SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 53 | Issue 3 Article 16

2003

What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality under the Federal Arbitration Act

Lee Korland

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

 Part of the Law Commons

Recommended Citation

Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality under the Federal Arbitration Act*, 53 Case W. Rsrv. L. Rev. 815 (2003)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol53/iss3/16

This Comments is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

COMMENTS

WHAT AN ARBITRATOR SHOULD INVESTIGATE AND DISCLOSE:

PROPOSING A NEW TEST FOR EVIDENT PARTIALITY UNDER THE FEDERAL ARBITRATION ACT[1]

INTRODUCTION

Parties to commercial disputes commonly resort to binding arbitration as an alternative to litigating disagreements. Over the last several decades, American companies have increasingly used arbitration to resolve legal issues because of the numerous perceived benefits of this dispute resolution process.[2] These benefits include expedience, the reduced costs that can be realized by avoiding protracted court battles, and the fact that arbitrators often have unique expertise and knowledge about certain industry or business-specific matters that make them preferable to a judge or jury. Additionally, parties to a disagreement frequently look to arbitration for its finality, since an arbitration award creates fewer grounds for judicial review than does typical litigation.[3]

Despite the sense of finality associated with arbitration, the losing party will frequently look for ways of vacating the arbitration award. One common means of challenging an arbitration award is for the losing party to claim that a supposedly neutral arbitrator was partial to the other party in the dispute. The premise for claims of such partiality can vary, but one prevalent argument asserted by parties seeking to vacate an arbitration award is that the arbitrator should have been disqualified from hearing the mat-

---

[1] 9 U.S.C. §§ 1-16 (2000).

[2] *See* DAVID B. LIPSKY & RONALD L. SEEBER, THE USE OF ADR IN U.S. CORPORATIONS 1 (1998); LUCILLE M. PONTE & THOMAS D. CAVENAGH, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS 159 (1999).

[3] *See* JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY 5-6 (1997); STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 234 (1999).

ter because a conflict of interest existed. Examples of such conflicts are numerous and can include situations where an arbitrator has prior or current financial dealings with a party to the arbitration, an employee of a party to the arbitration, counsel for a party to the arbitration, or a witness who appears during the course of the arbitration. Additionally, an arbitrator can have potential conflicts that stem from family relationships or social contacts with the disputants. Attorneys or businesspeople may also face conflicts based on current or past professional associates having dealings with the parties to the arbitration.[4]

If the arbitrator does not disclose such a conflict in a timely manner,[5] the losing party can then assert that "evident partiality" on the arbitrator's part warrants vacating the arbitration award under the Federal Arbitration Act (FAA).[6] Displeased parties will often conduct thorough background investigations following the arbitration award for the sole purpose of uncovering just such an undisclosed conflict that might allow for a successful challenge to the arbitration decision. The question then arises as to what specific types of conflict of interest are so serious as to warrant judicial intervention and the vacating of an arbitration award that would otherwise be considered binding and final.

Courts have struggled to define a standard for evaluating which undisclosed conflicts amount to evident partiality and which are merely oversights by an arbitrator who failed to notify the parties of some highly tenuous connection not meriting disqualification. Furthermore, courts have provided little help in developing a framework for determining what specific types of conflicts are highly suggestive of bias. The law gets even murkier when considering whether an arbitrator has a duty to investigate potential conflicts of interest prior to hearing a case. Questions linger as to whether an arbitrator can be evidently partial to a party, based on an undisclosed conflict of interest, if the arbitrator never even had knowledge that the conflict of interest existed.

---

[4] *See generally* George L. Blum, Annotation, *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators – Commercial, Business, or Real Estate Transactions*, 67 A.L.R. 5th 179 (1999) (discussing the plethora of scenarios upon which arbitration awards are challenged); Andrew M. Campbell, Annotation, *Construction and Application of § 10(a)(1)-(3) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(1)-(3)) Providing for Vacating of Arbitration Awards Where Award Procured by Fraud, Corruption, or Undue Means, Where Arbitrators Evidence Partiality or Corruption and Where Arbitrators Engage in Particular Acts of Misbehavior*, 141 A.L.R. FED. 1 (1997) (summarizing the myriad of cases on this topic).

[5] Once a conflict is disclosed, if neither party objects to the arbitrator's continued service upon agreement that the conflict is trivial, then any later claim of bias will have been waived. *See infra* note 43 and accompanying text.

[6] 9 U.S.C. § 10(a)(2) (2000). This section permits a court to vacate an arbitration award "where there was evident partiality or corruption in the arbitrators, or either of them." *Id.*

This Comment will address these various issues and attempt to bring some uniformity to a myriad of inconsistent judicial rulings, specifically in the context of commercial arbitration.[7] This Comment will argue that arbitrators should be encouraged, but not legally compelled, to follow the general guidelines regarding investigation and disclosure promulgated by arbitration-related organizations. To then prove evident partiality under the FAA, the law should only require a party to demonstrate that an undisclosed conflict of interest creates a reasonable impression of partiality. Assuming a party seeking to vacate an arbitration award can demonstrate evident partiality, this Comment will propose a new affirmative defense whereby the party seeking to maintain an arbitration award can have the award upheld by showing that the arbitrator made a reasonable investigation of potential conflicts and had no knowledge of the conflict at issue.

Part I will discuss the increasing use of arbitration, the perceived benefits of this dispute resolution process, and the general guidelines regarding arbitrator disclosures, investigations, and disqualifications. Part II will examine prior judicial decisions that have reviewed arbitration awards for evident partiality based on undisclosed conflicts of interest, the standards for evaluating such claims that have been enunciated, and decisions that have touched on arbitrator knowledge and the duty to investigate. Part III will propose a new test for evaluating evident partiality claims that incorporates the issues surrounding arbitrator knowledge and investigations, while providing a clearer framework for gauging the importance or triviality of potential conflicts.

I. ARBITRATION IN THE UNITED STATES

A. *Increasing Use of Arbitration*

Commercial arbitration has been around for centuries, as it "antedated the American Revolution in New York and several other colonies and is widely used today."[8] According to a recent study of arbitration use, 79% of U.S. corporations had utilized arbitration in the prior three years to settle disagreements.[9] Looking at a full range of alternative dispute resolution (ADR) techniques,

---

[7] The arguments in this Comment relate specifically to undisclosed conflicts of interest between a neutral arbitrator and a party to the arbitration in the context of commercial arbitration disputes governed by the American Arbitration Association Commercial Arbitration Rules. Different arguments would certainly apply to party-appointed arbitrators, in labor arbitrations, or if the parties agreed to have a different set of procedural rules govern their arbitration.

[8] GOLDBERG ET AL., *supra* note 3, at 233.

[9] LIPSKY & SEEBER, *supra* note 2, at 1.

the study found that a majority of companies viewed ADR as an essential tool to control costs and "improve their ability to manage disputes."[10] Furthermore, from 1986 to 1991 the American Arbitration Association (AAA), the leading provider of arbitration-related services and guidelines, saw a 34% increase in arbitration filings. In 1991, there were 62,000 arbitration cases filed that sought damages amounting to more than $4.5 billion.[11] Such an increase in the popularity of arbitration is hardly surprising, given the numerous perceived benefits of this dispute resolution process.

The advantages of arbitration versus litigation include having a decision maker with specialized knowledge, the generally limited means of appealing arbitration awards, the fact that arbitration is a private dispute resolution forum, "procedural informality," reduced costs, and the relative expedience of the process.[12] Arbitration, however, has numerous perceived drawbacks, "includ[ing] the lack of public norms, the lack of binding precedent, insufficient opportunity for full discovery, relaxed rules of evidence, usually no written reasons for decisions, no uniformity of decisions, and usually no opportunity for appeal."[13]

B. The Arbitration Process

Commercial arbitration is typically initiated because of a provision in an existing agreement or because the parties mutually agree that arbitrating their dispute is more desirable than litigating the dispute. Agreements to arbitrate are enforceable based on pro-

---

[10] *Id.* at 5-6.

[11] PONTE & CAVENAGH, *supra* note 2, at 159; *see also* Stephanie Armour, *Mandatory Arbitration: A Pill Many are Forced to Swallow*, USA TODAY, July 9, 1998, at A1 (finding that from 1991 to 1998, the AAA went from handling cases "for a few dozen companies" to "serv[ing] about 350 firms employing 4 million workers covered by both mandatory and voluntary arbitration clauses"). Much of the increase in arbitration is due to clauses in employment agreements and in corporate agreements with consumers. Although the benefits of commercial arbitration voluntarily entered into by two companies with virtually equal bargaining power are generally conceded, these benefits may not accrue to individuals in an arbitration setting. *See* PUBLIC CITIZEN, THE COSTS OF ARBITRATION 1-3, 27 (2002) (noting the added expense for individuals who arbitrate rather than litigate, while business-to-business arbitrations may save money for the parties); Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (finding that dispute resolution costs, as compared to litigation, are minimized when parties with equal bargaining power jointly agree to submit a disagreement to arbitration); Armour, *supra* (discussing mandatory labor arbitrations and noting that "[c]ritics say companies have found the gilded loophole for escaping costly jury awards"). Therefore, this Comment focuses largely on commercial arbitration as the resulting benefits are more visible.

[12] GOLDBERG ET AL., *supra* note 3, at 234.

[13] COOLEY & LUBET, *supra* note 3, at 7; *see also id.* at 5-9 (discussing the advantages and disadvantages of litigation, arbitration, and mediation).

visions in the FAA and state arbitration laws.[14] The first arbitration statute was passed in New York in 1920, and this statute served as the impetus for the United States Arbitration Act that was passed in 1925 (now known as the FAA).[15] The FAA "promoted the use of arbitration to resolve conflicts involving commercial transactions among businesses in different states."[16] The Uniform Arbitration Act (UAA),[17] providing a model law for the states, was also premised on the New York statute, and today every state has some form of arbitration statute that generally mirrors the UAA and FAA.[18] "The FAA displaces state law in the state courts to the extent that state law conflicts with the goals or policies of the [FAA]."[19]

Parties to arbitration commonly employ either a for-profit or nonprofit organization to provide arbitration services. These services can range from merely providing a standard set of rules and guidelines to govern the arbitration proceedings, to a physical location to conduct the arbitration, to providing neutral arbitrators and overseeing the entire arbitration process.[20] The most well known organization is the AAA which has developed its own rules to govern commercial arbitrations. Parties, however, are free to develop their own rules by contract, or adopt some or all of the AAA rules prior to the inception of the arbitration proceedings.[21] "It is common for arbitration clauses to provide that AAA rules will be followed."[22]

The selection of neutral arbitrators is often done with the assistance of organizations like AAA unless an arbitration agreement specifically delineates another method.[23] "In order to provide disputing parties with qualified arbitrators, AAA . . . maintain[s] arbitration panels composed of approved arbitrators."[24] These arbitrators are often "lawyers, business people, professors, or other per-

---

[14] *See* GOLDBERG ET AL., *supra* note 3, at 235 ("There is a strong public policy in favor of arbitration as a means of relieving court congestion, and both federal and state courts will interpret agreements to arbitrate broadly and exceptions narrowly.").

[15] PONTE & CAVENAGH, *supra* note 2, at 158.

[16] *Id.*

[17] UNIF. ARBITRATION ACT §§ 1-25 (1955).

[18] PONTE & CAVENAGH, *supra* note 2, at 158-59; *see also* George Chamberlin, *Cause of Action to Vacate Arbitration Award on Ground of Partiality or Misconduct of Arbitrator*, 25 CAUSES OF ACTION 473 (providing a table of all state statutes relating to arbitration agreements).

[19] GOLDBERG ET AL., *supra* note 3, at 235.

[20] *Id.* at 236.

[21] *Id.*

[22] *Id.*

[23] *See id.*

[24] *Id.*

sons familiar with the business or industry in which a dispute may arise."[25] A list of these arbitrators and brief biographies on each candidate are sent to the parties. The parties then rank their preferences and strike the names of arbitrators who they deem unacceptable to preside over the matter.[26] "The AAA will send a second list in substantial cases if the parties cannot select a full panel from the first one."[27]

Once the arbitrators are in place, the proceeding can begin. Procedural rules are normally governed by AAA rules or some other prescribed guidelines. Although the parties are free to contract otherwise, a typical dispute has only limited pre-arbitration discovery, as is allowed by the arbitrator.[28] The hearings are more informal than litigation, and "the rules of evidence are not strictly applied."[29] The parties will also mutually agree on the "objective standards on which the arbitrator's decision is to be based."[30] Additionally, in commercial arbitration the final ruling will often only contain the arbitration award, as "commercial arbitrators do not provide reasons for their decisions."[31]

When an award is handed down, parties are not legally bound to comply with the decision. Thus, the victorious party in an arbitration can seek judicial confirmation of the award under the FAA if the losing party fails to comply.[32] This relatively straightforward process will normally result in a judgment confirming the award, and this "has the same force and effect as any other judgment."[33] Failure to comply can then result in judicially imposed sanctions.[34] Alternatively, the losing party can seek to vacate based on several statutory and non-statutory grounds.[35] The statutory basis for vacating an arbitration award is found in section 10 of the FAA.[36] Section 10(a) provides that "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

---

[25] *Id.*

[26] *See* PONTE & CAVENAGH, *supra* note 2, at 172.

[27] COMMERCIAL ARBITRATION FOR THE 1990S 30 (Richard J. Medalie ed., 1991).

[28] *See* GOLDBERG ET AL., *supra* note 3, at 233-36.

[29] *Id.* at 234.

[30] *Id.*

[31] *Id.*; *see also* PONTE & CAVENAGH, *supra* note 2, at 173.

[32] *See* GOLDBERG ET AL., *supra* note 3, at 235-36.

[33] COOLEY & LUBET, *supra* note 3, at 211; *see also id.* at 210-12 (detailing the various means by which arbitration awards can be enforced and challenged).

[34] *See* GOLDBERG ET AL., *supra* note 3, at 235.

[35] *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) (explaining the various statutory and non-statutory means by which courts have vacated arbitration awards).

[36] 9 U.S.C. § 10 (2000).

arbitration . . . [w]here there was evident partiality or corruption in the arbitrators, or either of them."[37] Awards are vacated under Section 10 in only "approximately 10% of the instances in which they have been challenged."[38]

C. *Guidelines for Arbitrators*

The FAA does not provide any standards for arbitrators' conduct.[39] Thus, any requirement that an arbitrator disclose potentially disqualifying conflicts of interest or conduct an investigation to uncover such conflicts stems from case law and suggested guidelines by organizations within the field of arbitration. It is widely recognized, however, that "[o]ne of the primary ethical duties of arbitrators is to avoid any appearance of bias due to previous or ongoing relationships with the parties, their attorneys, or witnesses. Such relationships would be deemed a conflict of interest."[40] Therefore, arbitrators should "disclose to the parties any financial, business, professional, social, or familiar relationship that may affect their impartiality."[41]

When learning of such a relationship, an arbitrator should either voluntarily withdraw or disclose the conflict to the parties and assert a belief that despite the relationship the proceedings would still be conducted impartially. If either party objects to the continued service of the arbitrator, the arbitrator should then either withdraw or, in AAA proceedings, allow the organization to determine whether the arbitrator can continue to serve.[42] If both parties do agree to the continued service of the arbitrator, any later claim of partiality based on the conflict at issue would be waived.[43]

Rule 19 of the AAA Commercial Arbitration Rules deals specifically with neutral arbitrator disclosures and challenges to that arbitrator's continued service.[44] Although Rule 19 does not re-

---

[37] *Id.* at § 10(a)(2).

[38] Campbell, *supra* note 4, at § 2[a]. "The most frequent ground for vacating arbitration awards is that the arbitrators had exceeded their powers, permitting the vacating of the award under § 10(a)(4)." *Id.*

[39] *See* 9 U.S.C. §§ 1-16 (2000).

[40] PONTE & CAVENAGH, *supra* note 2, at 174.

[41] *Id.*

[42] *See* JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 36-37 (1998) (providing a detailed list for arbitrators to consult to determine if potential conflicts exist).

[43] *See, e.g.*, Cook Indus., Inc. v. C. Itoh & Co., 449 F.2d 106 (2d Cir. 1971) (finding that a party "cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge"); Campbell, *supra* note 4, at § 16 (discussing how an objection to an arbitrator's continued service is waived if the objection is not asserted in a timely manner).

[44] AM. ARB. ASS'N COMMERCIAL ARB. R. 19 (1999). The full text states that:

quire the disclosure of every possible connection the arbitrator may have with the parties, arbitrators are required to disclose "any circumstance likely to affect impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives,"[45] no matter how tenuous. Failure to disclose such a conflict might give rise to a strong claim for vacating an arbitration award based on evident partiality, but such an omission would certainly not be dispositive. This is merely an AAA rule, so it is not a lawfully imposed condition arbitrators must follow under the FAA. An arbitrator can fail to make such a disclosure and still not be found to have demonstrated evident partiality.[46]

Also providing guidance for arbitrators is the Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics), promulgated by the American Bar Association and the AAA.[47] Canon II requires arbitrators to disclose any "financial or personal interest in the outcome of the arbitration," as well as business, professional, familiar, or social relationships with any party, counsel, or witness that might impugn their own impartiality.[48] The Code of Ethics, however, notes that "[t]hese provisions . . . are intended to

> (a) Any person appointed as a neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties, and if it deems it appropriate to do so, to the arbitrator and others.
> (b) Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

Id. The AAA also asks that neutral arbitrators sign a disclosure statement prior to presiding over a dispute that acknowledges the importance of full and complete disclosure. *See* COMMERCIAL ARBITRATION FOR THE 1990S, *supra* note 27, at 36 (providing text of the disclosure statement).

[45] AM. ARB. ASS'N COMMERCIAL ARB. R. 19(a) (1999).

[46] *See, e.g.*, ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 499 (4th Cir. 1999) (finding that "[w]hen parties agree to be bound by the AAA rules, those rules do not give a federal court license to vacate an award on grounds other than those set forth in 9 U.S.C. § 10" and that when "determining whether to set aside an arbitration award, a court may only consider whether the complaining party has demonstrated a violation of the governing statute"); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983) ("Although we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award's validity under section 10 of the [Federal] Arbitration Act."); Transit Cas. Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346, 1353 n.7 (S.D.N.Y. 1987) ("[A] federal court may overturn an arbitration award only if the moving party proves one of the grounds enumerated in the Arbitration Act or shows that the panel disregarded the law. At the outside, were the violations of AAA guidelines clear cut, they might be relevant to issues of misconduct.").

[47] *See* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977).

[48] *Id.* at Canon II-A.

be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators."[49] Such application would "depriv[e] parties of the services of those who might be best informed and qualified to decide particular types of cases."[50]

The Code of Ethics diverges from the AAA Rules by imposing an affirmative duty to investigate on arbitrators. "Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships [required to be disclosed]."[51] Failure to comply with these ethical guidelines, however, does not automatically create a viable cause of action for evident partiality under the FAA. This is because the Preamble to the Code of Ethics states that "[v]arious aspects of the conduct of arbitrators . . . may be governed by . . . applicable law. This code does not take the place of or supersede such . . . laws and does not establish new or additional grounds for judicial review of arbitration awards."[52]

While the UAA is silent on arbitrator disclosure,[53] the Revised Uniform Arbitration Act (RUAA) promulgated in 2000 closely follows the Code of Ethics.[54] Section 12 of the RUAA requires disclosures based on similar criteria as the AAA rules and the Code of Ethics. An arbitrator need not disclose every trivial connection to the parties to the dispute. But an arbitrator, "after making a reasonable inquiry, shall disclose . . . any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator."[55] Thus, an arbitrator under the RUAA must investigate and disclose any reasonable known conflict.[56] As with the other guidelines previously discussed, failure to comply with the RUAA through a lack of investigation or through nondisclosure does not automatically demonstrate evident partiality under the FAA, as these are all mere guidelines for an arbitrator to follow.

---

[49] *Id.* at Canon II, introductory n.

[50] *Id.*

[51] *Id.* at Canon II-B. The National Association of Securities Dealers (NASD) Code of Arbitration Procedure also imposes a duty to investigate on arbitrators. *See* Louis F. Burke, *Standards for Arbitrator Recusal*, 1326 PLI/CORP 889, 894 (2002) (discussing Rule 10312(b) of the NASD arbitration rules where the language mirrors the investigation requirement found in the Code of Ethics for Arbitrators in Commercial Disputes).

[52] CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Preamble (1977).

[53] *See* UNIF. ARB. ACT §§ 1-25 (1955).

[54] *See* REVISED UNIF. ARB. ACT § 12 (2000).

[55] *Id.* at § 12(a).

[56] While an arbitrator must make a "reasonable inquiry" under section 12, "[t]he extent of this inquiry may depend upon the circumstances of the situation and the custom in a particular industry. . . . Once an arbitrator has made a 'reasonable inquiry' . . . the arbitrator will be required to disclose only 'known facts' that might affect impartiality." *Id.* at § 12 cmt. 3.

II. JUDICIAL REVIEW OF ARBITRATION AWARDS

A. *What Constitutes Evident Partiality Warranting Vacating an Arbitration Award?*

1. *The* Commonwealth Coatings *Decision*

The Supreme Court issued the seminal decision involving vacating an arbitration award based on an undisclosed conflict of interest in 1968. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[57] the Court vacated an arbitration award based on an undisclosed prior business relationship between a supposedly neutral arbitrator and the victorious party in the matter.[58] The arbitrator had served as an engineering consultant for the party and had been paid about $12,000 over several years.[59] Although the arbitrator had not worked for the party within the previous year, "the relationship even went so far as to include the rendering of services on the very projects involved in this [arbitration]."[60]

Writing for the majority, Justice Black sought to impose the same ethical standards on arbitrators as are faced by judges.[61] Justice Black stated that arbitrators should "disclose to the parties any dealings that might create an impression of possible bias."[62] He then held that for an arbitration award not to be vacated for evident partiality under the FAA based on an undisclosed conflict of interest, the arbitrator "not only must be unbiased but also must avoid even the appearance of bias."[63]

In a concurring opinion, Justice White stated 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."[64] Justice White also wrote that arbitrators should not be automatically disqualified based on an undisclosed relationship if "the relationship is trivial."[65] He then continued by discussing the

---

[57] 393 U.S. 145 (1968).

[58] *Id.* at 146-48.

[59] *Id.* at 146.

[60] *Id.*

[61] *Id.* at 146-50.

[62] *Id.* at 149.

[63] *Id.* at 150. The party seeking to vacate an arbitration award bears the burden of proof. *See, e.g.*, ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999); Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996).

[64] *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring). Justice Marshall joined in the concurring opinion. *Id.*

[65] *Id.*

need for early and full disclosure to maintain the integrity of the arbitration process.[66] Justice White continued by stating that:

> an arbitrator's business relationships may be diverse indeed, involving more or less remote connections with great numbers of people. He cannot be expected to provide the parties his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award.[67]

Both this concurrence and Justice Black's opinion, however, fail to define a clear standard as to specific types of relationships that will generally constitute evident partiality if undisclosed.[68] "Federal courts have struggled over the meaning and application of *Commonwealth Coatings*, principally because of the unusual nature of Justice White's concurrence in which he purported to join the majority opinion while delimiting its application."[69] In fact, Justice White wrote "[w]hile I am glad to join my Brother Black's opinion in this case, I desire to make these additional remarks."[70] Consequently, some courts have looked to Justice Black's opinion as authoritative while other courts have adopted Justice White's concurrence, as his concurrence was necessary to comprise a majority of the court.[71] Courts that evaluate evident partiality based on Black's "appearance of bias" standard typically manage to rec-

---

[66] *Id.* at 150-52.

[67] *Id.* at 151-52.

[68] *Id.* at 145-52. For example, the opinions fail to discuss whether family or social contacts could give rise to a conflict warranting the vacating of an arbitration award. Furthermore, the court does not opine on how recent business contacts must be or how sizable a financial connection must be to suggest potential bias. Courts examining these issues have largely taken a case-by-case, fact specific approach.

[69] Beebe Med. Ctr., Inc. v. InSight Health Serv. Corp., 751 A.2d 426, 434 (Del. Ch. 1999); *see also* Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995) ("[T]here is some uncertainty among the courts of appeals about the holding of *Commonwealth Coatings.*"); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983) (finding the *Commonwealth Coatings* decision of little value "because of the inability of a majority of the Justices to agree on anything but the result").

[70] *Commonwealth Coatings*, 393 U.S. at 150.

[71] *See* ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 499 n.3 (4th Cir. 1999) (noting the weight that has been given to Justice White's concurring opinion); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 n.3 (2d Cir. 1984) ("[W]e must narrow the holding to that subscribed to by both Justices White and Black."); *Merit*, 714 F.2d at 682 (stating that courts in the Seventh Circuit have looked to Justice White's opinion).

oncile the two opinions, whereas courts that adopt a more stringent standard justify it because Justice White narrowed Black's decision and his concurrence was needed to form a majority of the Court.[72]

2. *Other Courts*

Courts have struggled to interpret the *Commonwealth Coatings* standard for overturning an arbitration award and in developing a framework for determining what types of conflicts are so egregious that those awards should be vacated. As for the various standards that have been enunciated, courts have not required actual proof of bias in nondisclosure cases.[73] Courts have, however, taken varied approaches that range from Justice Black's "appearance of bias" standard to requiring a party to "demonstrate 'that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.'"[74] Some courts have employed standards requiring "a party seeking vacatur [to] put forward facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives."[75] Other decisions have found evident partiality to be "present when undisclosed facts show 'a reasonable impression of partiality'"[76] and where an "arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."[77] These various standards suggest just how much courts have struggled in interpreting the *Commonwealth Coatings* decision.

Aside from failing to define a clear standard for evaluating claims of evident partiality, courts have also struggled to generate guidelines for determining what types of relationships and how

---

[72] *Compare* Schmitz v. Zilveti, 20 F.3d 1043, 1046-47 (9th Cir. 1994) (reconciling the opinions and following the "appearance of bias" approach), *with Morelite*, 748 F.2d at 83-84 (looking to the Justice White's concurring opinion and adopting a standard more stringent than an "appearance of bias" but short of requiring proof of actual bias).

[73] *See* Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996) (distinguishing the burden of proof in nondisclosure cases as being at a lower threshold than proof of actual bias which is needed when actual bias is asserted); *Morelite*, 748 F.2d at 84 (discussing how it is nearly impossible to prove actual bias).

[74] *ANR*, 173 F.3d at 500 (citing Consolidation Coal Co. v. Local 1643, UAW, 48 F.3d 125, 129 (4th Cir. 1995)); *see also* Montez v. Prudential Sec., Inc., 260 F.3d 980, 983 (8th Cir. 2001) ("The absence of a consensus on the meaning of 'evident partiality' is evidenced by the approach adopted by the different circuits.").

[75] *ANR*, 173 F.3d at 501; *see also* Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996) (finding an "onerous standard for vacatur").

[76] *Schmitz*, 20 F.3d at 1046 (citing Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1201 (11th Cir. 1982)).

[77] Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998).

proximate connections must be to warrant vacating an arbitration award.[78] The following undisclosed relationships have not warranted the vacation of an arbitration award:[79] where an arbitrator's law firm represented a primary customer of a party to the arbitration on matters similar to the arbitration;[80] where an arbitrator, Nichols, failed to disclose that a witness for and employee of one party was himself "serving as an arbitrator in a number of arbitrations that involved Nichols' employer;"[81] where an arbitrator who was also an attorney had a disagreement with a lawyer from a party's law firm eighteen months prior to the arbitration;[82] where an arbitrator's former law firm had previously represented a party to the arbitration on unrelated matters;[83] where fourteen years prior to the arbitration the president of one party and a key witness in the arbitration proceedings had served as the arbitrator's supervisor;[84] where an arbitrator and a party's expert witness "were limited partners in a partnership that owned an apartment complex;"[85] where an arbitrator had recently arbitrated a identical matter for a party, resolving that issue in the party's favor;[86] where an arbitrator had a stock interest in a company whose subsidiary owned a small portion a party to the arbitration;[87] and where an arbitrator's law firm represented companies that had the same parent company as a party to the arbitration.[88]

Conversely, the following undisclosed relationships have warranted vacating an arbitration award: where an arbitrator had done consulting work for a party and received $12,000 over the past

---

[78] Courts typically take a case-by-case, fact specific approach rather than employ per se rules. *See, e.g., id.* at 1312 ("Whether these conditions [suggesting partiality] have been met ordinarily requires a fact-intensive inquiry."); *Morelite*, 748 F.2d at 85 ("We need not, and do not, attempt to set forth a list of familial or other relationships that will result in the *per se* vacation of an arbitration award, except to suggest that such a list would most likely be very short."); Federal Vending, Inc. v. Steak & Ale, Inc., 71 F. Supp. 2d 1245, 1247 (S.D. Fla. 1999) ("[E]vident partiality is a fact-intensive, case-specific issue.").

[79] For a thorough review of cases dealing with all types of undisclosed conflicts, see Blum, *supra* note 4 and Campbell, *supra* note 4. These challenges are usually unsuccessful. *See supra* text accompanying note 38.

[80] *ANR*, 173 F.3d at 501-02.

[81] Sofia Shipping Co. v. Amoco Transp. Co., 628 F. Supp. 116, 119 (S.D.N.Y. 1986).

[82] Lifecare Int'l. Inc. v. CD Med., Inc., 68 F.3d 429, 433-34 (11th Cir. 1995).

[83] Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682-83 (D.C. Cir. 1996).

[84] Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 676-83 (7th Cir. 1983).

[85] Apusento Garden Inc. v. Superior Ct. of Guam, 94 F.3d 1346, 1352 (9th Cir. 1996).

[86] Federal Vending, Inc. v. Steak & Ale, Inc., 71 F. Supp. 2d 1245, 1249-51 (S.D. Fla. 1999).

[87] Transit Cas. Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346, 1350-53 (S.D.N.Y. 1987).

[88] Evans Indus., v. Lexington Ins. Co., No. Civ.A. 01-1546, 2001 WL 803772, at *3-5 (E.D. La. July 12, 2001).

several years;[89] where an arbitrator had an ongoing legal dispute with a party to the arbitration;[90] where an arbitrator's law firm had represented the parent company of a party to the arbitration in numerous matters;[91] where an arbitrator's father was an officer of an international union, the local chapter of which was a party to the dispute;[92] where an arbitrator was a high ranking officer in a company that had substantial business dealings with a party to the arbitration, even though the arbitrator was not personally involved in those transactions;[93] where an arbitrator's law firm currently represented a party to the arbitration in other matters;[94] and where counsel for a party to an arbitration was simultaneously representing the arbitrator in an unrelated matter.[95]

Ultimately, there have been hundreds of decisions relating to evident partiality and undisclosed conflicts of interest, often along similar fact patterns, that have generated a myriad of differing results.[96] To develop some basis for its conclusion, the Fourth Circuit in *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*[97] developed a set of four guidelines to serve as a framework for evaluating such claims. These guidelines include evaluating:

> (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.[98]

The *ANR* decision further delineated that "[w]hen evaluating each factor, the court should determine whether the asserted bias is

---

[89] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 146-50 (1968).

[90] Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1199-1202 (11th Cir. 1982).

[91] Schmitz v. Zilveti, 20 F.3d 1043, 1044-49 (9th Cir. 1994); *see also* HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122, 1127-30 (C.D. Cal. 1999) (overturning an arbitration award where the Australian government was party to arbitration and was also represented by arbitrator's law firm).

[92] Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82-85 (2d Cir. 1984).

[93] Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 158-60 (8th Cir. 1995).

[94] Close v. Motorists Mut. Ins. Co., 486 N.E.2d 1275, 1277-79 (Ohio Ct. App. 1985).

[95] Beebe Med. Ctr., Inc. v. InSight Health Services Corp., 751 A.2d 426, 431-42 (Del. Ch. 1999).

[96] *See supra* note 4 and accompanying text.

[97] 173 F.3d 493 (4th Cir. 1999).

[98] *Id.* (citing Consolidation Coal Co. v. Local 1643, UAW, 48 F.3d 125, 130 (4th Cir. 1995)).

'direct, definite and capable of demonstration rather than remote, uncertain or speculative . . . .'"[99]

B. *Is There a Duty to Investigate or a Knowledge Requirement?*

While the AAA Commercial Arbitration Rules do not discuss the need for arbitrators to investigate whether there are potential conflicts of interest, both the Code of Ethics and the RUAA impose on an arbitrator a duty to investigate. As previously mentioned, however, this duty is merely a guideline and has not been interpreted as a legal obligation meriting vacation of an arbitration award if not followed.[100] Closely related to the issue of whether an arbitrator has an affirmative duty to investigate potential conflicts is whether an arbitrator must have actual knowledge of a conflict for a court to vacate an award.[101] If an arbitrator is unaware of a conflict, an arbitrator conceivably could never be biased. On these questions there is no consensus, as courts interpreting these issues have issued a string of conflicting decisions.

One of the earliest federal cases holding that an arbitrator must investigate potential conflicts was *Schmitz v. Zilveti*.[102] In *Schmitz*, a securities dispute was arbitrated according to the National Association of Securities Dealers arbitration rules.[103] These rules closely mirror the Code of Ethics by imposing certain disclosure obligations and requiring that arbitrators "'make a reasonable effort to inform themselves of any [conflicts that must be disclosed].'"[104] The arbitrator in *Schmitz* failed to disclose that his law firm had represented the parent company of a party to the arbitration in numerous matters over several decades. Furthermore, the arbitrator had actually seen documents noting the connection between the party and the parent company. The arbitrator, however, only ran a conflict check under the name of the party to the arbitration and not the parent company.[105]

The *Schmitz* court held that, even though there was no proof the arbitrator was aware of the conflict, he had also failed to make a reasonable investigation.[106] "Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable im-

---

[99] *Id.* at 500 (citing *Consolidation Coal*, 48 F.3d at 129).

[100] *See supra* Part I.C.

[101] *See supra* note 56 and accompanying text.

[102] 20 F.3d 1043 (9th Cir. 1994).

[103] *Id.* at 1044.

[104] *Id.* (citing NASD Code of Arbitration Procedure § 23(b)); *see also supra* text accompanying note 51.

[105] *Id.* at 1044.

[106] *Id.* at 1048-49.

pression of partiality."[107] The court continued by noting that "[r]equiring arbitrators to make investigations in certain circumstances gives arbitrators an incentive to be forthright with the parties."[108] The court concluded that the conflict in question created a reasonable appearance of bias, and even though the arbitrator had no actual knowledge of the conflict, he did have constructive knowledge. Furthermore, his failure to make a reasonable investigation and disclose this conflict warranted vacating the arbitration award.[109]

State courts have also held there is a duty to investigate. In *Close v. Motorists Mutual Insurance Company*,[110] an arbitration award was vacated where the arbitrator's law firm represented a party to the arbitration.[111] Although the arbitrator had no actual knowledge of this conflict, the court found that the arbitrator knew his firm often represented insurance companies, "he had access to a client index[,] and [he received] weekly 'new client' notices which would have alerted him to the conflict if he had consulted them."[112] The arbitrator commonly checked these sources when taking on a new client, and the court held "that the same duty is owed to the parties to an arbitration."[113] The court concluded by finding that the arbitrator had "constructive knowledge of the conflict and was under an obligation . . . under the AAA arbitration rules . . . to discover and disclose it."[114]

Similarly, based largely on the investigation requirement in the Code of Ethics, the court in *Beebe Medical Center, Inc. v. In-Sight Health Services Corp.*[115] held that an arbitrator must investigate potential conflicts. By failing to disclose that counsel for a party to the arbitration was also representing the arbitrator in a separate matter, even though the arbitrator may have not known that fact, the court found that this warranted the vacating of the arbitrator's award.[116] The court stated that "[d]oubtless there are costs to this strong pro-disclosure approach," but that the arbitrator "had the duty and opportunity to obtain the necessary knowledge

---

[107] *Id.* at 1048.

[108] *Id.*

[109] *Id.* at 1048-49; *accord* HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122, 1127-30 (C.D. Cal. 1999) (supporting the *Schmitz* ruling, finding a duty to investigate, and overturning an arbitration award where the Australian government was party to arbitration and was also represented by arbitrator's law firm).

[110] 486 N.E.2d 1275 (Ohio Ct. App. 1985).

[111] *Id.* at 1277-79.

[112] *Id.* at 1278.

[113] *Id.*

[114] *Id.* at 1278-79.

[115] 751 A.2d 426 (Del. Ch. 1999).

[116] *Id.* at 427-43.

to make appropriate disclosure – and would appear to have had to avoid reading important documents to remain in a state of ignorance."[117]

Despite this line of rulings, numerous federal courts have held that an arbitrator has no duty to investigate. Furthermore, these cases have implied that where an arbitrator has no knowledge of a conflict, then there can be no possibility of bias.[118] Specifically, the *Schmitz* decision was distinguished in *Al-Harbi v. Citibank, N.A.*[119] based on the fact that *Schmitz* involved a securities dispute conducted pursuant to securities arbitration rules that require an arbitrator to investigate possible conflicts.[120] The conflict in *Al-Harbi* involved a situation where an arbitrator's prior law firm had represented a party to the dispute on numerous unrelated matters. The court held that "the 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."[121]

Similarly, the arbitrator in *Lifecare International, Inc. v. CD Medical, Inc.*[122] failed to conduct an investigation adequate enough to uncover the fact that his law firm had done limited work for a party to the arbitration on matters related to the dispute over two years before the arbitrator had actually joined his current firm.[123] The court found no evidence that the arbitrator had any knowledge of this connection.[124] Furthermore, the court could not find that the arbitrator's "failure to investigate and, of course, disclose the two prior contacts between [the law firm] and CD Medical create[d] a reasonable impression of bias or partiality."[125]

Given the divergent opinions by courts as to a knowledge requirement and a duty to investigate, as well as the inability of the

---

[117] *Id.* at 438.

[118] "Some courts have considered an arbitrator's lack of knowledge as a factor in determining whether evident partiality was present." Schmitz v. Zilveti, 20 F.3d 1043, 1048 (9th Cir. 1994); *see also* Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1199-1202 (11th Cir. 1982) (vacating an award based on an arbitrator's knowledge of an undisclosed conflict, but implying that if it had been shown that the arbitrator truly had no knowledge, then no bias could be found).

[119] 85 F.3d 680 (D.C. Cir. 1996).

[120] *Id.* at 682-83; *accord* Evans Indus. v. Lexington Ins. Co., No. Civ.A. 01-1546, 2001 WL 803772, at *5 (E.D. La. July 12, 2001) ("The Fifth Circuit has not adopted such a duty to investigate, and a number of circuits have rejected such a rule.").

[121] *Al-Harbi*, 85 F.3d at 683.

[122] 68 F.3d 429 (11th Cir. 1995).

[123] *Id.* at 433-35.

[124] *Id.* at 434-35.

[125] *Id.* at 434; *accord* Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc., 146 F.3d 1309, 1312–13 (11th Cir. 1998).

courts to agree on a well-defined standard for evaluating evident partiality claims, a new test that reconciles these various issues is a necessity. The existing framework is fraught with inconsistency and ambiguity. The current scheme needs to be reevaluated, as it is precisely these ambiguities that encourage parties dissatisfied with arbitration results to bring what are all too often frivolous challenges. The lack of consensus as to what undisclosed conflicts warrant the vacating of arbitration awards incentivises parties to attack awards where clearly there is only a trivial relationship and no bias exists. Although these challenges are often unsuccessful, the mere fact that the standards are unclear gives hope to many parties that their challenge may be upheld. These challenges drive up the ultimate cost of arbitration, reduce the expedience of the process, and promote a sense that arbitration may not be as binding as the parties initially hoped. For all these reasons, a new test for evaluating evident partiality claims under the FAA is needed, specifically in the context of commercial arbitrations governed by AAA rules.

III. PROPOSING A NEW STANDARD FOR DETERMINING AN ARBITRATOR'S EVIDENT PARTIALITY

A. No Legal Obligation to Adhere to Arbitration Guidelines

At the outset, it is important that neutral arbitrators be encouraged to follow the general guidelines prescribed by the AAA Commercial Arbitration Rules, the Code of Ethics, and the RUAA.[126] Accordingly, an arbitrator should conduct a reasonable investigation and disclose any facts or circumstances that might imply that a potential conflict of interest exists. Arbitrators should not feel compelled to meticulously investigate every conceivable relationship an arbitrator could possibly have with a party to the arbitration stretching back over decades, but should only make an investigation that is reasonable under the circumstances.[127] Therefore, an arbitrator can certainly be conscious of the time involved in checking for potential conflicts of interest and the monetary burden that is associated with this obligation. As such, a lawyer serving as an arbitrator, for example, could make a reasonable investigation by performing a conflict check similar to that con-

---

[126] *See supra* Part I.C.

[127] *See* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II-B (1977) (requiring arbitrators to "make a reasonable effort" at investigating possible conflicts); REVISED UNIF. ARB. ACT § 12(a) (2000) (placing a "reasonable inquiry" requirement on arbitrators).

ducted within that attorney's law firm every time a new client is taken on.[128]

Businesspeople less accustomed to performing conflict checks should still take the time to review certain issues, such as whether they have had "any professional or social relationship with counsel for any party in this proceeding or the firms for which they work."[129] Additionally, the businesspeople/arbitrators should examine whether "[they], any member of [their] immediate family, or any close social or business associate [have] been involved in the last five years in a dispute involving the subject matter contained in the case to which [they] are assigned" or whether "[they] served as an expert witness or consultant to any party, attorney, or witness, or other arbitrator identified in this case."[130]

Potential conflicts uncovered through this investigation should normally be disclosed to both parties to the arbitration, unless the relationship at issue is unquestionably trivial. Any relationship that could even remotely give rise to an impression of bias should be disclosed. Spending several extra minutes to make full disclosures to the parties prior to the beginning of arbitration proceedings is hardly as burdensome as the time and expense that will later be incurred by the parties if a challenge can be maintained based on an undisclosed conflict. "If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award."[131]

Under the test being proposed, it is important to note that the obligations imposed on arbitrators to conduct an investigation and make disclosures per the AAA Commercial Arbitration Rules and Code of Ethics are merely guidelines. Arbitrators are not, nor should they be, legally compelled under the FAA to follow these guidelines. To state otherwise would create new legal standards under the statute where the plain language of Congress contemplates no such obligations. Although a failure to investigate or disclose a relationship might lend further support to a judicial finding that an arbitrator's undisclosed conflict creates a reasonable appearance of bias, thus warranting the vacating of an award, such

---

[128] *See* REVISED UNIF. ARB. ACT § 12 cmt. 3 (2000) (discussing the making of a "reasonable inquiry" and disclosing any "'known facts' that might affect impartiality," as well as methods by which lawyers might conduct a conflicts check).

[129] COOLEY, *supra* note 42, at 37.

[130] *Id.* There is an actual checklist for potential arbitrators to consult as part of an investigation to determine if any such conflict exists. *Id.* at 274.

[131] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 152 (1968).

failures cannot exclusively merit the overturning of an award.[132] Thus, there is no formal duty to investigate or disclose conflicts, although investigations and disclosures should be encouraged.

B. *What Party Seeking to Vacate Award Must Prove*

1. *A Reasonable Impression of Partiality*

Courts have failed to reach a consensus on the standard to be used when evaluating whether an undisclosed conflict of interest amounts to evident partiality, while also failing to enunciate a clear framework for gauging what types of conflicts would generally be highly suggestive of potential bias. The standards used by courts can be viewed as a spectrum, where the *Commonwealth Coatings* majority "appearance of bias" test presents a lower threshold of proof, demonstrating actual bias presents the most demanding burden of proof, and many courts have fallen somewhere in the middle by following Justice White's concurring opinion.[133]

Courts should adhere to a standard requiring that a party only demonstrates that "undisclosed facts show 'a reasonable impression of partiality.'"[134] This standard, drawn from Justice Black's majority opinion in *Commonwealth Coatings*, is more appropriate because Justice White's concurrence "does not expressly reject the 'appearance of bias' language."[135] Justice White sought to assure that arbitrators would not be held to the same standards as judges, because arbitrators "are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."[136] Aside from this point, there is no clear evidence that Justice White actually sought to limit application of the "appearance of bias" standard set forth in Justice Black's opinion.[137]

---

[132] *See supra* note 46 and accompanying text; *supra* text accompanying note 52.

[133] *See supra* Part II.A. The court in *ANR Coal Co. v. Cogentrix of N.C., Inc.*, for example, looked to Justice White's concurrence and used a higher proof threshold that was just short of requiring proof of actual bias. The court required a party to "demonstrate 'that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.'" 173 F.3d 493, 500 (4th Cir. 1999) (citing Consolidation Coal Co. v. Local 1643, UAW, 48 F.3d 125, 129 (4th Cir. 1995)).

[134] Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994) (citing Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1201 (11th Cir. 1982)). This test provides for a more "succinct standard" and "is the best expression of the *Commonwealth Coatings* court's holding." *Id.* at 1047.

[135] *Id.* at 1046.

[136] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

[137] The *Schmitz* court noted:

> Arbitrators have many more potential conflicts of interest than judges. In arbitration, moreover, only disclosure and not recusal is required.

When countering a claim of evident partiality, a party seeking to maintain an arbitration award has numerous arguments it can make during this stage of the analysis. A party can assert that the undisclosed relationship does not create a reasonable impression of partiality, possibly because the challenged relationship was too tenuous or was decades earlier. Thus, a party will argue that the conflict was trivial and there was no need for disclosure. Alternatively, a party can claim that the arbitrator did make a reasonable disclosure of the contested relationship. If disclosure was made then the party seeking to vacate the arbitration award may have waived any right to challenge the arbitrator's partiality.[138]

This portion of the test for partiality should not examine whether an arbitrator did investigate potential conflicts or whether an arbitrator had actual knowledge of the undisclosed conflict in question. The issues of arbitrator knowledge and investigations will be discussed in Part III.C, but at this juncture in the analysis they should not be considered by the courts. Thus, the initial test for evident partiality should solely examine whether an undisclosed conflict of interest creates a reasonable impression of partiality, regardless of any investigation or arbitrator knowledge. Such a finding would then result in the vacating of an arbitration award.[139]

2. *The Four-Factor Framework*

Courts should generally not have a predetermined set of relationships that automatically warrant the upholding or vacating of arbitration awards. However, certain guidelines are necessary to aid a court in determining whether an undisclosed conflict is so severe as to create a reasonable impression of partiality. The framework that should be employed is the four-factor test enunciated by the court in *ANR*, as it provides clear and easy to apply

---

> Given these differences, it is clear that the actual standard for arbitrators does differ from that of judges, even though language used to describe both standards may be similar. Justice White's rejection, in this context, of the standard applicable to judges does not therefore require rejection of language such as "appearance of bias," which might be used in other contexts to describe that standard. Given Justice White's express adherence to the majority opinion in *Commonwealth Coatings*, it is clear that the majority opinion, including its "appearance of bias" language, received at least five votes.

Schmitz, 20 F.3d at 1046-47.

138 *See* Chamberlin, *supra* note 18, at §§ 11-14 (discussing various defenses to claims of evident partiality).

139 The vacating of the award, however, is still subject to the proposed new affirmative defense discussed in Part III.C.

guidelines allowing for a more straightforward analysis.[140] This framework asks: (1) whether an arbitrator has a personal interest in an arbitration and what precisely is that interest; (2) how tenuous is the challenged relationship; (3) is the challenged relationship connected to the arbitration; and (4) how recent or remote is the challenged relationship.[141]

Some or all of these factors may be relevant to a court's analysis, but an undisclosed relationship need not register strong conflicts across all these factors to be highly suggestive of bias. For example, consider an arbitration where the key witness for a party in the dispute is the arbitrator's former college roommate. The entire dispute hinges on the credibility of this witness. Although the arbitrator and the witness had not been in contact for over twenty years, during college they were best of friends, and the arbitrator firmly believes the witness was a pillar of trust and possessed terrific judgment, based on their past relationship. Perhaps the arbitrator never disclosed the relationship because, upon receiving the witness list, the arbitrator failed to recognize the former roommate's name, as it had been changed following her marriage. When the witness arrived to testify the arbitrator again failed to disclose the relationship out of fear that it would disrupt the flow of the proceedings and perhaps give the parties a sense that the arbitrator might be partial to the party producing the college roommate as a witness.[142]

In this scenario, the arbitrator has no personal interest in the arbitration, the connection is somewhat tenuous given this is not a familial, business, or professional relationship, and the connection between the arbitrator and the witness is certainly remote in time. The challenged relationship, however, is tightly connected to the arbitration proceedings because of the importance of this witness's testimony and should have been disclosed. Failure to make such a disclosure could give rise to a reasonable impression of partiality, thus warranting the vacating the arbitration award. Therefore, no one factor should dominate a court's analysis, but all these factors must be examined within the totality of the factual scenario presented.

---

[140] *See* ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999).

[141] *Id.*

[142] This example was loosely drawn from PONTE & CAVENAGH, *supra* note 2, at 171.

C. *The Proposed Affirmative Defense: Lack of Knowledge Based on Reasonable Investigation*

Assuming that a court has found that an arbitrator's undisclosed conflict of interest constitutes evident partiality warranting the vacating of an arbitration award, the burden would then shift to the party seeking to maintain the arbitration award to successfully assert this new affirmative defense. That party could rebut the finding that the arbitrator was evidently partial by showing that the arbitrator made a reasonable investigation of all facts and circumstances known to the arbitrator and had no knowledge of the conflict of interest that went undisclosed.[143]

This new proposal for an affirmative defense would effectively deal with the issues of arbitrator knowledge and investigation, and it would only be available in arbitration disputes where the arbitrator performed a reasonable investigation. Parties that select an arbitrator who has not complied with the Code of Ethics and RUAA guidelines concerning conflict investigations could not later avail themselves of this affirmative defense if the award was overturned based on the arbitrator's evident partiality. Parties that want the later availability of this affirmative defense will therefore be encouraged to seek arbitrators that follow these arbitration guidelines.[144]

If a court has found that an undisclosed conflict creates a reasonable impression of partiality and the arbitrator failed to conduct a reasonable investigation, this affirmative defense would not be available even if it appeared the arbitrator had no knowledge of the conflict. A lack of knowledge would only serve as an affirmative defense if a reasonable investigation were conducted. Although this might produce some harsh results, it also prevents arbitrators from intentionally remaining blind to conflicts that would be readily apparent based on even a cursory conflict check, while further encouraging commercial arbitrators to comply with the Code of Ethics.

From a policy perspective, it is parties to commercial arbitration that intentionally employ this dispute resolution process, largely for its expedience, reduced costs, and finality. To insure that these benefits are more fully achieved, and to gain access to this affirmative defense if ever needed in the future, parties will seek to employ arbitrators who take the time and effort to conduct

---

143 For a discussion of what constitutes a reasonable investigation, see *supra* Part III.A.

144 This scheme also encourages arbitrators to conduct investigations and disclose all known conflicts, while not expanding the scope of the FAA. *See supra* note 46 and accompanying text; *supra* text accompanying note 52.

reasonable conflict investigations. It is these arbitrators who will uncover potential conflicts and make full disclosures, thus limiting the opportunity for later challenges and making their services that much more desirable. As demand for these arbitrators grows, others who provide arbitration services will be forced to follow suit and also conduct conflict investigations. Eventually the market demand for arbitrators that conduct reasonable investigations and make full disclosure of all known conflicts will result in changes to the supply of arbitration services, as those people who serve as arbitrators will take greater pains to assure the future integrity of any arbitration award they hand down.

CONCLUSION

Courts have struggled to clearly define the standards by which an arbitrator's undisclosed conflict of interest will warrant the vacating of an arbitration award. Furthermore, there has been a lingering debate over whether an arbitrator must investigate potential conflicts and whether an arbitrator can be evidently partial while lacking actual knowledge of the conflict that suggests possible bias. This proposed test for evaluating evident partiality claims would effectively resolve the inconsistency found in prior judicial determinations. Also, the introduction of an affirmative defense would promote arbitrator investigations and provide for rational results in cases where the arbitrator lacked actual knowledge.

LEE KORLAND[†]

[†] J.D. Candidate, 2003, Case Western Reserve University School of Law. I would like to thank my family and friends for all their support during the writing of this Comment.