

In The Face Of Judicial Budget Cuts, It Is Incumbent For An ADR Professional To Discover And Disclose His Or Her Biases So The Parties Can Have A Fair Hearing.

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Bias based on race, ethnicity, gender or sexual orientation remains a challenge throughout the legal profession. In the informal and supposedly neutral settings of mediation and arbitration, bias and prejudice are especially more difficult to identify, let alone remedy.

Can the arbitrator or mediator see past the race and gender and personal experiences to treat the parties fairly? What duties of disclosure do these neutrals have?

Consider the following scenarios.

A party is a German-American defendant, whose father served in the German army during World War II and his wife's father was in the Schutzataffel (SS), appears before an arbitrator, who was born in 1944, raised in the United States, had parents who were of German Jew heritage and lost family and property in the Holocaust. The arbitrator and his parents are members of the '1939 Club' an organization dedicated to avoiding a repeat of the Holocaust.

An Iranian-American attorney who was born in Iran and whose parents and family still live in Iran and Afghanistan mediates a case before a mediator who is a fifth generation American, has a son serving in Iraq, and lost a daughter in the September 11th attack of the World Trade Center.

An African American attorney defending a black man who has been sued for by his girlfriend for assault and battery has mediation with a white female mediator.

Given these scenarios can the parties have a fair and unbiased hearing before an arbitrator or mediator? Under the California Rules of Court an ADR professional is required to disclose any bias. But are ADR professionals misconstruing the rules. Given the recent case decisions the Judicial Council thinks so and is making amendments to the standards.

What disclosures do arbitrators have to make under the law?

Arbitrators, serving pursuant to an arbitration agreement, shall comply with the ethics standards for arbitrators which are contained in Ethic Standards for Neutral Arbitrators in Contractual Arbitrations. Standard 7(d)(1-13) contains a list of scenarios that must be disclosed. However, the Judicial Council is amending these standards effective January 1, 2012 because arbitrators have been reading Standard 7(d) literally and if a particular factual pattern does not apply to them, they fail to disclose. Recent cases have highlighted this problem: *Haworth v. Superior Court* (2010) where there was a failure to disclose a public censure by the Commission on Judicial Performance and *Johnson v. Gruma Corporation* (9th Cir. 2010) where there was a failure to disclose that arbitrator's wife had been a partner in a law firm of one of the attorneys who represented a party. In supporting the amendments, the Judicial Council stresses that the Standard 7 specifically requires arbitrators to disclose even though it is not enumerated in one of the examples given in the subparagraphs 1-13. While subdivision (d) requires the disclosure of specific interests, relationships or affiliations, these are only examples of

common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The amendments clarify that because a particular matter is not among the examples of matters listed does not mean that it need not be disclosed. It still needs to be evaluated under the general disclosure standard which states that 'Any other matter that might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be impartial.' It is the arbitrator's overarching duty under this standard is to inform the parties.

Does an arbitrator have the duty to disclose religious beliefs and heritage? Does this come under the overarching duty of an arbitrator?

In *Rohde v. Rebmann* (June 29, 2011) the court held that a party which received an unfavorable result in arbitration could not seek to vacate the award because the arbitrator did not disclose facts about his religion and heritage. The arbitrator provided the parties with a lengthy 10 page check list of items under Code of Civil Procedure and California Rules of Court Ethics Standards that might affect the arbitrator's ability to be neutral. Among the information that plaintiff Rohde contended was relevant were the facts that the arbitrator, who was born in 1944 and raised in the United States, had parents who were of German Jewish heritage and had lost family and property in the Holocaust. Rohde also noted that the arbitrator and his parents were members of the '1939 Club' an organization dedicated to avoiding a repeat of the Holocaust. Rohde contended that the arbitrator's decision was intended to 'punish me for the harm brought on his family' since Rohde was German, his father had served in the German Army during World War II, and his wife's father was in the Schutzstaffel (SS). Rohde stated that if he had known the arbitrator's religious and cultural affiliation and the dedication of keeping memory of the Holocaust alive, he never would have allowed him to be the arbitrator in his case.'

The court stated that the arbitrator's background was entirely irrelevant to the commercial case before him. The arbitrator did submit a declaration that he had 'made a reasonable effort to inform himself of any matters that could cause a person aware of the facts to reasonably entertain a doubt that as the proposed arbitrator he would be able to be impartial.'" The court went on to state that if one party harbors such a concern about the background of a group of potential arbitrators they should not sit back and wait before performing even minimal due diligence (such as an Internet search) only to raise the issue when an unfavorable outcome results.

The Judicial Council amendments place the burden on the arbitrator to disclose. In the Rhode case, an arbitrator should have disclosed the organizations he belonged to and from their Rhode could glean or ask questions as to whether the arbitrator could be impartial. Arbitrators may think that if they submit a declaration that states they performed a reasonable effort of disclosing matters that is enough. However, the Judicial Council amendments to the disclosure rules make it incumbent on the arbitrator to do more than just the minimal due diligence and check the boxes.

Do mediators have a duty to disclose?

Mediators will argue that disclosures are unnecessary because mediation is based on the parties' ability to decide for themselves how they want to resolve their dispute; the parties are not coerced by the mediator to reach an agreement and the mediator does not render decisions even if asked to do so by the parties. However, California Rule of Court 3.855 states that a mediator must make

reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially and must disclose these matters to the parties: ‘past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature and the existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.’

Arbitrators and mediators should not be misled by the decision of Rohde, supra. that counsel or the parties should perform due diligence before selecting an ADR professional. Arbitrators and mediators must disclose. The burden is not on the parties to research the background of the ADR professional. The Judicial Council makes it clear in the amendments that the rule for arbitrator disclosure is to disclose facts that might cause a party aware of the facts to reasonably entertain a doubt that the arbitrator would be impartial. The examples given are of common matters that reasonably could raise a question about a mediator’s ability to conduct the mediation impartially

But an ADR neutral may not be able to determine which facts to disclose that may be relevant because the neutral cannot see their own biases that may lead to an unfair hearing. The reasons neutrals follow Standard 7 so closely because specific facts have been identified so it is easier for them to disclose because they are not hampered by unconscious biases.

Researchers of studies conducted by Stanford University, have concluded that even when we think we are compensating for our bias, it is not something we can easily remove or factor out of our decisions because it operates unconsciously. We are far better at spotting biases in others than in ourselves. Researchers in the Stanford University study concluded that there is an assumption that our own golden rule of objectivity works well for ourselves- but others’ rules do not work for them. *The Bias Blind Spot: Perception of Bias in Self Versus Others (2002)*. Researchers have concluded there is no way to predict whether a person is likely to be unbiased or vice versa, or when. And contrary to expectations, a successful career built on making carefully reasoned decisions, for example in the legal profession, may only reinforce the illusion of objectivity.

The Judicial Council has done their best by identifying specific examples of factual scenarios that would lead to partiality and thus disclosure. No one can anticipate every scenario that would lead to disclosure in a specific case so the Judicial Council has provided a catch-all provision for the arbitrator to disclose facts that might lead to a bias in a particular case. This is difficult for a neutral to comply with when they have unconscious biases. Therefore, in order to be unbiased, a neutral must discover their hidden self, their unconscious biases. Self-awareness of how one reacts to “others” is vital to breaking conflict generating patterns. Neutrals must recognize that they have biases. Neutrals should not be intimidated by engaging in a discussion regarding biases and stereotypes. Taking workshops or participating in seminars that help recognize biases and limitations in regards race ethnicity, gender, disabilities and sexual orientation will increase personal growth and awareness. A neutral should engage in discussions about stereotypes and discrimination, what they see on TV, movies or hear on the radio. Travelling in the community, the United States or the world can broaden a neutral’s horizons by exposing him or her to different cultures and ethnicities. By attending culturally diverse dance performances, musicals, concerts, festivals, and other events will provide the neutral with opportunities to interact with people of different cultures, ethnic backgrounds, religions, and abilities. A neutral should talk positively about people's physical characteristics and cultural heritage.

If someone exhibits bias based on race, ethnicity, gender or sexual orientation in a proceeding, the neutral should not ignore it as if it never happened. A neutral should admonish the offending party

that it is not tolerated in the proceeding but at the same time favoritism should not be shown to one side. Do not rule against the party just because they made a derogatory comment if they have a valid claim. Remaining neutral and unbiased is difficult and challenging.

It is incumbent on the ADR professional to disclose any bias and to discover his or her hidden biases. It becomes even more important, when the court is undergoing severe budget cuts, cases are taking longer to come to trial and parties are being forced to secure a private ADR professional to decide their case.