LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, JANUARY 30 2024

PERSPECTIVE

Arbitrator disclosure: designed to ensure fairness

By Tricia Bigelow

Shutterstock

Arbitration has frequently garnered disfavor among plaintiff's counsel. Arbitrators are inherently biased, they say, with conflicts of interest that impact the way they rule on the cases before them. The system rewards defendants who provide repeat employment for their preferred arbitrators.

This is, alas, a misapprehension. Arbitration can, in fact, be an excellent way to resolve disputes outside of the courtroom. It offers parties an economical and cost-effective way to achieve finality. In most cases the parties mutually agree upon the arbitrator who will decide their case.

True, arbitration awards can be more challenging than judicial decisions - neither errors of fact nor law typically justify review - but the law actually provides strong tools to protect parties' interests from arbitrator bias and conflicts of interest. Those tools are statutory arbitrator disclosure requirements. When they are properly deployed and arbitrators take seriously their duty to act impartially, arbitration awards should withstand challenge.

This does not mean that counsel should assume that every arbitration will be conducted properly. Diligence is key: Case law is replete with problematic decisions resulting from failure of arbitrators or litigants to understand and fully appreciate the arbitrator's disclosure obligations under the law and the ethics code. So let's review those laws.

Disclosure laws

The California Arbitration Act, Code of Civil Procedure Sections 1280-1294.4, governs how arbitration is conducted, including when and how a dispute can or must be submitted to arbitration. To promote arbitrator neutrality, the law sets 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 the law, as well as in Standard 7 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Under Section 1281.9(a), a proposed neutral arbitrator must 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 matters that might disqualify an arbitrator are the same as the grounds for disqualifying a judge: significant relationships, prior representations, financial ties, and prior misconduct. The Ethics Standards add a requirement for 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. The standards also require disclosure of any professional discipline against the arbitrator within the preceding ten years, including the date the discipline was imposed, the professional or occupational disciplinary agency or licensing board, and the reasons for the discipline.

The fundamental intent of these disclosure rules is to eliminate real or perceived bias from arbitrations. In *Wechsler v. Superior Court* ((2014) 224 Cal.App.4th 384, 390), the court held that a party moving for disqualification need not show actual bias, because the law's intent is "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."

Thus, arbitrators who only adhere to the letter of the law could end up overlooking the law's fundamental intent, which is to ensure that parties have no reason to suspect bias or partiality. Parties and counsel must therefore conduct proper due diligence before an arbitration. If they fail to do so, they could find themselves bound by a decision that might have been avoided. Even if they should be able to expect impartiality from the arbitrator, it should not be taken for granted.

What must be disclosed

There is no bright-line test for when and how much disclosure is required; the burden rests squarely on the back of the arbitrator. It should never be up to the parties to investigate the arbitrator to discover information that should have been disclosed. (See *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 CA4th 1299, 1310-1313.)

Disclosure obligations ultimately depend on the facts of the case. When reviewing a motion to vacate

an award or disqualify an arbitrator, the court must ask 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." (See *Haworth v. Superior Court* (2010) 50 Cal.App.4th 372, 385-386.)

Disclosure is required whenever a reasonable, informed person could entertain doubts about the arbitrator's impartiality. A comment to Standard 7 of the Ethics Standards suggests that a court ask, "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?"

An arbitrator is therefore not required to disclose information outside the "reasonable person" standard, even if that information could make it easier for a party to decide whether to choose a particular arbitrator. An award will not be invalidated just because the arbitrator opted not to disclose such additional information. (See *Luce, Forward, Hamilton and Scripps, LLP v. Koch* (2008) 162 Cal. App. 4th 720.)

An arbitrator's duty to disclose continues throughout the entire proceeding. Ethics Standard 7(c)(2) states, "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."

Case law on disclosure

Disclosure required

A number of courts have penalized arbitrators for failing to disclose important information to the parties. In *Honeycutt v. JP Morgan Chase Bank*, NA ((2018) 25 Cal.App.5th 909), the Court of Appeal vacated an arbitral award because of an arbitrator's failure to disclose all of the cases in which he had served as an arbitrator for one of the parties. The court noted that the procedures had been updated to include penalties for noncompliance, including vacation of the arbitration award.

In another case, *Ceriale v. Amco Ins. Co.* ((1996) 48 Cal.App.4th 500), the award was reversed when an arbitrator failed to disclose that she actually represented one of the parties in another pending arbitration and that an attorney in first arbitration became an arbitrator in the other arbitration. A reasonable person, the court said, might have the impression of possible bias on the part of the arbitrator.

When an arbitrator was slated to decide a dispute over legal fees, the appellate court ruled that he was obligated to disclose to the parties the fact that his legal practice focused on defending lawyers and law firms. In *Benjamin Weill & Mazer v. Kors* ((2011) 195 Cal. App.4th 40), the court said that an objective person could reasonably question the impartiality of the arbitrator in the instant case.

Courts have also vacated arbitration awards when arbitrators failed to disclose grounds for disqualification. In *Ovitz v. Schulman* ((2005) 133 Cal.App.4th 830) the arbitrator should have told the parties about his intent to entertain offers of employment for the parties' attorneys and his subsequent acceptance of such employment. In *Mt. Holyoke Homes LP v. Jeffer, Mangels, Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299, 1310-1313), the court held that the arbitrator was required to disclose to the parties the fact that a partner for one of the legal firms involved in the case was listed as a reference on his resume.

Ex parte communications with counsel for a party in the arbitration have also been held to be grounds for vacating an award. In *Grabowski v. Kaiser Foundation Health Plan* ((2021) 64 Cal.App.5th 67, 78-80), 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 *FCM Investments v. Grove Pharm* ((2023) 96 Cal.App.5th 545), an appellate court overturned an arbitrator's award because of a "reasonable impression of possible bias by the arbitrator." Following a high-stakes commercial arbitration over a canceled real estate deal, the arbitrator found the seller in breach based on a perceived lack of witness credibility. The defendant had used an interpreter during the proceeding despite living in the United States for decades, and the arbitrator considered this a "tactical ploy" that made the witness not credible. According to the appeals court, the arbitrator's decision was based on "unacceptable misconceptions about English proficiency and language acquisition," which could show bias on the part of the arbitrator.

Importantly, parties in an arbitration cannot contract away their right to seek disqualification of an arbitrator (*See Roussos v. Roussos* (2021) 60 Cal.App.5th 962).

Disclosure not required

In several other cases, courts have ruled against parties seeking disqualification of an arbitrator or vacatur of the award. An appellate court held that an arbitrator's ownership interest in JAMS, and the amount of business a law firm did with JAMS, did not call for disclosure. Noting that both law firms were frequent users of JAMS, the court said that such information would not cause a reasonable person aware of those facts to entertain a doubt that the arbitrator would be impartial (*Speier v. Advantage Fund* (2021) 63 Cal.App.5th 134, 141).

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). Another arbitrator owed no duty to disclose to parties the post-appointment results of arbitration cases that were pending at the time of his appointment to their case (*Perez v. Kaiser Foundation Health Plan, Inc.* ((2023) 91 Cal.App.5th 645). Yet another arbitrator was not required to disclose participation in bar committees and panels (*Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641).

In a recent case, the appellate court ruled that an arbitrator in a nonconsumer case was not obligated to disclose that he was hired in a second matter by the same party and same law firm (*Sitrick Group v. Vivera Pharmaceuticals* (2023) 89 Cal.App.5th 1059). The Ethics Standards require arbitrators to disclose, at the time of appointment, whether they "will entertain offers of employment or new professional relationships" to serve as a neutral for a party or counsel while the current arbitration is pending. The court found that the arbitrator had provided such notice to the parties. For consumer arbitrations, there is a continuing duty to disclose whether the arbitrator subsequently receives an offer and accepts the offer. For nonconsumer matters, they only need to tell parties that they won't be informing them about offers they might receive while the arbitration is pending.

Even though arbitrators are supposed to disclose detailed information about past arbitrations involving parties or their attorneys, failure to disclose details may not justify vacatur. An award is subject to vacatur only when the arbitrator fails to disclose the existence and nature of any relationship - not the specifics - with the parties or their attorneys. In *Dornbirer v Kaiser Found. Health Plan, Inc.* ((2008) 166 Cal.App.4th 831, 845), the court refused to strike an arbitrator's decision for Kaiser, even though the patient said she would have sought disqualification had she known the full extent of the arbitrator's connection with Kaiser. The disclosure may have been incomplete, the court said, but it was enough to put the patient on notice of any potential bias, and she had agreed to proceed with the arbitration.

In another case, failure to disclose potentially disqualifying information did not necessarily require the award to be vacated. The party filing the motion was required to first show that she didn't forfeit her right to seek disqualification by failing to ask for it as soon as she became aware of possible grounds (*Cox v. Bonni* (2018) 30 Cal.App.5th 287).

Conclusion

Arbitrator disclosure rules were drafted to ensure that parties who entrust their legal matters to arbitrators will be treated impartially and that final awards will be fair and unbiased. Counsel representing parties in arbitration should demand the highest level of integrity from those who serve as arbitrators.

Note: This article includes material from an earlier article by Justice Bigelow that appeared in the September issue of the CAALA Advocate

---

Tricia Bigelow (Ret.) *is a neutral with Signature Resolution. As Presiding Justice of the Court of Appeal, Justice Bigelow presided over complex cases involving high-profile companies and public figures.*