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## Search to Clarify an Elusive Standard: What Relationships between Arbitrator and Party Demonstrate Evident Partiality - ANR Coal Co. v. Cogentrix of North Carolina, Inc., The

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# NOTES

## The Search to Clarify an Elusive Standard: What Relationships Between Arbitrator and Party Demonstrate Evident Partiality?

*ANR Coal Co. v. Cogentrix of North Carolina, Inc.*<sup>1</sup>

### I. INTRODUCTION

In the sophisticated and often complex world of business, many disputes are now resolved through arbitration, which often requires at least one neutral arbitrator. Ideally, the arbitrator should be knowledgeable about the field in which the dispute arises so that the arbitrator may best render an informed and just award. Often, an arbitrator who is knowledgeable in the field inevitably has some previous business relationships with one of the parties to the arbitration.<sup>2</sup> If these relationships are not discovered or disclosed prior to the arbitration proceeding, then a party might claim the arbitrator was partial to the party with whom she had prior relationships and seek vacatur of the arbitration award based on the arbitrator's evident partiality. When this situation arises, a standard must be applied to determine whether the arbitrator is partial, or whether the prior relationships are so unsubstantial and trivial as to deem the arbitrator impartial.

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,<sup>3</sup> the Supreme Court adopted a standard to determine and define an arbitrator's evident partiality in arbitration proceedings. Lower courts have relied on the Court's treatment of the issue, but this reliance has proved problematic, and led to both federal and state courts adopting inconsistent standards of evident partiality. This Casenote will examine the problems of *Commonwealth*, its impact on the standards of arbitrator partiality over the past thirty years, its continuing influence on the recent Fourth Circuit Court of Appeals decision in *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, and the future of *Commonwealth* as continuing precedent.

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1. 173 F.3d 493 (4th Cir. 1999).

2. See *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968).

3. 393 U.S. 145 (1968).

## II. FACTS AND HOLDING

ANR Coal Co. (“ANR”) filed a civil complaint in the United States District Court for the Western District of North Carolina seeking to vacate an arbitration award arising from an arbitration between itself and Cogentrix of North Carolina (“Cogentrix”).<sup>4</sup> The initial dispute, which was the subject matter of the arbitration, centered around a contract between ANR and Cogentrix, whereby Cogentrix agreed to purchase coal from ANR.<sup>5</sup> When Cogentrix failed to purchase the entire contracted amount due to reasons it felt were unavoidable, ANR initiated an arbitration proceeding to settle the dispute per the arbitration provision in the contract.<sup>6</sup>

The arbitration clause in the contract between ANR and Cogentrix allowed each party to choose one arbitrator, who would then choose a neutral, third arbitrator.<sup>7</sup> Pursuant to the Commercial Arbitration Rules of the American Arbitration Association (“AAA”), the AAA provided a list of possible neutral arbitrators, one of which was Wilburn Brewer.<sup>8</sup>

ANR objected to Brewer as a candidate because Brewer’s firm represented Carolina Power & Light Company (“Carolina Power”), a primary customer of Cogentrix.<sup>9</sup> The AAA rejected ANR’s objection, however, citing that Brewer’s firm only represented Carolina Power in “electrocution cases . . . which are sporadically filed,” and Brewer never worked on a Carolina Power case.<sup>10</sup> After the parties ranked the candidates, Brewer was chosen as the neutral arbitrator.<sup>11</sup>

In December of 1996, the AAA sent a letter to both parties announcing Brewer as the neutral arbitrator and disclosures about Brewer.<sup>12</sup> The only disclosure stated that Brewer’s firm and the firm who presently represented Cogentrix in the arbitration proceedings, Moore & Van Allen, merged from approximately 1987 to 1988.<sup>13</sup> During the time of the merger, Brewer was ill and not “actively practicing law or involved with the firm.”<sup>14</sup> The letter by the AAA further stated that Brewer was confident that this short merger would not affect his impartiality to hear and determine the dispute.<sup>15</sup>

With Brewer in the majority, the arbitrators ruled two to one for Cogentrix.<sup>16</sup> ANR subsequently filed a civil complaint with the United States District Court for

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4. 173 F.3d at 495.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 496.

9. *Id.* This was the only time that ANR ever objected to Brewer, although it was given the opportunity later. ANR stated that if it had objected to Brewer, then “a failed challenge could potentially offend the ‘neutral’ arbitrator as a challenge to his integrity.” *Id.*

10. *Id.*

11. *Id.* Under the AAA’s rules, a party is allowed three peremptory strikes. ANR did not use any to strike Brewer. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

the Western District of North Carolina seeking to vacate the arbitration award, because the supposed neutral third arbitrator, Brewer, did not make a full disclosure.<sup>17</sup> In support of its complaint, ANR maintained that subsequent to the award, ANR discovered that Brewer's law firm, Nexsen, Pruet, Jacobs & Pollard, had previously represented Carolina Power in cases involving "the utility's right to deliver electric service."<sup>18</sup> This, ANR contended, was more than just representing "electrocution cases," as earlier disclosed.<sup>19</sup> ANR also argued that in 1988, Moore & Van Allen, while merged with Nexsen Pruet, represented Cogentrix, as it had in the present arbitration, and in 1983 Moore & Van Allen loaned money to Cogentrix in exchange for stock warrants in Cogentrix.<sup>20</sup> ANR complained that these nondisclosures constituted a "basis for vacating the arbitration award" or, in the alternative, demonstrated "evident partiality."<sup>21</sup> The magistrate judge vacated the arbitration award.<sup>22</sup>

In reversing the district court's decision, the Fourth Circuit Court of Appeals held that an arbitrator's failure to disclose prior relationships with a party to the arbitration does not automatically justify vacatur, unless such relationship would make "a reasonable person . . . conclude than an arbitrator was partial to the other party to the arbitration."<sup>23</sup>

### III. LEGAL BACKGROUND

It is well-recognized that an arbitrator is obligated to disclose personal or professional information that might deem her partial or biased.<sup>24</sup> However, mere nondisclosure does not normally warrant vacatur.<sup>25</sup> In order to vacate an award because of an arbitrator's alleged bias, the party seeking vacatur must show that the arbitrator demonstrated "evident partiality."<sup>26</sup> In 1968, the United States Supreme

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 497, 500.

22. *Id.* at 496.

23. *Id.* at 500 (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995) (internal quotation marks and citations omitted)).

24. COMMERCIAL ARBITRATION RULES Rule 19 (American Arbitration Assoc. 1996) (amended 1999); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon 2 (American Arbitration Assoc. 1977).

25. See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) (stating courts are reluctant to vacate awards when an arbitrator fails to disclose a relationship with a party); *Hobet Mining, Inc. v. International Union, United Mine Workers of Am.*, 877 F. Supp. 1011, 1019 (S.D. W.Va. 1994) (finding the "failure [to disclose] may justify setting aside an award") (emphasis added); *Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 317 (S.D.N.Y. 1987) (holding that courts are reluctant to vacate an arbitration award because of nondisclosure).

26. Federal Arbitration Act, 9 U.S.C. § 10 states in part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . (2) Where there was evident partiality or corruption in the arbitrators, or either of them. 9 U.S.C. § 10 (1994).

Court sought to define evident partiality in *Commonwealth Coatings Corp. v. Continental Casualty Co.*<sup>27</sup>

In *Commonwealth*, the plurality opinion stated that because arbitrators have “free reign” in their rulings and because an arbitration award is not subject to appellate review, an arbitrator’s impartiality should meet the same standard as that of Article III judges.<sup>28</sup> The Court based its argument on rules which require nondisclosure in order to prevent not only biases, but the appearance of bias.<sup>29</sup> The high standard of Article III judges and the freedom given to arbitrators compels a standard such that evident partiality is demonstrated when an arbitrator, through her actions or nondisclosure, conveys an appearance or impression of bias.<sup>30</sup>

Justice White, in writing additional remarks to the plurality opinion, stated that the “Court does not decide today that arbitrators are to be held to the standards” of Article III judges.<sup>31</sup> In support, Justice White noted that “because [arbitrators] are men of affairs,” it is inevitable that knowledgeable arbitrators will have some business relationships.<sup>32</sup> As long as the relationships are unsubstantial, an arbitrator’s “trivial” relationships with a party should not foreclose the arbitrator from being considered neutral.<sup>33</sup>

It is clear that Justice White did not concur with the plurality’s opinion that arbitrators should be held to the same standard as Article III judges.<sup>34</sup> However, Justice White did not specifically disagree that an arbitrator demonstrates evident partiality when there exists an appearance of bias. Therefore, the lack of a clear five-justice majority subscribing to an appearance of bias standard has led to federal and state courts adopting inconsistent standards.

In *Schmitz v. Zilveti*,<sup>35</sup> a case of first impression for the Ninth Circuit Court of Appeals, the court attempted to synthesize the opinions in *Commonwealth* to determine an appropriate standard. The court first stated that *Commonwealth* is not a plurality opinion because Justice White wrote “additional remarks” to the “majority opinion” in which he joined.<sup>36</sup> The court further stated that although it appears there is a contradiction between the views expressed in Justice White’s opinion and the plurality opinion of *Commonwealth*, this contradiction is resolved when one considers that knowledgeable arbitrators will always have previous relationships with others in the field and, therefore, it must be that arbitrators and Article III

27. 393 U.S. 145 (1968).

28. *Id.* at 148-50. *Commonwealth* was a plurality opinion with four justices concurring in the plurality opinion and two justices concurring in the result but writing additional remarks. Therefore, although a majority of the justices concurred in the result, a majority of the justices did not concur in the plurality’s opinion. *Id.* at 145, 150.

29. *Id.* at 149-50. The Court cited early rules of the American Arbitration Association as well as the Canon of Judicial Ethics. *Id.*

30. *Id.* at 148-50.

31. *Id.* at 150. See *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984) (finding arbitrators held to “less stringent” standard than federal judges).

32. 393 U.S. at 150.

33. *Id.* at 150-51.

34. *Id.* at 150.

35. 20 F.3d 1043 (9th Cir. 1994).

36. *Id.* at 1045. But see, e.g., *Toyota of Berkeley v. Automobile Salesmen’s Union, Local 1095*, 834 F.2d 751, 755 (9th Cir. 1987) (stating that *Commonwealth* is a “plurality of the Supreme Court”).

judges cannot be held to equivalent standards.<sup>37</sup> Justice White's rejection of the plurality's opinion that arbitrators are not held to the same standard as Article III judges does not imply Justice White also rejected the appearance of bias language in the plurality's opinion.<sup>38</sup> Based on this logic, the court in *Schmitz* stated that a majority of the justices did agree on the appearance of bias language and, thus, if an arbitrator creates an appearance or impression of bias, then the arbitrator has demonstrated evident partiality.<sup>39</sup>

In *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*,<sup>40</sup> the Second Circuit Court of Appeals rejected the appearance of bias standard in favor of a standard based on whether a "reasonable person would . . . conclude that an arbitrator was partial."<sup>41</sup> The court noted that the appearance of bias standard was so low that it effectively invalidated many of the goals of arbitration.<sup>42</sup> For example, because arbitration proceedings generally require an arbitrator who is knowledgeable about the field, a consequence of that knowledge and expertise is that the arbitrator may have business relationships with many people in the particular field.<sup>43</sup> Therefore, it would not be difficult for those relationships to meet the appearance of bias standard, which would result in very few qualified impartial arbitrators.<sup>44</sup>

The court in *Morelite* also rejected a "proof of actual bias" standard.<sup>45</sup> This standard requires the party seeking to invalidate the arbitration award to prove that the arbitrator was actually biased because of her evident partiality. Evidence of actual proof, though, is often very difficult to obtain, which makes a proof of actual bias standard useless in separating the impartial arbitrators from the partial.<sup>46</sup>

37. *Schmitz*, 20 F.3d at 1046-47. The court stated that if an arbitrator is knowledgeable, then the arbitrator will have "many more potential conflicts of interest than judges." *Id.* at 1046.

38. *Id.* at 1046. The *Schmitz* court, in part, based this rationale on the fact that Justice White did not "expressly reject" the appearance of bias language in *Commonwealth's* plurality opinion. *Id.*

39. *Id.* at 1047. See also *Toyota*, 834 F.2d at 756 (holding that evident partiality is demonstrated when the party claiming bias establishes facts that create a reasonable impression of partiality); *Burlington N. R.R. Co. v. Tuco Inc.*, 960 S.W.2d 629, 634, 637 (Tex. 1997) (holding that an arbitrator demonstrates evident partiality when she fails to disclose facts which to a reasonable person would create an impression of bias). In *Burlington*, the court heavily relied on the *Schmitz* opinion and noted the policy arguments that *Schmitz* employed, namely that full disclosure is warranted because "parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed." *Id.* at 634 (quoting *Schmitz*, 20 F.3d at 1047).

40. 748 F.2d 79 (2d Cir. 1984).

41. *Id.* at 84.

42. *Id.*

43. *Id.* at 83-84. There are, of course, other goals of arbitration that a mere "appearance of bias" standard would quash. Efficiency and minimal costs to resolve the dispute are two strong incentives for arbitration. Both of these considerations would be negligible if a company had to litigate a motion for vacatur every time the arbitrator had any dealings with any of the parties, due to an appearance of bias standard almost inviting disgruntled parties to seek to invalidate the award.

44. *Id.* at 83.

45. *Id.* at 84.

46. *Id.* The court stated that "[u]nless an arbitrator publicly announces his partiality, or is overheard in a moment of private admission, it is difficult to imagine how 'proof' would be obtained." *Id.*

The court in *Morelite* concluded that an arbitrator exhibits evident partiality when a reasonable person would conclude the arbitrator was biased.<sup>47</sup> This standard is neither too low nor too high, which allows competing interests to receive fair and equal treatment.<sup>48</sup> The court, however, did not elaborate on what this standard entailed or evidenced, nor what factors should be considered in establishing a reasonable person would conclude the arbitrator was biased.

In *Sanford Home for Adults v. Local 6, IFHP*,<sup>49</sup> the United States District Court for the Southern District of New York expanded on the reasonable person standard by developing a test that could easily be applied on a case-by-case basis. The test consisted of three factors to determine whether a reasonable person would conclude the arbitrator demonstrated evident partiality and, therefore, whether a reasonable person would conclude that an arbitrator is biased.<sup>50</sup> The factors are as follows: “(1) the financial interest the arbitrator has in the proceeding; (2) the directness of the alleged relationship between the arbitrator and a party to the arbitration proceeding; (3) and the timing of the relationship with respect to the arbitration proceeding.”<sup>51</sup>

Even though it has been over thirty years since the *Commonwealth* decision, courts continue to struggle with the appropriate standard to be applied.<sup>52</sup> In *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*,<sup>53</sup> the Fourth Circuit Court of Appeals was asked to adopt an appearance of bias standard when a neutral arbitrator failed to disclose the full extent of his relationships with the parties.

#### IV. INSTANT DECISION

In the instant case, the court examined the two theories that ANR argued were in support of vacatur.<sup>54</sup> ANR first contended vacatur was warranted because Brewer, the neutral arbitrator, failed to disclose all prior business relationships.<sup>55</sup> In rejecting

47. *Id. Cf. Northwestern Nat'l Ins. Co. v. Allstate Ins. Co.*, 832 F. Supp. 1280, 1285 (E.D. Wis. 1993) (vacating an award for arbitrator partiality when the bias is “direct, definite, and capable of demonstration rather than remote, uncertain, or speculative”); *DeBaker v. Shah*, 533 N.W.2d 464, 468 (Wis. 1995) (adopting a standard that evident partiality is demonstrated when a reasonable person has “such doubts” about the arbitrator’s impartiality that the reasonable person is forced to take “action on the information”).

48. *Morelite*, 748 F.2d at 84. The court noted that a standard must be “[m]indful of the trade-off between expertise and impartiality,” yet still maintain the “integrity” of the arbitration proceeding and the federal court’s role in ruling on vacatur. *Id.* at 83-84.

49. 665 F. Supp. 312 (S.D.N.Y. 1987).

50. *Id.* at 320.

51. *Id. See Hobet Mining, Inc. v. International Union, United Mine Workers of Am.*, 877 F. Supp. 1011, 1021 (S.D. W.Va. 1994) (adopting a four-factor test: “(1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the relationship’s connection to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding” (citations omitted)); see also *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129-30 (4th Cir. 1995) (adopting *Hobet* four-factor test to determine “evident partiality”).

52. See, e.g., *DeVore v. IHC Hosps., Inc.*, 884 P.2d 1246 (Utah 1994).

53. 173 F.3d 493 (4th Cir. 1999).

54. *Id.* at 500.

55. *Id.* at 497.

this argument, the court noted that the Federal Arbitration Act,<sup>56</sup> which lists the statutory basis for vacating an arbitration award, does not specify an arbitrator's nondisclosure as a basis for vacatur.<sup>57</sup> ANR then contended that Rule 19 of the Commercial Arbitration Rules of the AAA<sup>58</sup> require disclosure and thus Brewer's nondisclosure was a violation of these rules.<sup>59</sup> The court noted that even though the rules state that a potential arbitrator is to disclose any interest or relationship "likely to affect impartiality," there is no requirement that the potential arbitrator disclose all relationships that may "conceivably be regarded as a basis for bias."<sup>60</sup>

The court further rejected ANR's reliance on *Commonwealth's* seemingly "mandatory nondiscretionary" disclosure policy.<sup>61</sup> Even though the facts in *Commonwealth*<sup>62</sup> were far more insinuating of bias than the instant case, the *Commonwealth* Court did not require an arbitrator to reveal "all information regarding his past or present relations with a party."<sup>63</sup> Instead, the Supreme Court stated that an arbitrator must disclose any relationships that "might create an impression of possible bias."<sup>64</sup> Therefore, the ANR court concluded that "trivial" and "nonsubstantial" relationships need not be disclosed because full disclosure would be "impractical" for those arbitrators who are knowledgeable about their field.<sup>65</sup>

The court further stated that even if Brewer's nondisclosure had been about a nontrivial or substantial relationship, Rule 19 of the AAA does not allow for vacatur due to nondisclosure because a federal court is prohibited from vacating an award on grounds other than those listed in the Federal Arbitration Act.<sup>66</sup> Even though Brewer disclosed facts which might ultimately demonstrate evident partiality, the nondisclosure alone does not have any "independent legal significance" for warranting vacatur.<sup>67</sup> The court rationalized that if ANR's theory was accepted, then any nondisclosure, even of a trivial fact, would result in vacatur of the award, which would make it very difficult to find qualified arbitrators.<sup>68</sup>

ANR next argued that if nondisclosure itself was not justification for vacatur, then nondisclosure was evidence of evident partiality.<sup>69</sup> The court stated that evident

56. 9 U.S.C. § 10 (1994).

57. ANR, 173 F.3d at 497 (stating the basis for vacatur can be found in proof that an award was "procured by fraud, corruption, or undue means, or resulted from an arbitrator's evident partiality, corruption, misconduct, or the like") (citing 9 U.S.C. § 10(a)(1)-(3) (1994)).

58. COMMERCIAL ARBITRATION RULES Rule 19 (American Arbitration Assoc. 1996) (amended 1999). This rule states, in part: "[a]ny person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives." *Id.*

59. ANR, 173 F.3d at 497-98 (quoting COMMERCIAL ARBITRATION RULES Rule 19 (American Arbitration Assoc. 1996) (amended 1999)).

60. *Id.* at 498.

61. *Id.*

62. 393 U.S. 145, 146 (1968). In *Commonwealth*, the arbitrator did not disclose a "repeated and significant" relationship with one of the parties that had existed for approximately four or five years and resulted in the arbitrator receiving \$12,000 in fees. *Id.*

63. ANR, 173 F.3d at 498.

64. *Id.* at 498 (quoting *Commonwealth*, 393 U.S. at 149).

65. *Id.*

66. *Id.* at 499. See 9 U.S.C. § 10 (1994).

67. ANR, 173 F.3d at 499.

68. *Id.* at 500.

69. *Id.*



partiality is exhibited when a “reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.”<sup>70</sup> In determining this, a court should apply the four-factor test originally adopted from *Hobet Mining, Inc. v. International Union, United Mine Workers of America*.<sup>71</sup> In addition, when considering each factor, a court should evaluate whether the alleged bias was “direct, definite and capable of demonstration rather than remote, uncertain or speculative,” and whether there was “improper motives on the part of the arbitrator.”<sup>72</sup> The court emphasized that to require proof the arbitrator did indeed have “improper motives” was tantamount to proving actual bias, which is too high of a standard.<sup>73</sup> Instead, a party seeking vacatur need only provide evidence that would force a reasonable person to conclude the arbitrator had improper motives.<sup>74</sup>

The court next applied a four-factor test to the present facts.<sup>75</sup> ANR first contended that had the arbitrators decided against Cogentrix, Cogentrix would then pass the costs of the decision on to its primary customer, Carolina Power.<sup>76</sup> Therefore, because Brewer worked for a firm that represented Carolina Power, Brewer had an interest in protecting Carolina Power by not awarding against Cogentrix.<sup>77</sup> The court rejected this theory based on the lack of “direct or definite” evidence that showed the costs of the award would be passed on to Carolina Power.<sup>78</sup> The court stated that the only factor favoring ANR was “proximity in time,” because Brewer’s firm represented Carolina Power at the time of the arbitration.<sup>79</sup>

ANR also argued that the third factor of connection to the arbitration demonstrated Brewer’s evident partiality.<sup>80</sup> In support of this theory, ANR relied on the previous Cogentrix stock warrants bought by attorneys of Moore & Van Allen, the firm that merged with Brewer’s firm in 1988. At that time, some members of the consolidated firm owned a small portion of Cogentrix.<sup>81</sup> The court noted that although this factor does favor ANR, the lack of other supporting factors shows nothing more than an “indirect and tenuous” relationship.<sup>82</sup> Therefore, given the

70. *Id.* (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995) (internal quotation marks and citations omitted)).

71. 877 F. Supp. 1011 (S.D. W.Va. 1994).

72. *ANR*, 173 F.3d at 500-01.

73. *Id.* at 501.

74. *Id.*

75. *Id.* at 500. The factors of the test consist of:

- (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding;
- (2) the directness of the relationship between the arbitrator and the party he is alleged to favor;
- (3) the connection of that relationship to the arbitration;
- and (4) the proximity in time between the relationship and the arbitration proceeding.

*Id.* For cases adopting a factor test to determine evident partiality, see *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129-30 (4th Cir. 1995); *Hobet Mining, Inc. v. International Union, United Mine Workers of Am.*, 877 F. Supp. 1011, 1021 (S.D. W.Va. 1994).

76. *ANR*, 173 F.3d at 501. Recall that the arbitration award was two to one for Cogentrix. *Id.* at 496.

77. *Id.* at 501.

78. *Id.*

79. *Id.* at 501-02.

80. *Id.* at 502.

81. *Id.*

82. *Id.*

unsubstantial relationship between Brewer and Cogentrix, a reasonable person could not conclude that Brewer was bias.<sup>83</sup>

## V. COMMENT

An arbitrator's alleged partiality is of serious concern to all parties. If a supposed neutral arbitrator is biased, the quality of the arbitration proceeding begins to degenerate rapidly.<sup>84</sup> However, the goals of arbitration, such as quick resolution and minimal costs, are also defeated if a party is allowed to bring claims of arbitrator partiality because the standard is so low that almost any evidence of relationships with the opposing party is considered bias. In addition, a standard requiring actual proof of bias is too high for those times when the arbitrator is biased.<sup>85</sup> With a view towards alleviating these concerns, the federal and state courts have sought to establish a middle ground. Unfortunately, the inconsistency between the opinions in *Commonwealth* and the lack of statutory law allows too many claims of arbitrator bias to be brought.<sup>86</sup>

In seeking to establish a workable standard of evident partiality, one needs to first determine what the standard is trying to protect. If the arbitration is not fair, parties will not want to participate. Thus, an arbitrator's impartiality is a primary concern to the parties participating in arbitration.<sup>87</sup> An arbitrator must be knowledgeable about the field, or the arbitration will be neither fair nor productive.<sup>88</sup> In balancing the competing concerns, it is generally accepted that a knowledgeable neutral arbitrator may have some relationships with the parties, which hastens the desire for full disclosure.<sup>89</sup> However, in a world full of mergers, sales, partnerships, meetings, letters, calls, and relationships made and broken, it must be expected that a potential arbitrator cannot recall, in order to disclose, every relationship that might be considered a basis for bias.<sup>90</sup> To require otherwise negates the ability to have a knowledgeable arbitrator. Therefore, a standard of evident partiality that hinges on

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83. *Id.*

84. Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 124 (1995) (noting that a "conflict of interest casts serious doubts on the integrity of the process").

85. See *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (noting that an appearance of bias standard is "insurmountable" and often impossible to prove).

86. For an extensive summary of cases regarding vacatur of an arbitration award due to arbitrator bias, see George L. Blum, Annotation, *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrator-Labor Disputes*, 66 A.L.R. 5TH 611 (1999).

87. Cf. Symposium, *The Lawyer's Duties and Responsibilities in Dispute Resolution*, 38 S. TEX. L. REV. 485, 500-01 (1997) (stating that arbitrating parties have contracted to arbitrate by choice and, thus, they must respect the "established practice and usage in the field of arbitration").

88. See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983); Symposium, *supra* note 87, at 495 (stating parties to an arbitration can expect no more impartiality than "inheres in the method they have chosen").

89. Perry A. Zirkel & Peter D. Winebrake, *Legal Boundaries for Partiality and Misconduct of Labor Arbitrators*, 1992 DET. C.L. REV. 679, 685 (1992).

90. See *Drinane v. State Farm Mut. Auto. Ins. Co.*, 584 N.E.2d 410, 416 (Ill. App. Ct. 1991) (stating that arbitrator experience "does not occur in a vacuum").

a mere impression of bias is low enough that almost any relationship between an arbitrator and a party, no matter how indirect or trivial, implies a biased arbitrator.

The other extreme is a standard that requires proof of actual bias. As the courts have noted, proof of actual bias is difficult because evidence is not easily attainable.<sup>91</sup> Therefore, even for those times when the arbitrator is biased, a standard of proof of actual bias is high enough that most partial arbitrators will be deemed to be impartial. This is obviously contrary to the desires and intentions of the parties who want a fair proceeding.

Although the reasonable person standard has been adopted by a majority of courts, it still has several obvious problems. One problem is that the standard is "roomy enough" to allow claims for partiality to be brought even when the party who brings the claim does not know of, nor claims the existence of "actual partiality, unfairness, bias, or fraud."<sup>92</sup> Although these claims will fail because a reasonable person could not conclude the arbitrator was biased, the damage is already done. The non-claiming party must defend the claim, which costs money and wastes time.

Another problem with the reasonable person standard, although not as prevalent, is that there exists some relationships that are per se demonstrative of evident partiality, even though there might be no allegation or proof of actual bias.<sup>93</sup> This is based on the rationale that the nature of some relationships would always force a reasonable person to conclude the arbitrator was biased. To aggravate the problem, courts have been reluctant to suggest a list of relationships that are per se bias, no matter how short the list might be.<sup>94</sup>

Even with the above concerns, the reasonable person standard is the most fair and appropriate standard given the desire to limit costs and time, yet still have a resolution that does not lack integrity. These problems might be alleviated, however, if there was a clear standard not hampered by the "murky" and indecipherable plurality opinion in *Commonwealth*.<sup>95</sup> A thorough investigation of cases that involve a bias arbitrator claim elicits the unsurprising result that the vast majority of claims are unfounded.<sup>96</sup> Unfortunately, though, the possibility that a court might reject precedent and accept *Commonwealth's* appearance of bias standard encourages disgruntled parties to file a claim. If the United States Supreme Court were to accept certiorari on *ANR* or another equivalent case, and in the subsequent opinion clearly

91. See *supra* note 46 and accompanying text.

92. See *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 152 (1968) (Fortas, J., dissenting) (noting that plaintiff made no claim of "actual partiality, unfairness, bias, or fraud"); Eric Lucentini, Note & Comment, *Taking a Fresh Look at Vacatur of Awards Under the Federal Arbitration Act*, 7 AM. REV. INT'L ARB. 359, 369 (1997) (noting that the facts of *Commonwealth* provide an example of "passive" partiality).

93. See *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (stating that sons are "more often than not" loyal and bias to their fathers); cf. *Hobet Mining, Inc. v. International Union, United Mine Workers of Am.*, 877 F. Supp. 1011, 1022 (S.D. W.Va. 1994) (holding that the relationship between the arbitrator and his brother who was an employee of a party to the arbitration does not automatically deem the arbitrator partial to that party).

94. *Morelite*, 748 F.2d at 85. See Lucentini, *supra* note 92, at 369.

95. *Morelite*, 748 F.2d at 83.

96. See, e.g., *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Hobet Mining, Inc. v. International Union, United Mine Workers of Am.*, 877 F. Supp. 1011 (S.D. W.Va. 1994); *DeVore v. IHC Hosps., Inc.*, 884 P.2d 1246 (Utah 1994); *Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36 (Neb. 1993).

delineate the reasonable person standard adopted by a majority of jurisdictions, then parties dissatisfied with the arbitration award might not be so quick to file bias arbitrator claims in the hope of having the award vacated.

The court in *ANR* reached the correct result through the correct analysis. However, the facts in *ANR* are such that the claim of a biased arbitrator should never have been filed. There was no indication that Brewer was biased, and it is clear that a reasonable person could not conclude that Brewer was biased. Because of the appearance of bias language in *Commonwealth*, though, *ANR* argued the award should be vacated. If the language in *Commonwealth* had been overturned, *ANR*'s argument of arbitrator partiality would not have been even remotely valid and, therefore, it is quite possible that the case would never have been brought. This would be one less case that a court would have to hear, and the same result, without the added cost and time, would be in effect.

## VI. CONCLUSION

*ANR* is not an unusual case. This is unfortunate because the primary goals of contracting to arbitrate disputes are to save time and money, and when cases like *ANR* are in the judicial system, this is not accomplished. However, the considerations of time and money must be balanced with the desire for a proceeding that is not void of integrity and fairness because of partial arbitrators. Without a clear standard, though, a disgruntled party will continue to seek vacatur, hoping that the inconsistent law and interpretations of *Commonwealth* will sway a court to adopt a lenient standard of evident partiality. Until the Supreme Court conclusively decides otherwise, the search for the elusive standard of evident partiality will continue.

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