ARBITRATOR DISCLOSURE IN THE INTERNET AGE:

SOME GUIDANCE CONCERNING THE OBLIGATION TO DISCLOSE INTERNET ACTIVITY AND ONLINE RELATIONSHIPS

BY RUTH V. GLICK AND LAURA J. STIPANOWICH

Internet connectivity, social and professional media Web sites, and group e-mail management systems allow arbitrators to communicate online, participate in activities, and develop social and professional relationships online. How do arbitrator disclosure obligations apply to these online activities, communications, and relationships? There is no case law that specifically answers this question. Arbitrators must resort to arbitrator ethics codes, arbitration rules, and case law on arbitrator disclosure, as well as state ethics opinions on online activity of judges, which could be applied to arbitrators. This article examines these sources of guidance on this developing issue.

Ruth V. Glick is a full-time mediator and arbitrator in the San Francisco Bay area. She has broad experience in resolving financial, business contract and tort, labor and employment, technology, real estate, and healthcare disputes. She is on the national commercial, Large, Complex Case, labor, and employment panels of the AAA. For further information see her Web site at www.ruthvglick.com.

Laura J. Stipanowich is a litigation associate with the Atlanta office of Sutherland Asbill & Brennan LLP, where she focuses her practice on construction litigation.

Trust in a fair arbitration process requires the engagement of impartial and independent arbitrators who can determine the issues submitted to arbitration free of bias. Federal and state disclosure standards, as well as rules prescribed by arbitration providers and codes of ethics for arbitrators, place an affirmative duty on arbitrators to disclose any connection or relationship they may have to the dispute and its participants, and any advantage they may gain by resolving it. In certain circumstances, nondisclosure of actual or potential conflicts of interest can have

Reprinted with permission from the *Dispute Resolution Journal*, vol. 67, no. 1 (Feb.–April 2012), a publication of the American Arbitration Association, 1633 Broadway, New York, NY 10019-6708, 212.716.5800, www.adr.org.

serious consequences—the filing of a petition to vacate the award. Determining whether an award should be vacated because of an arbitrator's nondisclosure has resulted in numerous cases arising out of different fact patterns. Courts that have decided these cases apply different analyses and standards. This can make it difficult for arbitrators to determine their disclosure obligations. Now that task is even more challenging because of the ever-evolving connectivity of the Internet and the proliferation of social media,[1] blogs,[2] and e-mail list managers,[3] which allow for discussions via e-mail. Arbitrator disclosure standards and ethical codes have not yet taken into account the myriad of potential conflicts that can arise in the electronic age. Without clear guidance on electronic disclosure obligations, the promise of post-award investigation into an arbitrator's online activity seems inevitable. This article will examine existing disclosure standards, judicial guidelines, applicable case law, and issues and challenges of arbitrator disclosure in an age of expanding online interconnectivity.

Arbitrator disclosure standards and ethical codes have not yet taken into account the myriad of potential conflicts that can arise in the electronic age.

Existing Arbitrator Disclosure Standards

The standards for arbitrator disclosure are found in statutes, arbitration rules, case law, and ethical codes. The Federal Arbitration Act,[4] which applies to arbitration provisions in contracts that affect commerce, does not directly address the issue of arbitrator disclosure. However, Section 10(2) permits a court to vacate an award where there was "evident partiality or corruption in the arbitrators, or either of them." This provision can be used to vacate an award based on the notion that the arbitrator demonstrated "evident partiality" by failing to disclose an actual or potential conflict of interest.

State arbitration statutes are another source of disclosure standards, but there, too, the standards are not clearly defined. The original Uniform Arbitration Act,[5] which many states enacted, has no express disclosure provisions. The extensively Revised Uniform Arbitration Act 2000 (RUAA), so far enacted by 15 states,[6] addressed the omission of disclosure standards in the earlier UAA. It imposes an affirmative duty on arbitrators to disclose at the time of appointment any facts that a reasonable person would consider likely to affect their impartiality. In addition, it imposes a continuing duty on arbitrators to disclose any financial or personal interest in the outcome of the arbitration, and any existing or past relationship with the parties, attorneys, witnesses, or other arbitrators, which, if not disclosed, could result in the award being vacated.[7]

For those arbitrators seeking more information on their responsibilities, the Code of Ethics for Arbitrators in Commercial Disputes provides ethical guidance to arbitrators with regard to a host of issues, including disclosure.[8] Originally prepared in 1977 by the American Arbitration Association (AAA) and the American Bar Association, the Code was revised in 2004. The disclosure provisions in the revised Code are in Canon II, which states, "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." Subparagraphs A(1)-(4) elaborate on this principle. Subparagraph A(1) calls for disclosure of "any known direct or indirect or personal interest in the outcome" and subparagraph A(2) calls for disclosure of "any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties." For example, prospective arbitrators should disclose any such relationships that they personally have with any party, or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts.

The AAA's arbitration rules contain similar disclosure obligations.[9] For example, Rule 16 of the AAA Commercial Arbitration Rules requires arbitrators to disclose at the time of appointment "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias, financial, or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives." The rule also imposes a continuing disclosure obligation on appointed arbitrators.

California has been a leader in arbitrator ethics, as it has expanded the disclosure obligations of arbitrators and arbitration providers with the Ethics Standards for Neutral Arbitrators in Con-

tractual Arbitrations,[10] which are referenced in the California Arbitration Act.[11] In addition to specifying exactly what must be disclosed, the Ethics Standards, as well as the California Arbitration Act, require the disclosure of all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator can be impartial.[12]

The landmark U.S. Supreme Court case on arbitrator disclosure, *Commonwealth Coatings v. Continental Casualty Co.*,[13] is the source of the "impression of possible bias" test for determining whether an arbitrator's nondisclosure has resulted in "evident partiality" under the FAA. A plurality decision of the Court held in this case that the arbitrator should disclose to the parties any dealings that might create "an impression of possible bias." The plurality was created by Justice White's separate and concurring opinion in which he wrote that the arbitrator must have "a substantial interest" in these dealings. However, federal case law after *Commonwealth Coatings* alternates between a more narrow "evident partiality test" and, at other times, a broader "impression of possible bias test." Often the determination has been dependent on facts surrounding the nondisclosure, which is why a case-specific disclosure analysis is the norm.

It makes sense to ask what standards a court would use to determine whether setting aside an award would be warranted based on an arbitrator's nondisclosure of participation in professional and social media sites, discussion blogs, sites that share document information, or use of other means of Internet connectivity. Recently, a group of prominent national and international arbitrators discussed this issue via a group-managed e-mail exchange. The general consensus was that this is an evolving area that requires attention, and that it would be wise to separate association with professional online sites with online sites geared to personal and family connections. Arbitrators should make disclosure of both professional and personal online activity that has any substantial connection to the arbitration or its participants. It was also suggested that potential arbitrators include with their arbitrator disclosures a brief statement about their online activity, if they believe it could give rise to concerns about their impartiality.

Guidance in State Judicial Ethics Opinions

No courts have tackled the issue of how social media affects an arbitrator's disclosure obligations. However, there are state judicial ethics opinions that address the use of social networking sites and other media by judges that could be instructive for arbitrators and courts. For example, an ethics opinion by the Florida Supreme Court Judicial Advisory Committee criticized the practice of judges "friending" lawyers, concluding that doing so violated the Code of Judicial Conduct.[14] An Oklahoma ethics opinion reached the same conclusion.[15] Some of these ethics opinions contain guidance for judges on the issue of social networking activity by judges.[16] These opinions, however, do not all agree on the degree to which a judge may use social media. For example, some states do not recommend that judges "friend" attorneys, while others advise that "friending" is permissible, with limitations. As with arbitrators, it is the degree of a judge's relationships that determines the scope of the disclosure.

The ethics opinion by the Florida Supreme Court's Judicial Advisory Committee received a lot of media attention. The committee decided to re-review the issue of social networking by judges. On reconsideration, it determined that judges could join social networks, post comments and other materials (provided they do not reveal information about pending cases), but it continued to be concerned about "friending" a lawyer on Facebook or a similar Web site. The concern is that people could infer that the "friended" attorney is in a position to influence the judge.[17] Following inquiries from judges about whether putting a disclaimer on the social media Web site might mitigate the perception of impropriety, the committee reiterated its original opinion that even a carefully worded disclaimer is insufficient.[18]

In New York, the State Judicial Advisory Committee on Judicial Ethics concluded that judges are not prohibited from joining a social network, but it cautioned them to use their good judgment to determine what they do on these networks.[19] The opinion recognized that "[t]here are multiple reasons why a judge might wish to be a part of a social network: reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family."[20] The opinion stated that a judge's participation in such sites, including maintaining connections with attorneys, was not necessarily an ethics violation. However, it went on to say that a judge should use his/her good judgment about the propriety of the connections that might, *inter alia*, create the impression of an attorney's "special influence." It further cautioned that judges be aware of the public nature of any comments they might make online, and the possibility that individuals might feel entitled to seek legal advice via

a judge's social network. Noting the evolving world of social media, the opinion concluded with this disclaimer and advice to judges:

> [T]he Committee is also aware that the functions and resources available on, and technology behind, social networks rapidly change. Neither this opinion, nor any future opinion the Committee could offer, can accurately predict how these technologies will change and, accordingly, affect judges' responsibilities under the Rules. Thus, judges who use social networks consistent with the guidance in this opinion should stay abreast of new features of, and changes to, any social networks they use and, to the extent those features present further ethics issues not addressed above, consult the Committee for further guidance.

California follows an approach similar to New York. Judges may be a member of an online social networking community in California, but may not interact with attorneys who have cases pending before them. Judges choosing to use social networks are cautioned to: (1) exercise an appropriate discretion in how they use such a network, (2) be familiar with the site's privacy settings and how to modify them, and (3) continue to monitor the features of the network's services as new developments may have an impact on their duties.

Logic tells us that arbitrators should be held to a similar standard as judges when it comes to the use of social media on the Internet. It seems obvious that arbitrators should not use social media, electronic mailing lists, or blogs to have *ex parte* communications with parties or attorneys in pending cases; nor should they comment on pending cases on these sites. They are obligated to refrain from making remarks that could cast doubt on their ability to act impartially. In addition, arbitrators should separate their personal and familial social networking through sites, such as Facebook, from their professional networking on sites, such as LinkedIn. Arbitrators operating in different states should also be mindful of each state's approach to judicial participation in social media, as these opinions are likely to indicate how each state will interpret an arbitrator's legal disclosure obligations.

It seems obvious that arbitrators should not use social media, electronic mailing lists, or blogs to have ex parte communications with parties or attorneys in pending cases, nor should they comment on pending cases on these sites.

If a party to a pending case (or its counsel) were linked to an arbitrator via a professional networking site (e.g., LinkedIn, or industry e-mail mailing lists, or blogs), and the arbitrator was aware of the connection, disclosure would be required if a person aware of the facts could reasonably conclude that the party (or its counsel) was in a position to influence the arbitrator. Cannon (4) of the Code of Ethics for Arbitrators in Commercial Disputes states that "any doubts as to whether disclosure is to be made should be resolved in favor of disclosure." If a party or counsel had any *ex parte* communication with the arbitrator, or in any way discussed online any aspects of the case or issues surrounding it, disclosure should be promptly made.

Case Law on Disclosure

At this time there are no cases dealing with the use of social media by arbitrators. Issues concerning other social interactions between arbitrator and parties or attorneys, however, have been recorded in some recent cases. A review of these cases indicates that there is no bright line rule as to what types of relationships require disclosure. A case-by-case analysis is still inevitable.

Until there is case law regarding arbitrator nondisclosure of online relationships, connections or discussion, arbitrators will have to rely on cases such as *Karlseng v. Cooke* and *Luce, Forward, Hamilton & Scripps, LLP v. Koch*.[21]

Karlseng involved a social relationship between an arbitrator and counsel that was close enough to make the need for disclosure seem obvious. In this case, a panel of the Texas Court of Appeals vacated an arbitration award where the arbitrator failed to disclose his social relationship with one of the attorneys representing a party to the arbitration. The arbitrator initially disclosed only that "within the preceding five years," he had served as a neutral arbitrator in another arbitration involving the appellee's lawyer. He denied all other questions on the disclosure form. Following these initial disclosures, a new attorney appeared in the arbitration on behalf of the appellee, but the arbitrator did not supplement his initial disclosures. Eventually, the arbitrator

found in favor of the appellee and awarded the appellee $22 million, including over $6 million in attorney fees. Subsequent discovery into the relationship between the arbitrator and the appellee's new counsel revealed a long social relationship. The arbitrator met this attorney during the latter's clerkship with a judge in the same court where the arbitrator had been a magistrate judge. Later, the two had become friends, often taking trips together with their families. Testimony revealed numerous social outings at sporting events and private dinners, as well as gifts exchanged over the years. The court noted that when the arbitrator was given an opportunity to explain what efforts he had made to inform himself or refresh his memory as to the relationship he had with the new attorney, he responded that he had done "absolutely nothing."

Although the appellee contended that "disclosure is required only if the relationship contains a substantial business or pecuniary aspect, and that social relationships standing alone are insufficient," the court rejected this argument, citing holdings in other jurisdictions that found the standard "too narrow." It also concluded that the extent of the relationship between the arbitrator and the lawyer was too substantial to ignore.

An arbitrator's disclosure obligations are not always as clear as those in the Karlseng case. For example, in *Luce, Forward, Hamilton & Scripps, LLP v. Koch*,[22] a retired judge acting as an arbitrator discovered, as an evidentiary hearing was to begin, that he had served on a board with a witness and on two boards with one of the attorneys appearing from the law firm that represented the prevailing party. The arbitrator refused to disqualify himself when asked to do so. A panel of the California Court of Appeal opined that there was no indication that the arbitrator had any close personal, or any business, relations with either the witness or the attorney for the other party. The contact was limited to serving with each other on boards of two professional organizations and, standing alone, that was insufficient to vacate the award.[23]

Cases Involving Post-Award Internet Research

Disclosure cases involving the arbitrator's use of social media may be looming in the future, but we have already seen cases challenging arbitration awards based on post-award Internet research about the arbitrator. For example, a panel of the California Court of Appeal recently overturned an award in favor of the attorney in a fee dispute where the arbitrator had not disclosed the substance of his legal practice.[24] The losing party in the arbitration, the client, found on the Web site of the chief arbitrator's law firm a statement saying that his practice focused on legal malpractice defense. After discovering this, the client moved to vacate the award. The court agreed, saying that the arbitrator had a duty to disclose the nature of his practice, based on his dependence on business from law firms, and the failure to do so questioned his impartiality.

Similarly, a recent decision by a panel of the Texas Court of Appeals overturned an award after an Internet search by the losing party revealed potential conflicts of interest sufficient to establish evident partiality.[25] The arbitrator had switched law firms during pre-arbitration proceedings and failed to make disclosure of the connections between his new firm and the appellants.

Not all courts have vacated awards based on post-award Internet investigations. Some of them have rejected attempts to overturn awards based on information identified after the award has been made because the information could have been discovered prior to the arbitration. These decisions place the onus on parties to conduct their Internet searches about potential arbitrators before they make their appointments.

Rebmann v. Rhode is one such case.[26] After an Internet investigation that "went on for weeks," Rhode found that the arbitrator did not disclose information about his German-Jewish heritage and his affiliation with a club dedicated to avoiding a repeat of the Holocaust. Rhode, whose father served in the German army, and whose father-in-law served in the SS during World War II, claimed he would never have selected this arbitrator had he known of these affiliations due to concern about arbitrator bias. The court ruled that the argument was without merit, noting that the dispute had nothing to do with either World War II or the Holocaust, there was no evidence that the arbitrator knew about the father and father-in-law's connection to the war, and that no evidence presented indicated that the arbitrator displayed partiality.

In a more recent case, *Haworth v. Superior Court*, the California Supreme Court looked at a former judge's nondisclosure of his public censure for making sexually suggestive remarks to female staffers 10 years prior to serving as arbitrator in a woman's medical malpractice claim against a plastic surgeon.[27] The trial court had found some evidence of gender bias in this statement in the award: "one thing probably everyone can agree upon, after five facial surgeries, she could have done without the sixth one…." The California Supreme Court determined, however, that since the parties had the authority to jointly select the neutral arbitrator, they had the opportunity to seek out publicly available information

about the arbitrator prior to his final appointment and, therefore, overturned the trial court. Applying the standard of how an objective, reasonable person would view the former judge's ability to be impartial, the court concluded that the broad "appearance of partiality" rule should not be used because it would subject arbitration awards to after-the-fact attacks by losing parties searching for potentially disqualifying information only after an adverse decision has been made. This result, the court said, would undermine the finality of arbitrations without contributing to the fairness of the proceedings.[28]

California's Supreme Court is not the only court to have tackled this issue, nor is it the only judiciary reluctant to vacate awards based on post-award discovery of publicly available information. In *Lagstein v. Certain Underwriters at Lloyds London*, the 9th Circuit recently declined to overturn an arbitration award based on information discovered during a post-award investigation into the backgrounds of the arbitrators.[29] The court was not persuaded that evident partiality could be demonstrated by an arbitrator's failure to disclose his role in an ethics controversy that took place over a decade prior to the arbitration. The court noted that, if the party moving to have the award vacated had desired additional information following the arbitrators' initial disclosures, "it was free to seek that information by its own efforts." The 9th Circuit declined "to create a rule that encourages losing parties to challenge arbitration awards on the basis of pre-existing, publicly available background information that has nothing to do with the parties to the arbitration."

The lesson from these cases is that parties should seek out all publicly available information about the potential arbitrators they are considering before making their choice. Although this is a burden some parties might resent, it behooves them to do their due diligence, as courts are seemingly unsympathetic to those who do not do so. A dissatisfied party will be more likely to succeed in vacating an award based on evident partiality if it can demonstrate to the court that it conducted an exhaustive investigation into publicly available information, including information on the Internet, about the arbitrator prior to agreeing to his or her appointment.

Disclosures and Non-Lawyer Arbitrators

The conclusions discussed above apply as well to non-lawyer arbitrators who use social media, e-mail list managers, and on-line forums to keep in contact with individuals and entities in their field, some of which could have connections to parties or other participants in a case these arbitrators are hearing.

Non-lawyer arbitrators are usually chosen to serve due to their expertise or experience in a particular field. Their involvement in a specialized area or industry suggests an increased likelihood that potential or actual conflicts of interest could exist because of the arbitrator's potential relationships in the business or area in question. Courts that have analyzed disclosure by lawyers serving as arbitrators have noted that there is a trade-off between impartiality and expertise. As one court stated, "[e]xpertise in an industry is accompanied by exposure, in ways large and small, to those engaged in it…."[30]

Yet, courts also recognize the right of parties to choose people who have expertise in arbitration. A court recently held that an arbitrator's decision to serve as the umpire in a concurrent, unrelated reinsurance arbitration was not evidence of partiality, even if the position was obtained by the action of a party-appointed arbitrator. or involved an arbitration proceeding in which one of the parties was an affiliate of a party to the current arbitration.[31] Courts have also held that membership in a professional organization in and of itself is not a basis to challenge an award based on evident partiality or bias. As one North Carolina court recognized:

> The most sought–after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose. Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results.[32]

However, non-lawyer arbitrators may not have as easy access to case law and other forms of information about disclosure obligations as lawyers do.[33] But this does not lessen their disclosure obligations. They must be just as diligent as attorney arbitrators about disclosing conflicts of interest to the parties. Accordingly, they must take steps to keep up with changing arbitrator disclosure standards, and assess their online relationships and participation in online discussion groups to determine if they might be connected to cases in which they serve and give rise to disclosure obligations.

Conclusion

The Internet is a powerful game changer in regard to arbitrator disclosure. Arbitrators should monitor information that is available about them on the Internet, and control the information they post online, especially on social media sites. They must now think about whether their Internet

activities might require disclosure. Thus, arbitrators should not electronically communicate or blog with those who have been, or are, involved in cases pending before them. Furthermore, they must be mindful that losing parties may actively search the Internet post-arbitration in order to find a possible conflict of interest to create a ground to vacate the award.

As the Internet plays an increasingly important role in our lives, it is likely that cases will come up involving arbitrator Internet activity and the issue of arbitrator disclosure. It will be interesting to see how courts will handle arbitrator disclosure obligations in an era of Internet connectivity, and whether there will be any judicial tolerance for attempts to vacate awards based on post-award Internet searches for information about arbitrators that were available pre-appointment. Perhaps arbitration institutions will provide guidance to arbitrators and parties about the electronic disclosure obligations of arbitrators. But one thing is certain—arbitrators will continue to have the primary duty to disclose to the parties, in accordance with the applicable law, arbitration rules and ethical standards, any connections, interests and relationships they have to any co-arbitrator, party, attorney, or other participant in the arbitration, whether in person or on the Internet, that would affect their ability to be impartial and independent. ■

ENDNOTES

[1] Social media sites such as Facebook, Google+, YouTube, and Twitter, use Web-based and mobile technology to allow the exchange of user-generated content, including blogs, videos, picture sharing, comments, and instant messaging. Depending on the platform and their preferences, users have the opportunity to share data either with the public or selected friends or groups.

[2] Blogging has become enormously popular. A blog is a self-published online journal or diary. The entries or posts usually display the most recent post first. Today there are blogs on every theme, often with commentary on particular subjects.

[3] E-mail list managers are applications that allow a person to send one e-mail to a multitude of e-mail addresses within a group. Recipients often comment on the content in a reply that is sent to the individuals who received the original e-mail. A well-known application is called "Listserv."

[4] 9 USC § 1 *et seq*.

[5] Uniform Arbitration Act (1956), available at www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uaa55.pdf. The UAA was adopted in 49 states.

[6] Alaska, Arizona, Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington.

[7] See RUAA § 12 (a)-(c). The RUAA is available at www.nccusl.org.

[8] Available on the American Arbitration Association Web site at www.adr.org (click on Education & Resources, then on Rules & Procedures).

[9] The AAA rules are available on the AAA Web site at www.adr.org.

[10] The Ethics Rules can be downloaded from www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf.

[11] Cal. Civ. Proc. Code § 1280 *et seq*.

[12] Cal. Civ. Proc. Code § 1281.9.

[13] 393 U.S. 145 (1968).

[14] Fla. S. Ct. Jud. Ethics Advisory Comm. Ops. 2009-20, 2010-04, 2010-05, 2010-06.

[15] Okla. Jud. Ethics Advisory Bd., Jud. Op. 2011-3 (July 6, 2011).

[16] Calif. Judges Ass'n Judicial Ethics Comm. Op. 66 (Nov. 23, 2010); Ky. Jud. Ethics Op. JE-119 (Jan. 10, 2010); N.Y. Jud. Ethics Advisory Op. 08-176 (Jan. 29, 2009). Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7; Okla. Jud. Ethics Advisory Bd., Jud. Op. 2011-3 (July 6, 2011); and S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (October 2009).

[17] The opinion spurred a flurry of inquiries and subsequent opinions. One inquiry concerned "friending" and judicial assistants and candidates for judicial office: could they "friend" lawyers on Facebook? (They may, with limitations). Fla. S. Ct. Ethics Advisory Comm. Ops. 2010-04, 2010-05.

[18] A dissenting minority called for a withdrawal of the original opinion, which they consider overly broad. Fla. S. Ct. Judicial Ethics Advisory Comm. Op. 2010-06.

[19] N.Y. Jud. Ethics Advisory Op. 08-176 (Jan. 29, 2009).

[20] *Id.*

[21] 162 Cal. App. 4th 720 (2008).

[22] *Id.*

[23] In a very recent case, *Scandinavian Reins. Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, Docket No. 10-0910-cv (2d Cir. Feb. 2, 2012), two arbitrators failed to disclose their concurrent service as arbitrators in another arguably similar arbitration. The 2nd Circuit found that the nondisclosure did not in and of itself constitute evident partiality; it stated that the proper analysis is whether the facts that were not disclosed suggest a material conflict of interest. It further stated, "Evident partiality may be found only ... 'where a reasonable person could have to conclude that an arbitrator was partial to one party to the arbitration' ...." (quoting *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) quoting another case).

[24] *Benjamin, Weill & Mazer v. Hurwitz-Kors*, 195 Cal. App. 4th 40 (2011).

[25] *Amoco D.T. Co. v. Occidental Petrol. Corp.*, 343 S.W.3d 837 (Texas Ct. App.-Houston 2011).

[26] 196 Cal. App. 4th 1283 (2011).

[27] 50 Cal 4th 372 (2010).

[28] A proposal has been made to add to the California Ethics Standards a new requirement for an arbitrator to disclose any public discipline by a professional licensing or disciplinary agency.

[29] 607 F 3d 634 (9th Cir. 2010).

[30] *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 701 (2d Cir. 1978)).

[31] *Ario v. Cologne Reinsurance (Barbados) Ltd.*, 2009 WL 3818626 (M.D. Pa. 2009).

[32] *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 647 (6th Cir. 2005) (quoting *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1981).

[33] Some non-lawyer arbitrators may not be on the panel of an established arbitration-administering organization, which has its own stringent disclosure rules, and trains the arbitrators on its panel to comply with its rules. Thus, when contemplating the appointment of one of these non-lawyer arbitrators, the parties should not assume that the potential arbitrator is knowledgeable about the scope of his or her disclosure obligations.