 2001).

⁹⁰ See *id.* at *13-14.

⁹¹ *Id.* at *14 (citing *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987)).

⁹² *Id.* at *10.

⁹³ *Id.* at *11.

⁹⁴ 668 F.2d 1140 (10th Cir. 1982).

⁹⁵ See *id.* at 1151.

consulting work for another corporation, he did not indicate that that corporation was a subsidiary.⁹⁶ The court noted that the arbitrator was not financially involved with the parties or their subsidiaries.⁹⁷

A. *Courts Highlight Factors Such as Financial Interest, Contemporaneity, and the Nature of a Relationship*

As the case law demonstrates, where a potential conflict involves a financial or other interest to the arbitrator, is contemporaneous or close in time to the arbitration and/or exemplifies some significant relationship, courts require vacatur.⁹⁸ In *Montez v. Prudential Securities, Inc.*,⁹⁹ an employee appealed a final order denying his petition to vacate an arbitration award in favor of the employer claiming that the arbitrator, James Benson, showed evident partiality.¹⁰⁰ In particular, petitioner-employee claimed that Benson's failure to disclose that he was employed with two separate firms, five years ago, that did business with the respondent-employer's attorney's firm, Baker and Botts, warranted vacatur.¹⁰¹ The Court of Appeals affirmed the district court's determination that the Benson's undisclosed business and professional relationship with the Prudential did not show "evident partiality" where "Benson [did not have] any financial interest related to Baker & Botts," he was neither a shareholder nor had "anything to gain from fostering a relationship," his current employer did not have dealings with the parties, and the relationship "ended five years prior to the arbitration."¹⁰²

⁹⁶ *Id.* at 1149–50.

⁹⁷ *Id.* at 1151.

⁹⁸ *See, e.g.,* Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312, 320 (S.D.N.Y. 1987) ("[I]n evaluating the purported bias of an arbitrator, the courts look at: (1) the financial interest the arbitrator has in the proceeding; (2) the directness of the alleged relationship between the arbitrator and a party to the arbitration proceeding; (3) and the timing of the relationship with respect to the arbitration proceeding.").

⁹⁹ 260 F.3d 980 (8th Cir. 2001).

¹⁰⁰ *Id.* at 981.

¹⁰¹ *Id.* at 982.

¹⁰² *Id.* at 983–84; *see also* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983) (holding that mere nondisclosure does not warrant vacatur under § 10(a)(2) where an arbitrator failed to disclose that he once worked for the plaintiff's president at a different insurance company since "their relationship had ended 14 years before, [the arbitrator] had no possible financial stake in the outcome of the arbitration, and his relationship with [the president] during their period together at

1. Financial Interest Will Generally Constitute "Evident Partiality"

Financial interest or evidence that the arbitrator had anything to gain from the outcome of the arbitration is strong evidence of partiality.¹⁰³ "Certainly any time money changes hands directly between an arbitrator and a representative of one of the parties involved in a pending arbitration before that arbitrator, disclosure must take place."¹⁰⁴ Even where a relationship exists, a court may deny vacatur if there is no pecuniary interest involved.¹⁰⁵

2. Temporal Proximity

The relationship between the time of a conflict alleged to affect an arbitrator's partiality and the arbitration at issue is relevant to a determination of evident partiality.¹⁰⁶ In *Crow Construction Co. v. Jeffrey M. Brown Associates, Inc.*,¹⁰⁷ an arbitration award by a three AAA-appointed panel of arbitrators was vacated when an arbitrator failed to disclose that she had served as a mediator for the prevailing party only a short time prior to the arbitration at issue, among other nondisclosures.¹⁰⁸

Cosmopolitan had been distant and impersonal").

¹⁰³ See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151 (1968).

The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties.

Id.; see also *Montez*, 260 F.3d at 984.

¹⁰⁴ *Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217, 225 (E.D. Pa. 2003).

¹⁰⁵ *Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 320–21 (S.D.N.Y. 1987) (denying motion to vacate arbitration award, because arbitrator's relationship with employer's counsel did not reach evident partiality and neither did the relationship since there was no pecuniary interest involved).

¹⁰⁶ See *HSMV Corp. v. ADI Ltd.*, 72 F. Supp. 2d 1122, 1130 (C.D. Cal. 1999) (holding that the arbitrator's failure to disclose his law firm's contemporaneous representation of the Commonwealth of Australia, which owned one of the corporate parties to the arbitration, constituted evident partiality); see also *In re First Quality Realty LLC*, No. 02-14758, 2006 Bankr. LEXIS 479, at *16 (Bankr. S.D.N.Y. Feb. 17, 2006) (finding an arbitrator's request and acceptance of perks from a law firm representing one of the parties while he was involved in the arbitration sufficient grounds, without disclosure, that the arbitrator was partial under Section 10(a)(2)).

¹⁰⁷ 264 F. Supp. 2d 217 (E.D. Pa. 2003).

¹⁰⁸ *Id.* at 224.

There were four nondisclosures in total: (1) respondent's counsel's (Cohen's) appearance before the arbitrators on a previous matter; (2) one arbitrator's role in a case involving the respondent; (3) another arbitrator's failure to disclose his private dealings with the party's counsel as a hired arbitrator; and (4) both arbitrators' failure to disclose their roles in another related matter of respondents.¹⁰⁹ On the first issue, the court determined that opposing counsel's appearance in a previous AAA-arbitrated matter before two of the arbitrators was an example of the trivial relationships alluded to by Justice White in his *Commonwealth Coatings* concurrence and thus did not rise to the level of evident partiality.¹¹⁰ However, citing to the AAA Ethics Code providing a continuing duty to disclose relationships with the parties, although not governing, the court used it "as a benchmark to assess the alleged failed disclosures" and in its determination that the later two nondisclosures amounted to evident partiality. The court found that the arbitrators' more extensive undisclosed ties with the respondent and his counsel's firm, Cohen Seglias, suggested bias. The arbitrator's role as a mediator in a case involving respondent occurred near the same time as the arbitration at issue and the other's failure to disclose his private dealings with Cohen Seglias was significant because Cohen Seglias was hired and paid as an arbitrator in 1999. "[M]ost disturbing is the arbitrators' failure to disclose to Crow their role in the JMB/Greenfield arbitration. . . . [I]t occurred at the conclusion of the JMB/Crow matter, a crucial time in which the arbitrators were presumably making their determinations as to liability and damages."¹¹¹

3. Business and Law Firm Relationships

Under the reasonable standard, the extent to which a party's previous business ties or other relationships to an arbitrator's firm evidences "evident partiality" differs depending on the facts. An arbitrator's prior *non-legal* relationship with a named partner in the firm of an attorney representing a party does not necessarily require vacatur.¹¹² There needs to be a relationship

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring)).

¹¹¹ *Id.* at 225.

¹¹² See *Skyview Owners Corp. v. Employees Int'l Union, Local 32B-J*, No. 04-

with someone involved in the arbitration proceeding and a charge that the arbitrator “stood to benefit from the outcome of the proceeding.”¹¹³ “[F]amiliarity due to confluent areas of expertise does not indicate bias. Rather, so long as the previous interactions do not represent part of an ongoing business relationship,” such familiarity with an industry more than likely presents an asset in the context of arbitration.¹¹⁴ In *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*,¹¹⁵ the court found a relationship between a neutral arbitrator and respondent’s counsel’s firm to be “nonsubstantial,” and thus not warranting vacatur of an arbitration award.¹¹⁶ The neutral arbitrator was a former member of a firm that had represented one of the parties for a brief period of time during a temporary merger.¹¹⁷ The petitioner failed to demonstrate “that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.”¹¹⁸

Vacatur was appropriate in a bankruptcy case where an arbitrator who “regularly went to lunch with one of the [party’s] attorneys,” was provided with free use of conference rooms and free legal research and was retained to represent a principal of the opposing party during the arbitration in question.¹¹⁹

In another case, the Eleventh Circuit found that although the arbitrator should have disclosed a prior, personal dispute

4643, 2004 U.S. Dist. LEXIS 19986, at *18–20 (S.D.N.Y. Oct. 5, 2004) (holding that vacatur of the award was not required where the arbitrator and a partner of a firm involved in the arbitration formerly co-owned a restaurant).

¹¹³ *Id.* at *18; see also *Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 321–22 (S.D.N.Y. 1987) (rejecting the argument that a prior business relationship between an arbitrator and a party’s counsel requires vacation of an arbitration award).

¹¹⁴ *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1340 (11th Cir. 2002) (finding that the petitioners made out two separate prima facie cases for vacatur under evident partiality where an arbitrator failed to disclose a concurrent business relationship with one of the parties’ lawyer and a meeting with the president of the same party).

¹¹⁵ 173 F.3d 493 (4th Cir. 1999).

¹¹⁶ See *id.* at 499–500.

¹¹⁷ See *id.* at 496.

¹¹⁸ *Id.* at 500, 502 (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1995)); see also *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682–83 (D.C. Cir. 1996) (refusing to vacate the arbitration award where the arbitrator’s former law firm represented respondent Citibank on unrelated matters).

¹¹⁹ See *In re First Quality Realty, LLC.*, No. 02-14758, 2006 Bankr. LEXIS 479, at *16–17, *20 (Bankr. S.D.N.Y. Feb. 17, 2006).

with an attorney belonging to firm representing the respondent, nondisclosure of this fact did not create reasonable impression of partiality where the incident did not involve any party to the arbitration hearing and occurred eighteen months prior to arbitration.¹²⁰

The Fifth Circuit, sitting en banc, overturned an appellate panel's ruling that found evident partiality based on a dated and limited contact between one of the arbitrators and counsel.¹²¹ The arbitration involved a software licensing dispute.¹²² After the award was issued, the losing party examined the arbitrator's professional history and discovered that his prior law firm and the winning party's firm had represented Intel in a large dispute involving six different litigations in the early 1990s.¹²³ At least seven firms and thirty-four lawyers represented Intel in that matter, including the arbitrator and counsel for the prevailing party in the litigation.¹²⁴ Although their names appeared in the pleadings together, the arbitrator and counsel never spoke to each other or attended the same meetings, hearings, or other proceedings together.¹²⁵ The majority of the en banc court concluded that the arbitrator's "failure to disclose a trivial former business relationship does not require vacatur of the award."¹²⁶ The majority found this "slender connection" between the arbitrator and counsel to not have met the standard for bias set forth in prior cases, noting that courts in previous cases had refused to vacate where the undisclosed connections were much stronger.¹²⁷

The court reasoned that allowing vacatur in this case would jeopardize the finality of arbitration awards and would provide an incentive for the losing party to scrutinize the arbitrator's background to discover trivial relationships upon which to

¹²⁰ See *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 434 (11th Cir. 1995) (citing *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 n.3 (2d Cir. 1981) ("It does not follow that an arbitrator's personal feelings in favor of or against one attorney would necessarily be transferred to another attorney in the same firm.")).

¹²¹ See *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 283–84 (5th Cir. 2007), *rev'g en banc* 436 F.3d 495 (5th Cir. 2006).

¹²² See *id.* at 279.

¹²³ See *id.* at 280.

¹²⁴ *Id.*

¹²⁵ See *id.* at 284.

¹²⁶ *Id.* at 283.

¹²⁷ See *id.* at 284.

challenge the award.¹²⁸ To warrant vacatur, the court found that the alleged nondisclosure must create “a concrete, not speculative impression of bias.”¹²⁹ The majority concluded that “[a]rbitration may have flaws, but this is not one of them. The draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship. This case does not come close to meeting this standard.”¹³⁰

“[R]epresentation of a parent corporation is likely to affect impartiality or may create an appearance of partiality in the lawyer’s representation of or dealings with a subsidiary.”¹³¹ As well, in *HSMV Corp. v. ADI Ltd.*,¹³² the Ninth Circuit found evident partiality where a firm at which an arbitrator was a partner had been representing a parent company in a move to privatize another company, ADI, who was a party in the arbitration proceeding.¹³³ The relationship at issue commenced prior to the arbitration and continued during the arbitration. Even though ADI’s counsel had sent a proposed confidentiality deed for the two parties which indicated that questions should be addressed by an attorney at Blake Dawson, the arbitrator’s firm, the court did not find it sufficient to waive the arbitrator’s obligation to disclose the relationship.¹³⁴

In *Al-Harbi v. Citibank, N.A.*,¹³⁵ the court affirmed a lower court’s finding of no evident partiality on a motion to vacate an arbitration award.¹³⁶ The parties agreed to Kenneth R. Feinberg as the arbitrator to the claim. After dissatisfaction with the award, Al-Harbi brought an action for vacatur claiming that Feinberg was partial in failing to disclose that his former law firm had represented Citibank on unrelated matters.¹³⁷ The court declined to find the relationship warranting vacatur where it was not direct, definite, or a relationship contemporaneous to

¹²⁸ *See id.* at 285.

¹²⁹ *Id.* at 286.

¹³⁰ *Id.*

¹³¹ *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994).

¹³² 72 F. Supp. 2d 1122 (C.D. Cal. 1999).

¹³³ *See id.* at 1132.

¹³⁴ *See id.* at 1124–25, 1132.

¹³⁵ 85 F.3d 680 (D.C. Cir. 1996).

¹³⁶ *Id.* at 681.

¹³⁷ *See id.* at 682.

the arbitration and Feinberg was no longer a member of the firm that had represented Citibank.¹³⁸

The fact that an arbitrator comes from the same industry does not show evident partiality, even where an arbitrator and a party are rivals.¹³⁹ Membership in the same trade association, likewise, is not sufficiently direct or substantial to establish evident partiality.¹⁴⁰

IV. ARBITRATOR LACK OF KNOWLEDGE OF UNDISCLOSED CONFLICT

A. *Failure to Investigate*

Generally, an award will not be vacated for a mere failure to investigate, unless the undisclosed facts make out “evident partiality.” In *Al-Harbi*, the court found that:

[T]he fact that an arbitrator has not conducted an investigation sufficient to uncover the existence of facts marginally disclosable under the *Commonwealth Coatings* duty is not sufficient to warrant vacating an arbitration award for evident partiality. That is, we explicitly hold that there is no such duty on an arbitrator to make any such investigation.¹⁴¹

¹³⁸ See *id.* at 682–83; see also *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551–52 (2d Cir. 1981) (denying a motion to vacate an arbitration award under evident partiality where the arbitrator in one dispute was also a non-party witness in another dispute involving the same law firms).

¹³⁹ See *JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (affirming the district court's confirmation of an arbitration award in the union's favor where the employer was on notice that the arbitration panel would be comprised of industry people and that “some of [its] competitors could be the employer representatives on the panel” but failed to inquire about the arbitrator's background). Similarly, evident partiality requires “more than an amorphous institutional predisposition.” *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (quoting *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998) (holding that the fact that the arbitrators were all members of the National Grain & Feed Association (“NGFA”) was insufficient to establish evident partiality under 9 U.S.C. § 10(a) even where Andersons, but not Horton Farms, was a member of NGFA)).

¹⁴⁰ *Norwood Co. v. Bennett Composites, Inc.*, No. 04-CV-0379, 2004 U.S. Dist. LEXIS 17153, at *3–5, *13 (E.D. Pa. Aug. 24, 2004) (denying vacatur on evident partiality grounds where the arbitrator failed to disclose a relationship between his son and a witness because the relationship was “one that occurs in the normal course of business [between] individuals who are involved in an industry [or] are members of a trade association”).

¹⁴¹ *Al-Harbi*, 85 F.3d at 683.

There are a few courts, however, that have held that the failure to investigate per se requires vacatur.¹⁴² In *Schmitz v. Zilveti*,¹⁴³ the Ninth Circuit held that a lawyer-neutral arbitrator had a duty to investigate his law firm's prior relationship with the corporate parent of a party. Where the arbitrator's law firm represented the parent of one of the corporate parties, but the arbitrator only ran a conflict check for the corporate party, the court found that the arbitrator had constructive knowledge of the conflict and his failure to inform the parties resulted in a reasonable impression of partiality meriting vacatur.¹⁴⁴ Thus, in concomitance to a duty to disclose under Ninth Circuit case law, a neutral arbitrator also has an independent duty to investigate conflicts with parties because, while a lack of knowledge may preclude an actual conflict, "a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it."¹⁴⁵ The court also relied on the NASD Code,¹⁴⁶ which requires an arbitrator to investigate potential conflicts.

B. Obligation After Conflict Becomes Known to Arbitrator After Non-Disclosure

Arbitrators are under an ongoing obligation to disclose information that might make them partial. The Ninth Circuit has held that an award may be vacated for nondisclosure if those facts create a "reasonable impression of partiality" *even where such facts are unknown to the arbitrator*.¹⁴⁷ Even where an

¹⁴² See, e.g., *Schmitz v. Zilveti*, 20 F.3d 1043, 1045, 1048 (9th Cir. 1994).

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 1049.

¹⁴⁵ *Id.* at 1048. *But see* ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 499–500 (4th Cir. 1999) ("ANR has failed to cite a single case holding that a failure to disclose in violation of the arbitration rules constitutes an independent basis for vacatur absent proof that, in addition, the nondisclosure proves one of the statutory grounds for vacatur.").

¹⁴⁶ See *Schmitz*, 20 F.3d at 1049. For the current version of this section, see NASD MANUAL, *supra* note 8, R. 10312(b).

¹⁴⁷ See *Schmitz*, 20 F.3d at 1049. The court stated:

[A]n arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*. For instance, the parties can expect a lawyer/arbitrator to investigate and disclose conflicts he has with actual parties to the arbitration.

Id. at 1048.

arbitrator may believe a relationship to be trivial, “if the law requires the disclosure, no such imputation can arise.”¹⁴⁸

Many courts, however, have not taken this harsh stance.¹⁴⁹ In *Norwood Co. v. Bennett Composites, Inc.*,¹⁵⁰ the Eastern District of Pennsylvania refused to overturn the plaintiff’s arbitration award on nondisclosure grounds under section 10(a)(2), where an arbitrator’s son and one of the parties were members of the same organization.¹⁵¹ The court addressed whether either the failure of the arbitrator to investigate potential conflicts or, subsequent to discovery of a relationship, the arbitrator’s failure to disclose such relationships, demanded vacatur. On the first issue, the court found that as the arbitrator-father was not aware of the relationship until after arbitration began and shortly prior to the decision being rendered, he could not have disclosed it prior to arbitration, but also that an arbitrator is not responsible for disclosing the relationships of third parties.¹⁵² Allowing vacatur for mere failure to investigate “would permit vacatur even where the arbitrator had no connections to the parties or the subject of the arbitration.”¹⁵³ And, a failure to investigate would not change

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (D.C. Cir. 1998); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682–83 (D.C. Cir. 1996). The court stated in *Gianelli Money*:

In *Lifecare Int’l, Inc. v. CD Medical, Inc.*, . . . [b]ecause there was no evidence that the arbitrator had actual knowledge of the past contacts, we confirmed the arbitration award and rejected the proposition that the arbitrator had a duty to investigate the past contacts to avoid evident partiality. In the present case it was error for the district court to rely on *Schmitz*, because its holding that an arbitrator’s failure to investigate past contacts with one of the parties may constitute “evident partiality” is squarely at odds with the position we took in *Lifecare*.

146 F.3d at 1312 (citation omitted).

¹⁵⁰ No. 04-CV-0379, 2004 U.S. Dist. LEXIS 17153 (E.D. Pa. Aug. 24, 2004).

¹⁵¹ See *id.*, at *8, *14.

¹⁵² See *id.* at *10, *14; see also *Team Scandia, Inc. v. Greco*, 6 F. Supp. 2d 795, 803 (S.D. Ind. 1998) (dismissing a motion to vacate the arbitration award where the arbitrator disclosed his former legal representation of a third party who was not bound by the arbitration because this was not a disqualifying conflict of interest).

¹⁵³ *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F. Supp. 2d 594, 624 n.14 (S.D. Tex. 2002), modified by No. H-01-495, 2002 U.S. Dist. LEXIS 21885 (S.D. Tex. July 16, 2002) (revising the form of the final judgment).

the fact that there was no relationship “to give rise to evident partiality.”¹⁵⁴

The Eleventh Circuit has held that there is no independent duty to investigate under the FAA where an arbitrator is unaware of the undisclosed facts.¹⁵⁵ In *Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc.*, the court held that evident partiality required that an actual conflict exist or “the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.”¹⁵⁶ In an attempt to recover money lost from investments, Gianelli filed a claim against ADM with the AAA.¹⁵⁷ After the parties jointly selected an arbitrator, but before the arbitration began, Gianelli discovered that the arbitrator’s firm had represented the president of Basic, with whom ADM had contracted to do its trading.¹⁵⁸ After assurances from the arbitrator that he was unaware of that case, he indicated that he had no more disclosures.¹⁵⁹ The arbitration proceeded and the arbitrator found for ADM.¹⁶⁰ Contending that he had discovered that the president of Basic had more frequent contact with the firm than originally stated, Gianelli appealed. The court found that the facts did not indicate any partiality that was “‘direct, definite and capable of demonstration rather than remote, uncertain and speculative.’”¹⁶¹ The court stated that the district court mistakenly relied on *Schmitz* and found that because the arbitrator had no knowledge of the conflict, there could not be a failure to disclose and therefore no evident partiality.¹⁶² The court looked not to the fact of nondisclosure, but to the nature of

¹⁵⁴ *Evans Indus., Inc. v. Lexington Ins. Co.*, No. 01-1546, 2001 U.S. Dist. LEXIS 10419, at *14 (E.D. La. July 12, 2001).

¹⁵⁵ *See Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312–13 (D.C. Cir. 1998); *Lummus Global Amazonas*, 256 F. Supp. 2d at 624 n.14 (citing *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C. Cir. 1996)). Whether or not an award is vacated does not need to be decided unless “this court first finds that the undisclosed facts show ‘clear evidence of impropriety,’ or, at the very least, a reasonable impression of bias.” *Lummus Global Amazonas*, 256 F. Supp. 2d at 624 n.14.

¹⁵⁶ *Gianelli Money*, 146 F.3d at 1312.

¹⁵⁷ *Id.* at 1310.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 1312–13 (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982)).

¹⁶² *See id.*

that nondisclosure: An arbitrator cannot be guilty of “evident partiality” by reason of past business contacts between his employer and the interested party, absent actual knowledge of real or potential conflict of interest.¹⁶³

V. RECENT CHANGES IN DISCLOSURE REQUIREMENTS

While the FAA provides the basis for the review of an arbitration award,¹⁶⁴ the parties’ agreement may provide the rules, usually an agreed upon institutional code or guiding statute,¹⁶⁵ to guide the arbitration and arbitrators.¹⁶⁶ This includes, in particular, standards for arbitrator disclosure.¹⁶⁷ Where there is no agreement, the FAA and the UAA are meant to act as default standards, particularly where there are questions about the vacation of an award due to “evident partiality.”¹⁶⁸ Where a party is challenging an arbitrator’s failure to disclose, the FAA may preempt a state arbitration act where there is a conflict of substantive law.¹⁶⁹ The language of many state UAA’s comports with the FAA as far as federal courts have defined

¹⁶³ See *id.*; see also *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 502 (4th Cir. 1999); *Evans Indus., Inc. v. Lexington Ins. Co.*, No. 01-1546, 2001 U.S. Dist. LEXIS 10419, at *15–16 (E.D. La. July 12, 2001).

¹⁶⁴ See 9 U.S.C. § 9 (2000). The FAA, however, does not create federal question jurisdiction. *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 291 n.1 (3d Cir. 2001) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983)).

¹⁶⁵ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (noting that the FAA does not operate in isolation from the wishes of the parties); *ANR Coal*, 173 F.3d at 499 (“[D]etermining whether to set aside an arbitration award, a court may only consider whether the complaining party has demonstrated a violation of the governing statute.”).

¹⁶⁶ See, e.g., *Diemaco v. Colt’s Mfg. Co.*, 11 F. Supp. 2d 228, 232 (D. Conn. 1998) (“When parties agree to arbitrate before the AAA and incorporate the Commercial Arbitration Rules [CAR] into their agreement, they are bound by those rules and by the AAA’s interpretation.”).

¹⁶⁷ See *U.S. Care, Inc. v. Pioneer Life Ins. Co. of Ill.*, 244 F. Supp. 2d 1057, 1062 (C.D. Cal. 2002) (“A court cannot require a higher level of impartiality than is provided for by the parties in an arbitration agreement.”).

¹⁶⁸ See, e.g., *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005) (affirming the district court’s finding that the parties of a contract were subject to the FAA because there was no explicit language indicating the parties intent to subject the arbitration award to another standard).

¹⁶⁹ See Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 393–95 (2004) (indicating that while there has been little treatment on federal preemption under the Federal Arbitration Act, a “second generation” of cases has begun to emerge).

“evident partiality” in the context of disclosure¹⁷⁰ even where also providing for additional language.¹⁷¹ Unless codified, ethics codes are “voluntary,” such as the one promulgated by the American Arbitrators Association and the American Bar Association (“AAA/ABA”).¹⁷² As such, these codes do not have the force of law unless codified by Congress or a state legislature.¹⁷³

A. *AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes—A Summary of Changes and Constants*

In March 2004, the AAA/ABA adopted the Revised Code of Ethics for Commercial Arbitrators.¹⁷⁴ The revised rules extend a presumption of neutrality to all arbitrators where it was formerly (if not obviously) only applicable to neutral arbitrators.¹⁷⁵ Unless a parties’ intent¹⁷⁶ or applicable law dictates otherwise, neutral and non-neutral arbitrators will be presumed neutral.¹⁷⁷ This places the AAA/ABA Code of Ethics more parallel to international arbitration standards.¹⁷⁸ This

¹⁷⁰ See, e.g., MINN. STAT. §§ 572.08–572.30 (1951), cited in *Lee v. Chica*, 983 F.2d 883, 888 n.11 (8th Cir. 1993) (“The UAA contains language similar to FAA Sections 10 and 11. Thus, our conclusions would be the same if we were to apply the UAA here”); TENN. CODE ANN. § 29-5-301 (2005).

¹⁷¹ See, e.g., MO. ANN. STAT. § 435.405, cited in *Madden v. Kidder Peabody & Co.*, 833 S.W.2d 79, 82 n.7 (Mo. Ct. App. 1994) (“The UAA does contain additional language not present in the FAA. . . . It appears, then, that the UAA has a higher statutory standard than the FAA.”).

¹⁷² See AAA ARBITRATOR DISCLOSURE, *supra* note 7.

¹⁷³ See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680–81 (1983).

¹⁷⁴ Am. Arbitration Ass’n, *Revised Code of Ethics for Arbitrators Approved, Takes Effect*, <http://www.adr.org/codeofethics> (last visited Feb. 7, 2007).

¹⁷⁵ See AAA/ABA CODE OF ETHICS, *supra* note 7, Canon VII. The Code also identifies three-member panel arbitrations where predisposition is assumed. They are referred to as “Canon X arbitrators” and, while they still have ethical obligations, they are not presumed neutral. See *id.* Canon IV.B.

¹⁷⁶ See Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, 59 DISP. RESOL. J., Feb.–Apr. 2004, at 10, 12 (“[S]ome parties . . . are likely to continue to prefer that their party-appointed arbitrators not be neutral.”).

¹⁷⁷ See AAA/ABA CODE OF ETHICS, *supra* note 7, Canon IX.A (inferring that parties can opt out of a presumption of neutrality); see also, e.g., *Universal Reins. Corp. v. Allstate Ins. Co.*, 16 F.3d 125, 127 (7th Cir. 1994).

¹⁷⁸ See *Byrne*, *supra* note 35, at 1825–26; Meyerson & Townsend, *supra* note 176, at 12 (observing that the concept of neutrality is meant to actuate a greater sense of “independence and impartiality,” and placing it on par with a more globally held belief in that all proceedings, arbitrators should be as independent and as impartial as possible); John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. MIAMI INTER-AM. L. REV. 1, 8 (2004) (“As [a presumption of neutrality] is the prevailing international standard, this 180-degree

presumption-shifting has also been amended in the AAA Commercial Arbitration Rules,¹⁷⁹ specifically Rules 12(b) and 16, which guide party-appointed arbitrators and disclosure, respectively.¹⁸⁰

The specific disclosures required are the same as the 1977 Ethics Code, just now they also apply to non-neutrals (again, except where Canon X arbitrators are permitted otherwise or the parties agree differently). Some of the relationships within the scope of disclosure include any direct or indirect financial interest in the outcome of the arbitration¹⁸¹ and relationships that might affect impartiality.¹⁸² The “reasonable effort” standard for arbitrator self-information remained the same.¹⁸³

Potentially relevant is the ABA/AAA decision not to transplant the “Introductory Note” from the 1977 Ethics Codes into the new one. In pertinent part, the Note had suggested that the Code provisions:

[A]re intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators, thereby depriving parties of the services of those who might be best informed and qualified to decide particular types of cases.¹⁸⁴

The Ethics Code does not mention nondisclosure as a ground for disqualification. Rather, it lists more general concepts such as partiality and lack of good faith, which may incorporate disclosure.¹⁸⁵ Generally, the language of the disclosure section

reversal of the presumption of non-neutrality effectively brings American arbitration into line with the international practice.”)

¹⁷⁹ See AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES R. 12(b), 16 (2005), available at <http://www.adr.org/sp.asp?id=22440> [hereinafter AAA RULES].

¹⁸⁰ Under Rule 12, unless specified that they are to be non-neutral, a party-appointed arbitrator must meet the standards in Rule 17 of impartiality and independence. See *id.* at R. 12, 17.

¹⁸¹ See AAA/ABA CODE OF ETHICS, *supra* note 7, Canon II.A(1).

¹⁸² See *id.* Canon II.A(2).

¹⁸³ See *id.* Canon II.B.

¹⁸⁴ Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 678 (7th Cir. 1983) (quoting the former Code's provisions for disclosure as meant to be applied realistically to obviate impracticality). Compare AAA/ABA CODE OF ETHICS, *supra* note 7, Note on Neutrality.

¹⁸⁵ AAA RULES, *supra* note 179, R. 17.

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

does not indicate *mandatory* disclosure¹⁸⁶ and the failure to provide an express remedy for a failure to disclose does not provide the revised Ethics Code the force that, even where codified, maybe it was intended. Finally, the Code incorporates a waiver rule that applies to all proceedings adopting AAA procedures.¹⁸⁷

In one of the only cases to cite the newly revised code, *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi*,¹⁸⁸ the court vacated an arbitration award for the failure of a neutral arbitrator to disclose.¹⁸⁹ The court looked at the parties' Submission Agreement, which provided the terms of disclosure and a waiver provision; specifically that "No arbitrator shall accept an appointment or sit on a Panel, where the arbitrator or the arbitrator's current employer has a direct or indirect interest in the outcome of the arbitration."¹⁹⁰ The court relied on the "broad standards for disclosure" in the Submission Agreement, the AAA/ABA Code of Ethics, and the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration,¹⁹¹ holding that the award should be

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- (i) partiality or lack of independence,
 - (ii) inability or refusal to perform his or her duties with diligence and in good faith, and
 - (iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

- (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

Id.

¹⁸⁶ See AAA/ABA CODE OF ETHICS, *supra* note 7, Canon II.A ("Persons who are requested to serve as arbitrators *should*, before accepting, disclose . . ."(emphasis added)).

¹⁸⁷ See AAA RULES, *supra* note 179, R. 37 ("Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.").

¹⁸⁸ No. 05-10540, 2006 U.S. Dist. LEXIS 44789 (S.D.N.Y. June 28, 2006).

¹⁸⁹ See *id.* at *28.

¹⁹⁰ *Id.* at *3 (quoting the Submission Agreement submitted by the respondent).

¹⁹¹ See *id.*; AAA/ABA CODE OF ETHICS, *supra* note 7, Canon II; INT'L BAR ASS'N, GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION 9-11 (2004), available at <http://www.ibanet.org/images/downloads/guidelines%20text.pdf>.

vacated due to the neutral arbitrator's nondisclosure. While the award would have likely been vacated under the Supreme Court's standard of "evident partiality,"¹⁹² this holding suggests not only a continuing obligation to disclose facts which might create a reasonable impression of bias, but also a continuing obligation to investigate any relationship that is disclosed for potential developments. The court noted:

It is reasonable, considering the Submission Agreement and [the arbitrator's] own disclosure statement, that the parties would rely on [the arbitrator] to continue to provide them with information should there be a relevant change in his relationship or in the event he discovered that he had misstated the facts in his disclosure.¹⁹³

B. California's New Ethics Standard

In response to consumer frustration over mandatory arbitration agreements, the California legislature took action in 2001 to curb what was perceived as arbitrator and arbitration-provider abuses.¹⁹⁴ It enacted section 1286.2(a)(6)(A) of the California Code of Civil Procedure as a solution to the growing "lack of public confidence" in arbitration in consumer contexts.¹⁹⁵ The statute codified the new California Ethics Standards requiring additional and extremely comprehensive arbitrator "disclosures about the relationships between the provider organization and a party or lawyer involved in a consumer arbitration,"¹⁹⁶ including disclosures about past service as a dispute resolution neutral for any party or attorney, other interests, relationships and affiliations that may constitute conflicts of interest, as well as "establishment of future professional relationships."¹⁹⁷

¹⁹² See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151–52 (1968) (White, J., concurring) ("[W]here the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.").

¹⁹³ *Applied Industrial*, at *19.

¹⁹⁴ See Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120–22 (2003).

¹⁹⁵ See Jaimie Kent, *The Debate in California Over and Implications of New Ethical Standards for Arbitrator Disclosure: Are the Changes Valid or Appropriate?*, 17 GEO. J. LEGAL ETHICS 903, 911–12 (2004).

¹⁹⁶ Glick, *supra* note 194, at 122 (citing CAL. ETHICS STDS., *supra* note 7, No. 8).

¹⁹⁷ CAL. CIV. PROC. CODE § 1281.85 (West 2002) (codifying the requirements of S.B. No. 475, 2001 Leg. (Ca. 2002)).

If an arbitrator wishes to entertain offers from other professional relationships, such as that of a mediator or other dispute resolution neutral, the arbitrator must disclose to all parties in writing within ten days of nomination that he or she will entertain such offers of employment. A party may then disqualify the arbitrator based on this disclosure. If no disclosure is made, the arbitrator is prohibited from entering into any new dispute resolution relationships with the parties or attorneys while the arbitration is pending.¹⁹⁸

The duty of an arbitrator to make reasonable inquiry into her potential conflicts was expanded as well.¹⁹⁹ Section 9 lays out an obligation for an arbitrator to “inform himself or herself of relationships or other matters involving her or her extended family and former spouse” by inquiring with immediate and extended family members and indicating in writing that he or she did such an inquiry.²⁰⁰ Further, an arbitrator must “inform himself or herself of relationships with any lawyer associated in the practice of law with the lawyer in the arbitration.”²⁰¹

The new statutes provide for disclosure of “specific data about arbitrations they have administered within the past five years” and “post the data on an internet website in a computer-searchable format.”²⁰² Broader than disclosure rules promulgated by the NASD and the New York Stock Exchange,²⁰³ the California rules extend to all neutral arbitrators throughout the period of the arbitration.²⁰⁴

Most dramatically, the California statute provides for vacating decision when arbitrators don't properly disclose transforming once optional guidelines into a mandate “with consequences for failure to comply.”²⁰⁵ If an arbitrator fails to comply with the statutory Ethics Standards, a party may serve a

¹⁹⁸ See CAL. ETHICS STDS., *supra* note 7, No. 12(c).

¹⁹⁹ See Glick, *supra* note 194, at 123.

²⁰⁰ CAL. ETHICS STDS., *supra* note 7, No. 9(b).

²⁰¹ *Id.* No. 9(c).

²⁰² Glick, *supra* note 194, at 122.

²⁰³ See NASD MANUAL, *supra* note 8, R. 10312(a); N.Y. STOCK EXCH., ARBITRATION RULES, R. 610(a) (2003) (“Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination.”).

²⁰⁴ See CAL. ETHICS STDS., *supra* note 7, No. 3(a).

²⁰⁵ Glick, *supra* note 194, at 121–22 (citing Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343, 346 (2003)).

notice of disqualification.²⁰⁶ Some of the specific mandatory disclosure requirements include: family relationships with a party or a lawyer in the arbitration,²⁰⁷ a relationship between a family members and an arbitrator, any service within the last five years in a case involving a party or attorney in the current arbitration, financial interests of the arbitrator or a family member in a party, or anything that “otherwise leads the arbitrator to believe that his or her disqualification will further the interests of justice.”²⁰⁸

Since state legislation cannot treat arbitration agreement in contracts differently than it treats provisions in contracts as a whole,²⁰⁹ California sought to avoid preemption under the Federal Arbitration Act by shifting the focus away from arbitration contracts and onto the arbitrators themselves.²¹⁰ But, will codes such as California’s Ethic Standards pass preemption? In *Ovitz v. Schulman*, the California Court of Appeal held that the FAA does not preempt the new standards based on the court’s “review of the relevant statutory language, the congressional purpose of the FAA, and the parties’ arbitration agreement.”²¹¹ After submitting to mandatory arbitration, an award was rendered in favor of Ovitz. However, during the arbitration proceeding, the arbitrator, Campbell Lucas, disclosed that he had accepted an offer a few months ago for a future matter with Ovitz’s counsel’s firm. When the opposing party sought disqualification of Lucas, the AAA refused. In opposition to Ovitz’s motion to confirm the award, Shulman argued that Lucas’ failure to disclose his business relationship at the time of appointment warranted vacatur under California Ethics Standard 12(b).

Ovitz argued that the FAA preempted the California Ethics Standards, such that an award vacatur is limited to the statutory language of the Act, specifically evident partiality. An example of how California is attempting to avoid preemption by placing

²⁰⁶ See CAL. ETHICS STDS., *supra* note 7, No. 10(a).

²⁰⁷ See *id.* No. 7(d). This includes “[t]he spouse or domestic partner of a lawyer in the arbitration.” *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

²¹⁰ *Drahozal*, *supra* note 169, at 393–95 (citing many states’ moves toward adopting the RUA, focusing on the process of arbitration—which includes extensive disclosure requirements—instead of trying to mandate arbitration).

²¹¹ *Ovitz v. Schulman*, 35 Cal. Rptr. 3d 117, 131 (Ct. App. 2005).

emphasis on an arbitrators duties, the court distinguished between the FAA's "evident partiality" as a basis for vacatur and the California Ethics Standards requirements for arbitrator disclosure. The court found that the arbitrator did not comply with section 12(b) by failing to note a relevant relationship in his initial disclosure and then failing to disclose after accepting a position in another case, "knowing of the involvement of the law firm representing [one of the parties] in the . . . arbitration."²¹² The issue, therefore, was explicitly about disclosure, not about vacatur. And since the FAA does not contain a provision regarding disclosure (i.e., Congress has not spoken on the issue), there is no conflict of law and, therefore, not a preemption issue.

In response to the new rules, however, provider organizations such as the NASD protested that California could not provide for more stringent standards than those of the Securities Exchange Commission ("SEC").²¹³ In response, the NASD and the New York Stock Exchange ("NYSE") "asked the federal court to exempt them from [the Standards, claiming] there was already extensive federal oversight" and that the FAA preempted the standards.²¹⁴ The court denied the NASD and NYSE relief. Two years later, however, the district court in *Mayo v. Dean Witter Reynolds, Inc.*²¹⁵ held that:

[A]pplication of the California standards to the NYSE and other self-regulatory organizations is preempted by the Exchange Act and the comprehensive system of federal regulations of the securities industry established pursuant to the Exchange Act. Moreover, at least as they are applied here, the California standards are preempted by § 2 of the FAA.²¹⁶

In 2005, the Ninth Circuit, in *Credit Suisse First Boston Corp. v. Grunwald*,²¹⁷ held that the California Ethics Standards were preempted by the NASD and NYSE disclosure rules. Also citing congressional intent and jurisdiction, the court affirmed

²¹² *Id.* at 128.

²¹³ See Glick, *supra* note 194, at 190; Kent, *supra* note 195, at 903.

²¹⁴ Glick, *supra* note 194, at 190 (citing Complaint for Declaratory Relief, Nat'l Ass'n of Sec. Dealers Dispute Resolution, Inc. v. Judicial Council of Cal., 232 F. Supp. 2d 1055 (N.D. Cal. 2002) (No. C-02-3486-SC)).

²¹⁵ 258 F. Supp. 2d 1097 (N.D. Cal. 2003), *amended*, 260 F. Supp. 2d 979 (N.D. Cal. 2003).

²¹⁶ *Id.* at 1116; see also Jevne v. Superior Court, 6 Cal. Rptr. 3d 542, 553-54 (Ct. App. 2003) (holding that NASD rules preempt the California Standards as a result of a direct conflict regarding arbitrator disqualification provisions).

²¹⁷ 400 F.3d 1119 (9th Cir. 2005).

that the NASD is not bound by California's ethics rules because they were preempted by a provision in the 1934 Securities Exchange Act.²¹⁸ Preemption applied because Congress' goal was inhibited by California's ethics rules where it made the SEC responsible for regulating self-regulating organizations; since it would be impossible to comply with both the federal rules and the California rules, the Supremacy Clause mandates that the NASD rules govern.²¹⁹ The NASD's Code does not mandate, but rather allows for removal of an arbitrator if she fails to make a required disclosure; even though an arbitration *can* be disqualified, parties may opt to prevent such disqualification by "unanimously agreeing that the arbitrator should not be disqualified."²²⁰ And, the battle seems hardly over as the court failed to address whether the FAA also preempted the California rules.

Those in favor of the new standards hold it as more efficient because it places the burden on those affected by the violation, as opposed to a government agency. It also provides for increased transparency with consequences to follow for failures to disclose, which give consumers some semblance of legitimacy and provide incentives for disclosure prior to arbitration.²²¹ Those in opposition to the new disclosure revisions see formal ethical regulations as another way that parties will avoid liability by using the standards to overturn otherwise legitimate arbitration awards.²²²

For now, California's Ethics Standard is the most demanding in the nation, and whether or not the FAA preempts the standards has yet to be addressed. Caution is essential, as one commentator noted:

The California disclosure rules for neutral arbitrators are complex and unforgiving. Knowing the rules and complying with them to the letter are essential not only for arbitrators, obviously, but also for the parties and their counsel. The latter must be aware of what the arbitrator has disclosed and, based on those disclosures, whether or not they or their opponents

²¹⁸ *Id.* at 1136.

²¹⁹ *Id.*

²²⁰ *Id.* at 1134 n.20.

²²¹ Kent, *supra* note 195, at 922.

²²² *Id.* at 923; *see also* Glick, *supra* note 194, at 128 (noting that any non-disclosure "no matter how trivial, has the potential to become the basis for challenging the enforcement of the award").

may offer the arbitrator additional employment as a neutral while the arbitration is pending. The consequences of failing to keep track can be significant. In the *Ovitz* case, even if the parties were to go through a second arbitration, the \$1.9 million award of attorneys' fees and costs in the first arbitration still would be lost forever.²²³

C. Other States' Disclosure Requirements

1. Revised Uniform Arbitration Act and State Treatment of Evident Partiality

Officially approved in 2000, the Revised Uniform Arbitration Act ("RUAA")²²⁴ was promulgated to provide, where parties' agreements are silent, "a model for arbitration that was increasingly efficient, streamlined, and . . . more attractive."²²⁵ The Committee wanted to limit "the grounds on which a court may review an arbitrator's award."²²⁶ Notwithstanding concerns of efficiency, the committee understood that the "notion of decision making by independent neutrals is central to the arbitration process." As of early 2006, the following states have adopted some version of the RUAA²²⁷: Alaska,²²⁸ Colorado,²²⁹ Delaware,²³⁰ Hawaii,²³¹ Nevada,²³² New Jersey,²³³ New Mexico,²³⁴ North Carolina,²³⁵ North Dakota,²³⁶ Oklahoma,²³⁷ Oregon,²³⁸ Tennessee,²³⁹ Utah,²⁴⁰ and Washington.²⁴¹ And currently, at

²²³ Walter Johnson, *Ovitz v. Shulman: California's Disclosure Rules for Neutral Arbitrators Are Not Preempted by the Federal Arbitration Act*, REGULATED FIN. INSTITUTIONS ALERT (Nixon Peabody LLP, New York, N.Y.), Nov. 8, 2005, at 4. Nixon Peabody LLP is the firm that represented Schulman on appeal.

²²⁴ UNIF. ARBITRATION ACT (2000).

²²⁵ Matthew E. Braun, *The Revised Uniform Arbitration Act*, 18 OHIO ST. J. ON DISP. RESOL. 237, 238 (2002).

²²⁶ *Id.*

²²⁷ UNIF. ARBITRATION ACT (2000).

²²⁸ ALASKA STAT. §§ 09.43.300 to .595 (2006).

²²⁹ COLO. REV. STAT. ANN. § 13-22-212 (West 2006).

²³⁰ DEL. CODE ANN. tit. 10, § 5701 (2006).

²³¹ HAW. REV. STAT. ANN. § 658A-23 (LexisNexis 2006).

²³² NEV. REV. STAT. ANN. § 38.227 (LexisNexis 2006).

²³³ N.J. STAT. ANN. §§ 2A:23B-1 to 23B-32 (West 2006).

²³⁴ N.M. STAT. ANN. § 44-7A-13 (West 2006).

²³⁵ N.C. GEN. STAT. § 1-569.12 (2006).

²³⁶ N.D. CENT. CODE § 32-29.3-12 (2006).

²³⁷ OKLA. STAT. ANN. tit. 12, § 1863 (West 2006).

²³⁸ OR. REV. STAT. § 36.650 (2006).

²³⁹ TENN. CODE ANN. § 29-5-301 (2006).

least twelve states and the District of Columbia have adopted or introduced such legislation.²⁴²

Similar to the AAA/ABA Code of Ethics, the RUAA provides that *before* accepting an appointment, an arbitrator must disclose *known* facts that could affect his or her impartiality, such as financial or personal interests in the outcome. Lack of this required disclosure *may* be a ground for vacating an arbitration award. The Drafting Committee was unequivocal about providing an *objective* standard for disclosure requiring those “facts that a reasonable person would consider likely to affect the arbitrator’s impartiality in the arbitration proceeding” to be disclosed.²⁴³ Again, this is similar to the AAA/ABA revised Ethics Codes,²⁴⁴ as is the ongoing nature of an arbitrator’s disclosure obligations.²⁴⁵

In adopting the Fourth Circuit’s holding in *ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc.*²⁴⁶ that only substantial relationships provide the basis for evident partiality, the Committee altered the requirement to disclose broadly “any” interest, replacing it with the need to disclose “‘an’ existing or past” interest with the purpose of having arbitrators “not to include *de minimis* interests or relationships.”²⁴⁷

²⁴⁰ UTAH CODE ANN. § 78-31a-101 (2006).

²⁴¹ WASH. REV. CODE § 7.04A.120 (2007).

²⁴² See The Nat’l Conference of Comm’rs on Unif. State Laws, *A Few Facts About the Uniform Arbitration Act* (2000), http://www.nccusl.org?Update/uniformact_factsheets?uniformacts-fs-aa.asp (last visited Feb. 6, 2007).

²⁴³ UNIF. ARBITRATION ACT § 12 cmt. 3, 7 U.L.A. 45 (2000) (citing *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493 (4th Cir. 1999)).

²⁴⁴ See *id.* § 12 cmt. 2.

²⁴⁵ *Id.* § 12(b).

²⁴⁶ 173 F.3d 493 (4th Cir. 1999).

²⁴⁷ *Id.* § 12, cmt. 2.

For example, if an arbitrator owned a mutual fund which as part of a large portfolio of investments held some shares of stock in a corporation involved as a party in an arbitration, it might not be reasonable to expect the arbitrator to know of such investment and in any event the investment might be of such an insubstantial nature so as not to reasonably affect the impartiality of the arbitrator.

Id.; see also *Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 571 A.2d 426, 427 (Del. Ch. 1999) (holding that under the Delaware Uniform Arbitration Act, title 10, section 5714(a)(2), nondisclosure that the attorney representing InSight was also representing the AAA arbitrator in a matter worth over \$100,000 constituted facts of a substantial relationship to create “reasonable impression of bias” sufficient to vacate an award).

The RUAA's vacatur section limits the grounds on which a party could seek vacatur in an attempt to curb vacatur as a means of expressing dissatisfaction with an arbitration result.²⁴⁸ Addressing the tension that riddles the issue of disclosure in arbitration, the RUAA addresses the conflict between the desire for arbitrator independence and impartiality with the industry-specific nature of arbitration, which demands an experience that comes with "ties in the business world."²⁴⁹ To this extent, and in contrast to the AAA/ABA provision, there is *no presumption of neutrality* for arbitrators generally, only for neutral arbitrators. Under section 12(e) of the RUAA, a neutral arbitrator who fails to disclose "known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2)."²⁵⁰ There is no per se vacatur for nondisclosure.

Distinctive to the RUAA, where an arbitrator fails to disclose information set forth in the statute, she or he "creates the presumption of vacatur in Section 23(a)(2)." The burden then shifts to the party accused of nondisclosure "to rebut the presumption by showing that the award was not tainted by the non-disclosure or there in fact was no prejudice."²⁵¹ The statute provides that where the arbitrator fails to rebut the presumption, the award *shall* be vacated. Grounds for vacatur may be found in relationships outside those enumerated, so long as there is "a known, direct and material interest" or a "substantial relationship."²⁵²

The states that have adopted some form of the RUAA have consistently retained the objective standard for determining evident partiality, with at least Hawaii and Utah adopting the code verbatim.²⁵³ With exceptions, there have been few cases

²⁴⁸ See Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 81 (discussing how vacatur sections of arbitration statutes act as vehicles of closure for arbitration agreements).

²⁴⁹ *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 148 (1968); see also UNIF. ARBITRATION ACT § 12(c)-(e) (2000).

²⁵⁰ UNIF. ARBITRATION ACT § 12(e).

²⁵¹ *Id.* § 12 cmt. 4.

²⁵² *Id.* § 12 cmt. 4.

²⁵³ See, e.g., MO. REV. STAT. § 435.450 (2006); N.C. GEN. STAT. § 1-569.12 (2006); N.D. CENT. CODE, § 32-29.3-12 (2006); N.J. STAT. ANN. § 2A:23B-12(a) (West 2006) (providing that prior to accepting an arbitration appointment, an arbitrator shall

under these *new* statutes (especially as some have gone into effect as recently as this year) addressing the vacatur of arbitration awards due to the failure of an arbitrator to disclose facts potentially rendering him or her partial.

Where state courts have addressed arbitrator disclosure under their respective RUAA, the results have not differed greatly from federal courts adopting the reasonable standard, with some relying explicitly on federal case law to determine whether an arbitrator's failure to disclose requires vacatur under section 10(a)(2). As indicated above, the inquiries into evident partiality are fact-intensive and require courts to look at the nature of the relationships or conflicts at issue, in particular whether there exists a financial or other interest that is contemporaneous with the arbitration or where there is a relationship that is not trivial.²⁵⁴

Despite the intent behind the RUAA,²⁵⁵ the Act has not greatly clarified arbitrator disclosure. In its first case to interpret the revised Nevada Arbitration Act, the Supreme Court of Nevada reversed the district court's vacatur of an arbitration award as the facts failed to established evident partiality.²⁵⁶ Adopting a "reasonable impression of partiality" standard, the court held that the arbitrator Matthew Goldberg did not have a duty to disclose his membership on a permanent arbitration panel for the Las Vegas Metropolitan Police Department, despite

disclose "known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator"); N.M. STAT. ANN. § 44-7A-13 (West 2006); OKLA. STAT. tit. 12, § 1863 (West 2006); OR. REV. STAT. § 36.650 (2006); UTAH CODE ANN. §§ 78-31a-113, 78-31a-124 (2006); WASH. REV. CODE § 7.04A.120 (2007); H.B 1210, 81st Legis. Assemb. (S.D. 2006).

²⁵⁴ See *Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 859 A.2d 742, 743-45, 747-48 (N.J. Super. Ct. App. Div. 2004) (holding, in an arbitration pursuant to the NASD Code of Arbitration Procedure, that an arbitrator's failure to disclose that the company he worked for had been a former co-underwriter with Merrill Lynch following an investigation did not satisfy the standard of evident partiality, particularly because such a relationship has no connection to the arbitration).

²⁵⁵ See Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 220 (2002).

Seizing the opportunity to sharpen and clarify, the RUAA Drafting Committee laid out a statutory standard for arbitrator disclosure that places an affirmative, continuing duty on arbitrators to make a reasonable inquiry and to disclose to the parties "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding.

Id. (quoting the Federal Arbitration Act, 9 U.S.C. § 12(a)-(b) (2000)).

²⁵⁶ *Thomas v. City of N. Las Vegas*, 127 P.3d 1057, 1070 (Nev. 2006).

the fact that the plaintiffs brought this case in protest of their termination from the North Las Vegas Metropolitan Police Department.²⁵⁷ Such a membership was not one of the relationships outlined in the revised code comments and did not rise to the level of a “managerial, representational or consultative” level; further, Goldberg had no financial interest at stake in the arbitration.²⁵⁸

In *Bailey v. American General Life and Accident Insurance Co.*,²⁵⁹ the court refused to vacate an award on a challenge that a neutral AAA arbitrator failed to sufficiently disclose. The arbitrator, Barbara Moss, provided a disclosure statement, sent it to the parties via the AAA, which indicated that her firm was representing respondent American General in two other matters and a colleague represented American General “from time to time.” The AAA indicated that any objections to any disclosure were to be made “on or before January 16, 2002,” after which the AAA would make a determination on such objections.²⁶⁰ Petitioner Bailey did not challenge the disclosure until after the award at which time she claimed that the disclosure should have provided more details. The court found that Bailey had waived any objection to the disclosure because the Rules laid out in the parties’ Resolution Plan required that disclosure be made “for comment.”²⁶¹ Relying on Second Circuit case law, allowing Bailey to challenge the award after an unfavorable award would condone parties making “strategic decisions not to challenge the selection of an arbitrator [but] only to use the same grounds to challenge the award later.”²⁶²

Colorado has adopted its version of the UAA (known as the CUAA). Despite rigid guidelines which mirror the FAA, there have been no reported Colorado cases of vacatur based solely on a failure to disclose since the revision.²⁶³ Under its code, there must be a showing of “evident partiality,” which has generally

²⁵⁷ *See id.* at 1061–63.

²⁵⁸ *See id.* at 1070.

²⁵⁹ No. M2003-01666, 2005 Tenn. App. LEXIS 838, at *1–2 (Ct. App. Dec. 29, 2005).

²⁶⁰ *Id.* at *11.

²⁶¹ *Id.* at *24–25.

²⁶² *Id.* at *30.

²⁶³ O. Russel Murray, *Arbitrator and Mediator Disclosure Obligations in Colorado*, COLO. LAW., Sept. 2005, at 53.

been defined as financial interest;²⁶⁴ this is consistent with Justice White's concurrence in *Commonwealth Coatings*.

*D. National Association of Securities Dealers*²⁶⁵

The NASD Code of Arbitration Procedure²⁶⁶ requires that arbitrators "disclose: (1) any direct or indirect financial or personal interest in the outcome of the arbitration; (2) any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias."²⁶⁷ A distinction from other codes in the NASD Code is that "[a]ll arbitrators in securities controversies must qualify as impartial, neutral arbitrators."²⁶⁸ The Code also requires arbitrators to investigate potential conflicts before and during arbitration. NASD Director also retains authority to disqualify an arbitrator.²⁶⁹

²⁶⁴ See *id.*

²⁶⁵ The NASD was created pursuant to Section 15A of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3 (2000). See Robert N. Rapp, *Rethinking Risky Investments for That Little Old Lady: A Realistic Role for Modern Portfolio Theory in Assessing Suitability Obligations of Stockbrokers*, 24 OHIO N.U. L. REV. 189, 197 n.32 (1998).

²⁶⁶ See NASD MANUAL, *supra* note 8, R. 10312.

²⁶⁷ *Id.* R. 10312(a).

²⁶⁸ NAT'L ASS'N OF SEC. DEALERS, ARBITRATOR'S MANUAL (2007), <http://www.nasd.com/ArbitrationMediation/ResourcesforArbitratorsandMediators/GeneralInformationandReference/ArbitratorsManual/DutytoDiscloseConflicts/index.htm>.

²⁶⁹ See NASD MANUAL, *supra* note 8, R. 10312. Rule 10312 states the following:

(d) Removal by Director

(1) The Director may remove an arbitrator based on information that is required to be disclosed pursuant to this Rule.

(2) After the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, the Director may remove an arbitrator based only on information not known to the parties when the arbitrator was selected. The Director's authority under this subparagraph (2) may be exercised only by the Director or the President of NASD Dispute Resolution.

(3) The Director will grant a party's request to disqualify an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has an interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative.

(e) The Director shall inform the parties to an arbitration proceeding of any information disclosed to the Director under this Rule unless either the arbitrator who disclosed the information withdraws voluntarily as soon as the arbitrator learns of any interest, relationship, or circumstances

In 2004, the SEC approved revisions to the NASD Code, specifically provisions that dealt with arbitrator disclosure.²⁷⁰ Similar to the AAA/ABA Code of Ethics and the California Ethics Standards, these revisions were prompted by a perceived lack of confidence in the arbitration process, specifically on the part of investors. To determine the impact of the recently adopted California Ethic Standards on the current conflict disclosure rules of SRO's, the SEC initiated and published the Report to the Securities And Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations²⁷¹ ("Perino Report"). The Perino Report provided for the adoption of several new provisions regarding arbitrator disclosure. Nevertheless, the evaluation concluded that the changes implemented in the California Ethics Standard were more costly than effective, particularly as "there is little if any indication that undisclosed conflicts represent a significant problem" in NASD or NYSE (collectively, self-regulating organizations, or SRO's) arbitrations.²⁷² According to the report, "significant unintended consequences . . . may reduce investors' perceptions of the fairness of SRO arbitrations."

described in paragraph (a) that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.

Id.

²⁷⁰ Cf. Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 423 (2006).

With the significant influx of additional and often more complex cases resulting from the McMahon decision, numerous issues that previously had only been discussed at SICA (when SRO arbitrations were largely voluntary) were reconsidered (for example: expanded discovery procedures; selection, qualification, background disclosures, training and evaluation of arbitrators; method of transcribing and preserving the record of arbitration hearings; and, the burdens placed upon SROs resulting from the anticipated increase in case loads.

Id.

²⁷¹ The SEC retained Professor Michael Perino to assess the California Standards, the results of which were made available in MICHAEL PERINO, REPORT TO THE SECURITIES AND EXCHANGE COMMISSION REGARDING ARBITRATOR CONFLICT DISCLOSURE REQUIREMENTS IN NASD AND NYSE SECURITIES ARBITRATIONS 2-3 (Nov. 4, 2002), [http://www.http://www.sec.gov/pdf/arbconflict.pdf](http://www.sec.gov/pdf/arbconflict.pdf).

²⁷² *Id.* at 3; see also Kent, *supra* note 195, at 903 n.5 (citing Caroline E. Mayer, *Arbitration Standards Challenged*, WASH. POST, July 30, 2002, at E01 ("The California rules are so complex that they not only would raise the cost of arbitration but also could reduce the number of arbitrators willing to serve.")).

To address complaints that arbitrators themselves display a bias towards the securities industry,²⁷³ even where contrary to Perino's report indicating little investor lack of confidence,²⁷⁴ the report did recommend additions that have since been codified. These included: an amendment reinforcing disclosure as mandatory;²⁷⁵ redefinition of what a public and non-public arbitrator is; and an amended definition of family.²⁷⁶ The Code now expands the definition of "immediate family member . . . to include parents, stepparents, children, or stepchildren, as well as any member of the arbitrator's household."²⁷⁷ As the Code mandates that an investor with a dispute shall be entitled to arbitration with a public arbitrator, the modification in who a public arbitrator is has import for Rule 10308(a)(4) increases the years for an arbitrator to transition from the industry to working as a public arbitrator from three to five. Under the definition of who a public arbitrator is, Rule 10308(a)(5)(A)(ii) bans anyone

²⁷³ PERINO, *supra* note 271, at 3; see generally Peter B. Rutledge, *Market Solutions to Market Problems: Re-Examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration*, 26 PACE L. REV. 113, 114–15 (2005) (discussing the general perception of unfairness regarding securities arbitrations).

²⁷⁴ See NATIONAL ARBITRATION FORUM REPORT: STUDIES COMPARE ARBITRATION AND LITIGATION, <http://www.arbitration-truth.com/arbitration-studies.htm> (last visited Feb. 7, 2007).

The data were derived from securities arbitrations involving consumers over a 21-year period (1980–2001). During those years securities industry arbitrators decided 31,001 public customer cases, and 16,294 of those cases (52.56%) resulted in awards for consumers. (Note: Federal court data from the Administrative Office of the United States Courts show plaintiffs in "Stockholders Suits" in 2000 prevailed only 32% of the time).

Furthermore, in a study surveying the responses of NASD investor-participants regarding their perceptions of fairness of SRO arbitrations, the results showed that an overwhelming 93% of the respondents believed their cases were handled fairly and without bias. Also, over 91% of respondents said their arbitrators demonstrated a level of fairness that was classified as excellent or good.

Id.

²⁷⁵ NASD MANUAL, *supra* note 8, R. 10312(b). The language of this provision was changed to read that "arbitrators must make a reasonable effort to inform themselves of any interests, relationships or circumstances described" above from "arbitrators *should*" make such disclosures.

²⁷⁶ U.S. Securities Exchange Commission, *Report to the SEC Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations*, <http://www.sec.gov/news/press/2002-161.htm>.

²⁷⁷ Order Granting Approval to a Proposed Rule Change Relating to Arbitrator Classification and Disclosure in NASD Arbitrations, 69 Fed. Reg. 21,871, 21,873 (Apr. 24, 2004).

who has been in the industry for at least twenty years from becoming a public arbitrator, among the other restrictions on who can be a public arbitrator.²⁷⁸

In *Schmitz*, discussed previously, as per an agreement between the parties, any dispute was to be arbitrated in accordance with the NASD Code.²⁷⁹ After a dispute arose between the parties, arbitrators were chosen and disclosure forms were completed in compliance with the NASD ethical code; neither side objected to the chosen arbitrators. After the panel found in favor of the appellees, the appellants learned that one of the arbitrators' law firm had represented the parent company, Prudential Insurance, Inc., of the appellee "in at least nineteen cases during a period of 35 years," with the most recent being twenty-one months prior to the arbitration at issue.²⁸⁰ The arbitrator, John R. Conrad, while he knew Prudential Insurance, Inc. was the parent company, only ran a check for the appellees' company, Prudential-Bache. Thus, Conrad did not uncover the cases at issue and did not disclose them. The appellants appealed the award in favor of the appellees, claiming that this failure to investigate and disclose constituted evident partiality under the FAA.²⁸¹

The court looked to the NASD Code in determining that neutral arbitrators have an independent duty to investigate potential conflicts. In overturning the district court's ruling that there was no evident partiality, the court adopted the "reasonable impression of partiality" standard for proving evident partiality in nondisclosure cases.²⁸² The court rejected the district court's contention that there could be no evident partiality where the arbitrator had no duty to investigate and, therefore, no knowledge of the conflict.²⁸³ The Ninth Circuit rejects this, stating, that while such knowledge precludes *actual* bias, "it does not always prohibit a reasonable impression of partiality."²⁸⁴ There is an independent duty to investigate, under Sections 23(a) and (b) of the NASD Code, such that where "an

²⁷⁸ NASD MANUAL, *supra* note 8, R. 10308(a)(5)(A)(ii).

²⁷⁹ *Schmitz v. Zilveti*, 20 F.3d 1043, 1044 (9th Cir. 1994).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 1044–45.

²⁸² *Id.* at 1046, 1048–50 (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982) and adopting its standard).

²⁸³ *Id.* at 1048.

²⁸⁴ *Id.*

actual conflict exists and the lawyer has constructive knowledge of it,” it creates a reasonable impression of partiality.²⁸⁵ The court held that the arbitrator had actual knowledge of the relationship between Prudential-Bache and Prudential Insurance, and therefore he had constructive knowledge of his firm’s previous representations of the parent company. His failure to fulfill his duty “under the NASD Code to make a reasonable effort to inform himself of his firm’s representation of Pru[dential]-Bache’s parent” evidenced evident partiality and warranted vacatur.²⁸⁶

Nevertheless, the Eighth Circuit held that a violation of the NASD Code as it relates to disclosure standards, does not demand vacatur in federal court where the FAA is applicable.²⁸⁷ This reinforces the fact, as articulated in *Commonwealth Coatings*, that while courts may look to ethics codes for guidance, they are not the law and thus not binding on arbitrators.²⁸⁸ The NASD Code requires on-going disclosure of relationships (which by definition precludes just an appearance before an arbitrator) with grounds for vacatur of arbitration claims still falling under section 10(a)(2).²⁸⁹ In quoting *University Commons-Urbana v. Universal Constructors, Inc.*, the court in *Boll v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*²⁹⁰ noted that:

[T]he Eleventh Circuit was careful to distinguish between “a large number of [previous encounters between counsel for one of the parties and an arbitrator]” which “at first blush” might seem to imply an inappropriately close association between arbitrator and counsel,” but might “simply be the result of the fact that both specialize in [a certain area of the law]” and those

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 1049.

²⁸⁷ *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 984 (8th Cir. 2001).

²⁸⁸ *Id.* (“[A] federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with NASD rules.”).

²⁸⁹ *See id.* (holding that arbitrator partiality is not established by an arbitrator’s undisclosed past associations with the law firm representing one of the parties, dating back five years); *Mariner Fin. Group v. Bossley*, 79 S.W.3d 30, 30–32, 35 (Tex. 2002) (holding that the arbitrator’s failure to disclose that the customer’s expert witness had previously testified against him presented factual issues as to his partiality); *Katsorsis*, *supra* note 270, at 440 (“After McMahan, the [disclosure] section was expanded to parallel Canon II of the Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) by explicitly imposing a duty upon the arbitrator to disclose *any* potential conflict—an ongoing duty which continues throughout the proceeding.”).

²⁹⁰ No. 04-800031, 2004 U.S. Dist LEXIS 27948 (S.D. Fla. June 25, 2004).

cases where the previous encounters “represent part of an ongoing business relationship.” While disclosure would be required in the first instance, no such disclosure would be required in the latter.²⁹¹

Distinguishing the contact outlined in *University Commons-Urbana*, where a non-party had an undisclosed, substantial financial relationship with an arbitrator, the court rebuked any hint at evident partiality where the respondent had no financial or business relationship with either arbitrator at any time before or during the arbitration.²⁹² The court hinged the *Boll* decision on the lack of any *relationship*, which is what the court distinguished from “trivial business relationships” under *Commonwealth Coatings*.²⁹³

But, even those relationships that seem trivial, and would most likely not constitute evident partiality, are to be disclosed. For instance:

[A] securities professional who attends a Rotary Club luncheon for the purpose of soliciting clients should disclose if he or she then happens to meet one of the parties, parties' representatives, or even another arbitrator on the panel. Although the contact may seem innocuous, the parties have the right to be apprised of the meeting and to judge the partiality of the arbitrator.²⁹⁴

In *Van Pelt v. UBS Financial Services*,²⁹⁵ the court affirmed an arbitration award against a challenge of evident partiality.²⁹⁶ After receiving disclosure statements by James Edward Banks, one of three NASD-appointed arbitrators, which stated the date his employment at Bank of America ended, defendant-UBS did not request additional information nor object in any respect to his appointment.²⁹⁷ After the arbitration, UBS “did not lodge any protest or request any additional information regarding Mr.

²⁹¹ *Id.* at *19 (quoting *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339–40 (11th Cir. 2002)).

²⁹² *Id.* at *21.

²⁹³ *Id.* at *23 n.8.

²⁹⁴ Rina Spiewak, *When in Doubt, Disclose*, NEUTRAL CORNER, Apr. 2006, http://www.nasd.com/ArbitrationMediation/ResourcesforArbitratorsandMediators/GeneralInformationandReference/TheNeutralCorner/NASDW_016590.

²⁹⁵ No. 3:04cv477, 2006 U.S. Dist. LEXIS 39556, at *12 (W.D.N.C. June 14, 2006).

²⁹⁶ *Id.* at *12.

²⁹⁷ *Id.* at *3.

Banks.”²⁹⁸ After an award in Van Pelt’s favor, however, UBS challenged the award claiming that Banks evidenced evident partiality in failing to disclose the circumstances of his retirement from Bank of America; UBS claimed because his retirement was recent, whether he was terminated involuntarily or not could affect his impartiality since the present case was a termination claim.²⁹⁹ The court disagreed, holding that while the NASD Rules impose an affirmative duty on arbitrators to disclose potential conflicts, the “asserted need to investigate further to see whether the Chairman may have failed to disclose some material circumstance . . . that would create an appearance of bias is remote, circular, and speculative.”³⁰⁰ Nevertheless, courts have reiterated that “a federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with NASD rules,” since section 10(a)(2) controls.³⁰¹ And, again, courts are left with similar codes, whether the guiding NASD Code or a codified RUAA, being used with varying degrees to determine whether an arbitrator’s nondisclosure constitutes evident partiality.

VI. PROPOSED UNIFORM STANDARD

The courts’ case-by-case approach to the Supreme Court’s “evident partiality” standard has resulted in inconsistent results for arbitrator (non)disclosure standards. Various codes adopted by such organizations as the ABA/AAA and NASD, and statutory schemes, including the far reaching California statute and the UAA, have attempted to articulate clear requirements and standards for violations. Although each attempt contributed positively to clarifying the requirements, it remains a patchwork of different standards. Further, with the increased disclosure requirements and the myriad disclosure standards emanating from the FAA’s “evident partiality” language, the cost and efficiency of the arbitration process is threatened. For example, the California statute’s requirement that an arbitrator investigate possible conflicts (past, present, *and* future) between the parties and their witnesses and his or her former spouse is casting the net way beyond the goal of ensuring against actual

²⁹⁸ *Id.* at *4.

²⁹⁹ *Id.* at *7–8.

³⁰⁰ *Id.* at *8–9.

³⁰¹ *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 984 (8th Cir. 2001).

bias. After all, an arbitrator and the former spouse might have had no contact in the twenty years since the divorce, and conducting an investigation is simply a waste of time.

The proposed standards for disclosure set out below presume that most employment and labor arbitrators know most other arbitrators in the field or had professional and sometimes personal relationships with members of the various panels.³⁰² Most arbitrators are either attorneys, fully knowledgeable of the employment law area through their current or previous legal practices in employment law, or labor arbitrators (most of whom are attorneys) who usually serve on a variety of labor panels. Most labor arbitrators know each other from their current or former legal practices or their previous work as attorneys at the National Labor Relations Board or state labor relations boards. A number of both employment and labor arbitrators are law school professors whose teaching and scholarship involve work law.³⁰³ This experience and expertise of the arbitrators is essential in employment arbitration because it involves a complex area of statutory discrimination issues and a large variety of other statutory and common law claims. This is especially true with respect to the statutory discrimination claims, which have evolved primarily through federal court civil rights litigation establishing and expanding on developing theories of discrimination law as public law. To privatize discrimination claims without a requirement that the arbitrators are experts in the depth of the law would go against the public policy in the federal discrimination laws to stop or prevent discrimination that is both harmful to the individual and the society.

In the traditional labor arbitration area, most of the parties are "repeat players," since they are all either the unions or

³⁰² The lead author of this article has served on the AAA Employment Dispute Resolution Panel since its inception in 1996 and attends national meetings of arbitrators, such as the ABA Section on Labor and Employment, ADR Committee's meeting. He has regular professional contacts with leading members of the National Academy of Arbitrators, who traditionally came from a background of labor, in contrast to employment arbitration, although many of these arbitrators are on employment panels today.

³⁰³ For example, on the New York area AAA Employment Dispute Resolution Panel, of the approximately twenty-five members, three are current full time law professors, one a former full time professor, and at least four have served as adjunct professors.

employers involved in a collective bargaining relationship. Employment arbitrators on the AAA's Employment Dispute Resolution Panels certainly know the other arbitrators in their geographic areas because they meet at training and other programs and serve with many members of the Panel on particular arbitration panels. Many labor and employment arbitrators work full time in this capacity. And, of course, since most arbitrators in the employment and labor arbitration field have worked primarily in this area during their professional work lives, they have contacts with numerous attorneys representing the parties.

Given this reality of frequent contacts between arbitrators and the attorneys representing the parties, and the important value of ensuring a process that provides for a fair and impartial hearing and award, it is crucial that a clear and objective, but not onerous disclosure requirement, be utilized. Opposing counsel's appearance in a previous arbitrated matter before one or more arbitrators on the purported panel or the arbitrators' previous service with one or more of the arbitrators more than five years ago is an example of the trivial relationships alluded to by Justice White in his *Commonwealth Coatings* concurrence and thus should not rise to the level of evident partiality.³⁰⁴ "[F]amiliarity due to confluent areas of expertise does not indicate bias. Rather, so long as the previous interactions do not represent part of an ongoing business relationship," such familiarity with an industry more than likely presents an asset in the context of arbitration.³⁰⁵ If any of the arbitrators previously represented any of the parties, including parent corporations, that fact should always be disclosed. Where the arbitrator is no longer working at the firm, however, this fact should mitigate against disqualification.

In examining the proposed disclosure requirements to determine evident partiality, a reasonableness standard³⁰⁶

³⁰⁴ See *Crow Constr. Co. v. Jeffrey M. Brown Assoc., Inc.*, 264 F. Supp. 2d 217, 224 (E.D. Pa. 2003) (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1969) (White, J., concurring)).

³⁰⁵ *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1340–43 (11th Cir. 2002) (finding that the petitioners made out two separate prima facie cases for vacatur under evident partiality where an arbitrator failed to disclose a concurrent business relationship with one of the parties' lawyer and a meeting with the president of the same party).

³⁰⁶ See, e.g., *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.*,

should apply, requiring “more than a mere appearance of bias,”³⁰⁷ such that an award will be vacated where the facts would lead a reasonable person to conclude that the arbitrator lacked partiality. The relationship should be material and substantial to constitute evident partiality. As indicated in Part III, while an arbitrator’s failure to disclose is relevant to an inquiry into arbitrator partiality, it alone is not always sufficient to establish “evident partiality,” as set forth in 9 U.S.C. § 10(a)(2). First, the arbitrator should make a reasonable inquiry to determine any disclosable information. Failure to make such an investigation should result in a vacation where an arbitrator fails to disclose information that a party subsequently objects to as evidencing partiality and the objection on its face is material. In other words, where there is actual bias or an arbitrator fails to disclose “information which would lead a reasonable person to believe that a potential conflict exists,”³⁰⁸ then evident partiality is present. Courts should examine the nature of the relationship and its connection to the arbitration dispute, including: (1) personal interest, pecuniary or otherwise, the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of the relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.

The time, nature, and depth of the relationship should be weighed. For example, where a potential conflict involving a financial or other interest to the arbitrator is contemporaneous or

Inc., 146 F.3d 1309, 1312–13 (11th Cir. 1998); *Lifecare Int’l, Inc. v CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (stating that the mere appearance of bias is insufficient to vacate an arbitration award); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984); *Int’l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981).

³⁰⁷ See, e.g., *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992) (“‘Evident partiality’ . . . means more than a mere appearance of bias [O]ften [arbitrators] have interests and relationships that overlap with the matter they are considering as arbitrators. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.”); *Evans Indus., Inc. v. Lexington Ins. Co.*, No. 01-1546, 2001 U.S. Dist. LEXIS 10419, at *10 (E.D. La. July 12, 2001) (quoting *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987) (affirming an arbitration award against a challenge of evident partiality where the arbitrator had at one time owned interest in a partnership at issue, including earning commissions)).

³⁰⁸ *Gianelli Money*, 146 F.3d at 1312–13.

close in time to the arbitration and/or exemplify some significant relationship, courts should vacate.

An arbitrator should disclose all material and substantial relationships with any of the arbitrators, the parties, their representatives, or witnesses that occurred within a five year period. Any time money changes hands directly between an arbitrator and another arbitrator, or a representative of one of the parties involved in a pending arbitration before that arbitrator, disclosure must take place. In addition, arbitrators who have served as arbitrators or mediators involving any of the parties or their representatives outside this period should state, at least in general terms, that the arbitrator served in such a capacity in the past, and should give specifics if there are factors that might demonstrate an actual conflict or bias.

The norm in arbitration should be that there is a strong presumption of neutrality, unless a parties' intent or applicable law dictates otherwise, and neutral and non-neutral arbitrators will be presumed neutral. This places the code of ethics more parallel to international arbitration standards. If an arbitrator entertains offers from any party or their representatives, or forms other professional relationships such as that of a mediator or other dispute resolution neutral, the arbitrator must timely disclose to all parties in writing that he or she will entertain such offers of employment.

CONCLUSION

The courts differ as to what arbitrators should disclose to prevent disqualification of an arbitrator and/or vacatur of an award. Even when the courts agree on the standard, it is applied inconsistently. The recent efforts by various organizations and states to develop codes of conduct and standards have resulted in a patchwork of rules. A disclosure standard should require revelation of actual conflict. In other words, it should preclude *actual* bias, but "it does not prohibit a reasonable impression of partiality." Arbitrators should disclose fully all their relationships with parties and potential conflicts of interest prior to an arbitration proceeding. The role of the judiciary in determining an arbitrator's impartiality after an award has been made will be significantly reduced, since parties will have an opportunity at the onset of arbitration to reject or accept an

arbitrator with full knowledge of his connections with the other party.

[I]t seems to us that the better practice is that arbitrators should disclose fully all their relationships with the parties, whether these ties be of a direct or indirect nature. Although some unnecessary disclosure may result, "if arbitrators err on the side of disclosure, . . . it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award."³⁰⁹

Disclosure must occur at every stage of the arbitration, as arbitrators have a continuing duty to disclose,³¹⁰ and sometimes a continuing duty to investigate, circumstances or relationships which may provide evidence of evident partiality, whether that be an impression of bias or facts which would lead a reasonable person to believe an arbitrator is biased. Where an arbitrator has completely followed his obligation under rules and terms of the parties' agreement, which she or he believes might disqualify him as impartial arbitrator, an arbitration award cannot be set aside on ground of arbitrator bias.

The codes and the courts should focus on whether the professional and social relationships between all the actors in the arbitral forum, the parties, the arbitrators, and the witnesses, result in evident partiality. A reasonableness standard makes sense and the codes should be reexamined to ensure that the value of full disclosure is not overwhelmed by onerous

³⁰⁹ *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263-64 (2d Cir. 1973) (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 152 (1969) (White, J., concurring)).

³¹⁰ AAA/ABA CODE OF ETHICS, *supra* note 7, Canon II.C ("The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered."); NASD MANUAL, *supra* note 8, R. 10312(c) ("The obligation to disclose . . . is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered."); UNIF. ARBITRATION ACT § 12(b) (2000) ("An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator."); CAL. ETHICS STDS. *supra* note 7, at No. 7(e) ("An arbitrator's duty to inform himself or herself of and to disclose matters . . . is a continuing duty, applying from service of the notice of the arbitrator's proposed nomination or appointment until the conclusion of the arbitration proceeding.").

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requirements. The fact that employment and labor arbitrators should be presumed to know each other, and that fact by itself, should not require disqualification.