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## Shifting from an Actual Bias to an Appearance of Bias ADR Disclosure Standard

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Arbitrators and mediators are facing a broadening array of disclosure standards—some mandatory and some voluntary—that can be expected to impact not only the way neutrals disclose possible conflicts but also the way they keep records and interact with attorneys, parties, and other neutrals. The focus has shifted from, as Judge Newcomer<sup>1</sup> termed it, an “actual bias” to an “appearance of bias” standard. For arbitrators, disclosure obligations have existed for many years. While the Federal Arbitration Act (FAA)<sup>2</sup> contains no express disclosure requirements, the Supreme Court, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,<sup>3</sup> stated: “We 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.”<sup>4</sup> Although *Commonwealth* appears to make mandatory the disclosure of any facts that might give the impression of bias—an appearance of bias standard—the decision was a plurality one, not a majority opinion, and many federal courts have not followed it. Several Circuits have followed the concurring opinion of Justice Byron White to the effect that the appearance of bias is not enough to set aside an award. These courts have followed an “actual bias” test, requiring “evidence of bias [that is] . . . direct, definite, and capable of demonstration.”<sup>5</sup> In other words, a failure to disclose is not enough to vacate an award. The challenging party must prove facts that would establish a reasonable impression of partiality. While the federal courts await a

definitive case to resolve the split at the federal level, the states, provider organizations, and other national and international organizations are enacting statutes and adopting practice standards requiring disclosures by both arbitrators and mediators of all information that a reasonable person may conclude could affect their impartiality and by imposing a duty to investigate before making the disclosures. The failure to make these disclosures may, without any showing of actual bias, jeopardize the enforceability of the arbitration award or the mediated agreement.<sup>6</sup> At least 10 states have adopted the Revised Uniform Arbitration Act (RUAA),<sup>7</sup> requiring that an arbitrator, before accepting an appointment, 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.”<sup>8</sup> If an arbitrator fails to make required disclosures, he or she is “presumed to act with evident partiality.”<sup>9</sup> In addition, at least four states have adopted the Revised Uniform Mediation Act (RUMA),<sup>10</sup> which has disclosure obligations for mediators nearly identical to those for arbitrators under the RUAA. Although not expressly provided in the RUMA, an agreement reached through mediation under the RUMA may also have increased the risk of being set aside where pertinent disclosures were not made. Other states have imposed, either through the legislature or the courts, additional disclosure obligations.

In addition to mandatory disclosures, voluntary disclosure standards abound. At its Annual Meeting in August 2005, the American Bar Association (ABA) adopted the revised and updated Model Standards of Conduct for Mediators (the Model Standards).<sup>11</sup> The Model Standards were prepared by the ABA and two provider organizations, the American Arbitration Association (AAA) and the Association for Conflict Resolution (ACR), and require mediators to “make reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest” and to “disclose, as soon as practicable, all actual and potential conflicts.”<sup>12</sup> Further, the Model Standards even impose restrictions on mediator activities after the mediation is concluded: “Subsequent to the mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation.”<sup>13</sup>

The ABA and the AAA have also approved a Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics). The Code of Ethics, which was originally prepared in 1977 by a joint committee consisting of special committees of the AAA and the ABA, was revised and reapproved in 2004.<sup>14</sup> Canon II of the Code of Ethics provides that, “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 existing 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.

In May 2004, the International Bar Association adopted its Guidelines on Conflicts of Interest in International Arbitration<sup>15</sup> (Guidelines). These Guidelines set forth seven general standards regarding impartiality, independence, and disclosure for neutral arbitrators. On disclosure, the Guidelines state: “If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances. . . .”<sup>16</sup>

The Guidelines add that any doubts should be resolved in favor of disclosure, arbitrators are under a duty to investigate any potential conflicts, and failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator did not make reasonable attempts to investigate. In addition, the Guidelines go a step further than do the guidelines or standards of other organizations and provide lists of situations facing arbitrators that are color-coded to indicate the level of conflict and that provide guidance about whether the conflict is waivable or nonwaivable.

Many other national, state, and local organizations have also adopted voluntary standards for disclosure by mediators and arbitrators in one form or another. Most require reasonable investigation and impose a continuing

duty to make disclosures as the arbitration or mediation progresses. The trend is clearly toward an appearance of bias standard for both mediators and arbitrators at all levels.

To comply with the appearance of bias standard, neutrals must make a reasonable investigation into potential conflicts before making disclosures, which means they may be expected to maintain records adequate to make the investigation and disclosure meaningful. This reasonable-inquiry requirement should not be ignored and has broad implications. While few cases have directly addressed the question of what constitutes reasonable inquiry in this context, one could expect that, at a minimum, arbitrators and the law firm or other organizations by 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.

If, as both the RUAA and RUMA require, neutrals must disclose all financial and personal relationships with the parties, lawyers, and other neutrals, then one should anticipate that the courts will expect that arbitrators would keep records containing such information, would inquire of the parties to the arbitration about their knowledge of such information, and would inquire of their partners or business associates about their knowledge of such information.

Although, generally, the arbitrator or mediator will not be exposed to personal liability for failure to make required disclosures, the adverse consequences to all parties of having an arbitration award or mediated agreement set aside can be expected to impact how arbitrators and mediators make disclosures in the future. Thus, arbitrators and mediators can be expected to move toward better and more sophisticated record keeping and disclosure practices and toward more circumspect interactions with parties, counsel, and other neutrals.

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1. Crow Construction Co. v. Jeffrey M. Brown Assoc., Inc., 264 F. Supp. 217, 220 (E.D. Pa. 2003).
  2. 9 U.S.C. §§ 1–16.
  3. 393 U.S. 145 (1968), reh’g denied.
  4. Id. at 149.
  5. Ormsbee Devel. Co. v. Grace, 668 F.2d 1140 (10th Cir. 1981), reh’g denied.

6. The Ninth Circuit, in *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994), held that, where the arbitrator is subject to a duty to disclose, the failure to disclose alone required vacatur of the award even though there was no indication of bias in the award and even though the arbitrator had no knowledge of the relationship that should have been disclosed—specifically, that his law firm had, unbeknownst to him, represented the parent company to one of the parties to the arbitration.

7. The Uniform Law Commissioners website, [www.nccusl.org](http://www.nccusl.org), indicates that 10 states have adopted a version of the Uniform Arbitration Act (RUAA) as revised in 2000 (Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Utah) and that in 2005 the Act was introduced in eight more states plus the District of Columbia (Arizona, Connecticut, Indiana, Maryland, Oklahoma, Vermont, Washington, West Virginia). The RUAA is available at [www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm](http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm).

8. RUAA, supra note 7 at section 12(a).

9. RUAA, supra note 7 at section 12(e).

10. The Uniform Law Commissioners website, [www.nccusl.org](http://www.nccusl.org), indicates that four states have adopted a

version of the Revised Uniform Mediation Act (RUMA) as revised in 2003 (Illinois, Nebraska, New Jersey, Ohio) and that in 2005 the ACT was introduced in five more states plus the District of Columbia (Connecticut, Indiana, Minnesota, Vermont, Washington). The RUMA is available at [www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm](http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm).

11. The Model Standards of Conduct for Mediators (Model Standards) are available at [www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm](http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm).

12. Model Standards, supra, note 11 at Standard III, (ii) and (iii).

13. Model Standards, supra, note 11 at Standard III, (vi).

14. The American Arbitration Association (AAA) and American Bar Association (ABA) Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) is available at [www.adr.org/sp.asp?id=21958](http://www.adr.org/sp.asp?id=21958).

15. The IBA Guidelines on Conflicts of Interest in International Arbitration (Guidelines) is available at [www.ibanet.org/images/downloads/guidelines%20text.pdf](http://www.ibanet.org/images/downloads/guidelines%20text.pdf).

16. Guidelines, supra note 15 at Part I(3) Disclosure by the Arbitrator.