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# Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill

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# Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill

## **Abstract**

The ethical standards governing conflicts of interest disclosure requirements for arbitrators and mediators are numerous and varied. In spite of the considerable attention that conflict of interest questions attract, both the extent to which an arbitrator must disclose past, present, and potential conflicts of interest and the consequences of a failure to make an appropriate disclosure remain unclear. This article examines disclosure requirements themselves, as well as the sanctions and penalties that may result from a failure to disclose information concerning a neutral's impartiality. Particular attention is paid to what generally is regarded as the most extreme consequence of failure; that being, vacatur.

Much of the confusion regarding disclosure requirements results from the fact that it is not always clear which conflict of interest and disclosure standard is controlling. Relevant standards include arbitral associations' codes of conduct, local codes of ethics, statutes, rules of professional conduct, and judicial decisions. The existing myriad of relevant guidance, regulations, and judicial decisions concerning conflicts of interest and required disclosures can lead arbitrators to make choices that conceivably result not only in sanctions but the nuclear option of the arbitral world, vacatur. Arbitral institutions, such as the American Arbitration Association and the National Arbitration Forum, have not been sufficiently careful to ensure that their codes, standards, and bills of rights do not articulate inconsistent standards as to what conflicts of interest must be disclosed and the consequences of both disclosure (possible removal) and failure to disclose (sanctions and vacatur).

A cynic might assert that in an apparent effort to assure potential clients that their arbitration services are as credible, ethical, and trustworthy as any other dispute resolution process, arbitral institutions have aggressively incorporated every available, recognized external ethics code or codes of conduct (such as judicial codes and local ethics codes) into the arbitral association's own code. A more forgiving commentator might reply that the associations are incorporating external codes because those codes generally have been in existence for a significant period of time, have undergone intense scrutiny, and can help achieve the arbitral association's goal of providing reliable and ethical services. Adopting and incorporating external codes that may have been drafted to regulate services other than arbitration, however, can create obligations inconsistent with the arbitral association's own codes and incompatible with the goals and realities of arbitration.

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. But there is no reason why arbitral institutions cannot review and, if necessary, amend their own codes and recommendations to ensure that their expectations concerning conflict of interest and disclosures are defined as clearly as possible.

## **Keywords**

Arbitration & award, Legal ethics, Conflict of interests

## **Disciplines**

Dispute Resolution and Arbitration | Legal Ethics and Professional Responsibility

# CONFLICTS OF INTEREST AND DISCLOSURES: ARE WE MAKING A MOUNTAIN OUT OF A MOLEHILL?

DAVID ALLEN LARSON\*

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The ethical standards governing conflicts of interest disclosure requirements for arbitrators and mediators are numerous and varied.<sup>1</sup> In spite of the considerable attention that conflict of interest questions

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1. See *infra* Part II.

attract, both the extent to which an arbitrator must disclose past, present, and potential conflicts of interest and the consequences of a failure to make an appropriate disclosure remain unclear.<sup>2</sup> This article will examine disclosure requirements themselves, as well as the sanctions and penalties that may result from a failure to disclose information concerning a neutral's impartiality. Particular attention will be paid to what generally is regarded as the most extreme consequence of failure; that being, vacatur.

Much of the confusion regarding disclosure requirements results from the fact that it is not always clear which conflict of interest and disclosure standard is controlling.<sup>3</sup> Relevant standards include arbitral associations' codes of conduct, local codes of ethics, statutes, rules of professional conduct, and judicial decisions.<sup>4</sup> The existing myriad of relevant guidance, regulations, and judicial decisions concerning conflicts of interest and required disclosures can lead arbitrators to make choices that conceivably result not only in sanctions but the nuclear option of the arbitral world, vacatur. Arbitral institutions, such as the American Arbitration Association and the National Arbitration Forum, have not been sufficiently careful to ensure that their codes, standards, and bills of rights do not articulate inconsistent standards as to what conflicts of interest must be disclosed and the consequences of both disclosure (possible removal) and failure to disclose (sanctions and vacatur).

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2. See *infra* Parts I, II.G.

3. See *infra* Part II.G.

4. See *infra* Part II.

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. But there is no reason why arbitral institutions cannot review and, if necessary, amend their own codes and recommendations to ensure that their expectations concerning conflict of interest and disclosures are defined as clearly as possible.

Part I will address the statutory standards for vacatur established under the Federal Arbitration Act (FAA) and analyze how these standards can be applied when a neutral fails to make an adequate disclosure. More specifically, the article will explore how a court may decide whether a proceeding was tainted by “evident partiality” in light of prior cases that have provided standards for evaluating neutral’s ethical behavior.

Part II will address the broad range of consequences for non-disclosure, including vacatur, which are permitted under the various ethical codes and standards governing neutrals and present a detailed review of the specific rules that provide the basis for such action. In an effort to clarify the operative standards for vacatur due to non-disclosure, the article will conclude with a review of several contemporary cases. In these cases the claimant sought vacatur of an arbitration award, with and without success, on the grounds that an arbitrator’s failure to disclose a conflict of interest was evident partiality.

Before investing too much time and energy analyzing conflicts of interest and disclosure requirements, however, one should pause and ask whether at this point in time there still are sufficient unresolved questions to justify the investment. Are conflicts of interest questions and disclosure requirements still so unsettled that they warrant a detailed inquiry and analysis or can these concerns be handled rather simply? In other words, do the issues surrounding conflicts of interest and disclosure requirements amount to a mountain or a molehill?

On the one hand, it can be argued that we only are dealing with a rather simple problem, nothing more than a molehill on the arbitral landscape. All an arbitrator has to do is disclose every imaginable connection that he or she has with a case—end of problem, end of story.

On the other hand, not unlike many things in life, this instruction may be easier said than done. A neutral can be connected to the parties or substantive issues in a case in a surprising number of ways. Possible connections include past, present and possible future relationships with the parties or associated persons/entities. Or the

neutral, his or her family, close friends or business associates may have either an immediate or potential interest in the outcome. Can we, realistically, disclose every possible connection? What happens if we cannot, or choose not, to disclose every conceivable connection? What if we simply forget? Are there any conflicts to which parties cannot consent no matter how thoroughly they are informed—does party autonomy have its limits? While the general concepts underlying disclosure requirements are comprehensible, the devil is in the details.

There are three primary reasons to conclude that the issue of disclosure is, in fact, a mountain. First, there is a risk of vacatur under the FAA.<sup>5</sup> Although the bases for vacatur under this law are not entirely predictable, it is conceivable that a failure to disclose could result in vacatur where that failure creates an appearance of partiality or bias from either the subjective perspective of a losing party or the objective perspective of a reasonable person. We know that an entire case can be vacated because the arbitrator did not make a required disclosure.<sup>6</sup> Because we do not know whether a case will be vacated only when a conflict of interest reasonably created an unfavorable appearance of partiality or bias or whenever the conflict creates the appearance of bias, we are looking at a mountain. Second, the risk of vacatur may extend to situations in which the arbitrator fails to follow applicable ethical codes requiring disclosure under certain circumstances.<sup>7</sup> The problem is that we do always know in advance which codes will be controlling. Finally, a failure to disclose may present a risk of sanctions for the arbitrator personally.<sup>8</sup> It is daunting, to say the least, to realize that you may be subject to sanctions when it is difficult to determine exactly what is required by the myriad of relevant codes, rules, statutes and judicial decisions.

### I. VACATUR OR THE “WAFEA”—THE NUCLEAR OPTION

Arguably, the worst possible result that could ensue from an arbitrator’s failure to disclose a conflict of interest is vacatur of the final arbitration award.<sup>9</sup> The acronym WAFEA, or Worst Alternative

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5. See 9 U.S.C. § 10(a) (Supp. V 2005).

6. See, e.g., *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, No. 05 CV 10540(RPP), 2006 WL 1816383, at \*9 (S.D.N.Y. June 28, 2006).

7. See *id.* (vacating the arbitral award because arbitrator failed to disclose, as required under the American Arbitration Association’s Code of Ethics, the IBA Guidelines on Conflicts of Interest in International Arbitration, and the Submission Agreement entered into by the parties).

8. MINN. GEN. R. PRAC. 114 app., CODE OF ETHICS R. III.

9. See, e.g., *Ovalar*, 2006 WL 1816383, at \*9 (demonstrating the harsh consequence

to a Final Arbitration Award, is a variation on the WATNA (Worst Alternative to Negotiated Agreement) concept. It captures concisely the potentially catastrophic consequences of failing to disclose.

The United States Arbitration Act of 1925, better known as the Federal Arbitration Act or FAA, was established to provide arbitration with the protection necessary to be an attractive and reliable adjudicatory option.<sup>10</sup> As such, the grounds to vacate an arbitration award are limited. Section 10(a) provides:

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

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>11</sup>

Notably, there is no express language within the statute addressing an arbitrator's failure to disclose conflicts of interest or relationships. However, in the case of *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the United States District Court for the Southern District of New York vacated an arbitration award based upon a violation of disclosure requirements in the submission agreement executed by the parties, the International

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of vacatur of an arbitral award for an arbitrator's failure to disclose a conflict of interest).

10. See generally 9 U.S.C. §§ 1–14 (2000 & Supp. 2005). The Federal Arbitration Act (FAA) was originally passed to address two significant problems within American courts. *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984). The first was a historical reluctance on the part of English judges to allow arbitration of disputes resulting from a desire on their part to avoid a loss of jurisdiction. *Id.* at 13. This attitude was integrated into English common law and was eventually adopted by the American courts. *Id.* The second problem addressed by the passage of the FAA was the inability of state arbitration statutes to adequately enforce arbitration agreements, and thereby ensure that the expectations of those individuals who preferred arbitration would not be undermined by state or federal courts. *Id.* The FAA has established a liberal policy favoring enforcement of arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

11. 9 U.S.C. § 10(a) (Supp. V 2005).

Bar Association Guidelines on Conflicts of Interest in International Arbitration, and the American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes.<sup>12</sup> Despite the district court's reliance on various ethics codes to support vacating the arbitration award, on July 9, 2007, the Second Circuit affirmed by engaging in an "evident partiality" analysis grounded only in section 10 of the FAA and the United States Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*<sup>13</sup> The court held that "when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality."<sup>14</sup>

Despite the Second Circuit's holding in *Ovalar*, there remains the question of when a court will vacate an award under section 10 of the FAA. Because the four statutory grounds do not provide substantive bases for vacatur, the possibility of a merits-based review is eliminated. The limited number of acceptable grounds and their content, however, do affirm the statutory policy favoring enforcement and suggest that judicial relief is available only when the arbitral proceeding was manifestly unfair and arbitrator abuse characterized the proceeding. Based upon this analysis, it is not clear which, if any, provisions of section 10(a) would be satisfied by an arbitrator's failure to disclose.

The first provision permits vacatur "where the award was procured by corruption, fraud, or undue means."<sup>15</sup> Meeting this standard would require wholesale illegitimacy, such as bribery, threats of violence, or other forms of intimidation. As such, it is unlikely, but not impossible, that a failure to disclose would satisfy the first ground for vacatur. Prior cases have suggested that violation of this provision demands a corruption of the entire process through 'undue means' rather than requiring a completely disinterested evaluation. For example, in *Superadio Ltd. Partnership v. Winstar Radio Productions, LLC*, the Massachusetts Supreme Court defined "undue means" as "an underhanded, conniving, or unlawful manner" in holding that an

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12. See *Ovalar*, 2006 WL 1816383, at \*9; see generally IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION (2004), available at [http://www.ibanet.org/images/downloads/Arbitration\\_guidelines\\_2007.pdf](http://www.ibanet.org/images/downloads/Arbitration_guidelines_2007.pdf); AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), available at [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf).

13. See *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 136–39 (2d Cir. 2007); *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147–48 (1968).

14. *Ovalar*, 492 F.3d at 138.

15. 9 U.S.C. § 10(a)(1) (Supp. V 2005).



arbitration award could not be vacated due to one party's representation by an attorney who was not licensed in the State of Massachusetts.<sup>16</sup>

Likewise, failure to disclose a conflict of interest does not appear to implicate the first portion of the third provision of section 10(a), which permits vacatur "where the arbitrators were guilty of misconduct in refusing to postpone the hearing... or... hear evidence pertinent and material to the controversy."<sup>17</sup> Nor does a failure to disclose constitute a situation in which the arbitrators have "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award... was not made"—thus eliminating the fourth provision as a basis for vacatur as well.<sup>18</sup>

Thus, we are left with two provisions under which a court might justify vacatur of an arbitration award under the FAA based upon a failure to disclose. The second ground listed in the FAA prohibits "evident partiality or corruption in the arbitrators" (as distinguished from the corruption described in the first ground which implicates illegitimacy of the process itself), and the latter portion of the third provision enables a court to vacate an arbitration award for "any other misbehavior by which the rights of any party have been prejudiced."<sup>19</sup> In addition to the statutory grounds for vacatur, several judicially-created grounds for vacatur have been established beyond the scope of the FAA.<sup>20</sup> These include situations in which the court finds a manifest disregard of the law and those where the arbitration award is counter to, or against, public policy.<sup>21</sup> Neither of these options represents likely grounds for vacatur when the allegation is a failure to disclose. A review of the applicable case law suggests that "evident partiality" is where the courts hang their hats.

Courts may take a variety of approaches when determining whether vacatur is appropriate based upon an evident partiality analysis. One possibility is that the mere "appearance of bias" is sufficient to establish evident partiality, and thus, the arbitrator must disclose *all* actual and potential conflicts.<sup>22</sup> A second approach requires that the arbitrator disclose only those relationships that

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16. *Superadio Ltd. P'ship v. Winstar Radio Prods., LLC*, 844 N.E.2d 246, 252 (Mass. 2006).

17. 9 U.S.C. § 10(a)(3).

18. *Id.* § 10(a)(4).

19. *Id.* § 10(a)(2)-(3).

20. *Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.*, 119 F.3d 847, 849 (10th Cir. 1997).

21. *Id.*

22. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

would cause bias in the eyes of a “reasonable person.”<sup>23</sup> Yet another possibility would permit a finding of evident partiality where the arbitrator does not comply with an ethics code that has explicit disclosure requirements such as the California Ethics Standards for Neutral Arbitrators.<sup>24</sup> Finally, a court might consider the approach taken by the International Bar Association and classify certain conflicts as non-waivable such that even disclosure cannot restore the integrity of the arbitration proceeding.<sup>25</sup>

The United States Supreme Court’s decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.* provides additional guidance to those attempting to predict whether a court will vacate based upon evident partiality.<sup>26</sup> The *Commonwealth* decision addressed the case of a sub-contractor who sought payment from the prime contractor for work on a painting project.<sup>27</sup> Unbeknownst to the sub-contractor, one of the three arbitrators selected to resolve the dispute was a local engineering consultant who had regularly done business with the prime contractor in the years preceding the arbitration.<sup>28</sup> Although the consultant’s fees obtained from the prime contractor were valued at only \$12,000 and there had been no dealings between the two parties in the year immediately preceding the arbitration, the plurality opinion asserted that “[s]ection 10 does authorize vacation of an award where it was procured by corruption, fraud, or undue means or [w]here there was evident partiality . . . in the arbitrators. These provisions show a desire of Congress to provide

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23. *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 31 (2d Cir. 2004).

24. See CAL. CIV. PROC. CODE § 1281.9 (West 2007). The statute provides:

(a) In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator *shall disclose* all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial . . . .

(b) Subject only to the disclosure requirements of law, the proposed neutral arbitrator *shall disclose* all matters required to be disclosed pursuant to this section to all parties in writing within 10 calendar days of service of notice of the proposed nomination or appointment.

*Id.* (emphasis added).

25. See IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 20 (2004), available at [http://www.ibanet.org/images/downloads/Arbitration\\_guidelines\\_2007.pdf](http://www.ibanet.org/images/downloads/Arbitration_guidelines_2007.pdf) (listing various non-waivable conflicts such as “an identity between a party and the arbitrator” and where the “arbitrator has a significant financial interest in one of the parties or the outcome of the case”).

26. *Commonwealth Coatings Corp.*, 393 U.S. at 147.

27. *Id.* at 146.

28. *Id.*

not merely for *any* arbitration but for an impartial one.”<sup>29</sup>

The plurality based its decision in part upon an earlier case, *Tumey v. Ohio*, which clarified the requirement of judicial impartiality in the context of a criminal conviction.<sup>30</sup> In *Tumey*, the Court held that a conviction may be set aside in cases where there is “*the slightest pecuniary interest*” on the part of the presiding judge.<sup>31</sup> In setting aside *Tumey*’s conviction, the Court “rejected the . . . contention that the compensation involved there was ‘so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty.’”<sup>32</sup> The *Commonwealth* Court reasoned that the same constitutional principle requiring impartiality on the part of judges could be found in the statutory text of the FAA allowing an award to be vacated “on the basis of evident partiality or the use of undue means.”<sup>33</sup> While the plurality noted that “arbitrators cannot sever all their ties with the business world,” the Court asserted that “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.”<sup>34</sup>

While Justices White and Marshall were supportive of the Court’s decision, the concurring opinion highlighted key differences between the roles of judge and arbitrator. Justice White emphasized that “[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges” and noted that “[i]t is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.”<sup>35</sup> Because of the unique expertise arbitrators often bring to the arbitral forum, “arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.”<sup>36</sup> Noting that the judiciary should play a minimal role in evaluating the impartiality of arbitrators and also emphasizing the practical difficulties associated with requiring an arbitrator to provide “his complete and

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29. *Id.* at 146–47 (internal quotation marks omitted).

30. *Tumey v. Ohio*, 273 U.S. 510, 531 (1927).

31. *Id.* at 524 (emphasis added).

32. *Commonwealth Coatings Corp.*, 393 U.S. at 148 (quoting *Tumey*, 273 U.S. at 524).

33. *Id.* (internal quotation marks omitted).

34. *Id.* at 148–49.

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

36. *Id.*

unexpurgated business biography,”<sup>37</sup> Justice White attempted to clarify the Court’s holding by stating 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.”<sup>38</sup> He went on to suggest that arbitrators should err on the side of disclosure to avoid creating a situation in which it is difficult for courts to determine whether the undisclosed conflicts are sufficiently material to permit vacatur.<sup>39</sup>

The dissenting opinion authored by Justice Fortas placed great emphasis on the claimant’s failure to allege bias or partiality on the part of the challenged arbitrator in support of his motion to vacate the award. Specifically, the dissenting Justices rejected what they interpreted as a rule that would permit vacatur based upon a finding of “evident partiality” where there was an “innocent failure to volunteer information” without consideration of the surrounding circumstances.<sup>40</sup> “‘Evident partiality’ means what it says: conduct—or at least an attitude or disposition—by the arbitrator favoring one party rather than the other.”<sup>41</sup> Justice Fortas concluded by asserting that “to rule otherwise may be a palpable injustice, since all agree that the arbitrator [in the instant case] was innocent of either ‘evident partiality’ or anything approaching it.”<sup>42</sup>

A detailed analysis of the various opinions set forth by the Court in *Commonwealth* thus still leaves those attempting to define the boundaries of ‘evident partiality’ with multiple interpretations from which to choose. While the plurality opinion clearly supports a standard under which the arbitrator must avoid the mere appearance of bias, which entails a “simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias,”<sup>43</sup> the plurality opinion is not binding without the concurrence, which requires more than the mere appearance of bias to justify vacatur.<sup>44</sup> Taking both opinions together, the resulting rule supports an objective standard, under which disclosure is required only when a reasonable person would conclude that the arbitrator was biased.<sup>45</sup> Despite the Court’s decision in *Commonwealth*, differing views persist with respect to whether an arbitrator is required to disclose all actual

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37. *Id.* at 151.

38. *Id.* at 151–52.

39. *Id.* at 152.

40. *Id.* at 154 (Fortas, J., dissenting).

41. *Id.* (emphasis added).

42. *Id.*

43. *Id.* at 149 (plurality opinion).

44. *Id.* at 150–52 (White, J., concurring).

45. *Id.* at 148–51 (plurality and concurring opinions).

and potential conflicts, or only those conflicts that permit a reasonable person to infer bias.<sup>46</sup>

Related to the question of when vacatur is appropriate under the FAA is the issue of whether parties to an arbitration agreement may contract to expand the grounds upon which an arbitration award may be vacated. In March 2008, the Supreme Court addressed this issue in *Hall Street Associates, L.L.C. v. Mattel, Inc.* The case involved a lease dispute in which the arbitration agreement executed by the parties included a provision requiring the court to “vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.”<sup>47</sup> Although several circuit courts of appeal previously held the grounds for judicial review provided in sections 10 and 11 of the FAA represented threshold provisions open to expansion by the parties,<sup>48</sup> the majority concluded that a natural reading of the language of sections 9 through 11 indicated that the grounds for expedited vacatur and modification of an arbitration award were exclusive.<sup>49</sup>

The Court reasoned that the “must grant . . . unless” structure of section 9, which commands the courts to confirm an arbitration award unless there exist grounds for vacatur or modification specified within sections 10 and 11, respectively, suggests that Congress did not intend to give the parties flexibility to determine their own grounds for judicial review.<sup>50</sup> Furthermore, Justice Souter appeared to reject a construction of sections 10 and 11 that permits the parties to compel judicial review of an award based upon a mistake of law, as the parties did in this case, and thereby equate such an error with the established grounds for vacatur of fraud, corruption, and evident partiality.<sup>51</sup> Asserting that an exclusive interpretation would “substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway,” the Court noted, “[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r]

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46. *See id.* at 148–52.

47. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, No. 06-989, 2008 WL 762537, at \*3 (U.S. Mar. 25, 2008).

48. *Id.* at \*4 n.5.

49. *Id.* at \*6–7.

50. *Id.* at \*6. “There is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.” *Id.*

51. *Id.* (“‘Fraud’ and a mistake of law are not cut from the same cloth.”)

informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,<sup>52</sup> and bring arbitration theory to grief in post-arbitration process.”<sup>52</sup> Notably, the Court limited its holding to arbitration awards subject to review under the FAA and declined to address other means of obtaining judicial review of arbitration awards pursuant to state statutory or common law.<sup>53</sup>

Regardless of which standard applies, however, a review of the relevant cases makes clear that the court’s decision often will be based upon a fact-intensive analysis. In *Schmitz v. Zilveti*, the court vacated an award where the arbitrator failed to investigate his law firm’s earlier relationship with a party’s corporate parent.<sup>54</sup> Thus, even where no actual conflict of interest exists, because the arbitrator had no actual knowledge of the relationship, a “reasonable impression of partiality” can still form.<sup>55</sup> Conversely, in *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, the court asserted that partiality must be “direct, definite, and capable of demonstration rather than remote, uncertain or speculative.”<sup>56</sup> The appellate court further held that the district court’s finding that the union’s employment of the arbitrator’s brother constituted bias *per se* was clearly erroneous and more evidence of partiality and improper motive was required to justify vacatur.<sup>57</sup> More recently, in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, the Fifth Circuit held the “draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship” and upheld the challenged award, despite the arbitrator’s failure to disclose that he and the attorney for one of the parties had previously represented the same entity, in an unrelated matter taking place over seven years ago.<sup>58</sup>

A review of case law, statutory language, and legislative history suggests several principles that determine whether a court will vacate

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52. *Id.* at \*7 (internal citations omitted) (quoting *Kyocera Corp. v. Prudential-Bache T Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

53. *Id.* at \*8 (explaining that the decision “speak[s] only to the scope of the expeditious judicial review under §§ 9, 10, and 11, [and] decid[es] nothing about other possible avenues for judicial enforcement of arbitration awards”).

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

55. *Id.* at 1049.

56. *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995) (citing *Peoples Sec. Life Ins. v. Monumental Life Ins. Co.*, 991 F.2d 141, 145 (4th Cir. 1993)).

57. *Id.*

58. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 286 (5th Cir. 2007).

an arbitration award for failure to disclose a conflict of interest. First, a court will consider vacatur if the failure to disclose creates “evident partiality” where “evident partiality” may be defined as either the mere appearance of bias or any bias that would be perceived by a reasonable person.<sup>59</sup> Second, the application of an “evident partiality” analysis must not undermine the goals of the FAA, namely to ensure that arbitration is fast, efficient, and not subject to delay and obstruction in the courts.<sup>60</sup> Third, a court considering vacatur of an arbitration award must consider and give due respect to the tradeoff between impartiality and expertise that inheres in a system that allows industry professionals to participate in the resolution of industry-specific disputes.<sup>61</sup> In fact, most courts are mindful of this tradeoff and have imposed a higher burden on those seeking to vacate awards on grounds of arbitrator interests or relationships.<sup>62</sup>

Another guiding principle that emerges when reviewing the relevant cases in this area involves the duty to investigate potential conflicts of interest. As with the duty to disclose, there is a split of authority regarding the implications of a failure to investigate.<sup>63</sup> Some courts have held that vacatur is permissible where the arbitrator fails to investigate, and thus does not discover the problematic conflict or relationship, but still is deemed to have constructive knowledge of the conflict. For example, in *Schmitz* the court asserted that “an arbitrator may have a duty to investigate independent of its . . . duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality . . . .”<sup>64</sup> In evaluating the impact of *Schmitz*, however, it is important to note that the court’s decision relied in part upon the National Association of Securities Dealers’ (NASD) Code of Arbitration Procedures, which requires arbitrators to investigate

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59. *Id.* at 282–83.

60. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (asserting that the “unmistakably clear congressional purpose [of the FAA was] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts”).

61. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983).

62. *See, e.g., id.* (requiring circumstances that are “powerfully suggestive of bias” to justify vacatur); *Artists & Craftsmen Builders, Ltd. v. Schapiro*, 648 N.Y.S.2d 550, 551 (App. Div. 1996) (stating that though an award may be overturned on proof of appearance of bias or partiality, party seeking to vacate has heavy burden and must show prejudice).

63. *See, e.g., Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994) (finding that an arbitrator has a duty to investigate independent of his duty to disclose); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996) (finding that an arbitrator has no duty to investigate).

64. *Schmitz*, 20 F.3d at 1048.

potential conflicts of interest.<sup>65</sup>

Conversely, in *Al-Harbi v. Citibank*, the court refused to vacate an arbitration award despite the arbitrator's failure to disclose a potential conflict of interest. In doing so, the court distinguished *Schmitz* because the relevant dispute was not arbitrated under the NASD Code and because "the alleged evident partiality [arose] . . . from [one party's] representation in unrelated matters by a firm with which [the arbitrator's] only continuing connection was . . . an interest in receivables, none of which were generated by any party connected with the arbitration."<sup>66</sup> The court went on to state:

[T]he fact that an arbitrator has not conducted an investigation sufficient to uncover the existence of facts marginally disclosable under the *Commonwealth Coatings* duty is not sufficient to warrant vacating an arbitration award for evident partiality. That is, we explicitly hold that there is no duty on an arbitrator to make any such investigation.<sup>67</sup>

In addition to the grounds for vacatur and related disclosure requirements derived from the FAA, the Revised Uniform Arbitration Act (RUAA) provides another set of standards that must be considered in our analysis of the issues surrounding disclosure and conflicts of interest. With respect to the duty to investigate addressed by the *Schmitz* and *Al-Harbi* decisions, the comments to section 12 of the RUAA state that:

Section 12(a) requires an arbitrator to make a "reasonable inquiry" prior to accepting an appointment as to any potential conflict of interests. . . . Once an arbitrator has made a "reasonable inquiry" as required by Section 12(a), the arbitrator will be required to disclose only "known facts" that might affect impartiality. The term "knowledge" (which is intended to include "known") is defined in Section 1(4) to mean "actual knowledge."<sup>68</sup>

Thus, unlike the court in *Schmitz*, which found constructive knowledge of a conflict sufficient to justify vacatur, the RUAA does

65. *Id.* at 1049. The court explained:

Section 23(a) & (b) of the NASD Code requires arbitrators to "make a reasonable effort to inform themselves of any" "existing or past financial, business, [or] professional . . . relationships [that they or their employer, partners, or business associates may have] that are likely to affect impartiality or might reasonably create an appearance of partiality or bias."

*Id.*

66. *Al-Harbi*, 85 F.3d at 682-83.

67. *Id.* at 683.

68. UNIF. ARBITRATION ACT § 12 cmt. 3 (2000).



not penalize the arbitrator for failure to disclose relationships of which he or she has no actual knowledge.

For those states that adopt the provisions of the RUA, the prefatory comments suggest that it is likely the grounds for vacatur provided in section 10 of the Federal Arbitration Act will preempt comparable state laws.<sup>69</sup> The parties to an arbitration proceeding, however, may execute a clearly expressed contractual agreement to proceed under state law so long as the law does not conflict with the FAA's pro-arbitration prime directive.<sup>70</sup> Under these circumstances, it is less likely that the disclosure standards provided in section 12 of the RUA will be preempted.

In addition to the portions of section 12(a) imposing a duty to investigate and limiting required disclosures to information within the actual knowledge of the arbitrator, there are other provisions of the RUA that are relevant to a discussion of disclosure requirements and grounds for vacatur—these include sections 4(b)(3), 11(b), and the remainder of section 12.

Section 4(b)(3) defines the circumstances under which the disclosure requirements provided in section 12 may be waived or preempted by disclosure requirements codified in the ethical standards of a professional organization such as the American Arbitration Association. Specifically, this section mandates that a party may not “agree to unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator.”<sup>71</sup> The related comment explains that this provision is intended to recognize that while the actions of parties to an arbitration proceeding are often governed by disclosure requirements established by an arbitration organization, these requirements are controlling only to the extent that they are “reasonable in what they require a neutral arbitrator to disclose.”<sup>72</sup> In addition, the comment to section 4 clarifies that the

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69. *Id.*, prefatory note. “[T]he Supreme Court’s unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to believe that a similar result will obtain with regard to Section 10(a) grounds for vacatur.” *Id.*

70. *Id.* (“*Volt* and *Mastrobuono* establish that a clearly expressed contractual agreement . . . to conduct . . . arbitration under state law rules effectively trumps the preemptive effect of the FAA . . . [provided] the state law principles invoked by the choice-of-law provision do not conflict with the FAA’s prime directive that agreements to arbitrate be enforced.”). See also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472–79 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57–64 (1995).

71. UNIF. ARBITRATION ACT § 4(b)(3).

72. *Id.* § 4 cmt. 4b. It is highly unlikely that a court would find an arbitration organization’s disclosure rules unreasonable solely based upon whether that organization requires disclosures only of those conflicts that reasonably create an impression of bias or

parties may waive their right to disclosure under section 12 for non-neutral arbitrators selected by the parties.<sup>73</sup>

Section 11 defines who may validly serve as a neutral arbitrator under the terms of the RUAA. Section 11(b) requires that “[a]n individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.”<sup>74</sup> The comments explain that an award granted by an arbitrator who fails to disclose such a relationship will be subjected to a presumption of vacatur pursuant to sections 12(e) and 23(a)(2) of the RUAA.<sup>75</sup> An arbitrator who discloses such a relationship but continues to serve despite a timely objection by a party will be subject to vacatur under sections 12(c) and 23(a)(2) of the RUAA.<sup>76</sup> The prohibition against arbitrators continuing to serve when they have serious conflicts of interest such as those described in section 11(b) is comparable to the International Bar Association’s list of non-waivable conflicts (also known as the Non-Waivable Red List) that the IBA has deemed incurable, even where the improper relationship is disclosed to the parties.<sup>77</sup>

Section 12 and the accompanying comments delineate the disclosures required by an arbitrator under the RUAA. This section demands disclosure of “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding.”<sup>78</sup> In addition, sections 12(c) and (d) specify that the failure to make a required disclosure or actual disclosure followed by continued service as a neutral may result in vacatur if a party objects to the conflict or relationship.<sup>79</sup> Section 12(e) goes even further and declares that an arbitrator who fails to disclose a personal or financial interest in the outcome of the proceeding or a substantial relationship with the parties will be “presumed to act with evident

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instead any conflict that creates an impression of bias.

73. *Id.*

74. *Id.* § 11(b).

75. *Id.* § 11 cmt. 2.

76. *Id.*

77. See IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARBITRATION 20 (2004), *available at* [http://www.ibanet.org/images/downloads/Arbitration\\_guidelines\\_2007.pdf](http://www.ibanet.org/images/downloads/Arbitration_guidelines_2007.pdf).

78. UNIF. ARBITRATION ACT § 12(a). The disclosures required under section 12(a) include: “(1) a financial or personal interest in the outcome of the arbitration proceeding; and (2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators [sic].” *Id.*

79. *Id.* § 12(c)–(d).

partiality,” making vacatur mandatory upon motion to the court by a party to the arbitral proceeding.<sup>80</sup>

The comments accompanying section 12 describe the principles that guided the Drafting Committee in defining the disclosure requirements under the RUAA. The comments explain that the affirmative disclosure requirements provided in section 12 are intended to ensure that the parties to the arbitration are given access to “all information that might *reasonably* affect the potential arbitrator’s neutrality.”<sup>81</sup> The Drafting Committee modeled the RUAA disclosure standards in part after the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes adopted in 1977, which espouse an objective standard of partiality under which “arbitrators should disclose the existence of any interests or relationships which are likely to affect their impartiality or which *might reasonably create the appearance of partiality or bias*.”<sup>82</sup> In fact, the drafters intentionally chose to modify an initial requirement to disclose “any” interest or relationship and elected instead to use the phrases “‘a’ financial or personal interest in the outcome or ‘an’ existing or past relationship” in order to avoid requiring arbitrators to disclose de minimis interests and relationships that would be unlikely to affect partiality.<sup>83</sup> The comments reject an understanding of evident partiality based upon tenuous connections among the arbitrator and the parties, asserting that “[t]he fundamental standard of Section 12(a) is an *objective* one: disclosure is required of facts that a reasonable person would consider likely to affect the arbitrator’s impartiality in the arbitration proceeding.”<sup>84</sup>

## II. NONDISCLOSURE HAS ADDITIONAL CONSEQUENCES BUT WHERE DO WE FIND THE RULES?

Vacatur is not the only regrettable consequence that may result from a failure to disclose a conflict of interest. Sanctions and penalties may affect an arbitrator personally.<sup>85</sup> But it can be difficult to determine which rules and regulations are controlling and exactly what those rules require.

One critical protection available to arbitrators, however, is

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80. *Id.* §§ 12(e), 23(a)(2).

81. *Id.* § 12 cmt. 2 (emphasis added).

82. *Id.* (emphasis added).

83. *Id.*

84. *Id.* § 12 cmt. 3 (emphasis added).

85. See generally *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372 (Minn. 1989).

arbitral immunity. Statutory and case law authority supports the conclusion that arbitral immunity is not jeopardized by a failure to disclose relevant conflicts of interest. In *L & H Airco, Inc. v. Rapistan Corp.*, the Minnesota Supreme Court explained its justifications for protecting arbitral immunity in cases of nondisclosure holding that:

Failure to disclose possible conflicts of interest creates at the least an impression of bias. An impression of bias contaminates the decision making process when neutrality is essential and is not condoned by this court. Nevertheless, we decline to permit a civil suit against the arbitrator for failure to disclose prior business or social contacts because of our policy of encouraging arbitration and of protecting the independence of the decision made. Permitting civil suit for a lapse in disclosure would chill the willingness of arbitrators to serve because of the difficulty of remembering all contacts, however remote, with parties to the arbitration.<sup>86</sup>

In addition, the RUA provides that failure to make a required disclosure does not cause any loss of immunity on the part of the arbitrator and suggests that vacatur is the appropriate remedy for nondisclosure.<sup>87</sup>

Although it seems fairly clear that arbitral immunity will remain intact in the event of a failure to disclose, in order to determine what else could happen one must examine the multitude of ethical codes and standards that address disclosure and conflicts of interest. A variety of organizations have attempted to define the ethical standards applicable to arbitrators including, but not limited to, the National Arbitration Forum (NAF), the Judicial Arbitration and Mediation Service (JAMS), the International Bar Association (IBA), the American Arbitration Association (AAA), the American Bar Association (ABA), the National Academy of Arbitrators (NAA), and the Federal Mediation and Conciliation Service (FMCS).<sup>88</sup>

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86. *Id.* at 377.

87. UNIF. ARBITRATION ACT § 12 cmt. 4.

88. See generally NAF CODE OF CONDUCT FOR ARBITRATORS (2006), available at <http://www.adrforum.com/users/naf/resources/CodeOfConductForArbitrators1.pdf>; JAMS, JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES, MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2007), available at [http://www.jamsadr.com/arbitration/consumer\\_min\\_std.asp](http://www.jamsadr.com/arbitration/consumer_min_std.asp); IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION (2004), available at [http://www.ibanet.org/images/downloads/Arbitration\\_guidelines\\_2007.pdf](http://www.ibanet.org/images/downloads/Arbitration_guidelines_2007.pdf); AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), available at [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf); NAA CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MGMT. DISPUTES (2007), available at <http://www.naarb.org/code.html>; FMCS CODE OF PROF'L RESPONSIBILITY FOR

Beyond the myriad organizations are a plethora of ethical codes and standards governing arbitrator conduct. Each of the codes and standards vary considerably with respect to their language, rules, and structure. Each set of standards tends to address conflicts and disclosure at different places within the Code. Sources of authority include the Rules of Professional Responsibility, the Revised Uniform Arbitration Act, the NAF's Judicial Codes of Conduct, District Court General Rules of Practice such as Minnesota Rule 114, the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, and the NAA/FMCS/AAA Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.<sup>89</sup>

#### *A. The Code of Ethics for Arbitrators in Commercial Disputes*

In attempting to isolate the information arbitrators need to know to avoid sanctions and penalties for nondisclosure, one must be mindful of the fact that ethical code provisions in and of themselves may not be a safe harbor. Some of the ethical codes referenced above expressly incorporate other rules and standards or they may simply defer to other rules and standards. For example, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes states that “[a]ll provisions of this Code should . . . be read as subject to contrary provisions of applicable law and arbitration rules . . . [and] subject to contrary agreements of the parties.”<sup>90</sup>

Nonetheless, several provisions of the ABA/AAA Code of Ethics address issues of partiality and disclosure directly. Canon I requires that the arbitrator “uphold the integrity and fairness of the arbitration process” and suggests that an arbitrator should accept an appointment only if he or she can serve impartially and independently of the

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ARBITRATORS OF LABOR-MGMT. DISPUTES (2007), available at <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=198&itemID=16989> (all discussing ethical standards for arbitrators).

89. See MODEL RULES OF PROF'L CONDUCT (2007); UNIF. ARBITRATION ACT (2000); NAF CODE OF CONDUCT FOR ARBITRATORS (2006), available at <http://www.adrforum.com/users/naf/resources/CodeOfConductForArbitrators1.pdf>; MINN. GEN. R. PRAC. 114 app., CODE OF ETHICS R. II; AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), available at [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf); NAA CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MGMT. DISPUTES (2007), available at <http://www.naarb.org/code.html>; FMCS CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MGMT. DISPUTES (2007), available at <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=198&itemID=16989>.

90. AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Note on Construction.

parties, witnesses, and other arbitrators.<sup>91</sup> The Code recommends that the arbitrator “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.”<sup>92</sup> The Code also suggests that the arbitrator should continue to avoid such conflicts of interest “[f]or a reasonable period of time after the decision of a case.”<sup>93</sup> In addition to avoiding conflicts of interest, the Code encourages arbitrators to “avoid conduct and statements that give the appearance of partiality toward or against any party.”<sup>94</sup>

Although the Code clearly states that conflicts of interest should be avoided when possible, the Code makes clear that the existence of such conflict “does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator’s appointment or continued services following full disclosure . . . in accordance with Canon II.”<sup>95</sup> Canon II recommends disclosure of “any interest or relationship *likely to affect impartiality or which might create an appearance of partiality*” such as “[a]ny known direct or indirect financial or personal interest in the outcome of the arbitration” and “[a]ny 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*.”<sup>96</sup> A close examination of the language employed by the drafters reveals the confusion that persists as to whether *all* conflicts that might create the appearance of partiality or only those that *reasonably* affect impartiality should be disclosed. The disclosure requirements under the Code extend beyond conflicts of interest to include “[t]he nature and extent of any prior knowledge [the arbitrator] may have of the dispute” and “[a]ny other matters, relationships, or interests which [the arbitrator is] obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.”<sup>97</sup>

The duty of disclosure defined by the code encompasses a duty to investigate, which requires that arbitrators make “a reasonable effort to inform themselves of any interests or relationships” that might taint

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91. *Id.* Canon I(B).

92. *Id.* Canon I(C).

93. *Id.*

94. *Id.* Canon I(D).

95. *Id.* Canon I(C).

96. *Id.* Canon II(A)(1)–(2) (emphasis added).

97. *Id.* Canon II(A)(3)–(4).

their impartiality.<sup>98</sup> The duty of disclosure is “a continuing duty which requires . . . an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.”<sup>99</sup> Echoing the sentiments of Justice White’s concurrence in *Commonwealth*, the Code declares that “[a]ny doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.”<sup>100</sup> In addition to defining the disclosures that are to be made under the Code, Canon II specifies that disclosures should be communicated to all parties including other arbitrators and reiterates the parties’ right to select an arbitrator despite his or her interests and relationships where the parties are fully informed of those interests and relationships.<sup>101</sup>

In the event all parties request that the arbitrator withdraw, the Code requires the arbitrator to do so.<sup>102</sup> If only one party requests withdrawal due to allegations of partiality, the arbitrator is encouraged to withdraw unless there exist established procedures for challenging an arbitrator that have been defined within an agreement between the parties, arbitration rule, or applicable law that must be followed.<sup>103</sup> In the absence of such procedures, the arbitrator may continue to serve only if he or she, after careful consideration, determines that the basis for the challenge is not substantial and the arbitrator still will be able to decide the case impartially and fairly.<sup>104</sup> Where compliance with these provisions would involve disclosure of confidential or otherwise privileged information, the arbitrator must either obtain consent to the disclosure or withdraw.<sup>105</sup>

Although Canons I and II of the Code provide a wealth of directly relevant information regarding disclosure, it does not explicitly tell us what we need to disclose. It is unclear whether the term “likely” (as it appears within Canon II in the phrase “likely to affect impartiality”) is to be understood as equivalent to the term “reasonably” or is instead intended to include subjective considerations. In addition, like other ethical codes, this one has other relevant language regarding conflicts of interest appearing elsewhere in the text. For example, Canon V states that “[a]n arbitrator should

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98. *Id.* Canon II(B).

99. *Id.* Canon II(C).

100. *Id.* Canon II(D).

101. *Id.* Canon II(E)–(F).

102. *Id.* Canon II(G).

103. *Id.* Canon II(G)(1).

104. *Id.* Canon II(G)(2).

105. *Id.* Canon II(H).

decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.”<sup>106</sup> Because of inconsistent language, an arbitrator might be confused regarding disclosure requirements even when one looks exclusively to a single authority.

### *B. National Arbitration Forum Standards*

Another authority providing guidance to arbitrators with respect to conflicts of interest and disclosure requirements is the National Arbitration Forum (NAF). The NAF not only has multiple provisions within single documents but relevant language appears in several documents. These documents include the Code of Conduct for Arbitrators, the Arbitration Bill of Rights, which expressly incorporates Judicial Codes of Conduct, and the Statement of Principles.<sup>107</sup> The NAF Code of Conduct for Arbitrators begins with a very general directive that arbitrators must “uphold the integrity and fairness of the dispute resolution process.”<sup>108</sup> Canon One states that arbitrators “should treat all parties equally and conduct themselves in a way that is fair to all parties . . . [and] should not be swayed by outside pressure, by public clamor, by fear of criticism or by self interest.”<sup>109</sup> The duties imposed under the Code of Conduct are continuing in that “[t]he ethical obligations of an Arbitrator begin upon appointment and continue throughout all stages of the proceeding.”<sup>110</sup> Ostensibly, this continuing duty encompasses the duty to disclose as it is defined within Canon Two.

Canon Two states that “[a]n Arbitrator should disclose any interest or relationship that affects impartiality or creates an unfavorable appearance of partiality or bias” and thus “should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, that adversely affects impartiality or might reasonably create the

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106. *Id.* Canon V(B).

107. See NAF CODE OF CONDUCT FOR ARBITRATORS Canon 2 (2006), available at <http://www.adrforum.com/users/naf/resources/CodeOfConductForArbitrators1.pdf>; NAF ARBITRATION BILL OF RIGHTS WITH COMMENTARY princ. 3 (2007), available at <http://www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf>; NAF STATEMENT OF PRINCIPLES 3-5 (2007), available at <http://www.adrforum.com/users/naf/resources/StatementPrinciples.pdf>.

108. NAF CODE OF CONDUCT FOR ARBITRATORS Canon 1.

109. *Id.* Canon 1C.

110. *Id.* Canon 1G.



unfavorable appearance of partiality or bias.”<sup>111</sup> The NAF Code of Conduct appears to adopt the broad, absolute disclosure requirement of the four justices in the *Commonwealth* plurality. It does, however, encourage arbitrators to avoid only those dealings that would “reasonably create the unfavorable appearance of partiality or bias.”<sup>112</sup> So if you do not “avoid” the relationship because you do not believe it “reasonably” creates an unfavorable appearance, you may still have to disclose that relationship. Similarly, the latter portion of Canon Two section A states that “[f]or a reasonable period of time after a case, Arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances that might reasonably create the impression that they had been influenced by the anticipation or expectation of the relationship or interest.”<sup>113</sup> Thus, once again, if the arbitrator does not “avoid” a relationship or interest, he or she may still have to disclose it.

Using language similar to that appearing in the AAA/ABA Code of Ethics, the NAF Code of Conduct instructs arbitrators to disclose “[a]ny financial, personal or material interest in the outcome of the arbitration” as well as “[a]ny existing or past material, financial, business, professional, family or social relationships that affect impartiality or might reasonably create an unfavorable appearance of partiality or bias.”<sup>114</sup> Once again, arbitrators are left to wonder whether they need to disclose anything that creates an appearance of partiality or anything that “reasonably” creates an appearance of impartiality. Although one can argue the latter based upon a construction in which the subsequent language limits the preceding terms, consistency probably is preferable.

Conversely, one also can argue that the broad *Commonwealth* plurality standard controls. This interpretation is supported by the language employed in section C of Canon Two, which states that “[p]ersons asked to serve as Arbitrators should disclose any such relationships they personally have with any Party, lawyer or individual whom they understand will be a witness. They should also disclose any such relationships involving immediate members of their families or their current employers, partners or business associates.”<sup>115</sup> Like its counterparts, the NAF Code of Conduct requires that “[a]rbitrators should make a reasonable effort to inform themselves of any interests

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111. *Id.* Canon 2A.

112. *Id.* (emphasis added).

113. *Id.* (emphasis added).

114. *Id.* Canon 2B(1)–(2).

115. *Id.* Canon 2C.

or relationships” that might call into question the arbitrators’ partiality.<sup>116</sup>

In a departure from the AAA/ABA Code of Ethics, the NAF Code of Conduct recommends (“should”), but does not require (“shall”), withdrawal of an arbitrator where all parties request that the arbitrator withdraw because of prejudice or bias.<sup>117</sup> Where fewer than all parties request withdrawal of an Arbitrator due to prejudice or bias, the arbitrator is encouraged to withdraw unless other rules determining challenges are applicable; the arbitrator determines that the reason for the request is insubstantial; or he or she remains able to decide the case impartially and fairly, and “withdrawal would cause unfair delay or expense to another Party or would be contrary to the ends of justice.”<sup>118</sup> Although Canons One and Two address partiality and disclosure requirements directly, Canon Four’s confidentiality requirements may also affect these issues. This provision requires that the arbitrator be honest, trustworthy, and maintain confidentiality such that he or she should not “use confidential information acquired during the proceeding to gain personal advantage or advantage for others, or to adversely affect the interest of another.”<sup>119</sup>

In a separate document called the Arbitration Bill of Rights, the NAF appears to take a tougher stance on the question of arbitrator conflicts and asserts that conflicts of interest are generally impermissible.<sup>120</sup> Relying upon the NAF Code of Procedure Rule 23, Arbitration Bill of Rights Principle 3, Competent and Impartial Arbitrators, states that “arbitrators are disqualified if they have a conflict of interest or if circumstances exist which cause the arbitrator to be unfair and biased. The standards used to determine conflicts and bias of an arbitrator are the same standards used to determine whether judges have a conflict or a bias.”<sup>121</sup> Although one might question whether NAF truly means that the standards applied to judges and arbitrators are equivalent, this provision suggests that local codes of judicial conduct may also play a role in deciphering the conflict and disclosure requirements to which arbitrators may be subjected.

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116. *Id.* Canon 2D.

117. *Id.* Canon 2G.

118. *Id.* Canon 2G(1)–(2).

119. *Id.* Canon 4A.

120. NAF ARBITRATION BILL OF RIGHTS WITH COMMENTARY 4 (2007), available at <http://www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf>.

121. *Id.*; see NAF CODE OF PROCEDURE R. 23 (2007), available at <http://www.adrforum.com/users/naf/resources/20070801CodeOfProcedure.pdf>.

Another publication of NAF called the Statement of Principles declares that persons serving on NAF's nationwide panel of arbitrators and mediators are bound by the Code of Conduct discussed above.<sup>122</sup> According to this document, NAF arbitrators are "required to disclose the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create a material appearance that they are biased against one party or favorable to another."<sup>123</sup> The Statement of Principles also reminds readers that judicial oversight of arbitrator impartiality exists in the form of vacatur as a remedy for arbitrator bias under the Federal Arbitration Act and several state arbitration statutes.<sup>124</sup>

The Statement of Principles refers to yet another document issued by the NAF known as the Code of Procedure, which presents various circumstances in which "arbitrators will be disqualified for conflict of interest or bias."<sup>125</sup> Among the provisions within the NAF Code of Procedure relevant to issues of partiality and disclosure are Rules 5, 20, 21, and 23.

Rule 5 defines arbitrator qualifications and states that "[a] neutral Arbitrator shall not serve if circumstances exist that create a conflict of interest or cause the Arbitrator to be unfair or biased in accord with Rules 21 and 23. A Forum Arbitrator may also be removed similar to the ways a judge or juror may be stricken."<sup>126</sup> Rule 20 requires that arbitrators "take an oath . . . and shall be neutral and independent."<sup>127</sup> Rule 21 of the Code of Procedure governs the selection of arbitrators and allows parties to strike arbitrators from a selected panel, remove a selected arbitrator through a peremptory challenge, and in some circumstances select an arbitrator of their choosing whether that individual is a member of the NAF panel or not.<sup>128</sup> Rule 23 authorizes the disqualification of arbitrators for a variety of reasons related to personal bias, relationships with a party, or other material circumstances creating the appearance of bias. It provides in part:

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122. NAF STATEMENT OF PRINCIPLES 3 (2007), available at <http://www.adrforum.com/users/naf/resources/StatementPrinciples.pdf>.

123. *Id.*

124. *Id.*

125. *Id.*

126. NAF CODE OF PROCEDURE R. 5F.

127. *Id.* R. 20B.

128. *Id.* R. 21 (explaining that "[e]ach Party . . . may strike one of the candidates [provided by the Forum] and may Request disqualification of any candidate in accord with Rule 23C by notifying the Forum in Writing, within ten (10) days of the date of the strike list"); see also NAF STATEMENT OF PRINCIPLES 3.

An Arbitrator shall be disqualified if circumstances exist that create a conflict of interest or cause the Arbitrator to be unfair or biased, including but not limited to the following:

- (1) The Arbitrator has a personal bias or prejudice concerning a Party, or personal knowledge of disputed evidentiary facts;
- (2) The Arbitrator has served as an attorney to any Party, the Arbitrator has been associated with an attorney who has represented a Party during that association, or the Arbitrator or an associated attorney is a material witness concerning the matter before the Arbitrator;
- (3) The Arbitrator, individually or as a fiduciary, or the Arbitrator's spouse or minor child residing in the Arbitrator's household, has a direct financial interest in a matter before the Arbitrator;
- (4) The Arbitrator, individually or as a fiduciary, or the Arbitrator's spouse or minor child residing in the Arbitrator's household, has a direct financial interest in a Party;
- (5) The Arbitrator or the Arbitrator's spouse or minor child residing in the Arbitrator's household has a significant personal relationship with any Party or a Representative for a Party; or
- (6) The Arbitrator or the Arbitrator's spouse:
  - a. Is a Party to the proceeding, or an officer, director, or trustee of a Party; or,
  - b. Is acting as a Representative in the proceeding.<sup>129</sup>

Rule 23 also imposes upon the arbitrator a duty to disclose to the NAF circumstances creating a potential conflict of interest and then requires disqualification or disclosure of the information provided to the parties.<sup>130</sup> In the event that a party wishes to request the disqualification of an arbitrator, a "Written Request stating the circumstances and specific material reasons for the disqualification"

129. NAF CODE OF PROCEDURE R. 23A.

130. *Id.* R. 23B. Rule 23B provides:

An Arbitrator shall provide the Forum with a complete and accurate resume, a copy of which the Forum shall provide the Parties at the time of the selection process. An Arbitrator shall disclose to the Forum circumstances that create a conflict of interest or cause an Arbitrator to be unfair or biased. The Forum shall disqualify an Arbitrator or shall inform the Parties of information disclosed by the Arbitrator if the Arbitrator is not disqualified.

*Id.*

must be filed.<sup>131</sup> Timely filing of this request is critical because “[a] Party who fails to timely and properly disclose disqualifying circumstances agrees to accept the Arbitrator and waives any subsequent objection to the Arbitrator in the pending arbitration or any other legal proceeding.”<sup>132</sup> Pursuant to Rule 23, the “Request to disqualify an Arbitrator must be filed with the Forum within ten (10) days from the date of the Notice of Arbitrator selection.”<sup>133</sup> When a timely filing is made, the NAF reviews the request and will disqualify the arbitrator “if there exist circumstances requiring disqualification in accord with Rule 23A or other material circumstances creating bias or the appearance of bias.”<sup>134</sup>

As noted above, both the Bill of Rights and the Code of Procedure require arbitrators to disclose circumstances “that create a conflict or bias”<sup>135</sup> or “create a conflict of interest or cause an Arbitrator to be unfair or biased.”<sup>136</sup> The Statement of Principles, however, states that arbitrators are “required to disclose the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create a material appearance that they are biased against one party or favorable to another.”<sup>137</sup> An arbitrator reading these provisions might be uncertain as to whether any conflict must be disclosed or whether only those conflicts that might reasonably create a material appearance of bias need to be disclosed. Not only may this inconsistent language create confusion for neutrals, it allows a reviewing court to emphasize whichever language it chooses, thus creating uncertainty and unpredictability as to whether evident partiality sufficient for vacatur exists.

### C. Minnesota Code of Judicial Conduct

In Preceding Section B, we observed that the NAF Arbitration Bill of Rights Principle 3, Competent and Impartial Arbitrators, declares that “[t]he standards used to determine conflicts and bias of an arbitrator are the same standards used to determine whether

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131. *Id.* R. 23C.

132. *Id.*

133. *Id.* R. 23D.

134. *Id.*

135. NAF ARBITRATION BILL OF RIGHTS WITH COMMENTARY 4 (2007), available at <http://www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf>.

136. NAF CODE OF PROCEDURE R. 23B (2007), available at <http://www.adrforum.com/users/naf/resources/20070801CodeOfProcedure.pdf>.

137. NAF STATEMENT OF PRINCIPLES 3 (2007), available at <http://www.adrforum.com/users/naf/resources/StatementPrinciples.pdf>.

judges have a conflict or a bias.”<sup>138</sup> Express incorporation of judicial standards may create additional obligations for arbitrators.

The Minnesota Code of Judicial Conduct, for example, mandates that judges perform their duties impartially and diligently.<sup>139</sup> Canon 3 provides in part:

A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, significant other, parent or child wherever residing, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other interest that could be substantially affected by the proceeding.

(d) the judge or the judge’s spouse or significant other or a person within the third degree of relationship to any of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the proceeding;

(iv) is to the judge’s knowledge likely to be a material witness in the proceeding.

(e) the judge, while a judge or a candidate for judicial office, has made a public statement that commits the judge with respect to:

(i) an issue in the proceeding; or

(ii) the controversy in the proceeding.<sup>140</sup>

Canon 4 of the Code of Judicial Conduct requires that “[a] judge

138. NAF ARBITRATION BILL OF RIGHTS WITH COMMENTARY 4.

139. MINN. CODE OF JUDICIAL CONDUCT Canon 3A(5) (2008).

140. *Id.* Canon 3D(1).

shall not solicit funds for any educational, religious, charitable, fraternal or civic organization.”<sup>141</sup> With respect to their financial activities, judges are not permitted to “serve as an officer, director, manager, general partner, advisor or employee of any business entity.”<sup>142</sup> In addition, the Code places various restrictions on a judge’s ability to accept gifts from others.<sup>143</sup> While the requirements specified within the Code are rather stringent, the commentary sometimes softens the restrictions. For example, the comments pertaining to gift restrictions referenced above acknowledge that “[a] judge cannot . . . reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge’s household.”<sup>144</sup> However, in the context of partiality, the commentary provides that “a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3D(1) apply.”<sup>145</sup>

Arbitrators familiar with the conflicts of interest and disclosure rules of arbitral associations may be surprised by the breadth and range of judicial rules. Judicial conduct codes expressly incorporated into an arbitral association’s code of conduct may require disclosure and even disqualification in circumstances that would not be problematic under the arbitral code. It is not unusual for arbitrators to serve only occasionally as arbitrators and to have other full-time employment. It might come as news to NAF arbitrators in Minnesota, for instance, that they may be subject to disqualification under judicial conduct rules because they helped raise money for their church, their child’s school, or a girl/boy scout troop—in spite of the fact that those entities have absolutely no connection to a particular case or to the parties involved.

Like its Minnesota counterpart, the ABA Model Code of Judicial Conduct applies an objective partiality standard declaring that “[a] judge shall disqualify himself or herself . . . [when] the judge’s impartiality might reasonably be questioned.”<sup>146</sup> The ABA Model Code permits a judge who would otherwise be disqualified to continue participating where, following disclosure, the parties and their lawyers agree that the judge should not be disqualified provided the basis for

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141. *Id.* Canon 4C(3)(b).

142. *Id.* Canon 4D(3).

143. *Id.* Canon 4D(5).

144. *Id.* Canon 4D(5) cmt.

145. *Id.* Canon 3D(1) cmt.

146. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2004), available at [http://www.abanet.org/judicialethics/2004\\_CodeofJudicial\\_Conduct.pdf](http://www.abanet.org/judicialethics/2004_CodeofJudicial_Conduct.pdf).

disqualification is not personal bias or knowledge of disputed facts.<sup>147</sup>

In contrast, the NAF Code of Conduct states only that the arbitrator “should,” rather than “shall,” withdraw if all parties ask him or her to do so because of bias.<sup>148</sup> Yet the removal procedures included within NAF’s Arbitration Bill of Rights suggest that withdrawal of the arbitrator may be mandatory in these circumstances, in spite of the fact that the Code of Conduct uses only the word “should.”<sup>149</sup> The Bill of Rights states that “each party may request that an arbitrator be disqualified and removed. These procedures are similar or identical to the removal of judges. Arbitrators are required to disclose circumstances that create a conflict or bias . . . . Arbitrators are removed at the request of a party in accordance with these procedures.”<sup>150</sup>

Although arbitral forums may believe it is advantageous to adopt judicial codes, it is interesting to note that in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, Justice White’s concurrence declares that “[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.”<sup>151</sup>

#### *D. Rules of Professional Responsibility*

The NAF Bill of Rights specifies that arbitrators are subject to its provisions as well as those of “the [NAF] Code of Conduct and any local Code of Ethics for arbitrators.”<sup>152</sup> Although the Rules of Professional Responsibility cannot necessarily be described as a “local Code of Ethics for arbitrators,” these standards often apply to neutrals and certainly do apply if the neutral is an attorney (as are all the members of the NAF, for example). The Rules generally are drafted to address issues arising in the practice of law. Some of the language, however, is applicable in the arbitration context. Minnesota Rule of Professional Conduct 1.12(a), for instance, declares that “a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a

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147. *Id.* Canon 3E(1) cmt.

148. NAF CODE OF CONDUCT FOR ARBITRATORS Canon 2G (2006), available at <http://www.adrforum.com/users/naf/resources/CodeOfConductForArbitrators1.pdf>.

149. NAF ARBITRATION BILL OF RIGHTS WITH COMMENTARY 4 (2007), available at <http://www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf>.

150. *Id.*

151. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring).

152. NAF ARBITRATION BILL OF RIGHTS WITH COMMENTARY 11.



judge . . . or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.”<sup>153</sup> The Rule provides an example of a required disclosure regarding one’s work as an arbitrator, but in the context of the arbitrator’s role as an attorney.<sup>154</sup> Subsection (c) of the same Rule expands the scope of the disqualification to other lawyers within the same firm unless the disqualified attorney is timely screened, apportioned no part of the fees obtained through the representation, and written notice of the relationship is given to the parties and any appropriate tribunal.<sup>155</sup>

The Minnesota Rules of Professional Conduct also require that:

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.<sup>156</sup>

Thus the Rules of Professional Conduct impose an affirmative duty on arbitrators, at least attorneys acting as arbitrators, and define a required disclosure.

#### *E. Minnesota Rule 114*

Although the Rules of Professional Conduct may not be “any local Code of Ethics for arbitrators,” as described in the NAF Bill of Rights, rules such as Rule 114 of the Minnesota General Rules of Practice for the District Courts do match that description. The Code of Ethics Appendix addresses conflicts of interest and requires that:

A neutral shall disclose all actual and potential conflicts of interest reasonably known to the neutral. After disclosure, the neutral shall decline to participate unless all parties choose to retain the neutral. The need to protect against conflicts of interest shall govern conduct that occurs during and after the dispute resolution process. Without the consent of all parties, and for a reasonable time under the particular circumstances, a neutral who also practices in another profession shall not establish a professional relationship in that other profession with one of the parties, or any person or entity, in a substantially

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153. MINN. RULES OF PROF’L CONDUCT R. 1.12(a) (2007).

154. *Id.* R. 1.12 cmt. 2.

155. *Id.* R. 1.12(c).

156. *Id.* R. 2.4(b).

factually related matter.<sup>157</sup>

The broad, absolute language of this rule, “all actual and potential conflicts of interest,” is devoid of references to relationships and conflicts that would “reasonably create the appearance of partiality.”<sup>158</sup> The disclosure requirement is all-encompassing. Neutrals acting under an arbitral institutional code of ethics that expressly requires disclosure only of the those conflicts that create a reasonable appearance of bias nonetheless will be required to make more comprehensive disclosures if that arbitral code incorporates a rule similar to Minnesota Rule 114. Furthermore, it appears that regardless of the nature or magnitude of the conflict, a neutral cannot serve unless he or she has express consent.

Neutrals cannot presume that the breadth of their disclosure requirements will be fully described by the language contained within the relevant arbitral institutional code. Neutrals first must determine whether external codes or statutes have been incorporated into their arbitral code. They then must decide what that external guidance requires and, if there is any inconsistency, which code or statute is controlling. The prudent choice, of course, is to assume that the most demanding language will be controlling.

The stringent disclosure requirements in Minnesota Rule 114 are tempered, however, by an objective definition of knowledge that demands an arbitrator disclose only those conflicts that are “reasonably known.”<sup>159</sup> Nevertheless, it appears that regardless of whether a conflict of interest is actual or potential, a neutral cannot serve without the express consent of the parties.

The introduction to the Code of Ethics states that “[v]iolation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty has been breached.”<sup>160</sup> The introduction goes on to note that “[n]othing in this Code should be deemed to establish or augment any substantive legal duty on the part of neutrals.”<sup>161</sup> Thus, the language appears to suggest that there are no

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157. MINN. GEN. R. PRAC. 114 app., CODE OF ETHICS R. II.

158. *Id.*; see, e.g., AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon I(C) (2004), available at [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf) (“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.”).

159. MINN. GEN. R. PRAC. 114 app., CODE OF ETHICS R. II.

160. *Id.* intro.

161. *Id.*

real consequences for violating the ADR Code of Ethics in Minnesota. However, the Code of Ethics enforcement provisions provide that sanctions may be imposed if supported by clear and convincing evidence.<sup>162</sup> These provisions define sanctions allowing authorities to:

- (1) Issue a private reprimand.
- (2) Designate the corrective action necessary for the neutral to remain on the roster.
- (3) Notify the appointing court and any professional licensing authority with which the neutral is affiliated of the complaint and its disposition.
- (4) Publish the neutral's name, a summary of the violation, and any sanctions imposed.
- (5) Remove the neutral from the roster of qualified neutrals, and set conditions for reinstatement if appropriate.<sup>163</sup>

#### *F. IBA Guidelines on Conflicts of Interest in International Arbitration*

The International Bar Association Guidelines on Conflicts of Interest in International Arbitration were prepared by a panel of nineteen experts representing fourteen countries.<sup>164</sup> The guidelines demand that “[i]f facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances.”<sup>165</sup> Although the IBA Guidelines adopt a subjective test for disclosure, an objective test is applied with respect to disqualification. The Guidelines demand that an arbitrator decline or discontinue participation “if he or she has any doubts as to his or her ability to be impartial or independent . . . [or] if facts or circumstances exist . . . that, from a reasonable third person’s point of view . . . give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”<sup>166</sup>

A unique and helpful feature of the IBA Guidelines is that the document provides specific examples detailing when disclosure can, and cannot, cure an apparent conflict of interest.<sup>167</sup> The IBA has

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162. *Id.* R. III.

163. *Id.*

164. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT’L ARBITRATION 3 (2004), available at [http://www.ibanet.org/images/downloads/Arbitration\\_guidelines\\_2007.pdf](http://www.ibanet.org/images/downloads/Arbitration_guidelines_2007.pdf).

165. *Id.* at 9.

166. *Id.* at 7–8.

167. *Id.* at 27.

developed several lists categorizing various scenarios and the corresponding action that may be appropriately taken by the arbitrator who encounters such a situation. These lists include the Non-Waivable Red List, which covers situations that give rise to such significant justifiable doubts as to impartiality (from the perspective of a reasonable third person) that disclosure cannot cure; the Waivable Red List, which covers serious but less severe conflicts that can be expressly waived if and when the parties are made aware of the conflict; the Orange List, which encompasses cases that may give rise to justifiable doubts and may be waived by the parties if disclosure is made and no objections follow; and the Green List, which includes situations in which there is no actual or apparent conflict and thus no duty to disclose.<sup>168</sup>

### G. Case Law Review

The rules, codes, and statutory material discussed thus far provide so many recommendations and mandates concerning conflicts of interest and disclosure that it can be difficult for arbitrators to know exactly what must be disclosed, the extent to which they must investigate to discover conflicts, and the consequences if they fail to make a required disclosure. But in addition to understanding the wide range of arbitral institutional and Supreme Court regulatory and ethical dictates that may be applicable, arbitrators also must comprehend and comply with the disclosure requirements that courts are articulating. Again, the problem is that those articulations do not provide consistent guidance. Some courts are very concerned about the parties' needs and desires to be as fully informed as possible and stand willing to vacate decisions based on the mere appearance of partiality. Other courts, however, have declared more restrictive standards for vacatur.

California courts have been particularly active concerning conflicts of interest and disclosure issues. In *Ovitz v. Schulman*, a California court of appeal upheld an order vacating an arbitration award based upon a failure to disclose.<sup>169</sup> The court concluded that the FAA provisions permitting vacatur upon a showing of "evident partiality" by the arbitrator did not preempt an applicable state statute permitting an arbitration award to be vacated based upon the arbitrator's failure to comply in a timely fashion with state standards

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168. *Id.* at 20–25.

169. *Ovitz v. Schulman*, 35 Cal. Rptr. 3d 117, 136 (Ct. App. 2005).

applicable to contractual arbitration proceedings that required disclosure of possible grounds for disqualification.<sup>170</sup> The court found that the language of the FAA strongly suggests that sections 10 and 12 of the statute apply only in federal court.<sup>171</sup> Furthermore, the court determined that the relevant California statute was not inconsistent with the purpose of the FAA to encourage private arbitration as a means of resolving disputes.<sup>172</sup>

In *Azteca Construction v. ADR Consulting*, another California appellate court reversed an order denying a petition to vacate based upon the court's finding that the parties could not waive a California Arbitration Act provision related to disqualification of arbitrators in favor of an AAA rule granting the organization conclusive authority to resolve challenges to the selection of an arbitrator.<sup>173</sup> The court determined that the arbitrator's failure to disqualify himself following Azteca's timely demand for such disqualification was a violation of California law<sup>174</sup> and noted that "the neutrality of the arbitrator is of such crucial importance that the Legislature cannot have intended that its regulation be delegable to the unfettered discretion of a private business."<sup>175</sup>

In *International Alliance of Theatrical Stage Employees v. Laughon*, a California appellate court reversed a lower court decision affirming an arbitration award where the arbitrator failed to disclose his service as a neutral in a prior proceeding in which another union was represented by the same law firm representing the union in the current case.<sup>176</sup> The court relied on various sections within the California Code of Civil Procedure including section 1286.2 subdivision (a)(6)(A) to conclude that vacatur was required under the circumstances because the arbitrator had "failed to disclose . . . a ground for disqualification of which the arbitrator was then aware."<sup>177</sup>

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170. *Id.* at 119, 136.

171. *Id.* at 132–33.

172. *Id.* at 134–35.

173. *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142, 151 (Ct. App. 2004).

174. *Id.* at 146–47.

175. *Id.* at 150.

176. *Int'l Alliance of Theatrical Stage Employees & Moving Picture Mach. Operators of the U.S. & Can., Local No. 16 v. Laughon*, 14 Cal. Rptr. 3d 341, 343 (Ct. App. 2004).

177. *Id.* at 345. "Section 1281.9, subdivision (b), provides that a 'proposed neutral arbitrator shall disclose all matters required to be disclosed pursuant to this section to all parties in writing within 10 calendar days of service of notice of the proposed nomination or appointment.'" *Id.* Subdivision (a)(4) of section 1281.9 requires disclosure of "[t]he names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator

California, of course, is not the only jurisdiction confronted with conflicts of interest and disclosure issues. In *Crow Construction Co. v. Jeffrey M. Brown Associate Inc.*, a United States District Court in Pennsylvania resolved the parties' conflicting interpretations of the term "evident partiality" by adopting an approach based upon the Supreme Court's opinion in *Commonwealth Coatings*.<sup>178</sup> According to the district court, in *Commonwealth Coatings* the Supreme Court determined that "'evident partiality' is established when arbitrators fail to disclose 'any dealings that might create an impression of possible bias.'"<sup>179</sup> Based on that understanding, the district court rejected an argument that "evident partiality is present only when 'a reasonable person would have to conclude that the arbitrator was partial' to the other party to the arbitration."<sup>180</sup> Implicitly equating the objective "reasonable person" standard with one requiring actual bias, the court went on to hold that the *Commonwealth Coatings* appearance of bias standard should be applied in the instant case because "[r]egardless of whether a court considers the actual bias standard to be legitimate . . . such a standard does not apply in cases . . . where (1) the parties have some influence in selecting their arbitrators and (2) an arbitrator failed to disclose information which may create a reasonable impression of the arbitrator's partiality."<sup>181</sup>

In *Houston Village Builders, Inc. v. Falbaum*, a Texas appellate court upheld an order vacating an arbitration award granted by an arbitrator who failed to disclose an attorney-client relationship with a builders association of which a party to the arbitration was a member.<sup>182</sup> The court held that despite indirect references to the relationship between the arbitrator and the builders association in the resume and disclosure letter provided to the parties, the disclosures made were "not sufficient to inform the parties that the Arbitrator was in an attorney-client relationship with the GHBA at the time of the arbitration."<sup>183</sup> The court also expressed its support for an

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served or is serving as neutral arbitrator." *Id.* (quotations marks omitted).

178. *Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217, 220–21 (E.D. Pa. 2003).

179. *Id.* at 220 (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968)).

180. *Id.* (quoting *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1523 n.30 (3d Cir. 1994)).

181. *Id.* at 222.

182. 105 S.W.3d 28, 30 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

183. *Id.* at 34. The arbitrator disclosed his membership in the builders association and, in the resume he submitted to the parties, there was a reference to an article authored by the arbitrator that included an endnote stating that the arbitrator served as counsel to the

objective interpretation of the evident partiality standard stating that “[t]he proper test is not whether the undisclosed information would, in fact, create the appearance of bias. Rather, the court must determine whether an objective observer would believe the information *might* create that appearance.”<sup>184</sup>

In *Mariner Financial Group, Inc. v. Bossley*, the Texas Supreme Court upheld an appellate court’s decision to deny summary judgment to a party seeking to avoid vacatur of an arbitration award. The court based its holding on the arbitrator’s evident partiality resulting from a failure to disclose that a party’s expert witness had previously testified against the arbitrator in a malpractice action.<sup>185</sup> Relying upon the plurality opinion in *Commonwealth Coatings*, the Texas Supreme Court adopted a subjective “appearance of partiality” standard to conclude that “[i]t is well-established . . . that a neutral arbitrator has a duty to disclose dealings of which he or she is aware that might create an impression of possible bias.”<sup>186</sup> In addition, the court also referenced provisions of the NASD Code that impose a duty to disclose “relationships that ‘might reasonably create an appearance of partiality or bias,’” and those that require the arbitrator to “make a ‘reasonable effort’ to inform themselves of such relationships.”<sup>187</sup> These requirements, the court concluded, indicate “there is no justification for the concurrence to shift the burden of disclosure from the arbitrator to a party.”<sup>188</sup>

Although one can find many cases illustrating the courts’ willingness to vacate arbitration awards for failure to disclose a conflict of interest, there also are many decisions revealing that courts do not take such action lightly. In *DeBaker v. Shah*, the Wisconsin Supreme Court reversed a lower court order granting a motion to vacate based upon the arbitrator’s evident partiality resulting from his receipt of campaign contributions from members of the law firm representing one of the parties to the proceeding.<sup>189</sup> The court found several facts determinative. First, the attorneys who contributed to the campaign did not personally represent Shah.<sup>190</sup> Additionally, a record of the contributions was available to the public and could have been

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board of directors of the builders association. *Id.*

184. *Id.* at 33 n.2.

185. *Mariner Fin. Group, Inc. v. Bossley*, 79 S.W.3d 30, 30–31 (Tex. 2002).

186. *Id.* at 35 (internal quotation marks omitted).

187. *Id.* (quoting NASD CODE OF ARBITRATION PROCEDURE § 10312(a)–(b)).

188. *Id.*

189. *DeBaker v. Shah*, 533 N.W.2d 464, 464–65 (Wis. 1995).

190. *Id.* at 469.

obtained by the DeBakers with little effort on their part.<sup>191</sup> In upholding the arbitration award, the court expressly rejected the evident partiality standard adopted by the Wisconsin Supreme Court in *School District of Spooner v. Northwest United Educators*, which had established a *per se* rule requiring a finding of evident partiality “any time an arbitrator fails to disclose employment with a party or an entity that supplies counsel to a party.”<sup>192</sup>

The *Debarker* court rejected the *Spooner* court’s reasoning that “a finding of evident partiality may be based on any undisclosed facts which are evidence of impartiality [sic]; actual impartiality or facts from which partiality is a foregone conclusion are not required.”<sup>193</sup> Instead, the *Debarker* court imposed a heightened burden upon the party seeking vacatur. The court declared that the “the standard for proving the invalidity of an award is met only upon a showing by the proponent that there exists clear and convincing evidence that the arbitrator in question demonstrated ‘evident partiality.’”<sup>194</sup> “[E]vident partiality’ exists only when a *reasonable person* knowing the previously undisclosed information would have had ‘such doubts’ regarding the impartiality of the arbitrator that the person would have taken action on the information.”<sup>195</sup>

In *Lucent Technologies Inc. v. Tatung Co.*, the United States District Court for the Southern District of New York upheld an arbitration award against a motion to vacate on grounds of partiality where an arbitrator previously had served as an expert witness on behalf of a party to the arbitration.<sup>196</sup> In so holding, the court explained that the proper test of evident partiality is neither an “appearance of bias” nor a “proof of actual bias” standard.<sup>197</sup> The court went on to clarify the proper test for evident partiality and its justification for adopting this approach:

“[E]vident partiality” within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. . . . [I]n assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances. . . . In this way, . . . the courts may refrain from threatening the

191. *Id.*

192. *Id.* at 467–68.

193. *Id.* at 467 (quotation marks omitted) (quoting *School Dist. of Spooner v. Nw. United Educators*, 401 N.W.2d 578, 582 (Wis. 1987)).

194. *Id.* at 468.

195. *Id.*

196. *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 27 (2d Cir. 2004).

197. *Id.* at 31.



valuable role of private arbitration in the settlement of commercial disputes, and at the same time uphold their responsibility to ensure that fair treatment is afforded to those who come before them.<sup>198</sup>

In *Guseinov v. Burns*, another California appellate court upheld an arbitration award granted in favor of the plaintiff after the arbitrator failed to disclose a prior relationship with an attorney representing a party to the arbitration.<sup>199</sup> The court reasoned a California law requiring neutral arbitrators to “disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”<sup>200</sup> did not require the arbitrator to disclose he had served as an unpaid, volunteer mediator in a prior proceeding in which the plaintiff’s attorney represented a party.<sup>201</sup>

In *Uhl v. Komatsu Forklift Co.*, the United States District Court for the Eastern District of Michigan was not persuaded by the argument that evident partiality required the court to vacate an arbitration award given to the widow of a victim in a forklift accident.<sup>202</sup> The court held while the allegations of fraud and evident partiality made by the defendant were appropriate bases for vacatur pursuant to section 10(a) of the Federal Arbitration Act, the defendant had failed to produce sufficient evidence to support a finding of evident partiality or fraud.<sup>203</sup> Instead, the defendant merely had shown the arbitrator and plaintiff’s attorney had appeared in the same lawsuits together on various occasions representing different parties and had on two occasions jointly represented a personal injury plaintiff.<sup>204</sup> These connections, the court reasoned, were insufficient to establish the type of relationship or conflict necessary to justify vacatur.<sup>205</sup>

In *Nationwide Mutual Insurance Co. v. Home Insurance Co.*, the United States Court of Appeals for the Sixth Circuit addressed the question of what standard to apply when evaluating allegations of evident partiality.<sup>206</sup> The court rejected Nationwide’s reliance on the

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198. *Id.* (internal citations and quotation marks omitted) (quoting *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).

199. *Guseinov v. Burns*, 51 Cal. Rptr. 3d 903, 905 (Ct. App. 2006).

200. *Id.* at 912.

201. *Id.* at 916.

202. *Uhl v. Komatsu Forklift Co.*, 466 F. Supp. 2d 899, 908 (E.D. Mich. 2006).

203. *Id.* at 906.

204. *Id.*

205. *Id.* at 907.

206. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643–47 (6th Cir. 2005).

*Commonwealth* plurality standard by which vacatur is required where the arbitrator's failure to disclose raises either a "reasonable impression of bias" or "appearance of bias."<sup>207</sup> Instead the court elected to apply the objective standard articulated in *Apperson v. Fleet Carrier Corp.*, which rejected the *Commonwealth* plurality's "appearance of bias" standard in favor of one in which "evident partiality 'will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration'"<sup>208</sup> Applying the *Apperson* standard, the court found that neither the arbitrator's fully disclosed ongoing contacts with Home Insurance nor his failure to disclose his social contacts with Home Insurance Company representatives would cause a reasonable person to doubt the arbitrator's ability to resolve the dispute in an impartial manner.<sup>209</sup>

Finally, in *Power Services Associates, Inc. v. UNC Metcalf Servicing, Inc.*, the court upheld an arbitration award despite the arbitrator's failure to disclose his prior representation of a party's parent corporation nearly 40 years ago.<sup>210</sup> Under these circumstances, the court reasoned, the relationship between the arbitrator and the party's parent corporation was "too remote" to demand disclosure.<sup>211</sup> Furthermore, the court reasoned even if disclosure had been required, Power Services Associates failed to meet the heavy burden of proof required to establish evident partiality, which the court maintained "must be direct, definite and capable of demonstration rather than remote, uncertain and speculative."<sup>212</sup>

### III. CONCLUSION

The diversity of opinions expressed by the courts confirms the considerable disagreement within the legal and arbitral communities regarding what disclosures are required, which conflicts and relationships are permissible, and how the concept of 'evident partiality' should be interpreted so as to provide a clear standard for arbitrators, parties, and the courts themselves. Although a standard requiring disclosure of every known, unknown but discoverable, or

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207. *Id.* at 644.

208. *Id.* at 645 (quoting *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).

209. *Id.* at 648-49.

210. *Power Servs. Assocs., Inc. v. UNC Metcalf Servicing, Inc.*, 338 F. Supp. 2d 1375, 1380 (N.D. Ga. 2004).

211. *Id.* at 1382.

212. *Id.* at 1381.

merely potential conflict of interest does establish a bright line, competing interests and values have encouraged at least some courts, and codes of conduct generally, to reject such a demanding standard. The willingness of arbitrators to serve, for example, and recognition that such comprehensive disclosure often is not realistic given memory, knowledge, and judgment lapses to which all human beings are susceptible are among the reasons for rejecting such a broad standard.

Because failing to disclose a conflict of interest can have serious consequences, including vacatur of the arbitral award, arbitrators must acquire a thorough understanding of the various statutory directives and ethical codes that are applicable. Arbitrators must familiarize themselves with not only the rules of the arbitral association with which they are affiliated, but any professional or statutory standards that have been incorporated into those rules either expressly or by implication. And, of course, arbitrators must look closely at the agreement to arbitrate not only to determine whether the agreement includes additional disclosure requirements but to discern the exact parameters of those requirements. Moreover, arbitrators must be familiar with the common law rules and principles that guide courts in determining whether vacatur is justified on the basis of evident partiality.

Courts recognize the federal policy favoring arbitration and generally appreciate that their rulings can create significant burdens for arbitrators. Many courts not only acknowledge the inherent trade-off between impartiality and expertise that exists in a dispute resolution system where the neutral may be expected to bring a valuable industry or insider perspective, but expressly make that trade-off a factor in their analysis and decision-making process. Yet whether a court applies a subjective standard of evident partiality under which the arbitrator must disclose conflicts that create the mere appearance of bias, or an objective standard in which the arbitrator must disclose conflicts and relationships that would cause a reasonable person to infer bias, still depends upon the jurisdiction. Ultimately, the decision to set aside an arbitration award will be highly dependent upon the specific factual circumstances in which the failure to disclose takes place. Although it may not be feasible to predict with absolute precision the outcome in any given situation, knowledge of the relevant standards and laws will in many cases enable an arbitrator to recognize which disclosures are required and, thereby, avoid vacatur.

The existing myriad of relevant guidance, regulations, and judicial decisions concerning conflicts of interest and required

disclosures is not only frustrating but can result in the nuclear option of the arbitral world, vacatur. Arbitral institutions such as the American Arbitration Association and the National Arbitration Forum must be vigilant to ensure their codes, standards, and bills of rights do not articulate inconsistent standards as to what conflicts of interest must be disclosed and the consequences of both disclosure (such as removal) and failure to disclose (such as sanctions). Whether arbitral institutions adopt external ethics codes and codes of conduct (such as judicial codes and local ethics codes) merely to assure potential clients that their arbitration services are as ethical and trustworthy as any dispute resolution process available, or whether institutions adopt the codes in order to benefit from ethical codes that already have been carefully vetted and scrutinized, incorporation of external codes can create obligations inconsistent with the arbitral association's own codes and incompatible with the goals and realities of arbitration. 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. But there is no reason why arbitral institutions cannot review and, if necessary, amend their own codes and recommendations to ensure that their expectations concerning conflict of interest and disclosures are defined as clearly as possible.

Until then, we still are talking about a mountain rather than a molehill. Arbitrators must be diligent and learn what codes and recommendations apply and what those codes require. Arbitrators also must understand how the courts in their jurisdiction are defining conflicts of interest disclosure requirements.

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