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# ‘Evident Partiality’ Will Lead to Vacating the Arbitration Award

***Judge Abraham J. Gafni (Ret.)***
*Published on October 17, 2023, in The Legal Intelligencer*

Increasingly, attention has been directed at the issue of arbitrator impartiality and the duties of participants in the process. A recent federal case from California involved the failure of both an arbitrator and the American Arbitration Association (AAA) to comply with their respective obligations in this regard. See *Equicare Health v. Varian Medical Systems*, (USDC, N.D. CA, 2023).

Equicare had entered into an agreement with Varian under which Varian had agreed to make a “reasonable commercial effort” to promote and sell Equicare products while Varian was developing a competitive product. Thereafter, Varian’s sales of Equicare products dropped until there were virtually none. Equicare claimed that Varian had breached the agreement by failing to use reasonable commercial efforts to sell Equicare products while promoting its own.

Eventually, Equicare submitted the dispute to the AAA.

The AAA provided the parties with a list of potential arbitrators and requested that the parties strike and rank their preferred arbitrators until three arbitrators were selected. Each was required to complete the arbitrator oath form, which included 31 conflicts questions including “Do you have or have you had any attorney-client relationship with a party or

lawyer for a party." Harry Dosker, one of the arbitrators, responded "no" to all conflicts questions.

Actually, the negative response was untrue. In fact, Varian's counsel, Quyen Ta, had submitted a conflicts disclosure response disclosing her prior representation of Dosker and his law firm in a legal malpractice claim. The AAA, however, failed to share this information with Equicare or its counsel.

Following a hearing, the arbitration panel issued a final award in favor of Varian.

Equicare then conducted its own research and learned of Dosker's prior attorney-client relationship with Varian's counsel. Based on this information, it filed a petition seeking to vacate the arbitration award.

The district court recognized that the Federal Arbitration Act (FAA) circumscribed a court's review of an arbitration award, including the authority to vacate an award. Nonetheless, Section 10(a)(2) of the FAA does permit a court to vacate an arbitration award "where inter alia 'there was evident partiality in the arbitrators.'"

However, the standards of judicial behavior minimize the judiciary's role as the judge of an arbitrator's impartiality; instead, they consign that role to parties as the architects of their own arbitration process who must abide by strict standards of disclosure. Accordingly, "if the parties are to be judges of the arbitrator's partiality, duties to disclose conflicts must be enforced, even if later a court finds that no actual bias was present."

The court noted that there are "two types of cases where 'evident partiality' may arise: those involving nondisclosure and actual bias."

In cases where actual bias is alleged, the appearance of impropriety, standing alone, is insufficient to establish evident partiality. Directly at issue in an actual bias determination is the "integrity of the arbitrators' decision."

In a nondisclosure case, however, the issue is the "integrity of the process" by which the arbitrators are chosen.

In this case, Equicare was not arguing that there was actual bias in Dosker's decision-making. Rather, it was seeking to demonstrate "evident partiality" based on Dosker's and the AAA's respective failures to disclose his prior attorney-client relationship, which deprived Equicare of the opportunity to select arbitrators intelligently. "Accordingly, Equicare can establish 'evident partiality' by showing there was a 'reasonable impression of partiality' regardless of whether Dosker was, in fact, biased."

The court concluded that "Dosker's admitted failure to conduct an adequate investigation in the first instance breached the independent duty on arbitrators to investigate for potential conflicts, a violation that 'may result in a failure to disclose that creates a reasonable impression of partiality.'"

The court emphasized that "the policy of Section 10 (a)(2) of the FAA instructs that the parties should choose their arbitrators intelligently" which they can do "only when facts showing potential partiality are disclosed." In summary, "the existence of a duty to investigate and disclose, along with the subsequent failure to do so—are sufficient in and of themselves to support a finding of 'reasonable impression of partiality' warranting vacatur."

The court's responses to Varian's arguments in opposition to the finding of evident partiality are instructive.

First, Varian contended that "Dosker's failure to disclose a fact that he did not remember should not rise to the level of "evident partiality" as there could be no basis for concluding that he had acted partially based upon a fact of which he was unaware. But as the Ninth Circuit had earlier stated, "though lack of knowledge may overcome actual bias it does not always prohibit a reasonable impression of partiality." Moreover, this should not be based on whether what was involved here was a long-running and ongoing attorney-client relationship or on the nature, recency, or intimacy of the attorney client relationship. To the contrary, how to judge the impartiality of the arbitrator as judge "is best consigned to the parties" so "regardless of what Varian, Dosker or Ta may think of the relationship, it was Equicare's prerogative to assess Dosker's partiality."

Varian also argued that Dosker's connection with attorney Ta five years earlier "is long past, attenuated or insubstantial" and, therefore, unable to give rise to a reasonable impression of partiality. The court appeared to accept that there may be a situation in which the prior representation was "so long past" that it would entirely preclude an impression of partiality. The court noted, however, that in any event Dosker had a duty to investigate; and in the malpractice case, in which Dosker had been a defendant Ta successfully defended him after extensive motion practice. In this circumstance, the court could "not conclude that Ta's relationship with Dosker is a 'long past, attenuated or insubstantial connection.' "

Varian's most interesting argument was that the award was issued by a unanimous panel, two members of whom Equicare did not challenge. While it is true that the other two acceptable arbitrators ruled in favor of Varian, evident partiality of the third arbitrator still would require vacatur. This is because "the arbitrators are not isolated from each other; they hear and decide the case as a panel after joint discussion, debate and deliberation. Each panel member has an opportunity to persuade the others. Thus, an undisclosed prior conflict taints the integrity of the process, not necessarily the arbitrators' final decision."

Finally, the court rejected Varian's contention that vacatur was unfair as it and Ta had complied with the AAA Commercial Rules and were now being penalized by reason of the failure of the AAA to transmit the information to Equicare. It noted that "federal courts have also not hesitated to vacate an arbitral decision for evident partiality even when the fault lied with the AAA for failing to communicate the disclosed conflicts it had received to the relevant parties."

While acknowledging that this may appear unfair to Varian, which had timely disclosed the requisite conflicts to the AAA, there is no statutory or case law support for a "good faith" or "harmless error" exception once evident partiality has been found.

The lesson to be learned is clear. Do not as an arbitrator or party casually respond to questions relating to potential partiality. Be aware that a court may find "evident partiality" by reason of some relationship, however remote in time or seemingly unrelated by circumstances. Here, a party was denied a favorable arbitration award because an arbitrator

and the AAA failed to carefully respond to conflicts inquiries. How disappointing for the party. How embarrassing for the arbitrator and the AAA.

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