

Kicking Our Gift Horse in the Mouth - Arbitration and Arbitrator Bias: Its Sources, Symptoms, and Solutions

I. INTRODUCTION

Interest in arbitration has increased dramatically over the past decade.¹ As a response to this interest, courts have expanded the legal status of arbitration.² Although arbitration is most commonly used in the context of tort and contract proceedings, recent court decisions have expanded arbitration's scope.³ For instance, arbitration is now being applied to antitrust claims involving international transactions and securities matters.⁴

Arbitration has been heralded by our nation's courts because it relieves their overcrowded dockets.⁵ Proponents of arbitration believe it provides a qualitatively better form of dispute resolution - a form that is more reflective of community norms and is better tailored to the needs of the individual disputants.⁶ Litigants also look favorably upon arbitration because it is less costly,⁷ cumbersome,⁸ and intimidating⁹ than traditional litigation.

Arbitration proceedings, however, can also cause grievous injustice to disputants. When an arbitration proceeding is tainted by bias or prejudice on the part of one or more of the members of the arbitration panel,¹⁰ such injustice will likely occur. It is this problem, arbitrator bias, which prevents arbitration from realizing its full potential.

The cases and commentaries reveal two basic types of arbitrator bias. It is useful to label the first group "personal" bias and the second group "contextual" bias. The purpose of this Note is to discuss these two types of bias and to illustrate and explain how they operate to taint arbitration proceedings.

Part II of this Note will detail the two separate arbitration systems

1. Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270 (1986).

2. William E. Hartgering, *A Lawyer's Guide Through the Rhetoric, Myths & Potential of A.D.R.*, C.B.A. RECORD, June 1987, at 44.

3. *Id.*

4. *Id.*

5. See generally Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc., Reconsidered*, 66 B.U. L. REV. 953, 954 (1986).

6. Hensler, *supra* note 1, at 270.

7. Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1366 (1985).

8. See Bernard J. Reilly, *The President's Message*, N.Y. ST. B.J., April 1983, at 5, 7.

9. See Warren E. Burger, *Our Vicious Legal Spiral*, 16 JUDGES J. 23, 48 (1977).

10. Gregory R. Kim, Note, *Graham v. Scissor-Tail, Inc.: Unconscionability of Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CAL. L. REV. 1014, 1021 n.4 (1982).

currently operating in the United States: (1) court-annexed mandatory arbitration, and (2) voluntary contractual arbitration pursuant to private contract and the mandates of the American Arbitration Association. Within the context of mandatory arbitration, Part II will also specifically and historically relate arbitration's rise in stature and will explain the manner by which it has arrived at its present level of popularity. Part III will relate the standards to which arbitrators are required to adhere when hearing a case (under both systems) and will explain these two systems' respective procedures for rejecting and vacating an award rendered by a biased arbitration panel. Part IV will explain "personal" and "contextual" bias and will specifically illustrate how these two biases operate to taint arbitration proceedings. Finally, Part V will discuss how to deal with the problem of arbitrator bias. It will explore how these two types of bias can be best addressed and, hopefully, combatted.

II. THE TWO ARBITRATION SYSTEMS CURRENTLY OPERATING IN THE UNITED STATES

A. *Court-Annexed Mandatory Arbitration*

1. *The Establishment and Operation of Mandatory Arbitration.*

Court-annexed mandatory arbitration (hereafter mandatory arbitration) programs are established by state statute, state supreme court rule, or local rule.¹¹ These programs authorize trial courts to compel arbitration of civil suits that "fall within a specified jurisdictional limit, as a precondition for placing those suits on the trial calendar."¹²

In Illinois, for example, the Supreme Court Rules (the enabling act for the state's mandatory arbitration system) compel arbitration for all lawsuits under \$15,000.¹³ Since the late 1950's, however, mandatory arbitration programs have steadily increased their jurisdictional amounts.¹⁴ In contrast to Illinois, court-induced arbitration programs in California include most cases under \$25,000.¹⁵ Moreover, several federal districts compel arbitration for cases under \$100,000 or \$150,000, and some have no jurisdictional limits.¹⁶

11. Hensler, *supra* note 1, at 271.

12. *Id.*

13. ILL. SUP. CT. R. 86 (this amount will soon be changed to \$30,000).

14. Hartgering, *supra* note 2.

15. *Id.*

16. *Id.*; Dana H. Freyer, *The Integration of A.D.R. Into Corporate Law Firm Practice*, ARB. J. (December 1990, at 6).

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The reason for the institution of these mandatory procedures, of course, has been the dramatic increase in the number of claims brought for formal adjudication.¹⁷ Over the last forty years, the number of federal district court cases filed has increased from about 35,000 to 180,000 annually.¹⁸ The same pattern is present in our nation's state courts. For instance, from 1967 to 1976 state trial court filings increased twice as fast as the nation's population.¹⁹

Mandatory arbitration hearings are informal, private, and often brief.²⁰ A full hearing necessary to arrive at an award can frequently be reached in a few hours.²¹ While a 12-person jury trial could feasibly arrive at a decision within 3 days, the same determination could be completed within three hours through a state's mandatory arbitration procedure.²² These arbitration proceedings are usually not recorded and relaxed rules of evidence are used.²³ Of particular significance is that in lieu of witnesses, medical and other written reports are sufficient as evidence.²⁴

Arbitrators are appointed to these proceedings pursuant to, and in accordance with, the particular state's mandatory arbitration statute or rule.²⁵ A list of possible arbitrators is compiled by the state, and a panel

17. See generally Bayless Manning, *Hyperplexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977).

18. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982).

19. *Id.*

20. Hensler, *supra* note 1, at 271. The following discussion also applies to voluntary, contractual, binding arbitration proceedings.

21. ILL. SUP. CT. R. Introductory Comments at 3.

22. *Id.*

23. *Id.*

24. Hensler, *supra* note 1, at 271.

25. ILL. SUP. CT. R. 86-94 (exemplifies a typical set of mandatory arbitration rules).

Since the Illinois set of rules represents a typical set of mandatory arbitration rules (derived from a careful study of many other jurisdictions' rules), it will be utilized throughout the discussion relating to appointment and qualification of arbitrators as well as the later discussion regarding the procedure for rejecting a mandatory arbitration award and the standard for such award's rejection.

The intention of the Committee in charge of creating Illinois' mandatory arbitration rules was to "obtain a product refined from the use and experience of the full panoply of models in existence" at that time. The Committee relied particularly on Pennsylvania's mandatory arbitration program in creating its own (as will be discussed, Pennsylvania was the first jurisdiction to implement a successful mandatory arbitration system). *Id.*, Introductory Comments at 2.

The Illinois Committee included four judges who had previously served on a Judicial Conference Study Committee. These judges' recommendations served as the basis for the Illinois Arbitration Act. These judges, as a result of their earlier studies, had available for their use a "considerable bank of knowledge of existing arbitration systems." *Id.* The Committee utilized these judges' knowledge of other jurisdictions' arbitration systems in formulating Illinois' system. See *id.*

Moreover, "[a] national conference on mandatory arbitration sponsored by the National Institute for Dispute Resolution held in Washington, D.C., May 29-31, 1985, provided the chair of this Committee with a further opportunity to discuss the development of [arbitration] programs with representatives of other jurisdictions." *Id.* This information

is selected from this list. For example, a typical rule (in this instance, the relevant Illinois Supreme Court Rule)²⁶ on this issue reads:

Rule 87. Appointment, Qualification and Compensation of Arbitrators

(a) List of Arbitrators. A list of arbitrators shall be prepared in the manner prescribed by a circuit rule. The list shall consist of a sufficient number of members of the bar engaged in the practice of law and retired judges within the circuit in which the court is situated.

(b) Panel. The panel of arbitrators shall consist of three members of the bar, or such lesser number as may be agreed upon by the parties, appointed from the list of available arbitrators, as prescribed by circuit rule, and shall be chaired by a member of the bar who has engaged in trial practice for at least three years or by a retired judge²⁷

The arbitration panel is most frequently formed by a method of random selection.²⁸ Other methods include alphabetical appointment from the list of arbitrators, appointment from the list in the order of arrival and signing-in on the hearing date, or selection of three members with a combined experience of ten years.²⁹

There also exist various methods for selecting a panel chairperson. In some jurisdictions, the member with the longest number of years in practice is appointed chairperson.³⁰ In other jurisdictions, a special list is maintained as the roster for appointment of the chairperson of the panel.³¹ This list consists of those arbitrators whom the arbitration administrator believes have the most pertinent experience in practice.³² Once this panel is selected and a chairperson is appointed, the mandatory proceedings begin.

was also utilized by the Illinois Committee in formulating a viable set of mandatory arbitration rules; a set of rules which considered, and was representative of, the types of arbitration systems operating successfully in other jurisdictions. *See id.*

Lastly, the Illinois Committee's chair met with supervising judges, arbitration administrators, and attorney practitioners in New Jersey, Pittsburgh, and Seattle in order to discuss the effectiveness of these states' local and statewide arbitration rules. Again, these people's input contributed to the Committee's final set of arbitration rules. *Id.* at 3.

26. *Id.* at 7.

27. *Id.*

28. ILL. SUP. CT. R. 87 committee cmt. para. (b).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

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2. *The Popularization of Mandatory Arbitration.*

The increase in the popularity of court-annexed mandatory arbitration, both in the state and federal systems, has been astounding. The first court-sanctioned arbitration system was established in Philadelphia in 1952.³³ An 18th century statute that provided for the referral of trial cases to arbitrators was amended in order to implement this program.³⁴ By the 1960's, similar systems had been established all across Pennsylvania.³⁵ Word of Pennsylvania's success in solving small money damage suits quickly spread.³⁶ As soon as the early 1970's, as many state courts were struggling to find a solution to ease their overcrowded dockets, a number of states adopted mandatory arbitration systems similar to the one in Pennsylvania.³⁷ Then, in the late 1970's and early 1980's, a number of new states decided in favor of mandatory arbitration and adopted their own programs.³⁸ By October 1985, eighteen states had implemented mandatory arbitration programs.³⁹

While mandatory arbitration began in the state courts, it was not long before federal courts decided to experiment with similar programs.⁴⁰ Currently, ten federal district courts (to be expanded to twenty) have

33. Hensler, *supra* note 1, at 271.

34. *Id.*

35. *Id.*

36. *Id.*; See generally JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM, THE INSTITUTE FOR CIVIL JUSTICE (1983).

37. Hensler, *supra* note 1, at 271.

38. *Id.*

39. *Id.*

40. *Id.*

court-annexed arbitration programs.⁴¹

41. Hensler, *supra* note 1, at 271; Freyer, *supra* note 16, at 6. The legislative authority for these federal arbitration programs is the Judicial Improvements and Access to Justice Act of 1988, §§ 901-907, 28 U.S.C. §§ 651-658 (1982).

Table 1 Mandatory court-annexed arbitration programs

Jurisdiction	Program title	Authorization	Earliest date authorized	Current scope
<i>State courts</i>				
Alaska	Arbitration of Small Claims	State Law—A S 09 43 190	1972	Never implemented, jurisdictional limit too low to make program useful
Arizona	Arbitration of Claims	State Law—A R S 12-133	1974	Operational in at least 2 counties including Phoenix and Tucson
California	Judicial Arbitration	State Law—C C P 1141 10-32	1978	Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts
Connecticut	Fact Finding and Arbitration	State Law—Conn. Statutes 52-549N	1963	Statewide implementation but far more cases processed by fact-finding than by arbitration
Delaware	Compulsory Pretrial Arbitration	Superior Court Rule 16(c)	1964	Program began statewide in mid-1964
Illinois	Mandatory Arbitration	State Law—C C P Ch. 110 Part 10A	1965	Rule drafting underway
Michigan	Mediation	Supreme Court Rule (except Wayne County Court) General Court Rule 316	1978	Operational in 28 of 55 circuit courts
Minnesota	Judicial Arbitration	State Law—Minn. Statutes 484 73	1964	Experimental implementation in Hennepin County (Minneapolis)
Nevada	Motor Vehicle Damage Actions Arbitration	State Law—N R S 33 215-245	1971	Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damage cases
New Hampshire	Compulsory Arbitration	Supreme Court Rule, Temporary Rules of Compulsory Arbitration	1978	2 counties (Merrimack, Rockingham)
New Jersey	Judicial Arbitration	State Law—Laws of N J Ch 356	1963	Statewide implementation
New Mexico		Supreme Court Rule	1964	Assisting funding
New York	Alternative Dispute Resolution by Arbitration	State Law 22 NYC RR Part 28	1970	Operational in 31 counties, including New York City
North Carolina	Court-ordered Arbitration	State Enabling Act	1965	Pilot program authorized in 3 districts
Ohio	Varies by county	Local Judicial Rules—Hamilton County Rule 24 Stark County Rule 16 Cuyahoga County Rule 29	1970	Operational in approximately 15 counties including Cleveland and Cincinnati
Oregon	Arbitration Program	State Law—Ch. 670 Oregon Laws	1963	Operational in 9 counties
Pennsylvania	Compulsory Arbitration	State Law—Pa. Con. Stat. Ann. Title 42 7101	1952	Operational in 53 counties, including Philadelphia and Pittsburgh
Washington	Mandatory Arbitration of Civil Actions	State Law—R C W Ch. 7 06	1979	Operational in at least 3 counties (King, Pierce, Yakima)
<i>Federal district courts</i>				
California—Northern Dist.	Court-annexed Arbitration	Local Rule—Rule 500	1978	Ongoing program
Florida—Middle Dist.	Court-annexed Arbitration	Local Rule	1965	Operational
Michigan—Western Dist.	Court-annexed Arbitration	Local Rule	1965	Operational
Missouri—Western Dist.	Court-annexed Arbitration	Local Rule	1965	Operational
New Jersey	Court-annexed Arbitration	Local Rule	1965	Operational
New York—Eastern Dist.	Court-annexed Arbitration	Local Rule	1965	Program to commence by January 1986
North Carolina—Middle Dist.	Court-annexed Arbitration	Local Rule—Part VI Rules of Practice and Procedure	1964	Operational
Oklahoma—Western Dist.	Court-annexed Arbitration	Local Rule	1965	Operational
Pennsylvania—Eastern Dist.	Court-annexed Arbitration	Local Rule—Civil Procedure 8	1978	Ongoing program
Texas—Western Dist.	Court-annexed Arbitration	Local Rule	1965	Operational

Source: Ebner, and Betancourt, *Court-Annexed Arbitration: The National Picture* (Santa Monica, CA: The Rand Corporation, 1985), updated to January 1, 1986.

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B. Voluntary Contractual Arbitration

Voluntary contractual arbitration (hereafter voluntary arbitration) is "agreed upon" arbitration. As opposed to court-annexed, mandatory arbitration, where the disputants have no choice but to subject their lawsuit to arbitration, in voluntary arbitration, the parties agree by private contract to have certain disputes, should they arise, resolved by arbitration. The parties further agree to be bound by the arbitration panel's decision.⁴²

Many contracts provide that the arbitration described therein take place in accordance with the rules and standards proscribed by the American Arbitration Association (AAA). The AAA, founded in 1926, is a public-service, not-for-profit organization.⁴³ The AAA encourages arbitration as a method of dispute resolution and administers arbitration proceedings.⁴⁴ The AAA offers a broad range of dispute resolution services which are available through offices located in major cities throughout the United States.⁴⁵

From a panel of individuals compiled by the AAA, private and public litigants select arbitrators for labor and commercial disputes.⁴⁶ The AAA Commercial Arbitration Rules provide for several alternative means of selecting arbitrators.⁴⁷ A typical manner of selection is for the AAA, when administering an arbitration proceeding, to simultaneously submit to each party an identical list of persons chosen from its panel of arbitrators.⁴⁸ The parties to the dispute then have the opportunity to cross potential arbitrators' names off this list. Along with this list of potential arbitrators, the AAA sends the parties a copy of the biographical card that each arbitrator provides to the AAA.⁴⁹ These cards assist the parties in deciding which arbitrators to strike from the list. The parties then indicate their order of preference among the remaining arbitrators.⁵⁰ Afterwards, the parties return their modified lists to the AAA.⁵¹ As in mandatory arbitration, once a panel is selected, the arbitration proceedings begin.

42. See *Kalish v. Illinois Ed. Ass'n*, 519 N.E.2d 1031 (Ill. App. 1988).

43. AM. ARB. ASS'N, ACCIDENT CLAIMS ARBITRATION RULES 2 (1989).

44. *Id.* at 3.

45. *Id.* at 2.

46. BLACK'S LAW DICTIONARY 75 (5th ed. 1979); "The AAA has produced a Code of Ethics and Procedural Standards for use and guidance of arbitrators." *Id.*

47. *Stipanowich*, *supra* note 5, at 1003 n.273.

48. W. David Pantle, *The Duty of an Attorney as Arbitrator to Disclose Possible Bias*, 18 COLO. LAW. 859, 862 (1989).

49. *Id.*

50. *Id.*; *Stipanowich*, *supra* note 5, at 1003-4 n.273.

51. COMMERCIAL ARBITRATION RULES, Rule 13 (1982).

Private arbitration is also encouraged by both federal and state legislatures.⁵² The Federal Arbitration Act,⁵³ for instance, provides that a written provision or contract regarding a transaction involving commerce shall be "valid, irrevocable, and enforceable" if such contract states that controversies arising out of such contract or transaction are to be settled by arbitration.⁵⁴ This Act requires a federal court, when faced with an action that the parties contractually agreed to arbitrate, to stay litigation pending arbitration or to compel arbitration.⁵⁵

Federal endorsement of arbitration promotes and encourages this process as a speedy and efficient means of resolving disputes.⁵⁶ The United States Supreme Court echoed this sentiment in *Southland Corp. v. Keating*⁵⁷ by holding that arbitration provisions are irrevocable and enforceable as substantive federal law and that such provisions preempt any state law that undermines the enforcement of arbitration agreements.⁵⁸

III. ARBITRATORS' STANDARDS OF CONDUCT AND THE PROCEDURES FOR REJECTING AND VACATING BIAS-INDUCED AWARDS

A. Mandatory Arbitration

1. Arbitrators' Standard of Conduct.

Pursuant to rule or statute, an arbitrator must comply with a specific standard of conduct when presiding over a mandatory arbitration proceeding. According to the earlier-mentioned, typical rule relating to the implementation of mandatory arbitration proceedings, an arbitrator has a duty to comply with the Code of Judicial Conduct: "Rule 87 . . . (c) Disqualification. Upon appointment to a case, an arbitrator shall notify the court and withdraw from the case if any grounds appear to exist for disqualification pursuant to the Code of Judicial Conduct."⁵⁹

The section of the Code of Judicial Conduct to which the above rule refers is Canon 3, section C: "A Judge Should Perform the Duties of His

52. See 2 WARREN FREEDMAN, RICHARDS ON INSURANCE § 14:2. (6th ed. 1990); see also Hartgering, *supra* note 2, at 43.

53. 9 U.S.C. §§ 1-14 (1988).

54. 9 U.S.C. § 2 (1988).

55. 9 U.S.C. § 3 (1988).

56. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1984); FREEDMAN, *supra* note 52.

57. 465 U.S. 1 (1984).

58. *Id.*; FREEDMAN, *supra* note 52.

59. ILL. SUP. CT. R. 87.

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[or Her]⁶⁰ Office Impartially and Diligently, (C) Disqualification.⁶¹ This Canon outlines specific instances where a judge or arbitrator will become disqualified from the proceedings because of bias (referred to in the Canon as the inability to be "impartial").⁶² This Canon requires a judge or arbitrator to disqualify himself or herself from the proceedings if he or she is tainted by bias.⁶³ However, it is the situation where the arbitrator does not disqualify himself or herself that is the focus of this Note.

2. *Procedure for Rejecting and Vacating a Biased Award.*

According to the Illinois rule, there is "no provision for a substitute of arbitrators or change of venue from the panel or any of its members."⁶⁴ The appropriate response to perceived bias or prejudice, when an arbitrator does not disqualify himself or herself, is to reject the award and to proceed to trial.⁶⁵ A typical rule relating to rejection of an arbitration award will provide that within 30 days after the filing of the award and upon payment of a sum of money to the clerk of the court with whom the award is filed, any party who was present at the arbitration hearing may file a written notice of rejection of the award and request to proceed to trial.⁶⁶

B. *Voluntary Arbitration*

1. *Arbitrators' Standard of Conduct.*

In arbitration proceedings administered by the AAA, arbitrators are expected to comply with and adhere to the AAA Commercial Arbitration Rules. These rules require a person appointed as an arbitrator to disclose to the AAA "any circumstances 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 counsel."⁶⁷ "If the AAA feels that the disclosure should disqualify the person from

60. The actual text reads "His."

61. CODE OF JUDICIAL CONDUCT 63(3)(C) (Ill. S. Ct. Practice Rules 1987).

62. *Id.*

63. *Id.*

64. ILL. SUP. CT. R. 87 committee emt. para. (c).

65. *Id.*; ILL. SUP. CT. R. 93.

66. ILL. SUP. CT. R. 93(a). Delaware's and New Jersey's mandatory arbitration programs also provide that the sole remedy of a party unwilling to accept an arbitration award is to reject the award and proceed to trial. ILL. SUP. CT. R. 93 committee emt. para. (a). Pennsylvania, New York, and Ohio provide a similar procedure relating to the rejection of an arbitration award. *Id.*

67. COMMERCIAL ARBITRATION RULES, Rule 19 (1982).

serving as an arbitrator, the arbitrator will not be invited to serve."⁶⁸ If the AAA feels disqualification is not necessary, it will summarize the results of each arbitrator's disclosure and notify each party to the dispute.⁶⁹

After appointment, the arbitrators are again reminded by the AAA that all prior or present business connections with either of the parties must be disclosed so that the parties can either waive objections or request another appointment.⁷⁰ A failure by an arbitrator to make the necessary disclosure may result in vacatur of any award the arbitration panel grants.⁷¹

2. Procedure for Rejecting and Vacating a Biased Award.

The Federal Arbitration Act (as do parallel state enabling statutes) provides a procedure for vacating an arbitration panel's award when the award was rendered in a biased manner.⁷² Section 10 of the Act permits "the United States court in and for the district wherein the award was made [to] make an order vacating the award upon the application of any party to the arbitration . . . (2) Where there was evident partiality or corruption in the arbitrators"⁷³ The complaining party must draft a notice of motion to vacate the award and must serve this notice upon the adverse party within three months after the award is filed or delivered.⁷⁴

However, the standard of review of an arbitration award is considerably narrower than the review of a trial judgment.⁷⁵ When a party moves to enforce an award, and the loser challenges its enforcement, "the court [will] not review the underlying facts of the case [T]he court will merely review the proceeding for minimal due process considerations."⁷⁶ Where an award is successfully vacated, however, the court may, in its discretion order a rehearing by the arbitrators.⁷⁷

68. Pantle, *supra* note 48.

69. *Id.*

70. *Id.*

71. Stipanowich, *supra* note 5, at 1003-4 n.273.

72. 9 U.S.C. § 10 (1988).

73. *Id.*

74. 9 U.S.C. § 12 (1988).

75. Hartgering, *supra* note 2, at 43.

76. *Id.*

77. 9 U.S.C. § 10(a)(5) (1988); for a parallel state provision, see 10 Ill. Rev. Stat. § 112(c) (1975).

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IV. "PERSONAL" AND "CONTEXTUAL" BIAS

If bias exists at all in an arbitration proceeding, the cases and commentaries indicate that this bias invariably takes one of two forms. The bias may be termed either "personal" or "contextual" bias.⁷⁸ Personal bias includes racial and ethnic bias.⁷⁹ The title "personal" bias is useful because this type of bias is personal or individual to the arbitrator. Contextual bias, on the other hand, includes types of biases arbitrators possess because of the particular relationship in which they find themselves with respect to one of the parties to the arbitration.⁸⁰ In this situation, the arbitrator is deemed to be biased due to this external relationship.

A. *Personal Bias*

A number of theories have been advanced which seek to explain racial and ethnic prejudice.⁸¹ The two theories which will be examined in this Note are those first identified by Professor Richard Delgado of the University of Colorado School of Law: (1) psychodynamic theories, and (2) social-psychological theories.⁸²

1. *Psychodynamic Theories.*

Psychodynamic theories of prejudice look to personality traits and tendencies to explain why some people react with bias toward certain groups of persons.⁸³ These theories of prejudice attempt to identify cognitive or emotional processes common to prejudiced persons.⁸⁴

According to these theories, persons who possess an "authoritarian personality" appear to be more susceptible to prejudice than others.⁸⁵ An authoritarian personality is characterized, among other things, by rigidity and conventionality.⁸⁶ Persons with authoritarian personalities are

78. These terms, "personal" and "contextual" bias, I have developed for purposes of this Note.

79. See generally Delgado, *supra* note 7.

80. See generally Pantle, *supra* note 48.

81. Prejudice, when used in this section of the Note, is synonymous with bias.

82. Delgado, *supra* note 7, at 1375.

83. *Id.*

84. See generally GEORGE E. SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 78 (4th ed. 1972).

85. Delgado, *supra* note 7, at 1376; THEODORE W. ADORNO, THE AUTHORITARIAN PERSONALITY (1969).

86. Delgado, *supra* note 7, at 1376.

dogmatic; they want definiteness and authority in their relationships.⁸⁷ Authoritarian personalities reject groups less familiar than their own. Because ethnic minorities may possess characteristics different from the authoritarian personality, members of these ethnic groups become the targets for racial bias.⁸⁸

2. *Social-Psychological Theories.*

Social psychologists believe that individuals learn whom to dislike in the same way people learn group values. Social psychologists believe biases are not innate.⁸⁹ It is suggested that biased attitudes emerge during early childhood.⁹⁰ Children acquire attitudes toward different people by observing the behavior and attitudes of others, especially their parents.⁹¹ Once acquired, these attitudes persist into adulthood.⁹²

Social psychologists also believe people have a natural tendency to categorize. Ethnic groups satisfy this basic psychological need.⁹³ Once categorized, people become loyal to their own group and begin to dislike other groups.⁹⁴ Along with this dislike come barriers to communication and stereotyping.⁹⁵ Racial and ethnic minorities are seen as different and are thus the objects of prejudice by other groups.⁹⁶

B. *Contextual Bias*

Contextual bias is easier to understand from a legal perspective because it does not involve psychological theory. Instead, contextual bias exists as the result of the situation in which an arbitrator has placed him or her or has been placed due to circumstance. Moreover, whereas personal bias operates in all spheres of life (whether one is an arbitrator or not), contextual bias deals specifically with arbitrators. Contextual bias typically exists because an arbitrator has not disclosed his or her bias (e.g., his or her previous relationship) to the disputants⁹⁷ as is required by both the Code of Judicial Conduct and the Commercial Arbitration

87. See generally ADORNO, *supra* note 84.

88. Delgado, *supra* note 7, at 1376.

89. *Id.*; see Thomas F. Pettigrew, *Regional Differences in Anti-Negro Prejudice*, 59 J. ABNORMAL & SOC. PSYCHOL. 28 (1959).

90. Delgado, *supra* note 7, at 1380.

91. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 298 (25th anniv. ed. 1979).

92. Delgado, *supra* note 7, at 1380.

93. ALLPORT, *supra* note 90, at 17.

94. *Id.*

95. See generally ALLPORT, *supra* note 90.

96. *Id.*

97. See Pantle, *supra* note 48, at 862.

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Rules.⁹⁸

There are a number of situations where contextual bias has been found to exist. Of the following factual situations, the first four were identified and categorized by W. David Pantle, a Denver attorney. The remaining four situations were derived from an analysis of the case law on this issue.

1. *Bias Will Exist Where the Arbitrator is the Attorney for One of the Parties in Another Matter.*⁹⁹

Contextual bias clearly exists where an arbitrator, or a member of an arbitrator's firm, represents, or has represented in another matter, a party to the dispute.¹⁰⁰ Even though the arbitrator believes he or she can remain fair and impartial, if this circumstance is disclosed, the previously unrepresented party to the arbitration dispute will most likely suggest this person not serve as an arbitrator. The AAA, if the arbitration is AAA sanctioned, will suggest likewise.¹⁰¹ Even if the arbitrator believes he or she can remain entirely fair and impartial, this belief will usually not overcome the presumption of bias, and the arbitrator will most likely be asked not to serve.¹⁰²

2. *Bias Will Exist Where the Arbitrator Has Been Previously Employed by One of the Parties.*¹⁰³

If an arbitrator has been previously employed by one of the parties to the dispute, and this fact is not disclosed, the arbitration award may be vacated for possible bias.¹⁰⁴ Although the arbitrator no longer works for the party and the grounds for the arbitrator leaving the party's employment are not evident, the arbitrator is nevertheless seen as

98. CODE OF JUDICIAL CONDUCT Canon 63(C) (Ill. Sup. Ct. Practice R. 1987); COMMERCIAL ARBITRATION RULES, Rule 19 (1982).

99. Pantle, *supra* note 48, at 862.

100. Pantle, *supra* note 48, at 862 n.26; Egan & Sons Co. v. Mears Park Dev. Co., 414 N.W.2d 785 (Minn. Ct. App. 1987); James D. Morrissey, Inc. v. Gross Const. Co., 443 A.2d 344 (Pa. Super. Ct. 1982); Bole v. Nationwide Ins. Co., 352 A.2d 472 (Pa. Super. Ct. 1975); San Luis Obispo Bay Prop., Inc. v. Pacific Gas & Elec. Co., 104 Cal. Rptr. 733 (Cal. Ct. App. 1972); E.J. Cecil v. Bank of America Nat. Trust & Sav. Ass'n., 236 P.2d 408 (Cal. Ct. App. 1951).

101. Pantle, *supra* note 48, at 862.

102. *Id.*; Bole v. Nationwide Ins. Co., 352 A.2d 472 (Pa. Super. Ct. 1975).

103. Pantle, *supra* note 48, at 862.

104. See Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968); School Dist. of Spooner v. Northwest United Educators, 401 N.W.2d 578, 582 (Wis. 1987); Northwest Mechanical, Inc. v. Public Util. Comm'n, 283 N.W.2d 522, 524 (Minn. 1979); Egan & Sons Co. v. Mears Park Dev. Co., 414 N.W.2d 785 (Minn. Ct. App. 1987).

potentially tainted with bias. This prior employment is grounds in itself to warrant the arbitrator's being excused.¹⁰⁵

3. *Bias May Exist Where the Arbitrator, or a Member of the Arbitrator's Firm, Has Previously Acted as Co-Counsel With One of the Attorneys.*¹⁰⁶

A problem may arise where an attorney-arbitrator, or a member of the arbitrator's firm, has, in the past, acted as co-counsel in another dispute with one of the attorneys representing one of the parties to the arbitration. If the arbitrator does not reveal this fact to the other party, a court may again vacate the arbitration award.¹⁰⁷

Further grounds for vacating an award may exist where an attorney from the representative attorney's firm has had the assistance of co-counsel from the arbitrator or another member of the arbitrator's firm.¹⁰⁸ It may at times be difficult for the arbitrator to know whether someone else in his or her firm has acted as co-counsel with either a representative attorney or a member of this attorney's firm. This is a very tenuous relationship, however, and bias is unlikely to occur. If the arbitrator does not know of these relationships, it has been argued that there should be no ground for the losing party to vacate the arbitration award.¹⁰⁹

4. *Bias Will Exist Where the Arbitrator Acts as an Advocate for One of the Parties.*¹¹⁰

Where an arbitrator acts as an advocate for one of the parties, the award may, depending on the level and extent of advocacy, be vacated.¹¹¹ Sometimes an arbitrator's keen interest in a matter is misinterpreted as bias toward one side or the other.¹¹² Interest in the dispute alone,

105. See generally Pantle, *supra* note 48.

106. *Id.* at 863.

107. *Id.*

108. *Id.*; Allen v. A. & W. Contractors, Inc., 433 So. 2d 839, 841 (La. Ct. App. 1983).

109. Pantle, *supra* note 48, at 863.

110. *Id.* at 864-65.

111. See generally Noffsinger v. Thompson, 54 P.2d 683 (Colo. 1936); Cassara v. Wofford, 55 So. 2d 102 (Fla. 1951); Gaines Constr. Co. v. Carol City Util., 164 So. 2d 270, 272 (Fla. Dist. Ct. App. 1964); Brennan v. Stewarts' Pharmacies, Ltd., 579 P.2d 673, 682 (Haw. 1978); Scherbenske Excavating, Inc. v. North Dakota State Highway Dept., 365 N.W.2d 485, 490 (N.D. 1985).

112. E. Arthur Tutein, Inc. v. Hudson Valley Coke & Prod. Corp., 245 N.Y.S. 125, 129 (N.Y.A.D. 1930); see also Courville v. B & B Eng. & Supply Co. 230 S.E.2d 380 (N.C. 1976); E. Millins & Co. v. Regal Shirt Corp., 113 N.Y.S.2d 385 (Sup. Ct. 1952).

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however, does not constitute bias.¹¹³ To the contrary, interest by an arbitrator is a positive characteristic.¹¹⁴

This category of contextual bias actually focuses on the arbitration selection process as opposed to an arbitrator's nondisclosure. This type of bias occurs where each side to the dispute appoints an arbitrator and then agrees on a third arbitrator. This method of appointing arbitrators differs markedly from the earlier-mentioned AAA method.¹¹⁵ Usually, contract provisions provide for this method of arbitration as opposed to the described AAA format. Typically, the appointees are biased toward their appointers' respective sides of the dispute.¹¹⁶

Such a system of arbitrator selection is fraught with problems.¹¹⁷ Usually, these attorney-appointed arbitrators are chosen after the representative attorney has had a chance to discuss the dispute with his or her potential arbitrator. The representative attorney will choose a person as an arbitrator only when the attorney has obtained a favorable disposition toward his or her side of the dispute from their potential arbitrator.¹¹⁸ Sometimes, a party or counsel will even appoint his or her own attorney as their arbitrator.¹¹⁹

Once both sides have made their selections, and it is apparent that these arbitrators are biased in favor of their respective selectors, the third, neutral arbitrator is placed in a precarious position. The two biased arbitrators now serve little function. They will typically disagree on all arguable issues.¹²⁰ Moreover, the neutral arbitrator may feel hindered from speaking freely or openly with either of them. The third arbitrator will thus be prevented from thinking the dispute through in a meaningful manner.¹²¹ This method of arbitrator selection obviously leads to difficult problems.

113. *E. Arthur Tutein, Inc. v. Hudson Valley Coke & Prod. Corp.*, 245 N.Y.S. 125 (N.Y.A.D. 1930).

114. *See generally id.*

115. Pantle, *supra* note 48, at 864.

116. *See Wechsler v. Gidwitz*, 250 Ill. App. 136 (1928); *see also Grambling v. Food Machinery & Chem. Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957); *Brennan v. Stewart's Pharmacies, Ltd.*, 579 P.2d 673 (Haw. 1978).

117. Pantle, *supra* note 48, at 864.

118. *Id.*

119. *Tipton v. Systron Donner Corp.*, 160 Cal. Rptr. 303, 305 (Ct. App. 1979); *see also Painters Dist. Council No. 33 v. Moen*, 181 Cal. Rptr. 17 (Ct. App. 1982); *Dinong v. Superior Ct.*, 174 Cal. Rptr. 590 (Ct. App. 1981).

120. *See generally Tipton v. Systron Donner Corp.*, 160 Cal. Rptr. 303, 305 (Ct. App. 1979).

121. Pantle, *supra* note 48, at 864-65.

5. *Bias Will Exist Where the Arbitrator Has a Financial or Personal Interest in the Outcome of the Dispute.*

Where an arbitrator has a financial interest in the outcome of the dispute, the award may be vacated.¹²² An arbitrator has a financial interest in an award when, for instance, the arbitrator is a stockholder in a corporate party¹²³ or when the arbitrator is a partner or silent partner¹²⁴ in a company which is a party to the dispute.

Where it appears that an arbitrator is under the dominion and control of a party to the arbitration, the arbitrator is presumed to be biased in favor of that party.¹²⁵ When an arbitrator is under the control of one of the parties (for instance, the party is an officer of a corporation involved in the arbitration while the arbitrator is a shareholder of this same corporation),¹²⁶ the arbitrator is considered to have a personal interest in the arbitration.¹²⁷ As one would expect, an arbitrator may not render a decision on a matter in which he or she has a personal interest.¹²⁸

6. *Bias Will Exist Where a Party's Attorney Has Represented the Arbitrator or the Arbitrator's Employer in Another Matter.*¹²⁹

There may be problems with bias and disclosure where a party's attorney has represented the arbitrator or the arbitrator's employer in another matter.¹³⁰ A consideration of the closeness of the relationship between the arbitrator and the attorney representing the party to the immediate dispute determines whether bias exists. Clearly, an arbitrator is presumed more biased when the party's attorney is also the arbitrator's

122. *Glazer v. Diamond*, 187 N.Y.S.2d 524 (Sup. Ct. 1959); *Lastmor Products Mfg. Corp. v. Storozum*, 107 N.E.2d 87 (N.Y. 1952).

123. *Gaines Constr. Co. v. Carol City Utils., Inc.*, 164 So. 2d 270 (Fla. Dist. Ct. App. 1964).

124. *Connor v. Simpson*, 7 A. 161 (Pa. 1886); *DePhillips v. Keystone Ins. Co.*, 58 D. & C.2d 183 (1972).

125. See *Tipton v. Systron Donner Corp.*, 160 Cal. Rptr. 303, 305 (Ct. App. 1979); see also *Painters Dist. Council No. 33 v. Moen*, 181 Cal. Rptr. 17 (Ct. App. 1982); *Dinong v. Superior Ct.*, 174 Cal. Rptr. 590 (Ct. App. 1981); *Gaines Constr. Co. v. Carol City Utils. Co.*, 164 So. 2d 270 (Fla. Dist. Ct. App. 1964).

126. *Baltimore & O. R. Co. v. Canton Co.*, 17 A. 394 (Md. Ct. App. 1889).

127. See *In re Miller*, 23 N.Y.S.2d 120 (1940), *reh'g denied*, 24 N.Y.S.2d 982 (1940); see also *In the Matter of the Arbitration between Petroleum Cargo Carriers, Ltd. and Unitas, Inc.*, 220 N.Y.S.2d 724 (1961), *Giddens v. Board of Educ.*, 75 N.E.2d 286 (Ill. 1947).

128. See *In re Miller*, 23 N.Y.S.2d 120 (1940), *reh'g denied*, 24 N.Y.S.2d 982 (1940); see also *In the Matter of the Arbitration between Petroleum Cargo Carriers, Ltd. and Unitas, Inc.*, 220 N.Y.S.2d 724 (1961).

129. *Pantle*, *supra* note 48, at 864.

130. *Texas E. Transmission Corp. v. Barnard*, 177 F. Supp. 123 (E.D. Ky. 1959), *rev'd on other grounds*, 285 F.2d 536 (6th Cir. 1960).

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personal attorney, as opposed to where the party's attorney represents the arbitrator's employer.¹³¹

It has been ruled, however, that the above situations do not give rise to arbitrator bias. For instance, it has been held that these situations involve very tenuous relationships and that "[s]omething more than such a vague and rather remote business relationship is needed if the losing party seeks to vacate an award on the ground of evident partiality."¹³²

7. *Bias May Exist Where the Arbitrator has a Familial Relationship with One of the Parties.*

Bias, interest, or partiality sometimes results when a familial relationship between an arbitrator and a party to the arbitration exists.¹³³ An arbitrator acts in a "quasi-judicial capacity,"¹³⁴ and should possess the judicial qualification of fairness to both sides so that the arbitrator may render a faithful, honest, and disinterested opinion.¹³⁵ A familial relationship that would bar a judge from sitting in a trial of a case would also apply to disqualify an arbitrator.¹³⁶

Not all awards rendered by a panel where a familial relationship exists between an arbitrator and a party, however, may be vacated.¹³⁷ It has been held that certain familial relationships are permissible, and the arbitrator need not fear that the award will be vacated.¹³⁸ For instance, a Texas court held that only arbitrators related to a party "within the third degree"¹³⁹ are subject to having their awards reversed for possible bias or partiality. In *Bell v. Campbell*,¹⁴⁰ the arbitrator's nephew married the sister of a party. This far-removed familial relationship, the court believed, was not sufficient grounds for establishing partiality and bias based on a family relationship.¹⁴¹

131. *See id.*

132. *Id.* at 128.

133. *St. Paul Ins. Co. v. Lulis*, 492 P.2d 575 (Wash. Ct. App. 1971) (arbitrator was in an extremely close professional relationship, arguably akin to a familial relationship, with the attorney for one of the parties).

134. *Texas E. Transmission Corp. v. Barnard*, 177 F. Supp. 123, 128 (e.D. Ky. 1959), *rev'd on other grounds*, 285 F.2d 536 (6th Cir. 1960).

135. *Id.*

136. *Id.*

137. *Glatzer v. Diamond*, 187 N.Y.S.2d 524 (Sup. Ct. 1959); *Bell v. Campbell*, 143 S.W. 953 (Tex. Civ. App. 1911).

138. *Glatzer v. Diamond*, 187 N.Y.S.2d 524 (Sup. Ct. 1959).

139. *Bell v. Campbell*, 143 S.W. 953 (Tex. Civ. App. 1911).

140. *Id.*

141. *Id.*

8. *Bias May Exist Where the Arbitrator Expresses His or Her Opinion Before the Award is Rendered.*

When an arbitrator expresses his or her opinion regarding the outcome of the arbitration proceeding before the final decision is made, this expression may be grounds for vacating the arbitration award.¹⁴² Losing parties sometimes accuse an arbitrator of having been biased by recalling the arbitrator's "off the record" remarks during the arbitration proceedings.¹⁴³ However, if the arbitrator makes an apparently biased "off the record" remark to one of the parties (for instance, that the arbitrator predicts he or she will rule for one side instead of the other),¹⁴⁴ bias is not necessarily proven.¹⁴⁵ An arbitrator's role is to act affirmatively in order to simplify and expedite the arbitration proceedings since one of the virtues of arbitration is its speed and informality.¹⁴⁶ Therefore, if the arbitrator makes a supposedly biased comment, this comment is not presumed to be biased as long as the arbitrator's view is one which arises from the evidence in the conduct of the parties.¹⁴⁷

Simply put, arbitrators must have the ability to speak about their impressions of a dispute. "The human mind [should] not remain suspended in a vacuum while it struggles toward a decision."¹⁴⁸ Remarks made by arbitrators, therefore, are viewed as articulations of impressions instead of impressions of bias or partiality.¹⁴⁹ Arbitrators are entitled to have tentative impressions and to articulate these impressions so long as they are not fixed in prejudice.¹⁵⁰ Consequently, while expressions of opinion may, in certain extreme circumstances, constitute actionable bias, it is the more common case that these expressions, and the award flowing therefrom, go unchallenged.

142. *Ballantine Books, Inc. v. Capital Dist. Co.*, 302 F.2d 17, 21 (2d Cir. 1962); *see also Brennan v. Stewart's Pharmacies, Ltd.*, 579 P.2d 673 (Haw. 1978).

143. *Ballantine Books, Inc. v. Capital Dist. Co.*, 302 F.2d 17, 21 (2d Cir. 1962).

144. *Id.*

145. *Id.*

146. *A. M. Perlman, Inc. v. Raycrest Mills, Inc.*, 117 N.Y.S.2d 572 (N.Y. App. Div. 1952).

147. *Ballantine Books, Inc. v. Capital Dist. Co.*, 302 F.2d 17, 21 (2d Cir. 1962).

148. *A. M. Perlman, Inc. v. Raycrest Mills, Inc.*, 117 N.Y.S.2d 572, 576 (N.Y. App. Div. 1952).

149. *Id.*

150. *Id.*

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V. DEALING WITH ARBITRATOR BIAS

Personal and contractual bias are, of course, quite divergent. Personal bias is rooted in psychological theory and the personal beliefs of the arbitrator, while contextual bias exists only when certain facts are present in a particular arbitration proceeding. Because of its psychological, rather than factual, character, personal bias is more difficult to identify than contextual bias and is accordingly more difficult, if not impossible, to remedy.

A. *Personal Bias*

1. *The Apparent Inability to Exclude Personal Bias From Arbitration Proceedings.*

Personal biases emerge in arbitration settings more readily than in formal adjudicatory settings.¹⁵¹ This is because our formal judicial system has incorporated the societal norm of fairness into its proceedings while our arbitration system has not.¹⁵² This norm of fairness is exemplified by the presence of the American flag, the black-robed judges, and the rules of procedure. This norm of fairness curtails the presence of bias in the courtroom.¹⁵³ Arbitration proceedings, on the other hand, possess few of these safeguards and are consequently a better breeding ground for bias. Because of its informal setting, arbitration more easily allows participants, notably arbitrators, to inject their emotional and behavioral biases into the proceedings.¹⁵⁴

2. *The Attempted Eradication of Personal Bias.*

As shown, personal bias is more likely to appear in informal arbitration proceedings than in formal adjudication. To eradicate this problem one must again refer to psychological theory. Some psychologists advocate increased social contact among minority and ethnic groups as a means of ridding an individual of his or her bias against these groups.¹⁵⁵ Sometimes this strategy fails, however, and intensified prejudice results.¹⁵⁶

If increased contact is to reduce prejudice, however, it is important

151. Delgado, *supra* note 7, at 1391.

152. ALLPORT, *supra* note 90, at 462.

153. *Id.*

154. Delgado, *supra* note 7, at 1391.

155. *Id.* at 1385.

156. *Id.* at 1386.

that three conditions are met. First, the majority and minority groups must be equal in status. Second, each of the groups must perceive this increased contact as rewarding instead of as antagonistic. Finally, this contact must be intimate and personal.¹⁵⁷ Whether these methods of reducing bias will work, of course, depends on the individual, or individuals, in question.

3. *The Proper Reaction to Perceived Personal Bias in an Arbitration Proceeding.*

Unfortunately, the above-mentioned steps toward dispelling personal bias are generally inapplicable to an arbitration proceeding. The purpose of an arbitration proceeding is to solve the immediate dispute between the parties, not to study and remedy any personal biases inherent to the arbitrators. Consequently, another method of addressing bias is necessary in an arbitration context.

Generally speaking, a person acting upon their bias or prejudice will not realize they are acting upon this belief. If they do in fact realize the impetus of their actions, it is unlikely they will confess to such bias or prejudice. Moreover, if a party to an arbitration proceeding suspects an arbitrator is acting in a biased or partial manner, it is very difficult, if not impossible, for the party to indicate this fact to the arbitrator so that the arbitrator may excuse himself or herself. Typically, there is never concrete nor specific evidence of personal bias other than the beliefs of the party against whom this alleged prejudice is directed. Despite the reliability and probable accuracy of this party's beliefs, however, these beliefs constitute nothing more than intangible items of proof.¹⁵⁸

Furthermore, if the existence of bias is indicated and the arbitrator is willing to listen to the party's accusation, it is unlikely that the arbitrator will alter his or her well-practiced beliefs and reshape his or her conduct for purposes of the instant arbitration. More likely, the accused arbitrator will react against his or her accuser. Consequently, accusations of personal bias may have additional adverse effects toward the party against whom the prejudice was originally directed.

The safer route, and more effective approach to addressing arbitrator bias, is for the affected party, after evidence of personal bias has been intuitively established, to compile as much specific proof of bias as possible prior to the close of the arbitration proceedings. This way, if

157. *Id.*

158. *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487 (S.D.N.Y. 1987); *Ronwin v. Piper, Jaffray & Hopwood, Inc.*, 447 N.E.2d 954 (Ill. Ct. App. 1983); *Foley Co. v. Grindsted Prod., Inc.*, 662 P.2d 1254 (Kan. 1983); *Kauffman v. Haas*, 318 N.W.2d 572 (Mich. Ct. App. 1982).

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the party against whom the prejudice is directed loses the arbitration based on what he or she believes to be a bias-induced decision, this party has a record upon which a reviewing court can vacate the biased arbitration panel's award.

Another remedy may simply be for the concerned disputant to choose traditional litigation instead of arbitration. This way, the minority disputant need not fear subjecting himself or herself to the behavior of a biased or prejudiced arbitrator.¹⁵⁹

B. Contextual Bias

Contextual bias is much easier to eradicate than personal bias. Contextual bias is easily addressed, and it need never taint an arbitration proceeding.¹⁶⁰ The remedy for contextual bias is typically simple disclosure.¹⁶¹ Before accepting appointment as an arbitrator, an appointee should carefully consider all the past relationships he or she has had with either of the parties or their attorney, if any.¹⁶² Moreover, the careful and responsible arbitrator should inquire into whether any members of his or her firm, employer, or clients have had dealings with either of the parties or attorneys to the immediate dispute.¹⁶³ If any questionable relationships exist, the arbitrator should disclose these facts to the parties.¹⁶⁴ Only in this way can the arbitrator ensure that the award will not be vacated due to contextual bias. Where the arbitrator does not disclose potential bias, the award may well be subject to reversal and the advantages of this type of informal, streamlined adjudication will have been thwarted.

VI. CONCLUSION

Arbitration contributes significantly to reducing court congestion, costs, and delays, and it diminishes the financial and emotional costs of litigation for the parties.¹⁶⁵ Arbitration's ability to fulfill this potential, however, is critically dependent on its arbitrators remaining fair and unbiased. Bias is far less likely to exist in a courtroom setting, but the

159. Delgado, *supra* note 7, at 1361.

160. *Id.*

161. Stipanowich, *supra* note 5, at 1023. With respect to contextual bias which exists due to an arbitrator acting as an advocate for one of the parties, the remedy is to choose the AAA procedure for selecting an arbitration panel.

162. Pantle, *supra* note 48, at 865.

163. *Id.*

164. *Id.*

165. *See generally* Hensler, *supra* note 1, at 275.

increased cost of formal adjudication forces many disputants toward arbitration. If two parties are going to choose arbitration, they need to pay attention to the very real problem of bias.

Arbitration must remain neutral to survive.¹⁶⁶ If the parties fail to get a fair and unbiased decision, it will not only be the parties who lose - the system will lose as well.¹⁶⁷ If arbitration is to serve its purpose, arbitration awards must not be reviewed by a court. If they are reviewed, the litigants will end up spending more time and energy litigating their cause than if it had gone to formal adjudication from the beginning. Surely, this is not the intent of the system.

In order to prevent this misapplication, arbitrators must be careful to be fair. If an arbitrator is personally biased with respect to certain racial or ethnic groups, this arbitrator must disqualify himself or herself from the proceedings. If an arbitrator has had prior relations with one of the parties, the arbitrator must disclose this fact. The system will not be used by litigants in future cases if it fails to deliver this essential product - justice.¹⁶⁸ Only by eliminating bias will arbitration serve as an effective and lasting method of alternative dispute resolution.

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166. Hartgering, *supra* note 2, at 44.

167. *Id.*

168. *Id.*