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The Role of Arbitrator Ethics

Robert A. Holtzman

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I. INTRODUCTION

There is a chain of pubs in Ireland called "The Honest Lawyer." Displayed on the sign at the door of each location is a picture of a barrister in the traditional gown. Unfortunately, however, his wigged head is severed and rests on a tray he holds in one hand. The message is clear: there is a widely held belief that the only honest lawyer is a dead lawyer.

Many in today's business community would hold that the same is true of arbitrators: there are no honest ones except those who are dead. We in the profession are compelled to admit that there are anecdotal tales of bias, interest, or real corruption, but to our credit, these are very few and far between. Whatever the reality, however, arbitrators must be cognizant of and deal with the appearance. This article will explore the systems, procedures, structures, and mechanisms that arbitrators have created to assure honesty, integrity, and freedom from bias and corruption and suggest some areas for improvement.

I will address commercial, construction, consumer, and employment arbitration in the United States,[1] arguing that arbitration is in reality the diametric opposite of its perceived image. The profession of arbitration—and today it is a profession—is not only cognizant of the criticisms that have been leveled against it but has long since embarked on a process of internal self-regulation far beyond anything required by the user public. Through this process, arbitration seeks to avoid not only impropriety but also any appearance of impropriety. We commonly refer to this process as "arbitrator ethics."

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1. Labor-management arbitration has somewhat different, but equally established, standards and principles and thus will not be discussed in this article.

II. ARBITRATOR ETHICS AND THE ROLE OF THE INDIVIDUAL ARBITRATOR

A. *The Ethics Codes*

The cadre of people who serve as arbitrators is drawn from many sources. Most function as members of panels created by institutional providers. In commercial and construction arbitration, the best known providers are the American Arbitration Association, the Judicial Arbitration and Mediation Services, Inc. (hereinafter "JAMS"), CPR International Institute for Conflict Prevention and Resolution, and the National Arbitration Forum, but there are many more. Some of these organizations also provide consumer and employment arbitrators. The Better Business Bureau, local real estate boards, and panels sponsored by local bar associations, government agencies, and other community-based organizations provide consumer and employment arbitration as well. In addition, there are myriad "*ad hoc,*" or non-administered arbitrations, in which the parties or their party-appointed arbitrators select a neutral arbitrator. In some industries, such as reinsurance, this *ad hoc* system is the norm.

The arbitrators affiliated with major providers are usually attorneys, but may also be architects, engineers, building contractors, and business people from many different sectors. They regard themselves as professionals, have ordinarily gone through training that emphasizes professional standards and responsibilities, and are—or at least should be—cognizant of arbitrator ethics principles. Some *ad hoc* arbitrators may equally be regarded as professionals, but many are drawn from the industry involved in the case and lack specialized knowledge of the arbitration process.

The ethics codes and the principles they articulate are generally well known to arbitrators serving on established panels and those who regularly serve in *ad hoc* proceedings. The ethics codes have been adopted or sponsored in some form by the major providers. They are the subject of training programs, seminars, rules, and published manuals. The April 2009 meeting of the American Bar Association Section of Dispute Resolution devoted an entire "track" of panel discussions to neutral ethics. However, there is no known mechanism to bring arbitrator ethics to the attention of persons selected to serve in *ad hoc* proceedings because of their business or industry experience and acumen, without training in the arbitration process. This is a part of the image problem for which there is yet no solution.

The *sine qua non* of arbitration is that the parties trust the process. Arbitrators must not only be totally free from bias in every case they

undertake to decide, they must also be free from any appearance of bias. To this end, arbitrators have developed and impose upon themselves ethical codes, which were promulgated to provide formal guidance to all persons serving as arbitrators in administered as well as *ad hoc* arbitrations, whether pursuant to contract, court-order, or by submission. The codes of ethics generally carry no sanctions for their breach. They are wholly aspirational. Notwithstanding the absence of compulsion, adherence to them is crucial to public confidence in, and the continued viability of, the arbitration process.[2]

This article will refer in detail only to the Code of Ethics for Arbitrators in Commercial Disputes originally prepared in 1977 and extensively revised in 2004 by representatives of the American Bar Association and American Arbitration Association, with major input from the International Institute for Conflict Prevention & Resolution, the National Arbitration Forum, members of the academic community, and other interested organizations and individuals (hereinafter "the 2004 Code").[3]

B. *Self-Examination*

As both an ethical and a practical matter, the initial determination whether a potential arbitrator should take on a tendered case must be made by the arbitrator. The 2004 Code states that an arbitrator should only accept appointment if he or she is satisfied of the following:

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2. As will be discussed below, the courts consider arbitrator ethical standards, particularly those relating to disclosure, where awards are sought to be set aside for evident partiality or misconduct by the arbitrator.

3. AMERICAN ARBITRATION ASSOCIATION AND AMERICAN BAR ASSOCIATION, THE CODE ON ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon I, B (2004), *available at* http://www.adr.org/si.asp?id=4582 [hereinafter THE 2004 CODE]. Other domestic sources include: JAMS, ARBITRATORS ETHICS GUIDELINES (2003), *available at* http://www.jamsadr.com/arbitration/ethics.asp; NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE (2008), *available at* http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3; CPR INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, 2007 RULES FOR NON-ADMINISTERED PROCEEDINGS, *available at* http://www.cpradr.org/Clauses/Rules; ETHICAL STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, CAL. RULES OF COURT, Appen., Div. VI (2002), *available at* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/ethics_standards_neutral_arbitrators.pdf [hereinafter CALIFORNIA ETHICAL STANDARDS] and provisions of federal and state law, *e.g.*, Federal Arbitration Act, 9 U.S.C. Sec. 1 *et seq.*, REVISED UNIF. ARBITRATION ACT (2000), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. International sources include: INTERNATIONAL BAR ASSOCIATION, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2004), *available at* http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx; INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, ICDR INTERNATIONAL DISPUTE RESOLUTION PROCEDURES: INTERNATIONAL ARBITRATION RULES (2008), *available at* http://www.adr.org/sp.asp?id=28819 and numerous regional and national arbitration tribunals.

> (1) that he or she can serve impartially; (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators; (3) that he or she is competent to serve; and (4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.[4]

The Comment to Canon I adds:

> A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.[5]

Furthermore, Subparagraph C of Canon I provides:

> After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality . . .[6]

Stated another way, the potential arbitrator must be satisfied in his or her own mind at the outset that he or she is impartial, independent, competent, available to serve, and has no interest or relationship—and will not acquire any—which is likely to affect impartiality during and for a reasonable time after the arbitration. If the arbitrator is not satisfied that this is the case, the arbitrator should decline the appointment or recuse him or herself. This introspective analysis is the first level of protection and is indispensable.

The 2004 Code provides that the existence of any of the matters or circumstances described in Subparagraph C does not render it unethical for one to serve as arbitrator if the parties have consented to the arbitrator's appointment following full disclosure.[7] However, service as a neutral arbitrator in a case where there is apparent absence of impartiality or interest carries with it such an appearance of impropriety that the arbitrator would be well advised to decline the appointment, even if the parties consented to the arbitrator's appointment.

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4. THE 2004 CODE, *supra* note 3, Canon I, B.
5. *Id.* Comment to Canon I.
6. *Id.* Canon I, C.
7. *See id. See also id.* Canon II, F.

Subparagraph B of Canon I highlights two of the critical differences between arbitration and court proceedings.[8] It references an arbitrator's "competence to serve," which is aimed at the potential arbitrator's confidence in his or her ability to take on a particularly complex or technical case.[9] The parties will also have the ability to consider the arbitrator's qualifications as they review biographical data. There is no counterpart to this in classic litigation where one must accept the assigned judge.

The second critical difference involves the reference in Subparagraph B of Canon I to an arbitrator's availability to commence and complete the arbitration in accordance with the case's requirements and the reasonable expectations of the parties.[10] This assures the parties that the potential arbitrator is satisfied that he or she can provide the parties with as expeditious a hearing and determination as the nature and circumstances of the case will permit—one of arbitration's most important attributes.

C. *Disclosure of Interests or Relationships*

1. The Process

The second level of protection is the disclosure process. Generally, disclosure occurs after the parties and their counsel have reviewed the resumes of potential arbitrators and are ready to make their selection. The disclosure process permits the parties to make informed decisions as to who will decide their case, and protects awards against later claims of unknown bias or interest. When carried out fully and properly, the disclosure process enables arbitrators to demonstrate to the parties and their counsel the arbitrator's intention and ability to serve without bias or interest. It also allows the parties to reject the arbitrator if they are unsatisfied with the arbitrator's ability to serve impartially. I regard full, candid disclosure as the most critical step in the process.

Pursuant to the 2004 Code, prior to accepting an appointment, potential arbitrators should disclose the following:

> (1) Any known direct or indirect financial or personal interest in the outcome of the arbitration; (2) 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. For example, prospective arbitrators should dis-

8. THE 2004 CODE, *supra* note 3, Canon I, B.
9. *Id.*
10. *Id.*

> close any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts; (3) The nature and extent of any prior knowledge they may have of the dispute; and (4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.[11]

Ordinarily, these disclosures are made in writing, and the parties and their attorneys should be afforded adequate time to review them.

If a party objects to a proposed arbitrator who has not yet been agreed to, there is simply no agreement and no appointment. If an objected-to arbitrator has already been appointed or agreed to, the arbitrator will in most cases withdraw. Some institutions, such as the American Arbitration Association, reserve the power to pass on objections which may be deemed frivolous or baseless.[12]

The duty to disclose continues throughout the arbitration, and requires an arbitrator to disclose, as soon as possible, any interests or relationships which may arise or are recalled or discovered during the course of the arbitration.[13]

2. Interests

Deciding what to disclose also requires introspective analysis. Fortunately, guidelines exist. The 2004 Code requires arbitrators to disclose "any known direct or indirect financial or personal interest in the outcome of the arbitration."[14] The term financial interest is used in its ordinary sense to mean that if the arbitrator's economic status may be affected—positively or negatively—by any potential outcome of the case, then the arbitrator has a financial interest. This may include, for example, an ownership of corporate stock or a share in a partnership or limited liability company that is a party involved in the case.

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11. *Id.* Canon II, A.

12. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-17(b) (2007), *available at* http://www.adr.org/sp.asp?id=22440. The California state courts have held that the public policy underlying the code provision requiring an arbitrator to withdraw following timely objection based on a disclosure without regard to its merit overrides the Association's reserved power to pass on the sufficiency of objections. CAL. CODE CIV. P. § 1281.91(b); *see* Azteca Constr. Inc. v. ADR Constr. Inc., 121 Cal.App.4th 1156 (Cal. Ct. App. 2004).

13. THE 2004 CODE, *supra* note 3, Canon II, C.

14. *Id.* Canon II, A.

The 2004 Code does not provide a materiality standard. Arguably, if the amount or rights in controversy are so minimal that the value of the stock or share will not be affected by any potential outcome or the amount of the arbitrator's investment is insignificant in light of his or her overall estate, the arbitrator's interest should not be a matter of concern. In his classic concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, Justice White wrote:

> Of course, 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. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed . . .[15]

With respect to relationships, the potential arbitrator need disclose only those which might *reasonably* affect impartiality or lack of independence "in the eyes of any of the parties."[16] No similar limitation appears as to interests. The prevailing view is that if the potential arbitrator—or the arbitrator's spouse or any family member living in the home—holds any such interest, however minimal, disclosure is in order.[17]

The 2004 Code does not define "personal interest." In their discussions, the authors referred to their expectation that it would reach any non-economic interests the arbitrator might have, such as those arising out of significant personal involvement in public or civic or religious institutions, schools, clubs or fraternities, and the like.

3. Relationships

The 2004 Code requires that prior to accepting a request to serve as arbitrator, the arbitrator disclose relationships that might affect impartiality:

> Any known existing or past financial, business, professional or personal relationships which might reasonably affect partiality or lack of independence in the eyes of any of the parties. For example, pro-

15. 393 U.S. 145, 151-52 (1968).

16. THE 2004 CODE, *supra* note 3, Canon III, A.

17. By way of example, the California Ethical Standards require disclosure of any financial interest in a party or in the subject matter of the arbitration on the part of the arbitrator or member of the arbitrator's family. CALIFORNIA ETHICAL STANDARDS, *supra* note 3, Standard 7-d(9),(10). However, the definition of "financial interest" excludes interests in parties amounting to less that one percent or having value of less than $1500, and indirect ownership of securities through shares in a mutual fund in any amount. CALIFORNIA ETHICAL STANDARDS, *supra* note 3, Standard 1(i), (incorporating CAL. CODE CIV. P. § 170.5(b)).

> spective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts.[18]

Failure to disclose relationships has been a ground for court vacatur of awards under the rubric of "evident partiality" in a number of cases. However, the disclosure duty was not expressly set forth in the Federal Arbitration Act or the Uniform Act, which was adopted by forty-nine states.[19] The Revised Uniform Arbitration Act (2000) codified the disclosure duty:

> [An arbitrator shall] . . . disclose to all parties . . . and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator . . . , including . . . an existing or past relationship with any of the parties . . . , their counsel or representatives, a witness, or another arbitrator . . .[20]

The Comment to Section 12 describes the juridical basis for the new proposed uniform statute.[21]

In *Delta Mine Holding Co. v. AFC Coal Properties, Inc.,* the District Court vacated an award based on alleged conduct by a party-appointed arbitrator inconsistent with the Code of Ethics.[22] Reversing the decision below, the Eighth Circuit pointed out that the Code of Ethics itself provided that it "does not form a part of the arbitration rules of the American Arbitration Association," nor does it "establish new or additional grounds for judicial review of arbitration awards."[23] The court then stated that "[i]t is well-settled that only the statutory grounds in Sec. 10(a) of the Act justify vacating an award; arbitration rules and ethical codes 'do not have the force of law.'"[24]

In the 2004 Code, "known" simply means that which is *actually* known or that which is capable of becoming known by a reasonable effort.[25] In *Schmitz v. Zilveti,* the appellants charged an arbitrator with evident partiality because he failed to reveal that his law firm had represented the parent company of the corporate respondent.[26] The arbi-

18. THE 2004 CODE, *supra* note 3, Canon II, A(2).
19. Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.; UNIF. ARBITRATION ACT (2000).
20. UNIF. ARBITRATION ACT § 12(a)(2).
21. *Id.* Comment to Section 12.
22. 280 F.3d 815, 820 (8th Cir. 2001).
23. *Id.*
24. *Id.* at 820 (quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th 1983).
25. THE 2004 CODE, *supra* note 3, Canon II, B.
26. 20 F.3d 1043, 1047 (9th Cir. 1994).

trator was unaware of this representation.[27] He had checked his firm's records to determine if it had done business with the respondent, but not its parent.[28] The Ninth Circuit vacated the award, finding an appearance of bias based on the inadequate search.[29]

Similarly, in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi,* the Second Circuit vacated an award where the arbitrator learned of a potential conflict during the arbitration and disclosed it, but only in terms indicating it to be trivial.[30] His deliberate failure to investigate it further and disclose the results of such an investigation constituted evident partiality. In *New Regency Productions, Inc. v. Nippon Herald Films, Inc.,* the Ninth Circuit held that where circumstances developed during an arbitration indicating a need to investigate a potential relationship, the arbitrator's failure to investigate was in itself evident partiality.[31]

There are no ground rules for how far back into the past one must disclose.[32] The California Ethics Standards for Neutral Arbitrators in Contract Arbitration (hereinafter "California Ethics Standards") use two years as a cut-off.[33] The California Ethics Standards were developed by the California Judicial Council in response to a legislative mandate; they were promulgated by the Supreme Court in 2002, revised extensively in 2003, and may be found at the Appendix to the California Rules of Court, Division VI.[34] The drafters were particularly concerned with perceived inadequacy in disclosure of business relationships, and attempted to particularize the types of relationships that, in their estimation, must be disclosed. After setting forth a duty to disclose in language very close to that of the 2004 Code—to ". . . disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial . . ."[35]—they went on to require disclosure of relationships in very specific terms:

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27. *Id.*

28. *Id.*

29. *Id.* at 1049.

30. 492 F.3d 132 (2d Cir. 2007).

31. 501 F.3d 1101, 1103 (9th Cir. 2007).

32. However, the author has disclosed prior relationships thirty years earlier and fifty years earlier and in each case a party thanked and excused him. The records of my firm are fairly complete and accurate over a twenty-year period and my practice is to disclose anything they reveal that is otherwise discloseable. I will go back even farther if the relationship was of importance to me (as in the thirty-year-old and fifty-year-old cases) or would, in my estimation, be important from the perspective of any party.

33. CALIFORNIA ETHICAL STANDARDS, *supra* note 3.

34. *Id.*

35. CALIFORNIA ETHICAL STANDARDS, *supra* note 3, Standard 7(d).

> The arbitrator or a member of the arbitrator's immediate or extended family is a party, a party's spouse or domestic partner, or an officer, director or trustee of a party ["immediate family" and "extended family" are defined terms]. . . . The arbitrator or the arbitrator's spouse, former spouse, domestic partner, child, sibling, or parent is a lawyer in the arbitration, the spouse or domestic partner is (A) A lawyer in the arbitration; (B) The spouse or domestic partner of a lawyer in the arbitration; or currently associated in the private practice of law with a lawyer in the arbitration. . . . The arbitrator or a member of the arbitrator's immediate family has or has had a significant personal relationship with any party or a lawyer for a party. . . . The arbitrator is serving or, within the preceding five years, has served [as a neutral or party-appointed arbitrator in a prior or pending case involving a party to the current arbitration or an attorney for a party.[36]

Additionally, the arbitrator must disclose: whether the arbitrator is serving or has served as a compensated dispute resolution neutral other than as arbitrator involving a party or attorney for a party; whether the arbitrator has or has recently discussed any arrangement with a party for compensated services as a dispute resolution neutral; whether the arbitrator has or has had any attorney-client relationship with a party or lawyer for a party (as defined); whether the arbitrator has or has had any other professional relationship with a party or lawyer for a party, including specifically association in the private practice of law, employment, or service as expert witness or as consultant; whether the arbitrator or member of the arbitrator's immediate family has a financial interest in a party or in the subject matter of the arbitration; whether the arbitrator or a member of the arbitrator's immediate family has an interest that could be substantially affected by the outcome of the arbitration; and whether the arbitrator or a member of the arbitrator's immediate or extended family has personal knowledge of disputed evidentiary facts concerning the proceeding.[37]

Much of the law requiring disclosure of arbitrator relationships stems from *Commonwealth.*[38] There, a supposedly neutral arbitrator, selected by two party-appointed arbitrators, failed to disclose that the firm he headed had over a period of time supplied engineering services to a party, including services on the projects involved in the arbitration.[39] Reversing the court below, the Supreme Court held that the failure to disclose the relationship constituted evident partiality or un-

36. CALIFORNIA ETHICAL STANDARDS, *supra* note 3, Standard 7(d).

37. *See* CALIFORNIA ETHICAL STANDARDS, *supra* note 3.

38. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).

39. *Id.* at 146.

due means within the meaning of the Federal Arbitration Act.[40] The plurality opinion written by Justice Black and the concurring opinion written by Justice White agreed that failure to disclose a substantial interest in a firm that did more than trivial business with a party required vacatur of the award.[41]

While the business relationship in *Commonwealth* is undoubtedly a required subject of disclosure, courts have struggled to draw the line between relationships of sufficient moment to require disclosure, and those which are of a trivial nature, and thus do not require disclosure. For example, in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, the attorney arbitrator failed to disclose a prior professional association—that he and one of the parties' attorneys were co-counsel for an unrelated client—with a member of one of the law firms in the case.[42] The court concluded that the Federal Arbitration Act did not mandate the extreme remedy of vacatur for nondisclosure of what it deemed a trivial past association.[43]

Positive Software adopted the view that there is a distinction between the statutory "evident partiality" standard and the "reasonable impression of partiality" Ethics Code standard, a distinction illustrated by the divergence between Justice Black's plurality opinion in *Commonwealth* and Justice White's concurring opinion in the case.[44] The *Positive Software* court concluded that the majority of circuit courts have found that the Supreme Court's disagreement in *Commonwealth* compels the conclusion that the majority of the Court did not equate "appearance of bias" with "evident partiality" and that only the Ninth Circuit has adopted a contrary rule.[45]

In *Luce, Forward, Hamilton & Scripps, LLP v. Koch,* an arbitrator recognized trial counsel who appeared unexpectedly at the hearing and a potential expert witness as past fellow members of the board of the Business Trial Lawyers Association and the American Inns of Court.[46] The arbitrator promptly disclosed the relationships and then denied a motion for disqualification based on the disclosures.[47] JAMS concurred in his decision. Following the hearing and issuance of the award, the claimant petitioned the California Superior Court to confirm the award. The respondents petitioned to vacate it on the ground

40. *Id.* at 151-52.
41. *Id.*
42. 476 F.3d 278 (5th Cir. 2007).
43. *Id.*
44. *Id.*
45. *Id.* at 288 (citing Schmitz v. Zilveti, 20 F.3d 1043 (9th 1994)).
46. 162 Cal.App.4th 720 (Cal. Ct. App. 2008).
47. *Id.*

that the disclosures were required under the California statute and thus entitled them to disqualification as a matter of right.[48] Thus, the issue was whether these were *required* disclosures.[49] The court concluded that serving on the boards of two professional organizations, standing alone and without any indication of a business relationship, was not ground for disqualification and that the disclosures, although made, were not required under the mandatory disqualification statute.[50] The Superior Court confirmed the award and on appeal its decision was affirmed.

In analyzing the issue presented by the appeal the Appellate Court quoted with approval two passages from its earlier decision in *Johnston v. Security Insurance Co. of Hartford,*[51] which quoted language from *Commonwealth.* The first was from Justice Black's majority opinion, and read:

> It is true that 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, but *we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.* We can perceive of no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that *arbitrators disclose to the parties any dealings that might create an impression of possible bias.*[52]

The second was from Justice White's concurring opinion, and read:

> 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 onset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties . . .[53]

The *Luce* court then picked up on the emphasis in both *Commonwealth* opinions on business or financial matters.[54] *Luce* cited a line of cases, including *Johnston,* which turned on the presence or absence of an acquaintanceship involving a substantial business relationship, and cited the following statement with approval:

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48. *Id.*
49. *Id.*
50. *Id.*
51. 6 Cal.App.3d 839 (Cal. Ct. App. 1970).
52. Luce, Forward, Hamilton & Scripps, LLP v. Koch, 162 Cal.App.4th 720, 731 (Cal. Ct. App. 2008) (citing Johnston v. Security Ins. Co. of Hartford, 6 Cal.App.3d 839, 842 (Cal. Ct. App. 1970) (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 148-49 (1968))).
53. *Id.*
54. *Id*

> Social acquaintance, even of long duration and of a personal nature, without a substantial business relationship does not create an impression of possible bias . . . ; [m]embership in a professional organization does not provide a credible basis for inferring an impression of bias . . . to create an impression of possible bias that therefore requires disclosure, a business relationship must be substantial and involve financial consideration.[55]

The court concluded by pointing out that *Commonwealth* recognized that arbitrators cannot sever all their ties with the business world and stating that "the same is true of professional obligations involving service to the legal community and the public, continuing education for bar members and mentoring for new lawyers."[56]

Finally, in *Guseinov v. Burns,* the court considered whether an arbitrator's failure to disclose his prior service as a pro bono mediator in an unrelated case in which one of the attorneys in the arbitration represented a party required vacatur.[57] The court held that the mediation was an ordinary and insubstantial business dealing not requiring disclosure.[58]

There is thus a distinction between what *must* be disclosed and what *should* be disclosed.[59] The general rule remains: when in doubt disclose.[60]

4. Other Subjects of Disclosure

Potential arbitrators should disclose the nature or extent of any prior knowledge they may have of the dispute.[61] They should also disclose any other matters required by the agreement of the parties, the rules or practices of the administering institution, or applicable law.[62] Although the 2004 Code is structured to require disclosure only of "interests" and "relationships," together with any other matters re-

55. *Id.* at 732.

56. *Id.* at 734.

57. Guseinov v. Burns, 145 Cal.App.4th 944 (Cal. Ct. App. 2006).

58. *Id.* at 958-59.

59. Although no economic consideration was involved, I have without hesitation disclosed my relationship with persons I worked long and closely with on Bar Association committees, but not casual acquaintanceship with Association members. I have disclosed my relationships with fellow members of mid-sized boards of directors of non-profit community organizations. I have disclosed service as a mediator, whether compensated or uncompensated, where parties to a proposed arbitration or their attorneys appeared before me. Perhaps these were not mandated, but I based my decisions to disclose on the premise that these were relationships the parties would prefer to know about.

60. THE 2004 CODE, *supra* note 3, Canon II, A(4).

61. *Id.* Canon II, A(3).

62. *Id.* Canon II, A(4).

quired by applicable rules, practices, or laws,[63] practice generally has advocated disclosing not only these specific matters but also anything else that a reasonable party would consider likely to affect impartiality. This concept was adopted by the Revised Uniform Arbitration Act, which specifically provides that a prospective arbitrator ". . . shall disclose . . . any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including [the interests and relationships discussed above]."[64]

The authors of the 2004 Code considered requiring potential arbitrators to disclose prior professional or personal life experiences resembling the subject matter of the dispute tendered to them, but rejected such a requirement as excessively vague and subjective. The issue was later raised in *O'Flaherty v. Belgum* in which the losing party complained that the arbitrator in a case involving a law firm break-up did not disclose that he had been personally involved in a remotely similar dispute.[65] The case was decided on other grounds but the dissent considered the issue at length, ultimately concluding that the personal or professional facts presented would not have justified vacatur.[66]

D. *Role of the Parties*

Parties have a concomitant duty to make known, at the disclosure stage, any relevant information they have that the arbitrator overlooked. A party that fails to do so may waive the right to vacate or to oppose confirmation based on such information.[67]

E. *Other Ethical Obligations*

With limited exceptions, a prospective arbitrator or arbitrator should not discuss any matter relating to the arbitration with any party or counsel outside the presence of the others or communicate in writing with one side's party or counsel without sending a copy to the other. This rule does not apply to hearings where a party who has received due notice does not appear. If an arbitrator receives a written

63. *Id.*

64. UNIF. ARBITRATION ACT (2000).

65. 115 Cal.App.4th 1044 (Cal. Ct. App. 2004).

66. *Id.* at 1106.

67. Fidelity Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306 (9th Cir. 2006), Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815 (8th Cir. 2001), *See also* Guseinov v. Burns, 145 Cal.App.4th 944 (Cal. Ct. App. 2006) (citing Fininen v. Barlow, 142 Cal.App.4th 185, 191 (Cal. Ct. App. 2006)).

communication concerning the case which has not been sent to the other parties, the arbitrator should send copies to them.[68]

Canon VI provides that an arbitrator is in a relationship of trust to the parties.[69] Thus, he or she should not use or disclose confidential information acquired during the arbitration, and should adhere to the reasonable expectations of the parties regarding the confidentiality of all aspects of the proceeding. Normally, those expectations anticipate that the arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. The expectation of confidentiality is another fundamental difference between arbitration and classic litigation. While the confidentiality of the result will vanish if the award is spread on the public record by court proceedings to confirm or vacate, the arbitrator should not assist in proceedings to enforce or challenge the award.

Earlier prohibitions on arbitrator advertising or promotion vanished as a result of First Amendment challenge of similar professional limitations. The 2004 Code permits arbitrators to engage in advertising or promotion of their services, in person or through any medium, which is truthful, accurate, and does not imply any willingness to accept an appointment other than in accordance with the 2004 Code.[70]

F. *Party Appointed Arbitrators*

The most radical departure of the 2004 Code from its predecessors lay in its treatment of arbitrators appointed by one party and serving in a non-neutral capacity. Under the 2004 Code, all arbitrators, even those appointed by a party, are presumed to be neutral and thus subject to all obligations of the 2004 Code.[71] Arbitrators are required to take appropriate steps to determine how the parties expected them to serve and to communicate the results of this inquiry. If the arbitrators determine and advise the parties and other arbitrators that their appointment contemplates service as non-neutrals, they may do so. In that event, the arbitrators are nevertheless subject to the obligations of the 2004 Code, except for those made expressly inapplicable to their status by Canon X.[72]

Consistent with this view, the Eighth Circuit held in *Delta Mine* that where a party-appointed arbitrator disclosed that he would communicate with the party that had appointed him throughout the arbitration,

68. THE 2004 CODE, *supra* note 3, Canon III.
69. *Id.* Canon VI.
70. *Id.* Canon VIII.
71. *Id.*
72. *Id.* Canon X.

would function as an advocate for that party, and then proceeded to do so, the objecting party failed to demonstrate that the arbitrator's conduct misled the other arbitrators, prevented the objector from fairly presenting its case, or otherwise prejudiced the outcome of the arbitration.[73]

III. THE ROLE OF THE COURTS AND INSTITUTIONS

Notwithstanding the more rigorous statutory requirement for vacatur, courts have referred to and at times relied upon arbitrator ethical standards, especially those requiring disclosure, in determining whether to confirm or vacate awards under the rubric of evident misconduct. The problem is that if an award is not confirmed or is vacated, the punishment did not fit the crime. The winning party, who labored at great expense to obtain a result in contested arbitration, is deprived of the benefit of an award which may or may not have been tainted by misfeasance on the part of the arbitrator with which the party had no involvement or responsibility. There is no economic impact on the arbitrator, who is immune from civil liability. The economic burden is cast upon the party who, having once prevailed, must try the case again.

The administering institutions attempt to train and indoctrinate their panel members, constantly reminding them of their obligations and in some instances supplying elaborate disclosure checklists tailored to local law and practice. The American Arbitration Association has adopted a policy whereby arbitrators on its panels may be placed on inactive status whenever any of their awards are challenged in court based on allegations that the arbitrator failed to properly disclose a relationship. Generally, inactive status will permit the arbitrator to proceed with existing cases, but he or she will not be considered for appointment on new cases. At the conclusion of the court challenge proceeding, the American Arbitration Association will make a determination whether to return the arbitrator to active status or remove him or her from its roster of neutrals.

IV. CONCLUSION

Both the 2004 Code and its 1977 predecessor advise us that few cases of unethical behavior by commercial arbitrators have arisen.[74] Over thirty years since the 1977 Code was promulgated, this proposi-

73. Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815, 820 (8th Cir. 2001).

74. THE 2004 CODE, *supra* note 3; AMERICAN ARBITRATION ASSOCIATION AND AMERICAN BAR ASSOCIATION, THE CODE ON ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977).

tion remains true. The reported cases of unethical behavior are few, and many have turned out to be post hoc efforts to set aside an adverse award resulting in full exoneration of the neutral. The process continues to be attacked based on a few unfortunate incidents, anecdotal evidence, and just plain misconceptions. The mission of the profession is then to rebut not so much impropriety but the claimed appearance of impropriety. The Ethics Codes, fully subscribed to and rigorously adhered to, provide tools that can be used toward this end.