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ARTICLES

Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations

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I. INTRODUCTION

Disputes resolved by neutral and impartial judges present the conventional paradigm of dispute resolution within the American system of justice.[1] While impartiality as an ideal is disputed in academic literature,[2] a traditional analysis of judging extols neutrality and impartiality as fundamental goals.[3] In this view, just and objective decisions based on the merits of an

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1. American culture and its judicial system "has been described as highly concerned with fair and ethical treatment." Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, WIS. L. REV. 1359, 1383 (1985) (examining the contradiction between the American ideal of justice and fairness and the reality of class and race-based prejudices in dispute resolution). Individuals are directed through the basic tenets of democratic and Judeo-Christian teachings to show fairness and justice. *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN AMERICAN CREED 9-12 (1944) (noting the roots of Christianity in the formation of the American Creed). Much has been written on the necessity of neutrality and impartiality of judges as well as on their disqualification. Judicial ethics, however, will not be discussed herein except as a means of elucidating issues relevant to arbitrator ethics.

2. One commentator, for example, asserts: "A vast body of legal literature addresses the question of what qualifies a person to be a judge. We speak about seeking individuals who will be 'impartial,' 'disengaged,' 'independent,' and who will hear both sides and judge fairly. . . . The current state of the law reflects either irreconcilable disagreements about when impartiality exists or unending difficulties in applying the theoretical demands for impartiality and disengagement." Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations For Our Judges*, 61 S. CAL. L. REV. 1877, 1878 (1988).

3. This Article uses a conventional approach of viewing neutrality and impartiality as aspirational goals with some value in ethical and fair judging. It does not, however, attempt to provide a definitive solution to the "irreconcilable disagreements about when impartiality exists" or the "unending difficulties in applying the theoretical demands for impartiality and disengagement." *Id.* It recognizes that considerable disagreement exists as to how to obtain impartiality and whether neutrality is, in fact, obtainable, but argues that regardless of fine line distinctions, party-appointed arbitrator conduct as currently permitted requires serious reform.

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issue or agreed upon societal values or rules are an idealized goal of litigation.[4] Thus, determinations obtained through a traditional system of dispute resolution which are, or even merely appear to be, biased are denounced as unfair and improper.[5] We expect independent criteria, guidelines, rules, or — in their most formalized state — laws to provide objectivity in dispute resolution. While, as critics have noted, the justice system often falls short of this ideal, unbiased objective decisions remain the conventional articulated objective.

Nowhere is this more apparent than in ethical guidelines which limit behavior of the professional players in society. We circumscribe the behavior of professionals in order to reduce mistakes which are the result of human frailty, bias, and partiality. Doctors, accountants, lawyers, judges, and public officials are all expected to behave in accordance with certain predetermined limits.[6] Each of these groups purports to regulate its activity through sets of internal rules and ethical mores. At the same time, those outside the regulated group maintain a strong interest in the observance of ethical guidelines that are consistent with societal notions of fairness and honesty. Thus, even the ethical strictures and boundaries of self-regulating professions are continually measured against larger societal goals and ideals, including neutrality.

In at least one form of dispute resolution sanctioned by the federal courts, neutrality and impartiality are not only ignored but denounced as hindering its effectiveness. In tripartite panel arbitrations, under the rules of the American Arbitration Association (AAA), party-appointed arbitrators are permitted and even encouraged to be predisposed toward the position of their nominating party.

Tripartite arbitration under AAA rules is a form of contractual arbitration. Disputes are resolved through the presentation of witnesses and evidence in a private, deformalized forum before a panel of arbitrators. Two of the arbitrators are usually "party-appointed arbitrators" selected by the

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4. Impartial judges are constitutionally required. *See* Tumey v. Ohio, 273 U.S. 510, 523 (1972) (stating that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case"); *see also* Seth Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 665 (1985) (noting that most judicial disqualification issues are determined not by constitutional grounds but on statute and common law).

5. *See generally* Peter Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593 (1992) (tracing the American adoption of the "appearance of impropriety" standard).

6. *See* Andrew Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 852 (1989) (ascribing rising interest in judicial ethics in large part to the "ever-increasing focus in our society upon the conduct of our public officials").

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parties to serve their interests during the course of the arbitration.[7] The third arbitrator is neutral.

Although the arbitrator's authority to issue a binding award is derived through the contract, the arbitral award is fully enforceable in the federal courts. Party-nominated arbitrators are, according to AAA's internal rules of procedure and conduct, non-neutral and often act more as advocates of their nominating party's position than as judges. Despite these adjudicatory anomalies, arbitration is marketed by its proponents as an efficacious substitute for litigation.

In fact, arbitration, including tripartite arbitration, is often touted by its champions as a more efficient and economical means of dispute resolution than litigation. Moreover, it is the most frequently used and widely accepted alternative to litigation.[8] Its use by commercial entities is widespread, and, while arbitration may have been originally limited to disputes among business people, it has become a boilerplate contractual provision in many industries today. As a result, arbitration affects not only the experienced businessperson but customers and clients as well.[9]

The federal judiciary is among the most vocal supporters of arbitration. Through judicial dictum, the courts have encouraged the use of arbitration and articulated a "strong federal policy" in its favor. Judicial support for arbitration, however, must be viewed with a critical eye that closely examines the residual effect of permitting a judicially sanctioned award to be made by a quasi-judicial officer who is predisposed to his nominating party's position. This Article posits that, despite the federal policy in favor of arbitration, the courts' response to party-designated arbitrators is symptomatic of the relegation of arbitration to an inferior form of dispute resolution when compared to litigation.[10] In reviewing arbitral awards, on the ground

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7. Bernard Gold & Helmut F. Furth, Note, *The Use of Tripartite Boards in Labor, Commercial and International Arbitration*, 68 HARV. L. REV. 293 (1954) (asserting that the most common tripartite panel consists of two party appointees and a neutral chairman).

8. Richard J. Medalie, *Introduction,* COMMERCIAL ARBITRATION FOR THE 1990's xv (Richard J. Medalie ed., 1991) [hereinafter ARBITRATION FOR THE 1990's]. A number of reasons are provided to explain the broad support enjoyed by arbitration. First, it is said that arbitration is efficient because it saves both time and money. Second, it is argued that arbitration is more accessible than more formal dispute mechanisms. Third, arbitration is said to be better suited to resolve disputes between parties with a long-standing relationship which they wish to continue. *See* Delgado et al., *supra* note 1, at 1366-67 (proposing ways that alternative dispute resolution devices could reduce prejudice); Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67, 71 (noting that proponents assert that arbitration can produce creative resolution of disputes).

9. *See* Thomas Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 427 (1988) (discussing the historical development of arbitration agreements); Sonia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 852-56 (1961) (examining the factors that led to the adoption of arbitration as a dispute resolution forum for commercial enterprises).

10. *See* Stroh Container Co. v. Dephi Indus., 783 F.2d 743, 751 (8th Cir. 1986) (stating that "[a]rbitration is an inferior system of justice" because of lack of due process, and rules of evidence,

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of arbitrator misconduct, judicial opinions often provide subtle support for questionable arbitrator conduct in an effort to maintain national support for and to minimize judicial involvement in arbitration.

The result is that prevailing customs and judicial inaction license an arbitrator to perform a number of services on behalf of his nominating party during the course of the arbitration.[11] These services may include the expounding by the arbitrator of his party's viewpoint and pointing out circumstances justifying his party's position; communicating with his nominating party and fact and expert witnesses; suggesting lines of testimony and arbitration exhibits; conducting independent investigations; providing wholesale assistance in the preparation of the case; and, ultimately, voting for his party and its position during deliberations.[12]

The involvement of non-neutral arbitrators in AAA arbitrations drastically differs from societal notions of what is ethical in decisionmaking and moves away from the idealized goals of impartiality and neutrality in traditional dispute resolution. We are left with the question of how such vastly differing notions of what constitutes fair decisionmaking can be permitted under one system of justice. Clearly, the rubric of alternative dispute resolution alone cannot justify such a departure from the articulated goal of unbiased, objective decisions.

This Article examines the apparent conflict between societal goals of unbiased, impartial decisionmaking and the role of non-neutral, party-appointed arbitrators[13] in tripartite panel arbitrations[14] governed by the

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rules of law); *See also* Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience,* 38 HASTINGS L.J. 239, 255 (1987) (noting that "courts have recognized and continue to recognize that arbitration may be inferior to traditional judicial dispute resolution in the quality of justice it accords to individual disputants as well as in its ability to protect public interests"); *but see* Stipanowich, *supra* note 9, at 427 (observing that courts have overcome their hostility towards arbitration and liberally enforce agreements to arbitrate). In a telling critique of arbitration, enriched by feminist theory and method, Jane Byeff Korn argues that the judicial system views arbitration as different and therefore necessarily inferior and unworthy of respect. She concludes that, from a feminist perspective, the court still mistrusts arbitration and views it as inferior to litigation. Korn, *supra* note 8, at 69, 95. This Article supports this conclusion but from a different perspective.

11. Gold & Furth, *supra* note 7, at 318.

12. *See id.* (concluding that these additional functions are some of the very reasons tripartite boards are used in commercial arbitration).

13. An arbitration tribunal composed of two party-appointed arbitrators and one neutral arbitrator is the most common tripartite panel. *Id.* at 293 (compiling the results of interviews with arbitrators, parties, and lawyers in order to acquaint counsel with the advantages and limitations of tripartite arbitration). In a survey conducted in 1985 and 1986 of attitudes toward arbitration, it was determined that 40% of survey respondents used party-appointed arbitrators. *See* Stipanowich, *supra* note 9, at 456 n.189.

Ironically, arbitration is defined as "the voluntary submission of a dispute to a disinterested person or persons for final and binding determination." AMERICAN ARBITRATION ASS'N., COMMERCIAL ARBITRATION RULES 3 (1992) [hereinafter COMMERCIAL ARBITRATION RULES]. *See also* Gates

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Federal Arbitration Act (FAA) and conducted in accordance with the rules of the AAA.[15] Joining the "Third Wave" of analysis[16] of alternative dispute resolution, this Article first addresses the internal standards of procedure and ethics applied to party-nominated arbitrators by the AAA and, second, examines the externally-imposed constraints on arbitrator conduct under federal statute as interpreted by the federal courts.[17]

This Article directly challenges the absence of ethical standards imposed on non-neutral arbitrators as incompatible with society's interests in impartial decisionmaking. The parameters of acceptable behavior of party-appointed arbitrators and the standards currently applied by the AAA to review potential arbitrator bias are ineffective. Further, the externally-imposed standards of the FAA are vague and easily manipulated by the parties and the courts in order to limit a court's review of the merits of an arbitration award. The Article concludes that not only should stricter ethical rules, akin to those imposed on judges, be adopted but also argues that the FAA should be applied more stringently. The Article focuses on

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v. Arizona Brewing Co., 95 P.2d 49, 50 (Ariz. 1939) (defining arbitration as "a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination").

14. This Article focuses its analysis on arbitrations decided under the Federal Arbitration Act (FAA) using AAA rules. "Most commercial arbitration agreements require the arbitration to be in accordance with the rules of the American Arbitration Association." Korn, *supra* note 8, at 70 n.16.

Numerous kinds of arbitrations exist including commercial, labor, industrial, and international arbitrations each involving their own rules of procedure and ethical considerations. Although party-appointed arbitrators exist in labor arbitrations as well, this Article deals exclusively with commercial arbitration. Commercial arbitration involves disputes arising out of business contracts, under which commerce and trade are carried on. FRANCES KELLOR, ARBITRATION IN ACTION 4 (1941). This Article focuses on commercial arbitration or arbitration relating to the disputes of business people and of business organizations. Although some tripartite arbitration panels are comprised of three neutral arbitrators, the norm, which is the focus of this Article, is the inclusion of two party-appointed arbitrators and one neutral arbitrator. Thus, all references to tripartite arbitration panels herein contemplate the inclusion of party-selected arbitrators.

15. The Uniform Arbitration Act is beyond the scope of this Article.

16. *See* Edward Brunet, *Questioning the Quality of ADR*, 62 TUL. L. REV. 1, 5 (1987) [hereinafter Brunet, *Quality of ADR*] (separating the scholarship on alternative dispute resolution (ADR) into several schools of thought). The First Wave of analysis, according to Brunet, takes a simplistic and overwhelmingly favorable view of ADR. *Id.* at 1-3. The Second Wave is described as balanced and skeptical and seeks to fashion a research agenda for appraising the efficacy of the different methods of dispute resolution. *Id.* at 6. Brunet argues that "[n]either the First nor Second Wave of ADR writing has captured the essence of the degree and nature of competition that now exists between traditional litigation and various modes of ADR." *Id.*

17. In analyzing ADR, Professor Brunet focuses on several qualitative justice values "crucial to understanding the relationship between ADR and conventional litigation": (1) substantive legal principles; (2) outcome accuracy; (3) speedy resolution of disputes; (4) objective and informed representation. *Id.* at 8. The question of ethical arbitrator conduct is directly related and intricately intertwined with values (1), (2), and (4).

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the important question of whether arbitration doctrine can be reconciled with a greater societal ideal of neutrality in judging.[18]

Part I of the Article places in historical perspective the courts' overwhelming acceptance of the partiality of party-appointed arbitrators and their current reluctance to fully recognize arbitration as equal to litigation. The impact of the courts' acquiescence in non-neutral arbitrator conduct is not limited to experienced business persons but rather extends to customers and clients as well. Part II details the accepted parameters of arbitrator conduct and examines the benefits and detriments of tripartite arbitrations. Although it is the most formalized of the alternative methods of dispute resolution, arbitration has few procedural strictures and is marked by informality. Furthermore, the unique factors of informality and privacy within arbitration exacerbate the problems inherent in a form of alternative dispute resolution that permits the inclusion of non-neutral decisionmakers.

Part III reviews the current approaches to arbitrator conduct and the deficiencies of these approaches and concludes that the courts' refusal to intensify their review of arbitrator conduct serves to "ghettoize" arbitration and reduces its quality.

Part IV rejects the internally-constructed ethical boundaries of arbitrator conduct and proposes fundamental reform in the operation of tripartite arbitration and the ethical standards by which we judge non-neutral arbitrators. More stringent ethical rules for party-appointed arbitrators will not only improve the quality of arbitration but will result in greater efficiencies and cost control.[19] Arbitration can be reformed to eliminate the bias of party-appointed arbitrators without compromising the goals of efficiency and cost-effectiveness.

II. HISTORY OF COMMERICAL ARBITRATION

Arbitration existed as an alternative to litigation even before medieval

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18. The issue of ethics in arbitration is an important one since the "nature of the tribunal in which suits are tried is an important part of the parcel of rights behind a cause of action." Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 203 (1956).

19. It is interesting to note that arbitration, although classified as an alternative to litigation, lies along the same continuum of dispute resolution as the courts. Professor Mentschikoff classifies both litigation and arbitration as part of the "adversary model" of dispute resolution. Mentschikoff, *supra* note 9, at 847. Both adjudication and arbitration are characterized by party control over whether the procedure should be utilized as well as what issues presented for decision and what data and arguments are to be presented. Professor Mentshikoff notes that the adversary model "presupposes that the system of selecting deciders produces men who are capable of understanding the nature of the issues, data, and arguments, to be presented, and who have . . . the knowledge necessary to [produce a] wise decision." *Id.* She concludes that to the extent any of these presuppositions fails, the adversary system becomes inadequate as a tool of dispensing justice. *Id.* To this, I would add the requirement of decision-makers who review the case before them based on the merits and not based upon an allegiance to a particular party.

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times.[20] Yet, historically, arbitrations have been viewed with hostility and were often seen as inferior to "real litigation."[21] Arbitration met with judicial disfavor in English, as well as early American, common law,[22] with English courts often refusing to enforce agreements to arbitrate.[23] Arbitration agreements, under English and American common law, were often seen as "against public policy because they 'oust the jurisdiction of the courts.' "[24] Thus, under common law, arbitration agreements were valid but unenforceable since parties were able to revoke an agreement to arbitrate at any time. The principal draftsman of the FAA, Julius Cohen, stated that the primary reason for this disfavor was fear that the powerful elements of society would take advantage of the weaker and, as a result, the courts' involvement was necessary in order to protect the weaker party's rights.[25]

In response to this hostility against arbitration and in an effort to

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20. *See* Julius Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926) (noting that arbitration "dates back to the earliest days of which we have historical knowledge").

21. "Commercial arbitration can become an important method of settling disputes outside the courts only if the law is expressly favorable to it." GABRIEL WILNER, DOMKE ON COMMERCIAL ARBITRATION 16 (1993); *In re* Pahlberg, 43 F. Supp. 761, 762 (S.D.N.Y. 1942), *app. denied*, 131 F.2d 968 (2d Cir. 1942) (noting that American courts "had not looked with favor upon arbitration agreements").

22. *Arbitration of Interstate Commercial Disputes, Joint Hearings Before the Committee on the Judiciary*, 68th Cong., 1st Sess. (1924). The House Report stated:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealously survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.

H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924).

23. For an in-depth review of the history of arbitration, see *Kulunkundis Shipping Co. v. Amtorg Trading Co.*, 126 F.2d 978, 982 (2d Cir. 1942). Under English common law, arbitration agreements and awards were generally unenforceable; successful arbitration rested on the good faith of the parties rather than on legal sanctions. Bruce Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 446-47 (1984).

24. *Kulunkundis Shipping Co.*, 126 F.2d at 983 n.9 (quoting Kill v. Hollister, 1 Wils. 129 (1746)). *See also* Robert Lawrence Co. v. Devonshire, 271 F.2d 402, 406 (2d Cir. 1959) (stating that "[i]n England and in America the courts resorted to a great variety of devices and formulas to destroy . . . [the] encroachment [of arbitration] on their monopoly of the administration of justice, protecting what they called their 'jurisdiction' ").

25. At the joint congressional hearing on the arbitration bill, Mr. Cohen noted that "at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. And the courts said, 'If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones.' " *FAA Hearings*, 68th Cong., 1st Sess. 15 (1924) (statement of Julius Cohen). *See also* S. REP. NO. 536, 68th Cong., 1st Sess. 2 (1924).

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encourage courts to enforce contractual agreements to arbitrate,[26] the FAA was enacted in 1925.[27] The FAA made arbitration for disputes "valid, irrevocable and enforceable" in commercial contracts or maritime transactions, presumably placing agreements to arbitrate on the same level as any other contract.[28] It is said that the courts have now come full circle in their views of arbitration, and there is presently a strong federal policy in favor of arbitration.[29] Indeed, the courts often engage in the wholesale enforcement of arbitration clauses despite the participants' protestations. The number of suits being arbitrated in the commercial area continues to grow.[30] As of 1991, the AAA, one of the principal administrators of private arbitrations, comprising 50,000 arbitrators, was handling 60,000 cases each year.[31]

Arbitration's scope has been expanded both through voluntary selection by parties and by the courts' increasing willingness to herd cases out of court and into private dispute resolution.[32] Crowded court dockets and the

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26. The purpose of the FAA was to alter the judicial atmosphere previously existing. *Kulunkundis Shipping Co.*, 126 F.2d at 985. The Report of the House Committee stated:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).

27. The FAA was first enacted in 1925, with little congressional discussion. It was later repealed and substantially reenacted in codified form in 1947. *Robert Lawrence Co.*, 271 F.2d at 407 n.4. The first modern arbitration law was enacted in 1920 by the New York legislature. CAMERON WEHRINGER, ARBITRATION PRECEPTS AND PRINCIPLES 5 (1969).

28. 9 U.S.C. §§ 1-14; §§ 201-208 (1993).

29. *See* Stipanowich, *supra* note 9, at 425 (noting that "American arbitration has come of age . . . [and that] its proponents have secured institutional acceptance of the process from business, bench and bar").

30. Gabriel Wilner, in *Domke on Commercial Arbitration*, writes:

> Commercial arbitration . . . is not confined to traditional commercial transactions such as the sale and purchase of commodities and manufactured goods, and issues in the maritime field. It is also used to decide controversies arising out of building and engineering contracts, agency and distribution arrangements, close corporation and partnership relations, separation agreements, individual employment contracts, license agreements, leases, estate matters, contracts of government agencies and municipal bodies with private firms for construction work, stock exchange transactions and controversies in the broad insurance field, reinsurance arrangements, inter-insurance company subrogation claims . . . uninsured motorist accident claims, as well as those involving medical malpractice.

WILNER, *supra* note 21, at 3.

31. AMERICAN ARBITRATION ASS'N, PROGRESS IN DISPUTE RESOLUTION, A HISTORY OF THE AMERICAN ARBITRATION ASSOCIATION ON ITS 65TH ANNIVERSARY 35 (1991) [hereinafter AAA HISTORY].

32. Daniel R. Karon, Note, *Kicking Our Gift Horse in the Mouth — Arbitration and Arbitrator Bias: Its Sources, Symptoms, and Solutions*, 7 OHIO ST. J. ON DISP. RESOL. 315, 315 (1992) (observing that courts have expanded arbitration's scope to relieve the pressures of overcrowded dockets); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 82-83 (1992) [hereinafter Brunet,

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purported speed of the arbitration process have fed this judicial zeal towards arbitration.[33] In addition, arbitration clauses have become standard in many industries' contracts. The result is that inexperienced individuals are signing arbitration agreements and are becoming increasingly entangled in arbitration's web.[34] As greater numbers of cases are diverted to arbitration, concern over the ethics of party-appointed arbitrators looms larger and the risks of trampling party rights become greater.

III. INFORMALITY AND PRIVACY WITHIN ARBITRATION

A number of factors unique to the informality and privacy of arbitration magnify its negative characteristics and reduce its quality. First, the FAA's purpose is to increase the use of, and decrease judicial involvement in, arbitration.[35] This purpose is complicated by the fact that the AAA is in competition with other sources of dispute resolution, including the courts. Second, AAA arbitrations are marked by a lack of substantive and procedural rules guiding the arbitrators. Third, the arbitrators are endowed with considerable power as a result of this deficit of positive rules. Fourth, the wholesale enforcement of arbitration clauses has led to a broadening of arbitration to nonsignatories and a wide-ranging number of claims. Finally, the refusal of the courts to intervene in arbitration decisions effectively leaves arbitration without any meaningful checks and balances.

Proponents of arbitration view it as representing the "essence of democ-

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Constitutional Rights] (noting that organizations sponsoring arbitration "were created to provide expertise and speed").

The courts are broadly sweeping claims and entities into the arbitral forum, stretching the bounds of contract doctrine as a means of diverting as many cases as possible to arbitration. *See* 9 U.S.C. § 4 (1993); *Kulunkundis Shipping Co.*, 126 F.2d at 988 (stating that courts are to order arbitration upon being satisfied that the making of the agreementis is not in issue). The federal mandate is to "resolve all doubts in favor of arbitration." 9 U.S.C. § 4; *see also* City of Meridian, Miss. v. Algernon Blair, Inc., 721 F.2d 525, 527 (5th Cir. 1983) (holding that "whenever the scope of an arbitration clause is in doubt, the court should construe the clause in favor of arbitration"). The result is a liberal construction of the scope of arbitration agreements in favor of requiring arbitration and a presumption of arbitrability. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (asserting that agreements to arbitrate should be enforced unless there is no doubt that a grievance does not fall within the agreement's coverage); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983) (holding that all doubts concerning the scope of arbitral agreements should be resolved in favor of arbitration); Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1165 (8th Cir. 1984) (finding that ambiguous agreement terms are to be construed in favor of arbitration).

33. Allison Brooke Overby, Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1144-45 (1986) (noting that agreements to arbitrate are presumptively valid).

34. *See* Brunet, *Constitutional Rights*, *supra* note 32, at 103-04 (noting that "repeat players" often enter into contracts with "rookies in the dispute resolution business").

35. AAA is unique and unquestionably predominates in the field of alternative dispute resolution. Mentschikoff, *supra* note 9, at 856-67 (discussing the AAA's personnel, workload, and decision making process).

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racy."[36] Arbitration is, in their view, a fundamental part of the freedom to create or terminate relationships and exemplifies a free society's willingness to allow people to mutually select their own methods of resolving disagreements.[37] Further, its proponents recognize that arbitration is the most formalized of the alternative dispute resolution procedures and resembles traditional adjudication in that it enables the adversaries to present proof and reasoned argument before a third party.[38]

According to arbitration's supporters, its advantages are many and varied.[39] In its ideal form, arbitration affords the parties greater control over the process than is possible in adjudication.[40] The most obvious example of this increased control is the parties ability to choose a private, informal dispute resolution forum in lieu of a public trial and to have that decision enforced by the courts. Arbitration provides the parties significant input into the process. Litigation, in contrast, is governed by predetermined rules largely independent of the parties individual preferences. The machinery of litigation operates without the parties input and often leaves the parties feeling embittered and alienated from the system. On the other hand, in arbitration, the parties select or assist in selecting the arbitrators, as well as the site for the hearing, and work in conjunction with the arbitrators to schedule the hearing's date and time.

Champions of the arbitral process also tout the efficiencies of arbitration. It is said to be speedier, less costly, and more efficient than litigation.[41] These efficiencies are due, in large part, to the paucity of formalized rules in arbitration. Arbitration essentially eliminates a strict reliance on form, freeing its participants from litigation's extensive and time-consuming motion and discovery practice while avoiding the scheduling conflicts inherent in a court's crowded docket.[42]

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36. AAA HISTORY, *supra* note 31, at 35.

37. *Id.* Critics assert, however, that alternatives to litigation are sought "in order to reduce the caseload of the judiciary or even more plausibly, to insulate the status quo from reform by the judiciary." Owen Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985).

38. *See* Korn, *supra* note 8, at 70 (stating that "[a]rbitration is perhaps the most formalized type of alternative dispute resolution"); Brunet, *Constitutional Rights, supra* note 32, at 82 (stating that arbitration resembles adjudication because it involves adversarial proceedings and reasoned argument before a factfinder).

39. Kanowitz, *supra* note 10, at 255 (stating that arbitration serves many interests because it is speedy, less expensive than litigation, and reduces the courts' docket).

40. *But see* AAA HISTORY, *supra* note 31, at 8 (observing that arbitrations are not entirely free from formality and pretense since in most commercial arbitrations the parties are represented by lawyers and because the AAA encourages parties to use attorneys); Mentschikoff, *supra* note 9, at 857 (noting that the AAA "encourages the parties to use attorneys").

41. *See, e.g.,* Kanowitz, *supra* note 10, at 255 (contending that arbitration is faster, cheaper, and more efficient than litigation).

42. *See* Stipanowich, *supra* note 9, at 438 (finding that parties do not have to deal with the delays and uncertainties of a court's docket while arbitrating).

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Proponents posit that tripartite arbitrations provide an even greater sense of control over the process than other forms of dispute resolution.[43] Participants in tripartite arbitration can each select a representative who may act on their behalf prior to the hearing in preparing witnesses and exhibits, during the hearing in examining witnesses, and subsequent to the hearing by participating in arbitrator deliberations. They are permitted, essentially, to select their own "judicial" representative. Tripartite panels provide a level of expertise not normally available in adjudication.[44] According to this view, parties who select an arbitrator with experience in the arbitrated subject area are assured of expertise on the panel.[45]

Arbitration clearly serves a number of laudable goals and, in some ways, is valued by the legal system. Yet, arbitration remains in litigation's shadow and is compared to adjudication in assessing its quality and effectiveness.[46] In fact, "[d]espite the rhetoric endorsing alternatives to litigation, the American judicial system still mistrusts arbitration" and considers it inferior and unequal to litigation.[47] Judge Edwards, echoing the sentiment of much of the judiciary, astutely notes that "inexpensive, expeditious and informal adjudication is not always synonymous with *fair* and *just* adjudication."[48] Arbitration, and particularly tripartite arbitration, is imbued with a number of factors that detract not only from its effectiveness as a dispute resolution forum but also serve to reduce confidence in the quality of justice derived in an AAA arbitration.[49] Unfortunately, many of arbitration's positive qualities also serve to intensify the ethical dilemma of employing a predisposed arbitrator in a quasi-judicial capacity. Despite the enumerated benefits of selecting arbitrators, the existence of party-selected arbitrators who are

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43. *See* WEHRINGER, *supra* note 27, at 35 (observing that "the arbitrator is a person chosen to sit as a private judge and resolve a controversy between two (or more) parties").

44. *See* Stipanowich, *supra* note 9, at 436 (arguing that arbitration expertise would reduce the possibility that a decision will be arbitrary or ill-informed).

45. *Id.* at 435-36 (noting that "[w]hile the civil justice system often selects its triers of fact on the basis that they know little or nothing about the subject of dispute, a hallmark of arbitration is the presence of one or more decisionmakers with pertinent knowledge or experience"). *See also* Gold & Furth, *supra* note 7, at 315 (asserting that tripartism gives parties an assurance of expertise on the panel).

46. *See* Korn, *supra* note 8, at 97 (noting that litigation is viewed as the norm and that arbitration is not viewed as equal to litigation despite the fact that arbitration may be useful in certain ways like advancing efficiency and cost savings). Korn further notes that deference should not be equated with equality. While a court may defer to arbitration, it does not view arbitration as equally capable as the court. *Id.*

47. *Id.* at 71.

48. Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) (emphasis added).

49. *See* Reichman v. Creative Real Estate Consultants, Inc., 476 F. Supp. 1276, 1282 (S.D.N.Y. 1979) (observing that arbitration is "governed to a large extent by its own principles, and not limited by the rules of evidence, the rules of law or even the canons of construction in the reading of documents").

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predisposed toward their nominating party challenges well-established notions of fairness and results in a court-encouraged anamoly in alternative dispute resolution.

A. AMERICAN ARBITRATION ASSOCIATION — RULES AND PROCEDURES

The AAA is credited with having institutionalized "arbitration by giving it a central administrative organization, facilities for research and education, a laboratory for experiments and a national system of tribunals."[50] As a private nonprofit organization,[51] the AAA has been instrumental in developing and maintaining an interest in arbitration as an alternative means of dispute resolution.[52] The AAA was formed in 1926 through the merger of the Arbitration Society of America and the Arbitration Foundation.[53]

The AAA rightly views itself in competition with other forums of dispute resolution and management, including adjudication, settlement, as well as other forms of private dispute resolution. The AAA actively works to increase the use of arbitration and to sustain a substantial interest in arbitration as a means of dispute resolution. It promulgated the AAA *Commercial Arbitration Rules* — which bind the parties who choose to arbitrate in accordance with AAA rules — and the AAA *Code of Ethics for Arbitrators in Commercial Disputes, (Code of Ethics)*.[54] The *Commercial Arbitration Rules* provide the sole source of procedural guidance for arbitration participants and cover the form and manner of holding an AAA hearing.[55]

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50. FRANCES KELLOR, AMERICAN ARBITRATION 25 (1948). AAA "became a laboratory for the study of arbitration and for the formulation of the policies and principles that were later to form the beginning of a science of arbitration." *Id.* at 53.

51. WILNER, *supra* note 21, at 24. AAA is headquartered in New York and has regional offices. *Id.* The AAA is described as "the preeminent forum for resolution of commercial disputes by arbitration." Stipanowich, *supra* note 9, at 430 n.22.

52. WILNER, *supra* note 21, at 15. *See also* Mentschikoff, *supra* note 9, at 856 (noting that the AAA "[f]rom its beginning held itself out as an expert in matters that went to the enforceability of an award and set up its rules and regulations with the primary aim of rendering awards that would not be set aside by the courts").

53. AAA HISTORY, *supra* note 31, at 4. The Arbitration Society of America was created, in 1922, by business leaders in order to promote the use of arbitration. *Id.* The Arbitration Foundation, founded in 1924, focused on research. Although the Arbitration Society of America and the Arbitration Foundation had entirely different approaches and experienced conflict, they merged in 1926 through the help of a mediator. *Id.* From its inception, arbitration drew distinguished and accomplished supporters; for example, Dean Harlon Stone (later Chief Justice) and Chief Justice Charles Evan Hughes were two of the founders of the AAA. Stipanowich, *supra* note 9, at 430 n.23.

54. COMMERCIAL ARBITRATION RULES Rule 1; Stipanowich, *supra* note 9, at 431 (noting that the AAA has overseen the development of arbitration rules); *see also* AMERICAN ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977) [hereinafter *Code of Ethics*].

55. Arbitration is initiated by a party providing written notice to the other party of its intention to arbitrate in accordance with the terms of the arbitration agreement (known as the "demand"). COMMERCIAL ARBITRATION RULES Rule 6(a). The demand is then filed with the AAA accompanied by the appropriate filing fee. COMMERCIAL ARBITRATION RULES Rule 6(b). The filing fees are based

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The AAA alone determines the application and compliance with its Rules.[56] The AAA is also the sole determiner, until after an award has been rendered, of whether an arbitrator is qualified to serve on an arbitration panel.[57] It is important to note that the AAA, while engaged in the business of selling an attractive form of dispute resolution, must realistically set and apply standards which keep in mind the needs and wishes of its customers within a competitive environment.[58]

Thus, tripartite panel arbitrations are conducted against a backdrop where two predisposed decisionmakers are governed by rules of procedure and codes of ethics promulgated and monitored by the AAA and designed to serve the AAA's own ends as a business entity.

B. THE ROLE OF NON-NEUTRAL ARBITRATORS

1. Normative Rules and Ethical Standards

The norm in judicial decisionmaking is that the law stands between the judge and the case. Ideally, the applicable law prevents judges from deciding cases based on a personal agenda. Judges guided by substantive law and formalized rules of evidence and procedure, at least on the surface,

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on the amount of the claim, ranging from $300 for a claim of $25,000 or less to $4,000 for claims of more than $5 million. *Id.* Intro., at 4. These fees do not include service charges, arbitrator compensation, or expenses or reporting fees. *Id.* at 21-22.

Some commentators have expressed concern that setting the AAA administrative fee as a percentage of the claim amount not only bears no relation to the services rendered but may place a financial burden on the parties. Critics have also challenged the assertion that arbitration is less costly than litigation for the parties. The requirement of submitting a filing fee equal to a percentage of the claim may prove an insurmountable financial burden to the claimant.

In accordance with AAA rules, the parties may designate the number and mode of selection of arbitrators in their agreement. 9 U.S.C. § 5 (1993); COMMERCIAL ARBITRATION RULES Rules 13 and 14. If the parties have not explicitly appointed an arbitrator through contract, the AAA then provides the parties with a list of names chosen from its panel of commercial arbitrators. *Id.* The AAA maintains panels of arbitrators with pertinent technical or legal knowledge, education, or experience for selection in various kinds of cases. Stipanowich, *supra* note 9, at 438. The parties eliminate those names on the list to which they object and indicate an order of preference for the remaining names. The AAA selects, if possible, a name from the list to serve as the neutral arbitrator. The AAA then invites an arbitrator from the list of agreed upon names to serve. COMMERCIAL ARBITRATION RULES Rule 13. If the arbitration clause permits the selection of party-appointed arbitrators, each party is free to select an arbitrator of its choice. The agreement may also provide that the party-appointed arbitrators appoint the neutral arbitrator. COMMERCIAL ARBITRATION RULES Rule 15.

56. COMMERCIAL ARBITRATION RULES Rule 3 (discussing authority and delegation of duties); Rule 52 (giving the AAA the final authority for interpretation and application of its rules).

57. COMMERCIAL ARBITRATION RULES Rule 12 (discussing qualifications of an arbitrator); Rule 13 (discussing appointment to arbitration panels).

58. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) (observing that the AAA may "set its standards as high or as low as it thinks its customers want").

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are focused on the merits of the case rather than on personal ties and sentiment. On the other hand, a party-appointed arbitrator's loyalties are divided between the merits of the case and the arbitrator's allegiance to his or her nominating party.[59] For arbitrators, in general, the barrier between themselves and the case that they are deciding is weakened. For non-neutral arbitrators, in particular, this obstacle is torn away. Arbitrators formulating their awards are not strictly bound by substantive law in the same manner as judges and, as a result, the arbitrators' decisions are based not in law but on their own sense of justice.[60] Moreover, the decisions of non-neutrals who are unburdened by substantive law or precedent may be steeped in personal ties or interests. Parties often select their party-appointed arbitrators not only because the arbitrator is informed but also to ensure a champion on the panel who will serve as an effective and determined advocate.[61]

While the AAA *Code of Ethics* is intended to ensure the moral and ethical strength of the decisions rendered in arbitration, the Code creates two tiers of ethical rules. On the one hand, the *Code of Ethics* broadly instructs that "persons who have the power to decide should observe fundamental standards of ethical conduct"[62] and requires that non-party-appointed arbitrators be both neutral and impartial.

On the other hand, a party-appointed arbitrator's conduct is governed by a substantively different set of ethical rules. While all arbitrators are instructed to maintain the integrity and fairness of the arbitration proceeding, the party-appointed arbitrator's duty is reduced to an explicit prohibition against engaging in "delaying tactics or harassment of any party or witness" and making "untrue or misleading statements to the other arbitrators."[63]

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59. *See* Brunet, *Quality of ADR, supra* note 16, at 27 (asserting that "[l]egal principles serve as a yard-stick or measurement function that allows disputants a way to assess the neutrality of those who decide . . . a dispute.").

60. *See* Stipanowich, *supra* note 9, at 437 (arguing that "while arbitrators may pay heed to principles of substantive law, they may elect to forego a strict contractual interpretation which, given their own experience, is inconsistent with justice in the instant case."); Brunet, *Constitutional Rights, supra* note 32, at 85 (arguing that the arbitrator unconstrained by substantive law can "do justice as he sees it"). *But see* Mentschikoff, *supra* note 9, at 701-03 (noting that while arbitrators tend to achieve results based on factors other than the law, courts often achieve these same goals by subterfuge).

61. Gold & Futh, *supra* note 7, at 315 ("A major purpose of businessmen in resorting to private arbitration is to present their claims before a tribunal familiar with the practices of their trade"); Edward J. Costello, *Selecting a Neutral*, 48 ARB. J., Sept. 1993, at 42; John P. McMahon, *The Role of Party-Appointed Arbitrators — The Sunkist Case*, 49 DISP. RES. J., Sept. 1994, at 66.

62. CODE OF ETHICS Pmbl. The *Code of Ethics* was promulgated in order to provide a standard of ethical behavior for all arbitrators. *Merit Insurance*, 714 F.2d at 678. The *Commercial Arbitration Rules* state "the parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association . . . or under its Commercial Arbitration Rules." COMMERCIAL ARBITRATION RULES Rule 1.

63. CODE OF ETHICS Canon VII.A.

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Directly prohibiting these behaviors, but not more, implies that the prohibitions against "delaying tactics" and "making untrue statements" regulate the boundaries of fairness and integrity for party-appointed arbitrators. A non-neutral arbitrator's real world relationships are an accepted and lauded factor of tripartite arbitrations.[64] Thus, financial, business, professional, familial, or social relationships are unlikely to result in the disqualification of party-appointed arbitrators. Proponents view party-appointed arbitrators who have experience in a particular industry as a distinct advantage of arbitration.[65] According to this view, the involvement of "experts" is superior because these arbitrators, unlike judges and juries unfamiliar with the technical intricacies of a case, possess the technical competency needed to remain focused on the relevant issues and, thus, are less likely to be swayed by extraneous considerations.[66] The ability to select an arbitrator of their own choosing, with the type and kind of expertise they desire, ensures a level of competency the parties consider appropriate for technical aspects of the case.[67]

Judicial inquiries into a neutral arbitrator's conduct has focused upon the disclosure of relationships that could reasonably affect the arbitrator's impartiality.[68] On occasion, awards have been vacated for the neutral arbitrator's failure to disclose pertinent social or business ties.[69] Non-neutrals, however, are expected to have interests and relationships in the industry in which the arbitration claims arose, and therefore, awards are rarely disturbed on this basis.[70] Party-appointed arbitrators are merely required to provide a one-time general disclosure of interests and relationships that are likely to affect their impartiality or that may create the appearance of bias; they are not obligated, however, to withdraw from acting as an arbitrator upon objection by non-nominating parties.[71]

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64. Stipanowich, *supra* note 9, at 435-36; Gold & Furth, *supra* note 7, at 315.

65. *See* Stipanowich, *supra* note 9, at 435-36 (noting that the "pertinent knowledge or experience" is a hallmark of arbitration).

66. Gold & Furth, *supra* note 7, at 315 (finding that business parties resort to arbitration to present their claims in a forum familiar with their trade practices).

67. *Id.*

68. Non-neutral arbitrators are required to disclose significant interests and relationships but are not required to withdraw as arbitrators if requested to do so. CODE OF ETHICS Canon II (Ethical Considerations Relating to Arbitrators Appointed By One Party). *See* Karon, *supra* note 32, at 316 (noting that arbitration's proponents argue that arbitration better embodies "community norms").

69. The AAA requires neutral arbitrators to sign disclosure agreements. COMMERCIAL ARBITRATION RULES Rule 19. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 146, 149 (1968), *reh'g. denied,* 393 U.S. 1112 (1969); Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1200 (11th Cir. 1982); Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

70. *See infra* Part IV (discussing the refusal, generally, of courts to intervene in arbitration decisions).

71. CODE OF ETHICS Canons II, VII.B.

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The hallmark of party-appointed arbitrators is the ability of non-neutrals to communicate with their nominating parties about any aspect of the case.[72] The content of communications between party and arbitrator is not disclosed. The arbitrator is merely required to inform the other arbitration participants that he intends to communicate with his nominating party.[73] Many parties consider the ability to communicate with the party-appointed arbitrator as a benefit of arbitration.[74] It is a benefit, however, that challenges the notion that judicial officers must be disengaged from the suits they are to decide and, consequently, the practice raises a number of ethical issues.[75]

The *Code of Ethics* provides few barriers between the predisposed party-selected arbitrator and a decision tainted by partiality. Delineating separate ethical boundaries for neutral and party-appointed arbitrator conduct supports the conclusion that party-appointed arbitrators' conduct is less constrained than that of the neutral arbitrator and, therefore, less impartial.

2. The Power of Arbitrators

The importance of the arbitrator's role cannot be overstated. Domke, a leading commentator on alternative dispute resolution, noted that:

> [t]he Arbitrator is the decisive element in any arbitration. His ability, expertness, fairness and impartiality are the basis of an arbitration process. . . . Not only does an efficient and responsible arbitrator conduct the proceeding with integrity . . . he also contributes to the improvement of business relations and of practices and customs in the specific trade.[76]

Simply stated, arbitrators are the key to the arbitral process because they have been endowed with considerable power through contract principles,[77] the FAA, and judicial deference.[78] Arbitration panels are given a significant degree of latitude in their decisionmaking because they are not limited by

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72. *Id.*

73. CODE OF ETHICS Canons III, VII.C.

74. The *Code of Ethics* permits party-appointed arbitrators to communicate with their party once their intention to do so is disclosed. CODE OF ETHICS Canon II, VII.B. *See* Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993) (approving party-appointed arbitrator's communication with its party's representatives and witnesses). *But see* Employers Ins. of Wassau v. National Union Fire Ins. Co. of Pittsburgh, 933 F.2d 1481 (9th Cir. 1991) (approving party-appointed arbitrator communication with party but noting that conduct in *Sunkist Soft Drinks* went too far).

75. *See infra* Part V (advocating for the reform of ethical standards in tripartite arbitration).

76. WILNER, *supra* note 21, at 67.

77. *See* Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3d Cir. 1972) (finding that the arbitrator derives authority from the parties through the agreement to arbitrate).

78. Recognizing that the success of arbitration is directly dependent upon the personal qualities and abilities of the arbitrator, Professor Stipanowich recommends reform in arbitration selection and training by the AAA. Stipanowich, *supra* note 9, at 478-81.

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substantive or procedural law.[79] Moreover, the arbitrators alone determine the relevance and materiality of any proffered evidence.[80] Conformity to the rules of civil procedure and evidence is not required, but all evidence must be taken in the presence of all arbitrators and the parties.[81] Moreover arbitrators are not bound by judicial conventions of construction when interpreting proffered evidence.[82] This absence of rules makes impartiality more difficult to attain.[83] Unconstrained by substantive and procedural rules, panels may be swayed not by the merits of a case, but by some personal sense of fairness or loyalty to a particular party. This is especially true of party-appointed arbitrators who are both unrestricted by the applicable law and also released from the ethical constraints that bind federal judicial officers.

Private arbitrations informalize and narrow the scope of adjudication to decisions in the individual case.[84] After the close of evidence, arbitrators submit a written award but are not required to disclose the basis upon which their awards are made.[85] In fact, the AAA discourages the issuance of

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79. One commentator, for example, noted that "the absence of formal rules of procedure and evidence is often touted as an advantage of ADR." Delgado et al., *supra* note 1, at 1374. Commentators disagree as to whether compromise in ADR results in it being superior or inferior to litigation. *See* Brunet, *Quality of ADR*, *supra* note 16, at 3-4, 15 (stating that compromise seems to be the basis of the claim that ADR is superior to litigation). Professor Fiss is a particularly eloquent critic of compromise in adjudication. *See generally* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

While arbitration involves less compromise than other forms of alternative dispute resolution, the lack of procedural rules and the ability to ignore substantive law makes the possibility of compromise in arbitration more likely than in litigation. As noted herein, the involvement of party-appointed arbitrators further increases the likelihood that compromise will be necessary in order for the panel to render an award.

80. 9 U.S.C. § 7 (1993); COMMERCIAL ARBITRATION RULES Rules 29 and 31.

81. COMMERCIAL ARBITRATION RULES Rule 31. All evidence must be taken in the presence of all the parties except where a party waives his right to be present or is in default. *Id.*

82. *See* Stipanowich, *supra* note 9, at 435 (observing that the AAA rules "contain few strictures on the conduct of the hearings or the admission of evidence, leaving such matters largely to the discretion of the arbitrator[s]"); COMMERCIAL ARBITRATION RULES Rule 31 (stating that parties shall produce such evidence as the arbitrator "may deem necessary"); COMMERCIAL ARBITRATION RULES Rule 43 (holding "[t]he arbitrator may grant any remedy the arbitrator deems just and equitable and within the scope of the agreement"). Professor Brunet notes that, in alternative dispute resolution, the means and not the substantive ends are emphasized. Brunet, *Quality of ADR*, *supra* note 16, at 14. According to Professor Brunet, the absence of law permits disputants in arbitration to evade the guidance function of the law. *Id.* at 16. He notes that "Legal norms make arguments and judging processes more effective. A judge . . . needs norms to decide." *Id.* at 25.

83. *See* Brunet, *Quality of ADR*, *supra* note 16, at 27 ("Whenever an ADR 'decision facilitator' lacks a clear legal standard, impartiality may be more difficult to attain.").

84. *See* Fiss, *supra* note 79, at 1082 (arguing that "[t]he Dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process"). This ends-oriented unreviewable approach requires a circumspect and scrupulously fair hearing.

85. Escobar v. Shearson Lehman Hutton, Inc., 762 F. Supp. 461, 463 (D. P.R. 1991) (stating that arbitrators are not required to disclose the basis on which their awards are made); Barbier v. Shearson Lehman Hutton, Inc., 752 F. Supp. 151, 163 (S.D.N.Y. 1990) (asserting that the arbitrator's decision should not be vacated if a ground be inferred from the facts of the case); Cobec

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reasoned awards, in part, to reduce the likelihood of substantive judicial review or reversal of the award.[86] Arbitrators merely issue an award that they deem just, equitable, and within the scope of the agreement.[87] Courts reason that to require arbitrators to record their decisions would reduce the speed and efficiency of arbitration.[88] Unfortunately, while courts support the absence of an arbitration opinion, they use its omission as a basis for refusing to review the award in any substantive manner. For example, in *Reichman v. Creative Real Estate Consultants*, the court found that the failure to state reasons for the arbitration award placed the merits of the award beyond the court's ability to review the case.[89]

Each case, therefore, is decided in isolation. Arbitrators determine the case immediately before them without attention to precedent or to the generalized situation that is presented in the particular case.[90] Without

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Brazilian Trading & Warehousing Corp. of U.S. v. Isbrandtsen, 524 F. Supp. 7, 9 (S.D.N.Y. 1980) (holding that no general requirement exists that arbitrators explain the basis for their awards); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 244 n.4 (1962) (same); Reichman v. Creative Real Estate Consultants, Inc., 476 F. Supp. 1276, 1286 (S.D.N.Y. 1979) (stating that arbitrator should not be called to give a reason for his decision).

86. ARBITRATION FOR THE 1990'S, *supra* note 8, at 91-96. *See also* Mentschikoff, *supra* note 9, at 857 (observing that the AAA "puts enormous pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts").

87. COMMERCIAL ARBITRATION RULES Rule 43. Professor Stipanowich notes that written opinions would force arbitrators to consider their decisions more carefully and inform the parties of the arbitrators' rationale. Stipanowich, *supra* note 9, at 485. Weighing this against the likelihood that written opinions might discourage some from acting as arbitrators would result in higher costs and greater appeals, Professor Stipanowich suggests that AAA rules permit parties to request an opinion if they mutually desire. *Id.*

88. *See Reichman,* 476 F. Supp. at 1282 (finding that forcing arbitrators to give written opinions would destroy whatever efficiency gains are inherent in the arbitration process).

89. *Id.*

90. *See* Mentschikoff, *supra* note 9, at 867 (noting that judges do not inform arbitrators of which substantive norms apply to disputes). Mentschikoff analogizes the role of arbitrator to that of the jury at trial, stating:

> For both the jury and [AAA] arbitrators, institutional pressure converge toward the production of a simple final product. . . . This, of course, makes it possible for both jurors in a court and commercial arbitrators at the [AAA] to reach an agreed upon decision without reaching agreement on the reasons for the decision.

Id. at 866. She posits that arbitrators are most like juries in their "decision-consensus" functions (the process by which the arbitrators agree among themselves on the end product, the award) and are most like judges in the "decision-making" process (the process by which an individual arbitrator determines which party is in the wrong and which is in the right). *Id.* at 867.

The analogy Mentschikoff discusses aptly suggests an ideal form of commercial arbitration in which arbitrators truly strive for impartiality and adherence to some substantive law. Unfortunately, however, the reality differs from these ideals on these central points. Mentschikoff acknowledges the apparent differences between juries and arbitrators in that the jury, once instructed on the law, is bound to follow it. *Id.* at 866. Arbitrators are not necessarily instructed on the law and substitute their sense of justice. Moreover, while juries often take seriously their role of impartiality and fairness, party-appointed arbitrators are instructed by the AAA that they are permitted predisposition of ideas.

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opinions, arbitration awards can neither contribute to nor benefit from the guiding and instructional force of precedent.[91] Further, there is no continuity of decisionmakers. Tribunals are temporarily established for each specific case and lack the continuity of knowledge derived from reviewing similar issues over a period of time.

The absence of a written opinion also means there can be no check on the panel's reasoning, and consequently, there is no means by which the parties can insure that the decision was based solely on the merits of the action and not on improper grounds. The silence surrounding the panel's deliberations is maintained by AAA decree. According to AAA *Commercial Arbitration Rules* and *Code of Ethics*, arbitration proceedings as well as the arbitrator's deliberations are confidential. The *Code of Ethics* states that, "[i]t is not proper for an arbitrator to inform anyone concerning the deliberations of the arbitrators" or to "assist in any post-arbitration proceedings, except as may be required by law."[92]

Arbitrators are also conferred testimonial privilege[93] and cannot be required to testify regarding the content of the arbitral panel discussions.[94] Thus, the parties are left with no real means of determining the basis upon which awards were granted or to what extent and whether improper conduct or relationships of the party-appointed arbitrator may have affected the award.

The considerable power wielded by the arbitrator make clear that the most important act in any arbitration proceeding is selecting the arbitrators.[95] Arbitrators, depending upon their abilities and personal sense of integrity, can engage in a variety of behaviors that will produce a number of possible results — not merely a winner and a loser, but also satisfying results for all participants due to choices between the system of justice or disappointment, cooperation among the parties or antagonism, and respect or distrust for the system as well as its participants. Effective arbitrations require that the arbitrator and the participants show respect for the decision-making process involved.

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91. *See* Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 147 (4th Cir. 1993) (stating that arbitration awards have no precedential value). *See also* Brunet, *Quality of ADR*, *supra* note 16, at 21 (noting that judicial opinions benefit not only the litigants to the dispute but generally serve to improve and focus the law).

92. CODE OF ETHICS Canon VI.C.

93. Mark A. Sponseller, Note, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, 444 n.196 (1993).

94. The AAA has also deemed that "[n]either the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules." COMMERCIAL ARBITRATION RULES Rule 47.

95. Arbitrators, under AAA rules, obtain their authority from a contractual provision. See Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3d Cir. 1972) (finding that the arbitrator derives authority from the parties through the agreement to arbitrate).

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The position of arbitrator lacks the trappings and accountability of a judge.[96] Judges are constrained both by their position, which carries a certain prestige and expectation of neutrality, and by codes governing judicial conduct.[97] In applying existing rules and decisions, judges are more likely to produce consistent results in similar cases. Similarly, rules of evidence and procedure result in consistent judicial processes.[98] The *Code of Judicial Conduct* also directly regulates judicial behavior by requiring disqualification where there is prejudice or bias.[99] Parties to litigation, unlike participants in arbitration, are also empowered by the right of appellate review of the merits of the action.[100]

Despite the informalities which have made arbitration a popular and lauded form of dispute resolution, "fundamental standards of ethical conduct" should be observed.[101] It is because "[c]ommercial arbitration . . . forms a significant part of the system of justice which our society relies upon for the fair determination of legal rights that the highest standards of ethical behavior should be adopted. Arbitrators undertake serious responsibilities to the public as well as to the parties."[102] In order for the process to work, even party-appointed arbitrators should be required to abide by the same level of ethical standards required of any other decisionmaker of a quasi-judicial capacity. The amorphous standards governing arbitrator behavior, coupled with the degree of latitude provided to the arbitrator in hearings and in deciding cases, underscore the cause for concern about party-appointed arbitrator ethics. If these fundamental judicial precepts of neutrality and impartiality are ignored, the integrity of the entire process is undermined. The absence of formality in arbitration and the removal of the technical aspects of litigation should not result in the adoption of a system of "ethic-less" judging.

IV. REFUSAL OF COURTS TO INTERVENE IN THE ARBITRAL PROCESS

Though empowered by contract, arbitrators, their awards, and their

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96. *See* Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362-63 (D.N.Y. 1957) (summarizing some of the differences between arbitration and trial).

97. *See* Delgado et al., *supra* note 1, at 1368 (examining ethnic prejudice and bias in alternative dispute resolution and noting that "[b]oth internal and external constraints are designed to keep a judge from exhibiting bias or prejudice").

98. *See id.* at 1370-75 (discussing the rules of civil procedure and evidence and their ability to reduce prejudice in decisionmaking).

99. *See* CODE OF JUDICIAL CONDUCT Canon 3(c)(1)(a)(1990); 28 U.S.C. § 455 (1993) (stating that a judge should disqualify himself in any proceeding in which his impartiality might be questioned). Professor Delgado notes that although disqualification procedures are used sparingly, their presence at least checks the more extreme instances of judicial bias. Delgado et al., *supra* note 1, at 1369.

100. *Id.* at 1368.

101. CODE OF ETHICS pmbl.

102. *Id.*

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conduct are legitimized by the courts and by Congress.[103] Arbitration essentially acts as a "surrogate for the courts."[104] Through the limited review of arbitration awards and arbitrator conduct, the federal courts provide a stamp of validity and legality to the arbitral process.[105] In contrast, the reluctance of the courts to further intercede in the process weakens it as an alternative to litigation.

The arbitration award is not subject to review in the same manner as a trial court's judgment. Arbitrators, for all practical purposes, are the final judges of law and fact of the cases before them. The only way to appeal an arbitration award is to seek to vacate or set aside the award under FAA or narrow common law grounds.[106] Unless the arbitrator has exceeded his power by deciding a matter not arbitrable under the contract,[107] the award enjoys a presumption of validity[108] and is subject to very limited judicial review. Courts view challenges to arbitrator behavior and arbitration awards as nothing more than mere pretexts for invalidating arbitration awards.[109] As a result, arbitrators have broad and almost unlimited determinative powers.[110]

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103. The Congress' acceptance of arbitration as a suitable alternative to litigation is embodied in the Federal Arbitration Act. 9 U.S.C. § 1 *et seq.* (1993).

104. *See* Stipanowich, *supra* note 9, at 433 n.36 ("The dichotomy of arbitration lies in the fact that although arbitrators derive their power from private contract, they serve to impart justice as a surrogate for the courts.").

105. *See* Karon, *supra* note 32, at 315 (noting that courts have expanded arbitration's legal status).

106. *See* General Constr. Co. v. Hering Realty Co., 201 F. Supp. 487, 491 (E.D.S.C. 1962) (finding that arbitration awards may be set aside if obtained through fraud, corruption, or undue means).

107. Local 453, Intern., Union of Elect., Radio, & Mach. Workers v. Otis Elevator Co., 201 F. Supp. 213, 215 (S.D.N.Y. 1962). *See also* Stipanowich, *supra* note 9, at 439 (asserting that arbitral awards are generally only open to challenge when fraudulent or when a hearing has not been provided).

108. Robbins v. Day, 954 F.2d 679, 681 (11th Cir. 1992) (stating that arbitration requires deferential review to promote its advantages of speed and finality); City of Parkersburg v. Turner Constr. Co., 612 F.2d 155, 156 (4th Cir. 1980) (holding that arbitration award entitled to strong presumption of validity); Gonzalez v. Shearson Lehman Bros., Inc., 794 F. Supp. 53, 55 (D.P.R. 1992) (noting a strong presumption that the grounds for vacating an arbitration award are strictly limited to avoid frustrating arbitration's efficiency). As a result, the party moving to vacate an award shoulders a heavy burden of proof. *See* Federated Dept. Stores, Inc. v. JVB Indus., Inc., 894 F.2d 862, 866 (6th Cir. 1990) (holding that a party's claim alleged only "errors of interpretation" of a contract and failed to prove that the arbitrators "displayed a manifest disregard for the law"); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1274 (2d Cir. 1971) (holding that moving party must bear burden of proof when claiming arbitrator bias).

109. *See In re* National Bulk Carriers, Inc. v. Princess Management Co., 597 F.2d 819, 825 (2d Cir. 1979) (stating that only "clear evidence of impropriety" will prevent summary confirmation of arbitrator's decision); *In re* Arbitration Between Andros Compania Maritima, S.A. & Marc Rich & Co., A.G., 579 F.2d 691, 702 (2d Cir. 1978) (discussing tendency of losing parties to seize upon an "undisclosed relationship" between a party and an arbitrator "as a pretext for invalidating an award").

110. *See* Kanmak Mills, Inc. v. Society Brand Hat Co., 134 F. Supp. 263, 269 (E.D.Mo. 1955), *aff'd in part, rev'd in part*, 236 F.2d 240 (8th Cir. 1956) (finding that arbitrators have almost unlimited powers when acting on a matter within their jurisdiction).

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The FAA does not provide for judicial review of an arbitrator's qualifications or conduct until the arbitration is complete. Motions to disqualify an arbitrator may not be brought before a federal court until after an arbitration award has been issued.[111] Until a final award has been rendered, the AAA is the sole determiner of the challenged arbitrator's ability to serve.[112] The AAA is then faced with competing goals of ensuring its clients' satisfaction, maintaining the integrity of the process, and retaining a positive relationship with the arbitrators.

A party seeking an arbitrator's disqualification may be required to present his objections in several forums before being heard before a judicial panel. Moreover, the objecting party must be vocal in his protestations, since the failure to object constitutes a waiver.[113] If the AAA refuses to remove the arbitrator after an objection has been raised, the arbitration proceeds with his involvement. In such circumstances, full participation in the arbitration is allowed despite the view that the arbitrator is corrupt and the process tainted. The challenging party is charged with the expense and responsibility of aggressively presenting his case even while knowing that the narrow and limited review of arbitration awards and arbitrator conduct will effectively foreclose a later judicial challenge. Efficiency, speed, and economy for the parties are tossed aside in favor of judicial-efficiency goals.

The latitude afforded arbitrators by the courts, that stems in part from the concept of contractual choice, begins when deciding whether to compel arbitration and continues until after the award is rendered, when deciding whether the award should be confirmed. In reviewing challenges to arbitral awards, courts reason that the inclusion of an arbitration clause can be construed as an implicit assent to the panel's construction of the facts and law that resulted in the award.[114] Concerned first with maintaining the purported efficiencies of arbitration and judicial economy, courts hesitate to be used as a means of challenging arbitration awards and accordingly

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111. *See* Marc Rich & Co., A.G. v. Transmarine Seaways Corp of Monrovia, 443 F. Supp. 386, 388 (S.D.N.Y. 1978) (holding that judicial review of arbitrator's qualifications can only be made after the arbitrator has similarly reviewed his qualifications); Michaels v. Mariforum Shipping, 624 F.2d 411, 414 n.4 (2d Cir. 1980) (holding that courts cannot maintain an attack on arbitrator's qualifications or partiality until after award).

112. COMMERCIAL ARBITRATION RULES Rule 19. *See also* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) (noting that a violation of the *Commercial Arbitration Rules* and *Code of Ethics* do not have a direct bearing on an analysis under section 10 of the FAA).

113. WILNER, *supra* note 21, at 331; Gold & Furth, *supra* note 7, at 323-24.

114. *See* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (reasoning that parties paid for arbitrator's interpretation of a contract and that the courts have no business overruling the arbitrator because of interpretation differences); Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 415 F.2d 403 (5th Cir. 1969) (same).

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decline to review alleged errors of law, procedure, or ethics.[115] Courts typically remain unmoved by allegations of improper arbitrator relationships or conduct, especially with regard to party-appointed arbitrators. The judges argue that "[s]ince both parties, by agreeing upon tripartite arbitration, have necessarily accepted the idea of partisan 'appointees,' neither may object to the other's designation of someone associated with his interest or related to him."[116]

Consequently, the confirmation of an arbitration award becomes a summary proceeding.[117] Courts essentially limit their inquiry to asking the oversimplified question: Did the arbitrator exceed the limits of his contractual authority? The relevant case law suggests that any more depth of inquiry would do nothing more than frustrate the ostensible purpose of arbitration, to wit, the avoidance of litigation.[118] The analysis of vacating arbitration awards may be viewed through three broad categories: errors in law or procedure, improper relationships, and inappropriate behavior.[119]

A. MISAPPLICATION OR ERROR OF LAW

The merits of the arbitration award are, in essence, free from judicial review.[120] Arbitration awards must illustrate a "manifest disregard of the law" in order to be vacated. This judicially derived standard requires more than an error in applying the law or a misunderstanding with respect to the law.[121]

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115. One court, for example, noted that "[a]rbitration cannot achieve the savings in time and money for which it is justly renowned if it becomes merely the first step in lengthy litigation." *In re* Arbitration Between National Bulk Carriers & Princess Management Co., Inc., 597 F.2d 819, 825 (2d Cir. 1979); *See also In re* Dover S.S. Co., Inc., 143 F. Supp. 738, 740 (S.D.N.Y. 1956) (reasoning that to allow one party to challenge the qualification of the other party's arbitrator would defeat arbitration's "disposition of commerical disputes without the restrictive conditions characteristic of judicial proceedings").

116. *See* Fahnestock & Co. v. Waltman, 935 F.2d 512, 516 (2d Cir. 1991) (stating that any "colorable justification" will support an arbitration award). *See also* Stipanowich, *supra* note 9, at 439-40 ("For better for worse, the parties have bargained for arbitral justice without judicial intervention.").

117. *See* Ottley v. Schwartzberg, 819 F.2d 373, 377 (2d Cir. 1987) (stating that the confirmation of an arbitration award "merely makes what is already a final arbitration award a judgment of the court").

118. Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805 (2d Cir. 1960), *cert. denied*, 363 U.S. 843 (1960).

119. The grounds for vacating an arbitration award are as follows: (a) where the award was procured by corruption, fraud or undue means; (b) where there was evident partiality or corruption in the arbitrators; (c) where the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy or any other misbehavior by which the rights of any party have been prejudiced; and (d) where the arbitrators exceed their powers. 9 U.S.C. § 10 (1993).

120. *See* Marion Mfg. Co. v. Long, 588 F.2d 538, 541 n.3 (6th Cir. 1978) (noting that "even if the result reached by the arbitration panel was not 'equitable' it must be upheld by the courts unless clearly erroneous").

121. *See* Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (holding that Federal Arbitration Act permits an arbitral award to be vacated only if the arbitrator exhibited a "manifest disregard" of the

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This exception to the presumed validity of arbitration awards is construed narrowly and refers to errors which are obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator.[122] The standard permits vacation of an award only where the arbitrator appreciated the existence of clearly governing legal principles but deliberately ignored them in making his award.[123] The "manifest disregard" standard does not allow a court to set aside an arbitral award merely because it views the law's meaning or application differently than the panel. Courts may not overturn an award solely on the basis of a misinterpretation of law or fact.[124] Even if the award is clearly erroneous in logic and result, it must stand; parties must show that the arbitration result was "completely irrational" and without basis.[125]

The "manifest disregard" doctrine protects arbitration awards with a high standard and is consistent with the laissez-faire attitude toward arbitration.[126] This standard further illustrates the latitude provided arbitrators to reach a decision without constraint of legal principles. In fact, one court refused to set aside an arbitration award, reasoning that it could not vacate the award under the "manifest disregard" standard where the arbitrators did not state their reasons for the award.[127]

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law); *See also* Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 250-54 (1993) (discussing lower court interpretations of the "manifest disregard" standard).

122. Carte Blanche (Singapore) Ste, Ltd. v. Carte Blanche Int'l., Ltd., 888 F.2d 260, 265 (2d Cir. 1989).

123. Fine v. Bear Stearns & Co., Inc., 765 F. Supp. 824 (S.D.N.Y. 1991).

124. *See* Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 261 F. Supp. 832, 836 (D.N.J. 1966) (finding that arbitration award will not be overturned on the basis of misinterpretation of law); Office of Supply v. N.Y. Nav. Co., Inc., 469 F.2d 377, 379 (2d Cir. 1972) (refusing to overturn an arbitration award based on the arbitrator's misintepretation of the law); Raytheon Co. v. Rheem Mfg. Co., 322 F.2d 173, 182 (9th Cir. 1963) (holding that award will not be set aside because arbitrator does not understand or misapplies the law); Ainsworth v. Skurnick, 960 F.2d 939, 940 (11th Cir. 1992) (finding that courts are generally forbidden to overturn an award because of errors in interpreting the law).

125. *See* Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) (quoting French v. Merrill Lynch, 784 F.2d 902, 906 (9th Cir. 1986)) ("An arbitrator's award must be upheld unless it is 'completely irrational' or it constitutes a 'manifest disregard for law.' ").

126. *See* Stipanowich, *supra* note 9, at 440 (noting that the "manifest disregard" standard is rarely applied to overturn an award because courts will not "pry" into the arbitrator's legal conclusions). *See also* Brunet, *Constitutional Rights*, *supra* note 32, at 87-88 (stating that while early cases were sometimes set aside for "manifest disregard" of the law, courts currently refuse to vacate arbitration awards on these grounds).

127. J.A. Jones Const. Co. v. Flaht, Inc., 731 F. Supp. 1061 (N.D. Ga. 1990). Similarly, the Second Circuit reversed a district court's decision that an arbitration award be remanded so that the arbitrators could sufficiently explain their award in order to permit judicial review. Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972). The arbitrators, the Second Circuit held, have no duty to explain their award and such an obligation would undermine the very purpose of arbitration. *Id.* at 1215.

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B. ARBITRATOR RELATIONSHIPS AND CONDUCT

Statutory authority for vacating an arbitration award is similarly narrow in order to minimize judicial involvement and immunize awards from attack.[128] Courts may vacate an award upon the application of any party where: (1) the arbitrators were evidently partial or corrupt; or (2) the arbitrators were guilty of any other misbehavior that prejudiced the rights of any party.[129]

As a concept, "evident partiality" has proved elusive and no court has been able to formulate an exact legal standard.[130] However, as applied by the courts, "evident partiality" focuses on an arbitrator's bias.[131] "Evident partiality" may be applied to vacate arbitration awards on the ground that an arbitrator maintained an undisclosed business relationship[132] with parties or their agents.[133] Vacating an award because of something other than a business or social relationship is rare.

Commonwealth Coatings Corp. v. Continental Casualty Co., the seminal case reviewing appropriate arbitrator conduct, delineated the boundaries of acceptable arbitrator partiality in deciding "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitra-

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128. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), *cert denied*, 464 U.S. 1009 (1983) (noting that the standards for judicial intervention in arbitration proceedings are narrowly drawn to assure the basic integrity of the process without undue meddling); Blue Tee Corp. v. Koehring Co., 754 F. Supp. 26, 30 (S.D.N.Y. 1990) (noting the Second Circuit's policy of reading narrowly judicial authority to vacate arbitration awards).

The FAA also provides for vacating an arbitration award for corruption, fraud, or undue means and where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award was not made. 9 U.S.C. § 10 (1993). The standard of corruption, fraud, or undue means is less directly related to predisposition of party-appointed arbitrators and is, therefore, beyond the scope of this Article.

129. 9 U.S.C. § 10(a)(1)-(3). *See also* Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980) (holding that a district court cannot entertain an attack on the qualifications or partiality of an arbitrator until after the conclusion of the arbitration and rendition of an award).

130. Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88, 96 (R.I. 1991).

131. The FAA provides: "[E]vident partiality or corruption in the arbitrators, or either of them is an independent ground under the FAA for vacating an arbitration award." 9 U.S.C. § 10(b) (1993).

132. The neutral arbitrator, but not the party-appointed arbitrators, is to disclose to the AAA "any circumstance likely to affect impartiality, including any bias or financial or personal interest in the arbitration" or relationships with the parties or their representatives. COMMERCIAL ARBITRATION RULES Rule 19.

133. *See* Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 700 (2nd Cir. 1978) (holding that award should be confirmed although the neutral arbitrator failed to disclose that he had sat on nineteen arbitration panels with the president of one of the firms involved in the arbitration and in twelve of these panels the president had been one of the arbitrators who had selected him to be the neutral); International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551 (2d Cir. 1981) (stating that award was confirmed even though neutral arbitrator had been a witness in another case between the same law firms that were trying the arbitration matter before him).

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tion."[134] In *Commonwealth Coatings*, a subcontractor submitted a dispute with the prime contractor to tripartite arbitration.[135] The neutral arbitrator was a consultant who had provided services to one of the parties on several occasions, including the very project involved in the dispute. In a plurality decision, the Court stated:

> [A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.[136]

The plurality, therefore, vacated the award on the grounds that the neutral arbitrator demonstrated "evident partiality" in failing to disclose his prior relationship with one of the parties. Justice White's concurring opinion, however, moving away from the majority's strong view of arbitrator ethics, stated that "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges."[137] Nor are arbitrators who disclose their relationship with the parties in advance subject to automatic disqualification from serving as an arbitrator.[138] Moreover, arbitrators are not automatically disqualified by a business relationship with the parties.[139] Justice White's concurrence cautions the judiciary to "minimize its role in arbitration as judge of the arbitrators' impartiality. . . . That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business."[140] The effect of the concurrence is to relegate the "impression of bias" language to dictum and to create significant confusion as to the parameters of acceptable arbitrator behavior.[141]

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134. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) (plurality opinion), *reh'g. denied*, 393 U.S. 1112 (1969). Although the Court cited 9 U.S.C. § 10(a) (corruption, fraud or undue means) as part of its reason for vacating the award, the main impact of this decision came under § 10(b) (evident partiality). Unfortunately, *Commonwealth Coatings* provides little guidance because of the inability of a majority of the Court to agree on anything other than the result.

135. *Id.* at 145.

136. *Id.* at 150.

137. *Id.* (White, J., concurring).

138. *Id.*

139. *Id.*

140. *Id.* at 151 (White, J., concurring).

141. *See* Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82-83 (2d Cir. 1984) (opining that the result of the *Commonwealth Coatings* failure to achieve consensus exhibits ongoing uncertainty as to the appropriate standard to apply to arbitrator relationships and misconduct).

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It is generally accepted that the mere "appearance of bias" standard referred to by the *Commonwealth Coatings* plurality is too stringent for any arbitrator.[142] Most federal circuit courts have concluded that evident partiality requires more than an appearance of bias but less than actual bias.[143] The emerging standard of judicial review is that a reasonable person would have to conclude that the neutral arbitrator was partial or exhibited conduct, attitude, or disposition favoring one party for vacation to be proper.[144] To set aside an award for partiality, the moving party must show an interest or bias that is "direct, definite and capable of demonstration rather than remote, uncertain or speculative."[145] To vacate an arbitration award where nothing more than an appearance of bias is alleged would be to "automatically disqualify the best informed and most capable potential arbitrators."[146]

Despite the emergence of a cloudy standard from the *Commonwealth*

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142. *See id.* at 84 (holding that 9 U.S.C. § 10 requires more than the mere "appearance of bias" to vacate an arbitral award); Peoples Security Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993) (stating mere "appearance of bias" insufficient to demonstrate evident partiality); Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992) (holding the "appearance of bias" insufficient to demonstrate evident partiality); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (holding that a party must show that "a reasonable person would conclude that an arbitrator was partial to the other party" to invalidate an arbitration award for bias).

143. *See Health Services*, 975 F.2d at 1264 (holding that relationship between arbitrator and party must be "so intimate — personally, socially, professionally, or financially — as to cast serious doubt on the arbitrator's impartiality") (internal quotations omitted); *Apperson*, 879 F.2d at 1358 (rejecting the exacting standard of "proof of actual bias"); *Morelite*, 748 F.2d at 82 (suggesting that "proof of actual bias" would prove an insurmountable burden for moving party); Sheet Metal Workers Int'l Ass'n Local Union #420 v. Kinney Air Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985) (adopting a "reasonable impression of partiality" standard); Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88, 96 (R.I. 1991) (asserting that evident partiality requires a showing of "less than actual bias").

144. *See Commonwealth Coatings*, 393 U.S. at 154 (Fortas, J., dissenting) (arguing that " 'Evident partiality' means what it says: conduct — or at least an attitude or disposition — by the arbitrator favoring one party rather than another"); *Peoples Security*, 991 F.2d at 146 (adopting a standard that "a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration") (internal quotations omitted); *Sheet Metal Workers*, 756 F.2d at 746 (moving party must establish "reasonable impression of partiality"); *Morelite,* 748 F.2d at 84; Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993) (stating that arbitral awards can be set aside for conduct that creates "a reasonable appearance of bias"); Reichman v. Creative Real Estate Consultants, Inc., 476 F. Supp. 1276, 1284 (S.D.N.Y. 1979) (finding that "evident partiality" standard is "confined to situations where the arbitrator has had dealings with one of the parties that might cause him to be biased").

145. Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1200 (7th Cir. 1980) (quoting United States Wrestling Fed'n v. Wrestling Division of the AAU, Inc., 605 F.2d 313, 318 (7th Cir. 1979)). *See also People's Security*, 991 F.2d at 146 (holding that moving party must establish bias or interest in order to set aside an arbitral award); Florasynth, Inc. v. Pickholz, 750 F.2d 171, 173-74 (2d Cir. 1984) (same).

146. International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 552 (2d Cir. 1981) (quoting *Commonwealth Coatings*, 393 U.S. at 150).

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Coatings opinion, courts still adopt a case-by-case approach to reviewing arbitration awards under section 10 of the FAA. A great degree of analytical manipulation of the applicable standard and the facts of each case occurs to preserve the judicial aversion to vacating an arbitration award.

The practical effects of the standard are a refusal to vacate in the majority of cases and a preoccupation with the disclosure of an arbitrators' ties with the parties and their representatives rather than with the nature of the relationships themselves. A relationship between the arbitrator and the party or its representatives is unlikely to be the source of vacation of an award unless the alliance is out of the ordinary course of business and is so "intimate — personally, socially, professionally, or financially — as to cast serious doubt" on the arbitrator's impartiality.[147]

Arbitrators are required to disclose any interest or bias which might affect their judgment.[148] Nonetheless, arbitrators are not required to give "complete and unexpurgated" business biographies.[149] Despite the nature of the challenged relationship, courts will often refuse to vacate when the relationship, although undisclosed, was known by the party or its employees[150] or where the parties failed to object in a timely manner.[151]

In reviewing the challenged relationships of party-appointed arbitrators, the courts apply an even lower standard than they apply to neutrals. Many courts refuse to find a non-neutral arbitrator capable of evident partiality as a result of his relationships with parties or their representatives since "arbitrators are men of affairs" and, under AAA rules, non-neutral arbitrators are permitted to be predisposed toward their nominating party. Courts reason that party-appointed arbitrators, almost by definition, have inextricable ties to the industry from which they were plucked.[152] It is because of a

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147. *Health Services*, 975 F.2d at 1264. *See also* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), *cert denied*, 464 U.S. 1009 (1983) (noting that courts often refuse to vacate on the grounds of a prior business relationship where the arbitrator had no possible financial stake in the outcome of the arbitration). *But see Aetna Casualty*, 590 A.2d at 88 (refusing to vacate an award where the arbitrator did have a direct financial stake in the outcome of the arbitration through a contingent fee arrangement on the ground that there was no showing that the improper behavior affected the outcome of the arbitration).

148. Sanko S.S. Co. v. Cook Indus., 495 F.2d 1260 (2d Cir. 1973).

149. *Commonwealth Coatings*, 393 U.S. at 152 (White, J., concurring); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1275 (2d Cir. 1971). *See also Merit Insurance Co.*, 714 F.2d at 678 (stating that the disclosure of every former social or financial relationship with a party or its principals is not required).

150. *See* Cook Indus., Inc. v. C. Itoh & Co., Inc., 449 F.2d 106 (2d Cir. 1971) (holding that party could not challenge an arbitrator for bias where he knew of otherwise improper relationship).

151. *Health Services*, 975 F.2d at 1263 (finding that objection made on second day of hearing but two months after party first learned of relationship between two out of three arbitrators and the prevailing party was untimely).

152. *See* Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759 (11th Cir. 1993) (stating that party-appointed arbitrator's conduct in communicating with its representatives is commonplace).

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non-neutral arbitrator's connections to the business community that the parties have contracted to resolve disputes before a tripartite panel. Courts view the inclusion of a non-neutral arbitrator in the process as a conscious choice among the parties to trade off expertise for impartiality.[153] In essence, the courts view the non-neutral arbitrator's relationships with the parties and their representatives to be that for which the parties bargained. As a result, these ties almost never rise to the level of "evident partiality" and, thus, cannot be the basis for overturning an arbitration award.

Arbitration awards are also subject to vacation, under the FAA, on the grounds of arbitrator misconduct or misbehavior.[154] These standards refer more directly to the conduct of the arbitrators in pursuing their duties. To be grounds for vacation, the misconduct or misbehavior must rise to the level of a denial of fundamental fairness in the arbitration proceeding and must have influenced its outcome.[155] Although the "misconduct" or "misbehavior" standards for reviewing arbitrator conduct have afforded greater success to the parties challenging awards than to parties challenging the non-neutral arbitrators' relationships, courts still hesitate to vacate arbitral awards.

In limited instances, parties have been successful in challenging a party-appointed arbitrator's conduct when the arbitrator received evidence outside the confines of the arbitration proceedings.[156] In *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, the Fifth Circuit reversed an AAA arbitration award because a party-appointed arbitrator, with the apparent approval of the other two arbitrators, contacted counsel for one of the parties after the close of the formal proceedings. The panel then

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153. *See* Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984) (stating that "[f]amiliarity with a discipline often comes at the expense of complete impartiality").

154. 9 U.S.C. § 10(a)(3) (stating that award may be vacated where arbitrator was guilty of misconduct in refusing to postpone the hearing, in refusing to hear pertinent evidence, and for any other misbehavior where the rights of a party have been prejudiced). In focusing on conduct specific to party-appointed arbitrators, this Article focuses on the "any other misbehavior" language of the statute. Courts view challenges under this subsection of the statute largely as challenges to procedural irregularities and, therefore, rarely vacate awards under subsection (a)(3).

155. *See* M & A Electric Power Cooperative v. Local Union No. 702, Int'l Bhd. of Electrical Workers, 977 F.2d 1235, 1237 (8th Cir. 1992) (stating that outside the record consultation by arbitrator did not taint the process and did not constitute misconduct); Roche v. Local 32B—32J Serv. Employees Int'l Union, 755 F. Supp. 622, 624 (S.D.N.Y. 1991) (holding that arbitrator misconduct must amount to a denial of fundamental fairness of the arbitration proceeding to justify vacating an award); Grahams Serv., Inc. v. Teamsters Local 975, 700 F.2d 420, 422 (8th Cir. 1982) (finding that vacation of an award is only proper if an error "so affects the rights of a party that it may be said that he was deprived of a fair hearing").

156. Rule 31 of the *Commercial Arbitration Rules* states that "[a]ll evidence shall be taken in the presence of all the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present." COMMERCIAL ARBITRATION RULES Rule 31.

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rendered an award based in part on this ex parte receipt of evidence.[157] The Fifth Circuit concluded that the panel violated *Commercial Arbitration Rule* 31 and vacated the award, stating:

> Evidence was received from North American's counsel out of Totem's presence when the telephone call was made and the figure given by North American was adopted by the arbitrators as the basis for their computations. Totem neither defaulted nor waived its rights, but instead, timely filed a motion to vacate in district court. The arbitration rules provide specific procedures for the receipt of evidence and the close of hearings, procedures violated by the ex parte communication with North American .... The ex parte receipt of evidence bearing on this matter constituted misbehavior by the arbitrators prejudicial to Totem's rights in violation of 9 U.S.C.A. sect. 10(c).[158]

Neither this prohibition nor this opinion, however, reflects a judicial willingness to strengthen the prohibitions on party-appointed arbitrator misconduct. Moreover, party-appointed arbitrators have interpreted the vague and malleable FAA standards to permit a wide range of behaviors.

A recent Eleventh Circuit case further illustrates the courts' reluctance to vacate an arbitration award on the grounds of party-appointed arbitrator misconduct. In *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*,[159] Sunkist Growers, Inc. (Sunkist) licensed the use of its name to General Cinema Corporation (GCC) to produce and market an orange soda.[160] The agreement between Sunkist and the GCC's wholly-owned subsidiary, Sunkist Soft Drinks (SSD), contained an arbitration agreement requiring "any controversy or claim arising out of or relating to this Agreement or the breach thereof" to be settled by arbitration. The arbitration agreement further provided that the arbitration be conducted in accordance with AAA rules and that the tribunal be comprised of two party-designated arbitrators and a third neutral arbitrator.

SSD was later purchased by Del Monte Corporation and a subsequent dispute arose between Del Monte and Sunkist. The matter was forwarded to arbitration and Sunkist challenged the validity of the arbitration award on the grounds of alleged improper arbitrator conduct of Del Monte's party-appointed arbitrator, Jesse Meyers.

During the time leading up to the arbitration hearing, Mr. Meyers had met with Del Monte's counsel and other representatives to prepare for the hearing. He also attended and participated in meetings with six Del Monte

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157. Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649, 652 (5th Cir. 1979).

158. *Id.* (footnotes omitted).

159. 10 F.3d 753 (11th Cir. 1993).

160. *Id.* at 755.

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arbitration witnesses before the arbitration. Sunkist further alleged that Mr. Meyers suggested lines or areas of testimony to fact witnesses, helped select one of Del Monte's consultants, and advised an expert witness on how to improve charts related to the expert's testimony.

Sunkist challenged Mr. Meyers' behavior as violative of the FAA's standards of evident partiality and misconduct and as improper under the AAA *Commercial Arbitration Rules* and *Code of Ethics*. The Eleventh Circuit was not persuaded by this argument. It reasoned that the witnesses interviewed by Mr. Meyers were not placed under oath, and therefore, Mr. Meyers could not be considered to have received evidence ex parte in violation of the FAA and the *Commercial Arbitration Rules*. Moreover, the court echoed prior decisions on arbitrator conduct, opining that "Mr. Meyers' conduct was not only unobjectionable, but commonplace."[161] The court trivialized Mr. Meyers' behavior, stating that "[i]t would be unrealistic to expect a party engaged in an arbitration dispute to nominate an arbitrator without telling him what the dispute is about."[162]

The court, clearly underwhelmed by the charges of Mr. Meyers' improper behavior, stated that "there was no evidence that the award itself was based upon evidence or documents not before the arbitration panel."[163] The court thus concluded that it "failed to see how this prejudiced Sunkist or affected its right to a fair hearing. . . . [A] party-appointed arbitrator is permitted, and should be expected, to be predisposed toward the nominating party's case."[164]

In contrast, a district court in Connecticut took an unusual stance vis-a-vis non-neutral arbitrators. In *Metropolitan Property and Casualty Co. v. J.C. Penney Causalty Insurance Co.*,[165] Metropolitan Property sought to disqualify J.C. Penney's party-appointed arbitrator on the grounds that he met with J.C. Penney officials prior to being selected as an arbitrator. Specifically, Metropolitan Property alleged that the arbitrator:

> engaged in *ex parte* meetings with Penney officials about the pending arbitration, discussed the merits of Penney's case, and accepted "hospitality" from Penney without giving notice to Met[ropolitan Property] . . . . [Furthermore, the arbitrator] received documentary evidence from Penney regarding "material facts of the dispute" prior to being selected to the panel and without giving notice to Met[ropolitan Property]; . . . attempted to discuss the substance of these ex parte communications with the arbitrator named by Met prior to the selection of the third "neutral" arbitrator; and . . . engaged in deliberations and considered material

161. *Id.* at 759.
162. *Id.*
163. *Id.*
164. *Id.* at 760.
165. 780 F. Supp. 885 (D. Conn. 1991).

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> evidence received from Penney prior to the selection of the full arbitration panel.[166]

The court agreed that these ex parte meetings and examination of documents constituted overt misconduct and were contrary to the procedures agreed upon in the applicable contract as governing the arbitration hearing.[167] J.C. Penney's arbitrator violated the rule that an arbitrator must disclose "any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator."[168] The court held that this conduct was evidence of sufficient misconduct or misbehavior and evident partiality to support vacation of the arbitration award pursuant to section 10 of the FAA.[169] Under this reasoning, *Metropolitan Property* is an anomalous judicial opinion which suggests that the prohibitions against evident partiality and misconduct are equally applicable to a party-appointed arbitrator.[170]

The decisions in *Metropolitan Property*, *Sunkist Soft Drinks*, and *Totem Marine* are difficult to reconcile. The party-appointed arbitrators in each case behaved as advocates rather than judges and involved themselves in the preparation of the case. Although the party-appointed arbitrator in *Metropolitan Property* received documentary evidence prior to the selection of the full panel and the non-neutral in *Sunkist Soft Drinks* had contact with parties and witnesses primarily after the full panel of arbitrators had been appointed, the issue of the misconduct's timing should not be decisive in weighing impartiality and fairness in judging. A review of Mr. Meyers' conduct in *Sunkist Soft Drinks* would suggest that Mr. Meyers received, at a minimum, ex parte evidence. Yet the court, unpersuaded by this, held that Mr. Meyers' behavior did not amount to misconduct. The courts' rationalization of Mr. Meyers' conduct was made possible by the FAA's vague and

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166. *Id.* at 890

167. *Id.* at 893.

168. *Id.* at 890 (citing Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968) (plurality opinion), *reh'g. denied,* 393 U.S. 1112 (1969)). Canon II(A) of the *Code of Ethics* provides that:

> persons requested to serve as arbitrators [must] disclose any financial or personal interest in the outcome of the arbitration and any financial, business, professional, family, or social relationships which are likely to affect impartiality or which might reasonably create an obligation to disclose interests or relationships. . . . [This] is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

CODE OF ETHICS Canon II(A).

169. *Metropolitan Property*, 780 F. Supp. at 890.

170. *See id.* at 893 (stating that "even a party-appointed arbitrator in the tripartite context has a responsibility not only to the parties but to the process itself, and must observe high standards of conduct so the integrity and fairness of the process will be preserved") (quotations omitted).

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malleable standards. Courts are inclined to view party-appointed arbitrator conduct along the lines of the Eleventh Circuit in *Sunkist Soft Drinks*. Consequently, courts permit non-neutral arbitrators to communicate with his nominating party;[171] conduct independent reviews of the site at issue in the litigation;[172] meet with party witnesses;[173] prepare witness testimony;[174] prepare arbitration exhibits and predecide the issues in the underlying arbitration.[175]

C. SUMMARY

The result of the courts' reluctance to review arbitrator behavior is the tacit approval of this conduct. While courts justify their laissez-faire approach toward reviewing arbitrator improprieties as consistent with and in furtherance of the goal of supporting arbitration, this judicial reluctance to oversee the arbitral process must be viewed critically.

The courts' approach toward challenges to arbitral awards on the basis of arbitrator relationships or misconduct suggests an unwillingness to restrain, in any meaningful way, an arbitrator's behavior. Rather, it denotes a willingness to apply a lesser standard of ethical behavior to arbitrators than is applied to judicial officers. This approach permits a court to use arbitration to reduce its docket while neglecting to monitor the arbitration process itself.

Permitting non-neutral arbitrators to engage in advocacy and to prejudge cases reduces the public's confidence in the fairness of the system and ensures that arbitration remains inferior to litigation.[176] The continued relegation of arbitration to an inferior status, exhibits the courts' historical distaste for arbitration. The judiciary's mistrust of arbitration is manifested in its willingness to accept biased arbitrators' involvement in the process and its refusal to raise the standards of partiality and misconduct.

A wholly supportive view of arbitration would necessarily have to apply guidelines to party-appointed arbitrators that demand the same level of

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171. *See* Stef Shipping Corp. v. Norse Grain Co., 209 F. Supp. 249, 253 (S.D.N.Y. 1962) (refusing to find arbitrator misconduct where the party-appointed arbitrator had conferred only with his nominating party and was given documentary evidence by his nominating party before the start of the arbitration hearing).

172. *See* Anderson v. Nichols, 359 S.E.2d 117, 199 (W. Va. 1987) (finding no prejudicial misconduct where a party-appointed arbitrator had a single contact with the site at issue, and both party-appointed arbitrators had business dealings with their nominating party).

173. *See, e.g.*, Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 756 (11th Cir. 1993) (holding that a party-appointed arbitrator's contact with appointing party's witnesses and participation in hearing preparations was appropriate).

174. *Id.*

175. *Id.*

176. The courts' approach to non-neutrals lends concrete support to Professor Fiss' astute observation that "adjudication is more likely to do justice than . . . arbitration." Fiss, *supra* note 37, at 1673.

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impartiality as is required of other decisionmakers. Judges demand impartiality and neutrality from their ranks, yet simultaneously insist that the integrity of the arbitral process is not undermined by arbitrators who are predisposed toward their selecting party. Permitting arbitrations to be conducted by arbitrators who are allowed to meet with witnesses, prepare exhibits, and assist in case preparation "ghettoizes" arbitration, thereby maintaining a tiered system of dispute resolution that resigns arbitration to an inferior status when compared to litigation.

Courts should take a less deferential stance with respect to the limits of party-appointed arbitrator conduct. The rationale for accepting party-appointed arbitrators in their current role and the existing standards governing their conduct cannot withstand serious scrutiny. The rationales supporting non-neutral arbitrators articulated by the courts fail to justify the inclusion of party-appointed arbitrators in a judicially supported process.

This rationale includes, first and foremost, that the FAA standards for vacating arbitration awards provide sufficient protections. The FAA standards of "evident partiality" and "misconduct or misbehavior," as applied by the courts, fail to fully address the concerns inherent in permitting the inclusion of party-appointed arbitrators in a quasi-judicial process. The FAA's focus on the end product of arbitration fails to effectively police the process. The aim, in addition to overturning tainted awards, should be to more actively prevent inappropriate behavior.

In addition, the ambiguous and indeterminate nature of the standards permit widely divergent results from quite similar facts, as is apparent from *Metropolitan Property* and *Sunkist Soft Drinks*. There is only a fine line distinction between the prohibition against "evident partiality" and the allowance of predisposition. Predisposition is synonymous with bias and signifies an inclination, proclivity, or propensity toward one party prior to a full review of the action's merits. Conversely, predisposition also implies an aversion or dislike to the opposing party. It is difficult to ascertain what distinction, if any, can reasonably be drawn between partiality and predisposition that the courts may logically apply to ensure the integrity and fairness of the arbitral process. There is a similarly troubling incongruity between the bar's position against "misconduct or misbehavior" and the practical application of this standard by the courts.

A second rationale supporting the presence of party-appointed arbitrators is that the parties, having chosen arbitration through contract, bargained for all the consequences of their actions.[177] Arguments that arbitra-

177. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983), *cert denied*, 464 U.S. 1009 (1983) (asserting that "no one is forced to arbitrate a commercial dispute unless he has consented by contract").

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tion is a bargained-for substitute for litigation do not, however, necessarily justify the resolution of disputes by a predisposed panel of arbitrators. Only a tortured application of contract doctrine can impute to a party an intention to have disputes resolved in a forum that permits its judges to maintain a bias for or against a position without reference to the evidence. Moreover, this justification diminishes the reality that arbitration clauses are being agreed to by inexperienced laypersons and that "there exists a serious question whether experienced signatories to arbitration clauses truly consent to arbitration with any measure of understanding" about the legal, procedural, and ethical protections that are being given up.[178]

It is more logical to assume that parties, when agreeing to arbitrate, presume that party-appointed arbitrators are constrained by ethical rules similar to those which bind other fact finders.[179] Indeed, the text of section 10 of the FAA, which prohibits "evident partiality" and "misconduct or misbehavior," without reference to judicial interpretation of these standards, would support such an assumption. It seems unreasonable to assume that the casual arbitration user is sufficiently aware of the nuances of arbitration to anticipate the kind of arbitrator conduct that is often condoned by the courts. Parties with varying levels of arbitrating experience might not be bargaining for the same type of party-appointed arbitrator conduct, and there is nothing inherent in a standard arbitration clause to suggest otherwise. As Professor Brunet points out, the selection of an arbitration clause may be merely the selection of an out of court forum with no precise reference to mutually understood procedures, and "the implications of the word 'arbitrate' . . . are vastly different when one party . . . knows little or nothing about arbitration."[180]

Arguments that tripartite panels are acceptable because they represent the parties' choice also fail to consider that the parties, in choosing an alternative means of dispute resolution, choose the method which most closely mimics the trappings of a trial. Perhaps, arbitration is chosen in an effort to preserve many of the rights available to a trial participant, such as the opportunity to be heard before an impartial third party, while achieving the goals of speed, lower costs, and efficiency.[181]

Interpreting a party's contractual choice to arbitrate as a conscious decision to forego arbitrator neutrality and condone questionable arbitrator

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178. Brunet, *Constitutional Rights, supra* note 32, at 83, 104. Arbitration clauses have become standard in areas such as medical malpractice, auto insurance, and small business loans; they are routinely used by doctors, hospitals, car dealers, and brokerage houses. *Id.*

179. *See* Sponseller, *supra* note 93, at 437 (arguing that parties choosing arbitration do not consciously assume the risk of non-redressable arbitrator misconduct or bias).

180. Brunet, *Constitutional Rights, supra* note 32, at 104.

181. *But see* Fiss, *supra* note 79, at 1083 (arguing that settlement is not a "perfect substitute for judgment").

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activity may be too contrived an interpretation of the arbitration clause and of the parties' intent. Courts admonish parties who choose arbitration to be "content with its informalities . . . [and] with looser approximations to the enforcement of their rights than those that the law affords them."[182] Judicial decisions ring with the implicit goal of requiring parties to be self-reliant. Permitting dubious party-appointed arbitrator relationships and conduct enforces a false belief that, by the mere inclusion of an arbitration agreement, parties intend all negative consequences of the clause.[183] This analysis is unrealistic and untenable given the practical results of permitting non-neutrals to conduct themselves as advocates. The question remains, however, whether freedom of contract justifies the risks inherent in permitting non-neutral arbitrators to be predisposed toward their nominating party and to engage in the types of partisan conduct presently condoned by the courts. Participants to the arbitral process should be guaranteed a higher ethical standard than that which is currently imposed upon party-appointed arbitrators.

Beyond this dilemma, there remains the question of whether contractual analysis appropriately governs ethical issues. The difference in the ethical obligations of arbitrators and judges cannot be explained solely by contract doctrine. It is not clear that the voluntary nature of choosing arbitration through contract justifies this difference.

The third rationale justifying arbitration in its current state proposes that the informalities of arbitration serve the interests of justice and the public good.[184] Yet, it is the formalities inherent in litigation that serve to protect the participants from corrupt and partial judges.[185] Procedural and evidentiary rules, the *Code of Judicial Conduct*, and precedent all operate to protect participants in the process from the frailities of the process. Arbitration, however, is more easily abused, because it lacks these protections. Success or failure in arbitration turn on: the competence of counsel; the ability of the parties to select neutral arbitrators who will remain unswayed by the biases of the non-neutral arbitrators; and the ability to designate and utilize the party-appointed arbitrator as an advocate. In essence, the informal nature of arbitration may permit the final award to turn on a party's ability to manipulate the rules pertaining to non-neutral arbitrators[186] and,

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182. Reichman v. Creative Real Estate Consultants, Inc., 476 F. Supp. 1276, 1287 (S.D.N.Y. 1979).

183. *See id.* at 1282 (stating that parties choosing arbitration must be content with its informalities).

184. Korn, *supra* note 8, at 71.

185. *See* Delgado et al., *supra* note 1, at 1387-88 (citing empirical studies that found decision-maker bias to be counteracted by formal adjudication's processes).

186. *See* Mentschikoff, *supra* note 9, at 868-69 (asserting that parties who can manipulate the fine line distinction between predisposition and evident partiality so as to come within the FAA standards and avoid vacation of the award may achieve the best result).

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as a result, the participant's success in the arbitral process relies upon his individual savvy.[187] Constraining arbitrator behavior within clearly defined limits would help ensure fairness while allowing arbitration to retain the benefits of informality.

Fourth, many commentators justify the inclusion of party-appointed arbitrators in the arbitral process as the result of a clear but fair tradeoff between impartiality and expertise.[188] Professor Stipanowich explains that arbitrator knowledge and experience may be critical in reducing the time spent educating the arbitrators on subtle technical points.[189] He asserts that their backgrounds may prove decisive in increasing efficiency by enhancing the ability of the arbitrator to identify the significant issues and sharpen the focus of the hearing.[190] Courts have wholeheartedly adopted this view, stating that the parties to an arbitration choose their method of dispute resolution and can ask for no more impartiality than that inherent in the method they have chosen.[191] Yet, the foregoing argument assumes that the party-appointed arbitrator's specialized knowledge will be material in a majority of the cases. This assumption may not be true.

Ideally, non-neutrals are able to bring expertise that a judical officer may lack to a proceeding. However, the expansion of arbitration beyond industry-specific disputes to commonplace, contractual disputes reduces the validity of this argument.[192] Many arbitrated matters involve commonplace issues of contract interpretation requiring merely a straightforward determination of the rights and liabilities of the parties. Industry practice often has little or no bearing on these questions that may be adequately addressed without expert testimony or evidence.[193] Moreover, the reliance on party-appointed arbitrators may raise the distinct and distasteful possibility that the final

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187. Professor Fiss also notes that formal litigation lessens the impact of economic inequalities which, in turn, has a direct bearing on the quality of the presentation of a case, on who wins, and on the terms of victory. Fiss, *supra* note 79, at 1077.

188. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983).

189. *Id. See also* Stipanowich, *supra* note 9, at 436 (arguing that arbitration expertise would also reduce the possibility that the decision will be arbitrary or ill-informed and that such arbitrations would be less susceptible to lawyer artifice).

190. Stipanowich, *supra* note 9, at 436.

191. *See* American Almond Prod. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944) (asserting that when parties have adopted arbitration, they must not complain about its procedural infirmities); *Merit Insurance Co.*, 714 F.2d at 679 (noting that parties express a preference for expert, rather than impartial, decision makers by signing arbitration clauses).

192. *See* Brunet, *Constitutional Rights*, *supra* note 32, at 88 (remarking that while, historically, industry specific arbitrations may have relied upon and benefitted from the inclusion of arbitrators with special expertise, it is doubtful whether any modern arbitration expertise exists). Professor Brunet also notes that arbitration has expanded far beyond the merchant context in which expertise played an important role. *Id.* at 103.

193. *See* Mentschikoff, *supra* note 9, at 853 (examining the use of arbitration clauses in industries using standardized contracts).

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award may be based on industry-bred expectations of the individual arbitrators and not on the submitted evidence.[194]

Numerous instances exist, however, where the arbitrator's expertise serves a useful purpose and creates enormous tension between the ideal of impartiality and the desire for knowledgeable, experienced arbitrators.[195] This consideration alone, however, does not exculpate party-appointed arbitrator behavior present in cases such as *Metropolitan Property* and *Sunkist Soft Drinks*. As explored in greater detail earlier, it is possible to retain the expertise contributed by non-neutrals while reducing the risks of bias and prejudice.

The fifth rationale supporting party-appointed arbitrators is that the inclusion of non-neutrals has no detrimental effect since their presence is offset by the participation of a neutral arbitrator who often chairs the tripartite panel.[196] According to this view, the neutral arbitrator ultimately decides the case, and therefore, the non-neutral arbitrators have little or no effect on the outcome of the case.[197] This view is somewhat simplistic given that the presence of non-neutral arbitrators is not without effect. The neutral arbitrator may not understand the full nature of the relationship between the party-appointed arbitrator and his nominating party. Thus, the party-appointed arbitrator may effectively distort the case in favor of his nominating party during deliberations.

On the other hand, neutral arbitrators may assume that party-appointed arbitrators are partisan and reject their statements. The result is unfortunate if the party-appointed arbitrators possess knowledge which may, in fact, help to resolve the case. Non-neutral arbitrators also increase the danger of compromise. Party-appointed arbitrators may take positions during deliberations which compel the arbitrators to compromise in order to reach an award. The private nature of arbitration makes it impossible to determine the party-appointed arbitrator's impact and influence on the

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194. *See* Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929, 936-37 (1927) (arguing that leaving legal matters to an unqualified tribunal without adequate legal guidance is against public policy).

195. *See* International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 552 (2d Cir. 1981) (noting that "[t]he most sought after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute arose").

196. Karon, *supra* note 32, at 315; Mark McAlpine, *ADR in Large and Complex Cases*, 72 MICH. BAR J. 1054 (1993); Gold & Furth, *supra* note 7, at 320-21.

197. *See* Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88, 92, 96 (R.I. 1991). In *Aetna Casualty*, the court analyzed whether to vacate a tripartite arbitration award on the grounds that one of the party-appointed arbitrators exhibited evident partiality. The party-appointed arbitrator at issue in that appeal was retained by his nominating party to act as arbitrator under a contingent fee arrangement. *Id.* at 90. The court, while concluding that the contingent fee gave the arbitrator a direct financial interest in the award (and was therefore improper), nonetheless refused to vacate the award since the objecting party failed to demonstrate that the improper behavior affected the final award. *Id.* at 96.

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neutral arbitrator during the deliberations. However, one can safely assume that the party-appointed arbitrators have a significant impact upon the arbitration process by influencing witnesses, their testimony, and the presentation of evidence, and proponents should not dismiss their influence so readily.

Because of the informalities inherent in arbitration, the dominance of the AAA, and the reluctance of courts to review arbitration awards, party-appointed arbitrators have become the "untouchables" of dispute resolution. Lacking any real supervision or guidance, private citizens work to resolve their disputes in a highly informal structure without the protections of procedural, evidentiary, and substantive law.[198] The informalities inherent in arbitration magnify arbitrator bias and prejudice and exacerbate the troubling inconsistencies between permitting a "judge" to act as an advocate while simultaneously expecting him to decide the issues fairly.[199] Tripartite panels, therefore, stretch arbitration's integrity beyond the idealized goals of neutrality and impartiality and reduce the quality of justice provided in arbitration.

V. THE CALL FOR REFORM IN TRIPARTITE ARBITRATION

Meaningful reform must consider the competing interests within the arbitration system while increasing its quality.[200] On the one hand, parties choose arbitration in order to avoid the judicial system and may desire that some degree of expertise be represented on the panel. On the other hand, any system of justice, but especially one so closely intertwined with the federal courts, requires some degree of impartiality.[201] It is difficult to measure what is lost when one interest outweighs the other. Yet, it is

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198. *See* Brunet, *Quality of ADR, supra* note 16, at 20 (theorizing that litigation has been "privatized" by delegating the task of enforcing legal rights to citizens). I would argue, however that litigation remains a highly public form of dispute resolution regulated and administered not by citizens but by public officials.

199. One of the findings of Professor Delgado's pointed review of ethnic prejudice in ADR is that formal dispute resolution is better at deterring prejudice than informal adjudication. Delgado et al., *supra* note 1, at 1375. While this Article does not focus on racial bias, Professor Delgado's conclusion is equally applicable in analyzing the prejudice inherent in party-appointed arbitrators' participation in contractual arbitration.

200. One commentator has noted that "[i]f reform . . . benefits only judges, then it isn't worth pursuing. If it holds out progress only for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America." Edwards, *supra* note 48, at 684 (quoting Leon Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 138 (1976)).

201. It is interesting to note that a number of court-annexed arbitral systems require standards for arbitrator impartiality equal to that of Article III judges. *See* U.S. District Court, District of Connecticut, Rule 28; U.S. District Court, Eastern District of Pennsylvania, Local Rule 49; U.S. District Court, Northern District of California, Local Rule 500. *See also* Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 n.4 (2d Cir. 1984).

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reasonable to wonder whether non-neutral arbitrators are indeed a viable part of the arbitral system given the latitude provided to party-appointed arbitrators. Banning party-appointed arbitrators, while a solution to the problems they present, is an unlikely and drastic measure. The expertise offered by party-appointed arbitrators is a significant asset that can be preserved in a reformed process emphasizing neutrality. Party-appointed arbitrators also preserve the participants' ability to control the makeup of the panel. This degree of control is significant since participants and observers have long noted the AAA's inability to maintain updated lists of experienced and knowledgeable arbitrators. Reform must, therefore, attempt to preserve the best of both arbitration and litigation.[202]

Maintaining the goals of arbitration — speed, efficiency, and economy — is hindered rather than helped by the participation of party-appointed arbitrators. Uncertainty exists as to what behavior the courts will tolerate from arbitrators as well as which relationships are taboo. It is clear, however, that federal appellate courts are not inclined to set aside arbitral awards for inappropriate arbitrator behavior for fear of creating a tide of continually relitigated cases.[203] The judiciary's unwillingness to upset arbitral awards almost certainly leads parties and their counsel to push the limits of party-appointed arbitrator behavior as far as possible to assist the nominating parties in arising victoriously from the arbitration. Unfortunately, it is the repeat, experienced, and more savvy users of arbitration who best realize how elastic the boundaries of accepted arbitrator conduct can be.

Because of the deference accorded to party-appointed arbitrators, parties left shocked by an arbitrator's conduct and patent advocacy often seek redress in the courts. Ironically, the result is not less litigation, as the courts had hoped. Rather, parties seeking to vacate arbitration awards for arbitrator bias and prejudice have increased the courts' already crowded dockets.

The courts, therefore, have become a continual testing ground for fuzzy and lenient arbitrator conduct standards. Stricter controls over arbitrator conduct would serve a guidance function. Parties, potential arbitrators, and

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202. Professor Kanowitz notes that "[n]either judicial nor alternative dispute resolution devices (including arbitration) are flawless, each method has strengths and weaknesses and choosing one over another inevitably requires trade-offs, calculations of relative costs and benefits and a variety of value judgments." Kanowitz, *supra* note 10, at 242.

203. Brunet, *Quality of ADR*, *supra* note 16, at 1-2 (noting that the First Wave of ADR analysis focused on ADR as a means of reducing the explosion of litigation and court dockets); Kanowitz, *supra* note 10, at 250 (stating that the FAA describes only narrow, technical grounds for review); Stipanowich, *supra* note 9, at 439 ("Arbitration awards are meant to be final."); Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 593 (1988); Kim Karelis, Note, *Private Justice: How Civil Litigation Is Becoming a Private Institution — The Rise of Private Dispute Centers*, 23 SW. U. L. REV. 621 (1994) (noting that conflicts may arise when an arbitrator has personal or business relationships with parties — especially where this leads the arbitrator to favor large, repeat clients).

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lawyers would become informed of the parameters of proper arbitrator behavior once such controls are clearly implemented.[204] Armed with clearer boundaries for arbitrator behavior, participants could plan accordingly, and arbitrator behavior would be challenged less frequently.[205] Parties who are cost conscious could select impartial arbitrators whose decisions are unlikely to invite unnecessary appeals.

A number of courts discussing this issue reason that requiring more stringent ethical rules "would make it impossible in some circumstances, to find a qualified arbitrator at all."[206] While this argument supports not limiting an arbitrator's business relationships too severely, it fails to justify allowing party-appointed arbitrators to engage in the type of conduct which is currently permitted. The party-appointed arbitrator's role as a paid advocate is not a necessary cost of obtaining qualified, experienced arbitrators. Moreover, controlling and constraining arbitrator behavior would not exclude qualified arbitrators.

In addition, lines may be drawn between arbitrators with experience in the trade and arbitrators with direct ties to the parties or their representatives in that litigation. Most industries are broad enough to permit such a distinction. If not, the inevitable analytical choice must be made between some level of expertise and impartiality as the more desired goal of dispute resolution. In order for arbitration to be fully accepted as an equal to litigation, sacrificing impartiality at the expense of expertise cannot occur.

Public confidence and integrity are essential to the effective functioning of any system that seeks to mete out justice.[207] If arbitration is to be a truly respected and viable alternative to the established judicial system, it must instill a sense of fairness and equity equal to that of the judicial system.[208] "Therefore, an arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved."[209] Despite the relative informality inherent in arbitration, arbitra-

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204. Professor Brunet comments on the importance of "bright line" rules in ordering behavior. Brunet, *Quality of ADR*, *supra* note 16, at 23-24

205. One author has asserted that "in increasing numbers, parties are going to court to have arbitration awards vacated on the grounds of partiality of bias of the arbitrator." Steven J. Goering, Note, *The Standards of Impartiality as Applied to Arbitrators by the Federal Courts and Code of Ethics*, 3 GEO. J. LEGAL ETHICS, 821, 821 (1990) (comparing the standard of impartiality to which arbitrators are held with the standard applied to federal judges).

206. Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984).

207. This concept has been recognized as significant in the analysis of judicial ethics and disqualification law. Bloom, *supra* note 4, at 662.

208. Canon I(A) of the *Code of Ethics* echoes this sentiment. This Article seeks to provide the means by which to achieve this laudable objective set by the AAA.

209. Bloom, *supra* note 4, at 662.

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tors should nonetheless afford the parties "a fundamentally fair hearing" including impartial decisionmakers.[210] The *Code of Judicial Conduct*, for example, could provide guidance in drafting a more restrictive ethical code for party-appointed arbitrators.[211]

VI. CONCLUSION

This Article, therefore, takes issue with the assumption that the role of judging party-appointed arbitrators is best left to the parties as the architects of their own arbitration process.[212] The potential for arbitration as a means of dispute resolution is unnecessarily hindered by the current rules for party-appointed arbitrators. Party-appointed arbitrators reduce the effectiveness of arbitration as well as the quality of justice achieved. Heightening internally and externally imposed standards of appropriate non-neutral behavior will improve the quality of arbitration and will more likely result in fair arbitration before a fair tribunal.

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210. Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979) (quoting Bell Aerospace Co. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974)). In his article reviewing arbitration in colonial America, Professor Mann reaches a compelling conclusion which is equally applicable here, that "societies get the law they deserve." Mann, *supra* note 23, at 481. Professor Mann's statement raises the question of how a predisposed decisionmaker reflects upon America's society and judicial system.

211. *See* United States Wrestling Fed'n. v. Wrestling Division of the AAU, Inc., 605 F.2d 313, 319 (7th Cir. 1979) (applying Canon 3 of the *Code of Judicial Conduct* for federal judges to review a neutral arbitrator's failure to disclose).

212. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 151 (1968), *reh'g. denied*, 393 U.S. 1112 (1969).

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