

Arbitrator and Mediator Disclosure Obligations in Colorado

by O. Russel Murray

This column is sponsored by the CBA Alternative Dispute Resolution Committee. The articles printed here describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

This article addresses the increasing obligations of arbitrators and mediators in Colorado to investigate and disclose business relationships and other information that may be perceived as affecting their impartiality. It also discusses the effects of failing to make such disclosures.

Arbitrators and mediators in Colorado have long been required to be unbiased and impartial—in short, “neutral.”¹ Nonetheless, Colorado is following a national trend toward requiring more than neutrality. Recent legislation for arbitrators, as well as voluntary standards of conduct and proposed legislation for mediators, is prompting arbitrators and mediators to take affirmative steps to disclose all information that a reasonable person may conclude could affect their impartiality.

The failure of arbitrators and mediators to make these disclosures may jeopardize the enforceability of the arbitration award or mediated agreement. This may apply even where the arbitrator or mediator otherwise was neutral or was unaware of the undisclosed, yet compromising facts.

This article reviews disclosure provisions that impact arbitrators and mediators practicing in Colorado, including statutory requirements, case law, and voluntary standards. The article also discusses the growing obligation of arbitrators and mediators to make reasonable investigation into matters that should be disclosed and the potential effects of their failure to make such disclosures.

the respective requirements; a longer discussion follows. (See also the summary of disclosure requirements in the accompanying sidebar.)

Arbitrator Disclosures

Beginning in 1994, a handful of Colorado cases imposed an obligation on arbitrators to disclose “any potential conflict which could constitute evident partiality,”² including “a substantial business relationship” with a party.³ Nevertheless, to date, no reported Colorado case has set aside an award on the ground of failure to disclose, absent a further showing of “evident partiality” or bias affecting the award.⁴ In other words, although an obligation to disclose certain facts was set down by the courts, a failure to disclose alone has been of little consequence.

In 2004, the Colorado legislature adopted a revised and updated Colorado Uniform Arbitration Act (“CUAA”).⁵ CUAA requires that, before accepting an appointment, an arbitrator must disclose to all parties “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding.”⁶

An arbitrator who fails to make required disclosures under CUAA “shall be presumed to act with evident partiality.”⁷ Thus, the statute shifts the burden of proof on the issue of “evident partiality” to the party seeking to enforce the award. Some cases in other jurisdictions have gone further, holding that the fail-

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Disclosure Issues: Overview

The obligations to make disclosures differ for arbitrators and mediators in Colorado. Below is a short overview of

ure to make a required disclosure is conclusive—requiring *vacatur* of the arbitration award.⁸

Moreover, an arbitrator cannot circumvent the disclosure obligations by claiming not to have known of, or not to have remembered, a past affiliation or interest requiring disclosure. This is because, before making disclosures, the arbitrator also has a statutory duty to make “a reasonable inquiry.”⁹ Thus, an arbitrator may be expected not only to investigate, but also to keep detailed records of past arbitrations, mediations, and other business dealings such that reasonable inquiry might readily and accurately be made.¹⁰

Mediator Disclosures

For mediators, the issue of disclosure is less clear than for arbitrators. Colorado does not have mandatory disclosure requirements for mediators, either statutory or case law-based. Further, even nationally, there are few cases to be found that challenge mediated agreements on the

ground of failure of an arbitrator to disclose pertinent information to the parties.

Nonetheless, the voluntary Colorado Model Standards of Conduct for Mediators (“Colorado Model Standards”) state that a “mediator shall advise all parties of any prior or existing relationships or other circumstances giving the appearance of or creating a possible bias, prejudice, or partiality.”¹¹ In addition, the American Bar Association’s Model Standards of Conduct for Mediators (“ABA Model Standards”) state, “A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator.”¹²

Although both model standards for mediators are voluntary, many mediators in Colorado may have agreed to follow such standards by becoming members of organizations that have adopted or endorsed them. Where an agreement between parties to mediate provides that mediation will be conducted by a particular organization, the parties may have reason to expect that standards adopted by that organization will be followed.

In setting aside awards in arbitration proceedings, courts have considered even the voluntary standards established by alternative dispute resolution organizations.¹³ Voluntary standards also may be considered where a mediated agreement is being challenged for a mediator’s failure to follow procedures.

In 2001, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all states the Uniform Mediation Act (“UMA”).¹⁴ The Colorado legislature considered, but did not enact, the UMA in 2004. The UMA would impose disclosure obligations on mediators nearly identical to those now imposed in Colorado on arbitrators by CUAA.¹⁵ Further, under the UMA, a mediator who violates the disclosure requirements would be denied the protection of the UMA’s privilege provisions.¹⁶ An agreement reached through mediation under the UMA also could be expected to have an increased risk of being set aside where pertinent disclosures were not made.

Voluntary Standards: Arbitrator and Mediator Disclosures

Many professional organizations provide disclosure standards for their members. Following is a sampling of guidelines that Colorado practitioners may follow.

Disclosure Guidelines	Organization that Developed or Endorsed	Applicability
Code of Ethics for Arbitrators in Commercial Disputes (“AAA/ABA Code of Ethics”)	American Arbitration Association (“AAA”) and American Bar Association (“ABA”)	Arbitrators
International Dispute Resolution Procedures: International Arbitration Rules	International Centre for Dispute Resolution (International Division of the AAA)	Arbitrators
Commercial Arbitration Rules and Mediation Procedures	AAA	Arbitrators and Mediators
International Dispute Resolution Procedures: International Mediation Rules	International Centre for Dispute Resolution (International Division of the AAA)	Mediators
Mediator Ethics Guidelines	Judicial Arbitration and Mediation Services, Inc.	Mediators
American Bar Association’s Model Standards of Conduct for Mediators	Dispute Resolution Section of the ABA, Society of Professionals in Dispute Resolution, and AAA	Mediators
Colorado Model Standards of Conduct for Mediators	Colorado Bar Association, Colorado Judicial Institute, Colorado Department of Law, Colorado Council of Mediators, Office of Dispute Resolution of the Colorado Judicial Department	Mediators
Mediator’s Revised Code of Professional Conduct	Colorado Council of Mediators	Mediators

Disclosure Standards for Arbitrators

The question of what disclosure standards apply to arbitrators in Colorado does not have a simple—or a single—answer. The answer may depend on whether: (1) enforcement of the award is being sought or challenged in state versus federal court; (2) the reviewing court is applying the Federal Arbitration Act (“FAA”),¹⁷ CUA, or both; and (3) the arbitrator also may be subject to a separate set of disclosure obligations imposed by an arbitration organization of which he or she is a member or to which the arbitrator otherwise may be subject.

The fact that an arbitration proceeding is being conducted in Colorado does not automatically mean that CUA and its presumption of evident partiality will be applied.¹⁸ For example, the arbitration agreement under which the arbitration is being conducted could direct arbitration pursuant to the FAA and the parties may be in federal court, either because the underlying claims are based on federal questions or because of diversity jurisdiction.¹⁹

In such a situation, whether the federal court will apply Colorado’s state law presumption of evident partiality where an arbitrator has not disclosed all required information is an open question. A federal court may take any of several approaches in analyzing the issue. First, the federal court may consider that the CUA presumption of evident partiality provision is procedural or remedial, rather than substantive, and choose to apply federal law under FAA § 10 instead and ignore CUA provisions entirely.

Alternatively, the federal court may take the view that the FAA has not preempted the field of arbitration,²⁰ because: (1) states have the right to regulate arbitrators and arbitrations within the state;²¹ and (2) Colorado’s presumption of evident partiality does not necessarily conflict with the FAA. Therefore, the federal court may find that CUA’s disclosure requirements and presumption of evident partiality will be applied in determining whether to uphold the arbitration award.²² It also is possible that the federal court may take the view that Colorado’s presumption of partiality statute is in conflict with the FAA and, thus, is preempted.

On the other hand, it could reasonably be expected that a Colorado court would follow CUA in reviewing a challenge to an award based on a failure by the arbitrator to disclose “a known, existing, and

substantial relationship with a party.”²³ The court could apply a presumption of evident partiality, which could readily lead to *vacatur* of the award. This result could be expected where: (1) the parties submitted their claims to arbitration in Colorado; (2) the arbitrated claims were state law claims; (3) the arbitration agreement directed that the arbitration proceed in Colorado pursuant to Colorado law; and (4) the prevailing party ultimately sought to enforce the award in a Colorado state court rather than in federal court.

Such *vacatur* of an award by a Colorado court might occur even if the arbitration agreement and claims fell within the broad ambit of the FAA’s “involving commerce” provision.²⁴ In the rare event that the FAA does not apply because the underlying contract does not involve or affect commerce between the states, CUA clearly applies.

There is no clear direction from either state or federal case law as to what approach the courts may be expected to take in addressing which disclosure standards will be applied. In most reported cases on enforcement of arbitration awards, these questions are not addressed.

Thus, an arbitrator in Colorado, in accepting an appointment, should not be expected to make a decision as to what disclosures to make based on a complex analysis of the federal or state nature of the claims or the likelihood that the award ultimately will be enforced or challenged in state versus federal court. In-

stead, an arbitrator might reasonably expect that: (1) at a minimum, his or her conduct will be evaluated under CUA; and (2) he or she also may be held to any other disclosure standards that could apply. The disclosure standards a Colorado arbitrator should consider when conducting an arbitration in Colorado are addressed below.²⁵

Statutory and Case Law-Based Requirements

The FAA contains no express disclosure requirements, but federal case law has made certain disclosures obligatory, at least in theory. In a 1968 case, *Commonwealth Coatings Corp. v. Continental Casualty Co.*,²⁶ the U.S. Supreme Court determined that regardless of whether a failure to disclose pertinent information is analyzed as “evident partiality” or as the use of “undue means,”²⁷

[w]e can perceive no way in which the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create the impression of possible bias.²⁸

The holding in *Commonwealth* appears to make mandatory the disclosure of any facts that might give the impression of bias. Such a disclosure obligation is as broad as the disqualification standards for federal judges and magistrates.²⁹ However, the *Commonwealth* case was only a plurality decision, not a majority opinion, and many federal courts have not fol-



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lowed it. Several federal courts have followed the concurring opinion of Justice White to the effect that the appearance of bias is not enough to set aside an award. Instead, the challenging party must present “evidence of bias [that is] . . . direct, definite, and capable of demonstration.”³⁰ In other words, a failure to disclose is not enough. The challenging party “has the burden of proving facts which would establish a reasonable impression of partiality.”³¹

Many other federal court decisions have stated that arbitrators must make various disclosures.³² However, most have found that, for the award actually to be set aside, more than a failure to disclose must be shown. The challenging party must prove there was evident partiality in the award. Thus, although the FAA and federal case law say that arbitrators must disclose all circumstances that create the impression of possible bias, far more has been required before an award actually will be set aside.³³

Nonetheless, in *Schmitz v. Zilveti*,³⁴ the Ninth Circuit took the position that, where the arbitrator is subject to a duty to disclose,³⁵ the failure to disclose alone required *vacatur* of the award. In *Schmitz*, there was no indication of bias in the award and the arbitrator had no knowledge of the relationship that should have been disclosed—namely, that his law firm had, unbeknown to him, represented the parent company to one of the parties to the arbitration. The Ninth Circuit held that the failure to comply with the disclosure obligation, including the obligation to “make reasonable effort”³⁶ to learn of matters requiring disclosure, alone was a ground for setting aside an award.³⁷ Constructive knowledge of a conflict, together with a failure to inform the parties, constituted a “reasonable impression of partiality” requiring *vacatur* of the arbitration award.³⁸

CUAA, in contrast to the FAA, expressly requires arbitrators to make disclosure “to all parties . . . and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator. . . .”³⁹ CUAA provides specific examples of what must be disclosed, including “a financial or personal interest in the outcome” or “a current or previous relationship with any of the parties[,] . . . their counsel or representatives, a witness[,] or another arbitrator.”⁴⁰ Further, the arbitrator must make a “reasonable inquiry”⁴¹ into what facts should be disclosed. The duty to disclose is

continuing, meaning that facts learned after the appointment to arbitrate is accepted, such as a relationship with a witness called at the hearing, must be disclosed when learned.⁴²

Although no Colorado cases and few national ones have directly addressed the question of what constitutes “reasonable inquiry” in this context,⁴³ this reasonable inquiry requirement has broad implications. At a minimum, arbitrators and the law firm or other organizations in which they are employed would keep records of all business contacts—including the parties and counsel in all arbitrations, mediations, and other dispute resolution proceedings in which they have been engaged—and would examine these records in deciding what disclosures are needed.

CRS § 13-22-212 requires that an arbitrator must disclose all financial and personal relationships with the parties, lawyers, and other arbitrators. Thus, the courts are likely to expect that arbitrators would keep records containing that information and could inquire of the parties to the arbitration, as well as their partners or business associates, as to their knowledge of such information. Indeed, as in the *Schmitz* case,⁴⁴ constructive knowledge was enough to set aside an award in California and could be expected, at a minimum, to raise a presumption of evident partiality under CUA.

Voluntary Arbitrator Disclosure Standards

In addition to statutory or case law-imposed disclosure obligations, arbitrators may follow certain voluntary standards. For example, the American Arbitration Association (“AAA”) and American Bar Association (“ABA”) jointly approved a Code of Ethics for Arbitrators in Commercial Disputes (“AAA/ABA Code of Ethics”).⁴⁵ The AAA/ABA Code of Ethics states that arbitrators “undertake serious responsibilities to the public, as well as to the parties” and “[t]hose responsibilities include important ethical obligations.”⁴⁶ Further, the AAA/ABA Code of Ethics specifies that it is intended to apply “to all . . . proceedings in which disputes or claims are submitted for decision to one or more arbitrators.”⁴⁷

Canon II of the AAA/ABA Code of Ethics also provides:

An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of impartiality, . . . [including] any known direct or indirect financial or personal interest, . . . any known ex-

isting or past financial, business, professional or personal relationships . . . , [and other matters].

Canon II also requires that arbitrators make reasonable efforts to inform themselves of disclosable matters and imposes a continuing duty to disclose.

A comparison of Canon II to CRS § 13-22-212 reveals obvious similarities. Both: (1) require pre-disclosure inquiry; (2) require disclosure of circumstances that might be interpreted as creating an appearance of partiality; and (3) impose a continuing duty to disclose as the arbitration proceedings progress. Thus, although Canon II is generally voluntary and imposes ethical rather than statutory disclosure obligations, a court could consider it as an additional indication that an award should be set aside if pertinent disclosures under Canon II were not made by the arbitrator, even where the arbitrator is not a member of the AAA.

In addition, disclosures by their member neutrals are required in rules and procedures of various arbitration organizations, including the AAA, Judicial Arbitration and Mediation Services, Inc. (“JAMS”), and International Centre for Dispute Resolution (International Division of the AAA),⁴⁸ and others. For example, the AAA’s Commercial Arbitration Rules and Mediation Procedures require that an arbitrator

shall disclose . . . any circumstance likely to give rise to justifiable doubt as to the arbitrator’s 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.⁴⁹

Although these standards are voluntary in many circumstances, there are certain instances in which arbitrators may be obligated to follow them. For example, arbitration agreements may expressly provide that arbitrations be conducted by the AAA or under its Commercial Arbitration Procedures. In such circumstances, a party might reasonably challenge an award where the arbitrator failed to comply with the disclosure requirements of the AAA or other designated arbitration organization. Thus, an arbitrator may be bound by an arbitration organization’s disclosure rules or standards because: (1) he or she is a member of the organization; or (2) the parties contractually agreed to proceed with the arbitration pursuant to the organization’s rules and procedures. Either way, a court may consider the fail-

ure to comply with the disclosure standards in considering whether to enforce the arbitrator's award.

Disclosure Standards for Mediators

There are no statutory or case law-imposed disclosure requirements for mediators in Colorado at this time. Nevertheless, although the Colorado legislature has not enacted the UMA, it has been adopted in at least three other states,⁵⁰ and should not be considered to have disappeared from the horizon in Colorado. If enacted, the UMA would impose disclosure obligation for mediators that are nearly identical to those for arbitrators, as set forth in CUAAs.⁵¹

In the absence of statutory disclosure obligations, mediators in Colorado are guided by several voluntary standards. For example, the ABA Model Standards are "intended to apply to all types of mediation."⁵² Section III of the ABA Model Standards directs that a "mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator." After disclosure, however, the medi-

ator may continue to mediate the matter if all parties agree.

The ABA Model Standards for disclosure by mediators appear to be less onerous but also less clearly defined than those contained in the UMA. For example, in the ABA Model Standards there is no explicit duty to investigate or make inquiry before making disclosures. However, Section III of the ABA Model Standards states that the mediator's disclosure obligations include an obligation to disclose all actual and potential conflicts that "... could reasonably be seen as raising a question about impartiality." Thus, a duty of inquiry may be implied.

Mediators in Colorado may be guided by the Colorado Model Standards, which are "intended for voluntary statewide use."⁵³ They are endorsed by the Colorado Bar Association, Colorado Judicial Institute, Colorado Department of Law, Colorado Council of Mediators,⁵⁴ and Office of Dispute Resolution of the Colorado Judicial Department.⁵⁵ Disclosure guidelines for mediators in Colorado that are in the Colorado Model Standards include a requirement that the mediator "advise all parties of any prior or existing relation-

ships or other circumstances giving the appearance of or creating a possible bias, prejudice, or partiality."⁵⁶

Other voluntary standards may apply to members of particular groups of mediators as well. JAMS, under its Mediator Ethics Guidelines, provides, "A mediator should disclose any information that reasonably could lead a party to question the mediator's impartiality."⁵⁷ Similarly, the Colorado Council of Mediators, in its own Mediator's Revised Code of Professional Conduct, directs that its mediators "should disclose all actual and potential conflicts of interest reasonably known to the mediator."⁵⁸

Until such time as statutory guidelines are adopted in Colorado, a court may consider any or all of these voluntary standards in an action brought to challenge the enforceability of a mediated agreement. In addition, as with agreements to arbitrate, the agreement of the parties to mediate may indicate that particular rules, including applicable disclosure standards, may apply. Other states have adopted statutes containing disclosure obligations for mediators,⁵⁹ and the matter can be expected to arise again in the Colo-



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rado legislature. Mediators in Colorado should expect and prepare for an eventual requirement of full disclosure.

Consequences of Failures to Disclose

When practitioners fail to disclose facts bearing on the issue of partiality or bias, there may be serious consequences for the parties. The impact depends in part on whether the parties were involved in arbitration or mediation.

Arbitration

When an arbitrator has made full disclosure of all facts bearing on the question of partiality or bias, and the parties proceed with the arbitration without objection, the arbitration award generally will not be subject to challenge on grounds of evident partiality or the like. Disclosure becomes an issue only when it is not properly made and the non-prevailing party who is dissatisfied with the award seeks to challenge its enforcement. At this point, the reviewing court can either uphold the award or set it aside. Except in limited circumstances, courts cannot modify or reform an award, rewrite an award, or uphold part of an award and reject the rest.⁶⁰

If an arbitration award is set aside because of the failure of the arbitrator to make disclosures, the parties essentially must start over. Each will be out costs, expenses, attorney fees, and time. The question may arise as to whether the parties have recourse against the arbitrator for damages in such circumstances.

Under CUA, an arbitrator is expressly immune from liability, even where the arbitrator failed to make required disclosures.⁶¹ Under the doctrine of arbitral immunity, the same result usually will occur in state and federal courts in the absence of the CUA.⁶² Courts have broadly and uniformly held that arbitrators are immune from liability for their actions in arbitration proceedings (a result that has been criticized by some commentators).⁶³ The only effect on the arbitrator is that prudent parties and their counsel will not likely bring repeat business to an arbitrator who fails to make adequate disclosures.

Mediation

Similarly, where a mediator has failed to make disclosures and a party has used the mediator's failure to disclose to set aside the mediated agreement, the parties are left to start the process from the be-

ginning. They may consider an action against the mediator for negligence or other causes of action.

Although no express immunity is provided to mediators under the UMA (and Colorado has not adopted the UMA), the courts have extended immunity to mediators in the limited number of cases where the question has arisen.⁶⁴ In the mediation setting, there is the added issue that the parties consented to the mediated agreement—and often have done so when they had legal representation in the mediation proceedings. Thus, there may be even less ground in the mediation setting than in the arbitration setting for holding the neutral liable to the parties for damages (although there is some criticism for this result, as well).⁶⁵

Conclusion

Arbitrators and mediators in Colorado must address the questions of what disclosure standards may be applied to them and what information should be disclosed in response. The trend is toward more disclosure in the future, not less. Colorado has already adopted the CUA, and adoption of the UMA should not be ruled out. The many potentially applicable standards dictate erring on the side of disclosure. (For minimum disclosure requirements, see the accompanying sidebar.)

In most instances, disclosures should be tailored to individual matters. The arbitrator or mediator should look not only to mandatory disclosure standards, but also to voluntary ones adopted by dispute resolution organizations to which he or she subscribes or is a member, model standards adopted by national organizations, and statewide standards.

Minimum Requirements For Full Disclosure

Full disclosure by arbitrators and mediators in Colorado will require, at a minimum:

- 1) detailed record keeping of the names of parties and counsel in all arbitrations, mediations, and other proceedings in which the arbitrator or mediator (and his or her organization) has been involved;
- 2) inquiries to parties as to any related or affiliated businesses and prior dealings with the arbitrator or mediator and his or her firm or organization; and
- 3) inquiries within the arbitrator's or mediator's firm as to business or other relationships with the prospective parties.

Although the arbitrator or mediator generally will not be exposed to personal liability for failure to make required disclosures, there are serious adverse consequences to all parties if an arbitration award or mediated agreement is set aside. Such impacts likely would adversely affect the practitioner's future business. It is expected that arbitrators and mediators will continue to move toward better and more sophisticated record keeping and disclosure practices.

NOTES

1. *Noffsinger v. Thompson*, 54 P.2d 683 (Colo. 1939), *en banc*. This article does not address issues of non-neutral arbitrators. See, e.g., American Arbitration Association ("AAA") and American Bar Association ("ABA") Code of Ethics for Arbitrators in Commercial Disputes ("AAA/ABA Code of Ethics"), Canon X. The AAA/ABA Code of Ethics is available at <http://www.adr.org/sp.asp?id=21958>.

2. *Giraldi v. Morell*, 892 P.2d 422 (Colo.App. 1994), *cert. denied*; *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo.App. 1996), *cert. denied*; *Nasca v. State Farm Mutual Auto. Ins. Co.*, 12 P.3d 346 (Colo.App. 2000), *cert. denied*.

3. *Nasca*, *supra*, note 2 at 350.

4. *Id.*

5. CRS §§ 13-22-201 *et seq.* Colorado Uniform Arbitration Act ("CUAA") applies only to agreements to arbitrate entered on or after August 1, 2004, which was the CUA effective date.

6. CRS § 13-22-212(1).

7. CRS § 13-22-212(b)(5).

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

9. CRS § 13-22-212(1).

10. See *Cobler v. Stanley, Barber, Southard, Brown & Associates*, 217 Cal.App.3d 518 (Cal. App. 1990).

11. Colorado Model Standards of Conduct for Mediators ("Colorado Model Standards"), Section II, Impartiality, Part A. See Ortner and Shields, "Colorado Now Has Model Standards of Conduct for Mediators," 29 *The Colorado Lawyer* 49 (June 2000).

12. ABA Model Standards of Conduct for Mediators ("ABA Model Standards"), Article 3. The ABA Model Standards were developed through a joint initiative of the AAA, Dispute Resolution Section of the ABA, and Society of Professionals in Dispute Resolution. The ABA Model Standards are available at <http://www.adr.org/sp.asp?id=22118>.

13. E.g., *Schmitz*, *supra*, note 8 (NASD disclosure obligations); *Cobler*, *supra*, note 10 (AAA disclosure obligations).

14. The Uniform Mediation Act ("UMA") is available at <http://www.mediate.com/articles/umafinalstyled.cfm>.

15. CUA, *supra*, note 5 at § 9(a)(1) and (a)(2), would require a person requested to serve as a mediator to "make an inquiry that is

reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation" and to "disclose any such known fact to the mediation parties as soon as is practical. . . ."

16. See the UMA, *supra*, note 14 at § 4.

17. 9 U.S.C. §§ 1 through 16.

18. CRS § 13-22-223(1)(b).

19. The Federal Arbitration Act ("FAA"), standing alone, does not vest a federal court with jurisdiction. There must be some other independent basis for jurisdiction in the federal courts, such as diversity or a federal question. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

20. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989); *Southland Corp.*, *supra*, note 19.

21. States generally have the authority, under their police powers, to regulate professions within their borders. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Semler v. Oregon St. Bd. of Dental Examiners*, 294 U.S. 608 (1935).

22. *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771, 775 (Colo.App. 2000).

23. CRS § 13-22-212(b)(5).

24. 9 U.S.C. § 2. "Involving commerce" has been held by the U.S. Supreme Court to have the same broad scope as "affecting commerce," for purposes of the Commerce Clause. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995). As stated in *Byerly, supra*, note 22 at 775, "The FAA preempts state law only to the extent that such laws purport to invalidate otherwise enforceable agreements to arbitrate. Where the FAA applies and the trial court has found a valid and enforceable agreement to arbitrate, the resulting arbitration thereafter proceeds pursuant to state procedural and substantive law."

25. If the arbitrator is traveling to another jurisdiction to conduct an arbitration hearing, he or she is well advised to look to forum law governing arbitrators and arbitrations. In addition, some jurisdictions may look unfavorably on arbitrators conducting proceedings who are not licensed in the forum state.

26. *Commonwealth*, 393 U.S. 145 (1968), *reh'g denied*.

27. "Evident partiality" is grounds for setting aside an arbitration award under 9 U.S.C. § 10(a)(2). "Undue means" is grounds for setting aside an arbitration award under 9 U.S.C. § 10(a)(1).

28. *Commonwealth, supra*, note 26 at 149.

29. 28 U.S.C. § 455.

30. *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1981), *reh'g denied*.

31. *Cal-Circuit Abco, Inc. v. Solbourne Computer, Inc.*, 848 F.Supp. 1506 (D.Colo. 1994).

32. See, e.g., *Lucent Techs., Inc. v. Tatum Co.*, 269 F.Supp.2d 402 (S.D.N.Y. 2003); *Univ. Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 301 F.Supp.2d 1297 (N.D.Ala. 2004).

33. An arbitration proceeding also may arise under the federal Alternative Dispute Resolution Act of 1998 ("ADR Act"), 28 U.S.C. §§ 651 *et seq.* Like the FAA, the ADR Act does not have express disclosure requirements. However, under the ADR Act, even the appearance of impropriety requires self-disqualification. If, in a federal court case, the parties agree under ADR Act § 654 that the matter may be referred to arbitration and the district court has authorized arbitration by arbitrators certified by the court under ADR Act § 655(b), the arbitrators so certified are subject to disqualification under 28 U.S.C. § 455. This is the same disqualification statute that applies to federal justices, judges, and magistrates. Section 455 calls for disqualification of arbitrators in a variety of enumerated circumstances, including disqualification in any proceeding where the arbitrator's "impartiality might reasonably be questioned," where the arbitrator "has a personal bias or prejudice," or where the arbitrator or his or her spouse or child "has a financial interest. . . ."

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34. *Schmitz, supra*, note 8.

35. In *Schmitz, id.*, the arbitration was conducted pursuant to the National Association of Securities Dealers Code of Arbitration Procedures ("NASD Code"). The NASD Code required that arbitrators "disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination." *Id.* at 1044.

36. *Id.* at 1044.

37. The Eleventh Circuit has declined to follow this position. *Gianelli Money Purchase Plan and Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309 (11th Cir. 1998). The Tenth Circuit has not addressed this issue directly.

38. *Schmitz, supra*, note 8 at 1049.

39. CRS § 13-22-212(1).

40. CRS § 13-22-212(1)(a) and (b).

41. CRS § 13-22-212(1).

42. CRS § 13-22-212(2).

43. *Del Piano v. Merrill Lynch Pierce Fenner & Smith Inc.*, 859 A.2d 742 (N.J.Super.Ct.App. Div. 2004).

44. *Schmitz, supra*, note 8.

45. The AAA/ABA Code of Ethics, *supra*, note 1, originally was prepared in 1977 by a joint committee consisting of a special committee of the AAA and a special committee of the ABA. It was revised and re-approved in 2004. AAA/ABA Code of Ethics, opening paragraph.

46. Preamble to AAA/ABA Code of Ethics, *supra*, note 1.

47. *Id.*

48. *E.g.*, International Dispute Resolution Procedures, International Mediation Rules, M-5, Qualifications of the Mediator ("the prospective mediator shall disclose any circumstance likely to create a presumption of bias. . ."); International Arbitration Rules, Article 7, Impartiality and Independence of Arbitrators ("a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise

to justifiable doubts as to the arbitrator's impartiality or independence. . ."). The International Dispute Resolution Procedures are available online at <http://www.adr.org/sp.asp?id=22090>.

49. AAA's Commercial Arbitration Rules and Mediation Procedures, R-16.

50. As of November 2004, Illinois, Nebraska, and New Jersey had adopted versions of the UMA.

51. Under the UMA, *supra*, note 14, before accepting a mediation, an individual who is requested to serve as a mediator shall: "(1) make an inquiry that is reasonable . . . to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties. . ." See also CRS § 13-22-212.

52. ABA Model Standards, *supra*, note 12, Introductory Note.

53. Colorado Model Standards, *supra*, note 11.

54. In May 1995, the Colorado Council of Mediators also adopted a separate Mediator's Revised Code of Professional Conduct, which is available online at <http://www.coloradomediation.org/codeofconduct.htm>. The Mediator's Revised Code of Professional Conduct is somewhat similar to the ABA Model Standards, *supra*, note 12, and to the Colorado Model Standards. However the Mediator's Revised Code of Professional Conduct has its own disclosure provisions: "III. Conflict of Interest: A mediator should avoid involvement where it may be inferred that the private interests of the mediator could conflict with those of a party. . . A mediator should disclose all actual and potential conflicts of interest reasonably known

to the mediator. . . A mediator should disclose any potential conflicts of interest in recommending the services of individual professionals."

55. Colorado Model Standards, *supra*, note 11, Introductory Comments.

56. *Id.* at Section II, Impartiality, Part A.

57. JAMS, *Mediators Ethics Guidelines: V. A Mediator Should Conduct the Process Impartially*. These guidelines may be found online at <http://www.jamsadr.com/mediation/ethics.asp>.

58. Mediator's Revised Code of Professional Conduct, *supra*, note 54, Part III.

59. See, *e.g.*, note 50, *supra*.

60. Under the FAA and most state statutes, the remedy for arbitrator misconduct is to vacate the award. 9 U.S.C. § 10. Further, a court may modify or correct an award only "where there was an evident material miscalculation of figures or an evident material description of any person, thing or property," where the arbitrators "made an award on a matter not submitted to them," or "where the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11.

61. CRS § 13-22-214.

62. *Butz v. Economou*, 438 U.S. 478 (1978); *New England Cleaning Servs. v. Am. Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999); *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996); *Stanz v. Schwab*, 121 Cal.App.4th 420 (Cal.App. 2004).

63. *E.g.*, Weston, "Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration," 88 *Minn. L.Rev.* 449 (2004).

64. See *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994).

65. *E.g.*, Joseph, "The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity," 12 *Ohio St. J. Disp. Resol.* 629 (1997). ■



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