

Post-arbitration Discovery: When are Arbitrators Subject to Depositions?

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While the grounds for vacating arbitration awards are narrow, courts will sometimes permit post-arbitration discovery relating to issues that constitute the basis for potential vacatur. This article considers the circumstances under which arbitrators could be required to respond to discovery requests, including sitting for depositions, in the context of a motion to vacate an arbitration award, and discusses the standards that courts use to decide whether to permit such discovery.

I. Post-arbitration Discovery Requests, Generally

Discovery in judicial proceedings to confirm or vacate an arbitration award is governed by the Federal Rules of Civil Procedure and not by the Federal Arbitration Act (“FAA”), but the liberality normally associated with civil litigation discovery is not considered appropriate in the context of post-arbitration petitions.¹ Despite the fact that arbitrations today can involve as much discovery as one might encounter in civil litigation, reviewing courts still operate according to the premise that arbitration “is intended to be a relatively prompt and inexpensive procedure,”² involving “expeditious and summary hearings, with only restricted inquiry into factual issues.”³ Further, courts recognize an arbitration panel’s power to limit discovery, by virtue of the parties’ agreement to trade judicial process and procedures for the simplicity, informality, and expedition of arbitration.⁴ Perhaps most importantly, reviewing courts resist post-arbitration discovery because they recognize that it threatens one of the presumptive benefits of arbitration: finality,⁵ and they are loathe to allow arbitration to become merely the “first step in lengthy litigation.”⁶

Courts permit post-arbitration discovery,

however, under certain circumstances. The requested discovery must be “relevant and necessary to the determination of an issue” raised by the petition to vacate.⁷ If factual questions exist “that cannot be reliably resolved” by the reviewing court without some further information, discovery may be appropriate.⁸ However, if the post-arbitration inquiries target an arbitrator, courts will consider the requests “particularly suspect” because of the inherent risks that the discovery will intrude upon the arbitrator’s quasi-judicial function and create a chilling effect on the willingness of qualified individuals to offer their services as arbitrators.⁹ Thus, the determination of whether post-arbitration discovery is appropriate turns on the purported bases for vacatur of the award, the specific subjects of the requested discovery, the type of discovery requested, and the degree to which the requesting party can justify the discovery.

II. Discovery Relating to Arbitrators

Courts have addressed the appropriateness of discovery relating to arbitrators in a variety of post-arbitration contexts, including: where the discovery is intended to reveal an arbitrator’s decision-making process or reasoning; where the discovery is intended to support allegations of arbitrator misconduct, bias, or evident partiality; and where the discovery is not intended to impugn the arbitrator’s decision or conduct. Different standards apply in each of these contexts.

A. Discovery Aimed at the Deliberative Process of Arbitrators

Courts routinely block efforts to depose arbitrators regarding their decision-making process, referring to it as the “forbidden purpose.”¹⁰ This judicial response comports with the well-established principle that a party may not vacate an arbitration award by showing that the arbitrator’s decision was incorrect.¹¹ It is also consistent with the



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general principle that arbitrators may not testify or submit affidavits, even *voluntarily*, to sustain, impeach, clarify, or amend an award.¹² Regardless of whether a party intends to use the arbitrator's testimony to sustain or impeach the arbitration award, such discovery is not permitted.¹³

The strict rule against either seeking discovery or offering testimony from arbitrators regarding their decision-making process applies whether or not the award in question articulates the arbitrator's reasoning. Arbitrators "are not required to state reasons for their award, [and] courts generally presume that arbitrators relied on permissible grounds in determining their award."¹⁴ Therefore, if parties want to know an arbitrator's reasoning for an award, they should ask the arbitrator in advance to include it in the award because they cannot seek this information after the fact.¹⁵

Accordingly, courts routinely deny discovery requests aimed at an arbitrator where the basis for vacatur necessarily turns on the arbitrator's deliberative process, such as an allegation that the arbitrator acted in "manifest disregard of the law."¹⁶ Required to "closely supervise" discovery requests that address the validity of an arbitrator's decision, reviewing courts will limit deposition requests to exclude any inquiry into an arbitrator's reasoning.¹⁷

But might the courts, in limited circumstances, allow a party to seek arbitrator testimony concerning the deliberative process where the party is not attempting to impugn the arbitrator's decision-making or conduct? For example, a party seeking to vacate an arbitration award based on perjured testimony might attempt to depose an arbitrator for the purpose of demonstrating that the perjured testimony was "material" to the arbitrator's decision.¹⁸ Or a party raising a *res judicata* defense in a civil litigation based on an earlier arbitration award might seek an arbitrator's testimony to clarify what issues were encompassed by the award.¹⁹

In either context, it seems highly

unlikely that a reviewing court would permit the deposition or testimony of an arbitrator. In a case involving the allegation that the arbitration award was based on perjured testimony, it would be virtually impossible to depose the arbitrator regarding the materiality of a witness' testimony without probing the arbitrator's decision-making, which is the "forbidden purpose."²⁰ The court is more likely to remand the case back to the same arbitrators, as they alone would be able to assess whether the perjury, if proved, had any material impact on their decision.²¹

Indeed, remanding an arbitration involving perjury would be consistent with the courts' strict prohibition against probing into an arbitrator's deliberative process.

Similarly, courts have remanded "indefinite awards" to the same arbitration panel for clarification where *res judicata* has been raised in a later lawsuit.²² Note, however, that one state's supreme court, considering this issue, determined that remand for this purpose was "improper" as it required the arbitrator, in effect, to "testify to the grounds for the decision."²³ Nonetheless, it is not unusual for courts to remand to the arbitrator where clarification is necessary for effective judicial review for a variety of reasons, including to determine *res judicata*.²⁴ Therefore, courts will remand rather than permit discovery that would necessarily invade the deliberative process of arbitrators, and there appear to be no exceptions to the prohibition against such discovery.

B. Deposing Arbitrators to Support a Party's Claim of Arbitrator Misconduct, Bias, or Evident Partiality

Post-arbitration discovery is most often sought by a party seeking to vacate an arbitration award on the basis of the alleged misconduct, bias, or evident partiality of an arbitrator. Such discovery has been permitted when it has not necessarily implicated the decision-making process behind the arbitration award. However, courts apply a strict standard to parties seeking to depose arbitrators for this purpose.

"Clear Evidence of Impropriety or Fundamental Defect" Standard

The majority rule, adopted by virtually all federal courts, requires a showing of "clear evidence of impropriety" or some fundamental defect in the arbitration proceedings or the arbitration award before courts will allow a party to depose an arbitrator in an effort to show arbitrator misconduct in support of a motion for vacatur.²⁵ Many state courts have applied the "clear evidence" standard as well.²⁶

The "clear evidence" standard originated in the Second Circuit's opinion in *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978). The dispute involved unpaid charges with respect to the chartering of a tanker to carry a cargo of crude oil.²⁷ After the arbitration panel ordered Marc Rich to make a payment to the plaintiff, Marc Rich moved to vacate on the ground that the chairman of the arbitration panel, Mr. Arnold, allegedly made insufficient disclosures—namely, failing to disclose a purportedly "close personal and professional relationship" with Mr. Nelson, the president of a third-party that allegedly owned the tanker at issue.²⁸ In support of its request to depose the arbitrator, Marc Rich submitted affidavits of two lawyers, stating that in twelve arbitrations since 1975, Nelson had been a party-selected arbitrator who had, in turn, selected Arnold as the neutral arbitrator.²⁹ In all but one of the arbitrations in which Arnold acted as chairman and Nelson was a member, Arnold cast his vote for the party that nominated Nelson.³⁰

The court described Marc Rich's request to depose Arnold as "somewhat unusual," but "[at first blush ... reasonable]" in light of the broad discovery allowed in federal courts.³¹ Nonetheless, the court affirmed the district court's denial of the deposition request, determining that: (i) the primary, if not only, basis of the claimed "close relationship" between Arnold and Nelson was that they had served together on more than a dozen panels;

Thus, the court held that “in the special context of what are in effect post hoc efforts to induce arbitrators to undermine the finality of their own awards ...any questioning of arbitrators should be limited to situations where clear evidence of impropriety has been presented.”

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(ii) Nelson had submitted an affidavit stating that his contact with Arnold was limited to the instances where they were members on the same panels and a few social meetings through the Society of the Maritime Arbitrators; and (iii) Nelson’s contacts with Arnold were similar to those he had with the arbitrator appointed by Marc Rich, and yet that arbitrator also did not “think it important to disclose” that he had sat on panels with Nelson as well.³² Relying on those submissions, the court determined that there was no “business relationship” in the ordinary sense between Arnold and Nelson, only a “professional relationship,” and that Nelson’s company had no direct financial stake in the outcome of the arbitration, making Nelson’s alleged interest even more attenuated.³³ Thus, the court held that “in the special context of what are in effect post hoc efforts to induce arbitrators to undermine the finality of their own awards ...any questioning of arbitrators should be limited to situations where *clear evidence of impropriety has been presented.*”³⁴

Historically, parties have met the “clear evidence” standard only in rare instances.³⁵ Even though it may be difficult for parties alleging arbitrator bias to prove their allegations without deposing arbitrators, courts consistently block attempts to depose arbitrators without clear evidence of arbitrator impropriety.³⁶

“Objective Basis” Standard

A minority of courts allow arbitrators to be deposed where there exists an objective basis for a reasonable belief that misconduct occurred. This standard is more relaxed than the “clear evidence” standard.³⁷ The “objective basis” standard is most clearly applied by state courts in North Carolina.³⁸ Although at least three federal district courts have seemingly applied the “objective basis” standard to post-arbitration discovery aimed at demonstrating arbitrator bias, in each of these cases the courts did not clearly articulate the applicable standard and, in any case, the deposition subpoenas served on the arbitrators were quashed.³⁹ Moreover, one of these opinions pre-dated the Second Circuit’s opinion in *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978), which was the genesis of the “clear evidence” standard.

Because virtually all federal courts appear to

apply the “clear evidence” standard when addressing post-arbitration requests to depose arbitrators for the purpose of impugning an arbitration award, that standard warrants more detailed discussion.

C. The “Clear Evidence” Standard in Practice

To meet the “clear evidence” standard, a party must do one of two things: either (i) point to “objective evidence in the record” that suggests a demonstration of actual bias or misconduct at the arbitration hearing;⁴⁰ or (ii) present evidence of undisclosed business relationships between the party and arbitrator, or other improper conduct on the part of the arbitrator, such as undisclosed contacts with a party while the arbitration proceedings were pending.⁴¹ Where a recorded transcript of the arbitration hearing is available, a deposition of the arbitrator for the purpose of demonstrating “evident partiality” may be deemed unnecessary.⁴² As for affirmatively producing “clear evidence,” one court has suggested that a party seeking to depose an arbitrator may do so by presenting “evidence that the individual arbitrator had any financial or personal stake in the outcome of the arbitration.”⁴³

Because courts routinely condemn nondisclosure of any material circumstances that could lead to an appearance of arbitrator impropriety, an arbitrator’s undisclosed business relationships with a party to an arbitration have the potential to be fertile ground for post-arbitration deposition requests.⁴⁴ However, courts acknowledge a tension between allegations that an arbitrator has a business relationship with either a party or a party’s affiliate and the fact that arbitrators are often selected explicitly because of their involvement in the industry in which the dispute occurred.⁴⁵ Thus, courts balance their condemnation of undisclosed business relationships with a practical evaluation of the degree and kind of any business relationship in question, so that the nondisclosure of “peripheral matters” unrelated to the arbitration will not necessarily satisfy the “clear evidence” standard.⁴⁶

The U.S. District Court for the Eastern District of Pennsylvania recently ordered the deposition of an arbitrator because of his prior undisclosed business relationships with both a party to the arbitration and that party’s outside counsel.⁴⁷ The dispute

concerned an audit performed by Ernst & Young, LLP (“E&Y”) for plaintiff EquiMed.⁴⁸ Pursuant to the arbitration agreement, the parties each selected an arbitrator, and the third arbitrator was chosen by the two party-selected arbitrators.⁴⁹ EquiMed did not raise any objections to E&Y’s selected arbitrator at the time of selection.⁵⁰ However, after the arbitration panel found in favor of E&Y, EquiMed filed a petition to vacate on the basis that E&Y’s selected arbitrator failed to disclose his prior relationships with E&Y, as well as with E&Y’s counsel for the arbitration.⁵¹ EquiMed issued a subpoena to the arbitrator directing him to appear for deposition.⁵² EquiMed submitted evidence that E&Y did hundreds of thousands of dollars worth of work directly for the arbitrator’s company for several years while the arbitrator served as general counsel and senior vice president.⁵³ Furthermore, E&Y’s arbitration counsel had worked directly for the arbitrator’s company for three years.⁵⁴ None of these relationships had been disclosed by the arbitrator prior to the arbitration.⁵⁵ The court determined that these submissions were sufficient to warrant the arbitrator’s deposition, after which the court would be better able to assess if the undisclosed relationships were “trivial,” as E&Y contended they were.⁵⁶ Significantly, the court ordered the parties to conduct the deposition in the courtroom to ensure that the arbitrator would not be questioned regarding the thought process underlying the decision.⁵⁷

Other courts have allowed the deposition of arbitrators where parties seeking discovery provided sufficient evidence regarding: (i) an arbitrator’s undisclosed contacts with a party’s counsel during the arbitration proceeding;⁵⁸ and (ii) an arbitrator’s failure to disclose numerous social, business, and professional relationships with partners in the law firm representing one of the parties.⁵⁹ Similarly, courts have ordered post-arbitration evidentiary hearings, without explicitly approving arbitrator depositions, where: (i) a party produced evidence of undisclosed business relationships indicating the arbitrator may have had a financial interest in the

outcome of the arbitration;⁶⁰ and (ii) the arbitrator’s role as commissioner of a professional sports league suggested potential bias in resolving a contract dispute between team owners and players.⁶¹

While parties potentially can provide “clear evidence,” such as significant business relationships or contacts between the arbitrator and a party to the proceeding, this is rare, especially when the arbitrator has *disclosed* the relationships or contacts. In the *Nationwide* case, the U.S. District Court for the Southern District of Ohio recently considered a variety of contacts submitted by a party attempting to justify deposing an arbitrator.⁶² For example, the arbitrator in question had notified the panel and the parties that he intended to have one lunch with one of the party’s counsel, and another lunch with an employee at that same party’s subsidiary.⁶³ Both times the arbitrator confirmed that the arbitration would not be discussed.⁶⁴ No objection was made by either party in advance of the two meetings.⁶⁵ While the *Nationwide* court noted that it would have preferred that the arbitrator had no contacts with the parties during the pendency of the arbitration, it concluded that the contacts did not meet the “clear evidence” standard for multiple reasons.⁶⁶ The court relied heavily on the fact that the contacts were *disclosed* to the parties prior to the meetings, and that evidence established that the arbitration was not discussed at either meeting.⁶⁷ Furthermore, the court noted that the arbitrator did not have a business relationship with the party in question, and that the party seeking to depose the arbitrator began its attacks only after the panel issued unfavorable orders.⁶⁸

Courts have also denied requests to depose an arbitrator based on: (i) comments made to a witness during a break praising a mutual acquaintance;⁶⁹ (ii) an arbitrator’s alleged lack of qualifications where the issue of qualifications had been previously raised and denied by the AAA in selecting a qualified arbitrator for the parties;⁷⁰ and (iii) the fact that the arbitrator’s recent departure from his law firm “paralleled” the partnership

dissolution issues involved in the arbitration.⁷¹ None of these requests met the high threshold required for deposing arbitrators to impugn their awards for misconduct, bias, or evident partiality.

D. Depositions of Arbitrators Where There is No Allegation of Impropriety, and No Risk of Invading the Deliberative Process.

Courts have indicated a willingness to allow an arbitrator to be deposed when the party seeking the deposition is neither attempting to impugn the arbitration award nor attempting to invade the arbitrator’s decision-making process. Depositions in these circumstances may be burdensome to arbitrators, but they do not receive vigorous protection from courts.

When considering requests to depose arbitrators in these more limited contexts, courts focus on standard discovery concerns, such as the probative value and relevance of the testimony. The U.S. District Court for the Northern District of Illinois has considered this issue in two similar contexts. On one occasion, it allowed the deposition of arbitrators for the limited purpose of determining the actual date the panel issued its award.⁷² The party seeking vacatur needed the discovery because the record was unclear, and the prevailing party had raised as an affirmative defense that too much time had lapsed between the date of the award’s issuance and the date of the motion to vacate.⁷³ On an earlier occasion, the U.S. District Court for the Northern District of Illinois allowed a party to depose an arbitrator for the purpose of eliciting testimony as to the quality of a labor union’s representation of an employee at an arbitration hearing, where the employee later claimed that the union’s handling of his grievance was perfunctory.⁷⁴

Other courts have also allowed parties to depose arbitrators when the integrity of the award itself was not being challenged. For example, one state court allowed the deposition of an arbitrator for the purpose of describing the

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conduct at an arbitration of a driver and his victim in an automobile accident where the driver's insurer later claimed that the two parties had colluded in the judgment.⁷⁵ The insurer had not been present at the arbitration, but it believed that the insured had not vigorously defended itself against the victim's claims, without a clear record from the proceedings, the insurer was permitted to depose the arbitrator.⁷⁶ Also, a federal district court allowed the deposition of an arbitrator for the purpose of clarifying what claims had been presented and ruled upon in an arbitration, where the reviewing court had issued a prior order explicitly stating that any issues decided by the arbitrator could not be included in the lawsuit pending before it.⁷⁷

III. Conclusion

Courts apply three different standards to post-arbitration requests for discovery from arbitrators, depending on the nature of the requests. Discovery into an arbitrator's decision-making, in any form, is not permitted. Deposition discovery aimed at an arbitrator's alleged bias, prejudice, or misconduct must meet the strict "clear evidence" standard. Finally, deposition discovery aimed at arbitrators where the party is not attempting to invade the arbitrator's reasoning or impugn the arbitrator's award usually will be treated under regular discovery standards.▼

The views expressed in this paper do not necessarily reflect the views of Butler Ruben Saltarelli & Boyd LLP or any of its attorneys, or those of its clients.

1 See *Frere v. Orthofix, Inc.*, No. 99Civ.4049(RMB)(MHD), OOCIV, 1968(RMB)(MHD), 2000 WL 1789641, at *4 (S.D.N.Y. Dec. 6, 2000).

2 *Id.*

3 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

4 See *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007).

5 *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 90 F. Supp. 2d 893, 898 (S.D. Ohio 2000).

6 *Nat'l Bulk Carriers, Inc. v. Princess Mgmt Co.*, 597 F.2d 819, 825 (2d Cir. 1979).

7 *Frere*, 2000 WL 1789641, at *4.

8 *Id.* at *5.

9 *Id.* at *4.

10 See *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 430 (9th Cir. 1996); *OR. Secs. Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 748 (2d Cir. 1988); *Reichman v. Creative Real Estate Consultants*, 476 F. Supp. 1276, 1286 (S.D.N.Y. 1979). Although this article focuses mainly on the FAA and federal case law, it appears that state courts apply this same principle. See, e.g., *Craig v. Barber*, 524 So. 2d 974, 978 (Miss. 1988) (applying Mississippi's arbitration statute and overturning circuit court's

order for arbitrator to explain and clarify arbitration award, and to provide additional findings of fact and conclusions of law); *Jackson v. Gov't Employees Ins. Co.*, 612 A.2d 1071, 1074 (Pa. Super. Ct. 1992) (acknowledging and accepting the general rule that an arbitrator's testimony cannot be used to impeach an award of arbitrators when analyzing the issue under Pennsylvania's Uniform Arbitration Act, 42 Pa. C.S.A. § 7301-7320).

11 See, e.g., *Martin Marietta Materials, Inc. v. Bank of Oklahoma*, 304 Fed. Appx. 360, 363 (6th Cir. 2008) (noting that when it comes to the merits of an arbitration decision, such as one relating to a contract claim, the question is not whether the arbitrators correctly construed the contract; it is whether they arguably construed or applied the contract).

12 See *Rubens v. Mason*, 387 F.3d 183, 191 (2d Cir. 2004) (holding that district court's reliance on an arbitrator's affidavit, submitted in conjunction with motion papers to the Court, "violated well-settled law that testimony revealing the deliberative thought processes of judges, juries or arbitrators is inadmissible"); *RD. Mgmt. Corp. v. Philadelphia Indem. Ins.*, 302 F. Supp. 2d 728, 736 n.1 (E.D. Mich. 2004) (ignoring appraiser's affidavit that attempted to justify an award of damages; court applies similar analysis to appraiser that it would an arbitrator).

13 *Wood v. Gen. Teamsters Union, Local 406*, 583 F. Supp. 1471, 1474 (W.D. Mich. 1984) (noting that the distinction between testimony intended to sustain an award, as opposed to testimony intended to impeach an award, is meaningless because "sustaining" testimony will necessarily lead to efforts to cross-examine the arbitrator).

14 *Corsini v. Prudential Sees., Inc.*, No. 95-0707-B (RBB), 1995 WL 663174, at *2 (S.D. Cal. Sept. 29, 1995); see also *O.R. Secs.*, 857 F.2d at 747.

15 *Hoefl v. MVL Group, Inc.*, 343 F.3d 57, 68 (2d Cir. 2003).

16 *Id.* at 67. *In light of Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), it is now questionable whether a party can vacate an arbitration award under the FAA by showing a "manifest disregard of the law."

17 See *T. McGann Plumbing, Inc. v. Chicago Journeymen Plumbers Local 130, UA.*, 532 F. Supp. 2d 1009, 1015 (ND. Ill. 2007) (allowing party to depose arbitrators on specific issues, but preventing deposition from inquiring into the reasoning behind award); *Nat'l Hockey League Players Ass'n v. Bettman*, No. 93 CIV. 5769 (KMW), 1994 WL 38130, at *2 (S.D.N.Y. Feb. 4, 1994) (allowing party limited discovery, but not allowing deposition of arbitrator).

18 See, e.g., *Gimbel v. UBS Fin. Servs., Inc.*, No. 08 C 4319, 2009 WL 1904554, at *10 (ND. Ill. May 28, 2009) (noting that the alleged perjury must be material to the arbitration outcome; however, the party moving to vacate had not attempted to depose the arbitrator).

19 See, e.g., *Boston Cattle Group v. ADM Investor Servs., Inc.*, No. 94 C 4673, 1995 WL 723781, at *6 (N.D. Ill. Dec. 5, 1995) ("The doctrine of res judicata generally applies with equal force to arbitration awards as to prior court decisions.").

20 See *Reichman*, 476 F. Supp. at 1286.

21 See *In the matter of the Arbitration Between Red Apple Supermarkets/Supermarkets Acquisitions*, No. 98 CV. 2303 (LMM), 1999 WL 596273, at *8 (S.D.N.Y. Aug. 9, 1999). The *Red Apple* court noted that while remand back to arbitration is rare, it is appropriate in certain circumstances. *Id.* It then remanded the case back to the arbitrator for the limited purposes of: (i) determining the extent of the alleged perjury, including what bearing, if any, the perjury had on the arbitrator's award; and (ii) considering new evidence discovered by the party seeking vacatur. *Id.* Of course, if the reviewing court determines on its own that the perjury was material, it will likely vacate the award and order a new arbitration panel. See, e.g., *Medina v. Foundation Reserve Ins. Co., Inc.*, 940 P.2d 1175, 1176 123

- N.M. 380, 381 (N.M. 1997) (ordering new panel of arbitrators after granting motion to vacate based on perjury).
- 22 See, e.g., *Boston Cattle Group*, 1995 WL 723781, at *7.
- 23 *Vermont Built, Inc. v. Krollick*, 969 A.2d 80, 88, 185 Vt. 139, 149-50 (Vt. 2008).
- 24 See, e.g., *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 191 (4th Cir. 2010) (“[R]emand to arbitrator for clarification and interpretation is not unusual in judicial enforcement proceedings.”); *McQueen-Starling v. Unitedhealth Group, Inc.*, No. 08 Civ. 4885 (JGK), 2010 WL 768941, at *3 (S.D.N.Y. Mar. 8, 2010) (remanding award to arbitration panel where arbitration agreement required arbitrator’s explanation for decision); *Boston Cattle Group*, 1995 WL 723781, at *7 (remanded to arbitration panel so that court could consider *res judicata* effect of award).
- 25 The Ninth and Second Circuit Courts of Appeal are frequently cited for the standard. See, e.g., *Woods*, 78 F.3d at 430; *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 702 (2d Cir. 1978). Federal District Courts in the Third, Fourth, Fifth, and Tenth Circuits have applied this standard. See, e.g., *Amicorp Inc. v. Gen. Steel Domestic Sales, LLC*, No. 07-cv-01 105-LTB-BNB, 2007 WL 2890089, at *4 (D. Col. Sep. 27, 2007) (applying “clear evidence” standard and denying request to depose arbitrator); *Van Pelt v. UBS Fin. Servs.*, No. 3:05CV477, 2006 WL 1698861, at § 11(A) (W.D.N.C. June 14, 2006); *In re EquiMed, Inc.*, No. Civ. A. 05-1815, 2005 WL 2850373, at *2 (E.D. Pa. Oct. 28, 2005); *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F. Supp. 2d 594, 626 (S.D. Tex. 2002) (indicating that the “clear evidence” standard applies when arbitrator bias has been alleged); *Corsini*, 1995 WL 663174, at *2 (describing the standard as the “majority rule”). The Sixth Circuit Court of Appeals has equivocated about which standard applies to parties seeking post-arbitration discovery. See *Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 308 (6th Cir. 2008) (acknowledging that the Court has been “ambiguous” about what standard applies). Nonetheless, federal district courts in the Sixth Circuit have applied the “clear evidence” standard without being overturned. See, e.g., *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 90 F. Supp. 2d 893, 899 (S.D. Ohio 2000), *affirmed by Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628-29 (6th Cir. 2002). District courts in the First, Seventh, Eighth, and Eleventh Circuit do not appear to have explicitly adopted a standard.
- 26 See, e.g., *Wilbanks Sees., Inc. v. McFarland*, No. 105451, 2009 WL 5910481, at *6 (Okla. Civ. App. Oct. 8, 2009); *Truser Corp. v. Ernst & Young LLP*, 876 N.E. 2d 77, 86, 376 Ill. App. 3d 218, 228 (Ill. App. Ct. 2007) (affirming circuit court’s confirmation of arbitration award governed by the FAA and explicitly adopting “clear evidence of impropriety or some other fundamental defect in the arbitration proceeding” as the standard in denying post-arbitration discovery request); *Chrobak v. Edward D. Jones & Co.*, 878 SW. 2d 760, 765, 46 Ark. App. 105, 114 (Ark. Ct. App. 1994) (applying “clear evidence” standard in denying party’s request for evidentiary hearing prior to court’s ruling on motion to vacate arbitration award).
- 27 *Andros*, 579 F.2d at 693.
- 28 *Id.* at 695.
- 29 *Id.* at 696.
- 30 *Id.*
- 31 *Id.* at 697.
- 32 *Id.* at 701-02.
- 33 *Id.* at 701.
- 34 *Id.* at 702 (emphasis added).
- 35 See, e.g., *Uhl v. Komatsu Forklift Co., Ltd.*, 466 F. Supp. 2d 899, 910 (E.D. Mich. 2006).
- 36 See *Woods*, 78 F.3d at 430.
- 37 See *Nationwide*, 278 F.3d at 628 (describing “objective basis” standard as a relaxed standard).
- 38 See *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 230 SE. 2d 380, 388, 291 N.C. 208, 219 (N.C. 1976); *William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed’n*, 472 S.E.2d 346, 123 N.C. App. 97 (N.C. Ct. App. 1996); *In re Nat’l Risk Underwriters, Inc.*, 884 F.2d 1389, 1989 WL 100649, at *3 (4th dr. 1989) (unpublished opinion) (stating that North Carolina law under *Carolina-Virginia* calls for application of “objective basis” standard).
- 39 See *Gearhardt v. Cadillac Plastics Group, Inc.*, 140 F.R.D. 349,351 (S.D. Ohio 1992); *United Food & Commercial Workers Int’l Union, AFL-CIO v. SIFCO, Inc.*, No. 90-250-B, 1990 WL 364772, at *2 (S.D. Iowa Oct. 16, 1990); *DeFrayne v. Miller Brewing Co.*, 444 F. Supp. 130, 130-31 (E.D. Mich. 1978).
- 40 See *Uhl*, 466 F. Supp. 2d at 910-11.
- 41 See *In re EquiMed, Inc.*, 2005 WL 2850373, at *2 (concluding that evidence of undisclosed business relationships between arbitrator’s company and both a party and the party’s counsel was sufficient to warrant the arbitrator’s deposition where evident partiality was alleged to be basis for vacatur of award); *Nationwide*, 90 F. Supp. 2d at 901 (considering as evidence certain contacts between the arbitrator and the party’s internal counsel while the arbitration was pending, but ultimately concluding that the facts set forth did not meet the threshold for showing entitlement to discovery).
- 42 See *T. McGann Plumbing*, 522 F. Supp. 2d at 1014.
- 43 *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 899 (2d Cir. 1991) (denying request for discovery).
- 44 See, e.g., *Nationwide*, 90 F. Supp. 2d at 901.
- 45 See, e.g., *id.* at 902 (considering as a factor in analyzing the alleged undisclosed business relationship of the arbitrator and the prevailing party that the parties’ arbitration agreement required that “the arbitrators come from within the insurance industry and serve as an executive officer of an insurance or reinsurance company.”); *Wilbanks*, 2009 WL 5910481, at *7 (“Arbitrators are usually knowledgeable in a given field and often have interests and relationships that overlap with the matter they are considering as arbitrators. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.”); *Greenwald v. Shayne*, 910 N.E.2d 536, 545, 152 Ohio Misc. 2d 12, 23 (Ohio Ct. Comm. Pleas 2009) (noting that fact that arbitrator’s departure from his own law firm paralleled the partnership dissolution issues that formed the professional experience was “precisely why these parties hired [him]”).
- 46 *Greenwald*, 910 N.E.2d at 544 (citing *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 644-47 (6th Cir. 2005)).
- 47 *In re EquiMed*, 2005 WL 2850373, at *2.
- 48 *Id.* at *1.
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 53 *EquiMed’s Brief in Opposition to the Motion to Quash*, located at 2005 WL 3675227, at § IV.
- 54 *Id.*
- 55 *Id.*
- 56 *In re EquiMed*, 2005 WL 2850373, at *2.
- 57 *Id.* at *3
- 58 *RZS Holdings AVV v. PDVSA Petroleos S.A.*, 598 F. Supp. 2d 762, 765 n.1 (E.D. Va. 2009). The RZS opinion does not actually reveal the basis for allowing the arbitrator to be deposed, but rather refers to the court’s prior unpublished order allowing the deposition. *Id.* However, a review of the opinion suggests that the court likely allowed the arbitrator to be deposed because: (i) there were undisclosed contacts between the arbitrator and a party’s counsel, who was not involved in the litigation, at a professional association conference during the arbitration proceedings; and (ii) a draft of the arbitration award had been prematurely leaked to both parties. *Id.* at 768. Nonetheless, the court confirmed the arbitration award after the arbitrator’s deposition, and noted that the arbitrator had testified at his deposition that he had no direct conversation with the party’s counsel at the conference. *Id.* at 770.
- 59 *William C. Vick*, 472 S.E.2d at 349, 123 N.C. App. at 102 (applying less stringent “objective basis” standard). See also *Kauffman v. Haag*, 318 N.W. 2d 572, 573, 113 Mich. App. 816, 818 (Mich. Ct. App. 1982) (applying lesser standard and allowing deposition of arbitrator in light of potential relationship between arbitrator, who served as township community developer, and contractor who was party to the proceedings).
- 60 *Sanko S.S. Co., Ltd. v. Cook Indus., Inc.*, 495 F.2d 1260, 1262 (2d dr. 1973) (predating the “clear evidence” standard established by *Andros*).
- 61 *Nat’l Hockey League*, 1994 WL 38130, at *1.
- 62 *Nationwide* 90 F. Supp. 2d at 900.
- 63 *Id.*
- 64 *Id.*
- 65 *Id.*
- 66 *Id.* at 901.
- 67 *Id.*
- 68 *Id.*
- 69 *Schwartz v. Merrill Lynch & Co., Inc.*, No. 09 Civ. 900 (WHP), 2009 WL 2496028, at *2 (S.D.N.Y. Aug. 5, 2009).
- 70 *Crawford Group, Inc. v. Holekamp*, No. 4:06-CV-1274 CAS, 2007 WL 1656275, at *2 (E.D. Mo. June 7, 2007).
- 71 *Greenwald*, 910 N.E. 2d at 547.
- 72 *T. McGann Plumbing*, 522 F. Supp. 2d at 1016.
- 73 *Id.* at 1012.
- 74 *Bliznick v. Int’l Harvester Co.*, 87 F.R.D. 490,491 (N.D. Ill. 1980).
- 75 *Driskell v. Empire Fire & Marine Ins. Co.*, 547 S.E.2d 360, 362, 249 Ga. App. 56, 57 (Ga. Ct. App. 2001).
- 76 *Id.*
- 77 *Elgin Sweeper Co. v. Powerscreen Int’l, PLC*, 158 F.R.D. 494,495 (S.D. Ala. 1994). While the court made clear that the party requesting the deposition was not seeking to vacate the award, it is not entirely clear why the court allowed the deposition instead of remanding the case to the arbitrator for clarification, as some courts have done.