ARBITRATION ADVISORY

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AVOIDING ARBITRATOR BIAS

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INTRODUCTION

Avoiding not only bias, but also the appearance of bias, is of vital importance to the success of an arbitration. The importance of avoiding bias is underscored by:

a) The attorney fee arbitration program is administered by attorneys and bar associations. That may itself cause people to suspect that a lawyer-operated program is biased in favor of lawyers. Attorney arbitrators should be alert to the potential public relations disaster if conduct is perceived as being pro attorney. On the other hand, attorneys may suspect that the program is pro client. Attorney arbitrators are not appointed to be "pro attorney" and lay arbitrators are not appointed to be "pro client".

b) Arbitration is a consensual procedure. In the context of fee arbitration, clients cannot be expected to elect fee arbitration, and lawyers cannot be expected to consent to binding arbitration or allow non-binding adverse decisions to stand if they sense bias in the proceedings.

c) Under Code of Civil Procedure Section 1286.2 one of the very few reasons a binding arbitration award may be overturned is a finding of bias or the appearance of bias in an arbitrator.

d) Code of Civil Procedure Section 1286.2, as amended in 1993, provides that the grounds for disqualifying a judge under CCP Section 170.1 are also grounds for disqualifying an arbitrator.

DISCUSSION

California's arbitration statute has long provided that a binding arbitration award shall be vacated if "(a) the award was procured by corruption, fraud or other undue means; (b) there was corruption in any of the arbitrators...." [CCP § 1286.2].

Settled interpretation of the statute did not require a person seeking to upset an arbitration award to prove that, for example, the arbitrator received a bribe. To the contrary, California

courts adopted the rule annunciated in Commonwealth Corp. v. Casualty Co. 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1968) that arbitrators must "disclose to the parties any dealings that might create an impression of possible bias." No proof of actual corruption or fraud was required.

In Neaman v. Kaiser Foundation Hospital (1992) 9 Cal.App.4th 1170 [11 Cal.Rptr. 2d 879], the court vacated a binding arbitration award where the neutral arbitrator, a retired Superior Court judge, failed to disclose that on five prior occasions he had been hired by Kaiser Permanente as an arbitrator, when the record showed he had arbitrated numerous Kaiser matters, 65% of the time as the opposing party-appointed arbitrator, 30% as the neutral arbitrator, and only 5% of the time as Kaiser's appointed arbitrator. The judge's declaration stated he had advised both parties "in substance" regarding his prior service as an arbitrator in Kaiser matters. The court determined he had not "unambiguously" disclosed his prior experience as a party arbitrator and, on that basis, held that the retired judge's relationship with Kaiser "was a substantial business relationship, and should have been fully disclosed . . . ."

In brief summary, CCP Section 170.1, which now applies to arbitrations, will prevent a person from serving as an arbitrator if the person:

a) has personal knowledge of disputed facts or is likely to be a witness,

b) served as a lawyer for one of the parties or practiced with one of the parties within the past two years, or

c) has a financial interest in a proceeding.

These specific disqualification factors are defined broadly in CCP Section 170.1, which also provides for disqualification if the foregoing factors apply (a) to the arbitrator's or party's family, including in some instances relatives within the third degree or (b) to business associates such as partners, officers or directors. Section 170.1 also provides for disqualification if "a person aware of the facts might reasonably entertain doubt that the [arbitrator] would be able to be impartial." It has been the practice of many judges to apply broader recusal and disclosure standards in matters appearing before them than are required by statute.

Thus, the courts are ready to upset an arbitration award if there is the appearance that an arbitrator has had significant prior dealings with one of the parties, without the need to determine whether the arbitrator was biased or prejudiced or to otherwise weigh the likelihood of bias.

ARBITRATOR SELECTION ISSUES

When the arbitrator is first requested to arbitrate a fee dispute, the arbitrator should perform the same type of conflict check analysis that an attorney would conduct in undertaking the representation of a new matter. That conflict check should encompass the parties to the arbitration, their attorneys, if any, and any then anticipated witnesses. The analysis should consider not only the applicable case law and statutes, but should also consider the potential difficulties that can arise if the losing party thereafter decides to make a claim of bias. The arbitrator should consider:

1) Can I be fair?

2) Will my service be perceived as being fair?

Where the first question cannot be answered positively, the arbitrator must withdraw. If

the answer to the second question is uncertain, the arbitrator must then consider whether it will be necessary to withdraw or whether it is sufficient to disclose the matter.

If the conflict is one which requires withdrawal, the arbitrator should immediately give notice to the program administrator or the parties, or both, of his or her withdrawal. Delaying the notice may put a party in the uncomfortable position of having to determine whether to challenge the arbitrator or may result in the loss of the preemptory challenge under B&P Section 6204.5.

If the arbitrator reasonably believes the situation requires disclosure but not withdrawal, disclosure should also be made promptly and in writing. The disclosure should identify the relationship that causes the potential or perceived conflict and, unless the prior relationship is insubstantial, it may be appropriate to offer to withdraw if either party perceives there to be a conflict. The arbitrator should not assume that a prior relationship which might be perceived as resulting in a bias in favor of party "A" might in fact be objected to only by party "B" Party "A" may perceive that the arbitrator may want to show neutrality leaning in favor of "B", and may well have a valid concern of bias.

POST APPOINTMENT ISSUES

While there may be no issue of bias at the time of appointment, that may change because a party changes attorneys, witnesses are disclosed prior to or at an arbitration, or lawyers move from firm to firm. The issue of bias may also arise from a party who perceives that the arbitrator will rule against his or her position, or by a party who seeks to delay the proceedings by invoking a challenge. A charge of bias arising after the commencement of proceedings, which does not involve a clear-cut and irremediable conflict will usually result in opposition to the claim of bias by the opposing party. Such a dispute must be determined in a judicious manner, in accordance with the procedural rules of the sponsoring association. Wherever possible, the claim of bias, the relevant evidence and the resulting decision should be documented in a written instrument.

CONDUCT OF THE ARBITRATION

The perception of bias also may arise from the arbitrator's conduct. The arbitrator must strive to maintain at all times a judicial, even-handed approach to the parties and the issues to avoid creating the impression that the arbitrator is biased. Examples of conduct which must be avoided include:

a) Shop talk between the arbitrator and the attorney, or between members of the arbitrators firm or office and the attorney party.

b) Conducting the arbitration in the office of the attorney party.

c) Differences in reference to the parties: e.g., calling one party by their first name and the other by their last name.

d) Remarks referring to or depreciating anyone on account of race, religion, national origin, economic status, handicap, gender, etc., etc.

e) Exclusion of evidence tendered by the client without at least a brief explanation of the reason for excluding the evidence [see also C.C.P. Section 1286.2(e)].

f) Body language suggesting that the arbitrator favors or disfavors a witness or a party's position.