Motions to Vacate: How Much Information Should Arbitrators Disclose?

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INTRODUCTION

NASD Dispute Resolution asks prospective arbitrators a series of questions designed to determine conflicts of interest or other circumstances from which partiality or bias may be inferred. Ostensibly NASD Dispute Resolution forwards the answers to the parties. Before the arbitration begins, each arbitrator takes an oath swearing that his answers were true.

This article will address whether an arbitration award should be vacated because of an arbitrator's false response to one or more questions that are designed by the NASD or other sponsoring forum to elicit circumstances evidencing possible bias. Furthermore, this article will discuss whether an arbitration award can be vacated on the basis that the arbitrator falsely certified in his oath that all required disclosures had been made. As will be explained in more detail below, the answer to both questions is almost certainly "yes."

In a fractured decision interpreting the Federal Arbitration Act ("FAA"), the U.S. Supreme Court established the broad rule that an arbitration award must be vacated when an arbitrator fails to *disclose all circumstances that might create an impression of possible bias.* The majority opinion in that Supreme Court case is unclear, and a special concurring opinion serves to obscure rather than illuminate the precise meaning of the rule the Court announced. In applying the rule, the lower courts have adopted two distinct approaches: The 5th, 8th, 9th, 11th, and D.C. Circuits will vacate an award when a non-disclosed circumstance demonstrates a mere "reasonable impression of partiality." The 2nd, 4th, 6th and 7th Circuits impose a higher burden, requiring a showing that "a reasonable person would have to conclude that the arbitrator was partial to one party or the other." Under the latter approach, many motions to vacate are denied because the arbitrator was unaware of the circumstance alleged to indicate bias, or because the non-disclosed relationship or circumstance was "trivial" or "insignificant."

Where an arbitrator answers a specific question falsely, however, vacatur is more likely not only because the question came to the arbitrator's mind, but also because the question is objective evidence of the sponsoring forum's and the parties' consideration of the materiality of the question. This fact all but precludes a finding that the nondisclosure is "trivial," and makes vacatur likely even under the more stringent test. The few cases that address false answers to specific questions favor vacatur. Analogous cases dealing

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with false answers by jurors during *voir dire* lend additional support in favor of vacatur.

NASD CODE OF ARBITRATION AND THE OATH OF ARBITRATOR

The parties to an NASD arbitration typically enter into an agreement by which they agree to arbitrate disputes arising between them pursuant to the Rules and Regulations of the National Association of Securities Dealers ("NASD"). Rule 10312 of the NASD Code of Arbitration Procedure ("NASD Rule") provides:

> 10312. Disclosures Required of Arbitrators and Director's Authority to Disqualify
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> (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:
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> > (1) Any direct or indirect financial or personal interest in the outcome of the arbitration;
> >
> > (2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators must disclose any such relationships or circumstances that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They must also disclose any such relationship or circumstances involving members of their families or their current employers, partners, or business associates.
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> (b) Persons who are requested to accept appointment as arbitrators must make a reasonable effort to inform themselves of any interests, relationships or circumstances described in paragraph (a) above.
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> (c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

The same Rule provides the following procedure for challenging an arbitrator for cause:

> (d) Removal by Director
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> > (1) The Director may remove an arbitrator based on information that is required to be disclosed pursuant to this Rule.
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> > (2) After the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, the Director may remove an arbitrator based only on information not known to the parties when the arbitrator was selected. The Director's authority under this subparagraph (2) may be exercised only by the Director or the President of NASD Dispute Resolution.
> >
> > (3) The Director will grant a party's request to disqualify an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has an interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable

> demonstration, rather than remote or speculative.

Id. Subsection (e) provides that the Director of Arbitration will forward to the parties any information disclosed by an arbitrator under the Rule, except in limited circumstances enumerated under the rule that are not pertinent to this article.

NASD Dispute Resolution requires each eligible arbitrator to create and maintain an arbitrator profile. The profile is maintained via an "arbitrator update form," a blank version of which is accessible via the internet at http://apps.nasd.com /Mediation_&_Arbitration/ArbInfoUpdate.asp. The following message appears on the web page:

> It is essential that the information NASD Dispute Resolution provides to parties regarding the arbitrators on our roster be accurate and up-to-date. For this reason, arbitrators have a continuing obligation to update the roster information that we maintain on their behalf. Accordingly, if you are already an arbitrator on our roster, please use the following form to notify us of any new or revised information.

After spaces for the arbitrator to enter personal contact information, there is a list of eight questions. In addition to the Arbitrator Profile, NASD sends an "Arbitrator Disclosure Checklist" to each arbitrator appointed to a specific case.[1] The checklist recites:

> The Arbitrator Disclosure Checklist is sent to the arbitrators as part of the Oath of Arbitrator. It not only provides a reminder to the arbitrators to consider all possible disclosures, but also requires a complete explanation of any possible conflict with the parties.
>
> Please indicate your response to each of the questions listed below by checking the appropriate box. Please check "yes" or "no" to each question. Provide a **full explanation** to any question(s) to which you provided a "yes" response. All affirmative responses and explanations will be sent to the parties. (emphasis in original).

Following that introduction are 28 questions that each arbitrator must answer.

NASD Rule 10308 provides that after the commencement of arbitration the parties will be provided with a list of prospective arbitrators from which a panel will be selected. In addition to the Arbitrator Profile and the Arbitrator Disclosure Checklist, the practice of NASD is to send, concurrently with the initial list of names, a brief biography of each arbitrator. At the bottom of page one of this biography is, in summary format, a description of certain disclosures that have been made by each arbitrator. The summary is intended to alert the reader to possible disclosures from the checklist. Either party may strike one or more of the arbitrators for any reason. NASD Rule 10308 (c)(1).

Each arbitrator takes the following oath of arbitration:

> Oath of Arbitrator. The Oath of Arbitrator is executed by every arbitrator and returned to NASD Dispute Resolution before the arbitrator makes any decision or attends a hearing. As part of the Oath, you are required to review three documents: The Temporary and Permanent Disqualification Criteria; the Arbitrator Disclosure Checklist; and your Arbitrator Disclosure Report.

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[1] This document is not typically sent to the parties unless the arbitrator answers one or more of the questions in the affirmative.

Following that statement is the actual Oath:

> Having been selected as an arbitrator to consider the matter in controversy between the above-captioned parties, I affirm that I am not an employer of, employed by, or related by blood or marriage to any of the parties or witnesses whose names have been disclosed to me; that I have no direct or indirect interest in this matter; I know of no existing or past financial, business, professional, family, or social relationship which would impair me from performing my duties; and that I will decide the controversy in a fair manner and render a just award.
>
> I have carefully read, reviewed, and considered NASD Dispute Resolution's Temporary and Permanent Arbitration Disqualification Criteria. I affirm that, based on the criteria, I am not temporarily or permanently disqualified from being an NASD arbitrator.
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> I have reviewed and completed the Arbitrator Disclosure Checklist enclose, and certify that (check one):
>
> I have nothing to disclose.
>
> I made disclosures on the Arbitration Disclosure Checklist.
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> I have carefully read, reviewed, and considered my Arbitration Disclosure Report and certify that (check one):
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> > I have nothing additional to disclose. My Arbitrator Disclosure Report is accurate, current, and up-to-date.
> >
> > I have noted changes or corrections on the Report.

Among the Criteria for Permanent Disqualification is: "Misstatement or failure to disclose material information."

After it is confirmed on the record that all arbitrators had signed the oath and had no additional disclosures, the panel asks each party in turn whether they accepted the composition of the panel. If all parties accepted the panel, the arbitration proceeds with the Panel as constituted.

Discussion and Citation of Legal Authority

Section 10 (a) of the Federal Arbitration Act, 9 U.S.C. § 10, provides, in relevant 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
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> > (1) Where the award was procured by corruption, fraud, or ***undue means***.
> > (2) Where there was ***evident partiality*** or corruption in the arbitrators, or either of them.
> > (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any ***other misbehavior by which the rights of any party have been prejudiced***. [or]
> > (4) Where the arbitrators ***exceeded their powers, or so imperfectly executed them*** that a mutual, final and definite award upon the subject matter was not made. (emphasis added)

* * *

Based upon the facts discussed above, if an arbitrator falsely answers a question on the application or checklist, either party would

have a good faith factual and legal basis to move for an order vacating the arbitration award on the following grounds:

> (1) under Section 10(a)(1), in that the arbitrator's giving of false answers to specific questions contained on the Checklist and Profile, and making false certifications in the Oath of Arbitrator, constituted undue means by which the award was procured.
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> (2) under Section 10(a)(2), in that the arbitrator was evidently partial, as evidenced by his giving false answers to specific questions contained on the Application Checklist and Profile, and by his violation of the Oath of Arbitrator.
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> (3) under Section 10(a)(3), in that the arbitrator's conduct in falsely answering specific questions bearing on his partiality constituted misbehavior by which the parties' rights to challenge him, either for cause or peremptorily, was substantially prejudiced; and
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> (4) under Section 10(a)(4), in that the arbitrator violated his Oath of Arbitrator or was, in fact, permanently disqualified by virtue of his material omissions on the Checklist and Disclosure, thereby so imperfectly executing his powers that a mutual, final and definite award upon the subject matter was not made.

The present article focuses on the "evident partiality" ground. Any authority that also bears upon the other grounds will be noted.

1. Decisions Under the FAA

(a) The U.S. Supreme Court

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the Supreme Court was called upon to interpret Section 10 (a)(2) of the FAA. The Court, through Justice Black, adopted "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. The Court found that the FAA shows "a desire of Congress to provide not merely for any arbitration but for an impartial one." *Id.* at 147. Accordingly, "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 149.

The issue before the Court in *Commonwealth Coatings* was whether Section 10 (a)(2) of the FAA required the vacation of an award when one of three arbitrators had served as an engineering consultant for one of the parties to the arbitration. *Id.* at 146. In deciding the question, the Court cited *Tumey v. State of Ohio*, 273 U.S. 510, in which it had held that it was a denial of due process of law for a judge to preside over a criminal case when he had a pecuniary interest in the outcome. While noting that the *Tumey* decision was based upon a "constitutional principle," the Court could "see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality' or the use of 'undue means'." *Commonwealth Coatings* at 148.

In a concurring opinion, Justice White, joined by Justice Marshall, added:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transaction which he has had or is negotiating with either of the parties . . . The judiciary should minimize its role in arbitration as judge of the arbitrator's 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***.

Id. at 151 (emphasis added). White's concurrence also emphasized that arbitrators are often effective in their adjudicatory function precisely because they are "men of affairs, not apart from the marketplace." *Id.* at 150. Arbitrators should not automatically be disqualified if the parties are either aware of a relationship that poses a potential conflict of interest or if "they are unaware of the facts but the relationship is trivial." *Id.* He concluded by stating, "If arbitrators err on the side of disclosure, which they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating the award." *Id.* at 152.

(b) The Lower Courts

The vast majority of cases interpreting *Commonwealth Coatings* arise in cases involving the failure to disclose facts potentially indicating bias, as opposed to cases involving false answers to specific questions. The Circuit Courts of Appeals have struggled with the application of *Commonwealth Coatings* to these cases. One line of cases, represented by *Schmitz v. Zilveti*, 20 F. 3d 1043 (9th Cir. 1994), has held that evident partiality exists when undisclosed facts show a "reasonable impression of partiality." *Id.* at 1046. The other line of cases, represented by *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benef. Funds*, 748 F. 2d 79 (2d Cir. 1984), have held that it is necessary to show that a reasonable person would have to conclude from the undisclosed facts that the arbitrator was partial to one of the parties. *Id.* at 84.

In *Schmitz*, an arbitrator failed to disclose that his law firm had previously represented the parent company of one of the parties to the arbitration, even though it was undisputed that the arbitrator was unaware of the representation. The court stated:

> In a nondisclosure case, the integrity of the process by which arbitrators are chosen is at issue. Showing a "reasonable impression of partiality" is sufficient in a nondisclosure case because the policy of [FAA] section 10(a)(2) instructs the parties should choose their arbitrators intelligently. The parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed. Whether the arbitrator' decision itself is faulty is not necessarily relevant. But in an actual bias determination, the integrity of the arbitrators' decision is directly at issue. That a reasonable impression of partiality is present does not mean the arbitration award was the product of impropriety.

Id. at 1047. While recognizing that *Commonwealth Coatings* imposed a duty to disclose, the Court also found that the NASD Code of Arbitration procedure imposed an additional duty upon an arbitrator -- the duty to investigate and disclose conflicts of interests. *Id.* at 1048. Whether actual partiality exists, "a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it." *Id.* Because the arbitrator had constructive knowledge of the undisclosed conflict (a conflicts check at his law firm would have revealed it), a reasonable impression of partiality existed. If, as the Supreme Court requires in *Commonwealth Coatings*, the parties are to be the judges of the arbitrators' partiality, duties to investigate and disclose must be enforced. It therefore is irrelevant that the arbitrator may have been actually unaware of the facts upon which the claim of partiality is based. *Id.* at 1049. The Court therefore vacated the award. *Id.* [2]

Many courts interpreting *Schmitz* have held that the evident partiality is established from the nondisclosure itself, regardless of whether the nondisclosed fact would establish bias. *See, e.g., Thomas James & Assoc., Inc. v. Owens*, 1 S.W.3d 315, 321 (Tex. App. 1999);[3] *Burlington Northern RR v. TUCO, Inc.*, 960 S.W.2d 629 (Tex. 1997). Although not limited to cases in which the arbitrator was aware of the undisclosed facts, these cases have been described as establishing something akin to a *per se* rule requiring vacatur when the arbitrator knew of the facts that could lead to the alleged bias. *Overseas Private Investment Corp. v. Anaconda Co.*, 418 F. Supp. 107, 110 (D.C. Cir. 1976).

The 5th Circuit Court of Appeals recently affirmed an Order vacating an arbitration award based on the rationale in *Schmitz*. *Positive Software Solutions, Inc. v. New Century Mortgage Corporation*, 436 F.3d 495 (5th Cir. 2006)[4]. In *Positive Software*, following an adverse arbitration award, Positive Software conducted a detailed investigation into the arbitrator's background. *Id.* at 496. It discovered that the arbitrator and his former law firm had previously been involved in a professional relationship with New Century's arbitration counsel. *Id.* Soon thereafter, Positive Software filed a motion to vacate the arbitration award. The district court granted Positive Software's motion on the grounds that the arbitrator failed to disclose that "he had served as co-counsel with New Century's counsel over a period of years in significant litigation," and that his prior relationship "might create a reasonable impression of possible bias." *Id.* Further, the district court stated that the arbitrator's "failure to disclose that relationship deprived Positive Software of the opportunity to make an informed choice of arbitrators and requires vacatur of the award" and that any reasonable lawyer selecting a sole arbitrator would have wanted to know of the prior professional relationship. *Id.* Therefore, the district court held that the arbitrator's failure to disclose his prior relationship with opposing counsel created a reasonable impression of possible partiality that warranted vacating the award. *Id.* The district court also held that Positive Software did not learn of the arbitrator's prior professional relationship until after the arbitration and, therefore, did not waive its objection to the nondisclosure. *Id.*

Specifically approving *Schmitz*, the 5th Circuit held that an arbitrator selected by the parties displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality. *Id.* at 500. The Court stated, "The evident partiality is demonstrated from the nondisclosure, regardless of whether actual bias is established." *Id.* Citing to *Commonwealth Coatings*, the 5th Circuit went on to state that such a demanding disclosure rule ensures that the parties will be privy to a potential arbitrator's biases at the outset, when they are "free to reject the arbitrator or accept him with knowledge and relationship and continuing faith in his objectivity," and allows the parties, who are "far better informed of the prevailing ethical standards and reputations within their business," to be the "architects of their own arbitration process." *Id.*

By contrast, the *Morelite* line of cases, relying more upon Justice White's special

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[2] *Schmitz* also held that evident bias of a single arbitrator is sufficient to vacate an award. *Id.*

[3] *Thomas James* implies that where a nondisclosure violates a NASD Rule, that may constitute "other misbehavior by which the rights of any party have been prejudiced" within the meaning of Section 10(a)(3) of the FAA. *Id.* at 321-22. Even if a misrepresentation on the Checklist does not violate NASD Rule 10312, a violation of the oath may constitute "misbehavior."

[4] The court granted a motion for rehearing *en banc*. *Positive Software Solutions, Inc. v. New Century Mortgage Corporation*, 449 F.3d 616 (5th Cir. May 5, 2006).

concurrence in *Commonwealth Coatings*, tend to focus on both the arbitrator's awareness and the nature of the undisclosed relationship rather than the fact of nondisclosure itself. These cases are likely to deny vacatur where the arbitrator was unaware or the relationship or circumstance is "trivial." For example, in *Health Services Mgt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992), the Court held that the alleged conflict of interest "must be so intimate . . . as to cast serious doubt on the arbitrator's impariality," and that the interest or bias "must be direct, definite and capable of demonstration rather than remote or speculative." *Id.*

(c) Materiality of the Fact, a\k\a "Triviality"

Whether applying *Schmitz* or *Morelite*, the more material the omitted underlying fact, the more likely its nondisclosure is to be recognized as evident bias. So, for example, in *Thomas James* the court, applying *Schmitz*, found no evident bias because there were no facts from which bias could even be inferred. See *Thomas James & Assoc., Inc. v. Owens*, 1 S.W.3d at 321. By contrast, in *Olson v. Merrill Lynch, Pierce, Fenner & Smith*, 51 F. 3d 157 (8th Cir. 1995), the facts were sufficient to meet either test.

In *Olson*, an unsuccessful party to an NASD employment arbitration learned after the award that two of the three panelists were employed by firms that had ongoing business relationships with the respondent, Merrill Lynch. In fact, one of the arbitrators was Vice President, Chief Financial Officer, and Compliance Officer of an investment firm that managed bond issues syndicated by Merrill Lynch. Olsen moved to vacate, "arguing the nondisclosure showed evident partiality in the arbitrators." *Id.* at 158. The District Court denied Olson's motion.

On appeal, the Eighth Circuit reversed. In so doing, it recognized the disagreement among the Circuit Courts as to the proper meaning of *Commonwealth Coatings*. The Court found it unnecessary to select from the two competing views, however, holding that either approach resulted in a finding of "evident partiality" under these particular facts. The undisclosed relationship created an impression of possible bias, was substantial, and was not trivial; therefore, it met all of the possible tests used in implementing *Commonwealth Coatings*. *Id.* at 159.

The Court concluded with the following statement:

> Our view is especially fair because it realizes the terms of the parties' arbitration agreement in this case. Section 23 of the NASD arbitration rules, which the parties agreed would govern the arbitration proceedings, requires arbitrators to disclose, among other things, any existing or past financial, business, or professional relationships that "might reasonably create an appearance of partiality or bias." Under section 23, the duty of disclosure expressly extends to arbitrators' indirect relationships, specifically including those between the arbitrators' current employers and any arbitration party or its counsel. Indeed, courts have recognized arbitrators should disclose even indirect ties with parties before arbitration begins. This gives the parties, who are in the best position to judge an arbitrator's partiality, a chance to reject or accept an arbitrator with full knowledge of the arbitrator's connections.

Id. at 160 (citations omitted). *But see Montez v. Prudential Securities, Inc.* 260 F. 3d 980, 984 (8th Cir. 2001)("even if Benson's failure to disclose had violated NASD Rule 10312, 'that would not by itself, require or even permit a court to nullify an arbitration award.'")(quoting *Commonwealth Coatings,* 393 U.S. at 149).

There are very few cases interpreting the FAA that discuss the materiality of a false statement given in response to a questionnaire provided to the arbitrator by the sponsoring forum. In *Fields v. Freiberg*, (District Court, City and County of Denver Colorado, Case No. 02CV7622)(unpublished decision), the Court set aside an NASD arbitration award where the arbitrator failed to disclose "that his conduct was at issue in a pending arbitration involving similar allegations."[5]

Another such case is *Hartman v. Cooper*, 59 Md. App. 154 (1984), *overruled in part by Wyndham v. Haines*, 305 Md. 269 (1986). In *Hartman*, a medical malpractice case, an arbitration was commenced under Maryland's mandatory health claim law. Pursuant to the procedures under that law, a panel was selected, including Dr. William H.B. Howard. Dr. Howard was required by regulations to respond to a data sheet containing several questions for use by the parties in selecting a panel. In response to the question: Have you ever been sued or had a claim brought against you for medical malpractice?" Dr. Howard answered, "No." *Id.* at 158.

In fact, as discovered after the panel rendered an award, Dr. Howard had been sued in a medical malpractice claim in a case that was pending during the arbitration. The unsuccessful Plaintiff/Claimant in arbitration moved to vacate the award on the ground of evident partiality. *Id.* at 160. The trial court denied the motion to vacate. *Id.*

On appeal, the Court of Appeals reversed. Recognizing that the Maryland Arbitration Act was patterned after the FAA, it analyzed *Commonwealth Coatings*, concluding that the failure to supply the information "reasonably supported an inference of or the appearance of the existence of bias, prejudice or partiality or absence of impartiality." *Id.* at 167. This standard was later narrowed by the Maryland Court of Appeals to require vacatur only when the facts were sufficient to permit an inference of partiality, rather than its mere appearance. *Wyndham v. Haines*, 305 Md. 269 (1986). Because the *Hartman* court found both standards to be met, its holding would seem to remain valid. *See Parks v. Sombke*, 127 Md. App. 245 (1999) (harmonizing *Hartman* with *Wyndham*).

There are many cases arising in the context of jury *voir dire* that would seem analogous. As the Tenth Circuit has recognized, a civil litigant's right to a trial by jury, as encompassed in the Seventh Amendment to the U. S. Constitution, would be meaningless unless the jury is required to be fair and impartial. *Skaggs v. Otis Elevator Co.*, 164 F. 3d 511, 514-15 (10th Cir. 1998). The right to an impartial jury "is neither enlarged nor diminished by the Fifth Amendment provision that a person shall not 'be deprived of life, liberty, or property, without due process of law.' [The] denial of trial by an impartial jury is also the denial of due process...." *Casias v. United States*, 315 F.2d 614, 615 (10th Cir. 1963).

In *Commonwealth Coatings*, *supra*, the Supreme Court equated the evident bias standard of the FAA to the impartiality requirements applicable to judges under the due process clause. Because the impartial jury requirements also arise under the Fifth Amendment, cases involving juror misconduct should be equally informative to questions involving interpretation of Section 10 of the FAA.

In cases involving claims of juror partiality, the Court has stated that a litigant is entitled to a fair trial, albeit not a perfect one. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *Skaggs*, 164 F. 3d at 515. As the Tenth Circuit stated in *Skaggs*:

> An impartial jury is an essential element of a litigant's right to a fair trial. The

[5] The decision was also based upon the procurement of an award through undue means under FAA Section 10(a)(1).

> examination of prospective jurors during *voir dire* is intended to expose possible juror biases and is employed to insure that jurors are impartial. Not all juror biases, however, adversely affect a litigant's right to a fair trial. To violate due process, the bias must affect the juror's ability to impartially consider the evidence presented at trial.

Id. (citations omitted). Thus, in order to establish juror bias sufficient to constitute a deprivation of the right to a fair trial, a litigant must prove that a juror failed to answer honestly a material question on *voir dire* ***and either***:

> (a) a correct response would have provided a valid basis for a challenge for cause; or
>
> (b) the juror's motive for answering dishonestly or additional circumstances outside the *voir dire* process demonstrate actual or implied bias.

Skaggs, 164 F. 3d at 516. Applying this rule, most courts have held that intentional concealment "has become tantamount to a *per se* rule mandating a new trial." *Brines v. Civis*, 882 S.W.2d 138 (Mo. 1994). Even in cases in which the concealment is unintentional, among the "additional circumstances" that may demonstrate implied bias is the situation in which the juror has a "close connection to the circumstances at hand." *Burton v. Johnson*, 948 F.2d 1150, 1156 (10th Cir. 1991). Thus when a juror falsely answered a question on *voir dire* in a domestic assault case that she had not been a victim of domestic assault, a new trial was warranted even though a correct response would not have resulted in a challenge for cause and her answer was not intentionally dishonest. *Id.*

If the rules regarding new trials based upon false statements by jurors are applied to arbitrator selection, vacatur will be required if the undisclosed fact would have been the basis for a proper challenge for cause. *See* NASD Rule 10308(f) (close questions to be resolved in favor of customer). Even if grounds for cause do not exist, the award should be vacated if the arbitrator's false statement was intentional or the circumstances were closely connected to those involved in the case.

For example, in *Pierce v. Altman*, 147 Ga. App. 22 (1978), a juror in a personal injury case answered during *voir dire* that he had never been a defendant in a lawsuit for personal injuries. Subsequently it was discovered he had been a defendant in a personal injury suit less than four years earlier. The Court explained the significance of the question presented to the juror:

> In the context of personal injury actions, where pro-plaintiff and pro-defendant passions abound, a party is entitled to know of circumstances which might arouse such a bias in a prospective juror. . . .The question was most likely material to a determination of partiality, for bias could reasonably be expected to ensue from the circumstances inquired about.

Id. at 24.; *accord Beggs v. C.I.T. Credit Corp.*, 387 S.W. 2d 499 (Mo. 1985) (juror falsely stated that he had not been sued by credit companies; new trial ordered); *Stilwell v. Johnson*, 272 P. 2d 365 (Ok. 1954) (juror falsely stated that he had not been defendant in auto accident case; new trial ordered). This explanation would seem to be equally applicable to securities arbitrations.

The bias of jurors with similar life experiences was colorfully summarized by one judge in this way:

> One who has been assaulted, threatened with a deadly weapon and robbed is not likely to forget or forgive nor to treat lightly or even fairly similar

> conduct in others. This is a normal human reaction following customary behavior, expected and anticipated by the background of human experience.

U.S. v. McCorkle, 248 F.2d 1 (3d Cir. 1957) (*quoting State v. Grillo*, 16 N.J. 103, 116, 106 A.2d, 294). Civil defendants, like crime victims, often feel assaulted or violated by their civil opponent in a way that prejudices them against those asserting similar claims in similar cases.

CONCLUSION

In conclusion, as explained above, arbitration awards should be vacated if an arbitrator falsely responds to one or more questions that are designed by the NASD or other arbitration forums to elicit circumstances evidencing possible bias. In addition an arbitration award can and should be vacated on the basis that the arbitrator falsely certified in his oath that all required disclosers had been made.