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The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California

by

Matthew David Disco*

Introduction

Contractual arbitration is a popular alternative to commercial litigation because it allows parties to resolve their disputes in an extrajudicial setting; parties agree to forego the judicial process in favor of immediate resolution of their conflict in an impartial hearing. Ar-

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1. Contractual arbitration refers to the process by which contracting parties agree to “voluntarily submit their disputes for resolution by one or more impartial third persons instead of by a judicial tribunal.” H. Warren Knight et al., California Practice Guide: Alternative Dispute Resolution ¶ 4:6 (1992). Contractual arbitration differs markedly from “judicial arbitration.” See id. ¶ 4:7. Judicial arbitration is a term for certain actions that are statutorily diverted to arbitration before trial (like superior court actions in which the amount in controversy is $50,000 or less). Cal. Civ. Proc. Code § 1141.11 (West Supp. 1993); see Knight et al., supra, ¶ 4:7. In these judicial arbitrations, there is no preexisting agreement to arbitrate. Id. Furthermore, judicial arbitration awards are nonbinding on the parties and either party may demand a trial de novo by judge or jury. Cal. Civ. Proc. Code § 1141.2 (West Supp. 1993); see Knight et al., supra, ¶ 4:7. While parties are free to choose either binding or nonbinding contractual arbitration, this Note focuses on binding contractual arbitration. Unless otherwise indicated, “arbitration” refers solely to binding contractual arbitration before one or more neutral arbitrators.

2. The number of arbitrations presided over by American Arbitration Association (AAA) arbitrators demonstrates, in part, the contemporary prevalence of arbitration as a means of private dispute resolution. In 1980, AAA arbitrators presided over 40,694 arbitrations. In 1985, AAA arbitrators presided over 45,141 arbitrations, 7,937 of which were commercial arbitrations. In 1990, AAA arbitrators presided over 60,808 arbitrations, 13,603 of which were commercial arbitrations. In 1992, AAA arbitrators presided over 59,156 arbitrations, 12,858 of which were commercial arbitrations. Telephone Interview with Barbara Brady, American Arbitration Association (Nov. 16, 1993).

3. See infra notes 24-27 and accompanying text.
Arbitration awards differ significantly from court-rendered judgments in that they receive only limited post-determination judicial review. This review is limited to examining possible defects in the arbitration process, and does not address the arbitrator's substantive decision. One defect that would justify vacation of an arbitrator's award is manifest bias on the part of a supposedly neutral arbitrator. Manifest bias taints an award because the aggrieved party does not receive the minimum levels of integrity granted to parties who choose to have their disputes resolved by a neutral arbitrator.

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the United States Supreme Court held that the failure of a neutral arbitrator to disclose a relationship that gives rise to an impression of possible bias justifies vacation of an arbitration award. The policy

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4. Arbitration awards are the functional equivalent of judgments rendered in a court of law, in the sense that both allow for principled dispute resolution between two parties. See Richard Chernick, *ADR for the Commercial Litigator* 47 (1989).


6. An arbitrator's substantive decision is defined here as an exercise of the power to resolve the entire merits of a controversy submitted by the parties. See Moncharsh v. Heily & Blase, 832 P.2d 899, 900 (Cal. 1992). In California, the general rule is that an arbitrator's decision cannot be reviewed for errors of fact or law, even when such error appears on the face of the award and causes substantial injustice to the parties. *Id.* at 919; see Robert Coulson, *Business Arbitration—What You Need to Know* 30 (3d ed. rev. 1987).

Coulson notes that state statutes generally limit a court's authority to review awards. *Id.* An arbitration award will be vacated only if the arbitrator engaged in misconduct, the arbitrators exceeded their statutory authority, or the arbitration hearing did not comport with due process. *Id.*


8. It might seem self-evident that neutral arbitrators should be impartial, but no California case has explicitly stated that the presence of a neutral arbitrator demands that the neutral arbitrator act in an impartial manner. However, grounds to vacate an arbitration award would exist if a neutral arbitrator acted in a partial manner. As the California Supreme Court has stated:

>The Legislature has determined that the parties shall have considerable leeway in structuring the dispute settlement arrangements by which they are bound; while recognizing that this leeway may permit the establishment of arrangements which vary to some extent from the dead-center of neutrality, we at the same time must insist . . . that certain 'minimum levels of integrity' be achieved if the arrangement is to pass judicial muster.

Graham v. Scissor-Tail, Inc., 623 P.2d 165, 176 (Cal. 1981). An arrangement providing for dispute resolution before one or more neutral arbitrators provides the requisite minimum levels of integrity because it ensures an award from a neutral decision maker similar to that which would have been obtained had the parties litigated their dispute. However, such integrity would be absent in a case where a neutral arbitrator acted in a partial manner. In such a case, the neutral arbitrator would be acting contrary to the agreement between the parties. If courts were to give effect to an award procured under these circumstances, the actions of the "neutral" arbitrator surely would not meet the "minimum levels of integrity" required under California law.


10. *Id.* at 149.
basis for this ruling was sound: to ensure that those parties who opt out of the judicial system enjoy the same safeguard as those who choose to litigate.\(^{11}\)

This “impression of possible bias” test seems like it would be an easy standard to meet. Because arbitrators know about their previous relationships, they should have no problem identifying and disclosing those that create an impression of possible bias. However, while adherence to this standard appears easy in the abstract, its practical application is difficult. The Commonwealth Coatings standard creates significant and difficult questions for arbitrators: What types of relationships create an impression of possible bias? Are they limited to business relationships, or do they include social relationships? What, for that matter, constitutes a business relationship?

These questions assume greater importance in connection with judicial recognition of arbitration awards. After an arbitration hearing, the arbitrator renders an award favoring one party over the other.\(^{12}\) The arbitration proceedings at this point are not subject to court review except under two situations.\(^{13}\) First, if the losing party

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11. *Id.* at 148; *see also id.* at 150 (“This rule of arbitration and [the 33d Canon of Judicial Ethics] rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”).

While the judicial and arbitration systems share this common safeguard, different considerations apply to arbitrators than to judges. Justice Byron White noted this difference in his concurrence when he stated:

The 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. It is often because they are men of affairs, not apart from but of the market place, that they are effective in their adjudicatory function. This does not mean that the judiciary must overlook outright chicanery in giving effect to their awards; this would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable arbitrators.

*Id.* at 150 (White, J., concurring) (citations omitted).

Justice White’s commentary is important because it recognizes more than just the different considerations that apply to judges and arbitrators. It recognizes that parties are free to disregard previous relationships that give rise to an impression of possible bias if they are informed of these relationships in advance. This recognition gives rise to an important corollary, one founded on the consensual nature of contractual arbitration. See *infra* note 25. If parties are confronted with an arbitrator whose previous relationships give rise to an impression of possible bias, they may either disregard the previous relationships and appoint the arbitrator, or refuse to appoint the arbitrator, opting instead for the appointment of one satisfactory to both parties.

12. *Coulson*, *supra* note 6, at 28.

13. This is because “[a]n arbitrator’s award is not directly enforceable. Until confirmed or vacated by court proceedings, the award has no more force or effect than a
does not comply with the terms of the award, then the winning party may seek enforcement of the award in court. Second, the losing party may go to court if grounds exist to vacate the award, such as the failure to disclose a relationship that gives rise to an impression of possible bias.

This limited access to judicial review is problematic because a court of law is the sole forum that can provide authoritative answers to the questions raised above. An arbitrator's answers to these questions are merely speculative, and show only what the arbitrator personally felt was necessary to disclose. However, judicial determination of these questions is final. If a judge thinks an undisclosed relationship creates an impression of possible bias, then the judge will vacate the award. Essentially, the judiciary maintains the power to second-guess an arbitrator's judgment. Thus, arbitrators have only the phrase "impression of possible bias" as a guide to disclosure. The phrase itself offers little practical assistance; it is an amorphous guide whose contours are developed by judges in a post hoc determination of what an arbitrator should have disclosed.

Two principal reasons necessitate clarification of the impression of possible bias standard. First, clarification is necessary to maintain the viability of arbitration as an alternative means of dispute resolution. If the standard is unclear, then parties will be tempted to seek vacation of unfavorable arbitration awards in every instance by attempting to capitalize on a vague and inherently manipulable standard. If losing parties routinely turn to the judiciary to avoid unfavorable arbitration awards in this manner, then arbitration will be little more than a pit stop before the parties' eventual invocation of the judicial process. Second, a clear standard is necessary for the continued vitality of the arbitration system. If the standard is imprecise, uncertainty will creep into the process. This instability will, in turn, delegitimize arbitration because people will be unwilling to opt into a system of alternative dispute resolution that cannot guarantee consistent results.

contract in writing between the parties to the arbitration." KNIGHT ET AL., supra note 1, ¶ 4:443.
14. COULSON, supra note 6, at 29.
15. Id. at 30.
16. See infra note 25.
17. An arbitrator's civil liability is generally not at issue when an award is vacated for failure to disclose a relationship that gave rise to an impression of possible bias, because California grants arbitrators immunity from civil liability when acting in the capacity of arbitrator under any statute or contract. See CAL. CIV. PROC. CODE § 1280.1 (West 1982 & Supp. 1993).

However, this does not foreclose the possibility of civil litigation altogether. A striking example of this is Neaman v. Kaiser Found. Hosp., 11 Cal. Rptr. 2d 879 (Cal. Ct. App. 1992), discussed infra notes 129-134 and accompanying text. In Neaman, an award favor-
This Note examines the impression of possible bias standard as it has evolved in California, and applies it to institutional arbitration providers. Part I discusses arbitration as a means of alternative dispute resolution, characteristic features of the arbitration process, and the need for neutral arbitrators. Part II discusses the legal framework governing the impression of possible bias, covering the seminal Commonwealth Coatings case and its adoption in California. Part III traces the evolution of the standard in the California courts of appeal and normatively assesses current law. Part IV addresses application of the standard to two of the nation's largest providers of arbitration services. Given the great number of disputes settled through arbitration proceedings, this issue is of great importance. As the business ties of arbitrators extend to wider circles, the pool of relations that may create an impression of possible bias also increases. While California courts have not tested the impression of possible bias standard as applied to large arbitration providers, this Note addresses how the standard should be applied.

I. Arbitration as a Means of Alternative Dispute Resolution

Arbitration is the functional equivalent of litigation in the sense that it allows parties to create binding settlements of disputes, albeit outside the judicial forum. While differing in form, arbitration shares certain characteristics with litigation. Perhaps the most important similarity is that both feature an impartial decision maker.

Arbitration offers several advantages over the judicial system as a means of dispute resolution in this impartial setting. Arbitration generating Kaiser was vacated because the neutral arbitrator failed to disclose a substantial business relationship with Kaiser. Id. at 880. The neutral arbitrator, Ralph Drummond, was not sued for this nondisclosure. However, he was later sued in a similar situation. See Evans v. Drummond, No. BC 067119 (Cal. Super. Ct. filed Oct. 26, 1992). In Evans, Evans submitted to arbitration an unrelated claim against Kaiser in which Drummond also served as the neutral arbitrator. Drummond rendered an award favoring Kaiser. Unsatisfied with the award, Evans sued Drummond and Kaiser on various fraud theories. The one most relevant to this Note was her claim of constructive fraud. She alleged constructive fraud on the basis that Drummond fraudulently stood to gain by neglecting to disclose his substantial business relationship with Kaiser. Evans claimed that she never would have agreed to Drummond as the chosen neutral arbitrator had she known of this relationship.

This allegation of fraud would not overcome the statutory grant of immunity because the proper remedy for arbitrator misconduct is the vacation of an award rendered by the arbitrator. Coopers & Lybrand v. Superior Court, 260 Cal. Rptr. 713, 721 (Cal. Ct. App. 1989). However, this complaint demonstrates that failure to disclose relationships that give rise to an appearance of possible bias may force neutral arbitrators into unwanted litigation.

18. See supra note 2.
19. See supra note 1.
erally resolves commercial disputes at a lower cost than litigation.\textsuperscript{20} It also tends to settle disputes more quickly and efficiently than litigation does. Parties in large commercial disputes need not wait years for courtroom access, nor wade through extensive pretrial discovery and motion practice.\textsuperscript{21} Arbitration hearings and decisions are not matters of public record and may be kept confidential.\textsuperscript{22} Furthermore, parties generally do not sacrifice decision-making quality when they submit claims to arbitration because arbitrators are typically retired judges, practicing lawyers, or experts in the field in which the dispute arises.\textsuperscript{23}

Arbitration is a consensual arrangement,\textsuperscript{24} with its terms dictated by contract between the parties.\textsuperscript{25} The two methods that predominate are “single” and “tripartite” arbitration.\textsuperscript{26} In single arbitration, the

\textsuperscript{20} Hoening, supra note 5, § 1.02 (“Although no nationwide statistics are available, several major ‘consumers’ of dispute resolution have done comparative cost studies, and arbitration and other ADR methods have come out as clear winners. Thus, one major insurance carrier reported that it saved over $500,000 by submitting 450 claims for ADR.”); Bruce Fein, Keeping Customers Out of the Courts, Legal Times, Sept. 28, 1992, at 24 (“[A]n uncomplicated personal injury court trial may consume two weeks and cost $1,000,000, whereas an ADR procedure addressing the identical claim might be completed in less than a day for approximately $1,200.”).

\textsuperscript{21} Chernick, supra note 4, at 48.

\textsuperscript{22} Id.

\textsuperscript{23} Coulson, supra note 6, at 9; Hoening, supra note 5, § 4.13.


\textsuperscript{25} The function of courts in civil litigation is to resolve disputes between parties. Concomitant to this function is the right to make use of the courts as a means to settle disputes. In contractual arbitration, parties agree ahead of time to forego this right in the event that a future dispute should arise. See supra note 1.

That this agreement to bypass the judicial process arises from a contractual relationship is significant. Through their freedom to contract, parties select for themselves the method by which future disputes are to be decided. Although this Note focuses on arbitration before one or more neutral arbitrators, see supra note 1, nothing prevents the parties themselves from selecting a method of arbitration that does not feature neutral arbitrators. See supra note 8; see also Graham v. Scissor-Tail, 623 P.2d 165, 174 (Cal. 1981). Once the parties do choose to arbitrate before one or more neutral arbitrators, however, those arbitrators must truly be impartial, see supra note 8, and they must disclose any previous relationships that give rise to an impression of possible bias.

Just as parties are free to choose the method by which their disputes will be arbitrated, they may select the method for choosing their arbitrators. On this point, see Coulson, supra note 6, at 14 (“Commercial arbitrators serve under the rules selected by the parties.”); see also Cal. Civ. Proc. Code § 1281.6 (West 1982); Knight et al., supra note 1, at 62 (“If the arbitration agreement does not contain provisions for selecting an arbitrator, the parties may agree among themselves at the time of the dispute to a particular arbitrator or to particular selection procedures. If the parties are unable to agree, and the arbitration is ad hoc, a party may petition the court to appoint a neutral arbitrator.”).

\textsuperscript{26} Of course, parties are free to arbitrate their disputes in any way upon which they can agree. See supra note 25; Cal. Civ. Proc. Code § 1282 (West 1982) (“Unless the arbitration agreement otherwise provides . . . “). However, single and tripartite arbitration are the two major methods of arbitrator selection. See Ian R. MacNeil, American Arbitration Law 78 n.11 (1992).
parties submit their dispute to arbitration before a single, mutually chosen arbitrator. In tripartite arbitration, the parties submit their dispute to a panel consisting of two party arbitrators—one chosen by each party—and a third neutral arbitrator chosen by agreement between the party arbitrators.27

The consensual nature of arbitration might seem to render the question of arbitrator bias moot, because it is unlikely that parties would agree to a hearing in front of an arbitrator who is biased against them. For this reason, one may begin with the presumption that an arbitrator is impartial.28 This presumption of neutrality can be rebutted,29 however, and the arbitration award consequently vacated. For the most part, the grounds for rebuttal are limited to evident partiality, corruption, or arbitrator misconduct.30 However, as Commonwealth Coatings demonstrates, even the impression of possible bias may justify rebuttal of this presumption and a consequent vacation of any arbitration award.

II. Legal Framework Governing the Impression of Possible Bias

The landmark case vacating an arbitration award because of the failure to disclose a relationship that gives rise to a impression of pos-

27. See COULSON, supra note 6, at 31; HOENIGER, supra note 5, § 1.08. Cases are decided by majority vote, unless the arbitration agreement otherwise provides. See CAL. CIV. PROC. CODE § 1282(b).
28. The presumption of neutrality is strengthened through default rules of appointment promulgated by large-scale arbitrators such as the AAA. The AAA has adopted the following default selection procedures to ensure impartiality when parties apply to the AAA to select an arbitrator:
   1. The AAA will send a specially prepared list of proposed arbitrators to each party. Arbitrators are nominated by leaders in their industries or professions, and are added to the list after the AAA has checked their qualifications and reputations.
   2. Parties may cross off objectionable arbitrators and number the remaining names in order of preference. It is up to the parties to investigate proposed arbitrators, and they may get additional information from the AAA.
   3. The lists are returned to the AAA, and mutually acceptable choices are noted. If there are no mutually acceptable choices, additional lists may be submitted at the request of both parties.
   4. If the parties are unable to agree upon an arbitrator, the AAA will make administrative appointments.

   COULSON, supra note 6, at 14, 18. These standards give both parties a voice in choosing the arbitrator. Given this bilateral input, it is unlikely that a manifestly partial arbitrator will be chosen to conduct any AAA arbitration hearing.

30. See 9 U.S.C. § 10; see also CAL. CIV. PROC. CODE § 1286.2(a), (b).
sible bias is the United States Supreme Court's decision in Commonwealth Coatings. California adopted this approach and applied it to California's statutory grounds for vacating arbitration awards in Johnston v. Security Insurance Co.

A. The Seminal Case

In Commonwealth Coatings, the Supreme Court interpreted the federal statutory grounds for vacating arbitration awards. In addition to recognizing the explicit statutory bases for vacating an award, Commonwealth Coatings found an implicit requirement that arbitrators disclose to the parties "any dealings that might create an impression of possible bias."

Commonwealth Coatings involved a construction dispute between a subcontractor, Commonwealth Coatings, and the surety to the prime contractor's performance bond, Continental Casualty. Commonwealth Coatings successfully challenged an unfavorable arbitration award because the neutral arbitrator failed to disclose close financial relations between himself and the prime contractor. The neutral arbitrator regularly acted as an engineering consultant to the prime contractor, generating fees of about $12,000 over five years. The Court held that failure to disclose these previous dealings to Commonwealth Coatings justified vacation of the award.

The Supreme Court based its conclusion on its interpretation of the United States Arbitration Act. Section 10(a) of the Act specifies grounds for which vacation of an arbitration award is proper. Sections 10(a)(1) and (2), respectively, state that an award may be vacated if it is "procured by corruption, fraud, or undue means," or if

33. 393 U.S. at 149.
34. Id. at 146.
35. Id. at 147-50.
36. These fees were paid for services rendered on many different projects, including those at issue in the dispute. Id. at 146.
37. Id. at 146-50.
39. These include:
(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 may have been prejudiced, and (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

"there [i]s evident partiality . . . in the arbitrators." The Court rejected lower court rulings that intimated that these subsections required a finding of actual fraud or bias. Recognizing that Congress intended to provide for impartial arbitration, the Court held that arbitrators must disclose to the parties any dealings that might create a reasonable impression of possible bias. Failure to do so would require vacation of an arbitration award.

In Commonwealth Coatings, the Court found that the arbitrator’s financial relations with the prime contractor’s surety created an impression of possible bias. However, it reached its decision in conclusory terms and did not specify what kinds of relationships could create this impression in other circumstances. The only guiding principles for future arbitrators were the “impression of possible bias” test and the facts of Commonwealth Coatings.

B. The California Approach

Like federal law, California law provides statutory grounds for the vacation of arbitration awards. Subsections (a) and (b) of California Civil Procedure Code section 1286.2 are nearly identical to those provisions of the United States Arbitration Act considered in Commonwealth Coatings. Those California provisions mandate the vacation of an arbitration award if a court determines that “the award was procured by corruption, fraud or other undue means,” or that “there was corruption in any of the arbitrators.”

Based on these similarities, the court in Johnston v. Security Insurance Corp. interpreted subsections (a) and (b) just as the Supreme Court had interpreted the corresponding subsections of the United States Arbitration Act in Commonwealth Coatings. In Johnston, the claimants filed a claim for fire loss under their insurance policy. The claim was submitted to tripartite arbitration and resulted in an award favoring the claimants.

40. 9 U.S.C § 10(a)(1), (2).
41. 393 U.S. at 147-48.
42. Id. at 147.
43. Id. at 149. The Court further stated, “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.” Id. at 150.
44. CAL. CIV. PROC. CODE § 1286.2.
45. CAL. CIV. PROC. CODE § 1286.2(a), (b).
47. Id. at 134-36.
48. Id. at 133.
49. Id. at 133-34.
The court granted the insurer's motion to vacate because the following facts were not disclosed to the parties: (1) The neutral arbitrator was acquainted with the claimants' counsel and the claimants' party arbitrator; (2) The neutral arbitrator previously referred cases to the claimants' party arbitrator; and (3) On the date of the arbitration hearing, the claimants' party arbitrator represented a client referred to him by the neutral arbitrator on an unrelated matter pending in court. In light of these undisclosed facts, the court held:

The undisputed facts bring ... the arbitration proceedings under review within the zone where the rule of Commonwealth Coatings is applicable. The difference in the acquaintanceship being with claimants' counsel and [claimants' party arbitrator] and the business dealings being with [claimants' party arbitrator] directly instead of directly with the claimants ... is insufficient to remove the acquaintanceship and dealings beyond the scope of creating an impression of bias.

The court held that these factors, when taken as a whole, created an impression of possible bias. However, the court did not clarify whether there is a meaningful difference between mere acquaintanceships and business dealings. Nor did it discuss the difference, if any, in relations between the neutral arbitrator and the claimants' counsel, or between the neutral arbitrator and the claimants' party arbitrator.

While Johnston did not provide a clear rule, its analysis of Commonwealth Coatings gave some indication of what kind of relationships would create an impression of bias in California. The opinion noted that in Commonwealth Coatings the "failure to disclose even sporadic but substantial business relationships with a party to the arbitration constituted legal cause for vacating the award." Thus, under Johnston, "substantial business relationships" between the arbitrator and one of the parties to the arbitration will trigger a duty to disclose.

III. Evolution of the California Approach

With Johnston's unclear language as their only guide, California courts of appeal began to define the contours of what facts would create an impression of bias and trigger a duty to disclose. Banwait v. Hernandez was the first substantial attempt by a California court of appeal to define the nature of those relationships that give rise to an impression of possible bias. For this reason, Subpart A covers those cases leading up to Banwait, Subpart B discusses the Banwait decision itself, and Subpart C covers those post-Banwait cases that address the

50. Id. at 135-36.
51. Id. at 136.
52. Id. at 134.
impression of bias standard. Subpart D critically assesses the standard as developed by the California courts.

A. Early Cases Addressing the Impression of Possible Bias

Whether an impression of possible bias arises from personal relationships is now settled law.\(^54\) *Gonzales v. Interinsurance Exchange of Automobile Club*\(^55\) addressed this issue, holding that an arbitrator need not disclose a purely personal relationship because such a relationship, standing alone, does not give rise to an impression of possible bias.\(^56\)

In *Gonzales*, the claimant, Gonzales, sought to recover under the uninsured motorist provision of his insurance policy, which was issued by Interinsurance Exchange.\(^57\) The parties sent Gonzales’s claim to arbitration in accordance with American Arbitration Association (AAA) rules, which resulted in an award in favor of Interinsurance Exchange that Gonzales moved to vacate.\(^58\) Gonzales challenged the award and claimed that the neutral arbitrator’s longstanding “personal relationship” with a senior partner of the law firm representing Interinsurance Exchange created an impression of possible bias.\(^59\)

The issue on appeal was whether a purely personal relationship between an arbitrator and one party’s counsel required vacation of an arbitration award. The court used the facts of *Gonzales* to tighten up *Johnston’s* loose language,\(^60\) holding that without something more, such as a business-related element, a personal relationship does not create an impression of possible bias.\(^61\)

According to *Gonzales*, the personal relationships between the neutral arbitrator and both claimants’ counsel and claimants’ party arbitrator in *Johnston* were irrelevant to that decision. There, the gravamen of the nondisclosure was the neutral arbitrator’s business dealings, not his social relations with the interested parties. Post-*Gonzales* cases have followed this method of analysis and required something more than a mere personal relationship to vacate an arbitration award.\(^62\)

\(^54\) See infra note 62.
\(^56\) Id. at 285.
\(^57\) Id. at 283.
\(^58\) Id.
\(^59\) Id.
\(^60\) Id. at 284.
\(^61\) Id. at 285.
The law is not as well-settled, however, with respect to business relationships. *San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Electric Co.* was the first case after *Johnston* to address these relationships. *San Luis Obispo Bay Properties* implies that business relationships bearing indicia of "favoritism or unusual preference" create an impression of possible bias, and that nondisclosure of such relationships justifies the vacation of an arbitration award.

In *San Luis Obispo Bay Properties*, claimant San Luis Obispo Bay Properties, Inc. (SLOBP) subleased land to Pacific Gas & Electric (PG&E) in return for PG&E's guarantee of repayment of loans made by SLOBP. The amount of the guarantee was to be established by independent appraisals of the value of the leasehold interest, with any disagreements to be resolved by a mutually appointed arbitrator. The parties could not agree on the final amount of the guarantee and submitted the dispute to arbitration. SLOBP challenged the subsequent arbitration award, and alleged an impression of possible bias because the neutral arbitrator had referred one or two overflow cases per year to PG&E's appointed appraiser for no consideration. Despite this relationship, the court refused to vacate the arbitration award.

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64. Id. at 741. San Luis Obispo Bay Properties also moved to vacate the award because of connections between a company owned by the neutral arbitrator, Goode, and Pacific Gas & Electric (PG&E). Goode's company had performed substantial appraisal work for the Irvine Company from 1951 to 1963. Id. at 742. One of Irvine's directors, Robert Gerdes, was general counsel and vice president at PG&E during that time. Id. The court held that no impression of bias was created due to this relationship because there was "no evidence nor any suggestion that Mr. Gerdes dominated any of the corporations, or that any of them was in any sense his alter ego. ... Moreover, the trial court found ... that Goode and Gerdes did not know one another and that no business or social relationship between them had ever existed." Id.

As an aside, the court further acknowledged in dicta that practical limits constrained the class of relationships requiring disclosure. An arbitrator cannot be expected to delve too deeply in research to uncover past relationships, since "he cannot be expected to provide the parties with his complete and unexpurgated business biography." *Id.* at 742 (citing Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 150, 151 (1968) (White, J., concurring)). Thus, prudential constraints limit the true class of relationships that must be disclosed.

65. Id. at 736.

66. Id. at 736-37.

67. Id. at 737.

68. See infra note 73.

69. Id. at 741.

70. Id.
The court noted that an indirect relationship between an arbitrator and a party could create an impression of possible bias. It distinguished Johnston, where an indirect relationship requiring disclosure arose from dealings between an arbitrator and an attorney for one of the parties, holding that the dealings between the neutral arbitrator and a party-appointed representative need not have been disclosed.

The different relationships in these two cases—arbitrator and attorney in Johnston, arbitrator and party-appointed representative in San Luis Obispo Bay Properties—do not explain the different results. The court in San Luis Obispo Bay Properties focused on qualitative differences between the two relationships, and denied the motion to vacate because there was "no indication of any favoritism or unusual preference[,] . . . nothing, in short, that could be fairly said to create an impression of possible bias as a matter of law." In holding that the relationship between the neutral arbitrator and PG&E's appointed appraiser did not create an impression of possible bias, the court recognized that it was important, though not determinative, that the references were made for no consideration.

San Luis Obispo Bay Properties' "favoritism or unusual preference" language is problematic because it suggests that vacation of an arbitration award requires a finding of actual favoritism or unusual preference. As Commonwealth Coating illustrates, however, the impression of possible bias standard requires no such finding; the impression alone justifies vacating an award. Any requirement of an actual finding would undermine the potency of the impression of possible bias standard. San Luis Obispo Bay Properties' holding should be reformulated in recognition of this point. Properly reformulated, the standard would require either a direct or indirect relationship between the arbitrator and a party whose nature is such that there exists a possibility of favoritism or unusual preference on the arbitrator's part.

Reformulation of the standard would not change the result in San Luis Obispo Bay Properties. The mere reference of one or two overflow cases per year from the neutral arbitrator to PG&E's appointed appraiser for no consideration does not give rise to a reasonable inference that there existed possible favoritism or unusual preference between the two. Although each may have derived a personal benefit
from the additional business, neither derived a personal benefit from the act of referral itself.\textsuperscript{76}

\textit{Wheeler v. St. Joseph Hospital,}\textsuperscript{77} decided four years after \textit{San Luis Obispo Bay Properties}, did not add much to the verbal formulation of the impression of possible bias standard. It is nevertheless significant because it calls for different levels of scrutiny depending upon the neutral arbitrator's relation to the underlying controversy.\textsuperscript{78}

In \textit{Wheeler}, claimant Wheeler sued St. Joseph's Hospital and several doctors for medical malpractice, and Wheeler's wife sued for loss of consortium and emotional distress.\textsuperscript{79} Their claims were arbitrated in accordance with the hospital's "Conditions of Admission" form, which Wheeler had signed.\textsuperscript{80} The Wheelers moved to vacate an unsatisfactory arbitration award. They noted that the medical member of the arbitration panel failed to disclose that he rendered medical services as an expert witness in an unrelated case for the law firm representing the principal doctor defendant in the arbitration.\textsuperscript{81}

The court found an impression of possible bias only in conclusory terms and did little analysis to justify its vacation of the arbitration award.\textsuperscript{82} The decision, however, was decided correctly under the reformulated \textit{San Luis Obispo Bay Properties} standard. The doctor's law firm retained the neutral arbitrator as an expert witness shortly before the arbitration hearing. This business relationship was beneficial to both parties; the arbitrator's services helped the law firm's case, and the law firm conferred a financial benefit on the arbitrator for services rendered. These close relations with strong financial motives

\textsuperscript{76} This formulation does not change the result in \textit{Johnston} either. In \textit{Johnston} the neutral arbitrator previously referred cases to the claimants' arbitrator, and the claimants' arbitrator represented one of those referred clients on the day of the arbitration in question. The neutral arbitrator made these referrals for the professional and monetary benefit of the claimants' arbitrator. Unlike the referral of overflow cases in \textit{San Luis Obispo Bay Properties}, the neutral arbitrator was not dumping off cases that he otherwise could not handle. He conferred a present benefit to claimants' arbitrator, suggesting possible favoritism or undue preference in the \textit{Johnston} arbitration. This possibility was strengthened because of the party arbitrator's contemporaneous representation of a referred client on the day of the arbitration hearing. \textit{See KNIGHT ET AL., supra} note 1, ¶ 4:492.

\textsuperscript{77} 133 Cal. Rptr. 775 (Cal. Ct. App. 1976).

\textsuperscript{78} \textit{See infra} text accompanying note 84.

\textsuperscript{79} \textit{Wheeler}, 133 Cal. Rptr. at 778.

\textsuperscript{80} \textit{Id.} at 778-79. The arbitration followed the AAA rules for medical malpractice claims, and the neutral arbitration panel consisted of one medical doctor, one lawyer, and one businessman provided by the AAA. \textit{Id.} at 792.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} The court noted two additional independent bases for vacation of the award. First, there was no showing of valid assent on the part of the Wheelers to arbitration. Second, the "arbitration option" in the hospital's admission agreement was too uncertain and ambiguous to constitute an agreement to arbitrate on the part of the defendant doctors. \textit{Id.} at 790.
for both parties created circumstances in which favoritism or preference on the part of the arbitrator was clearly possible. The timing of these relations—consummated as they were on the eve of the arbitration proceedings—augmented this possibility.83

In addition to its cursory impression of possible bias analysis, the court in Wheeler also commented on the neutral arbitrator’s position on the arbitration panel, recognizing that “[t]he views of a medical member of an arbitration panel deciding a medical malpractice claim can manifestly influence the vote of the nonmedical members.”84 Since the medical member of the panel possessed specialized knowledge about the substance of the underlying arbitration, the Wheeler court closely scrutinized his contacts with the parties to the arbitration. Although not explicit on this point, Wheeler suggests that courts will be more likely to vacate an award under the impression of possible bias standard when a neutral arbitrator possesses specialized knowledge about the underlying controversy.

Figi v. New Hampshire Insurance Co.85 contributed further to the impression of possible bias analysis.86 In a factual situation analogous to Wheeler, the court implicitly rejected the idea that a “substantial business relationship” is determined by the quantitative value of services rendered. Rather, the nature and quality of the business relationship determines its “substantiality.”87

In Figi, claimant Figi sustained fire loss and filed a claim with New Hampshire Insurance Company.88 Figi’s claim was submitted to a tripartite appraisal panel89 pursuant to the terms of his insurance agreement.

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83. Knight et al., supra note 1, ¶ 4:492.
84. 133 Cal. Rptr. at 793.
85. 166 Cal. Rptr. 774 (Cal. Ct. App. 1980).
86. Gonzales, rendered in 1978 between the Wheeler and Figi opinions, focused primarily on personal relationships. It did, however, address business relationships in dicta.

The court cited to Johnston’s “substantial business relationship” language, and focused on monetary benefits accruing to the neutral arbitrator. The court cited favorably both the “close financial relationship” language of Commonwealth Coatings and language noting the absence “of favoritism or unusual preference” in San Luis Obispo Bay Properties. See Gonzales, 148 Cal. Rptr. at 285-86 (citing San Luis Obispo Bay Properties, 104 Cal. Rptr. at 741-42).

87. See infra notes 92-94 and accompanying text.
88. 166 Cal. Rptr. at 776.
89. Figi did not concern a traditional arbitration award because the case involved the settlement of fire insurance claims. In addition to the California Code of Civil Procedure provisions relating to arbitration, arbitration provisions in fire insurance contracts are governed by the California Insurance Code. Id. at 777. Specifically, the Insurance Code mandates particular “appraisal” procedures in the event the provider and the insured disagree about the actual cash value of a loss. See Cal. Ins. Code §§ 2071, 2072 (West 1972). In the event of disagreement, each party shall select a “competent and disinterested” appraiser, and the two selected appraisers then choose a third appraiser. Cal. Ins. Code
policy. Figi moved to vacate an unfavorable award because of undisclosed business dealings between the neutral arbitrator, an accountant, and New Hampshire's party arbitrator. Between the time the arbitrator agreed to preside over Figi's claim and the time he delivered the award, the neutral arbitrator worked as an accountant for New Hampshire's party arbitrator in five unrelated matters that generated fees of $847.

In vacating the award, the court modified the Johnston test and recognized the need to disclose any "repeated or significant contacts" an arbitrator has with a party to the dispute. In light of these five accounting jobs, the neutral arbitrator's relationship with New Hampshire's party arbitrator was indeed substantial. As the court noted, a neutral arbitrator "cannot be described as 'disinterested' when he has done business with an insurance company's [arb]itrator during the pendency of an appraisal involving the company."

Figi shows that quantitatively immaterial relations might nevertheless be "substantial" relations. Figi placed great emphasis on the monetary insignificance of services rendered as an accountant. However, the relationship was "substantial" despite generating only $847 for the neutral arbitrator. This emphasis on qualitative substantiality is proper. Rather than focusing on the amount of fees generated by the arbitrator, Figi correctly focused on the nature of the relationship generating the monetary benefit.

Park Plaza, Ltd. v. Pietz addressed the money-generating aspects of business relationships and underscored the significance of fi-

§ 2071. "The specific requirement [that] appraisers be 'disinterested' is not a requirement for arbitrators generally in other areas of the law." Id.

Although the Figi court cited all of the impression of possible bias cases discussed so far in this Note, it did not clearly state the basis for its opinion that the arbitration award should be vacated. It merely held that the business done between the neutral arbitrator and New Hampshire's party arbitrator furnished a basis for "vacating the award under Insurance Code Section 2071 and Code of Civil Procedure Section 1286.2 read together." Id. at 778 (emphasis added).

The facts of Figi, standing alone, would lead to a violation of § 1286.2(c). In Figi, the court used evidence of the neutral arbitrator's dealings to determine that he was "interested" within the meaning of Insurance Code § 2071. Since § 2071 is an administrative code provision which merely sets out the required form for the California Standard Form Life Insurance Policy, the court must have concluded that application of Civil Procedure Code § 1286.2 to the facts formed the basis for vacating the award.

90. 166 Cal. Rptr. at 776.
91. Id.
92. Id. at 777.
93. Id. at 778.
95. 239 Cal. Rptr. 51 (Cal. Ct. App. 1987).
nancial benefits flowing to the neutral arbitrator.\textsuperscript{96} \textit{Park Plaza} held that an arbitrator is not bound to disclose an appointment as a discovery referee in an unrelated case involving the attorneys for one of the parties, when that arbitrator cannot fairly be said to have an employment relationship analogous to that of an independent contractor.\textsuperscript{97}

In \textit{Park Plaza}, claimant Park Plaza entered into a joint venture with several investors doing business under the name of the Fess Parker-Red Lion Hotel.\textsuperscript{98} Each party gave a right of first refusal to the other party, capable of being exercised if either Park Plaza or the investors put their interest in the hotel up for sale.\textsuperscript{99} The investors later expressed a desire to sell their interest, and Park Plaza merely protested this proposed sale, rather than exercising their right of first refusal to the terms of sale.\textsuperscript{100} Park Plaza then demanded arbitration pursuant to the joint venture agreement to prevent the investors from selling their interest in the hotel.\textsuperscript{101} The neutral arbitrator ruled that the right of first refusal had been recognized and had expired by Park Plaza’s failure to act.\textsuperscript{102}

Park Plaza challenged the award on the grounds that the neutral arbitrator failed to disclose his appointment as a discovery referee in a previous unrelated case. Park Plaza noted that the same law firm that

\textsuperscript{96} Two years before \textit{Park Plaza}, Ray Wilson Corp. v. Anaheim Memorial Hosp. Ass’n, 213 Cal. Rptr. 62 (Cal. Ct. App. 1985), addressed the appearance of possible bias from a different perspective. In \textit{Ray Wilson Corp.}, the court held that any possible benefit to be gained by establishment of industry standards was insufficient as a matter of law to require vacation of an arbitration award due to the impression of possible bias. \textit{Id.} at 66. Anaheim claimed that one of the neutral arbitrators, an experienced contractor, stood to benefit from the arbitration because the construction arbitration could establish industry-wide standards for the electrical industry. \textit{Id.} at 65. Anaheim alleged an appearance of possible bias on this ground, but the court rejected this contention. \textit{Id.} Although the arbitrator stood to benefit personally from the arbitration’s outcome, this possibility did not create an impression of possible bias. \textit{Id.} at 66. This recognizes the principle enunciated by California courts of appeal that possible monetary benefits accruing to an arbitrator will not justify vacation of an arbitration award as a matter of law.

Missing here was Johnston’s “substantial business relationship.” In the context of establishing industry-wide standards, the arbitrator did not have a direct relationship with the parties, their counsel, or any of the other two neutral arbitrators. He simply stood to benefit from the outcome of the hearing, and had no direct interest tied to either party. The fact that industry-wide standards would be established if Ray Wilson were to prevail was irrelevant to the decision. The absence of any significant business opportunities or dealings arising from a relationship with one of the parties is determinative of the issue. Simply put, there could be no impression of possible bias without some substantial business relation, despite the possibility of monetary benefit.

\textsuperscript{97} 239 Cal. Rptr. at 53.
\textsuperscript{98} \textit{Id.} at 52.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.} at 52-53.
represented two of the investors represented one of the parties in that unrelated case. Park Plaza alleged that this nondisclosure amounted to corruption under California Civil Procedure Code section 1286.2(b) alone.

The court evaluated this relationship under the impression of possible bias standard, citing Johnston and Wheeler, even though the complaint was couched in terms of section 1286.2(b). The court discussed California's statutory provisions governing the appointment of court referees and "construed such a court-appointed referee as a subordinate judicial officer, [one] performing services for the court, and receiving compensation fixed by the court. In no sense [was the neutral arbitrator] an employee or an independent contractor of the parties or their attorneys." For these reasons, the facts did not "demonstrate any business relationship, substantial or otherwise, between the arbitrator and respondent's counsel or clients of respondent's counsel."

Park Plaza tied together the "substantial business relationship" of Johnston with a particular employment-type relationship. The neutral arbitrator could not maintain a business relationship with the investors' law firm without being its employee. Additionally, San Luis Obispo Bay Properties strongly suggests that there would not be any impression of possible bias in this case even if the parties had paid the neutral arbitrator's fees. While court-appointed referees do conduct discovery hearings, they are subordinate to the court and do not provide services that are severable from the judicial function. The neutral arbitrator's sole function was to conduct hearings and provide recommendations to the trial judge. He remained detached from the

103. Id. at 53.
104. Id.
105. Park Plaza's use of the impression of possible bias standard is significant. Although the complaint alleged a violation of § 1286.2, the court applied the Commonwealth Coatings-Johnston standard, a standard derived from the interstices of the explicit statutory grounds for justifying arbitration awards. Thus, it appears this the standard will be used in all cases arising under an implicit violation of § 1286.2(a) or (b) (i.e., cases alleging a violation of those sections when there is no outright corruption or fraud in the award or in the arbitrators themselves).
106. These sections state that the court may direct a referee when necessary "to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon," and that the court may order parties to pay fees of referees who are not employees or officers of the court. 239 Cal. Rptr. at 53 (citing CAL. CIV. PROC. CODE §§ 639(e), 645.1 (West Supp. 1993)).
107. Id.
108. Id.
109. With regard to findings of a referee appointed pursuant to the provisions of § 639, findings of fact concerning a collateral matter (such as discovery issues) are not binding on the court unless and until adopted by it. Chiarodit v. Chiarodit, 21 P.2d 562, 563 (Cal. 1933).
The neutral arbitrator's "employment" by the firm could not create the possibility of favoritism or unusual preference, despite the payment of fees directly from the firm pursuant to statutory directive. Therefore, no substantial business relationship requiring disclosure would exist.

B. Banwait v. Hernandez

Banwait marked the first substantial attempt to characterize the true nature of the business relationship that creates an impression of possible bias, some sixteen years after San Luis Obispo Bay Properties' "favoritism and unusual preference" formulation.

In Banwait, claimant Banwait sought to recover under the uninsured motorist provision of his insurance policy from the California State Automobile Association (CSAA) for injuries suffered in an automobile accident. Banwait commenced arbitration proceedings in accordance with his policy, and when the two parties could not agree to a mutually acceptable arbitrator, the court appointed an arbitrator pursuant to Banwait's petition. Banwait was unsatisfied with the arbitrator's award, and subsequently filed a motion to vacate. He alleged that a year before the arbitration, the neutral arbitrator hired CSAA's law firm (though not the particular lawyer appearing in the arbitration) to represent him in a lawsuit, which generated about $400 in legal fees for the firm.

The court held that the neutral arbitrator's relations with CSAA's law firm did not create an impression of possible bias. The opinion borrowed from Johnston, suggesting that a substantial business relationship between the arbitrator and one of the parties to the arbitration triggers a duty to disclose. However, the court in Banwait suggested that a substantial business relationship involves something more than a mere pecuniary interest, and stated that "the existence of bias depends on whether one can draw an inference of favoritism not because the arbitrator may receive money but because the arbitrator has a business-connected relationship that may lead him or her to place unusual trust or confidence in one side as opposed to the other."

111. Id. at 648.
112. Id.
113. Id.
114. Id. Banwait provided alternative grounds to support his motion to vacate by noting that the arbitrator was a longstanding friend of a partner in CSAA's law firm. The court rejected this contention, citing Gonzales. Id. at 651.
115. Id. at 652.
116. Id.
Banwait marks the first substantial attempt by a court to characterize the nature of those relationships that create an impression of possible bias and trigger a duty to disclose. However, it can be criticized because its language could conceivably require disclosure of every business or employment relationship that bears upon the parties to an arbitration hearing, their counsel, or their appointed arbitrators.

A more careful reading of Banwait demonstrates that Banwait's language augments both Johnston and San Luis Obispo Bay Properties. A substantial business relationship is one characterized by an atmosphere of pervasive trust and confidence—that is, one in which the possibility for "favoritism or unusual preference" on the part of the arbitrator is real. This formulation goes to the core of the impression of possible bias standard. Banwait, standing by itself, says that vacation of an award is proper if a business relationship "may lead [the arbitrator] to place unusual trust or confidence in one side as opposed to the other."\footnote{117} The opinion is overinclusive in this respect, however, since every employment relationship may arguably lead the parties to place unusual trust or confidence in each other.

The logic of Banwait does not explicitly require a relationship of trust or confidence. Rather, it requires a continuing relationship characterized by trust and confidence that may conceivably give rise to unusually preferential, though unintended, treatment on a particular future instance. In other words, when the relationship is so close that unintended trust and confidence might influence the decision of the arbitrator, it must be disclosed. Pervasive trust and confidence, permeating a business relationship,\footnote{118} triggers the duty to disclose.

The facts of Banwait illustrate that the court was unwilling to follow its own overinclusive standard. If what is truly important is a business-connected relationship that may lead the arbitrator to place unusual trust or confidence in one particular party, then the court erred in refusing to vacate the award. By retaining the law firm, the neutral arbitrator engaged in a business-connected relationship in which he undoubtedly formed opinions and impressions about its professional capability. It is conceivable that the neutral arbitrator might carry these impressions, either positive or negative, to future arbitration hearings involving that same law firm. Were the impressions positive, he could easily overestimate the capabilities of its representation; were they negative, he might dismiss its advocacy.

\footnote{117. \textit{Id}.}
\footnote{118. In light of this, it would seem that personal relationships would be the relationships most likely to create an impression of possible bias, because trust and confidence most definitely pervade those relationships. However, this contention is foreclosed by Gonzales and its progeny.}
based upon past experience, rather than on true reflection on the issues at hand.

Vacation of the award might seem extreme in light of the small amount of legal services rendered. The court recognized this point, noting that “the services rendered by the firm to the neutral arbitrator were insignificant.”\(^{119}\) However, if courts are concerned with the nature of the relationship in determining what creates an impression of possible bias, as they should be,\(^{120}\) the magnitude of services rendered should be irrelevant. Wheeler clearly supports this qualitative method of analysis.\(^{121}\) To let pure quantitative distinctions factor into the consideration is to disregard Banwait’s own admonition that a duty to disclose stems from something more than a mere pecuniary interest. The court should have either taken the “trust and confidence” standard as it stood and lived with an unpalatable application, or it should have searched for a better standard.

C. Post-Banwait

Only two cases decided after Banwait address the issue of vacating an award for failure to disclose a relationship that creates an impression of possible bias\(^{122}\) — Tate v. Saratoga Savings & Loan\(^{123}\) and

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\(^{119}\) Id.

\(^{120}\) See Blum, supra note 94, at 110.

\(^{121}\) See Wheeler, 133 Cal. Rptr. at 792.

\(^{122}\) Two recent post-Banwait decisions discuss the impression of possible bias standard. The first was Betz v. Pankow, 20 Cal. Rptr. 2d 834 (Cal. Ct. App. 1993) (Betz I), in which the court reached its decision without ever deciding whether an impression of possible bias was created. In Betz I, Betz and Pankow formed a partnership “for the purpose of owning and operating property.” Id. at 835. The parties could not agree on the manner of dissolution of the partnership, and submitted their dispute to arbitration under the auspices of the AAA, pursuant to the terms of the partnership agreement. A tripartite panel was selected, consisting of two males and one female. Id. Betz moved to vacate an unfavorable award, charging that the male panelists were improperly influenced by gender bias against her, and that this bias satisfied the impression of possible bias standard. Id. at 835-36. She relied on declarations by the female arbitrator, which stated in conclusory terms that the male arbitrators, in arriving at their decision, considered irrelevant and improper matters outside of the record that reflected gender bias. Id. at 839. The court denied relief, holding that the declarations were “entirely conclusual” and “irrelevant[] since the [impression of possible bias] test is objective and judged by the perspective of the hypothetical reasonable person.” Id.

The second case, Betz v. Pankow, 20 Cal. Rptr. 2d 841 (Cal. Ct. App. 1993) (Betz II), arose out of the proceedings of Betz I and discussed the impression of possible bias standard in greater detail. There, the neutral arbitrator’s former law firm had represented three businesses owned or controlled by Pankow. The court stated that this relationship created an impression of possible bias, but denied Betz’s motion to vacate on jurisdictional grounds.

Betz II was reminiscent of Wheeler in that it found an impression of possible bias only in conclusory terms. Id. at 843 (“This clearly presents an impression of possible bias.”). However, the case was rightly decided under the impression of possible bias standard de-
Neaman v. Kaiser Foundation Hospital. Curiously, neither case cites Banwait. This failure to consider Banwait might be a signal that the California courts of appeal reject its overinclusive language. The logic of Neaman suggests, however, that reading Banwait as an extension of both Johnston and San Luis Obispo Bay Properties correctly characterizes the true nature of the business relationship that must be disclosed.

Tate was the first case decided after Banwait to address this issue. It peripherally raised the impression of possible bias standard in a tripartite arbitration arrangement. In Tate, Saratoga attempted to discredit Tate's party arbitrator. The most substantial ground for vacating the arbitration award was that the party arbitrator failed to disclose that he became embroiled in a fee dispute when he represented one of the corporations owned by Saratoga's chief executive officer in an unrelated action.

Tate is important because it illustrates what relationships fall outside of the Commonwealth Coatings-Johnston framework, but it does not help define the nature of the business relationship that must be disclosed. The court summarily dispensed with the impression of bias analysis and rejected Saratoga's argument, holding that there was no impression of possible bias because the challenged relationship involved Tate's party arbitrator. As the court noted, Johnston's holding "was limited to the neutral arbitrator involved ... and not to the party arbitrators also involved." Since the party arbitrator's relationship fell outside of the Commonwealth Coatings-Johnston framework, there could be no impression of bias requiring disclosure.

Developed in Part III.D of this Note. The neutral arbitrator's law firm represented corporations owned or controlled by Pankow while the arbitrator was still with the firm. Id. Because the law firm acted as the corporations' advocate in business-related matters, an atmosphere of pervasive trust and confidence clearly existed between the law firm and the corporations. This relationship may be imputed to the neutral arbitrator because he was a partner of the firm at the time. Id.; see also Model Rules of Professional Conduct Rule 1.10 (1983) (imputed disqualification of attorneys). This relationship may likewise be imputed to Pankow by virtue of his actual control over the corporations at issue.

125. Id. at 449.
126. Id. Other attacks by Saratoga on Tate's party arbitrator, Mazetti, included claims that Mazetti misinformed another party arbitrator regarding the availability of a retired judge to serve as a neutral arbitrator; that Mazetti "improperly unsurped [sic] the nondelegable responsibility of the neutral arbitrator to rule on objections and the admission of evidence"; and that the arbitrators failed to find on all issues presented to them. Id. at 449-50. The court rejected these naked attempts to vacate a proper award, and stated that "[w]hen the smoke clears from Saratoga's ... challenges ... no impropriety is found." Id. at 450.
127. Id. at 448-50.
128. Id. at 449.
Neaman v. Kaiser Foundation Hospital addressed in greater detail the nature of the business relationship that must be disclosed, focusing on direct employment of a neutral arbitrator by a party to the arbitration that exhibits some indication of a partial relationship. In Neaman, the claimants, the Neamans, filed an action against Kaiser for medical malpractice in connection with treatment of their deceased relative. The parties submitted the matter to tripartite arbitration pursuant to the decedent's health care agreement with Kaiser. This resulted in an award favoring the hospital. The Neamans moved to vacate this award for the neutral arbitrator's failure to disclose a business relationship that the Neamans thought gave rise to an impression of possible bias.

The Neamans charged that a substantial business relationship arose from the neutral arbitrator's previous arbitration experience involving Kaiser. According to the neutral arbitrator:

[Thirty] percent of his professional time since . . . retirement from the bench had been spent as an arbitrator in Kaiser matters; 65 percent of that time was spent as a claimant's party arbitrator, 30 percent [of that time] as the neutral arbitrator and 5 percent [of the time] (about 5 cases) as Kaiser's [party] arbitrator.

The court of appeal vacated this award because the neutral arbitrator failed to unambiguously disclose his experience as a party arbitrator for Kaiser.

Though the neutral arbitrator had significant previous dealings with Kaiser, only his experience as Kaiser's party arbitrator created a "substantial business relationship" and triggered a duty to disclose. The quantitative insignificance—five cases out of 300—of his experience as Kaiser's party arbitrator was irrelevant. More important was the nature of this representation.

The arbitrator's previous experience as both a claimant's arbitrator and a neutral arbitrator did not trigger a duty to disclose because it was not characterized by an atmosphere of pervasive trust and confidence. When he acted as a claimant's party arbitrator, he did so as the representative of Kaiser's adversary. In this capacity the arbitrator did not have any relationship with Kaiser, let alone one characterized by pervasive trust and confidence. Similarly, such a relationship was absent when he acted as a neutral arbitrator in previous Kaiser matters. In these matters he was chosen not by Kaiser alone to be its representative, but rather by two competing actors to be a neutral arbitrator.

129. 11 Cal. Rptr. 2d at 880.
130. Id.
131. Id. at 881.
132. Id.
133. Id. at 883.
The arbitrator’s relationship with Kaiser as party arbitrator, however, was an employment-type relationship requiring disclosure despite its quantitative insignificance. As Kaiser’s party arbitrator, he accepted payment to represent the hospital’s interest in matters of conflict. As Kaiser’s “agent,” he conducted his representation with complete openness toward the hospital. Since a party arbitrator is selected precisely because of the perception that the arbitrator will favor the party’s interests, his relationship with Kaiser was characterized by an atmosphere of pervasive trust and confidence. Failure to disclose this relationship justified vacation of the arbitration award.

D. The Standard: What It Is and What It Should Be

The cases discussed above illustrate the ambiguity in this area of the law. *San Luis Obispo Bay Properties* highlighted an essential truth by stating, “In the final analysis, each case must depend on its own facts.” Fact-specific inquiry smothers the crisp application of rule-based doctrine. Critics and cynics alike might maintain that fact-specific inquiry means each case turns on a particular judge’s idea of what may possibly be perceived as creating an impression of possible bias. However, several common threads emerge from the case law discussed in this Note. Arbitrators who are aware of these commonalities can render awards resistant to judicial attack.

As *Gonzales* and later cases make clear, a personal relationship between the arbitrator and one of the parties, counsel for one of the parties, or one of the other arbitrators in the arbitration proceeding, will not create an impression of possible bias standing alone. This categorical rule has been followed in every “personal relationship” case. Without something more, such as business-related dealings, no duty to disclose exists.

Either direct or indirect business-related dealings between an arbitrator and a party to arbitration may create an impression of possible bias under certain circumstances. California courts of appeal have grappled with a precise characterization of those circumstances. Although no case has resolved the issue, five cases have created five formulations of the impression of possible bias standard:

134. See *Tate*, 265 Cal. Rptr at 449.
136. *But see supra* note 118.
An alternative approach would be to say that a relationship requiring disclosure is defined by what a reasonable person would consider to be a relationship that gives rise to bias. This reasonable person approach works well in other areas of the law because it assigns to the accused the duty to act according to community norms. However, arbitration involves the specialized skill and judgment of a quasi-judicial actor, and the standard for disclosure should reflect this specialized skill, not community norms.

Banwait's "trust and confidence" rationale is a step in the right direction because it properly focuses on the nature of the neutral arbitrator's relations. The use of the word "may," however, suggests that a huge class of relationships must be disclosed. This literal reading should be contrasted with the respective holdings of Johnston and San Luis Obispo Bay Properties. These cases temper the broad language of Banwait by confining the class of relationships that must be disclosed to those characterized by an atmosphere of pervasive trust and confidence. Perhaps these types of relationships are what Banwait had in mind when it used the word "unusual" to qualify its formulation, but the word "unusual" defies practical definition. While not without its own ambiguities, the "atmosphere of pervasive trust and confidence" formulation provides the most objective standard to date to describe the nature of those relationships that give rise to an impression of possible bias.

137. Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it . . .").
138. Two examples are negligence ("Did defendant use reasonable care under the circumstances?") and corporate proxy statement disclosure requirements ("Did the buyer-seller disclose all information that a reasonable investor would consider important in deciding whether to sell-buy?").
139. See supra Part III.C.
IV. How Does the Impression of Possible Bias Standard Apply to "Institutional" Arbitrators?

Two of the nation's largest banks, Bank of America and Wells Fargo, have recently introduced arbitration clauses into their commercial contracts. Both organizations make use of "institutional" arbitrators in their arbitration clauses: Bank of America names the AAA, and Wells Fargo designates Judicial Arbitration and Mediation Services, Inc. (JAMS). Contractual arbitration provisions involving large repeat customers and institutional arbitrators raise interesting questions about the disclosure of relationships that give rise to an impression of possible bias. These questions are significant because "[w]ith ADR companies getting many cases from [large corporate clients], private judges could feel pressured to favor big clients and preserve their relationships at the expense of the individual plaintiff."

Since the Bank of America and Wells Fargo plans provide for impartial arbitrators, these impartial arbitrators are required to disclose relationships that would give rise to an impression of possible bias under the Commonwealth Coatings-Johnston line of cases. However, these financial institutions provide repeat business to these institutional arbitrators. A question arises whether this repeated referral of business gives rise to an impression of possible bias on the part of individual arbitrators if those arbitrators do not otherwise maintain relationships that give rise to an impression of possible bias. This Part examines that question.

The AAA is a public, nonprofit arbitration clearinghouse, founded in 1926 to encourage the use of arbitration and other techniques of voluntary dispute resolution. By contrast, JAMS is a private corporation whose sole activity is providing private judges to preside over arbitration and other alternative dispute resolution hearings. JAMS boasts annual revenues of $24 million and offers the services of 178 retired judges who conduct nonbinding mediations, binding

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141. Id.
142. Nicholas Varchaver, Dispute Resolution, Am. Law., Apr. 1992, at 60 (quoting Daniel Weinstein, Vice-Chairman of JAMS); see also Badie v. Bank of Am., No. 944916, para. 22(a) (Cal. Super. Ct. filed Aug. 4, 1992) ("Defendant's practice is also unfair because it . . . substitutes for courts and juries . . . a process for dispute resolution which is biased in favor of business interests and will be biased in favor of the defendant bank as one of its best customers.").
143. Fein, supra note 20.
144. It is important to note that this discussion is not limited to Bank of America, Wells Fargo, or any other financial institution. The issues raised here confront all contractual provisions between institutional arbitrators and corporate clients, where third parties are required to arbitrate any dispute with that client's designated arbitration provider.
145. COULSON, supra note 6, at 8.
arbitrations, and other "private judging" options.\textsuperscript{146} It does not offer the broad education-related services and seminars that AAA does.

As a private corporation, JAMS maintains a financial stake in the outcome of every arbitration hearing; it stands to benefit financially from every matter submitted to it for arbitration by Wells Fargo. It has a direct interest in the volume of business done, and thus has a stake in maintaining satisfied institutional clients that constitute a source of repeat volume business. The vitality of the corporation as a whole depends in part upon the continued referral of matters to JAMS for arbitration, as does the welfare of its arbitrator employees. AAA has a lesser financial stake in matters submitted to them for arbitration, but it has a financial stake nonetheless. While it is true that AAA is a nonprofit corporation, this does not mean it will not benefit from the continued referral of matters for arbitration. AAA's management, officers, and other employees depend upon the vitality of the organization because their continued employment depends upon AAA's continued existence.

Thus, each organization essentially has a "stake" in the continued vitality of their operations (and, derivatively, in the continuation of their relations with the aforementioned financial institutions). However, the "stakeholders" are different with respect to each organization. For JAMS, the stakeholders are the corporation's shareholders; for the AAA, the stakeholders are those employed directly by the organization. A question arises whether this different identity of stakeholders has any significance in the impression of possible bias analysis. This Part also examines this question.

A. The Bank of America and Wells Fargo Agreements

Bank of America includes an arbitration clause in all checking, savings, and VISA-MasterCard accounts established after June 2, 1992.\textsuperscript{147} This clause states that all controversies involving one account or two or more accounts with at least one common owner will be decided by arbitration under the Commercial Arbitration Rules of the AAA.\textsuperscript{148}

In contrast, Wells Fargo requires a four-step procedure to resolve all consumer checking, savings, and credit card disputes exceeding $25,000.\textsuperscript{149} The four steps comprise informal negotiations, mediation

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{146} Varchaver, \textit{supra} note 142.
\item \textsuperscript{147} \textsc{Bank of America, Announcing Changes to Bank of America's Deposit Account Programs} (June 1992); \textsc{Bank of America, Change of Terms Notice for BankAmericard VISA, MasterCard, VISA Gold, Gold MasterCard and Apollo Accounts} (June 1992).
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textsc{Wells Fargo, An Important Notice For All Account Holders} (July 1992).
\end{enumerate}
\end{footnotesize}
before a JAMS judge, trial before a JAMS judge, and binding arbitration before a JAMS judge governed by federal arbitration law.\textsuperscript{150} If JAMS is unable to provide an arbitrator, Wells Fargo's arbitration provisions allow for selection of arbitrators by the AAA.\textsuperscript{151}

B. Applying the Standard

The banks and their customers jointly apply to either the AAA or JAMS to resolve their disputes. Under these arrangements, the banks are repeat customers of these institutional arbitrators, but each bank does not necessarily appear before an individual AAA or JAMS arbitrator more than once. One must take this into account when applying the impression of possible bias standard.

Part III showed that, under current case law, substantial business relationships requiring disclosure arise from direct or indirect relationships between a particular party and a particular neutral arbitrator. Accordingly, if an individual JAMS or AAA arbitrator selected under an arbitration clause has had a previous significant business relationship with either bank,\textsuperscript{152} then that arbitrator must disclose that relationship.\textsuperscript{153}

A different question is whether these arbitration clauses create a blanket impression of possible bias by virtue of the repeat business the banks provide. Must individual JAMS or AAA arbitrators unambiguously disclose the relations of their employers with Bank of America or Wells Fargo\textsuperscript{154} when they preside over a customer dispute? Framing the question this way raises two additional and related questions. First, does the relationship between a financial institution and an institutional arbitration provider rise to the level of a significant business relationship that an individual arbitrator is required to disclose? Second, if disclosure is required, do the customer agreements\textsuperscript{155} provide the "unambiguous disclosure" required under Neaman?

\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Under Neaman, merely selecting a particular arbitrator under either the Wells Fargo or Bank of America arbitration provisions does not create a significant business relationship requiring disclosure. This is because the arbitrator is chosen to serve as a neutral arbitrator, rather than as the party arbitrator of either bank.
\textsuperscript{153} See supra note 133 and accompanying text. The arbitrator must also disclose any previous significant business relationship with the claiming party in these banking disputes.
\textsuperscript{154} An arbitrator chosen under these arbitration clauses maintains an indirect relationship with the banks. The banks employ, under these arbitration clauses, the industrial arbitrators. The institutional arbitrators, in turn, employ (in the case of JAMS) or provide (in the case of AAA) the individual arbitrators chosen.
Concerning the first question, it appears that the significance of the business relationship differs between both financial institutions and their designated institutional arbitrators. Each of the financial institutions in a sense “employs” the institutional arbitrators through their arbitration clauses. Whether this “employment” rises to the level of a substantial business relationship depends, as seen in Part III, on the nature of the employment relationship.

Under the modified Banwait standard, the appropriate inquiry is whether a relationship characterized by an atmosphere of pervasive trust and confidence exists between the financial institutions and the institutional arbitrators. The AAA, as a nonprofit corporation, does not stand to gain as an institution from Bank of America’s continued referral of matters. However, those employed directly by the AAA (i.e., its officers, managers, and other employees) benefit from the continued referral because keeping the AAA going keeps them employed.

However, this benefit does not give rise to an atmosphere of pervasive trust and confidence between Bank of America and the AAA; those employees deriving a benefit from the continued acts of referral have no real influence over the decisions made by the individual AAA arbitrators hearing Bank of America matters. Since the decision makers are for the most part divorced from those who would benefit from continued acts of referral, it cannot be said that there is an atmosphere of pervasive trust and confidence between the AAA as an institution and the Bank of America.

Application of the impression of possible bias is less clear with regard to the Wells Fargo-JAMS relationship. There, JAMS, as a profit-seeking corporation, has a direct financial stake in every matter submitted to it for arbitration. If this source of business were to suddenly evaporate, JAMS as an institution would suffer. For this reason, JAMS has a vested interest in the Wells Fargo arrangement. Whether an atmosphere of pervasive trust and confidence exists in this interest presents a closer question than in the Bank of America-AAA arrangement. Arguably, such an atmosphere does exist, because JAMS places trust and confidence in Wells Fargo to continue referring matters to it for arbitration, and this trust and confidence pervades the relationship.

156. The individual AAA arbitrators appointed under the Bank of America-AAA agreement do stand to benefit from the act of appointment in the sense that such appointments provide those arbitrators with additional business. But this benefit is no different from benefits deriving from AAA appointments outside of the Bank of America-AAA agreement. For this reason, no impression of possible bias would arise on the part of individual arbitrators appointed under the Bank of America-AAA agreement.
Cast in these terms, the Wells Fargo-JAMS arrangement may properly be classified as a substantial business relationship. However, this may stretch the modified *Banwait* standard too far. The "trust and confidence" in this situation arises from the hope of continued future business, rather than from impressions formed through past business dealings.

The benefit accruing to JAMS's shareholders, however, presents a stronger case for the existence of a relationship characterized by an atmosphere of pervasive trust and confidence. JAMS shareholders have a degree of influence over the decisions made by individual JAMS arbitrators through their ownership interest in the corporation. The shareholders are residual owners of the corporation and reserve the power to make decisions regarding the future employment of particular arbitrators. At the same time they stand to benefit from Wells Fargo's continued acts of referral. Thus, those who stand to benefit financially from the Wells Fargo-JAMS relationship possess a measure of influence over each arbitrator that JAMS provides. In this sense, an atmosphere of pervasive trust and confidence may well permeate the Wells Fargo-JAMS relationship, because JAMS benefits from every matter submitted to it for arbitration, and the owners of JAMS have control over employment decisions involving the arbitrators presiding over individual arbitration hearings.

This, too, may stretch the modified *Banwait* standard too far, because it imputes the interest of the JAMS shareholders to individual JAMS arbitrators by virtue of the shareholders' residual influence over the continued employment of those arbitrators. This attenuated imputation of interest is a step removed from the employment relationships of *Wheeler* and *Figi*, where financial benefits accrued directly to the individual arbitrators. Until this institutional relationship is tested in California courts, however, application of the impression of possible bias relationship to the Wells Fargo-JAMS arrangement (and, for that matter, the Bank of America-AAA relationship) is an open question.

(2) *Does the Customer Agreement Provide “Unambiguous Disclosure”?*

The next question concerns full disclosure of these institutional arbitration arrangements. Because the Wells Fargo-JAMS arrange-
ment presents a closer case for the creation of an impression of possible bias, it is the focus for discussion of this question.

Assuming that the Wells Fargo-JAMS arrangement gives rise to an impression of possible bias that individual arbitrators must disclose, under Neaman each arbitrator must make unambiguous disclosure of JAMS’s agreement with Wells Fargo. Wells Fargo’s customer agreement alone probably does not provide unambiguous disclosure. Although the agreement clearly states that JAMS will resolve all disputes, this “disclosure” cannot be described as unambiguous. Wells Fargo customers are not likely to pore over the technical customer agreements that detail the substantial business relationship between Wells Fargo and JAMS. Without a clear explanation of the arbitration agreement to the customer, stated in plain English, there can be no unambiguous disclosure.

It is also debatable whether the customer receives unambiguous disclosure by virtue of the arbitration proceedings. When disputes are submitted to JAMS arbitrators for resolution, individual customers are concerned only with the resolution of their individual claims. Wells Fargo customers will undoubtedly know that JAMS has provided the arbitrator presiding over the dispute, but there is no guarantee that they will grasp the full extent of the Wells Fargo-JAMS arrangement. This is significant, since the full extent of the relationship is what arguably gives rise to an impression of possible bias. A sophisticated party—one with outside knowledge of the Wells Fargo-JAMS relationship—or its counsel might not need this disclosure, but Neaman does not suggest that this substitutes for anything less than full disclosure to the claimant. “Unambiguous disclosure,” by its very nature, requires an objective standard to protect all claimants, regardless of any particular knowledge or status that they might have.

In the face of this uncertainty with regard to disclosure, the validity of JAMS’s arbitration awards in the context of the Wells Fargo arrangement is questionable. Disclosure affords parties the opportunity to reject the appointment of particular arbitrators maintaining relationships that give rise to an impression of possible bias. If the Wells Fargo-JAMS arrangement itself is what gives rise to an impression of possible bias, then claimants would be free to reject any JAMS arbitrator. This, however, clashes with Wells Fargo’s contractual provision mandating the submission of every customer dispute to JAMS for arbitration. This irreconcilable conflict seemingly compels one of

159. Perhaps providing individual Wells Fargo customers with the actual terms of the Wells Fargo-JAMS agreement would provide the unambiguous disclosure required under Neaman. However, like the customer agreements, these are technical documents that might not unambiguously disclose the true nature of the relationship.

160. The consensual theory of contractual arbitration supports this notion. See supra note 24 and accompanying text.
two results. Courts may either disregard the formalities of the impres-
sion of possible bias analysis and honor Wells Fargo's arbitration
clause, or invalidate the clause outright because it essentially denies
claimants their liberty to submit disputes to an arbitrator free from
possible bias.

Conclusion

Because the impression of possible bias standard is based on fact-
specific cases, assessment of its underlying framework is complicated.
Critical analysis of California case law nevertheless yields criteria that
may be consistently applied. Courts appear reluctant to squarely ad-
dress the nature of the relationship requiring disclosure, yet this pro-
vides the key to proper analysis. Banwait v. Hernandez was the first
try to characterize the true nature of this relationship, but its for-
mulation was overinclusive. The Banwait standard is properly limited
by the logic of Johnston and San Luis Obispo Bay Properties. Thus
limited, the question becomes whether a particular relationship is
characterized by an atmosphere of pervasive trust and confidence. If
a relationship may be characterized in this manner, it must be
disclosed.

The impression of possible bias standard raises questions when
applied to arbitration clauses involving large institutional arbitrators.
Part IV addressed clauses presently used by two of the nation's largest
banks, Wells Fargo and Bank of America. Bank of America's provi-
sions seemingly withstand analysis because they mandate the use of a
nonprofit arbitration provider, the AAA. Wells Fargo's provisions,
however, are more problematic. They entail the employment of a pri-


161 The Wells Fargo contractual arbitration provision may provide an alternative if
courts are unwilling to disregard the impression of possible bias analysis. It provides for
the appointment of arbitrators by the AAA if JAMS is unable to provide an arbitrator.
One possible interpretation of this provision is that imputation of the impression of possi-
ble bias to all JAMS arbitrators renders them all unavailable within the meaning of Wells
Fargo's contractual provision. While this may allow the continued arbitration of Wells
Fargo's contractual disputes, JAMS would vigorously oppose such an interpretation, since
it would be denied the business that the provision seemingly provides.

162 However, invalidation of the clause outright would have serious practical conse-
quences as it would ultimately mean the end of contractual arbitration provisions between
large corporate enterprises and profit-seeking institutional arbitration providers.
As discussed in Part IV, courts have two options when faced with an institutional arbitration provision that creates a blanket impression of possible bias. They may disregard formal application of the impression of possible bias analysis and honor the arbitration arrangements, or they may invalidate the clauses outright. Invalidation of the clauses outright would violate the strong public policy of diverting the resolution of disputes from public (i.e., judicial) to private fora. In light of this, courts may decide to sacrifice logical consistency for the sake of maintaining viable procedures for implementing this public policy, and to disregard any blanket impression of possible bias created by virtue of these institutional arbitration arrangements.

Postscript

Just before the issue in which this Note appears went to press, two decisions involving the impression of possible bias standard took place. The first was the California Supreme Court's denial of review of Betz II. As that case was correctly decided under the "atmosphere of pervasive trust and confidence" standard set forth in this Note, this denial of review is of little practical significance.

The second decision, Kaiser Foundation Hospital v. Superior Court, may potentially affect the impression of possible bias standard as applied in California. In Kaiser, the court vacated an arbitration award where Ralph Drummond, the arbitrator whose presence on the arbitration panel was at issue in Neaman, served as the neutral arbitrator. Because Drummond's relationship with Kaiser created an impression of possible bias in Neaman, nondisclosure of that relationship was sufficient to vacate the award in Kaiser.

What is potentially significant about Kaiser, however, is its treatment of Johnston. The court cited Johnston for the proposition that "a neutral arbitrator's failure to disclose even sporadic business relationships with a party to the arbitration constitutes legal cause for vacating the award." Noticeably absent from this interpretation of Johnston is any reference to the substantiality of the arbitrator's previous business relationships. This may have been an oversight, or it may have

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163. See supra notes 161-162 and accompanying text.
164. See, e.g., Delta Lines, Inc. v. International Bhd. of Teamsters, 136 Cal. Rptr. 345, 348 (Cal. Ct. App. 1977) ("It has long been the policy of this state to recognize and give the utmost effect to arbitration agreements.").
166. See supra note 122.
168. See supra notes 129-134.
169. Kaiser, 23 Cal. Rptr. 2d at 433 (citing Johnston, 86 Cal. Rptr. at 134).
been intentional. Whatever the reason for this omission, its practical impact will be determined by the holdings of future cases.