Judicial Review of Arbitration Awards and Mediation Agreements:

Tips for Sustaining Deference

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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.

Courts generally extend deference to arbitration awards and mediated settlement agreements, but there are exceptions. This article discusses what arbitrators and mediators should do to sustain such deference.

Courts value the results produced by arbitration and mediation. Both processes dispose of disputes that might otherwise clog court dockets. Both processes also provide parties with the opportunity to be heard. Finally, both processes are supposed to involve the exercise of party self-determination. As a result, and consistent with the provisions of the Federal Arbitration Act (FAA), courts extend great deference to arbitrators when determining whether to enforce or vacate arbitral awards. Similarly, courts are highly unlikely to set aside or refuse to enforce settlement agreements facilitated by mediators.

Arbitrators and mediators may be tempted to take judicial deference for granted. They should not. Recent cases reveal occasions when courts have concluded that an arbitrator or mediator forfeited the right to deference. Based on these cases, this article suggests some trends and common-sense practice tips that could help arbitrators and mediators avoid unnecessary missteps.

I. Arbitration

A. Adhere to Procedural Rules and Remedies Established by the Parties

It is often said that arbitration is a "creature of contract." Through their contracts, parties determine the arbitrators' substantive and procedural powers. Arbitrators who comply with the resulting substantive and procedural limits demonstrate deference to the parties and reinforce the parties' autonomy. Arbitrators who exceed the scope of the authority granted to them in the contract provide unhappy parties with the opportunity to challenge the enforcement of arbitration awards on two different grounds—exceeding arbitral authority and manifest disregard of the law.

State v. Connecticut State Employees Association[1] provides an example of the recent use of the "exceeding authority" ground. The collective bargaining agreement (CBA) in this case required the arbitrator to determine whether an employee's demotion was based on "just cause." If the arbitrator failed to find just cause, the arbitrator was empowered to award the appropriate remedy. In this instance, the arbitrator found just cause for the employee's demotion but nonetheless proceeded to prescribe a remedy. The Connecticut Appellate Court partially vacated the award, finding that the arbitrator had exceeded the authority explicitly conferred in the CBA. The arbitrator's prescription of a remedy was not welcomed as a useful extra service. Rather, it had the effect of undermining the parties' autonomy.

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In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[2] the U.S. Supreme Court limited judicial review of awards to grounds expressed in Sections 10 and 11 of the FAA. However, the Court refrained from resolving whether manifest disregard of the law, a common law ground for vacating an award, constituted a valid ground for vacatur. Because this issue remains unanswered, lower courts have continued to vacate arbitral awards on the basis of manifest disregard of the law in all of the following circumstances: when an arbitrator has rendered an award that is inconsistent with the plain language of the parties' agreement, or fails to "draw the award from the essence of the agreement," or ignores applicable law despite recognition of such law.[3]

When a contract specifically incorporates the rules governing the conduct of arbitration proceedings, the arbitrator's failure to follow these rules has been found to represent manifest disregard of the "essence of the agreement."[4] In *Kashner Davidson Securities Corp. v. Mscisz*,[5] the 1st Circuit ruled that the award dismissing the claims against Kashner Davidson with prejudice had to be vacated for manifest disregard of the law because the arbitrator ignored "plainly stated procedural rules" that were implicitly incorporated into an agreement pursuant to the "Constitution, By-Laws, Regulations and/or Code of Arbitration Procedures of the 'sponsoring organization,' in this case, the NASD [National Association of Securities Dealers]." The NASD rules then in effect allowed arbitrators to dismiss a claim with prejudice only if: (1) "dismissal [is] a response to the 'willful and intentional material failure to comply with an order of the arbitrator(s)'" and (2) "lesser sanctions have proven ineffective." Though the court found the first condition satisfied, the second condition was not, since a lesser sanction had not previously been imposed upon the parties.

Courts also have vacated awards based on manifest disregard of the law if they find that arbitrators have implicitly eliminated or revised substantive provisions in the parties' agreement. In *PMA Capital Insurance Co. v. Platinum Underwriters Bermuda, Ltd.*, the arbitrator was required to determine "the validity and scope of" a contract provision entitling a party "to seek reimbursement for previously incurred losses that it could 'carry forward.'"[6] Instead of deciding validity and scope, the arbitrator ordered one party to pay the other a specific sum, which effectively eliminated the provision referred to above and rewrote a portion of the contract. The court "found no decision … that authorizes arbitrators, acting *sua sponte*, to eliminate material provisions of the contract" that arbitrators "are charged with interpreting."

These cases suggest that an arbitrator who wishes to have courts extend judicial deference when reviewing her arbitral awards should abide by the procedural rules chosen by the parties and provide

only the relief that the parties authorized. She must remember that an arbitrator is neither a lone ranger nor an independent judge. She derives her authority entirely from the parties' contract and is thus bound by the limitations they have imposed and the procedural rules they have invoked, whether this is done explicitly or implicitly.

B. Respect the Adversarial and Adjudicative Purpose of Arbitration

Courts have vacated arbitral awards for exceeding authority when arbitrators have transgressed the appropriate boundaries of arbitration as an adversarial adjudicative process. In *Burlage v. Superior Court of Ventura County*, the parties agreed to arbitrate a real estate purchase dispute.[7] The purchasers sought damages from the seller for allegedly failing to disclose that the property encroached on an adjoining owner's land. Prior to the commencement of the arbitration proceedings, the title company paid the adjoining property owner $10,950 in exchange for a lot-line adjustment that granted the purchasers "clear title to the encroaching land." In accepting the purchasers' argument that "damages must be measured from the date escrow closed," the arbitrator rejected the seller's assertion that the lot-line adjustment had to be considered in the calculation of damages, and for that reason granted the purchasers' motion *in limine* to exclude evidence of the adjustment. Thus, the arbitrator refused to grant the seller the opportunity to rebut the purchasers' expert witness, who testified to the reduction in property value as a result of the encroachment. The arbitrator also found that the seller knew that the encroachment problem "materially affected the property's value" and failed to disclose it to the purchasers. The seller moved to confirm the award and the purchaser moved to vacate. The reviewing California Court of Appeal found that granting the motion *in limine* constituted the exclusion of "material evidence," which it characterized as "more than a mere erroneous evidentiary ruling." The court rhetorically asked: "What could be more material than evidence that the problem was 'fixed' and there were no damages?" Further, it noted that the applicable arbitration rules provided for the opportunity to be heard on material evidence and expressly forbade the exclusion of material evidence.[8] Consequently, the court found that the arbitrator's exclusion of evidence was unsupported by applicable procedural rules and constituted an excess of authority.

Burlage, like *Kashner*, makes it clear that arbitrators should follow the procedural rules under which they are operating. However, *Burlage* also provides insight regarding the importance of considering the purposes of arbitration. The California appeals court found that the arbitrator's failure to permit the seller to rebut the testimony resulted in the arbitration assuming "the nature of a default hearing.…" This suggests that an understanding of arbitration as an adversarial process, in which all parties have the opportunity to be heard on material evidence, should also guide the arbitrator's procedural determinations.

Trimble v. Graves[9] is another recent case in which a court found itself delineating the differences between arbitration and a different dispute resolution process, specifically mediation. Here, the parties' agreement designated arbitration as the process by which to adjudicate the dispute and provided for a panel of three arbitrators to decide it.[10] Additionally, the agreement stated: "Since this is an arbitration proceeding, the strict formal rules of evidence do not apply, but the arbitrators will have to determine whether the evidence is or is not credible. Either side can argue that the evidence is not credible." It also expressly stated: "The arbitrators are by this agreement permitted to ask questions of any witness if they do not understand the answer or they want clarification for any purpose." This language authorized the arbitrators to examine witnesses only for the purpose of gathering relevant evidence and required them to reach a conclusion on the basis of credible evidence. During the hearing, however, the arbitrators asked the defendant to state the amount of damages that he deemed fair. The parties' contract did not authorize the arbitrators to seek the parties' input regarding the determination of a fair award. Thus, the Illinois Appellate Court found that the arbitrators impermissibly delegated the duty of deciding the matter to the parties by inquiring into their opinions. In vacating the award on the ground that the arbitrators exceeded their authority, the court stressed the difference between the processes of arbitration and mediation and between the differing roles of arbitrator and mediator.

Trimble is similar to *Burlage* in that it exposes the potential risk of having an award vacated for exceeding arbitral authority if arbitrators, on their own initiative, import techniques unique to other dispute resolution processes into arbitration. When the parties' agreement expressly designates arbitration as the exclusive process to be used to decide their dispute, arbitrators must manage the process and conduct the hearing in a manner consistent with arbitration's adversarial, adjudicative purpose. The same principle applies if the parties' agreement explicitly provides for a hybrid ADR process or the parties later agree to use of a hybrid process. The arbitrator will have

to proceed in accordance with the parties' agreement and the procedural rules they have chosen to invoke. If the parties ask the arbitrator to serve as a mediator in a med-arb proceeding, it will be essential to have clarity regarding the sequencing of these phases, the potential that techniques unique to one phase could be imported into the other phase, and the resulting advantages and disadvantages.

C. Disclose Fully Rather than Subjectively

Courts will vacate challenged arbitral awards on the ground of evident partiality if the arbitrator is shown to prefer one party over the other. They may also vacate an award on a much lesser showing than actual partiality. The U.S. Supreme Court has stated that an impression or appearance of bias is sufficient.[11]

The issue of appropriate arbitrator disclosure obviously is crucial to many courts when they are asked to determine whether to vacate an award on the ground of evident partiality, and if so, whether the challenging party waived its objection. Arbitrators have a duty to make advance disclosure (i.e., prior to their appointment) of their potential and actual conflicts of interest, and this obligation continues until the award is issued. Conflicts requiring disclosure include relationships an arbitrator has or had with any participants in the arbitration,[12] or with affiliates of the participants, such as a parent company or a subsidiary. Arbitrators must also disclose relationships and interests that their affiliates have or had with the participants.[13]

Participation in multiple arbitrations that share similar issues and involve related parties and witnesses may place the arbitrator at risk of being subject to influence[14] and, therefore, should be disclosed. The arbitrator's good faith belief that she will not be subject to such influence is insufficient to excuse disclosure.[15] The extent of disclosure is also significant. If the arbitrator discloses a "less significant or temporarily remote relationship,"[16] a court may be more likely to vacate an award for the arbitrator's failure to disclose a more significant relationship. Consequently, if an arbitrator makes any disclosure, she should make all disclosures.

In *Dealer Computer Services, Inc. v. Michael Motor Co., Inc.*, for example, the court vacated an arbitral award on the basis of evident partiality because the arbitrator had failed to make adequate disclosure.[17] The arbitrator disclosed that she had previously participated on a panel of three arbitrators in a proceeding between Dealer Computer Services and another party, and she opined that she did not believe that the service created a conflict. The problem was that she did not disclose that the other party was also an automobile dealership and that the case involved substantially the same contract and the identical clause. The court observed that the arbitrator had previously reviewed the same evidence and arguments and made a decision regarding the provision at issue. It concluded, "It would be unreasonable to expect an arbitrator who has already signed … an opinion ruling for a party as to how a contractual provision should be interpreted to change her mind in a subsequent arbitration and rule against that party on the exact same contractual provision."[18] Further, it was also unreasonable to expect an arbitrator who had "fully adopted the damages theories of an expert witness to then reject the damages theories of that same witness on similar issues in a subsequent arbitration."

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The *Dealer Computer* case teaches the wisdom of making full disclosure of any and all known conflicts of interest.

D. Consider the Depth of the Record

In determining that the arbitrator in *PMA Capital Insurance* manifestly disregarded the law, the court noted that the arbitrator's "failure to offer any supporting explanation or reasoning" contributed to the difficulty of the inquiry.[19] In that case, the court chose to vacate the award. Most cases, though, continue to suggest that a scant record will lead to greater judicial deference to arbitral awards. Specifically, cases concerning

manifest disregard imply that the less information is circulated during the arbitral proceeding and documented in the record, the more likely the arbitrator will avoid having her award vacated.[20]

It is too early to tell, but the decision in *PMA Capital Insurance* suggests the potential for a reversal in the traditional presumption that a scant record is better practice. Arbitrators may want to pay attention to this. Since the U.S. Supreme Court continues to encourage the use of arbitration, some courts may become more assertive and require a more extensive record to assist their determinations when an award is challenged. Some arbitrators may even find comfort in providing a fuller record to the parties, particularly to assure losing parties that their arguments were heard and considered.

II. Mediation

Although mediation has sometimes been viewed as a "less legal" process than arbitration, it is clearly integral to the resolution of many legal disputes. It is also increasingly the subject of satellite litigation. Courts are less likely to defer to a mediated settlement agreement if they find that the mediator failed to comply with the relevant procedural requirements, or conducted the process in a manner inconsistent with the purpose of the mediation process. The following practice tips are based on apparent trends in the case law.

A. Do Not Assume an Oral Agreement Will Be Enforceable

Settlements arising out of court-connected mediations are frequently required by state law or court rule to be in writing and signed by each party and sometimes their attorneys.[21] For example, under Rule 17.06(c) of Missouri's Supreme Court Rules, a settlement reached in a court-ordered mediation must be in writing and signed by the parties. Cases involving disputes over the enforceability of oral settlement agreements reached in court-ordered mediation arise much more frequently than one would expect.[22] For example, in the Missouri case of *Williams v. Kansas City Title*, Williams and his attorney left the court-ordered mediation prior to signing a final written agreement.[23] They indicated that they would return shortly and sign it. When they did not reappear after almost an hour, the mediator, the defendants, and their counsel signed the final agreement. The Missouri Court of Appeals refused to enforce the agreement since it was not signed by all parties as required by court rules.

Florida's procedural rules provide that, in order for a mediation settlement agreement to be binding, "it be reduced to writing and executed both by the parties and their respective counsel, if any."[24] In *Gordon v. Royal Caribbean Cruises Ltd.*, the Florida District Court of Appeals declined to enforce a written settlement agreement formed during mediation because it was missing a party's signature, even though the party's attorney signed it in his presence.[25] In contrast, a different Florida appellate court held in *Jordan v. Adventist Health System/Sunbelt Inc.* that the absence of the signatures of the parties' attorneys on a mediated settlement agreement was a "technical detail" and that enforcement could not be avoided.[26] The court cautioned in a footnote that "the mediation rules are developing sufficient complexity and have experienced such frequent amendments that even those most familiar with them seem to have difficulty following their requirements."[27]

Statutory requirements for mediated settlement agreements may conflict with local court rules governing such settlements. For example, in *Ashley Furniture Industries Inc. v. SanGiacomo N.A., Ltd.*, the 4th Circuit declined to rule specifically on the enforceability of a mediated settlement agreement.[28] In dispute was whether the district court's local rules requiring the agreement to be in writing superseded North Carolina state law, which permitted enforcement of oral settlement agreements. The court remanded the case back to the district court to make this determination.

These cases indicate that mediators should facilitate the development of written mediated settlement agreements, signed by the parties and their attorneys if necessary. This will require time and attention. If it is not feasible to reduce an agreement to writing during the mediation session, the parties should agree on procedures to be followed in the event that problems arise. For example, the parties could agree to return to mediation, or agree that neither party will rely upon or seek to enforce a settlement agreement unless it is written and signed within a set period of time.

B. Include Contextually Required Language

In addition to requiring mediated settlement agreements to be in writing and signed by all parties (and sometimes counsel), statutes or local court rules frequently require particular language to be incorporated into the agreement. For example, the Minnesota Civil Mediation Act requires a mediated settlement agreement to include a provision stating, among other things, that the document is "binding."[29] In *Haghighi v. Russian American Broadcasting*, the parties' mediation agreement stated that they agreed to be bound by Minnesota law.[30] At the conclusion of

the mediation session, the parties signed a handwritten document prepared by their attorneys, and the parties behaved as if they were bound by that document. However, it was held unenforceable because it did not state that it was binding.

California law is similar. A signed mediated settlement agreement is admissible in civil proceedings only if it "provides that it is enforceable or binding or words to that effect."[31] The California Supreme Court in *Fair v. Bakhtiari* examined whether a mediated settlement agreement containing an arbitration clause could be admitted in a proceeding to compel arbitration.[32] The trial court found that because the "term sheet" did not specify that it was binding, it was inadmissible. Therefore, it denied the motion to compel arbitration. However, the California Court of Appeal reversed, holding that the settlement agreement was admissible because the arbitral provision constituted "words to [the] effect" that the terms were binding. The California Supreme Court reversed, holding that the settlement agreement was not admissible because the parties could draft a document containing an arbitration clause without creating a final binding document.

Just as arbitrators must comply with the procedural requirements established by the parties, mediators must abide by the procedural requirements applicable to the contexts within which they are working.

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C. Respect the Deliberative and Consensual Purpose of Mediation

Though relatively rare, a number of judicial opinions describe allegations of egregious circumstances occurring in mediation. In a property owner's suit against an asphalt company, for example, the property owner asserted that he was subject to duress during the mediation session because his blood sugar rose, he was in severe physical pain, his then-attorney prevented him from leaving the session without signing the agreement, and he was prevented from leaving the building when he wanted to end the negotiations.[33] Both the property owner and the other party, however, signed the mediated settlement agreement. The court concluded that the agreement was entered into voluntarily and was enforceable.

In *Olam v. Congress Mortgage Co.*, a 65-year-old woman in poor health sought to have a mediation settlement agreement declared unenforceable on the ground that the opposing party and his counsel exerted undue influence by pressuring her during a 15-hour mediation session.[34] With little time left before the trial was to commence, the mediator worked with the parties until 1:00 a.m. After the mediation concluded, the mediator drove the elderly woman home. There was undisputed evidence that during the ride home, she did not voice any dissatisfaction with the mediation process and did not complain about any physical ailments. The court enforced the settlement agreement, as it did not find undue influence.[35]

Despite the concern raised by these sorts of allegations, courts generally defer to agreements resulting from the efforts of mediators. In certain areas of practice, however, courts seem to be less deferential and even willing to set aside or refuse to enforce mediated settlement agreements. One such area is family law. In *Vitakis-Valchine v. Valchine*, the wife moved to set aside a marital settlement agreement on the grounds of coercion and duress by her husband, his attorney, and the mediator.[36] She testified that the mediator told her she would never be given custody of her frozen embryos, and that he threatened to tell the judge that she caused the mediation to fail. She also said he told her that the court would rule against her. Further, she told the court that the mediator estimated court litigation fees and the impact of refusing to settle on her husband's pension. At the time of the case, Florida law provided that a settlement could not be set aside on the basis of coercion or duress unless the improper influence was imposed by one of the contracting parties and not by a third party. Nonetheless, the court acknowledged that mediator misconduct might invalidate a mediated settlement agreement and remanded for further findings.

The assertion of duress as a defense to the

enforcement of a contract occurs more frequently in family mediations than in any other type of mediation.[37] The vast majority of parties who claim the defense of duress are unsuccessful. However, the court in *Cooper v. Austin* refused to enforce a mediated settlement agreement on this basis.[38] In *Cooper*, the wife sent her husband a note threatening to reveal incriminating photographs. The parties reached an agreement shortly thereafter in which the husband received $10,000 in marital assets while the wife received $128,000. The court likened the wife's behavior to a "fraud on the court" and deemed the settlement agreement unenforceable.[39]

In *Boyd v. Boyd*, the failure to disclose material information during a family mediation also resulted in a court's refusal to enforce the agreement that had been reached.[40] The husband intentionally failed to disclose a $230,000 bonus at mediation. The court held that the settlement agreement was unenforceable even though it complied with the Texas Family Code.[41]

Mediators should always manage the mediation process in a manner that assists the parties in engaging in careful deliberations and informed, voluntary decision-making. A mediator who exercises, or permits one of the parties to engage in, undue pressure during the mediation process certainly is not demonstrating respect for the informed, deliberative, consensual purpose of the process. Courts have become more demanding as they review mediated settlement agreements in the family law context. Such trends may reach judicial review of mediated settlement agreements involving other areas of law.

D. There Are Times When the Mediator Must Help to Ensure the Fairness of the Outcome

At this point, there are relatively few contexts in which a mediator bears responsibility for ensuring the fairness of mediated outcomes. One exception is family mediation in which mediators frequently are expected to help divorcing parents consider the best interests of their children.

Another is the class action settlement. Mediators working in this arena must be aware that courts may look to the mediator and the mediation process in determining whether or not to approve class settlements. The court in *Bert v. AK Steel Corp.* summarized the prevailing talismanic view of mediator involvement in class action settlement agreements,[42] observing that the "participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties."

Not all courts react in this manner, however. Some courts have refused to approve class action settlements achieved with the aid of a mediator on the ground that a subclass would not receive fair treatment, or the rights of third parties would be negatively affected, or the attorney's fees might exceed the benefits the class would receive.[43] One judge has expressed downright skepticism of mediators, observing that they are mere "masters in the art of what is possible" and "[i]t matters little to the mediator whether a deal is collusive as long as a deal is reached."[44] The honeymoon may be ending between courts and mediators who help facilitate class action settlements. Indeed, the time may be coming when courts will expect to see a record that explicitly supports a decision to approve a mediated settlement.

Conclusion

Taken together, recent cases suggest that courts are beginning to be more demanding in their review of arbitration awards and mediated settlements. After all, the parties to arbitration and mediation and the providers of these dispute resolution processes are relying upon public resources for enforcement power. To warrant judicial deference, arbitrators and mediators must demonstrate respect for the limits of their authority, comply with relevant procedural requirements, and conduct proceedings in a manner that is both procedurally fair[45] and consistent with the unique purposes of the arbitration and mediation processes. The cases discussed here suggest that continued judicial deference should not be taken for granted. Such deference must be earned—and, if care is not taken, it can be lost. ■

ENDNOTES

[1] 978 A.2d 131, 136 (Conn. App. Ct. 2009).

[2] 522 U.S. 576, 590-92 (2008).

[3] See *Kashner Davidson Secs. Corp. v. Mscisz*, 531 F.3d 68, 74-77 (1st Circ. 2008) (reversing and remanding to the district court).

[4] See *id.*

[5] *Id.*

[6] 659 F. Supp. 2d 631, 638 (E.D. Pa. 2009).

[7] 178 Cal. App. 4th 524, 530 (2d App. Dist. (citing Knight *et al.*, *Cal. Practice Guide: Alternative Dispute Resolution* ¶ 5:391.1, p. 5–260 (The Rutter Group 2008)).

[8] These rules provided that "the arbitrator may exclude immaterial or unduly repetitive evidence, but must afford all parties 'the opportunity to present material and relevant evidence.'"

[9] 409 Ill. App. 3d 506, 510 (2011).

[10] The parties' arbitration agreement stated: "The purpose of this arbitration is to decide by three competent arbitrators that will be discussed later in this agreement[] the amount of money due, if any, from collectively the [defendants] to [plaintiff]." The agreement provided that the parties were entering into bind-

ing arbitration to resolve issues that had arisen concerning the lease.

[11] *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968); see, e.g., *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1198-1203 (11th Cir. 1982) (district court's vacatur of the award affirmed based on the existence of an appearance of bias where the arbitrator was aware, and nevertheless failed to disclose, that his family-owned insurance company was involved in a dispute with two of the parties, "and that he was under investigation by the Florida Bar concerning a trust account violation involving these" parties); see also, e.g., *Matter of Andros Compania Maritima, S.A.* (Marc. Rich & Co., A.G.), 579 F.2d 691, 701 (2d Cir. 1978) (court affirmed the district court's refusal to find an impression of bias where the arbitrator enjoyed a professional relationship with the president of a firm "that allegedly operated the vessel involved in the arbitration." The arbitrator and the firm's president served on 19 arbitration panels together, with the firm's president selecting the arbitrator for 12 of the panels. The firm's president swore that the relationship with the arbitrator was limited to serving on the same panels and "'occasions associated with … membership in the Society of the Maritime Arbitrators.'" The firm's president also noted that his relationship with the arbitrator at issue was similar to his relationship with the arbitrator appointed by the party asserting evident partiality, "except that he had known [the party's appointed arbitrator] since 1957, while he had known [the arbitrator at issue] only since 1973"); *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 495-97 (4th Cir. 1999) (no impression or appearance of bias found where the arbitrator's law firm represented a company to which the party involved in the arbitration sold electric power. The arbitration arose out of the party's reduction of electrical power output to said company, causing the party to decrease coal purchases in alleged violation of its coal sales contract with the party asserting evident partiality).

[12] See *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837 (Tex. App. 2011) (award vacated where, during pre-arbitration proceedings, the arbitrator failed to disclose becoming "Of Counsel" with a law firm that represented subsidiaries of a party to the arbitration and knew of that representation).

[13] See generally *Al-Harabi v. Citibank, N.A.*, 85 F.3d 680, 682-83 (D.C. Cir. 1996). The court noted that the Supreme Court has not yet "considered whether a duty of investigation underlies the arbitrator's duty to disclose facts that 'might create an impression of possible bias.'" It further acknowledged that the circuits are split as to the existence of a duty to investigate. It also noted that while the 9th Circuit, in *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir.1994), determined the existence of the duty and that the arbitrator's failure to "'investigate may result in a failure to disclose that creates a reasonable impression of partiality,'" the 4th Circuit, in *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993), reached a contrary conclusion, determining that the burden of proof rested on the party asserting evident partiality.

[14] *Id.*

[15] *Scandinavian Reins. Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp. 2d 293, 303 (S.D.N.Y. 2010) (award vacated as a result of arbitrators' involvement in another arbitration, which "overlapped in time, shared similar issues, involved related parties," and had a common witness. The arbitrators' failure to disclose this involvement precluded the parties from objecting to their "service on both arbitration panels").

[16] *Id.* at 307-8.

[17] 761 F. Supp. 2d 459, 467 (S.D. Tex. 2010).

[18] *Id.* at 465.

[19] *PMA Capital Ins. Co.*, *supra* n. 7, 659 F. Supp. 2d at 639.

[20] See, e.g., *E. Seaboard Constr. Co., Inc. v. Gray Constr., Inc.*, 553 F.3d 1 (1st Cir. 2008) (court refused to vacate the award, noting that the arbitrator's excess of authority is a close question due to the limited record. In the absence of exhibits and arguments, the court considered the arbitrator's statement, which evidenced that the arbitrator did not exceed its authority); *Popkave v. John Hancock Distrib.*, 768 F. Supp. 2d 785 (E.D. Pa. 2011) (vacatur of award denied due to parties' failure to educate arbitrators on applicable law. By pleading only facts, parties did not provide legal framework for arbitrators. Arbitrators' questioning of the issues indicated uncertainty, which precludes a finding of manifest disregard. The court noted that, if arbitrators "do not state … reasons for an award, it is nearly impossible for the court to determine whether'" the arbitrator acted in manifest disregard).

[21] See e.g., Fla. R. Civ. P. 1.730(b); Ind. Alternative Disp. Resol. R. 2.7(E)(2); Tex. R. Civ. P. 11; Colo. Rev. Stat. Ann. § 13-22-301, *et seq.* (West 2011).

[22] *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008); *Druker v. Thomas Jefferson Univ.*, 2008 WL 1826192 (E.D. Pa. 2008); *Riner v. Newbraugh*, 563 S.E.2d 802 (W. Va. 2002); *Few v. Hammack Enters. Inc.*, 511 S.E.2d 665 (N.C. Ct. App. 1999).

[23] *Williams v. Kansas City Title*, 314 S.W.3d 868, 869 (Mo. Ct. App. 2010).

[24] Fla. R. Civ. P. 1.730(b).

[25] 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994). See also *Omni Builders Risk, Inc. v. Bennett*, 2011 WL 5924667 (Ga. Ct. App. 2011) (court declined to enforce mediated settlement agreement, finding that attorney who had signed for employer did not have apparent authority to enter into settlement agreement on employer's behalf as indicated by separate lines provided on document for signatures of employer and attorney).

[26] 656 So. 2d 200, 201 (Fla. Dist. Ct. App. 1995).

[27] *Id.* at 201. n. 1.

[28] 187 F.3d. 363, 378 (4th Cir. 1999).

[29] Minn. Stat. Ann. § 572.35 subd.1(1) (West).

[30] 173 F.3d 1086, 1087 (8th Cir. 1999).

[31] Cal. Evid. Code § 1123 (West).

[32] 147 P.3d 653, 655 (Cal. 2006).

[33] *Peacock v. Spivey*, 629 S.E.2d 48 (Ga. Ct. App. 2006).

[34] 68 F. Supp. 2d 1110 (N.D. Cal. 1999). *Olam v. Congress Mortgage Co.* is well known for requiring a mediator to testify *in camera* and then unsealing such testimony.

[35] *Id.* at 1150.

[36] 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001).

[37/41] See James R. Cohen & Peter N. Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation," 11 *Harv. Negot. L. Rev.* 43, 82 (2006).

[38/42] 750 So. 2d 711, 713 (Fla. Dist. Ct. App. 2000).

[39] *Id.* at 713.

[40] 67 S.W.3d 393, 401 (Tex. App. 2002).

[417] See also *Kalof v. Kalof*, 840 So. 2d 365, 366-67 (Fla. Dist. Ct. App. 2003); *Adams v. Adams*, 11 P.3d 220, 221-22 (Okla. Civ. App. 2000).

[42] *Bert v. AK Steel Corp.*, 2008 WL 4693747 (S.D. Ohio 2008).

[43] See *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011).

[44] *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007), subsequent determination, No. C06-06493 WHA, 2007 WL 2221073 (N.D. Cal. Aug.2, 2007).

[45] See Nancy A. Welsh, "What Is '(Im)Partial Enough' in a World of Embedded Neutrals?" 52 *Ariz. L. Rev.* 395 (2010); Nancy A. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?" 79 *Wash. U. L. Q.* 787 (2001).