Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes

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I. INTRODUCTION

Arbitration is a frequently utilized,[1] expeditious and cost-effective alternative to litigation.[2] While additional advantages of arbitration include privacy, specialized arbitrator expertise and party control over

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[1] International Centre for Dispute Resolution, http://www.adr.org/sp.asp?id=28819 (last visited Dec. 27, 2008).

[2] 9 US NITA prec § 1; American Arbitration Association, http: www.adr.org/sp.asp?id=28749 (last visited Dec. 27, 2008).

the process,[3] the most important feature of arbitration, and indeed, the key to its success, is the public's confidence and trust in the integrity of the process.[4] However, such confidence and trust is undermined when an arbitration award is vacated for arbitrator evident partiality. Arbitrator evident partiality, which is listed under the Federal Arbitration Act ("FAA")[5] as one ground for vacatur of an arbitration award,[6] encompasses both an arbitrator's explicit bias toward one party and an arbitrator's inferred bias when an arbitrator fails to disclose relevant information to the parties.[7] Arbitrator evident partiality is particularly problematic because it is difficult to concretely define arbitrator evident partiality, the standards for interpreting arbitrator evident partiality lack consistency, and, furthermore, it is a frequently used basis for vacatur under Section 10(a)(2).[8]

The FAA does not explicitly define evident partiality, and as a result, the standards for what constitutes evident partiality are vague and oftentimes conflicting.[9] There are at least three judicial interpretations regarding evident partiality: (1) an "appearance of partiality" standard, (2) an "actual partiality" or bias standard, and (3) a "reasonable impression of partiality" middle-ground standard.[10] However, courts

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[3] 9 U.S.C. § 5 (2000). *See* MARGARET C. JASPER, THE LAW OF DISPUTE RESOLUTION: ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION 12 (1995).

[4] *See* Richard Chernick & Kimberly Taylor, *Ethical Issues Specific to Arbitration*, *in* DISPUTE RESOLUTION ETHICS: A Comprehensive Guide 181 (Phyllis Bernard et al. eds., 2004) (noting that "Canon I of the *ABA/AAA Code of Ethics* recognizes that for commercial arbitration to be effective the public must have confidence in the integrity and fairness of the process.").

[5] 9 U.S.C. §§ 1–16 (2000).

[6] 9 U.S.C. § 10(a) (2000). The other three grounds are: (i) corruption, fraud, or undue means; (ii) arbitrator misconduct or misbehavior; or (iii) where the arbitrators exceeded their powers.

[7] 4 AM. JUR. 2D *Alternative Dispute Resolution* § 138 (2008). *See* Jill Gross, *Grounds to Challenge FINRA Arbitrators* (Working Paper Series, 2009), *available at* http://ssrn.com/abstract=1504110.

[8] *See* 9 US NITA prec § 1 (noting that vacatur under § 10 is where most battles are fought; vacatur under § 10(a)(2) frequently turns on the undisclosed bias of an arbitrator and "whether that bias was substantial enough to taint the award"). For an illustrative example of a finding of evident partiality on the part of the arbitrator, see Morelite Constr. Corp. v. New York District Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984) (evident partiality found where there was a father-son relationship between the arbitrator and an officer of one of the parties to the dispute).

[9] 4 AM. JUR. 2D *Alternative Dispute Resolution* § 138 (2008).

[10] *Id*. The three interpretations are: (1) that arbitrators are expected to be "completely impartial," with absolutely "no connection with the parties or the dispute involved which might give the appearance of partiality" unless otherwise agreed to by the parties; (2) that "an appearance of bias" will only disqualify an arbitrator where an arbitrator exhibits some sort of personal interest, e.g., a pecuniary interest; and (3) that a "reasonable impression of partiality" establishes when an arbitrator possesses a duty to disclose

have construed these three standards in a variety of fashions and, as a result, there is presently no uniformity regarding the definition of evident partiality.[11]

Without a precise definition of arbitrator evident partiality, the implications for vacatur predicated upon evident partiality are serious.[12] First, the issue of remedy is far from certain. The FAA does not mandate or compel certain action once an award is vacated.[13] The statute indicates that if an award is vacated within the timeframe prescribed by the arbitration agreement for an award to be rendered, then a court "may, in its discretion," order a rehearing on the matter.[14] Where bias, fraud, corruption, or other misconduct is involved, courts often remand to a new arbitrator.[15] Conversely, if the relevant timeframe in the agreement has lapsed, then the issue of remedy becomes even less clear, as the FAA is completely silent on that point.[16] Even if a court remands to a different arbitrator, the parties still face another arbitration proceeding. Thus, the vacated award ultimately fails to resolve a given dispute; the parties are in court and basically have to start at the beginning of the arbitration process. Second, a vacated award has broader implications: if the public does not have confidence in the finality of an award, then the integrity of the process is compromised.[17] More to the point, if the public does not have confidence in the fairness and impartial nature of an arbitration proceeding, then the integrity of the process as a whole is similarly undermined.

This Comment suggests a way to ease the confusion regarding the definition of arbitrator evident partiality and to also reinforce the public's perception of the integrity of the arbitration process by imposing an

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(further noting that arbitrator evident partiality consists of a "middle ground" between the "appearance of bias" standard and the "actual bias" standard). *Id*.

[11] *See supra* note 10 and *infra* Part II.

[12] *See* David Allen Larson, *Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill?*, 49 S. TEX. L. REV. 879, 882–83 (2008) (indicating that vacatur based on an arbitrator's failure to disclose a conflict of interest is captured by the acronym "WAFAA": the "Worst Alternative to a Final Arbitration Award" and noting that vacatur is a "catastrophic consequence[] of failing to disclose").

[13] *See* William H. Hardie, *Arbitration: Post-Award Procedures*, 60 ALA. L. REV. 314, 324 (1999).

[14] 9 U.S.C. § 10(b) (2000).

[15] In re: A.H. Robins Co. v. Dalkon Shield Claimants Trust, 1999 230 B.R. 82, 86 (E.D. Va. Feb. 12, 2009).

[16] 9 U.S.C. § 10(b) (2000). *See* William H. Hardie, *supra* note 13.

[17] *See* MARTIN DOMKE, COMMERCIAL ARBITRATION 15 (2002) (contending that the advantages of arbitration are lost once any aspect of the arbitration is challenged in court). *See also* Chernick & Taylor, *supra* note 4, at 179 (noting that "it is essential that the arbitration process be fair and the arbitrator impartial. It is also important that the parties have confidence in the integrity of the process.").

affirmative duty to investigate on an arbitrator. Stated simply, an arbitrator should have a legally independent affirmative duty to run a conflict check prior to the commencement of an arbitration and disclose the results to the parties. This will allow the parties to make an informed decision as to the arbitrator's partiality, thereby minimizing the risk of award vacatur for arbitrator evident partiality. Whether or not this duty is met will be judged by an objective standard.

This affirmative duty to investigate will minimize the focus on actual and/or constructive knowledge—what an arbitrator knows, should know, or might potentially know based upon the actions an arbitrator did take or should have taken in order to make an adequate disclosure. While the determination of actual knowledge may be objective, assessing constructive knowledge is inherently subjective. Instead of trying to evaluate an arbitrator's subjective state of mind, the process of arbitration will be better served by the imposition of an affirmative duty on an arbitrator to investigate potential conflicts and disclose the results of the investigation. Such a free-standing duty would eliminate the need for conducting a subjective balancing test to measure the sufficiency of a disclosure. While one could contend that an additional step in the arbitration process is not needed, the judicial response to arbitrator evident partiality clearly indicates that an additional step is most assuredly needed.

Part II will explore the pillar of the doctrine, the Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.* Setting forth an "impression of possible bias" standard,[18] the opinion is fraught with ambiguities concerning the nature and scope of evident partiality. Part III will give an overview of subsequent judicial interpretations of evident partiality, with particular emphasis placed on the Second and Ninth Circuit's divergent approaches. While the Second and the Ninth Circuits both employ subjective reasonableness standards,[19] the two circuits differ in the context of an affirmative duty to investigate possible conflicts of interest. Although the Second Circuit

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[18] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) (plurality opinion).

[19] The Second Circuit utilizes a "reasonable person" standard, whereas the Ninth Circuit utilizes a "reasonable impression of partiality" standard. *See infra* note 51. The Third Circuit utilizes a "'reasonably construed' bias standard", which is functionally equivalent to the Second and Ninth Circuits' standard. *See* HSM Constr. Servs., Inc. v. MDC Systems, Inc., No. 06-2584, 2007 U.S. App. LEXIS 16964, at **10 (3d Cir. July 16, 2007) (citing Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1523 n.30 (3d Cir. 1994), *aff'd*, 514 U.S. 938 (1995)) (noting that the "First, Second, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits have adopted the reasonably construed bias standard, albeit not under that name.").

has refused to impose a free-standing affirmative duty to investigate potential conflicts, it does, under certain circumstances, impose on an arbitrator a duty to take some action.[20] Conversely, the Ninth Circuit is more willing to explicitly impose an affirmative duty on an arbitrator to investigate and disclose a potential conflict.[21] Part IV will examine several sets of model guidelines to aid in the analysis of imposing a duty to investigate on an arbitrator. These guidelines have been promulgated by both domestic and international arbitration bodies, including the *American Bar Association / American Arbitration Association's Code of Ethics* and the *International Bar Association's Guidelines on Conflicts of Interest of International Arbitration*. Finally, Part V will posit that these various issues warrant a reexamination of the arbitrator's duty throughout the arbitration process. In light of the divergent judicial interpretations of evident partiality, a new approach to the arbitrator impartiality calculus is needed. An affirmative free-standing duty to investigate will help reinforce the notion of party self-determinism, meaning the parties themselves should evaluate an arbitrator's partiality instead of the arbitrator himself or herself. The imposition of an affirmative duty to investigate on an arbitrator, similar to the Ninth Circuit's approach, could alleviate much of the current ambiguity and uncertainty that exists throughout the various courts.

II. THE FOUNDATIONS OF EVIDENT PARTIALITY

In order to comprehend the universe of arbitrator evident partiality, it is necessary to first consider where the uncertainty all began: the Supreme Court's 1968 opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[22] In this case, the Supreme Court addressed the issue of whether impartiality, a requirement for every judicial proceeding, applied to an arbitration dispute.[23] Although the Court provided an affirmative answer, the opinion was an unclear delineation of the standard for evident partiality.[24]

The underlying matter involved a dispute between a subcontractor and a prime contractor for a painting job.[25] The contract between the two

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[20] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 138 (2d Cir. 2007).

[21] New Regency Prod., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1109 (9th Cir. 2007).

[22] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) (plurality opinion). For a discussion of whether Justice Black's opinion was in fact a plurality opinion, *see infra* note 38.

[23] *Commonwealth Coatings Corp.*, 393 U.S. at 145 (plurality opinion).

[24] *Id*.

[25] *Id*. at 146.

parties contained an arbitration agreement.[26] Pursuant to the agreement, the petitioner appointed one of the arbitrators, the respondent appointed a second arbitrator, and then the two selected arbitrators appointed the third and final arbitrator.[27] The third arbitrator had a large business and served as a consultant for individuals regarding building construction projects.[28] The prime contractor-respondent was one of the third arbitrator's "regular customers,"[29] despite the two parties having had what the Court deemed a "sporadic" relationship.[30] Although the arbitrator had not conducted any business dealings with the prime contractor for approximately one year prior to the commencement of the arbitration proceeding, the prime contractor paid the arbitrator a significant amount of money over a four to five year time span and even rendered services on the projects involved in the underlying lawsuit.[31] An arbitration proceeding took place, but the "close business connections" between the arbitrator and the prime contractor were not known by the petitioner, nor were they revealed by anyone until after the award had already been rendered.[32] The petitioner challenged the award, but the District Court refused to vacate, and the Court of Appeals subsequently affirmed the award.[33] Both courts concluded that the FAA did not support vacatur of the award.[34] The Supreme Court granted certiorari[35] and reversed, thus vacating the award.[36]

The plurality opinion,[37] authored by Justice Black, adopted an elusive "impression of bias" standard.[38] Attempting to "safeguard the impartiality of arbitrators," the Court held that arbitrators must disclose

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[26] *Id*.
[27] *Id*.
[28] *Commonwealth Coatings Corp.*, 393 U.S. at 146 (plurality opinion).
[29] *Id.*
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 382 F.2d 1010 (1st Cir. 1967).
[34] *Id*.
[35] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 390 U.S. 979 (1968).
[36] *Commonwealth Coatings Corp.*, 393 U.S. at 146–47.
[37] Much debate has revolved around whether Justice Black wrote for a plurality or a majority of the Court. *See* Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278, 282 (5th Cir. 2007) ("A majority of circuit courts have concluded that Justice White's [concurring] opinion did not lend majority status to the plurality opinion."); Burlington N. R.R. v. TUCO, 960 S.W.2d 629, 633 (Tex. 1997) ("Although Justices White and Marshall joined fully in Justice Black's opinion for the Court, some lower federal courts have purported to see a conflict between the two writings. By treating Justice Black's opinion as a mere plurality, they have felt free to reject the suggestion that 'evident partiality' is met by an 'appearance of bias,' and to apply a much narrower standard.").
[38] *Commonwealth Coatings Corp.*, 393 U.S. at 149.

to the parties "any dealings that might create an impression of possible bias."[39] Under this standard, any connection or relationship an arbitrator has that might give rise to an "impression of *possible* bias" must be disclosed to the parties in order to preclude a finding of evident partiality sufficient to warrant award vacatur.[40] The Court recognized that arbitrators are inherently part of the business world; however, because of the special position arbitrators occupy in a disputed matter, with their authorization to decide the law and are free from appellate review, the Court imposed a high standard of impartiality on arbitrators.[41] In the plurality opinion's final paragraph, the Court opined that underlying this standard of evident partiality is "the premise 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."[42]

Justice White, along with Justice Marshall, joined in the decision but wrote a separate concurring opinion to make what he referred to as

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[39] *Id*.

[40] *Id*. (emphasis added).

[41] *Id*. Essentially, the plurality imposed on arbitrators the same standard of impartiality applicable for Article III judges. 28 U.S.C. § 455 sets forth the judicial standard of impartiality. § 455(a) states that "[a]ny justice, judge, or magistrate [magistrate judge] . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." § 455(b) enumerates the situations in which a judge must disqualify himself. This includes "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" as well as where "[h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding" and where "[h]e or his spouse, or a person within the third degree of relationship to either of them . . . [i]s a party to the proceeding" or "[i]s acting as a lawyer in the proceeding." 28 U.S.C. § 455 (2008). Judge Wiener, who concurred in Judge Reavley's dissent in *Positive Software Solutions, Inc.*, emphasized the differences between an Article III judge and an arbitrator. Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278, 286 (5th Cir. 2007) (Wiener, J., dissenting). Judge Wiener noted that, unlike an Article III judge, an arbitrator is selected not by an "objectively random or blind assignment through long established court procedures" but by the parties themselves. *Id*. As such, Judge Wiener posited that the parties alone have the "sole authority and duty to determine whether a candidate for the post of arbitrator should be accepted or rejected." *Id*. In order to make an informed determination, Judge Wiener concludes that an arbitrator must disclose to the parties "*every* relationship [no matter how "tenuous or remote"], without self-abridgement by the potential arbitrator . . . [f]iltration of partiality in arbitration is the exclusive prerogative and duty of the *parties* . . . [a]s gatekeepers, the parties are charged with guarding against favoritism and prejudice, a duty that they cannot possibly discharge in the absence of total disclosure." *Id*.

[42] *Commonwealth Coatings Corp.*, 393 U.S. at 150. It is implicitly assumed that the "appearance of bias" language from the last paragraph reflects the functional equivalent of the "impression of possible bias" standard. However, it is arguable that there is a difference between the two phrases, thus demonstrating why the Court's precise holding in *Commonwealth Coatings* is hard to discern.

"additional remarks."[43] Unfortunately, this concurring opinion created additional confusion as to what constitutes the applicable standard of evident partiality.[44] Justice White attempted to limit the scope of evident partiality to instances where an arbitrator has a "substantial interest" in the dispute before disclosure is required.[45] In Justice White's opinion, arbitrators should not automatically be disqualified from an arbitration proceeding because of a business relationship where both parties are aware of the relationship in advance, or where the parties are unaware of the circumstances but the relationship is trivial.[46] However, in the event that the arbitrator has a "substantial interest" in the transaction at hand, such information must be disclosed.[47]

Combining the "impression of possible bias" standard with an unclear definition as to what constitutes "substantial interest," the Court's evident partiality framework has failed to provide courts with much guidance in handling arbitrator evident partiality. The ensuing result is a fact-sensitive, case-by-case inquiry into each dispute with little predictability as to future outcomes.[48]

III. CURRENT JUDICIAL APPROACHES TO EVIDENT PARTIALITY

Courts have subsequently grappled with how to resolve the imprecise standard of evident partiality arising out of *Commonwealth*

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[43] *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J., concurring).

[44] *See, e.g.*, Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9th Cir. 1994) (noting that "the majority did not articulate a succinct standard").

[45] *Commonwealth Coatings Corp.*, 393 U.S. at 151 (White, J., concurring). [If you are going to use the short name, then you should be consistent throughout.]

[46] *Id*.

[47] *Id*. at 151–52.

[48] *See* Ann Ryan Robertson, Feature, *International Arbitration in the U.S.: Evident Partiality Based on Nondisclosure: Betwixt and Between*, 45 HOUSTON LAWYER 22, 23 (2007) (noting that the "confusion in the *Commonwealth Coatings* opinion gave lower courts little guidance, and most courts struggled with the import of Justice White's concurrence . . . There is no consensus among the circuits, but the test that has emerged can best be characterized as a case-by-case objective inquiry into partiality or a reasonable impression of bias standard.") *See also* Judge Wiener's dissent in Positive Software Solutions, Inc. (differentiating between disclosure and disqualification of an arbitrator; emphasizing that "Justice White did *not* 'remark' that the differences between the standards of decorum applicable to judges and those to which arbitrators are held has anything at all to do with the immutable prerequisite that, before the parties sign off on a candidate for arbitrator, they must have received from him an unexpurgated disclosure of absolutely every past or present relationship with the parties and their lawyers"; and further noting that "Justice White's remark that *disqualification* is not automatic for minor business relationships is simply inapposite to the requirement of full *disclosure* of every relationship, large and small.") Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278, 286 (5th Cir. 2007) (Wiener, J., dissenting).

Coatings.[49] The differing approaches of the Second and Ninth Circuits in regard to evident partiality are particularly illustrative of such divergence in judicial interpretation and application.[50] While both courts appear to employ an evident partiality standard based upon reasonableness, the two courts differ in their willingness to impose any affirmative duty to investigate on the arbitrator.

A. The Second Circuit's Approach

The Second Circuit addressed the issue of evident partiality in *Morelite Construction Corp. v. New York District Council Carpenters Benefit Funds*.[51] In this landmark case, the appellant challenged an arbitration award because the arbitrator's father served as a prominent figure within one of the appellees' corporate hierarchies.[52] Finding that the Supreme Court's decision in *Commonwealth Coatings* did not resolve the issue of what constitutes evident partiality, the court noted that it was left with "little guidance" in applying the correct standard for evident partiality under Section 10 of the FAA.[53]

The court recognized Justice Black's "appearance of bias" standard, but found it irreconcilable with Justice White's concurrence.[54] Positing that most of the plurality's opinion must therefore be interpreted as dicta, the court set about resolving the issue of what standard satisfies evident partiality.[55] The court concluded that an "appearance of bias" standard was too low to satisfy the evident partiality standard, since arbitration often involves a "trade-off" between arbitrator impartiality and expertise on one hand, and the fact that arbitration is voluntary in nature on the

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[49] *See* Burlington N. R.R. v. TUCO, 960 S.W. 2d 629, 635 (Tex. 1997) (noting that state courts are "divided between the broader [evident partiality] view reflected by *Schmitz* and the narrower view of *Morelite*").

[50] *Compare Morelite Constr. Corp*., 748 F.2d at 84 (adopting a "reasonable person" standard of evident partiality) *and* Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 138 (2d Cir. 2007) (reinforcing its "reasonable person" standard of evident partiality; also, finding no affirmative duty per se, but when an arbitrator thinks that there might be a nontrivial conflict of interest, the arbitrator must either investigate the potential conflict or disclose his reasoning for why there might potentially be a conflict and his intention not to investigate into the matter) *with* Schmitz, 20 F.3d at 1046 (adopting a "reasonable impression of partiality" standard and suggesting that an arbitrator might have an affirmative duty to investigate) *and New Regency*, 501 F.3d at 1101 (implied affirmative duty to investigate).

[51] *Morelite Constr. Corp*., 748 F.2d at 79.

[52] *Id*. at 81.

[53] *Id*. at 82–83.

[54] *Id*. at 83. The court read Justice White's concurrence as holding arbitrators to a distinctly lower standard than the plurality opinion and thus stated that "[f]our justices . . . do not constitute a majority of the Supreme Court." *Id*.

[55] *Id*.

other hand.[56] The court also concluded that the "proof of actual bias" standard was too high, for partiality would be hard, if not impossible, to prove.[57] As a result, the court adopted a "reasonable person" standard, whereby "evident partiality . . . will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[58]

In *Morelite*, the court focused on the father-son relationship, and without knowing more details about the relationship itself, vacated the award for evident partiality.[59] Despite indicating that "[w]e know nothing more about the relationship" between the father and son, the court concluded that "we are bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers."[60]

The Second Circuit revisited evident partiality in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*[61] This case involved an arbitrator who had purposefully constructed a "Chinese Wall"[62] to shield himself from learning about any contract negotiations between a division of his company and the appellant's parent corporation.[63] The court vacated the award because the arbitrator knew, at a minimum, that a potential conflict of interest existed; yet, he failed to either investigate the matter or to disclose the existence of the "Chinese Wall" to the parties.[64]

The court reiterated its "reasonable person" standard and also added an additional burden on arbitrators—the duty to investigate.[65] The court first posited that "arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists."[66] Then, the court held that if an arbitrator thinks that a "nontrivial conflict of interest

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[56] *Morelite Constr. Corp*., 748 F.2d at 84.
[57] *Id.*
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Applied Indus. Materials Corp*., 492 F.3d at 135.
[62] A "Chinese Wall," also termed an "ethical wall," is defined as "a screening mechanism that protects a client from a conflict of interest by preventing one or more lawyers within an organization from participating in any matter involving the client." BLACK'S LAW DICTIONARY (8th ed. 2004). The party relying on the "Chinese Wall" bears the burden of demonstrating its effectiveness. 7 AM. JUR. 2D *Attorneys at Law* § 189 (2008) (referencing Howitt v. Superior Court, 3 Cal. App. 4th 1574 (Cal. App. 4th 1992).
[63] *Applied Indus. Materials Corp*., 492 F.3d at 135.
[64] *Id*. The court did mention in a footnote that it was unprepared to conclude that a "Chinese Wall" was an insufficient substitute for investigation.
[65] *Id*. at 137–38.
[66] *Id*.

might exist," the arbitrator must either (i) conduct an investigation into the potential conflict, or (ii) disclose to the parties why he or she thinks there could be a conflict.[67] Further, the arbitrator must disclose his intent not to investigate the matter.[68] The court emphatically rejected the notion that it was creating a free-standing per se affirmative duty to investigate.[69] The court stated that an arbitrator's failure to investigate is insufficient to vacate an arbitration award; however, evident partiality arises when the arbitrator is aware of a potential conflict and fails to either investigate the matter or inform the parties of his intent not to investigate.[70] Thus, knowledge of a potential conflict triggers either the duty to investigate or the duty to disclose that the arbitrator will not investigate.

Because the court focused almost exclusively on the disclosure aspect of its evident partiality standard and failed to confront the duty to investigate directly, its opinion sends mixed signals regarding the applicable duty to investigate standard. The court explicitly stated that it was not creating an affirmative duty to investigate; however, the court also emphasized that, had the arbitrator conducted an investigation into the possible conflict, he would have found that a relationship between his company and the plaintiff's parent corporation "*already existed*" and, even more importantly, that the relationship had resulted in a significant amount of revenue.[71] Furthermore, the court's standard was premised on the notion that even the mere possibility of a nontrivial conflict of interest triggers an arbitrator's duty to take some affirmative action: either investigate or disclose the arbitrator's intent not to investigate the matter. Thus, while the court stated that it did not intend to create an affirmative duty to investigate, it is arguable that the court did create some type of duty by requiring that the arbitrator take affirmative action where there might be some potential conflict of interest. After all, the court's impartiality standard is not satisfied simply because an arbitrator sincerely thought that no conflict of interest initially existed.[72] If an arbitrator possesses a continuing duty to disclose conflicts, subsequent events can trigger the arbitrator's duty to either conduct an additional

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[67] *Id*. (emphasis added).

[68] *Applied Indus. Materials Corp*., 492 F.3d at 137–138.

[69] *Id.* at 135 ("We emphasize that we are *not* creating a free-standing duty to investigate.").

[70] *Id*.

[71] *Id*. at 139.

[72] *Id*. ("[A]s *Commonwealth Coatings* and *Morelite* make clear, subjective good faith is not the test.").

investigation into potential conflicts or disclose his or her intent not to investigate. [73]

Following the Second Circuit's holdings in *Morelite* and *Applied Industrial Materials Corp.*, an arbitrator has a duty to ensure that the parties to a dispute do not think that there is not a conflict of interest, or at least, that there is no nontrivial conflict of interest.[74] In order to discharge that burden, an arbitrator who thinks that a "nontrivial conflict of interest *might* exist[]"[75] must either investigate the possible conflict or disclose why he thinks there might be a conflict of interest and explain his intent not to investigate into the matter.[76]

B. The Ninth Circuit's Approach

The Ninth Circuit first addressed the conundrum of applying *Commonwealth Coatings*' evident partiality standard in *Schmitz v. Zilveti*.[77] In this case, a dispute was submitted to arbitration under the National Association of Securities Dealers (the "NASD").[78] Three arbitrators were selected to hear the matter.[79] One of the arbitrators failed to run a conflict check on the appellee's parent company—a company his law firm had represented on numerous occasions.[80] The appellants challenged the arbitration award.[81] The district court concluded that an arbitrator is required to disclose only the facts that he or she is aware of at the time of the proceeding, and since the arbitrator did not know of his firm's conflict of interest, the district court concluded that the arbitrator's lack of knowledge did not establish evident partiality.[82] On appeal, the court vacated the panel's award.[83] The court looked at prior Ninth Circuit cases involving actual bias and adopted a "reasonable impression of partiality" standard, deeming it to be the most accurate expression of the *Commonwealth Coatings* standard.[84] The court drew a distinction between cases involving an arbitrator's nondisclosure of potential conflicts and those cases of actual

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[73] *Applied Indus. Materials Corp*., 492 F.3d at 139.
[74] *Id*.
[75] *Id.* 139 (emphasis added).
[76] *Id*.
[77] *Schmitz*, 20 F.3d at 1043.
[78] *Id*. at 1044. *See also infra* note 93.
[79] *Id*.
[80] *Id*. The arbitrator's law firm had represented the party's parent company in at least nineteen cases over a time span of thirty-five years.
[81] *Id*.
[82] *Schmitz*, 20 F.3d at 1044–45.
[83] *Id*.
[84] *Id*. at 1046 (quoting Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1201 (11th Cir. 1982)).

arbitrator bias.[85] In the former situation, the court indicated that a "reasonable impression of partiality" standard suffices because, as a policy matter, the parties are supposed to select the arbitrator "intelligently," and they can do so "only when facts showing potential partiality are disclosed."[86]

The court went beyond merely articulating its standard of evident partiality, however, and explicitly imposed an affirmative duty to investigate in "*certain* circumstances"[87]—without concisely defining which circumstances gave rise to such an affirmative duty.[88] The Ninth Circuit distinguished this duty to investigate from *Commonwealth Coatings*' duty to disclose, and stated that a failure to investigate could give rise to a "reasonable impression of partiality."[89] The court reasoned that even an arbitrator's *constructive* knowledge of a conflict can give rise to a "reasonable impression of partiality."[90]

In the case at hand, the procedural rules of the NASD Code governed the dispute.[91] Under the NASD Code, an arbitrator *should* investigate potential conflicts of interest.[92] As the arbitrator in the dispute failed to investigate his law firm's prior representation of one of the appellee's parent companies, the court concluded that the arbitrator's constructive knowledge established evident partiality.[93] The court, recalling that the parties themselves are the judges of arbitrator partiality,[94] specifically stated that the imposition of an affirmative duty to investigate encourages candor and honest disclosure of information that an arbitrator might otherwise be inclined to keep secret from the parties.[95] The court opined that the dual duties of investigation and

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[85] *Id*. at 1047.

[86] *Id*.

[87] *Schmitz*, 20 F.3d at 1048 (emphasis added).

[88] The court did note that "the parties can expect a lawyer/arbitrator to investigate and disclose conflicts he has with actual parties to the arbitration." *Id*. (citing Close v. Motorists Mut. Ins. Co., 486 N.E.2d 1275 (Ohio Ct. App. 1985)).

[89] *Id*. at 1047–48.

[90] *Id*. at 1048 ("That the lawyer forgot to run a conflict check or had forgotten that he had previously represented the party is not an excuse.").

[91] *Id*. at 1044.

[92] *Schmitz*, 20 F.3d at 1044 ("The NASD Code . . . requires arbitrators to make an investigation regarding potential conflicts of interest. NASD Code section 23(b) provides: "Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.") (emphasis added).

[93] *Id*. at 1048–49.

[94] *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 151 (1968) (plurality opinion).

[95] *Schmitz*, 20 F.3d at 1048.

disclosure "must be enforced, even if later a court finds that no actual bias was present."[96]

While the court's imposition of an affirmative duty to investigate is a useful tool for ensuring that arbitrators are impartial to the proceedings at hand, its framework lacks definition, for it did not articulate specifically that arbitrators have a blanket duty to investigate potential conflicts. Indeed, the court did not define when arbitrators have such a duty, or for that matter, that all arbitrators inherently possess that duty by virtue of their position as arbitrators. The court only stated that arbitrators are required "in *certain* circumstances" to conduct an investigation.[97] Although the court did not elaborate on what constitutes "certain circumstances," or conversely, when an arbitrator does not have a duty to investigate, the court did indicate that when potential partiality is the issue, "no such imputation can arise."[98] Thus, while the court did not adopt a per se rule that every arbitrator in every circumstance must independently undertake an investigation into possible conflicts of interest, the court's language seems to indicate that it is theoretically inclined to adopt such a position in the future.[99]

The Ninth Circuit recently revisited the issue and similarly imposed an affirmative duty on an arbitrator to investigate and disclose a potential conflict. In *New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, the court affirmed the vacatur of an arbitration award where the arbitrator failed to investigate and disclose possible conflicts arising from his acceptance of employment with a film group currently in negotiations with the appellant corporation.[100] The court referenced its holding in *Schmitz* and restated that it utilized a "reasonable impression of partiality" standard.[101] Again noting that evident partiality can exist despite an arbitrator's actual knowledge of a conflict, the court explained that an arbitrator "may have a duty to investigate independent of [his] . . . duty to disclose."[102] Furthermore, the court noted that the arbitrator in *Schmitz* had a duty to investigate, and as the arbitrator failed to discharge his burden, his constructive knowledge of a conflict gave rise to evident

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[96] *Id*. at 1049.

[97] *Id*. at 1048 (emphasis added).

[98] *Id*. (quoting Justice White's concurrence in *Commonwealth Coatings*).

[99] *Id*. at 1049. For instance, the court stated that "[i]f the parties are to be judges of the arbitrators' partiality, duties to investigate and disclose conflicts must be enforced, even if a later court finds that no actual bias was present" (citing Close v. Motorists Mut. Ins. Co., 486 N.E.2d 1275, 1278–79 (Ohio Ct. App. 1985)).

[100] *New Regency*, 501 F.3d at 1111.

[101] *Id*. at 1106.

[102] *Id*. (citing *Schmitz*, 20 F.3d at 1048).

partiality.[103] The court, noting that it did not adopt a per se rule in *Schmitz* whereby arbitrators possess a duty to investigate "in all cases," nevertheless held that the arbitrator in the case at hand did have an affirmative duty to investigate when he accepted employment during the course of the arbitration proceeding.[104]

To arrive at its conclusion, the court cited the Second Circuit's decision in *Applied Industrial Materials Corp.* for the proposition that an arbitrator's constructive knowledge could satisfy evident partiality.[105] Then, the court noted that while the Second Circuit explicitly declined to impose an affirmative duty to investigate, the Second Circuit requires an arbitrator, who believes that there might be a conflict of interest, to either investigate into the matter or disclose his intent not to investigate.[106] The court also examined a citation in *Applied Industrial Materials Corp.*,[107] which noted that while the Fourth Circuit did not impose a blanket duty to investigate, the Fourth Circuit "suggested that should the arbitrator fail to perform due diligence in identifying conflicts," evident partiality could warrant vacatur.[108] After elaborating on the Second Circuit's decision in *Applied Industrial Materials Corp.* and noting that the court knew of only one appellate court that has a "per se rule" that an arbitrator's lack of actual knowledge precludes evident partiality,[109] the Ninth Circuit found that the situation at hand paralleled the matter facing the Second Circuit. As such, the arbitrator should have investigated potential conflicts prior to accepting the new employment.[110] The court concluded that the arbitrator had constructive knowledge of a potential conflict when he accepted an executive position with a company in the same industry as the parties to the arbitration.[111] Therefore, the arbitrator should have investigated any potential conflicts.[112]

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[103] *Id*. at 1107.

[104] *Id*. at 1109.

[105] *New Regency*, 501 F.3d at 1108 (citing Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007)).

[106] *Id*.

[107] ANR Coal Co. v Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999).

[108] *New Regency*, 501 F.3d at 1109 (noting that "[t]he court declined to recognize that an arbitrator has a general duty to investigate, but suggested that should the arbitrator fail to perform due diligence in identifying conflicts, an undiscovered, 'not trivial' conflict may result in vacatur.").

[109] Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1313 (11th Cir. 1998).

[110] *New Regency*, 501 F.3d at 1109.

[111] *Id*. (citing *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the court explained that "[w]e believe that his decision to accept a new high-level executive job at a company in the same industry as the parties during the arbitration is precisely the type of situation 'where an arbitrator has reason to believe that a nontrivial

The court also noted that the arbitration proceeding was governed by the American Film Marketing Association ("AFMA").[113] Under the AFMA arbitral rules, an arbitrator is required to disclose any circumstances that might evince partiality according to either the procedural law of the place of arbitration or, if none is indicated, in accordance with the laws of California.[114] Under California law, an arbitrator in an international arbitration matter possesses an ongoing obligation to disclose any information which might raise doubts about the arbitrator's partiality.[115] Recognizing that the language does not explicitly state that an arbitrator has an affirmative duty to investigate, the court concluded that the language "necessarily implicates a duty to investigate whether instances of potential conflict exist."[116]

By "implicat[ing] a duty to investigate" despite the existence of any "potential conflict," the court seemingly imposed an affirmative duty on an arbitrator to investigate regardless of whether there is an actual, potential, or even no conflict.[117] The court referenced several arbitral guidelines, including the *American Arbitration Association and American Bar Association Code of Ethics for Arbitrators in Commercial Disputes* and the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration*, which explicitly posit an affirmative duty to investigate.[118] While acknowledging that the referenced guidelines were not binding,[119] the court relied on the guidelines, along with "an attorney's traditional duty to avoid conflicts of

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conflict of interest might exist' and should investigate to determine the existence of potential conflicts.").

[112] *Id.* at 1109.

[113] *Id*. at 1103, 1109.

[114] *Id*. at 1109. The court referenced *AFMA Rules for International Arbitration* Section 6.5.

[115] *New Regency*, 501 F.3d. at 1109, 1111 (citing California Code of Civil Procedure §§ 1297.121, 1297.13, and 1297.123).

[116] *Id.* at 1109 (citing HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122, 1129 (C.D. Cal. 1999), *disapproved on other grounds in* Fid. Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004)).

[117] *Id*.

[118] *Id*. at 1109–10 (noting that "Canon II(B) of the code [the *American Arbitration Association and American Bar Association Code of Ethics for Arbitrators in Commercial Disputes*] . . . provides that arbitrators have an ongoing duty to 'make a reasonable effort to inform themselves of any interests or relationships' subject to disclosure" and that "General Standard 7(c) of the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* (2004) states that '[a]n arbitrator is under a duty to make reasonable enquiries to investigate any potential conflicts of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned.'").

[119] *Id.* at 1110. However, the court cited *Commonwealth Coatings*' treatment of the AAA rules as "persuasive authority." *Id.*

interest" to reinforce its holding in *Schmitz* that constructive knowledge can satisfy evident partiality where an arbitrator fails to investigate potential conflicts, and, in general, to impose an affirmative duty to investigate.[120]

Although the court did not state that it was adopting a per se duty to investigate requirement in all arbitration proceedings, the court's opinions in *Schmitz* and *New Regency* hint at such a conclusion. Even if one interprets the *New Regency* decision more narrowly, that is, to hold that an arbitrator must investigate potential conflicts when there is a change in circumstances, the court has still provided a more useful and workable framework for approaching the evident partiality quagmire. Coupling *Schmitz* with *New Regency*, the Ninth Circuit appears to be moving closer to a general affirmative duty to investigate.

While the Second Circuit and the Ninth Circuit have interpreted the evident partiality standard in a similar fashion, the two circuits diverge in their willingness to impose a duty to investigate. In the Second Circuit, a duty to investigate arises only when an arbitrator has some reason to think that a "nontrivial conflict of interest"[121] might exist. In that particular circumstance, an arbitrator is required to either investigate the conflict, or disclose why the arbitrator thinks a conflict might exist and his decision not to investigate further.[122] Where a potential nontrivial conflict of interest exists, an arbitrator's failure to either investigate or disclose his intent to not investigate is sufficient for a finding of evident partiality.[123] However, an examination of *Applied Industrial Materials Corp.* reveals that the court did create an affirmative duty to act. For instance, an arbitrator cannot simply turn a blind eye to the existence of a nontrivial conflict; he or she cannot actively mislead the parties into thinking that there is no nontrivial conflict of interest when such a conflict does actually exist.[124] The Ninth Circuit, on the other hand, imposes an affirmative duty to investigate where changed circumstances in the course of the arbitration proceeding could result in a potential conflict.[125]

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[120] *New Regency*, 501 F.3d. at 1110.
[121] *Applied Indus. Materials Corp*., 492 F.3d at 138.
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *See* Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW 363, 368–69 (2008) ("The Second Circuit's refusal to impose a free-standing duty to investigate seems at odds with the Ninth Circuit's decision in *New Regency*, which found an affirmative duty to investigate when a change in circumstances could potentially create conflicts.").

IV. ARBITRATION MODEL GUIDELINES

In addition to judicial decisions on the arbitrator's duties, several model guidelines hold particular relevance to the matter at hand by suggesting an affirmative duty to investigate. The guidelines are not binding as law and hence often take the form of a code of ethics, but they are evidence of "soft" law in the field.[126] In fact, they could provide an additional lens through which to view the evident partiality dilemma, which arises due to the disconnect between trying to establish an objective standard by which to evaluate arbitrator impartiality and the reality that the standard is inherently subjective in nature. At the core of arbitration model rules is the notion that an arbitrator must be and remain neutral and impartial.[127] However, two noteworthy guidelines do contain an affirmative duty to investigate: the *American Arbitration Association and American Bar Association Code of Ethics for Arbitrators in Commercial Disputes* ("AAA / ABA Code of Ethics") and the *International Bar Association Guidelines on Conflicts of Interest of International Arbitration* ("IBA Guidelines"). If one utilizes these guidelines in examining evident partiality, it becomes apparent that an affirmative duty to investigate could alleviate much of the difficulties surrounding domestic and international arbitration.

A. The American Arbitration Association / American Bar Association Code of Ethics

Canon II of the AAA / ABA Code of Ethics articulates how an arbitrator should conduct himself. Entitled "An Arbitrator Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create an Appearance of Partiality," Canon II recommends that an arbitrator "*should* make a reasonable effort to inform [him or herself] of any interests or relationships," including any financial or personal interest in the resolution of the proceeding, as well as any existing or past relationship which could render a selected neutral

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[126] *See* Mark Kantor, *Arbitrator Disclosure: An Active But Unsettled Year*, INT. A.L.R. 2008, 11(1), 20–32 (noting, for instance, that "[t]he ABA / AAA Code of Ethics states that it is non-binding. Still, the AAA requires arbitrators in AAA proceedings, as a condition to appointment, to execute an arbitrator's oath agreeing to follow the Code of Ethics' disclosure obligations.").

[127] *See, e.g.*, *AAA International Arbitration Rules*, which states that "[a]rbitrators acting under these Rules shall be impartial and independent." Am. Arbitration Ass'n, International Arbitration Rules art. 7, P 1 (2008), *available at* http://adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES.

impartial.[128] While the AAA / ABA Code does not explicitly state that there is a free-standing duty to investigate, its does recommend that an arbitrator inform him or herself about any possible conflicts, which gives rise to the conclusion that there is an affirmative duty to investigate. In fact, one could argue that the duty to disclose inherently triggers a duty to investigate[129] since an arbitrator cannot effectively disclose that which he or she does not know in the first place. Although the AAA / ABA Code of Ethics couches this duty to investigate in terms of a duty to disclose, from a practical standpoint, it is illogical that an arbitrator could make an effective disclosure absent an investigation. Ignorance of a conflict does not appear to be a sufficient excuse,[130] as the AAA / ABA Code of Ethics states that an arbitrator's duty to disclose is a "continuing duty" and where there is any uncertainty in whether an arbitrator should disclose a possible conflict, "[a]ny doubt . . . should be resolved in favor of disclosure."[131]

While useful in its recommendation that an arbitrator investigate possible conflicts, the AAA / ABA Code of Ethics is also problematic for three main reasons. First, it does not posit that the duty to investigate is a free-standing duty apart from the duty to disclose. An examination of case law on evident partiality demonstrates that a duty to disclose, absent an independent duty to investigate, is simply insufficient to resolve the problem at hand. Second, it notes that the duty to disclose is an ongoing duty, but it does not extend that ongoing vigilance in terms of an actual investigation. Third, the AAA / ABA Code's language is imprecise; what exactly constitutes a "reasonable effort" is fairly unspecific and open to subjective interpretation. What is a sufficient effort for one arbitrator could very well be insufficient for another arbitrator, all depending on the arbitrator's business, expertise, connections, and relationships, etc. Furthermore, it is unclear when "should" should in fact mean "shall" in light of the fact that arbitrators "should make a reasonable effort to inform themselves" of any potential conflicts and any doubt as to whether to disclose "should be resolved in favor of

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[128] Am. Bar Ass'n, The Code of Ethics for Arbitrators in Commercial Disputes Canon II(A)–II(B) (2004), *available at* http://www.abanet.org/dispute/commercialdisputes.pdf (emphasis added).

[129] *See* Larson, *supra* note 12, at 900 (noting that "[t]he duty of disclosure defined by the code encompasses a duty to investigate.").

[130] *See Schmitz*, 20 F.3d at 1048 (noting "[t]hat the lawyer forgot to run a conflict check or had forgotten that he had previously represented the party is not an excuse.").

[131] Am. Bar Assn'n, The Code of Ethics for Arbitrators in Commercial Disputes Canon II(C)–(D) (2004), *available at* http://www.abanet.org/dispute/commercialdisputes.pdf.

disclosure."[132] As such, the AAA / ABA Code can be somewhat confusing.[133]

At face value, it appears that an arbitrator, without doubt, must disclose any conflicts to ensure impartiality. In order to have a worthwhile disclosure, an arbitrator should affirmatively conduct an investigation into possible conflicts of interest by running a conflict check.[134] Because the AAA / ABA Code merely recommends, and does not require, disclosure and investigation, one is left with the suggestion that an arbitrator can be a passive participant regarding a conflict, thus potentially undermining an affirmative duty to investigate. Ultimately, however, by recommending that an arbitrator should at least make some effort to ascertain any potential conflicts of interest, the AAA / ABA Code is a small, but important step toward an affirmative and free-standing duty to investigate. It is also quite illustrative of the uncertainties and difficulties surrounding arbitrator impartiality.

B. The International Bar Association Guidelines

The IBA Guidelines are more helpful in establishing an arbitrator's duty to investigate possible conflicts. In fact, the IBA Guidelines recommend an affirmative and free-standing duty to investigate.[135] The focal point of the IBA Guidelines regarding a duty to investigate centers around "General Standard 7: Duty of Arbitrator and Parties."[136] General Standard 7 explicitly states that "[a]n arbitrator is under a duty to make reasonable inquiries to investigate any potential conflicts of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned."[137] Furthermore, General Standard 7 posits that ignorance is no excuse if an arbitrator fails to investigate a potential conflict.[138] As a result, the IBA Guidelines squarely place a

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[132] *Id*. at Canon II(B) and II(D).

[133] *See* Larson, *supra* note 12, at 900 (noting that "because of [the Code's] inconsistent language, an arbitrator might be confused regarding disclosure requirements even when one looks exclusively to a single authority."). For instance, Canon II(A) states that arbitrators "*should* . . . disclose" any interests or relationships that could give rise to a conflict, but Canon II(C) indicates that the "obligation to disclose" the aforementioned interests or relationships is a "continuing duty which *requires*" an arbitrator "to disclose, as soon as practicable . . . any such interests or relationships which may arise." (emphasis added).

[134] ABA / AAA Code of Ethics at Canon II(B).

[135] IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 7(c), approved on May 22, 2007, by the Council of the International Bar Association, *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid =e2fe5e72-eb14-4bba-b10d-d33dafee8918.

[136] *Id*.

[137] *Id*.

[138] *Id*.

duty to investigate on the arbitrator.[139] Interestingly, the IBA Guidelines also place a similar duty to investigate on the parties and/or potential parties to the arbitration proceeding.[140] The IBA Guidelines are quite notable in that they make the arbitrator *and* the parties responsible for ensuring the impartiality and fairness of the arbitration proceeding by conducting an investigation into potential conflicts of interest. Indeed, they are unique, especially in the international commercial litigation context.[141] Consequently, the implications are quite straightforward: an arbitrator possesses an affirmative and independent duty to investigate potential conflicts and disclose his or her findings.[142]

Unlike the FAA or other arbitration rules, the aforementioned model guidelines are, as previously indicated, not binding. However, the clear distinction between the guidelines and the rules is quite noticeable. Under governing arbitration rules, there essentially is no affirmative duty to investigate. Yet under several model guidelines, an arbitrator does have an affirmative duty to investigate. If an amendment to the arbitration statutes themselves—particularly the FAA, such that an arbitrator would be required to conduct an investigation into potential conflicts—is not forthcoming any time in the near future, then it is apparent that the entire arbitration process needs a new approach to award vacatur based upon evident partiality.

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[139] *Id*. at Explanation to General Standard 7 (stating that [i]t is the arbitrator or putative arbitrator's *obligation* to make . . . enquiries and to disclose any information that may cause his or her impartiality or independence to be called into question.") (emphasis added).

[140] *Id*. at Explanation to General Standard 7 (stating that "any party or potential party to an arbitration is, at the outset, required to make a reasonable effort to ascertain and to disclose publicly available information that . . . might affect the arbitrator's impartiality and independence.").

[141] *Compare* the IBA Guidelines (recommending an affirmative duty to investigate) *with* the American Arbitration Association's *International Arbitration Rules*, which posits no free-standing affirmative duty to investigate (stating that "[a]rbitrators 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."). *See* Am. Arbitration Ass'n, International Arbitration Rules art. 7, P 1 (2008), *available at* http://adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES.

[142] *See* Peter L Michaelson, *In International Arbitration, Disclosure Rules at the Place of Enforcement Matter Too*, DISP. RESOL. J., Nov. 2007–Jan. 2008, *available at* http://findarticles.com/p/articles/mi_qu3923/is_200711/ai_n21279144/pg_6. *See also* Lee Korland, *Comment: 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, 837 (2003) (proposing an affirmative defense based on an arbitrator's lack of knowledge after making a reasonable investigation into potential conflicts).

V. A PROCESS REEVALUATION

A. Why Change is Needed: Party Self-Determination

Because the arbitrator impartiality calculus imposed by courts is generally based upon an objective standard, measured not by the actual arbitrator's beliefs, but by a "reasonable person" standard, a new approach to evident partiality is needed. Only by imposing an affirmative free-standing duty to investigate on an arbitrator can one achieve any measure of objectivity. Otherwise, one is left with the inherent subjectivity of what an arbitrator knows or should have known, predicated upon the actions the arbitrator did take or should have taken. Giving credence to the intertwined notions of freedom of contract and party self-determination, the parties themselves should evaluate an arbitrator's partiality instead of the arbitrator himself or herself.[143] In this regard, imposing an affirmative duty to investigate can be evaluated from a public policy standpoint. It is more sensible for an arbitrator to bear the burden of making the requisite inquiries into potential conflicts than it is for the parties to run the risk of a partial arbitrator and ultimately, a biased award with less than certain judicial recourse.

If, for example, an arbitrator subjectively believed that no conflict of interest existed, yet failed to investigate and there was indeed a conflict of interest, then the award will be subject to vacatur based on nondisclosure of information the arbitrator *constructively* knew. Where, however, an arbitrator has an affirmative duty to investigate into potential conflicts of interest—a routine conflict check prior to the commencement of an arbitration—the situation changes drastically. Assuming the arbitrator does investigate, then there will be either no conflicts or a potential conflict; but since the arbitrator would disclose his or her findings to the parties, the parties could either waive the conflict or request a new arbitrator. In either case, the parties are the ultimate judges of an arbitrator's impartiality, and they will not be left wondering if they have all the information needed to make an informed decision.[144] Subjectivity is thus removed from the picture, and the goal of objectivity is achieved. Hence, an affirmative duty to investigate, similar to what the Ninth Circuit utilizes, is a useful tool in solving the evident partiality problem.

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[143] *See* Judge Wiener's dissent in Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278, 286 (5th Cir. 2007).

[144] *See Schmitz*, 20 F.3d at 1048 (citing Justice White's concurrence) (noting that "*Commonwealth Coatings* establishes that the parties rather than the arbitrators or the courts should be the judges of the partiality of arbitrators.").

B. The Evident Partiality Dilemma and its Implications

It is apparent from an examination of judicial interpretations of evident partiality under the FAA and of several arbitration model guidelines that the field of arbitration faces a conundrum, both on a domestic and international scale. On one hand, arbitration is theoretically meant to serve the goals of impartiality, finality, efficiency, and cost-effective dispute resolution.[145] However, when those goals are not achieved (which occurs when an award is vacated based upon evident partiality), it is quite clear that the integrity of the arbitration process is called into question. When an award is vacated, what was once meant to be a final decision becomes no longer final, what was supposed to be an efficient manner of resolving a dispute turns into a battle in the courtroom, and what was intended to be a cost-effective process yields a very high price tag for all parties involved in litigation.[146]

Because this problem affects the entire process of arbitration, the solution must be one that supports and fosters the integrity of the process as a whole. Admittedly, no easy solution exists—that much is apparent from the divergence of judicial interpretation on evident partiality.[147] Yet what is undoubtedly needed is a reevaluation of the arbitration process. Specifically, a reevaluation of an arbitrator's duty to the arbitration process, to the parties, and to society is warranted. Only by changing the lens through which one views arbitration can any sort of solution emerge. Instead of looking at arbitration as being comprised of individual components, evaluated on an ad-hoc basis, if one views arbitration holistically, it becomes apparent that change is an absolute must. Otherwise, arbitration becomes simply another avenue into the courtroom and serves a limited purpose.

C. The Imposition of an Affirmative Duty to Investigate

Many commentators have observed the arbitrator evident partiality dilemma, and some have suggested ways in which arbitration can and cannot be changed.[148] What appears to be missing from the calculus is

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[145] *See* 9 US NITA prec § 1 (2008).

[146] Not only monetarily speaking, but also in terms of time spent in the course of the arbitration.

[147] *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 138 (2008).

[148] *See* Korland, *supra* note 142, at 816, 823, 837 (noting that "[t]he law gets even murkier when considering whether an arbitrator has a duty to investigate potential conflicts of interest prior to hearing a case," suggesting utilization of ANR Coal Co. v. Cogentrix of North Carolina, Inc.'s four prong test for evaluating evident partiality, and proposing an affirmative defense based on an arbitrator's lack of knowledge of a conflict after making a reasonable investigation into the matter); Larson, *supra* note 12, at 881

an evaluation, if not suggestion, of imposing a legal affirmative duty on an arbitrator to investigate potential conflicts prior to the commencement of the arbitration proceeding.[149] By imposing such an affirmative duty on the arbitrator, the evident partiality problem could be alleviated, if nothing else. Currently, it is merely the arbitrator's ethical duty to voluntarily undertake an investigation into any conflicts.[150] In other words, an arbitrator may or may not take such affirmative action. Instead, an affirmative duty to investigate should be a legal mandate, for an arbitrator's failure to conduct a conflict check runs the serious risk of making an inadequate disclosure to the parties and of a finding of evident partiality, thus undermining the integrity of the arbitration process.

An affirmative duty to investigate ultimately stems from an arbitrator's ethical duty to the system and to the parties: that the arbitrator is impartial and that the arbitration proceeding will similarly be conducted in an impartial manner. A lawyer owes his or her client the duty of loyalty.[151] That duty prohibits a lawyer from undertaking representation of another that is directly adverse to his or her client without the client's informed consent.[152] A lawyer, prior to undertaking representation of a client, is advised to run a conflict check in order to ascertain any conflicts of interest.[153] And, as previously mentioned, a judge must adhere to a strict standard of impartiality. Such judicial impartiality requires disqualification in any proceeding where the judge's

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(concluding that "[a] call for the courts to adopt a more uniform standard for determining when a failure to disclose a conflict of interest will result in evident partiality warranting vacatur may not be answered any time soon."); Robertson, *supra* note 48, at 28 (lamenting that "until the Supreme Court breaks its almost 40 years of silence, vacatur based on an arbitrator's failure to disclose will continue to be betwixt and between.").

[149] *See* Korland, *supra* note 145, at 817. Korland proposes that arbitrators "should be encouraged, but not legally compelled" to undertake an investigation. *Id*.

[150] *See, e.g.,* JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 179–80 (2d ed. 2001) (noting that "[a]rbitrators act in a quasi-judicial capacity . . . arbitrators must avoid both the appearance and reality of conflict of interest and uphold the integrity and fairness of the arbitration process. It is important that potential arbitrators make a reasonable inquiry to determine whether any existing or prior financial, professional, family or social relationships might create an appearance of bias. If so, they should disclose this information in order to preserve the integrity of the arbitration process.").

[151] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2003).

[152] *Id*.

[153] *See* Charles F. Forer, *Ensuring Conflict-Free ADR*, THE METRO. CORPORATE COUNSEL, August 2000, at 14 ("A lawyer customarily 'runs a conflict check' as soon as a prospective new client is on the horizon. But what about running a conflict check on the person who has been selected to provide neutral mediation or arbitration services?" Forer ultimately, and sadly, concludes that "the parties should not rely on the proposed neutral to make his or her own conflict-determinations" and thus the parties should run a conflict check on the arbitrator.).

impartiality "might reasonably be questioned."[154] So too must an arbitrator run a conflict check to ensure his or her own impartiality: the arbitrator must undertake an investigation into potential conflicts of interest and disclose his or her findings to the parties. Since an arbitrator acts in a quasi-judicial capacity, his or her conflict check should include an investigation into categories such as: any relationship between the arbitrator and the parties; any past or present dealings between the arbitrator and the parties' attorneys; any financial, social, or professional affiliation / interest between the arbitrator and a party or attorney in the arbitration; and any relationship or interest between the arbitrator's family members and the parties or the parties' attorneys to the dispute.[155] Any limitations on the investigation, such as where the arbitration involves a multitude of parties and a conflict check would be overwhelming and unrealistic, must similarly be disclosed to the parties beforehand. While the above categories may or may not be exhaustive, the idea is to put as much information in the parties' hands as possible, thus allowing them to make an informed decision in either accepting the arbitrator or requesting the appointment of a different arbitrator.

D. Procedural Features of a Duty to Investigate

Procedurally speaking, the imposition of an affirmative duty to investigate is admittedly difficult to establish. It could theoretically be achieved in several ways. First, one could impose an affirmative duty via an amendment to the FAA that would explicitly require an arbitrator to conduct an investigation in order to ensure impartiality. Given that the Supreme Court has declined to resolve any of the evident impartiality murkiness, one might conclude that in terms of statistical probability an amendment to the FAA is more likely to occur.[156] Realistically, however, an amendment to the FAA is an unlikely option.[157]

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[154] *See supra* note 42.

[155] *Id*. These categories are not new. *See, e.g.,* 28 USC § 455 (2008): Disqualification of Justice, Judge, or Magistrate. *See also* Chernick & Taylor, *supra* note 4, at 186 (referencing *California Ethics Standards* Standard 7). Worth noting, California adopted the most comprehensive and extensive state law on arbitrator disclosure, requiring a proposed arbitrator to disclose information dating back five years, as required under California Code of Civil Procedure § 1281.9(a).

[156] *See* Robertson, *supra* note 48.

[157] *See* James Hosking et al., *Unintended Consequences of Proposed Amendments to Federal Arbitration Act*, International Law Office, Jan. 8, 2009, *available at* http://www.internationallawoffice.com/newsletters/detail.aspx?g=e4b5b897-d7f5-4b0f-a0c1-04c059527baa (last visited Feb. 20, 2009) (noting that "[s]ince they were enacted in 1925, most of the provisions of the Federal Arbitration Act have not changed.").

Second, since the Ninth Circuit appears to be moving in the direction of imposing an affirmative duty on an arbitrator,[158] the courts could uniformly adopt an affirmative duty to investigate. While this solution appears ideal and sufficiently warranted, it is obviously not the current standard.[159] As long as the courts interpret and evaluate evident partiality in different ways, the judicial approach to evident partiality will likely remain piecemeal and unsatisfactory.

At a bare minimum, all arbitrators need to voluntarily undertake an investigation into potential conflicts in order to make the requisite disclosures to the parties. There may not be a perfect solution, or even an easy solution, to imposing this duty. Nonetheless, the need for an affirmative duty to investigate remains. The parties to an arbitration need to be assured that the arbitrator is impartial. And, society in general needs to be assured of the integrity of the arbitration process. Such assurances can only come about if an arbitrator possesses a legal and affirmative duty to investigate conflicts of interest. Even if most arbitrators currently run conflict checks as part of their normal practice, not all arbitrators do so. In the end, crossing one's fingers and hoping that all arbitrators run a conflict check prior to the start of an arbitration proceeding is, unfortunately, a futile endeavor.

VI. CONCLUSION

Leaving evident partiality in its current state is unsatisfactory and untenable. From the state courts to the circuit courts, there is a myriad of judicial interpretations and approaches to evident partiality.[160] There is no uniform standard, thus leaving courts to examine evident partiality on a case-by-case basis.[161] Under the current framework, an arbitrator's "subjective good faith" is clearly not the defining criterion.[162] Yet, even an arbitrator's *constructive* knowledge can give rise to evident partiality.[163]

To eliminate the subjective disconnect between what an arbitrator knows or should know in order to make a sufficient disclosure, an

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[158] *See* New Regency Prod., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007); *Schmitz*, 20 F.3d at 1043.

[159] *See* Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW 363, 368–69 (2008) ("The Second Circuit's refusal to impose a free-standing duty to investigate seems at odds with the Ninth Circuit's decision in New Regency, which found an affirmative duty to investigate when a change in circumstances could potentially create conflicts.").

[160] *See supra* Part I.

[161] *Id*.

[162] *Applied Indus. Materials Corp*., 492 F.3d at 139.

[163] *Schmitz*, 20 F.3d at 1049.

affirmative duty to investigate is needed. An arbitrator's ethical duty to investigate potential conflicts needs to become a positive, legal mandate. While some arbitrators might find an affirmative duty to investigate time-consuming and redundant (after all, an arbitrator is obliged to make disclosures to the parties in the first place), in order to make an adequate disclosure, an arbitrator must first investigate into any potential conflicts. That is the only way an arbitrator can objectively know if there are any conflicts which might affect his or her impartiality. And, that is the only way in which the parties can be assured that their neutral will truly be neutral. An affirmative duty to investigate is a critical part of the evident partiality equation. It ensures impartiality in the here and now, and it fosters and upholds the integrity of the arbitration process for the future.