MASTERS & RIBAKOFF

mediation • arbitration • investigation

Is Disclosure Still Required When There is No There, There?

Section 1281.9 (a) of the California Arbitration Act requires a proposed neutral arbitrator to "disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral would be able to be impartial". The required disclosures under the Act specifically include any ground specified in Code of Civil Procedure Section 170.1 for disqualification of a judge. Section 170.1(C)(6)(iii) of the California Code of Civil Procedure repeats the above-referenced ground cited in Section 1281.9 (a).

Suppose that in the midst of an arbitration an event occurs which might require that an additional disclosure be made by the Arbitrator. For instance, what if new counsel for one of the parties is brought in to assist current trial counsel, or if a previously unlisted witness suddenly appears and is subpoenaed to testify. Assume further that the Arbitrator, being a diligent person, does a due diligence check and finds that he/she has no additional facts which he/she would be required to disclose. Assume further that the Arbitrator then issues a statement to the parties stating that a due diligence check has been made and that he/she has nothing to disclose.

Would this non-disclosure statement entitle either side to disqualify the Abitrator because he/she has made a "new" disclosure? In other words, what happens when there is a disclosure that "there is no there, there" (with apologies to Gertrude Stein)?

At first blush, the Court's opinion in Azteca Construction, Inc v. ADR Consulting, Inc. (2004) 121Cal.App.4th 1156, 18 Cal Rptr.3d 142 would seem to suggest that the answer to the above-noted question would be "yes," disqualification would be required. Azteca arose in the context of a motion to vacate an award after one party had moved, without success, to disqualify a proposed Arbitrator who had previously worked as co-employee with counsel for one of the parties. On appeal, the Court stated that the moving party had no independent burden to demonstrate that a reasonable person would doubt the Arbitrator's capacity to be impartial. It held that a timely demand for disqualification of a proposed neutral Arbitrator has the same practical effect as a timely peremptory challenge to a superior court judge under Section 170.6 – disqualification is automatic.

However, the answer to the disclosure question raised at the outset of this article is provided by the Court's opinion in Evans v. Centerstone Development Company (2005) 35 Cal. Rptr. 3d 745, 134 Cal. App. 4th 151. In Evans, a post-selection case, the Arbitrator failed to make any additional disclosure when new parties entered the case, because he had nothing further to disclose. On appeal the losing party attempted to vacate the award because the Arbitrator had failed to make an additional disclosure. In rejecting this argument the Court stated: "Section 1281.9 subdivision (a) requires an arbitrator to disclose anything that would

cause a reasonable person with knowledge of those facts to believe the arbitrator would not be impartial. Contrary to plaintiffs' claim, there is no requirement in either the Code of Civil Procedure or the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Cal. Rules of Court. Appen., div. VI) to disclose the lack of any such information, what plaintiffs call "nondisclosures."

But what if an Arbitrator does, in fact, disclose more than is necessary? Is this an additional pitfall? May an award be vacated when what's "there" is too much information. This question was answered by the Court in Luce, Forward, Hamilton and Scripps, LLP v. Koch (2008) 75 Cal.Rptr. 3d 869, 162 Cal. App. 4th 720. In this case the Arbitrator, a retired judge, refused to grant a motion to disqualify, after he had disclosed that he had served with one of the lawyers in the arbitration on two boards of directors of two large professional associations, the Business Trial Lawyers Association and the American Inns of Court. There had been no social, business or financial relationship between the Judge/Arbitrator and the attorney. In rejecting a post-trial motion to vacate the Award, the Court stated :

> Section 1289.91 does not indicate that when an arbitrator makes additional oral disclosures at the arbitration that he was not required to make, as, here, disqualification is a matter of right. Under the defendants' theory, an arbitrator could be disqualified during the arbitration for orally revealing even the most attenuated contact with a party's counsel or witness, such as occasionally shopping at the same grocery store. We may not interpret statutes in a manner that results in absurd and unintended consequences. (Gomes v. County of Mendocino (1995), 37 Cal. App. 4th 977, 986, 44 Cal.Rptr. 2d 93.) We cannot attribute to the Legislature an intent to upset arbitration awards, based on disclosures not legally required, but made out of an abundance of caution, given this state's strong public policy in favor of arbitration awards. Luce Forward, ibid, page .

In summary, there is no need, in the opinion of this author/arbitrator, for an arbitrator to make a "nothing to disclose" disclosure in order to avoid vacature; nor will counsel seeking to vacate an award succeed on this ground. Further, if more information is disclosed by the arbitrator than is legally necessary, the Arbitrator need not experience a dammed if you do and dammed if you don't result.