

INADEQUATE DISCLOSURES BY AN ARBITRATOR MAY RESULT IN VACATUR OF AN ARBITRATION AWARD, BUT FAILING TO ASK FOR MORE DETAIL ON WHAT WAS DISCLOSED WILL RESULT IN WAIVER OF A RIGHT TO VACATE THE AWARD.

You have lost at an arbitration, believing that the arbitrator favored the other side. Normally, arbitration awards are not subject to judicial review on the merits. However, you may be able to have the arbitration set aside if you find out that the arbitrator failed to disclose a material relationship with the adverse party or its attorneys prior to the arbitration. The appearance of bias will be enough to overturn the award – actual bias need not be shown.

The Law:

Pursuant to Ethics Standards, standard 7(d)(4), the arbitrator must disclose the above information for matters in which he or she has served as a neutral or party-appointed arbitrator within the preceding five years. Ethics Standards, standard 7(d)(5)(A) also requires disclosure of any pending or prior non-collective-bargaining case in which (1) the arbitrator has served as a dispute resolution neutral other than an arbitrator, (2) the arbitrator was compensated for his or her services, (3) the case involved a party or lawyer for a party, and (4) the arbitrator concluded his or her service within two years before the date of the arbitrator's proposed nomination or appointment. As pertinent here, where the arbitrator has served as a mediator, he or she must disclose the names of the parties in each prior and pending case, and the name of the attorney in the current arbitration involved in each case. (Ethics Standards, std. 7(d)(5)(B).)

Specifically as to arbitrations, the proposed arbitrator's initial disclosure must include "[t]he names of the parties to all prior or pending noncollective bargaining cases in which the proposed neutral arbitrator served or is serving as a party arbitrator for any party to the arbitration proceeding or for a lawyer for a party and the results of each case arbitrated to conclusion, including [(1)] the date of the arbitration award, [(2)] identification of the prevailing party, [(3)] the names of the parties' attorneys and [(4)] the amount of monetary damages awarded, if any." (§ 1281.9, subd. (a)(3).) The same information is required for all such cases in which the proposed arbitrator has served or is serving as a neutral arbitrator for any of the parties or their attorneys. (§ 1281.9, subd. (a)(4).)

Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP, 219 Cal. App. 4th 1299, 162 Cal. Rptr. 3d 597, 2013

Interpretation of the Law:

An award may be vacated when an arbitrator fails to make the disclosures required by the Ethical Standards, but the disclosure need not be completely comprehensive.

Not every item of information that is required to be disclosed under section 1281.9 constitutes a 'ground for disqualification' as the term is used in section 1286.2. Rather, the most reasonable interpretation of the statutory scheme is that HN8 the words 'failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware' in section 1286.2 refer to a failure to disclose the existence and nature of any relationship between the arbitrator and the parties or the parties' attorneys, not the specifics of each such relationship." (*Dornbirer, supra*, 166 Cal.App.4th at p. 842.) Although the arbitrator has a duty to comply with section 1281.9, the disclosure of past or present relationships constitutes inquiry notice of the potential for bias. (*Dornbirer, supra*, at p. 842.) *The statutory scheme does not require an arbitration award to be vacated "when the arbitrator has generally disclosed the grounds for disqualification, i.e., his or her relationships and prior interactions with the parties to the arbitration and/or their attorneys, but has not provided all of the specific details required under section 1281.9, and despite the omissions, the parties agreed to go forward with the arbitration."* (*Id.* at p. 846.)

The onus is on the parties to ask for the details of the prior relationships actually disclosed by the arbitrator. If no inquiry is made, and the arbitration goes forward, the losing party cannot then seek to vacate the award based on non-disclosure of the details, even if the details were among those required for disclosure under the Ethics Standards.

In Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP, supra, the trial court vacated an arbitration award based on the arbitrator's failure to disclose two mediations handled involving the other side's law firm. The appellate court reversed, holding that the attorney for the losing party had been apprised generally that there had been multiple mediations, but had failed to ask for the specifics and went ahead with the arbitration anyway. By not seeking the additional information before the arbitration, the losing party had waived any right to object after the award was given.

However, there have been cases that have resulted in vacating an arbitration award (non-disclosure by the arbitrator and some of the results are surprising. For example, in *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell*, 219 Cal. App. 4th 1299 (2013) a prominent arbitrator's award was vacated because the arbitrator failed to disclose that he had listed one side's attorney on his resume.

"The court ruled that the connection between the undisclosed fact of the arbitrator's naming an attorney as a reference on his resume and the subject matter of the arbitration, a legal malpractice action against the law firm in

which the same attorney is a partner, is sufficiently close that a person reasonably could entertain a doubt that the arbitrator could be impartial.”

In another matter, an arbitration award was vacated because the arbitrator had failed to disclose that, after the arbitrator’s appointment, defense counsel had joined the arbitrator’s ADR firm. *Gray v. Chiu*, 212 Cal.App.4th 1355 (2013)

In another matter, an arbitration award was vacated because the arbitrator failed to timely disclose attendance at the funeral of one of the lawyers for the firm defendant in a malpractice action. “Judge Chernow believed the celebration of Mr. Knowles's life was a matter of material significance. Judge Chernow gave notice of his attendance at the November 10, 2012 celebration in his July 16, 2013 e-mail after being served with the deposition subpoena. Attendance at the celebration at the invitation of one of Trope & Tropes' attorneys, could indicate favorable opinions of Mr. Knowles's friends, family and former colleagues.” The appearance of bias was enough to support vacating the arbitration award. *Evans v. Trope & Trope*, 2014 Cal. App. Unpub. LEXIS 6660.

In a third matter, an arbitration award was vacated in a woman’s medical malpractice case the arbitrator had failed to disclose that he had been censured for sexual misconduct ten years earlier The appellate court affirmed vacatur because it agreed with the trial court “that [this withheld information] could cause a person aware of the facts to reasonably entertain a doubt that the ... neutral arbitrator would be able to be impartial.” (Code Civ. Proc., § 1281.9, subd. (a).) *Haworth v. Superior Court*, 50 Cal. 4th 372 (2010)

Interpretation of the Law:

The take away from all of this is that the arbitrator must carefully consider all relationships the arbitrator has with all of the parties and the lawyers for the parties and then make full and complete disclosure. The arbitrator needs to expand the scope of consideration not just to prior appointments for arbitration and mediation, but to all relationships it has had in the past (such as sitting on committees, membership in political groups, boards and other affiliations) and make full disclosure.

The take away for the winning party is to make sure all disclosures are properly made, including reminding the arbitrator of past affiliations or directly disclosing them to the other side.

The take away from the losing party is that one basis for vacating an award is to find out if there are representations, relationships and affiliations that were not disclosed specifically or by description before the arbitration commenced, such as what is on the arbitrator’s resume and getting new information from the arbitrator and opposing counsel in areas not disclosed pre-arbitration. Additionally, the losing side should know that it will be found to have waived any specific non-disclosures on subjects generally described in the pre-arbitration disclosures made, if the general disclosure was sufficient to put the losing side on “inquiry notice” sufficient to require a request for more detail. That means

it needs to scrutinize the general disclosures and consider asking follow up questions or risk waiving the details as a basis for vacating an arbitration award.

If you would like further information, please contact your Rutan attorney.

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