Hon. Tricia Bigelow (Ret.)
SIGNATURE RESOLUTION

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Arbitrator disclosure requirements, failures, and disqualifications

AN ARBITRATOR'S DISCLOSURE FAILURES MAY CAUSE A JUDICIAL REVOCATION OF AN AWARD

Arbitration has historically been the bete noir of alternative dispute resolution, but this censure is largely undeserved. True, the grounds for appeal of an arbitration award are far narrower than those for a judicial decision – neither errors of fact nor law will typically justify review – but when counsel are diligent in protecting their clients' interests, and when arbitrators take seriously their obligation of impartiality, the resulting award should not be subject to challenge.

This is not to say that there are not reasons to be concerned about how some arbitrations are conducted. Case law is rife with examples of problematic decisions resulting from the failure of arbitrators and litigants to understand and fully appreciate the arbitrator's disclosure obligations enumerated in the statutes and ethics code.

Simply put, those disclosure requirements are nebulous. Arbitrators who adhere to the letter of the law may overlook the law's intent – to ensure parties have no reason to suspect bias or partiality. Parties and counsel who fail to poke and pry may find themselves bound by decisions that – with appropriate due diligence – could or should have been forestalled. Parties have the right to expect impartiality from their arbitrator.

In cases of all sizes and stripes, awards have been vacated and arbitrators have been disqualified because of botched disclosures. In this article we will look at the relevant codes and standards on arbitrator disclosure obligations. How have courts ruled when arbitration awards were attacked because of perceived failure by arbitrators to disclose information? When must arbitrators share information with parties under the applicable rules and standards?

Disclosure rules

The California Arbitration Act, codified in Code of Civil Procedure sections 1280-1294.4, governs how arbitration is conducted in California, including when and how a dispute can or must be submitted to arbitration. It also seeks to promote arbitrator neutrality by setting requirements for disclosure of potential conflicts and for disqualification of arbitrators who are or appear to be biased.

The disclosure and disqualification requirements are laid out in Code of Civil Procedure section 1281.9, as well as in Standards 7 and 12 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration [www.courts.ca.gov/26582.htm]. Section 1281.9, subdivision (a) requires that a proposed neutral arbitrator disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be impartial."

The act provides a list of specific matters that would be grounds for disqualifying an arbitrator – incorporating the grounds specified in Code of Civil Procedure section 170.1 that form the basis for disqualification of a judge, and including significant relationships, prior representations, financial ties, and prior misconduct. The Ethics Standards require disclosure of similar matters and add the requirement of disclosure of the arbitrator's "'membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation. [Citation.]'" (*Haworth v. Superior Court* (2010) 50 Cal.App.4th 372, 389 (*Haworth*).) However, the "reasonably entertain" language suggests that the list is far from exhaustive.

The law's fundamental intent is to eliminate bias from arbitrations. "A party moving for disqualification need not show actual bias because the Legislature sought to guarantee not only fairness to individual litigants, but also to ensure public confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who *appears* to be tainted. A party has the right to an objective decision maker and to a decision maker who appears to be fair and impartial." (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 390.)

Scope of disclosure

There is no bright-line test for when disclosure is required of an arbitrator and how much must be disclosed, but the burden of disclosure rests squarely on the back of the proposed arbitrator. Parties should not have to investigate the arbitrator to find out information, even if public, that the arbitrator was supposed to have disclosed to them. (*Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal.4th 1299, 1310-1313.)

Disclosure obligations will ultimately depend on the facts of the case. The question for the court, when reviewing a motion to vacate an award or disqualify an arbitrator, is how a reasonable person aware of the facts would view the matter. "The applicable rule provides an objective test by focusing on a hypothetical reasonable person's perception of bias…. The question here is how an objective, reasonable person would view [a neutral] ability to be impartial." (*Haworth, supra,* 50 Cal.4th 372, 385-386.)

Requirements will thus vary between cases, but disclosure is required whenever a reasonable, informed person could

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entertain doubts about the arbitrator's impartiality. "An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under subdivision (d): is the matter something that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial?" (Comment to Standard 7.)

By the same token, an arbitrator has no obligation to disclose information outside the "reasonable person" standard. Just because a party believes that additional information would make it easier to decide whether to choose a particular arbitrator, that does not mean an award must be invalidated because the arbitrator opted not to disclose such additional information. "We cannot attribute to the Legislature an intent to upset arbitration awards, based on disclosures not legally required." (*Luce, Forward, Hamilton and Scripps, LLP v. Koch* (2008) 162 Cal.App.4th 720, 736.)

According to Ethics Standards 7(c)(2), an arbitrator's duty to disclose continues throughout the entire proceeding: "If an arbitrator subsequently becomes aware of a matter that must be disclosed ..., the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter."

So, under what circumstances must an arbitrator make disclosure?

Disclosure? Yes!

"…a disqualifying matter on their plate."

In the *Honeycutt v. JP Morgan Chase Bank, NA* (2018) 25 Cal.App.5th 909, 925 (*Honeycutt*), the Court of Appeal found an arbitrator's failure to disclose all the cases in which he served as an arbitrator for one of the parties grounds for vacating the award. Citing *Azteca Const., Inc. v. ADR Consulting, Inc.* (2004) 121 Cal.App.4th 1156, the court noted that "the Legislature has gone out of its way, particularly in recent years, to regulate in the area of arbitrator neutrality by revising the procedures relating to the disqualification of private arbitrators and by adding, as a penalty for noncompliance, judicial vacation of the arbitration award." (*Honeycutt, supra* at p. 926.)

In *Ceriale v. Amco Ins. Co.* (1996) 48 Cal.App.4th 500, an arbitrator's award was reversed because the arbitrator did not disclose that she represented one of the parties in another pending arbitration and that one of the attorneys involved in first arbitration became an arbitrator in that other arbitration. A reasonable person, the court said, might actually have the impression that there was bias on the part of an arbitrator. In another case, *Benjamin Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40), the appellate court ruled that the arbitrator had an obligation to disclose the fact that his legal practice focused on defending lawyers and law firms. An objective person, the court said, could reasonably question the impartiality of the arbitrator in a dispute over legal fees.

Vacatur of an arbitration award was found to be proper when the arbitrator failed within the allotted time to disclose two grounds for disqualification – an intent to entertain offers of employment for parties' attorneys and subsequent acceptance of such employment. (*Ovitz v. Schulman* (2005) 133 Cal.App.4th 830). It was also found appropriate when an arbitrator failed to disclose that one of the legal firm's partners was listed as a reference on his resume. (*Mt. Holyoke Homes LP v. Jeffer, Mangels, Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299.)

An arbitrator's ex parte communications with counsel for one party in the arbitration was found to be misconduct warranting vacatur of the award. In *Grabowski v. Kaiser Foundation Health Plan* (2021) 64 Cal.App.5th 67, 78-80 (*Grabowski*), the court said that "a neutral arbitrator has a continuing duty to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the neutral arbitrator would be able to be impartial."

In the recent case of *Jolie v. Pitt* (2021) 66 Cal.App.5th 1025) – not an arbitration matter – the Court of Appeal held that a private judge owed a continuing obligation to disclose new matters involving opposing counsel as they arose. As would be required of an arbitrator, the judge was therefore ordered disqualified for failing to disclose new cases where he was retained by opposing counsel.

Of note, parties cannot contract away their right under the law to seek disqualification of an arbitrator. In *Roussos v. Roussos* (2021) 60 Cal.App.5th 962, the appellate court ruled that the parties could not give up these statutory protections, including disqualification of a proposed arbitrator on timely demand. The arbitrator who made the award was not only subject to disqualification, the court noted, but had failed on receipt of a timely demand to disqualify himself.

And once a party has shown that their arbitrator failed to disclose a matter he or she was required to disclose under the law, it is not necessary – for purposes of disqualifying the arbitrator – for the party also to show that the arbitrator was actually biased against them or even that the arbitrator was likely to be partial. It is enough to show that there was a disqualifying matter on their plate. (*Grabowski, supra,* 64 Cal.App.5th 67, pg. 83.)

Disclosure? No!

In *Speier v. Advantage Fund* (2021) 63 Cal.App.5th 134, the appellate court held that neither the arbitrator's ownership interest in JAMS nor the extent of JAMS business with a law firm in the case could or might cause a reasonable person who was aware of those facts to entertain a doubt that the arbitrator would be impartial. The court said, "[t]here is no issue of a repeat party or lawyer being favored over a non-repeat party of lawyer; the parties in this business dispute are sophisticated; and the law firms were both frequent users of JAMS to the same extent." (*Id*. at p. 141)

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Courts have also found that an arbitrator overseeing a commercial arbitration dispute was not required to disclose his prior relationship with a gay-rights advocacy organization (*Malek Medea Group LLC v. AXQG Corp* (2020) 58 Cal.App.5th 817) and that an arbitrator owed no duty to disclose to parties the post-appointment results of arbitration cases that were pending at time of his appointment to their case. (*Perez v. Kaiser Foundation Health Plan, Inc.* (2023) 91 Cal.App.5th 645.) Further, an arbitrator was not required to disclose participation in bar committees and panels. (*Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641.)

In the recent case of *Sitrick Group v. Vivera Pharmaceuticals*, a Second Appellate District case published March 30, 2023, the court ruled that an arbitrator in a nonconsumer case was not obligated to disclose that he had been subsequently hired in a second matter by the same party and same law firm. Under the Ethics Standards, 1281.9, subdivision (a)(2), the court noted, "an arbitrator must always disclose, at the time of appointment, if he or she 'will entertain offers of employment or new professional relationships' with a party or a lawyer for a party 'as a dispute resolution neutral' during the pendency of the arbitration." In this case, the court found that the arbitrator had provided such notice to the parties.

The *Sitrick* court pointed out that the scope of the arbitrator's disclosure depends on the nature of the arbitration. For consumer arbitrations, there is a continuing duty to disclose to the parties "if he or she subsequently receives an offer" and has accepted such offer. For nonconsumer matters, it is sufficient that the arbitrator informs the parties up front that he or she "will not inform the parties if he or she subsequently receives an offer while th[e] arbitration is pending." Because the case involved a nonconsumer matter and the parties did not "timely object to the arbitrator's indicated willingness to entertain new offers of employment," the court found no reason to set aside the award.

Disclosure? It depends

Although the statute requires arbitrators to disclose detailed information about past arbitrations involving the parties or their attorneys, failure to disclose these details may not necessarily require a judge to vacate the award. Code of Civil Procedure section 1286.2, subdivision (a)(6) requires that an award be vacated only when the arbitrator fails to disclose the existence and nature of *any* relationship with the parties or their attorneys, not the specifics of each relationship.

In *Dornbirer v. Kaiser Found. Health Plan, Inc.* (2008) 166 Cal.App.4th 831 (*Dornbirer*), the Court of Appeal was asked to strike an arbitrator's decision in favor of the health care giant in a patient's lawsuit regarding her mammogram. The plaintiff claimed that had she known the full extent of the arbitrator's connection with Kaiser, she would have asked for his disqualification. The court said that "although the arbitrator's disclosure was incomplete, the arbitrator sufficiently disclosed existing grounds for disqualification …." (*Dornbirer, supra*, 845.) The information that the arbitrator disclosed was sufficient to put Dornbirer on notice of any potential bias on the arbitrator's part." (*Id.* at p. 842.) The plaintiff had been put on notice of the potential conflict but agreed to proceed with the arbitration.

An arbitrator's failure to disclose potentially disqualifying information in another case did not necessarily require the award to be vacated, an appellate court ruled in *Cox v. Bonni* (2018) 30 Cal.App.5th 287, 310. The party filing the motion would first have to show that she had not forfeited her right to disqualify the arbitrator when she failed to seek disqualification as soon as she became aware of a ground for disqualification. (*Id.* at p. 306-307.)

In the case of *Haworth*, *supra*, the California Supreme Court ruled against vacating an arbitrator's award. The appellate court had ruled that the claimant, a plastic surgery patient suing her surgeon, was prejudiced by the arbitrator's failure to disclose that 10 years earlier, as a judge, he had received a public censure for conduct toward and statements to court employees that created "an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary." (Citing *In re Gordon* (1996) 13 Cal.4th 472, 474.) The arbitrator, the court held, was not required to disclose this public censure. "Neither the statute nor the Ethics Standards require that a former judge or an attorney serving as an arbitrator disclose that he or she was the subject of any form of professional discipline." (*Id.* at 158.)

Whether *Haworth* is still good law is open to question. Ethics Standards, 7(e)(C), was updated in 2014 and now requires disclosure of professional discipline: "If within the preceding 10 years public discipline other than that covered under (A) [disbarment, revocation of license] has been imposed on the arbitrator by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. "Public discipline" under this provision means any disciplinary action imposed on the arbitrator that the professional or occupational disciplinary agency or licensing board identifies in its publicly available records or in response to a request for information about the arbitrator from a member of the public. The disclosure must specify the date the discipline was imposed, what professional or occupational disciplinary agency or licensing board imposed the discipline, and the reasons given by that professional or occupational disciplinary agency or licensing board for the discipline."

Conclusion

The rules governing disclosure by arbitrators are anything but arbitrary. The statutes and ethics standards were

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drafted to ensure that parties who entrust their legal matters to this forum will be treated impartially and that awards issued will be fair and unbiased. Counsel representing parties in arbitration owe it to their clients to demand the highest level of integrity from those who serve as arbitrators.

Hon. Tricia Bigelow (Ret.) is a neutral with Signature Resolution. *She served as a Los Angeles Municipal Court and Superior Court Judge prior to her appointment as an Associate Justice and then Presiding Justice of the California Court of Appeal, Second Appellate District, Division 8. She has authored three books on California law and procedure and lectured extensively on judicial ethics and fairness, civil motions and trials, and other topics. From 2006 to 2008, she was the Dean of the Bernard E. Witkin California Judicial College, where she oversaw the education of all new judges in the state of California.*