1975

**J.P. Stevens & Co. v. Rytex Corp.**

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J.P. STEVENS & CO. V. RYTEX CORP.

LABOR RELATIONS—Arbitration—disqualification of arbitrators—arbitrators before entering on their duties should make known any relationship with any party and disclose all facts which might indicate any interest or create presumption of bias. 34 N.Y.2d 123, 312 N.E.2d 466, 356 N.Y.S.2d 278 (1974).

J.P. Stevens & Co. v. Rytex Corp.¹ provided the New York


An interesting tangential issue is presented by the 4-2 division of the court. The tabulation of the votes of the judges of the Court of Appeals indicates that the Honorable Harold Stephens did not participate in deciding the case. The author presumes that the reason was that he wrote the dissenting opinion at the appellate division level. J. P. Stevens & Co. v. Rytex Corp., 41 App. Div. 2d 15, 18, 340 N.Y.S.2d 933, 936 (1st Dep’t. 1973). Since this casenote deals with the subject of disqualification and the Court of Appeals decision does in fact compare the role of an arbitrator with that of a judge, J. P. Stevens & Co. v. Rytex Corp., 34 N.Y.2d 123, 129, 312 N.E.2d 466, 469, 356 N.Y.S.2d 278, 282-83 (1974), it is appropriate to ask whether or not a judge who decided a case in an appellate court should disqualify himself from participating in the same case if he assumes a position on a higher appellate court.

A memorandum of law was written by Mr. Justice Rehnquist on this subject. Laird v. Tatum, 409 U.S. 824 (1972). Justice Rehnquist stated:

Indeed, the clearest case of all is that of a Justice who comes to this court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue that later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. [citation omitted]. Indeed, there is weighty authority for this proposition even when the cases are the same. Mr. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that Court.

Id. at 835-36. The cases involving Mr. Justice Holmes were all affirmed by the United States Supreme Court without dissent. See Worchester v. Worchester Consol. St. Ry., 196 U.S. 539 (1905), reviewing 182 Mass. 49, 64 N.E. 581 (1902); Dunbar v. Dunbar, 190 U.S. 340 (1903), reviewing 180 Mass. 170, 62 N.E. 248 (1901); Glidden v. Harrington, 189 U.S. 255 (1903), reviewing 179 Mass. 486, 61 N.E. 54 (1901); Williams v. Parker, 188 U.S. 491 (1903), reviewing 174 Mass. 476, 55 N.E. 77 (1899).

Mr. Justice Rehnquist also summarized the status of the law in the memo:

Those federal courts of appeals that have considered the matter [of disqualification] have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified. [citations omitted]. These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal that may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. [citations omitted]. While it can seldom be predicted with confidence at the

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Court of Appeals with an excellent opportunity to resolve the vexing problem caused by an arbitrator's duty to disclose information likely to create an impression of bias. Unfortunately, rather than formulate a logical rubric for deciding future cases, the court made inconsistent statements which will only nurture the confusion and uncertainty that has already characterized this issue.

The parties in Stevens filed cross-motions to enforce and to vacate a unanimous commercial arbitration award. Rytex con-

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2. The term "arbitrator" as it is used in this casenote refers to a person who decides a dispute based on his own discretion; this is not to be confused with an "arbiter" who is required to adhere to the rules of law and equity.

3. The duty to disclose doctrine has been a formal requirement of arbitration since the United States Supreme Court's landmark decision in Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968). In that case the neutral member of a tripartite, commercial arbitration panel failed to disclose that during the previous four to five years he had served as an engineering consultant to one of the parties and had received $12,000 for his services. The Court vacated the award since the arbitrator's failure to disclose these past dealings with one of the parties created an impression of possible bias that did not satisfy the Congressional intent "to provide not merely for any arbitration but for an impartial one." Id. at 147 (emphasis by the Court).

4. See text accompanying notes 25-36 infra.

5. N.Y. C.P.L.R. §7510 (McKinney 1963) directs that: The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in Section 7511.

6. N.Y. C.P.L.R. §7511(b)(1) (McKinney 1963) provides: The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court
tended that two of the three arbitrators failed to disclose the extent of their business dealings with J. P. Stevens, thus depriving Rytex of the opportunity to object to their serving in the dispute. J. P. Stevens claimed that it had no substantial relationship with the arbitrators, but even if it had, the failure of Rytex to object when it learned of the employment background of the arbitrators prior to the hearing constituted a waiver. Stevens stressed the fact that Rytex received an adverse award and therefore as a losing party was trying to find a means to invalidate the award. The court accepted the contentions of Rytex and vacated the award.

It is necessary to examine the arbitration process itself before analyzing the court's approach to the disclosure problem so that

finds that the rights of that party were prejudiced by:

(ii) partiality of an arbitrator appointed as a neutral.

7. The agreement between the parties contemplated an arbitration panel composed of three neutral members. This should not be confused with the tripartite arbitration that was provided for in Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) which featured one representative of each party and a third neutral arbitrator. For a discussion of the distinctions between a neutral panel and a tripartite board see Lesser, Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitration?, 5 Am. J. 276 (1950). See generally Note, The Use of Tripartite Boards in Labor, Commercial, and International Arbitration, 68 Harv. L. Rev. 293 (1955).

8. Arbitration is utilized as a dispute settlement technique for commercial impasses and for labor-management disagreements. Although there are differences between the commercial setting (which is influenced by the dynamics of the marketplace) and the labor-management relationship (which is basically a permanent fixture that outlives any one arbitration dispute) the disclosure doctrine is an outgrowth of the arbitration process itself and is not dependent upon the type of arbitration setting to which it is applied. The two sectors are germane to the application of the doctrine only to the extent that the customs and usages of the respective sector affect the amount of dealings that the parties and arbitrators are likely to have with each other and the concomitant knowledge that the parties will have of these dealings. See generally Note, The Use of Tripartite Boards in Labor, Commercial, and International Arbitration, 68 Harv. L. Rev. 293 (1955).

9. Rytex challenged arbitrator Burnish who was employed by Deering Milliken, Inc. and arbitrator Lincer who was the sales manager of Kenyon Piece Dye Works, Inc. because of their alleged substantial business dealings with Stevens. Deering Milliken and Stevens are large textile purchasers and Kenyon is a textile finisher and processor. The Appellate Division concluded that the sales by Kenyon to Stevens amounted to approximately two and one-half million dollars ($2,500,000) annually. J. P. Stevens & Co. v. Rytex Corp., 41 App. Div. 2d 15, 17, 340 N.Y.S.2d 933, 935 (1st Dep't 1973). The Court of Appeals based its determination to vacate the award on this relationship between Lincer, his employer Kenyon, and Stevens.

10. The American Arbitration Association [hereinafter AAA] informed the parties of the employment status of the arbitrators and in accordance with the rules of the AAA directed that "if either party has any factual objections to the above appointments, it is requested that said objections be filed in writing." J. P. Stevens & Co. v. Rytex Corp., 34 N.Y.2d 123, 126, 312 N.E.2d 466, 467, 356 N.Y.S.2d 278, 280 (1974).
disclosure can be viewed in its proper context, namely, as a part of the overall arbitration process.

The heart of the process of arbitration is neutrality. In routine conversation the arbitrator is often referred to as the “neutral” or the “impartial”. This concept has been explained accurately by Professor Frank Elkouri:11

No qualification is more important than that of impartiality. It may well be that no man can be absolutely free from bias or prejudice of any kind, but it is not too much to expect an arbitrator to be able to divest himself of any personal inclinations, and to be able to stand between the parties with an open mind. This does not mean, however, that an arbitrator should decide contrary to his own best judgment. Indeed, the element of honesty is not satisfied unless the arbitrator fully believes that he is doing what is right. To be an arbitrator worthy of the name, one must always be able and ready to “call ’em as he sees ’em”. As long as both parties believe that an arbitrator is doing that, they will respect him whether or not they “see ’em” the same way he does.

Therefore, in arbitration there is a recognition that an arbitrator may have some preconceived notions. When an arbitrator enters a dispute, however, he must have a so-called “open mind” and be amenable to changing his thinking after hearing a persuasive argument. The fact that an arbitrator has developed certain notions about the practices of a given industry is actually somewhat advantageous, for that knowledge enables him to better decide how a controversy should be resolved.12

In order for a person to be selected to serve as an arbitrator, it is necessary for him to be acceptable to the parties involved in the dispute.13 Acceptability can be divided into two categories:

12. See generally Firemen’s Fund Ins. Co. v. Flint Hosiery Mills Inc., 74 F.2d 533, 535 (4th Cir. 1935) (appraiser’s previous dealings with insurance companies furnished the requisite skills); Atlantic Rayon Corp. v. Goldsmith, 277 App. Div. 554, 100 N.Y.S. 2d 849 (1st Dep’t 1950) (prior business dealings with a party were not a basis for disqualification where selection was under the bailiwick of a trade association and the arbitrator had special skill and experience); Newburger v. Rose, 228 App. Div. 526, 240 N.Y.S. 436 (1st Dep’t 1930) (stockbroker was warranted to arbitrate a dispute involving preferred stock).
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technical competence and visibility. Technical competence consists of the requisite working knowledge of a field which enables a person to be intellectually qualified to resolve a dispute arising in that area. Visibility, which cannot be achieved until a person has obtained the technical competence, is gained when the existence of this expertise is communicated to the people who do the selecting, i.e., attorneys, management officials, and union officers. Achieving visibility and the resultant acceptability is a major obstacle for the would-be arbitrator, as he must try to establish personal contacts with the selectors yet at the same time avoid creating circumstances that cause conflicts of interest. While the need for acceptability is a legitimate prerequisite for selection, the inherent danger that conflicts of interest will develop must be controlled. The need to eliminate conflicts of interest has resulted in statutory requirements which have been supplemented by a professional code of ethics and the formal rules of the American Arbitration Association, the major clearing house for arbitrators.

14. The reader is referred to Professor Herbert Sherman's articles on the duty to disclose, which provide an analysis of the opinions of arbitrators, union officials and company representatives from different geographic areas in the United States. Each respondent was presented with situations an arbitrator might confront concerning disclosure and was asked whether the arbitrator should disclose the information to the parties. The results of the survey indicated that there was general accord on what information should be disclosed, however, there was not unanimity. As a result an arbitrator may be quite perplexed about disclosing a specific point. Sherman, Arbitrator's Duty of Disclosure—A Sequel, 32 U. PITT L. REV. 167 (1971); Sherman, Labor Arbitrator's Duty of Disclosure, 31 U. Pitt. L. REV. 377 (1970), reprinted as The Duty of Disclosure in Labor Arbitration, 25 ARBITRATION J. 73 (1970).

15. See 9 U.S.C. §10; notes 5 & 6 supra.


The arbitrator should not undertake or incur obligations to either party which may interfere with his impartial determination of the issue submitted to him.

Id. at pt. I §4.


No person shall serve as a neutral Arbitrator in any arbitration in which he has any financial or personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification.

Id. at Rule 11.

Prior to accepting his appointment, the prospective neutral Arbitrator shall disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the AAA shall immediately disclose it to the parties. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

Id. at Rule 17.

18. The AAA has at times failed to take proper administrative steps to satisfy the due process requirements of the arbitration process. See Rogers v. Schering Corp., 165 F.
An effect of the need for acceptability that is implicit in the voluntary nature of arbitration is that it has been extremely difficult for a young, inexperienced arbitrator to enter the profession. Parties to a dispute like to be able to view an arbitrator's track record before making a selection. Once chosen, the parties feel that knowing the arbitrator's background helps them plan their strategy for the hearing. As a result parties feel less secure when an arbitrator is inexperienced.

Being inexperienced is an even greater handicap under the disclosure doctrine, which places a particular burden on unseasoned arbitrators who are struggling to convince the parties that they are in fact acceptable. Their disclosures will be scrutinized all the more closely because of the parties' underlying uneasiness with the arbitrator's inexperience. Because, as will be developed later, the present standard for disclosure is confusing and unworkable, the inexperienced arbitrator who has not developed a so-called "feel" for what to disclose, faces the possibility of overdisclosing information and raising sufficient doubts in the minds of the parties necessitating disqualification, or of underdisclosing information and causing post-hearing litigation to vacate the award.


19. Compare McDermott, Progress Report: Programs Directed at the Development of New Arbitrators, in Arbitration of Interest Disputes 247-48 (B. Dennis & G. Somers eds. 1974) (where in 1971 only 7.2% of the arbitrators rendering written opinions in AAA cases were under age 40), with Coulson, Labor Arbitration: The Insecure Profession?, 18 Lab. L.J. 336, 342 (1967) (where in 1964 only 5.1% were less than 40 years of age).

An additional point is suggested by the age distribution of arbitrators: is there inherent discrimination in the arbitration process because of the high age of arbitrators? For example, if an average labor arbitrator is 57, Appendix C. Survey of the Arbitration Profession in 1969, in Arbitration and the Public Interest 275 (G. Somers & B. Dennis eds. 1971) is there an underlying philosophical orientation to issues concerning drugs, long hair, and improper dress? Similarly, is it not possible that in the absence of more than a handful of women arbitrators, see, e.g., CCH Labor Arbitration Awards 9601-757 (1974), issues particularly related to women are not receiving proper treatment? See McKelvey, The Presidential Address: Sex and the Single Arbitrator, in Arbitration and the Public Interest 1 (G. Somers & B. Dennis eds. 1971).


21. See notes 25-37 infra and accompanying text.

22. This problem of overdisclosing information was recognized by Mr. Justice White who stated that:

In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party.


The need for acceptability and the concomitant burden that inexperienced arbitrators face are important aspects of the disclosure cases. It is unfortunate that courts have not thoroughly examined these extra-legal aspects of the disclosure problem, because this insensitivity to the arbitration process precludes them from dealing properly with the issue.\(^2\) This is not to say that the disclosure requirement should be eliminated. However, the actual burdens caused by disclosure must be recognized, rather than glossed over, as was done by the Stevens' court, in order to construct a realistic framework for dealing with the problem. Therefore, it is essential to examine the treatment by the Stevens' court of first, the standard for arbitrators to use in determining what to disclose, and second, when this standard is followed, where the actual burden of disclosure rests.

The first issue which the Court of Appeals addressed concerned the standard of disclosure that should be used to judge whether the arbitrator acted properly. After determining that a substantial relationship existed between Stevens and the two challenged arbitrators, the court indicated that the arbitrators should have disclosed their dealings because:

\[\text{"it could reasonably be inferred that a person in his [the arbitrator's] position might not have been acceptable as an arbitrator if the facts had been disclosed to Rytex." (emphasis added).}\]

The use of the expression "could reasonably be inferred" should be noted because, while it passes under the guise of presenting a standard for resolving the controversy, in practical terms it conveys little guidance.

The court then cited Rule 17 of the AAA to support its disclo-

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\(^2\) This insensitivity leads to inaccurate statements, such as the following one by Mr. Justice Black:

\[\text{"We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.}\]

Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 149 (1968). This statement reveals that the Supreme Court did not grasp the actual burden that disclosure presents to inexperienced arbitrators.

However, this rule requires an arbitrator to disclose "any circumstances likely to create a presumption of bias." 27 The court's reasoning and holding are contradictory because two different standards—inferring and presumption—were employed in deciding the case. 28 If the court intends that arbitrators disclose information that may cause an inference of bias, then disclosure will be broad because an inference is easily created. However, if the court's goal is for arbitrators to disclose information that raises a presumption of bias, disclosure will be more limited, since a strong interest on the part of the arbitrator would have to be shown. The net effect of the court's vacillation between these terms is confusion. As a result, there is no precise or logical standard to guide arbitrators and judges in future decisions. For the inexperienced arbitrator, the lack of a clear guideline will be particularly burdensome. 29

Furthermore, in attempting to identify the precise standard that an arbitrator should follow when determining what information to disclose, the majority stated that:

the very nature of the arbitrator's quasi-judicial function, particularly since it is subject to only limited judicial review, demands no less a duty to disclose than would be expected of a Judge.

This analogy does not make sense. 31 The fact that most persons only serve as arbitrators on an ad hoc basis necessitates that they continue to deal in the marketplace setting. Thus, it is impractical to expect them to subscribe to the same stringent standards

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26. Id. at 128, 312 N.E.2d at 468-69, 356 N.Y.S. 2d at 282.
   We agree and hold that the failure of an arbitrator to disclose facts which reasonably may support an inference of bias is grounds to vacate the award. . . . (emphasis added).
But see id. at 129-30, 312 N.E.2d at 469, 356 N.Y.S.2d at 283, where the court proclaims:
   [W]e do hold that in the interest of fairness (and to avoid just such a litigation as we deal with here) all arbitrators before entering upon their duties should make known any relationship direct or indirect that they have with any party to the arbitration, and disclose all facts known to them which might indicate any interest or create a presumption of bias (emphasis added).
29. See notes 20-23 supra and accompanying text.
that are expected of judges who are required to maintain a sense of distance from the business world because of the nature of their function.

After the court disposed of the disclosure standard problem, it next considered where the burden of disclosure should be placed. The court stated that the primary burden for disclosure rests on the arbitrator, "[who] is in a far better position than the parties to determine and reveal those facts that might give rise to an inference of bias." The court recognized that the arbitrator’s position in respect to the parties and the process necessitates that he make the ultimate decision concerning what to disclose, since only the arbitrator knows his own background, which may be quite varied, and of any indirect contacts he may have had with the parties. However, the court carved out an exception to this principle by allowing the arbitrator to escape responsibility even if he does not disclose relevant information:

If a party goes forward with arbitration, having actual knowledge of the arbitrator’s bias, or facts that reasonably should have prompted further, limited inquiry, it may not later claim bias based upon the failure to disclose such facts. This provision absolves an arbitrator from the general disclosure requirement if a party knew or should have known of a fact normally requiring disclosure and, nevertheless, failed to object to the arbitrator on the basis of the information. While this passage is intended to prohibit a losing party from using these grounds as a pretext to vacate an adverse award, logically it makes little

32. See generally Tumey v. Ohio, 273 U.S. 510 (1927) (judge not permitted to receive compensation from fines paid by those people who were convicted by him); Johnson v. Johnson, 424 P.2d 414 (Okla. 1967) (provisions made for litigants to prove their due process rights had been prejudiced by judge who had received bribes from 1934-39).
33. See 22 N.Y.C.R.R. 33.4-33.7 (1974) (limitations placed on nonjudicial activities of judges).
35. The Stevens’ court felt that the impact of this full disclosure would be the elimination of a great deal of post-hearing litigation, for the parties would have all of the information germane to the partiality issue in advance of the arbitration proceeding and therefore would have no reason to litigate subsequently. Id. at 128, 312 N.E.2d at 469, 356 N.Y.S.2d at 282 (1974).
36. Id.
37. Over the years courts have indicated their displeasure with parties who move to vacate arbitration awards as a delaying tactic or as a last-ditch effort to escape the provisions of the award. See Firemen’s Fund Ins. Co. v. Flint Hosiery Mills, Inc., 74 F.2d 533 (4th Cir. 1935) (court held against the party who had unclean hands and had lost the arbitration); Cross Properties, Inc. v. Gimbel Bros., Inc., 15 App. Div. 2d 913, 225 N.Y.S.2d 283 (1961).
sense. Either an arbitrator is required to disclose something or he is not, but the propriety of such a disclosure should not depend upon the actions of a party to the arbitration. If courts instead followed a fixed approach of uniformly placing the burden on the arbitrator, then the arbitrator would be on notice that he must disclose properly or else face the embarrassing situation of having his award vacated.

The court has blurred these two issues—the disclosure standard and the burden of disclosure—to a point where a careful inspection of the opinion can only leave the reader perplexed. It is therefore necessary to construct a model to deal effectively with the disclosure problem. The doctrine of "informed consent" seems to be the answer because it provides a direct focus on what the standard of disclosure should be and directs where the burden should lie. It adopts the inference standard, one of the two standards discussed by the Court of Appeals, and proceeds to unequivocally place the burden for disclosure on the arbitrator. It is easier to understand the application of the informed consent doctrine to the arbitrator's duty to disclose when one analogizes the use of informed consent to the doctor-patient and the manufacturer-consumer relationships.

In past years a doctor knew his patients and their families well. He therefore had a confidential relationship with them and could make medical judgments for them with complete knowledge of their needs and feelings. When a legal challenge concerning authorization for an operation or medical approach arose, the courts directed their attention to whether the physician exercised the accepted professional standard of care. The fact that the medical profession has, in recent years, been composed of specialists who are not usually well acquainted with their patients, has forced the courts to reevaluate the professional standard of disclosure in the community approach and consider the more fundamental question of whether a physician has obtained consent.

2d 1014 (1st Dep't. 1962) (arbitrator's business dealings with a party were known to the party moving to vacate the award and therefore objection to them was deemed waived); Atlantic Rayon Corp. v. Goldsmith, 277 App. Div. 554, 556, 100 N.Y.S.2d 849, 850 (1st Dep't 1950) (court indicated it was loathe to sustain belated claims of disqualification).

38. The distinction between requiring disclosure and disqualification should be stressed at this point. Clearly, a party may waive disqualification of an arbitrator if the relevant fact has been disclosed. However, the issue here involves whether the party may waive the disclosure itself.

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from a patient to perform the challenged operation or other act.40 The key requirement of the consent doctrine is that the doctor has a duty to tell his patient everything he needs to know in order to decide whether he wants to permit the doctor to proceed.41 If the doctor fails to inform his patient of relevant information, thereby improperly securing consent, he may subsequently be liable for malpractice.42

The sufficiency of the warning on pharmaceutical products creates a similar problem in the area of products liability. Although the actual danger level of the product remains constant with or without a warning by the manufacturer, the consumer must be given an opportunity to decide whether to expose himself to that risk of danger.43

Professor Aaron Twerski has stated:44

The issue is not that of unreasonable product danger, but rather one of informed consent. The defendant manufacturer of the product had a duty to inform potential plaintiffs that certain risks are inherent in the drugs. If the plaintiff's consent to take the drug is based on inadequate knowledge, then his consent to a battery was fraudulently obtained. Whether or not there has been sufficient communication of information to the plaintiff depends on the scope of informed consent law. Clearly, the defendant need not inform the plaintiff of all risks.

The framework for analyzing disclosure in the arbitration process should similarly be based on informed consent. A party who permits an outsider to resolve an internal dispute is exercising the same type of trust that a patient does when he permits a doctor to operate or that a consumer does when he relies on a

40. See id. Compare Mitchell v. Robinson, 334 S.W.2d 11 (Mo. 1960), with Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965) (overruling Mitchell on issue of how to satisfy burden of proof in informed consent).

41. The decision about what is or is not relevant information upon which a patient can base an informed consent is a human judgment, not a determination requiring medical expertise. When the doctor makes this decision, he does not deserve the special protection afforded his professional activities by the professional standard of negligence. His lack of a sustained personal relationship with his patients deprives the professional of any special ability to perceive a reasonable patient's capacity or need to understand and evaluate a proposed intervention. The doctor should be judged as an ordinary reasonable man (footnotes omitted).

Note, supra note 39, at 1559.

42. For a discussion of the provision for a therapeutic privilege to withhold information in emergencies, see id. at 1564-71.

43. Twerski, Assumption of Risk, 60 IOWA L. REV. 1, 46 (1974).

44. Id. at 46-47.
manufacturer for pharmaceutical products. Although extreme physical danger is not involved in arbitration, the seriousness of the issues that require arbitration, as well as the limited scope of judicial review of arbitration awards create grave concerns which make the informed consent analogy accurate. Since arbitration is voluntary, the parties must be informed of all facts pertinent to the ability of the arbitrator to serve impartially. The focus is therefore on what the parties need to know. In the absence of proper disclosure, the parties have not given their informed consent and therefore any award must be vacated.

There remains the problem of the actual standard that should be applied. The informed consent approach provides courts, arbitrators, and parties with a logical structure to guide them. All that need be asked is, what would a reasonable party want to know in order to exercise an informed consent? The burden is still on the arbitrator, but the informed consent doctrine reduces this burden by providing a rational, workable formula that pinpoints the purpose of disclosure. The arbitrator no longer needs to divert his attention to distinguishing between an inference and a presumption; rather, he can concentrate on disclosing the information that a reasonable party would need in order to give an informed consent. Admittedly, the actual definition of "reasonable" will have to be supplied through judicial interpretation. Although the situation may occasionally develop in which a party knows of an interest by an arbitrator, fails to object, and then subsequently uses that interest as a pretext for invalidating an award, this problem should not be used to detract from the important advantages that the informed consent doctrine provides, namely, a workable standard for disclosure and a specific allocation of the burden on the arbitrator.


46. There may be a need to provide for the situation where an arbitrator is honestly unaware of a fact subject to disclosure. For example, an arbitrator could have dealings with a company controlled by the same conglomerate that owned some of the parties. If the party with "due diligence" could have brought the information to the arbitrator's attention, then it should be the duty of that party to do so. The standard to be applied to this test is enunciated by Judge Wachtler in the dissent to J. P. Stevens & Co. v. Rytex Corp., 34 N.Y.2d 123, 131, 132 N.E.2d 466, 470, 356 N.Y.S. 2d 278, 284 (1974)(dissenting opinion). For an appropriate case where the "due diligence" approach could have been applied see Brewery Workers v. P. Ballantine & Sons, Inc., 83 L.R.R.M. 2712 (D.N.J. 1973) (where arbitrator's cousin's financial dealings with the victorious party were not known to the arbitrator).
A secondary problem which this doctrine will not resolve is the volume of litigation. Although frivolous appeals are frowned upon and do in fact contribute to court congestion, the advantage to a party knowing he has been afforded due process of law provides a justification for whatever impediments such a system creates. By utilizing a sound, direct doctrine such as informed consent, once the standard for disclosure is firmly established by the courts, frivolous claims of partiality will become easily identifiable.

Application of this approach can be seen by returning now to the principle case of *J. P. Stevens & Co. v. Rytex Corp.* The proper question to raise is whether a reasonable party would want to know the extent of the business dealings between the arbitrator and J. P. Stevens. Since the relationship was substantial, a party would want to have this information in order to make an informed decision. It should be noted that in the instant case the same result would be reached, *i.e.*, vacatur. However, it is hoped that had the arbitrator in this case had the informed consent doctrine on which to rely, such an oversight, necessitating vacatur, would never have occurred.

The informed consent doctrine, were it adopted, should prove to be a workable method for alleviating the problems that arbitrators, parties, and courts have had in dealing with the questions of the standard of disclosure and the burden of disclosure, while still accomplishing the desired equitable result. Informed consent provides a simple, logical procedure. If the courts and the arbitration profession gear their requirements accordingly, arbitration will function more efficiently.

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47. See note 35 supra.
48. See note 9 supra.