

Arbitrator Disclosure: Recommendation for a New UAA Standard

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I. INTRODUCTION

Increasingly lengthy and expensive civil litigation has promoted the expanded use of alternative dispute resolution procedures. One such alternative, binding arbitration, can provide the advantage of swift, cost efficient and final resolution. Yet the finality and limited review of arbitration, the very features that make it an appealing alternative to continued and costly litigation, are also directing more scrutiny towards the fairness of the entire arbitration process.

The single most essential characteristic of a fair arbitration process is the engagement of truly neutral and independent arbitrators. These arbitrators should have an affirmative duty to disclose any connection they may have to the dispute at hand and any advantage they may gain by resolving it. Yet arbitrator requirements for disclosure of potential conflicts of interest are not held to one universal or national standard. Awards are vacated when arbitrators fail to disclose connections with parties or attorneys that amount to “evident partiality,” but awards are not as easily vacated when arbitrators fail to disclose connections that fall short of evident partiality or merely present an appearance of partiality.¹ If an arbitrator’s undisclosed relationship creates an impression of bias, the challenged award could be vacated by a court. However, the phrase “impression of possible bias” as used in the majority opinion of *Commonwealth Coatings Corp. v. Continental Casualty Co.*,² offers little practical assistance as a guide to arbitrator disclosure. As one author has characterized it, the phrase “is an amorphous guide whose contours are developed by judges in a post hoc determination of what an arbitrator should have disclosed.”³

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¹ See *infra* text accompanying notes 19–26 (discussing the majority and concurring opinions in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148–152 (1968)).

² 393 U.S. 145, 149 (1968).

³ Matthew Disco, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113, 116 (1993).

Neither the Uniform Arbitration Act⁴ (UAA) nor the Federal Arbitration Act⁵ (FAA) directly takes up the issue of arbitrator disclosure. The UAA addresses the issue of arbitrator neutrality in section 12, which allows an award to be vacated where “there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators.”⁶ Similarly, the FAA permits an award to be vacated “where there was evident partiality or corruption in the arbitrators.”⁷ By their terms, both the UAA and FAA apply only to the vacation of awards, but issues of partiality occur and can be addressed much earlier.⁸ Therefore, a UAA section which calls for an affirmative duty by arbitrators to disclose any relationships or interests that would impact arbitrator neutrality both before and during the arbitration process would establish an important uniform standard of fairness and integrity.⁹

⁴ UNIF. ARB. ACT §§ 1-25, 7 U.L.A. 6-469 (1997).

⁵ 9 U.S.C. §§ 1-16 (1994).

⁶ UNIF. ARB. ACT § 12(A)(2), 7 U.L.A. 281 (1997).

⁷ 9 U.S.C. § 10(a)(2) (1994).

⁸ See 3 IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 28.1.1, at 28:3 (1995).

⁹ The National Conference of Commissioners on Uniform State Laws (NCCUSL) Study Report has suggested the need for covering this topic. Recommendation 12 regarding the UAA states that the “Committee felt it was important to provide standards for disclosure of possible party relationships, conflicts of arbitrators, and arbitrators’ qualifications. This may be appropriate for Section 3 or as an entirely new section.” See NCCUSL REPORT OF STUDY COMMITTEE ON THE UNIFORM ARBITRATION ACT AND ALTERNATIVE DISPUTE RESOLUTION 4 (1995). The Committee felt that such provisions could address:

- a. whether there is an affirmative duty to disclose or whether a *voir dire* would be allowed.
- b. whether qualification standards should be required such as experience, training, etc.
- c. whether an allowance should be made for separate standards for particular industries so that an experience factor for the arbitrator could be insured; and
- d. whether the disclosure provisions could be waived by the parties; and
- e. the consequences for nondisclosure, under Section 12 or under a separate provision.

II. DUTY TO DISCLOSE

Currently, the duty to disclose is based on ethical guidelines. These guidelines are incorporated in the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint American Bar Association (ABA) and American Arbitration Association (AAA) committee.¹⁰ This code requires an arbitrator to disclose any interest or relationship likely to affect impartiality or the appearance of partiality.¹¹ The disclosure must include “*direct or indirect financial or personal interest in the outcome of the arbitration.*”¹² Because this duty is presented in the form of an ethical guideline, it would not necessarily support vacating an award for evident partiality unless specified in the arbitration agreement or incorporated by reference to certain procedural rules. In sum, it does not by itself have the power of law.

Certain procedural rules do incorporate the essence of arbitrator disclosure. The National Association of Securities Dealers (NASD), which conducts more than eighty percent of securities arbitrations, is a self-regulatory organization, under the oversight of the Securities and Exchange Commission. It offers dispute resolution services to NASD members involved in securities disputes. Its Code of Arbitration Procedure mirrors the ABA/AAA code of ethics by requiring each arbitrator to disclose certain circumstances involving direct or indirect, financial or personal interest in the outcome of the arbitration.¹³ It further calls for disclosure of “[a]ny existing or past financial, business, professional, family or social relationships that are likely to affect impartiality or that might reasonably create an appearance of partiality or bias.”¹⁴ Disclosures required by AAA

See id.

¹⁰ *See generally* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977).

¹¹ *See* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon II.

¹² *See id.* § A(1) (emphasis added).

¹³ *See* NASD CODE OF ARBITRATION PROCEDURE (1996).

¹⁴ *Id.* § 10312. This section provides:

§ 10312. Disclosures Required of Arbitrators

(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective

rules are less specific. They require an arbitrator to disclose "any circumstance likely to affect impartiality, 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."¹⁵ The AAA

and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

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

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interest, relationships, or circumstances that arise, or are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this Rule. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this Rule if the arbitrator who disclosed the information is not removed.

Cf. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon 2 (1977).

¹⁵ AAA COMMERCIAL ARBITRATION RULES § 19 (1996). The full text of § 19 is as follows:

§ 19. Disclosure and Challenge Procedure

Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, 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

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does not use the specific language of *direct or indirect* financial or personal interest in the arbitration that is used in both the NASD code and the ABA/AAA code of ethics.¹⁶ Rather, its language can be understood to mean any circumstance which the arbitrator determines may affect impartiality, including financial or personal interest.

Because the AAA has long been a tribunal for a variety of commercial disputes, its arbitrator rosters are typically composed of individuals who have subject matter familiarity with a particular profession or area of law.¹⁷ These expert arbitrators may have a greater potential for conflicts and relationships with the disputing parties or their representatives. These arbitrators may also have positional conflicts where they or their law firms are involved in advancing a position likely to be litigated in the arbitration. While the goal is to have knowledgeable and neutral arbitrators who are untouched by any appearance of bias, in certain professions or in certain geographical areas, connections to the parties may be unavoidable. With mandatory disclosure requirements, however, parties can make an informed choice about accepting the services of the arbitrator. Parties may waive objections by agreeing that an arbitrator with certain subject matter expertise should not be subject to disqualification even if some relationship exists. But it is in those situations where no disclosure is made about a relationship to a party, attorney or witness, and thus no waiver by the other party, that questions of arbitrator impartiality become troublesome.¹⁸

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. 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. See also § 12 (stating, “any neutral arbitrator . . . shall be subject to disqualification for the reason specified in Section 19.”).

¹⁶ See *id.* § 19.

¹⁷ See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (White, J. concurring) (“It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.”).

¹⁸ See 3 MACNEIL ET AL., *supra* note 8, § 28. Section 28 makes a distinction between active and passive partiality. Passive partiality is defined as “circumstances surrounding the arbitrator [that] may give rise to inferences of partiality inconsistent with the role of a neutral arbitrator.” *Id.* § 28.1.3.1.

III. CURRENT LAW

The legal standards for vacating awards based on arbitrator nondisclosure are derived from the Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*¹⁹ In that case, a dispute between a contractor and a subcontractor resulted in an arbitration award for the contractor.²⁰ After the award was made, the subcontractor found that the neutral arbitrator had provided engineering consulting services to the contractor.²¹ The Court held that the failure to disclose the business relationship constituted a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party,"²² and that an arbitrator should "disclose to the parties any dealings that might create an impression of possible bias."²³ The majority opinion stated that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review."²⁴

It was Justice White's separate and concurring opinion in which he wrote that arbitrators should *not* be held to the same partiality standard applicable to judges²⁵ that has spurred debate as to the scope of the *Commonwealth Coatings* opinion. Justice White opined that arbitrator disclosure was only warranted when an arbitrator has "a substantial interest in a firm which has done more than trivial business with a party."²⁶ As a result of Justice Black's majority and Justice White's concurring opinions, which complement yet contradict each other, courts have struggled with the proper test for vacating awards based on nondisclosure of relationships between arbitrators, parties and their counsel.

Recently, some courts have underscored the duty to disclose, while others have reduced the scope of the requirement, particularly when the undisclosed information is, in retrospect, indirect and remote. These judgments, however, share a common characteristic: they are all fact-

¹⁹ 395 U.S. 145 (1968).

²⁰ *See id.* at 145.

²¹ *See id.*

²² *Id.* at 148.

²³ *Id.* at 149.

²⁴ *Id.*

²⁵ *See id.* at 150.

²⁶ *Id.* at 151-152.

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specific, post-award determinations that struggle with the conflicting opinions in *Commonwealth Coatings*. What they do not have in common is a clear standard.

The Ninth Circuit, for example, attaches a duty to investigate that is independent of the *Commonwealth Coatings* duty to disclose. In *Schmitz v. Zilveti*,²⁷ an NASD award was vacated when a post-award investigation found that one arbitrator's law firm represented the parent company of the respondent, Prudential-Bache Securities.²⁸ Even though the arbitrator had run a conflicts check for Prudential-Bache Securities, he neglected to discover and subsequently disclose the firm's relationship with Prudential's parent company in another city.²⁹ The court said that the undisclosed relationship produced "a reasonable impression of partiality."³⁰ Although the arbitrator lacked actual knowledge, the court charged him with constructive knowledge of his firm's previous representation of Prudential-Bache's parent company.³¹

Other circuits have not required constructive knowledge of indirect relationships between an arbitrator and a party. Recently in *Al-Harbi v. Citibank*,³² an award was affirmed in the D.C. Circuit, even though the arbitrator's former law firm represented one of the parties in matters unrelated to the dispute.³³ The arbitrator in *Al-Harbi* did not know about his former firm's prior representation of Citibank, and the court did not impose any duty on the arbitrator to conduct an investigation to uncover "facts marginally disclosable under the *Commonwealth Coatings* duty."³⁴

In another recent nondisclosure case, the Eleventh Circuit upheld the confirmation of an AAA award where the arbitrator failed to make two disclosures.³⁵ The first nondisclosure involved a prior dispute the arbitrator

²⁷ 20 F.3d 1043 (9th Cir. 1994).

²⁸ *See id.* at 1043

²⁹ *See id.* at 1044.

³⁰ *Id.* at 1049.

³¹ *See id.* at 1044.

³² 85 F.3d 680 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996).

³³ *See id.* at 682-684.

³⁴ *Id.* at 683. A reason for not imposing a constructive duty on an arbitrator whose former law firm may have represented a party, its parent or subsidiary is the practical difficulty of trying to retrieve that information. In *Betz v. Pankow*, 38 Cal. Rptr. 2d 107, 112 (Cal. Ct. App. 1995), the court asked how a former member of a law firm, now competing with the firm, can accomplish a conflicts check. *See infra* text accompanying notes 55 and 56.

³⁵ *See Lifecare Int'l Inc. v. CD Medical Inc.*, 68 F.3d 429 (11th Cir. 1995).

had with an attorney associated with the law firm representing one of the parties to the arbitration.³⁶ The second nondisclosure concerned two prior contacts between the party and the firm to which the same arbitrator became "of counsel."³⁷ But unlike *Schmitz*, the contacts did not constitute actual representation of the party, and at the time of the party's contact, the arbitrator was not then even associated with the law firm.³⁸ Thus, in both *Al-Harbi* and *Lifecare*, the arbitrators were not concurrently associated with the law firms when the representation or contacts occurred, and they consequently did not appear to have had any financial interest in the outcomes of the arbitrations.

A recent decision in the Eighth Circuit, *Olson v. Merrill Lynch*,³⁹ avoided the uncertainty created in the opinions of *Commonwealth Coatings* by not phrasing the question in terms of impression of possible bias. In *Olson*, the court vacated the award, simply determining that an arbitrator's nondisclosure of his position as an officer in a company that did more than trivial business with one of the parties to the arbitration created evident partiality.⁴⁰

It appears that Justice White's concurring opinion in *Commonwealth Coatings*, with its narrower standard for disclosure, has swayed the analysis of arbitrator disclosure in most other federal circuit courts. The Fourth Circuit, citing White, ruled that "[i]t is well established that a mere appearance of bias is insufficient to demonstrate evident partiality."⁴¹ In the Sixth Circuit, the court held that, in light of Justice White's concurring opinion, the test was whether a "reasonable person would have to conclude that an arbitrator was partial."⁴² This court cited the Second Circuit's test in *Morelite Construction v. New York City*⁴³ which amplified that court's

³⁶ See *id.* at 432.

³⁷ See *id.* Cf. *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988) (upholding an arbitration award even though an arbitrator failed to disclose his law firm's representation of clients who were adversaries of the parties to the arbitration because no evidence was produced that he was even aware of the possible conflict).

³⁸ See *Lifecare Int'l*, 68 F.3d at 434.

³⁹ 51 F.3d 157 (8th Cir. 1994).

⁴⁰ See *id.* at 160.

⁴¹ *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993).

⁴² *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989).

⁴³ 748 F.2d 79, 84 (2nd Cir. 1984) (holding that evident partiality "will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration").

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previous ruling that “the standard of evident partiality for disqualification of an arbitrator does not include the appearance of bias.”⁴⁴ In the Seventh Circuit, Judge Posner analyzed the test as “whether having due regard for the different expectations regarding impartiality parties bring to arbitration [rather] than to litigation, the relationship . . . was so intimate—personally, socially, professionally or financially—as to cast serious doubt on . . . impartiality.”⁴⁵ To vacate on the ground of evident partiality, the Eleventh Circuit has determined that the party challenging must establish that the undisclosed facts create a reasonable impression of partiality that is “direct, definite and capable of demonstration rather than remote, uncertain and speculative.”⁴⁶ The Eleventh Circuit has also stated that “[t]he type of business relationship at issue is a factor to address and where trivial, disclosure is not required.”⁴⁷

In light of the direction of the other circuits, the question arises whether *Schmitz* was an anomaly.⁴⁸ However, when viewed in combination with California statutes and case law, *Schmitz* does not stand out as particularly extraordinary. That is because a number of California state appellate decisions, combined with state legislation providing some rigid disclosure requirements, have brought the issue to the forefront.

IV. THE CALIFORNIA EXPERIENCE

In California, state courts have considered a number of factors when appraising nondisclosure cases. These factors have included whether a substantial business relationship or financial advantage existed or whether a reasonable person would consider the arbitrator to be impartial. For example, a medical malpractice arbitration decision in favor of the hospital was vacated when the losing party discovered that the neutral arbitrator had

⁴⁴ *International Produce v. A/S Rosshavet*, 638 F.2d 548, 551 (2nd Cir. 1981).

⁴⁵ *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983).

⁴⁶ *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201–1202 (11th Cir. 1982) (quoting *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196, 1200 (7th Cir. 1980)).

⁴⁷ *Lozano v. Maryland Casualty, Co.*, 850 F.2d at 1471 (citing *Commonwealth Coatings*, 395 U.S. at 150).

⁴⁸ A more recent Ninth Circuit opinion in *Apusento Garden (Guam) Inc. v. Super. Ct. of Guam*, 94 F.3d 1346, 1353 (9th Cir. 1996) was influenced by the Eleventh Circuit’s reasoning in *Lozano*, but still analyzed the relationship in terms of *Commonwealth Coating’s* majority standard of impression of possible bias. A case can also be made that *Schmitz* was conducted under the NASD rules, and therefore by reference incorporated the security industry’s higher duty of disclosure.

served as the hospital's party arbitrator on five previous occasions.⁴⁹ The court called this previous service a substantial business relationship.⁵⁰ Another arbitration award made by the same neutral arbitrator was overturned when the disclosure about his prior service as an arbitrator was made by the hospital's attorney in a letter that the court labeled "essentially misleading."⁵¹

Yet another arbitration award was challenged when information that the arbitrator had been retained as an expert witness for the respondent's law firm was disclosed between the liability and damage phase of an AAA arbitration.⁵² After the AAA declined to disqualify the arbitrator, and the trial court affirmed the award, the court of appeals reversed and remanded for a de novo determination of whether the relationship between the law firm and the arbitrator was substantial enough to create a reasonable impression of possible bias.⁵³ Even the AAA, which had refused to disqualify the arbitrator, was not spared the Court's disapproval:

[E]ven though . . . the AAA is certainly a respected forum for such arbitration, AAA nevertheless is a business enterprise "in competition not only with the other private arbitration services but with the courts in providing—in the case of the private services, selling—an attractive form of dispute settlement. It may set its standards as high or as low as it thinks its customers want."⁵⁴

In another case, where an arbitration award was challenged for arbitrator bias on the basis of the arbitrator's past association with a law firm that represented the prevailing party, the court stated that "the established test for making this determination . . . is whether the record

⁴⁹ See *Neaman v. Kaiser Found. Hosp.*, 11 Cal. Rptr. 2d 879, 880 (Cal. Ct. App. 1992).

⁵⁰ See *id.* at 884. The arbitrator, a retired judge, stated in a declaration that since retirement he spent 30% of his time on Kaiser matters, of which 65% was spent as a claimant's party arbitrator, 30% as a neutral arbitrator and 5% as Kaiser's arbitrator. See *id.* at 881.

⁵¹ See *Kaiser Found. Hosp. v. Super. Ct. of Los Angeles County*, 23 Cal. Rptr. 2d 431, 433 (Cal. Ct. App. 1994).

⁵² See *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 40 Cal. Rptr. 2d 700 (Cal. Ct. App. 1995).

⁵³ See *id.* at 710.

⁵⁴ *Id.* (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983)).

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reveals facts which might create an impression of possible bias.”⁵⁵ The court also stated that “[t]he test is an objective one, whether such an impression is created in the eyes of the hypothetical reasonable person.”⁵⁶ Because the relationship was not known to the arbitrator, the court concluded that there was no appearance of actual bias.⁵⁷ The court did caution, however, that its decision addressed only the post-award challenge and expressed no opinion on pre-arbitration challenges.⁵⁸ This suggests that a prior disclosure might have resulted in a challenge to the arbitrator.

Reacting to the issues of arbitrator disclosure heard by the courts, the California legislature enacted several pieces of legislation to amend state arbitration law. These statutes, which carve an exception for arbitrations conducted under collective bargaining agreements, provide a more stringent standard for disclosure. One statute holds neutral arbitrators to the same standards as state court judges, subjecting the arbitrators to disqualification upon grounds that include personal knowledge of the dispute or parties, financial interest, bias and so forth.⁵⁹ An arbitrator’s failure to disqualify as specified in the statute is a basis for vacation of the award.⁶⁰ Another statute requires neutral arbitrators who have formerly served as arbitrators for any of the parties or attorneys to reveal the results of all such prior private arbitrations.⁶¹ Yet another statute, referring to court appointed

⁵⁵ *Betz v. Pankow*, 38 Cal. Rptr. 2d 107, 110 (Cal. Ct. App. 1995). This case was the third post-arbitration challenge to vacate the award.

⁵⁶ *Id.*

⁵⁷ *See id.* at 112. The court also made the point that a conflicts check by the arbitrator would not have disclosed the client relationship with his former firm since he never worked on any cases. Moreover, the court asked as a practical matter, how a former member of a law firm who is now competing with it can accomplish a client check of his former firm. *See id.* The court also made a point of distinguishing this case from *Schmitz* where the arbitrator was aware of the relationship between Prudential-Bache Securities and its parent, Prudential Insurance, which was a client of the firm, and from *Close v. Motorists Mutual Insurance Co.*, 21 Ohio App. 3d 228 (Ohio Ct. App. 1985) where the arbitrator was associated with a law firm that had represented the insurance company defendant, and thus had immediate and frequent access to material that would have made him aware of the conflict. *See Betz*, 38 Cal. Rptr. 2d at 111.

⁵⁸ *See Betz*, 38 Cal. Rptr. 2d at 112.

⁵⁹ *See* CAL. CIV. PROC. CODE § 1282(e) (West Supp. 1996) (referring to CAL. CIV. PROC. CODE § 170.1).

⁶⁰ *See* CAL. CIV. PROC. CODE § 1286.2(f).

⁶¹ *See id.* § 1281.9. While the catalyst for this statute appeared to be the *Kaiser* arbitrator challenges, the statute still does not specifically address the potential for conflict with regard to private forums selling dispute resolution services to large repeat

arbitrators, requires arbitrators to disclose any information that might create an appearance of impartiality for themselves and for those who have up to a third degree relationship with them.⁶² These statutes present arbitrators not only with a higher threshold of disclosure, but also with a confusing array of requirements. The result is that it is unclear how much must be disclosed and under what circumstances such disclosures should be made.

V. A PROPOSAL

There are no universal expectations for arbitrator disclosure. When an arbitration award is challenged, and the courts are called in to determine whether there was evident partiality, impression of possible bias or merely a disgruntled losing party, the analysis is usually made on a fact-specific, case by case basis. If a basic standard of pre-arbitration disclosure was adopted, the analysis would become more universal and more predictable for practitioners.

A meaningful guideline for arbitrator selection and retention could be attained if new disclosure requirements were modeled after a simplified version of the ABA/AAA code of ethics. The objectives of a pre-arbitration and continuing disclosure requirement would be:

1) *To ensure the integrity of the arbitration process.* Justice White in *Commonwealth Coatings* stated that "the arbitration process functions best when an amicable and trusting atmosphere is preserved . . . and this end is best served by establishing an atmosphere of frankness at the outset."⁶³ Pre-arbitration disclosure allows parties to either challenge the arbitrator, waive their objections or request more information to satisfy themselves of the arbitrator's impartiality.

2) *To provide the arbitrator with a simple and understandable disclosure demand.* That demand would be derived from the same common sense reasoning courts have employed in their case-by-case post-arbitration factual analysis, and it would guide arbitrators in providing disclosures.

3) *To discourage losing parties from conducting routine background investigations of arbitrators.* These investigations may still occur, but with well-defined disclosure requirements, awards would only be vacated

real parties in interest. See *supra* notes 50 and 51 and accompanying text.

⁶² See CAL. CIV. PROC. CODE § 1281.6 (referring to CAL. CIV. PROC. CODE § 1297.121).

⁶³ *Commonwealth Coatings*, 393 U.S. at 151.

according to circumscribed criteria.

4) *To prevent requirements so burdensome that those with subject matter expertise are discouraged from serving as arbitrators.* Justice White in *Commonwealth Coatings* put it so well when he stated that “it is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.”⁶⁴

The draft I propose follows:

Section NEW. Arbitrator Disclosure

An arbitrator must, and has a continuing duty to, disclose:

- (a) any personal or professional connection, affiliation, or relationship with a party, lawyer, or witness in the arbitration proceeding that could foreseeably lead to a direct or indirect financial or distinct personal advantage for the arbitrator as a result of the arbitration; or**
- (b) any facts that would lead a person to entertain a reasonable doubt of the arbitrator’s neutrality.**

The arbitrator must make a reasonable and good-faith effort to ascertain the existence of the grounds described in subdivision (a) and (b) above.

If these disclosures are made at the time of appointment, parties may waive objections to the appearance of bias, request more information about the relationship from the arbitrator, or challenge the arbitrator for cause. This should eliminate many post-arbitration challenges for arbitrator nondisclosure.

Failure to make disclosure should be grounds for vacateur. Section 12 of the UAA would then require the addition of a new ground such as:

Section 12. Vacating an Award

- (a) Upon application of a party, the court shall vacate an award where:**

⁶⁴ *Id.* at 150.

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral, or there was corruption in any of the arbitrators, or there was misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefore, or they refused to hear evidence material to the controversy, or they otherwise so conducted the hearing, contrary to the provision of Section 5, as to prejudice substantially the rights of a party; or . . .

(NEW) The arbitrators failed to disclose any of the grounds set forth in Section NEW.

VI. CONCLUSION

Almost thirty years ago in *Commonwealth Coatings*, both Justices Black and White agreed on the value of early disclosure. The inconsistency between the two justices' opinions had to do with how much needed to be disclosed, not whether disclosures should be made. Today, in a complex commercial marketplace of private dispute resolution, a standard that imposes universal disclosure requirements on arbitrators would supply the necessary integrity to the arbitration process.